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FIFTH REPORT ON RESERVATIONS TO TREATIES

by Mr Alain Pellet, Special Rapporteur

Secretariat Memorandum
Prepared by the Directorate General of Legal Affairs

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Fifth report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Contents

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I. Introduction

1. Formally speaking, this is the fifth report that the Special Rapporteur has submitted on reservations to treaties. Nevertheless, only a very incomplete version of the fourth report was submitted to the International Law Commission in 1999, and in that year both the Commission and the Sixth Committee continued their consideration of the third report, begun in 1998. Thus, at the risk of redundancy, this chapter reproduces most of the introductory chapter of the fourth report (A/CN.4/499), while including therein the necessary updates concerning new developments with regard to the earlier work of the Commission on the topic, as well as the action taken by other bodies in relation to reservations to treaties.

A. The earlier work of the Commission on the topic

2. The first report of the Special Rapporteur on the law and practice relating to reservations to treaties contains a relatively detailed description of the Commission's earlier work on the topic and the outcome of that work.[1] It is therefore unnecessary to return to that subject in detail in the present report, except in order to inform Commission members of new developments in that connection since the preparation of the third report, which described the reception given to the first and second reports.[2] Section 1 deals with the outcome of the first and second reports and the discussion of the third and fourth reports in the Commission and the Sixth Committee; section 2 deals with a number of subsequent developments.

1. First and second reports on reservations to treaties and the outcome

(a) Outcome of the first report (1995)

3. In his first report, the Special Rapporteur briefly examined the problems to which the topic gives rise, noting that where reservations are concerned there are gaps and ambiguities in the relevant Vienna Conventions (Convention of 1969 on the Law of Treaties, Convention of 1978 on Succession of States in respect of Treaties, and Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations), which meant that the topic should be considered further in the light of the practice of States and international organizations.[3] In order to have a clearer picture of such practice, with the Commission's authorization[4] the Special Rapporteur prepared two detailed questionnaires on reservations to treaties, to ascertain the practice of States and international organizations and the problems encountered by them. In its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which are depositaries of conventions, to answer

[1] A/CN.4/470, chap. I, paras. 8-90.

[2] See A/CN.4/491, I, paras. 1-30.

[3] Ibid., paras. 91-149.

[4] See the report of the International Law Commission to the General Assembly on the work of its forty-seventh session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 493.

the questionnaires promptly;[5] it reiterated that request in its resolution 51/160 of 16 December 1996.[6]

4. By the time the fourth report was prepared,[7] 32 States and 22 international organizations[8] had replied either partially or fully to the questionnaires. Since then, another State, New Zealand,[9] and two more international organizations[10] have transmitted replies to the Secretariat.

5. The Special Rapporteur regards this number of replies, which represents a higher response rate than normal for Commission questionnaires, as encouraging; it indicates that there is great interest in the topic and confirms that studying it meets a real need. The number of replies is nonetheless unsatisfactory: replies have been received from only 33 of the 188 States Members of the United Nations to which the questionnaire was sent and 24 of the international organizations that received questionnaires, or 18 per cent and 40 per cent, respectively. Moreover, the replies are not evenly distributed geographically: they are mainly from European States (or other States in that group) (20 replies) and Latin American States (8 replies); and although five Asian countries have also replied, the Special Rapporteur has so far received no replies from any African countries. Furthermore, one of the most active treaty-making international organizations, the European Communities, has as yet not replied to the questionnaire sent to it.

6. The Special Rapporteur is fully aware that Commission questionnaires are burdensome for the legal departments of Ministries of Foreign Affairs and international organizations, and that this applies particularly in the case of the long and detailed questionnaire on reservations; he is also aware that States that have not yet been able to respond to the questionnaire have other ways of informing the Commission of problems that they encounter and of their expectations, particularly by means of statements by their representatives in the Sixth Committee; he attaches the greatest importance to such responses.[11] However, they are no substitute for replies to the questionnaire, which is almost entirely factual; its purpose is not to determine the "normative preferences" of States and international organizations but, rather, to try to assess their actual practice on the basis of their replies, in order to guide the Commission in its task of progressively developing and codifying international law; this cannot really be achieved on the basis of oral statements, which are necessarily brief. Moreover, such comments are made at a later stage, whereas it is easier for both the Commission and the Special Rapporteur to make their proposals in the light of replies made earlier than to adjust them afterwards.

7. It was for these reasons that in his fourth report[12] the Special Rapporteur felt strongly that the Commission should recommend to the General Assembly that it should appeal once again to States and international organizations that have not yet replied to the questionnaires, and to those that have transmitted only partial

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[5] Para. 5 of the resolution.

[6] Para. 7 of the resolution.

[7] In the case of that part of the report, 30 April 1998.

[8] A/CN.4/491, notes 7 and 9.

[9] A number of States that had transmitted only partial replies completed their replies, for which the Special Rapporteur wishes to thank them.

[10] The organizations in question are the United Nations (Treaty Section) (1998) and the World Meteorological Organization (1999) both of which the Special Rapporteur also wishes to thank.

[11] See paras. 32-50 below.

[12] A/CN.4/499, para.6.

responses and thus need to complete their replies, to do so. Nevertheless, although the Commission made an appeal to that effect in its report on its fifty-first session,[13] that appeal was transmitted only implicitly by the General Assembly at its fifty-fourth session,[14] and no new replies have been received by the Secretariat since the end of the session. Perhaps the Commission should reiterate that request.

(b) Outcome of the second report (1996-1997)

8. Owing to lack of time, the Commission was unable to consider the second report on reservations to treaties[15] at its forty-eighth session, in 1996. It did so at its following session, in 1997. Once it had considered the report, it adopted "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties".[16]

9. The Commission also decided to transmit its preliminary conclusions to the human rights treaty-monitoring bodies. By means of letters dated 24 November 1997 transmitted through the Secretary of the Commission, the Special Rapporteur sent the text of the preliminary conclusions and of chapter V of the Commission's report on the work of its forty-ninth session to the chairmen of human rights bodies with universal membership,[17] requesting them to transmit the texts to the members of the bodies in question and to inform him of any comments they made. He sent similar letters to the presiding officers of a number of regional bodies.[18]

10. So far, only the chairmen of two monitoring bodies and the presiding officer of the eighth and ninth meetings of the chairmen of bodies established pursuant to human rights instruments have transmitted their observations.[19] In addition, in a letter dated 23 January 1998, the President of the Inter-American Court of Human Rights thanked the Secretary of the Commission for transmitting the preliminary conclusions.

11. In a letter dated 9 April 1998,[20] the Chairman of the Human Rights Committee emphasized the role of universal monitoring bodies in the process of developing the

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[13] "The Commission recalls that, in 1995, a questionnaire on the topic was sent to States and international organizations. The Commission, while thanking the States and organizations which have already answered, would like to reiterate its plea to those States and organizations which have not answered so far, to do so. Moreover, the Commission welcomes additional answers on the parts of the questionnaire which had not been covered by the States and organizations which answered, indicating that they would respond later on those parts" (*Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 30).

[14] See paragraph 3 of General Assembly resolution 54/111.

[15] A/CN.4/477 and Add.1.

[16] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

[17] Letters were sent to the Chairmen of the Committee on Economic, Social and Cultural Rights, the Commission on Human Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, and the Committee on the Rights of the Child.

[18] Letters were sent to the presiding officers of the African Commission on Human and People's Rights, the European Commission of Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

[19] The Special Rapporteur intends to reproduce these replies in full in an annex to a future report; see para. 18 below.

[20] The most important paragraph of the letter is reproduced in the third report (A/CN.4/491, para. 16).

applicable practice and rules. She restated the Committee's views in a second letter, dated 5 November 1998, in which she indicated that the Committee was concerned at the views expressed by the Commission in paragraph 12 of its preliminary conclusions[21] and stressed that the proposition enunciated in paragraph 10,[22] was subject to modification as practices and rules developed by universal and regional monitoring bodies gained general acceptance.[23] She added the following:

> "Two main points must be stressed in this regard.
>
> "First, in the case of human rights treaties providing for a monitoring body, the practice of that body, by interpreting the treaty, contributes — consistent with the Vienna Convention — to defining the scope of the obligations arising out of the treaty. Hence, in dealing with the compatibility of reservations, the views expressed by monitoring bodies necessarily are part of the development of international practices and rules relating thereto.
>
> "Second, it is to be underlined that universal monitoring bodies, such as the Human Rights Committee, must know the extent of the States parties' obligations in order to carry out their functions under the treaty by which they are established. Their monitoring role itself entails the duty to assess the compatibility of reservations, in order to monitor the compliance of States parties with the relevant instrument. When a monitoring body has reached a conclusion about the compatibility of a reservation, it will in conformity with its mandate, base its interactions with the State party thereon. Furthermore, in the case of monitoring bodies dealing with individual communications, a reservation to the treaty, or to the instrument providing for individual communications, has procedural implications on the work of the body itself. When dealing with an individual communication, the monitoring body will therefore have to decide on the effect and scope of a reservation for the purpose of determining the admissibility of the communication.
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> "The Human Rights Committee shares the International Law Commission's view, expressed in paragraph 5 of its Preliminary Conclusions, that monitoring bodies established by human rights treaties 'are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them'. It follows that States parties should respect conclusions reached by the independent monitoring body competent to monitor compliance with the instrument within the mandate it has been given."

12. In an important decision dated 31 December 1999,[24] the Human Rights Committee took this position in a specific case. What was involved was assessing

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[21] "The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts."

[22] "The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving States that have the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or foregoing becoming a party to the treaty."

[23] As in his previous reports, the Special Rapporteur has placed the French translation of citations in languages other than French in brackets following the citations in the French text. These are his own translations having no official character.

[24] *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999 (CCPR/C/67/D/845/1999).

the admissibility of a communication from a person condemned to death, whereas Trinidad and Tobago had, by means of a reservation entered following its "re-accession" to the Optional Protocol to the International Covenant on Civil and Political Rights which it had previously denounced, rejected the competence of the Committee "to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith".[25] Despite the contrary view held by the Government of Trinidad and Tobago, the Committee declared the complaint receivable on the basis of General Comment No. 24:

> "As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.
>
> "At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.
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> "In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:
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> > 'The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And

[25] See *Multilateral treaties deposited with the Secretary-General, Status as of 30 April 1999*, United Nations, New York, 1999, Sales No. E.99.V.5, p. 172.

because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this *would be contrary to object and purpose of the first Optional Protocol,* even if not of the Covenant' HRI/GEN/I/Rev.3, 15 August 1997, p. 46. (emphasis added)

"The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[26]

13. The Chairman of the Committee against Torture informed the Secretary of the Commission that the Committee had considered the Commission's preliminary conclusions at its twenty-first session (9 to 20 November 1998) and that it shared the views expressed by the Human Rights Committee.

"In addition, the Committee against Torture believes that the approach taken by monitoring bodies of international human rights instruments to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted and safeguarded is consistent with the Vienna Conventions on the law of treaties."

14. In a letter dated 29 July 1998, the presiding officer of the eighth and ninth meetings of the chairmen of bodies established pursuant to human rights instruments informed the Chairman of the Commission of the discussions on the matter at the ninth meeting of the chairmen held in Geneva from 25 to 27 February 1998. He indicated in that letter that the chairpersons of the human rights bodies, after having recalled the emphasis placed in the Vienna Declaration and Programme of Action (June 1993) on the need to limit the number and scope of reservations to human rights treaties, welcomed the role that the Commission assigns to human rights bodies with respect to reservations in its preliminary conclusions.

"They considered, however, that the draft as it currently stands is unduly restrictive in other respects and does not accord sufficient attention to the fact that human rights treaties, by virtue of their subject matter and the role they recognize to individuals, cannot be placed on precisely the same footing as other treaties with different characteristics.

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[26] *Rawle Kennedy v. Trinidad and Tobago* (see note 24 above), paras. 6.4-6.7.

"The Chairpersons believe that the capacity of a monitoring body to perform its function of determining the scope of the provisions of the relevant convention cannot be performed effectively if it is precluded from exercising a similar function in relation to reservations. At their ninth meeting, they specifically recalled the two general recommendations adopted by the Committee on the Elimination of Discrimination against Women in relation to reservations and they noted the proposal by that Committee to adopt a further recommendation on the subject in conjunction with the fiftieth anniversary of the Universal Declaration of Human Rights. The Chairpersons expressed their firm support for the approach reflected in General Comment No. 24 of the Human Rights Committee and they urged that the conclusions proposed by the International Law Commission should be adjusted accordingly to reflect that approach."

15. Moreover, although this document is not, strictly speaking, a reaction to the Commission's preliminary conclusions, the Special Rapporteur wishes to draw the Commission's attention to the important report, dated 28 June 1998, of Working Group II of the Committee on the Elimination of Discrimination against Women,[27] established under article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, concerning reservations to that Convention, which the Committee adopted at its nineteenth session.[28] This report calls on States parties to the Convention which have formulated reservations to withdraw or modify them. The Committee bases itself *inter alia* on the second report on reservations to treaties,[29] saying that it agrees with the Special Rapporteur that "objections by States are often not only a means of exerting pressure on reserving States, but also serve as a useful guide for the assessment of the permissibility of a reservation by the Committee itself,[30] and it concludes

"that it has certain responsibilities as the body of experts charged with the consideration of periodic reports submitted to it. The Committee, in its examination of States' reports, enters into constructive dialogue with the State party and makes concluding comments routinely expressing concern at the entry of reservations to articles 2 and 16[31] or the failure of States parties to withdraw or modify them".[32]

And it adds that:

"The Special Rapporteur [of the Commission] considers that control of the permissibility of reservations is the primary responsibility of the States parties. However, the Committee again wishes to draw to the attention of States parties its grave concern at the number and extent of impermissible

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[27] Pursuant to article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, report of Working Group II (CEDAW/C/1998/II/WG.II/WP.1/Rev.2).

[28] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 38* (A/53/38/Rev.1), para. 405.

[29] A/CN.4/477/Add.1. The Committee seems to be referring to paragraphs 241 to 251, although they are not specifically mentioned.

[30] Above-mentioned report (see note 28 above), para. 20.

[31] Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 enumerates the general obligations of States parties and article 16 draws specific conclusions from the principle of equality of men and women in all matters stemming from marriage and family relations.

[32] Above-mentioned report (see note 28 above), para. 22.

reservations. It also expresses concern that, even when States object to such reservations there appears to be a reluctance on the part of the States concerned to remove and modify them and thereby comply with general principles of international law."[33]

16. In addition, in accordance with the recommendation contained in paragraph 2 of General Assembly resolution 52/156 of 15 December 1997,[34] five States transmitted to the Secretariat comments regarding the preliminary conclusions adopted by the Commission in 1997.[35] Generally speaking, these States welcome the adoption of the preliminary conclusions[36] and the opportunity to comment on them before the Commission takes a final decision on the matters dealt with therein. Monaco and the Philippines (which make several additional suggestions) endorse the preliminary conclusions. China, while emphasizing the importance it attaches to the cooperation of the human rights bodies, considers that the latter should remain strictly within the framework of their mandate, as defined in the respective treaties, adding that where the latter contain no specific provision, the permissibility of reservations is not part of the functions and responsibilities of the monitoring bodies; it also suggests that the term "traditional modalities" in paragraph 6 should be replaced by the words "well established modalities"[37] and that paragraph 12 should be deleted so as not to give the impression that regional practices and rules differ from or take precedence over those in effect at the universal level.[38] China agrees with Liechtenstein that the implementation of the recommendation in paragraph 7 of the preliminary conclusions might prove difficult in practice.[39] Liechtenstein concludes its comments by drawing the Commission's attention to the following points, which it feels deserve particular attention:

"– Reconsideration of the correlation between paragraphs 5 and 7 of the preliminary conclusions;

– The possibility of drafting optional protocols should be further elaborated upon. In doing so, the Commission should consider issues such as

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[33] Ibid., para. 23.

[34] "The General Assembly ... draws the attention of Governments to the importance for the International Law Commission of having their views ... in particular on: ... (b) the preliminary conclusions of the Commission on reservations to normative multilateral treaties, including human rights treaties". With reference to that request, the Director of the Codification Division addressed a letter on 29 December 1997 to the Permanent Missions of Member States and to Observers, requesting their comments on the preliminary conclusions of the Commission.

[35] The three States mentioned in the third report (Liechtenstein, Monaco and the Philippines; A/CN.4/491, note 35) and also China and Switzerland. The Special Rapporteur wishes to thank those States and to express the hope that other States will follow suit.

[36] Liechtenstein wondered, however, whether they were not premature.

[37] Paragraph 6 of the preliminary conclusions reads as follows:

"The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties."

[38] See the text of paragraph 12 in note 21 above.

[39] Paragraph 7 reads as follows:

"The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation."

feasibility, usefulness from a practical point of view, including time-frame;

- Practical and concrete suggestions for the imminent future to remedy the current state of affairs involving uncertainties concerning the application of multilateral treaties, especially in the field of human rights;
- Comments on the legal effect of objections by States parties made to reservations lodged by other States parties;
- Study of the potential of an enhanced role played by depositaries of multilateral treaties."

Switzerland, which merely confirms the comments and observations made by its delegation in the Sixth Committee, had also drawn attention, on that occasion, to the role of the depositaries and to what it saw as a contradiction between the provisions of paragraph 5 of the preliminary conclusions (and those of paragraph 4) stating that the competence of monitoring bodies in respect of reservations could not be evaluated except with reference to the instrument in question and dependent on the will expressed by the States parties.[40]

17. The lengthy passages concerning the reactions of States and human rights treaty-monitoring bodies have been reproduced above for the information of members of the Commission. The Special Rapporteur believes that it would be pointless, at the present stage, to reopen discussion of the preliminary conclusions which the Commission adopted in 1997.

18. Although, as he tried to explain in his third report,[41] he does not believe that the adoption was premature, it would be preferable not to formally revise the conclusions adopted two years earlier, since such a revision would only be provisional in nature; on the one hand, because other States or human rights bodies may still respond (and those that have already done so may complete their responses) and, on the other hand, and above all, because it seems only reasonable that the Commission should not reopen that aspect of the issue until it has completed consideration of all the substantive questions concerning the regime for reservations to treaties. This should be done by the year 2000, or by 2001 at the latest. At that point, as he indicated in his third report,[42] the Special Rapporteur proposes to submit draft final conclusions on the issues dealt with in the preliminary conclusions; if necessary, those conclusions could be incorporated in the Guide to Practice (although they may not lend themselves to such inclusion). The Commission did not voice any objection to that suggestion at its fiftieth session.

19. Moreover, the Special Rapporteur had annexed to his second report a bibliography concerning reservations to treaties. As announced in the third report[43] a complete text of that document was annexed to the fourth report.[44]

[40] See A/C.6/52/SR.22, paras. 80-87.
[41] A/CN.4/491, para. 22.
[42] Ibid., para. 23.
[43] A/CN.4/491, para. 11.
[44] A/CN.4/478/Rev.1.

2. Third and fourth reports and the outcome

20. The third report on reservations to treaties[45] consisted of two chapters of very unequal length. The first, entitled "Introduction" served the same "purpose" as this chapter — it recapitulated the Commission's earlier work on the topic and gave a general presentation of the report, essentially stating the methodology used.[46] The second dealt with "Definition of reservations (and interpretative declarations)".[47] There was also an annex which recapitulated the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice.[48]

21. Owing to lack of time, the Commission was only able to give partial consideration to the third report at its fiftieth session. It completed the consideration of that report at its fifty-first session in 1999. In the meantime, the Special Rapporteur had submitted his fourth report which, taking into account the aforementioned circumstance, contained only a single chapter recapitulating the new elements introduced since the consideration of the second report[49] and proposing a reconsideration of the draft guideline concerning "statements of non-recognition".[50]

(a) Consideration of the third report by the Commission

(i) The fiftieth session

22. At its fiftieth session, the International Law Commission considered the third report on the law of treaties in three stages.

- First, it discussed the part of the report dealing with the definition of reservations to multilateral treaties and the corresponding draft guidelines,[51] which it referred to the Drafting Committee.
- The Commission then proceeded — the Drafting Committee having made a number of amendments to the draft guidelines — to consider the amended texts, six of which it adopted after making relatively minor adjustments. In addition, the Commission adopted the text of one "safeguard" guideline, proposed by the Special Rapporteur at the request of several members.[52] On the other hand, in full agreement with the

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[45] A/CN.4/491 and Corr.1, Add.1, Add.2 and Corr.1, Add.3 and Corr.1, Add.4 and Corr.1, Add.5 and Add.6 and Corr.1.

[46] Ibid., paras. 31-47.

[47] Ibid., paras. 48-522. Notwithstanding what the Special Rapporteur had hoped to do and had initially said he would do (cf. paras. 44 and 47) he was unable in his third report to tackle the issue of the formulation of reservations (and of interpretative declarations), acceptances and objections to reservations (and to interpretative declarations) because of the wealth of material. Moreover, an issue linked to that of the definition of reservations and interpretative declarations, that of "alternatives to reservations" (cf. para. 50 of the third report) could not be dealt with.

[48] A/CN.4/491/Add.6 and Corr.1, para. 523.

[49] These elements are largely reproduced in this chapter of the fifth report. See para. 1 above.

[50] A/CN.4/499, paras. 44-54.

[51] A/CN.4/491/Add.1-3 and Add.3/Corr.1, paras. 48-235; draft guidelines 1.1 and 1.1.1 to 1.1.8 which, in the numbering system adopted in 1999, became 1.1.1 to 1.1.6 and 1.4.1 to 1.4.3; a "table of concordances" between the numbers of the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission in 1999 appears in the annex to this chapter.

[52] Initially unnumbered, this draft guideline is numbered 1.6 in the text adopted in 1999; see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 251.

Special Rapporteur, the Commission decided to refer back to the Drafting Committee draft guidelines 1.1.5 and 1.1.6 concerning "extensive reservations" since neither the wording proposed by the Special Rapporteur nor that proposed by the Committee itself seemed fully satisfactory.

- Lastly, the Commission approved the commentaries on the draft articles it had adopted, which are reproduced in its report to the General Assembly.[53]

23. At the close of the fiftieth session, the Special Rapporteur also submitted the part of his third report[54] which deals with the distinction between reservations and interpretative declarations.[55] However, owing to lack of time, there was only a very brief exchange of views on that part of the third report and only draft guideline 1.2, regarding the general definition of interpretative declarations, was referred to the Drafting Committee.[56]

(ii) The fifty-first session

24. In 1999, at its fifty-first session, the Commission had before it the parts of the third report which it had been unable to consider the year before, concerning, on the one hand, interpretative declarations and, on the other hand, "reservations" and interpretative declarations relating to bilateral treaties.[57] In addition, the Commission had to re-examine the draft guidelines on "extensive reservations"[58] and new draft guideline 1.1.7, replacing the one on "statements of non-recognition" proposed by the Special Rapporteur in his third report.

25. Indeed, following the plenary debate at the fiftieth session, the Special Rapporteur stated that he was convinced that he had been on the wrong track in considering initially that what was at issue was reservations in the legal sense of the term.[59] Accordingly, in his fourth report,[60] he proposed a draft guideline which reflected the position of the vast majority of members of the Commission and which was, with a few amendments, adopted by the Commission as draft guideline 1.4.3.

26. Moreover, as it had planned to do at its fiftieth session,[61] the Commission re-examined draft guidelines 1.1.1 and 1.1.3 concerning "object of reservations" and "reservations having territorial scope", respectively, in the light of the discussion on interpretative declarations, which led it to reformulate the former[62] but to make no amendments to the latter.

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[53] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 540.

[54] A/CN.4/491/Add.4, paras. 236-414.

[55] See A/CN.4/SR.2551 and the corresponding report of the above-mentioned Commission (note 53 above), paras. 505-519.

[56] Cf. the summary record of the 2552nd meeting, of 30 July 1998 (A/CN.4/SR.2552).

[57] A/CN.4/491/Add.5, paras. 422-521.

[58] See para. 22 above.

[59] See A/CN.4/491/Add.3, paras. 168-181.

[60] A/CN.4/499, paras. 44-54.

[61] A/53/10 (note 53 above), note 215, p. 217.

[62] The initial text read as follows: "A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty as a whole". The new text reads: "A reservation purports to exclude or

27. At its fifty-first session, the Commission therefore adopted, with larger or smaller amendments, all the draft guidelines on definition of reservations and interpretative declarations submitted to it in the third report of the Special Rapporteur.[63] It also re-examined and completed the "safeguard" guideline on "scope of definitions" which it had adopted provisionally in 1998.[64] Moreover, on the initiative of the Drafting Committee, the Commission proceeded to re-order the presentation of the 25 draft guidelines adopted up to then. They are now grouped in six sections on the following topics, respectively:

- Definition of reservations (guidelines 1.1 and 1.1.1 to 1.1.7);
- Definition of interpretative declarations (guidelines 1.2, 1.2.1 and 1.2.2);
- Distinction between reservations and interpretative declarations (guidelines 1.3 and 1.3.1 to 1.3.3);
- Unilateral declarations other than reservations and interpretative declarations (guidelines 1.4 and 1.4.1 to 1.4.5);
- Unilateral declarations relating to bilateral treaties (guidelines 1.5.1 to 1.5.3); and
- Scope of definitions (guideline 1.6).[65]

28. The Special Rapporteur wishes to take the opportunity of this report to explain his views on the numbering system which he has adopted for the provisions of the Guide to Practice and which has been criticized by some members of the Commission for its apparent complexity.[66] This system satisfies two concerns. On the one hand, it purports to diverge clearly from the usual format of international treaties, which are divided into articles; the Guide to Practice is not a draft treaty and is not, in principle, designed to become one.[67] Moreover, after some initial trial and error, this format should make it possible to insert any new provisions within the existing sections without undermining the general structure of the text and without resorting to the awkward formula of "*bis*", "*ter*" and "*quater*" provisions. Perhaps the members of the Commission who might have been disconcerted at the outset by the numbering method adopted will agree that, now that the adjustment period is over, it does not pose any particular problems.[68]

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modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation".

[63] After discussion, and in agreement with the Special Rapporteur, the Commission did not adopt draft guidelines 1.3.0., 1.3.0.*bis* and 1.3.0.*ter*, which listed the criteria for distinguishing between reservations and interpretative declarations. It rightly considered that such criteria were already inherent in the definitions themselves (cf. A/54/10 (note 52 above), para. 468).

[64] See para. 22 above.

[65] See the table of concordances between the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission, annexed hereto.

[66] See, in particular, the comments by Mr. Kabatsi and Mr. Kateka (A/CN.4/SR.2597); contrasting opinion: Mr. Melescanu, ibid.

[67] Cf. paras. 467-470, 483, 484 and 487 of the report of the International Law Commission on the work of its forty-seventh session, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10).

[68] It is interesting to note that the representatives of States who spoke in the Sixth Committee at the past two sessions of the General Assembly did not seem to have special difficulties in that regard.

29. Each of the draft guidelines adopted up to now is the subject of a commentary.[69]

30. In the light of certain misunderstandings,[70] it seems useful to recall that the sole purpose of Chapter 1 of the Guide to Practice is to *define* what is meant by the term "reservations", by distinguishing them from other unilateral declarations satisfying different criteria, particularly interpretative declarations. The draft guidelines contained therein do not in any way prejudge the validity of either statement. As the commentary on draft guideline 1.6 adopted by the Commission in 1999 explains clearly:

> "Defining is not the same thing as regulating. As 'a precise statement of the essential nature of a thing',[71] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft guidelines (and in those which the Commission intends to adopt next year), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law. The same is true of interpretative declarations, which might conceivably not be permissible, either because they would alter the nature of the treaty or because they were not formulated at the required time;[72] etc."[73]

31. The set of draft guidelines adopted in 1998 and 1999 calls for a second observation. While the topic chosen by the Commission in agreement with the Sixth Committee is entitled "Reservations to treaties", the Commission sought to define not only reservations per se, but also other interpretative statements made concerning a treaty and commonly referred to as "interpretative declarations"; it is often difficult to draw a dividing line between the two statements. For this reason, and in the light of the scope which the practice of interpretative declarations has assumed, the Special Rapporteur believes, despite his initial hesitations,[74] that it will be appropriate, in subsequent chapters of the Guide to Practice, to define the legal regime of reservations themselves, as well as that of interpretative

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[69] The commentaries on guidelines 1.1, 1.1.2 to 1.1.4 and 1.1.7 are contained in A/53/10, para. 540, pp. 196-199, 203-210 and 210-214. Those pertaining to other guidelines are contained in A/54/10, para. 470.

[70] See, in particular, the article — literally insulting to the Special Rapporteur — entitled "Alain Pellet's Definition of a Reservation" by Mr. Karel Zemanek, published in the *Austrian Review of International and European Law* (1998, No. 3 (2), pp. 295-299). The author, who did not take the trouble to attempt to understand Part One of the Guide to Practice (or, in any event, did not understand it), harshly attacks draft guideline 1.1.1 which, in his view, would legitimize across-the-board reservations. This is tantamount to confusing the definition of reservations with their validity. As the Special Rapporteur has pointed out on several occasions (A/CN.4/SR.2545; A/CN.4/SR.2548; and A/CN.4/SR.2549), it is absurd to exclude impermissible reservations from the definition of reservations; to do so is to rob oneself of any opportunity to declare them impermissible!

[71] *The Oxford English Dictionary*, 2nd ed. (Oxford, The Clarendon Press, 1989).

[72] This problem may very likely arise in connection with conditional interpretative declarations.

[73] A/54/10, para. 470, pp. 308-309.

[74] See, in particular, A/CN.4/SR.2552, A/CN.4/SR.2581, 10 June 1999 and A/CN.4/SR.2583, 14 June 1999.

declarations, and among the latter, to make a distinction between "simple" interpretative declarations and conditional interpretative declarations.[75] It is possible, moreover, that the legal regime of the latter statements, to which the declaring State or international organization subordinates its consent to be bound by a treaty, will be similar to that of reservations themselves.

[75] The definition of conditional interpretative declarations is provided in draft guideline 1.2.1; see A/54/10, pp. 240-249, with the commentary adopted by the Commission.

(b) Consideration of the reports of the Commission by the Sixth Committee

32. Just as the Commission considered the Special Rapporteur's report (corrected on one point in the fourth report) twice, the Sixth Committee considered the Commission's reports on the definition of reservations at both its fifty-third and fifty-fourth sessions, in 1998 and 1999.

33. In both cases, during the debate on the section of the report concerning reservations to treaties,[76] some delegations returned to topics considered in previous years, and many took positions and made useful suggestions on various draft guidelines adopted by the Commission.

(i) General comments on the topic

34. In 1998[77] and 1999[78] several delegations restated their desire not to see the Vienna regime called into question, although some believed that a specific reservations regime should apply to human rights treaties,[79] while others adamantly opposed the idea.[80]

35. Several delegations drew attention to the growing interest in the subject[81] and stressed the practical usefulness the Guide to Practice would have for States once it was completed.[82] In the view of the Special Rapporteur, this point is of particular importance: indeed, it is the first time States are able to assess *in concreto* the form

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[76] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 469-540, and *Fifty-fourth Session, Supplement No. 10* (A/54/10), paras. 450-470.

[77] United States of America (A/C.6/53/SR.14, para. 52), France (A/C.6/53/SR.16, para. 64), Sweden, on behalf of the Nordic countries (A/C.6/53/SR.17, para. 5), Pakistan (ibid., para. 20), Romania (A/C.6/53/SR.18, para. 4), Germany (ibid., para. 23), Venezuela (ibid., para. 29), Cuba (ibid., para. 55), Tunisia (ibid., para. 57), Hungary (A/C.6/53/SR.19, para. 23), Singapore (ibid., para. 27), Islamic Republic of Iran (A/C.6/53/SR.20, para. 9), Portugal (ibid., para. 36), India (A/C.6/53/SR.21, para. 34) and Egypt (A/C.6/53/SR.22, para. 14).

[78] Chile (A/C.6/54/SR.16, para. 3), Pakistan (A/C.6/54/SR.17, para. 59), Slovenia (A/C.6/54/SR.22, para. 35), Croatia (A/C.6/54/SR.25, para. 51), Russian Federation (A/C.6/54/SR.26, para. 50), Libyan Arab Jamahiriya (ibid., para. 14), Slovakia (ibid., para. 58), Cyprus (ibid., para. 86), Egypt (A/C.6/54/SR.27, para. 24), Kuwait (A/C.6/54/SR.28, para. 87) and Cuba (ibid., para. 95).

[79] Sweden, on behalf of the Nordic countries (A/C.6/53/SR.17, para. 6), Italy (A/C.6/53/SR.18, para. 33, and A/C.6/54/SR.24, para. 30), Hungary (ibid., para. 36) and Niger (A/C.6/54/SR.25, para. 108); see also Ireland (A/C.6/53/SR.20, para. 50). Greece said that the role of the human rights treaty monitoring bodies with regard to reservations should be reviewed (A/C.6/54/SR.28, para. 12).

[80] Singapore (A/C.6/53/SR.19, paras. 27 and 28), Egypt (A/C.6/53/SR.22, para. 15, and A/C.6/54/SR.27, para. 25), Pakistan (A/C.6/54/SR.17, para. 59), Tunisia (A/C.6/54/SR.25, para. 29) and Cuba (A/C.6/54/SR.28, para. 95); see also Algeria (A/C.6/53/SR.20, para. 61) and the statement by the Secretary-General of the Asian-African Legal Consultative Committee (A/C.6/53/SR.17, para. 45).

[81] Sweden, on behalf of the Nordic countries (A/C.6/53/SR.17, paras. 4 and 6), Germany (A/C.6/53/SR.18, para. 23), India (A/C.6/53/SR.21, para. 33) or Greece (A/C.6/53/SR.22, para. 44), Bahrain (A/C.6/54/SR.28, para. 59) and Portugal (ibid., para. 90).

[82] United Kingdom (A/C.6/53/SR.14, para. 15), Japan (A/C.6/53/SR.17, para. 26), Italy (A/C.6/53/SR.18, para. 33), Tunisia (ibid., para. 57), Chile (A/C.6/54/SR.16, para. 2), United States of America (A/C.6/54/SR.19, para. 32, and A/C.6/54/SR.25, paras. 83 and 85), Slovenia (A/C.6/54/SR.22, para. 35), Poland (A/C.6/54/SR.25, para. 110), Islamic Republic of Iran (A/C.6/54/SR.26, para. 69), Cyprus (ibid., para. 86) and Kuwait (A/C.6/54/SR.28, para. 87).

that the future guide could take.[83] It is encouraging to note that the exercise appeared convincing to those States that spoke on this point, none of which made any major criticism of the form selected.

36. However, two States considered the draft to be too detailed,[84] while another felt that the ultimate goal should be the elaboration of a draft convention;[85] while the Commission has never rejected this option outright, it is not in line with the thinking of the majority of its members,[86] and the Special Rapporteur has serious reservations about it. Yet another State suggested that the draft should be supplemented by model statements,[87] which would seem to include not only model clauses, as the Commission has envisaged,[88] but also model acceptances, objections or other reactions to reservations and interpretative declarations similar to those contemplated by the Council of Europe;[89] this suggestion would appear to merit consideration.

37. More specifically, with regard to the "definition" exercise which the Commission undertook in 1998 and 1999, most delegations expressing views on the matter felt that it was useful and even very important,[90] even if some believed that the exercise should not stop there.[91] This conclusion is obvious;[92] however, as some delegates noted and as the Special Rapporteur again pointed out when he addressed the Sixth Committee, in keeping with the welcome practice instituted in 1997,[93] the definition of reservations on the one hand and their permissibility on the other must not be confused. It is only by determining precisely whether or not a particular unilateral statement constitutes a reservation that it is possible to apply — or not apply — the legal regime for reservations, and thus to assess permissibility.[94]

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[83] France (A/C.6/53/SR.16, para. 65, and A/C.6/54/SR.24, para. 38) and Niger (A/C.6/54/SR.25, para. 104) disputed the use of the word "*directives*", and would prefer the term "*lignes directrices*"; the Special Rapporteur is not convinced that this change is warranted.

[84] Japan (A/C.6/54/SR.25, para. 15) and Austria (A/C.6/54/SR.27, para. 17).

[85] Venezuela (A/C.6/54/SR.27, para. 13).

[86] See *Yearbook of the International Law Commission, 1995*, vol. II, Part II, paras. 467-470, 483 and 487.

[87] Croatia (A/C.6/54/SR.25, para. 50).

[88] See *Yearbook of the International Law Commission, 1995*, vol. II, Part II, para. 487.

[89] See paras. 54-56 below.

[90] Austria (A/C.6/53/SR.15, para. 16), Italy (A/C.6/53/SR.18, para. 33), Tunisia (ibid., para. 57) or Slovakia (A/C.6/53/SR.22, para. 41).

[91] See in particular the United Kingdom (A/C.6/53/SR.14, para. 15) and also the annex to that country's statement of 2 November 1999, which indicates that the United Kingdom is "more than ever convinced that [the discussion of definitions] is unnecessarily absorbing the Commission's time and leading it away from the main issues on which States need guidance"; see also Germany (A/C.6/54/SR.25, para. 16) or Sweden, on behalf of the Nordic countries (A/C.6/54/SR.24, para. 47), and the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session, prepared by the Secretariat (A/CN.4/504, paras. 87 and 88).

[92] The Special Rapporteur wishes to take his share of responsibility for the delay in the preparation of the Guide to Practice. In his "defence", he would note that he received no assistance other than what the Commission secretariat was able to provide (assistance which he wholeheartedly welcomed), that he could not place excessive demands on the secretariat, given its heavy workload, and that the topic itself proved to be sprawling and complex.

[93] On 4 November 1998 (A/C.6/53/SR.20, paras. 73-84).

[94] See para. 30 and note 70 above.

38. That is also why almost all delegations supported the intention of the Special Rapporteur[95] to define interpretative declarations in relation to reservations and to conduct a parallel study of the legal regimes applying to each.[96]

(ii) Observations on the draft guidelines

39. The draft guidelines adopted received overall approval from several delegations,[97] although others offered some criticisms, generally on points of detail, or made interesting drafting suggestions.[98] It is not possible to reflect all of them here, and only those of immediate interest for the work of the Commission relating to the adoption on first reading of the Guide to Practice are briefly described below.[99]

40. With regard to guideline 1.1, which is noteworthy for being an amalgam of the definitions of reservations contained in the Vienna Conventions on the Law of Treaties, it is reassuring to note that most speakers endorsed the composite method used in adopting the general definition.[100] Three delegations did propose amendments to guideline 1.1, replacing the word "modify" by "limit" or "restrict"[101] or adding a reference to guideline 1.1.1.[102] However, as one delegation and the Special Rapporteur noted, that would amount to amending the Vienna definition,[103] which the Commission had decided to avoid as far as possible.[104]

41. Some delegations nevertheless drew attention to the problems posed by the effects of State succession on the legal regime for reservations to treaties, including the definition itself.[105] They agreed that it would be sufficient to return to that topic

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[95] See para. 31 above.

[96] Sweden, on behalf of the Nordic countries (A/C.6/53/SR.17, para. 5), Germany (A/C.6/53/SR.18, para. 24), Venezuela (ibid., para. 30), Italy (ibid., para. 33), Tunisia (ibid., para. 57), Slovenia (A/C.6/53/SR.21, para. 5), Slovakia (A/C.6/53/SR.22, para. 41), Greece (ibid, para. 45), Bosnia and Herzegovina (ibid., para. 47), Republic of Korea (ibid., para. 49), Niger (A/C.6/54/SR.25, para. 105) and Switzerland (A/C.6/54/SR.28, para. 104). Only the delegation of the United Kingdom appeared to express doubts on this point (A/C.6/53/SR.14, para. 15).

[97] United States of America (A/C.6/53/SR.14, para. 52), Argentina (A/C.6/53/SR.15, para. 98), Algeria (A/C.6/53/SR.20, para. 62), Slovenia (A/C.6/53/SR.21, para. 5), India (ibid., para. 34, and A/C.6/54/SR.22, para. 45) or Sweden, on behalf of the Nordic countries (with the exception of guideline 1.1.3) (A/C.6/54/SR.24, para. 46).

[98] Short of constantly reworking the guidelines adopted, which would delay the work of the Commission considerably, those suggestions cannot be reflected until the second reading, in accordance with current practice. Nevertheless, these comments can be of great importance for the future work of the Commission, even on first reading.

[99] The valuable topical summaries prepared by the Secretariat provide a fuller picture of the positions taken by States on individual guidelines; see A/CN.4/496, paras. 155-174, and A/CN.4/504, paras. 92-114.

[100] See, *inter alia*, the Czech Republic (A/C.6/53/SR.16, para. 77), Venezuela (A/C.6/53/SR.18, para. 29), Tunisia (ibid., para. 57), Greece (A/C.6/53/SR.22, para. 45) or Bosnia and Herzegovina (ibid., para. 47); see also notes 77 and 78 above.

[101] France (A/C.6/53/SR.16, para. 66) and Switzerland (A/C.6/53/SR.20, para. 66).

[102] Guatemala (A/C.6/54/SR.25, para. 43).

[103] Mexico (A/C.6/53/SR.18, para. 16) and Mr. Pellet (A/C.6/53/SR.20, paras. 74 and 75).

[104] See note 67 above.

[105] Czech Republic (A/C.6/53/SR.16, paras. 81-83), Slovenia (A/C.6/53/SR.21, para. 5, and A/C.6/53/SR.22, para. 35), Switzerland (A/C.6/53/SR.20, para. 67), Bosnia and Herzegovina (A/C.6/53/SR.22, para. 47) and Croatia (A/C.6/53/SR.25, para. 52).

when the Commission addressed reservations from that angle, which it planned to do in a special chapter of the Guide to Practice.[106]

42. A single delegation initially cast some doubt on the possibility of "across-the-board" reservations referred to in guideline 1.1.1;[107] however, it stated that it was satisfied with the reworded draft adopted in 1999.[108] Generally speaking, this text, which in the view of the Special Rapporteur provides significant clarification, was approved both in the original version adopted in 1998[109] and in 1999,[110] although some delegations cautioned against a practice that had to be governed by specific rules,[111] which the Commission would obviously have to consider when taking up the crucial question of the permissibility of reservations.

43. Subject to the possibility of including a reference to notifications of succession in cases of State succession,[112] draft guideline 1.1.2 met with unanimous acceptance,[113] as did guidelines 1.1.4[114] and 1.1.7, with several delegations expressly acknowledging, by way of approval, their contribution to the progressive development of international law.[115]

44. Draft guideline 1.1.3 was generally approved,[116] subject, in some cases, to certain drafting changes.[117] One delegation did wonder whether it would be appropriate to extend the scope of the draft guideline beyond situations of

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[106] See the second report (A/CN.4/477, paras. 37 and 46).

[107] Czech Republic (A/C.6/53/SR.16, para. 78).

[108] On 3 November 1999 (A/C.6/54/SR.25, para. 79).

[109] See France (A/C.6/53/SR.16, para. 67) and Mexico (A/C.6/53/SR.18, para. 16).

[110] See Italy (A/C.6/53/SR.24, para. 26), France (ibid., para. 39), Poland (A/C.6/53/SR.25, para. 111) and Greece (A/C.6/53/SR.28, paras. 8 and 9).

[111] France (A/C.6/53/SR.24, para. 39); see also Burkina Faso (A/C.6/53/SR.26, para. 46).

[112] Czech Republic (A/C.6/53/SR.16, para. 82), Switzerland (A/C.6/53/SR.20, para. 67) and Poland (A/C.6/53/SR.25, para. 112); see also note 105 above.

[113] See, *inter alia*, France (A/C.6/53/SR.16, para. 68), Mexico (A/C.6/53/SR.18, para. 16), Venezuela (ibid., para. 29) and Bahrain (A/C.6/53/SR.21, para. 17).

[114] See, *inter alia*, Bahrain (A/C.6/53/SR.21, para. 18) or Greece (A/C.6/53/SR.22, para. 46).

[115] See, *inter alia*, the Czech Republic (A/C.6/53/SR.16, para. 84), Mexico (A/C.6/53/SR.18, para. 18), Italy (ibid., para. 34), Switzerland (A/C.6/53/SR.20, para. 69), Bahrain (A/C.6/53/SR.21, para. 18) or Greece (A/C.6/53/SR.22, para. 46). China drew attention to the problems posed by the withdrawal or modification of reservations and interpretative declarations formulated jointly (A/C.6/53/SR.25, para. 101); this question is addressed in chapter III of this report.

[116] See, *inter alia*, France (A/C.6/53/SR.16, para. 68), Mexico (A/C.6/53/SR.18, para. 17), Italy (ibid., para. 34), Bahrain (A/C.6/53/SR.21, para. 17; the delegation of Bahrain, however, expressed reservations about a point in the commentary — expressly endorsed by France (A/C.6/53/SR.16, para. 68) — that will warrant further study when the section of this report dealing with the formulation of reservations is considered) and Greece (A/C.6/53/SR.22, para. 46).

[117] Switzerland (A/C.6/53/SR.20, para. 66) and Poland (A/C.6/53/SR.25, para. 113).

colonialism,[118] and two others expressed some doubts as to the merits of the chosen solution or, in any event, to the possibility of making it general.[119]

45. Curiously, draft guidelines 1.1.5 and 1.1.6, concerning unilateral statements by which States intend to increase the rights conferred by a treaty or discharge an obligation by an equivalent means, and 1.4.1 and 1.4.2, concerning unilateral statements purporting to undertake unilateral commitments, or add further elements to a treaty, which had been the subject of extensive debate in the Commission,[120] did not elicit very many comments from States. At most one can say that while some States felt in 1998 that the specific problem of "extensive reservations" ought to be taken up in order to remove any ambiguity,[121] others found the question to be a theoretical one.[122]

46. Since 1998, some States have supported the Special Rapporteur's position regarding the definition of interpretative declarations.[123] On this important aspect of the Commission's work delegations to the Sixth Committee in 1999 did not differ in their views from the positions taken in the Commission and approved both the decision to define interpretative declarations in the Guide to Practice and the

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[118] Mexico (A/C.6/53/SR.18, para. 17); the Mexican delegation extended this observation to draft guideline 1.1.4 (idem).

[119] Sweden, on behalf of the Nordic countries (A/C.6/53/SR.24, para. 46) and Spain (A/C.6/53/SR.26, para. 2); in addition, the United Kingdom, which did not bring this point up again during the public debate in 1999, transmitted to the Special Rapporteur in July 1999 a long, forcefully argued note entitled "Draft Guidelines on Reservations to Treaties Provisionally Adopted by the International Law Commission on First Reading", in which it concluded that State practice was contrary to the position taken by the Commission in that the latter included unilateral statements having the effect of excluding the application of an entire treaty to a non-metropolitan territory. This note reached the Special Rapporteur too late to be of use during the Commission's discussions in 1999, but should be a valuable tool during the second reading of the Guide to Practice.

[120] See para. 22 above.

[121] See France (A/C.6/53/SR.16, para. 69) or Switzerland (A/C.6/53/SR.20, para. 70). Switzerland maintains that guideline 1.1.5 is useful but has some reservations about guideline 1.1.6; see also A/C.6/54/SR.28, para. 102.

[122] Austria (A/C.6/53/SR.15, para. 16), Sweden, on behalf of the Nordic countries (A/C.6/53/SR.17, para. 4) and the Russian Federation (A/C.6/54/SR.26, para. 57, concerning guideline 1.1.6 only); Guatemala felt that guideline 1.1.5 did little more than state the obvious (A/C.6/54/SR.25, para. 45). See also A/C.6/53/SR.20, para. 42. Several States felt that statements purporting to undertake unilateral commitments (guideline 1.4.1) were in fact unilateral acts (see Italy (A/C.6/54/SR.24, para. 28), Tunisia (A/C.6/54/SR.25, para. 29), Venezuela (A/C.6/54/SR.27, para. 13), Austria (ibid., para. 17) and Bahrain (A/C.6/54/SR.28, para. 58)), which is also what the Special Rapporteur thinks (see the third report (A/CN.4/491/Add.3, para. 217, draft guideline 1.1.5)).

[123] Mexico (A/C.6/53/SR.18, para. 15) and Greece (A/C.6/53/SR.22, para. 45).

definition selected[124] with only a few slight changes,[125] or the distinction criterion in guideline 1.3.[126]

47. The distinction between "simple" and conditional interpretative declarations was approved by States.[127] Several States felt that the latter were closer to reservations than to simple interpretative declarations,[128] while others insisted that the two concepts were different.[129]

48. Many delegations in the Sixth Committee made comments, both general and detailed, about the draft guidelines contained in section 1.4 or the commentary thereto.[130] Guideline 1.4.3, concerning statements of non-recognition, on which there were major differences of view in the Commission,[131] was approved as to substance by all States that spoke,[132] although one of them felt that since certain statements did not constitute reservations, such a provision had no place in the Guide to Practice.[133]

49. As for "reservations" to bilateral treaties, the draft texts proposed by the Special Rapporteur[134] and adopted by the Commission in 1999 were unanimously approved[135] with only minor changes.

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[124] See, *inter alia*, Chile (A/C.6/54/SR.16, para. 5), Italy (A/C.6/54/SR.24, para. 29), France (ibid., para. 41), Croatia (A/C.6/54/SR.25, para. 53), Poland (ibid., para. 114) and Venezuela (A/C.6/54/SR.27, para. 13).

[125] See the comments by Guatemala (A/C.6/54/SR.25, para. 48), which believed that the word "attributed" left too much to the discretion of the declarant, the Republic of Korea (ibid., para. 95), which wanted the definition of reservations to be reworded *a contrario*, or Italy (A/C.6/54/SR.24, para. 41) and Switzerland (A/C.6/54/SR.28, para. 103), which suggested the reintroduction of time limits.

[126] Similarly, guideline 1.3.2, concerning the phrasing and name of interpretative declarations elicited little opposition.

[127] Only Japan criticized what it seemed to consider to be an unnecessary complication (A/C.6/54/SR.25, para. 15).

[128] See Republic of Korea (A/C.6/54/SR.25, para. 96) and Spain (A/C.6/54/SR.26, para. 3). Switzerland thought that this could only be determined later (A/C.6/54/SR.28, para. 104).

[129] See Israel (A/C.6/54/SR.25, para. 96), the Czech Republic (A/C.6/54/SR.25, para. 81) and China (ibid., para. 100).

[130] See A/CN.4/504, paras. 109-113.

[131] See para. 25 above and the fourth report (A/CN.4/499, paras. 44-54).

[132] France (A/C.6/54/SR.24, para. 42), the Czech Republic (A/C.6/54/SR.25, para. 81), Poland, which suggested that the question of the effects of such declarations should be considered by the Commission in the context of unilateral acts (ibid., para. 115) and Spain (A/C.6/54/SR.26, para. 2).

[133] Israel (A/C.6/54/SR.25, para. 77); *contra*: China (A/C.6/54/SR.25, para. 102).

[134] See Argentina (A/C.6/53/SR.15, para. 98) and Venezuela (ibid., para. 30).

[135] Including by the United States of America (A/C.6/54/SR.54, para. 97), a fact which should be noted, owing to the wealth of practice existing in this area in that country. See also Hungary (A/C.6/54/SR.24, para. 37), France (ibid., para. 44), the Czech Republic (A/C.6/54/SR.25, para. 82), the Niger (ibid., para. 106), Poland (ibid., para. 116) or Spain (A/C.6/54/SR.26, para. 4); Spain points out, not without reason, that the title of draft guideline 1.5.1 is rather unsatisfactory.

50. The few delegations that commented on draft guideline 1.6, on "safeguards" (scope of definitions), approved them as well.[136]

B. Action by other bodies

51. In his third report, the Special Rapporteur had drawn attention to another sign of the interest in the topic of reservations to treaties demonstrated by the action taken by two bodies with which the Commission has a cooperative relationship: the Council of Europe and the Asian-African Legal Consultative Committee.[137] These bodies continued their exploration of the topic in 1998-1999.

52. The third report noted that the Asian-African Legal Consultative Committee had given special consideration to the question of reservations to treaties during its thirty-seventh session, held in New Delhi from 13 to 18 April 1998.[138] During that session a special meeting devoted to reservations to treaties was held on 14 April 1998.

53. According to the report prepared by Mr. W. Z. Kamil,[139] who had been appointed rapporteur of the special meeting, the participants had focused particular attention on the Commission's preliminary conclusions adopted in 1997.[140] Their deliberations yielded the following consensus views:

(a) The regime of reservations provided for in the Vienna Convention on the Law of Treaties has proved effective and does not need to be changed;

(b) In particular, it is sufficiently flexible and it satisfactorily ensures both the right of States to enter reservations and the necessary preservation of the object and purpose of the treaty;

(c) It would be better not to introduce differences in the regime applicable to different categories of treaties, including human rights treaties; accordingly,

(d) Most participants opposed paragraph 5 of the preliminary conclusions.[141]

54. The Group of Specialists on Reservations to International Treaties established by the Committee of Ministers of the Council of Europe (DI-S-RT)[142] continued its work and held several meetings which led to significant progress. During one meeting, held in Paris from 14 to 16 September 1998, the Group engaged in a rapid

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[136] France (A/C.6/53/SR.16, para. 70) and Singapore (A/C.6/53/SR.19, para. 27); the delegation of Bahrain, however, felt that the question could not be separated from that of the permissibility of reservations (A/C.6/53/SR.21, para. 19). On this point, see para. 26 above. Guatemala suggested that the scope of this measure should be broadened (A/C.6/54/SR.25, para. 47).

[137] A/CN.4/491, paras. 27-30.

[138] Ibid., para. 30.

[139] Report of the Rapporteur of the Special Meeting on the Reservations to Treaties, held on 14 April 1998, annexed to the document prepared by the secretariat of the African-Asian Legal Consultative Committee, *Notes and Comments on Selected Items Before the Fifty-Third Session of the General Assembly of the United Nations*, document AALCC/UNGA/LIII/98/2, pp. 67-76. The same document contains a summary of the portion of the Commission's report on reservations (pp. 33-38).

[140] See para. 7 above.

[141] Report of the Rapporteur of the Special Meeting on the Reservations to Treaties held on 14 April 1998, see note 139 above, pp. 72-74.

[142] See third report (A/CN.4/491, para. 28).

exchange of views with the Special Rapporteur on the progress of the Commission's work and heard a communication from Mr. Pierre-Henri Imbert, Director for Human Rights of the Council of Europe and an eminent specialist on the question of reservations to treaties.[143] It also considered the "Model objection clauses for objecting to inadmissible reservations to international treaties", prepared by the delegation of Sweden, and a document submitted by the Netherlands entitled "Key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage".

55. On the proposal of this group, which became the Group of Experts on Reservations to International Treaties (DI-E-RIT), the Committee of Ministers of the Council of Europe on 18 May 1999 adopted Recommendation No. R (99) on reactions to impermissible reservations to international treaties; it called on the Governments of member States to be guided by the model clauses for reacting to indeterminate reservations annexed to the recommendation.[144]

56. At its sixth meeting,[145] the Group discussed the report of the International Law Commission on reservations[146] and held a debate on the basis of a document by the Netherlands on essential elements regarding the formulation of reservations to international treaties, a new version of which had been adopted at the third meeting;[147] this highly practical document looks at several major problems and will be discussed in this report in the context of the topics it covers. In addition, at these meetings the Group, in its capacity as a European observatory of reservations to international treaties, considered a list of reservations and declarations to international treaties and expressed doubts as to the lawfulness of some of them.

C. General presentation of the fifth report

57. Following the consideration of the first report on reservations to treaties, the Special Rapporteur concluded that:

> "(b)[148] The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
>
> "(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would

[143] DI-S-RIT (98) 9/CADHI (98) 23; this document clearly spells out the "Strasbourg approach" and discusses whether it can be applied in a general fashion.

[144] These model clauses will be discussed in chapter IV of this report.

[145] Held at Strasbourg on 6 September 1999; see document DI-E-RIT (99) 9.

[146] And noted its concern at the current rate of progress of the Commission's work on the topic; see note 92 above.

[147] Held at Berlin on 10 March 2000. The document adopted is now entitled "Guide to practice concerning reservations to international treaties: key issues regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and post-ratification stage" (DI-E-RIT (99) 5 rev 2).

[148] Subparagraph (a) concerned the amendment of the title of the topic; the original title was "The law and practice relating to reservations to treaties".

submit new proposals to the General Assembly on the form the results of its work might take;

"(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions."[149]

58. These conclusions met with general approval both in the Sixth Committee and in the Commission itself, and they were not called into question during consideration of the second and third reports.[150] The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

59. This report has been prepared according to the general method described in the third report on reservations to treaties.[151] This method is

- Empirical (the Special Rapporteur is unable to analyse the extensive documentation on the subject[152] as systematically as he might wish);
- "Viennese" (these arguments are consistently based on the three Vienna Conventions on the Law of Treaties of 1969, 1978 and 1986, whose text, preparatory work, lacunae and implementation are described as systematically as possible); and
- "Composite" insofar as the relevant provisions of the Vienna Conventions have been combined wherever possible into single guidelines which have been reproduced at the beginning of the various sections of the Guide to Practice.

60. The third report, devoted to the definition of reservations, covered the majority of chapter II of the "provisional plan of the study" set forth in the introductory chapter of the second report.[153] Two of the planned sections, "Distinction between reservations and other procedures aimed at modifying the application of treaties" and "The legal regime of interpretative declarations", have, however, been omitted for different reasons.

61. In the second case, the omission was deliberate. As the Special Rapporteur indicated in his third report,[154] the legal regime for interpretative declarations poses complex problems that could not have been solved without lengthy consideration by the Commission at the cost of delaying its discussion of the problems relating to reservations. The fact that the rules applicable to interpretative declarations can be defined only by comparison with those relating to reservations makes such an approach seem even more illogical. This is particularly true in the case of conditional interpretative declarations, which it would doubtless not be excessive to consider "quasi-reservations"[155] and where it must be determined to what extent they correspond to the legal regime applicable to reservations and to what extent

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[149] *Yearbook of the International Law Commission, 1995*, vol. II, Part II, para. 487.

[150] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[151] A/CN.4/491, paras. 31-41.

[152] See note 92 above.

[153] A/CN.4/477, para. 37.

[154] A/CN.4/491, para. 45.

[155] See the discussion of this issue in the third report (A/CN.4/491/Add.4, paras. 314-335, 344-346 and 389-399); see also the views expressed by Mr. Kateka, Mr. Illueca and Mr. Addo (A/CN.4/SR.2552), Mr. Gaja (A/CN.4/SR.2582), and Mr. Elaraby and Mr. Kamto (A/CN.4/SR.2583).

they vary from it (if they do so at all, which is not certain). Therefore, the Special Rapporteur stated in his third report that he planned systematically to present the draft articles of the Guide to Practice relating to the legal regime of interpretative declarations at the same time as the corresponding provisions relating to reservations.[156] This proposal met with the approval of both the members of the Commission who spoke on the matter[157] and the Sixth Committee.[158] Thus, that approach will be followed in this and any subsequent report.

62. The second omission mentioned in the third report, which did not comment on the distinction between reservations and other procedures purporting to modify the application of treaties, is entirely fortuitous and is simply the consequence of insufficient time. This question will therefore be the subject of chapter II of this report.

63. In accordance with the above-mentioned provisional general outline,[159] the following chapters will be devoted, respectively, to the formulation and withdrawal of reservations, the formulation of acceptances of reservations and the formulation and withdrawal of objections to reservations and to the corresponding rules governing interpretative declarations.

64. In addition, time permitting, the Special Rapporteur will devote a final chapter of this report to an overview of the issues raised by the effects of reservations (and of interpretative declarations), their acceptance and objections to them.

65. This report will thus be organized as follows:

- Chapter II: Alternatives to reservations;
- Chapter III: Formulation and withdrawal of reservations and interpretative declarations;
- Chapter IV: Formulation of acceptance of reservations;
- Chapter V: Effects of reservations, acceptances and objections.

156 A/CN.4/491, para. 46.

157 See the statements made by Mr. Brownlie, Mr. Simma, Mr. Al-Baharna, Mr. Herdocia Sacasa, Mr. Economides, Mr. Bennouna and Mr. Galicki (A/CN.4/SR.2551); see also *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 533-539.

158 See para. 38 above.

159 See note 153 above.

Annex

Table showing concordances[a] between the draft guidelines proposed by the Special Rapporteur and those adopted by the Commission on first reading

Commission's numbering		*Special Rapporteur's numbering*
1.	Definitions	
1.1	Definition of reservations	1.1
1.1.1	Object of reservations	1.1.4
1.1.2	Instances in which reservations may be formulated	1.1.2
1.1.3	Reservations having territorial scope	1.1.8
1.1.4	Reservations formulated when notifying territorial application	1.1.3
1.1.5	Statements purporting to limit the obligations of their author	1.1.6
1.1.6	Statements purporting to discharge an obligation by equivalent means	-
1.1.7	Reservations formulated jointly	1.1.1
1.2	Definition of interpretative declarations	1.2
1.2.1	Conditional interpretative declarations	1.2.4
1.2.2	Interpretative declarations formulated jointly	1.2.1
1.3	Distinction between reservations and interpretative declarations	1.3
1.3.1	Method of implementation of the distinction between reservations and interpretative declarations	1.3.1
1.3.2	Phrasing and name	1.2.2
1.3.3	Formulation of a unilateral statement when a reservation is prohibited	1.2.3
1.4	Unilateral statements other than reservations and interpretative declarations	-
1.4.1	Statements purporting to undertake unilateral commitments	1.1.5
1.4.2	Unilateral statements purporting to add further elements to a treaty	1.1.5
1.4.3	Statements of non-recognition	1.1.7
1.4.4	General statements of policy	1.2.5
1.4.5	Statements concerning modalities of implementation of a treaty at the internal level	1.2.6
1.5	Unilateral statements in respect of bilateral treaties	
1.5.1	"Reservations" to bilateral treaties	1.1.9

[a] This table is presented in response to a request by the Chairman of the Commission at its fifty-first session (see A/CN.4/SR.2597, p. 20 of the English text, the French text being unavailable at the time this report was prepared).