RESERVATIONS TO TREATIES

[Agenda item 5]

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Fourth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

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CONTENTS

Multilateral instruments cited in the present report

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	Ibid., vol. 1946, No. 33356, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, No. 20378, p. 13.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Introduction

A. The earlier work of the Commission on the topic

1. 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] Sections 1 and 2 deal with the outcome of the first and second reports and the discussion of the third report in the Commission and the Sixth Committee; section 2 also 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)*

2. 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 (1969 Vienna Convention on the Law of Treaties, 1978 Vienna Convention on Succession of States in respect of Treaties, and 1986 Vienna Convention 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 paragraph 5 of its resolution 50/45 of 11 December 1995, the General Assembly invited States and international organizations, particularly those which were depositaries of conventions, to answer the questionnaires promptly; it reiterated that request in paragraph 7 of its resolution 51/160 of 16 December 1996.

3. By the time the third report was prepared,[5] 32 States and 22 international organizations, which were listed in the third report,[6] had replied either partially or fully to the questionnaires. Since then, no more States[7] and just two more international organizations[8] have transmitted replies to the Secretariat.

4. 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 32 of the 187 States Members of the United Nations or observers to which the questionnaire was sent and 24 of the 65 international organizations that received questionnaires, or 17 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) (19 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.

5. 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.[9] 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.

6. The Special Rapporteur therefore feels 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 responses and thus need to complete their replies, to do so.

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[1] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/470, pp. 126–141, paras. 8–90.

[2] See *Yearbook … 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, pp. 229–233, paras. 1–30.

[3] *Yearbook … 1995* (see footnote 1 above), pp. 141–150, paras. 91–149.

[4] See *Yearbook … 1995*, vol. II (Part Two), p. 108, para. 489.

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

[6] *Yearbook … 1998* (see footnote 2 above), p. 230, footnotes 7 and 9.

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

[8] The organizations in question are WMO and the United Nations (Treaty Section), both of which the Special Rapporteur also wishes to thank. The United Nations actually transmitted its reply to him in 1998, but he failed to indicate that he had received it; he presents his apologies to the Treaty Section for that oversight.

[9] See paragraphs 24–38 below.

(b) *Outcome of the second report (1996–1997)*

7. Owing to lack of time, the Commission was unable to consider the second report on reservations to treaties[10] at its forty-eighth session, in 1996. It did so at its following session, in 1997. Once it had considered the report, it adopted the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties.[11]

8. 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 chairpersons of human rights bodies with universal membership,[12] 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.[13]

9. So far, only the chairpersons of two monitoring bodies and the presiding officer of the eighth and ninth meetings of the chairpersons of bodies established pursuant to human rights instruments have transmitted their observations.[14] 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.

10. In a letter dated 9 April 1998,[15] the Chairperson of the Human Rights Committee emphasized the role of universal monitoring bodies in the process of developing the 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[16] and stressed that the proposition enunciated in paragraph 10,[17] "was subject to modification as practices and rules developed by universal and regional monitoring bodies gained general acceptance". 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.
>
> 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.[18]

11. 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, from 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.

12. In a letter dated 29 July 1998, the presiding officer of the eighth and ninth meetings of the chairpersons 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 chairpersons 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 (as adopted by the World Conference on Human Rights on 25 June 1993) on the importance of limiting the number and extent of reservations to human rights treaties, welcomed the role that the Commission assigned to human rights bodies with respect to reservations in its preliminary conclusions.

> They considered, however, that the draft was unduly restrictive in other respects and did not accord sufficient attention to the fact that human rights treaties, by virtue of their subject matter and the role they recog-

[10] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1.

[11] *Yearbook …1997*, vol. II (Part Two), pp. 56–57, para. 157.

[12] Letters were sent to the Chairpersons of the Committee on Economic, Social and Cultural Rights, the Committee 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.

[13] 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.

[14] The Special Rapporteur intends to reproduce these replies in full in an annex to a future report; see paragraph 15 below.

[15] The most important paragraph of the letter is reproduced in the third report (*Yearbook … 1998* (footnote 2 above), p. 230, para. 16).

[16] *Yearbook … 1997*, vol. II (Part Two), p. 57, para. 157: "The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts."

[17] Ibid.: "The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty."

[18] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 40* (A/54/40), vol. I, annex VI.

nize to individuals, could not be placed on precisely the same footing as other treaties with different characteristics.

The chairpersons believed that the capacity of a monitoring body to perform its function of determining the scope of the provisions of the relevant convention could not be performed effectively if it was precluded from exercising a similar function in relation to reservations. They therefore recalled the two general recommendations adopted by the Committee on the Elimination of Discrimination against Women and 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, and expressed their firm support for the approach reflected in General Comment No. 24, adopted by the Human Rights Committee. They requested their Chairperson to address a letter to the International Law Commission on their behalf to reiterate their support for the approach reflected in General Comment No. 24, and to urge that the conclusions proposed by the International Law Commission be adjusted accordingly.[19]

13. 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, established under article 21 of the Convention on the Elimination of All Forms of Discrimination against Women, concerning reservations to that Convention, which was transmitted to it by the Division for the Advancement of Women and which the Committee adopted at its nineteenth session.[20] 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,[21] 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",[22] 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[23] or the failure of States parties to withdraw or modify them.[24]

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 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.[25]

14. In addition, in accordance with the recommendation contained in paragraph 2 of General Assembly resolution 52/156,[26] five States transmitted to the Secretariat comments regarding the preliminary conclusions adopted by the Commission in 1997.[27] Generally speaking, these States welcomed the adoption of the preliminary conclusions[28] and the opportunity to comment on them before the Commission took a final decision on the matters dealt with therein. Monaco and the Philippines (which made several additional suggestions) endorsed the preliminary conclusions. China, while emphasizing the importance it attached to the cooperation of the human rights bodies, considered that the latter should remain strictly within the framework of their mandate, as defined in the respective treaties, adding that where the latter contained no specific provision, the permissibility of reservations was not part of the functions and responsibilities of the monitoring bodies; it also suggested that the term "traditional modalities" in paragraph 6 should be replaced by the words "well-established modalities"[29] 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.[30] China agreed with Liechtenstein that the implementation of the recommendation in paragraph 7 of the preliminary conclusions might prove difficult in practice.[31] Liechtenstein concluded its comments by drawing the Commission's attention

[19] *Official Records of the General Assembly, Fifty-third Session*, item 113 (a) of the preliminary list, document A/53/125, annex.

[20] Ibid., *Fifty-third Session, Supplement No. 38* (A/53/38/Rev.1), part two, paras. 5–21.

[21] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/477 and Add.1. The Committee seems to be referring to paragraphs 241–251, although they are not specifically mentioned.

[22] *Official Records of the General Assembly* (see footnote 20 above), para. 21.

[23] Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women 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.

[24] *Official Records of the General Assembly* (see footnote 20 above), para. 23.

[25] Ibid., para. 24.

[26] "*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 States Members and to observers, requesting their comments on the preliminary conclusions of the Commission.

[27] The three States mentioned in the third report, Liechtenstein, Monaco and the Philippines (*Yearbook … 1998* (footnote 2 above), p. 232, footnote 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.

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

[29] 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."

(See footnote 11 above.)

[30] See footnote 16 above.

[31] 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."

(See footnote 11 above.)

to the following points, which it felt deserved particular attention:

(*a*) Reconsideration of the correlation between paragraphs 5 and 7 of the preliminary conclusions;

(*b*) The possibility of drafting optional protocols should be further elaborated upon. In doing so, the Commission should consider issues such as feasibility, usefulness from a practical point of view, including time frame;

(*c*) 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;

(*d*) Comments on the legal effect of objections by States parties made to reservations lodged by other States parties;

(*e*) Study of the potential of an enhanced role played by depositaries of multilateral treaties.

Switzerland, which merely confirmed 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.[32]

15. 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. Although, as he tried to explain in his third report,[33] he does not believe that the adoption was premature, it would be preferable not to revise formally 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,[34] 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 in 1998.

16. Moreover, the Special Rapporteur had annexed to his second report a bibliography concerning reservations to treaties.[35] As announced in the third report, a complete text of that document is annexed to the present report.[36]

2. Third report and the outcome

17. The third report on reservations to treaties[37] consisted of three chapters of very unequal length. Its introduction served the same "purpose" as this one—it recapitulated the Commission's earlier work on the topic and gave a general presentation of the report, essentially stating the methodology used.[38] Chapter I dealt with the definition of reservations and of interpretative declarations.[39] In chapter III there was a recapitulation of the draft guidelines proposed by the Special Rapporteur in the context of the Guide to Practice.[40]

(a) *Consideration of the third report by the Commission*

18. In 1998, at its fiftieth session, the Commission considered the third report on reservations to treaties in three stages.

19. First, it discussed the part of the report dealing with the definition of reservations to multilateral treaties and the corresponding draft guidelines,[41] which it referred to the Drafting Committee. (However, at the conclusion of the debate in plenary concerning draft guideline 1.1.7 proposed by the Special Rapporteur concerning reservations relating to non-recognition,[42] the latter stated that he was convinced he had been mistaken in considering, initially, that these were reservations in the legal sense of the word.[43] He therefore proposed, see below,[44] a draft guideline which reflected the position of the vast majority of members of the Commission and which he, too, supported.)

20. The Commission then proceeded—the Drafting Committee having made a number of amendments to the draft guidelines—to consider the amended text, which it adopted after making relatively minor adjustments to draft guidelines 1.1 (general definition of reservations), 1.1.1 (object of reservations),[45] 1.1.2 (cases in which a reserva-

[32] See *Official Records of the General Assembly, Fifty-second Session, Sixth Committee*, 22nd meeting, paras. 80–87.

[33] *Yearbook … 1998* (see footnote 2 above), p. 232, para. 22.

[34] Ibid., para. 23.

[35] *Yearbook … 1996* (see footnote 21 above), annex I (A/CN.4/478).

[36] A/CN.4/478/Rev.1.

[37] *Yearbook … 1998* (see footnote 2 above), p. 221.

[38] Ibid., pp. 229–235, paras. 1–46.

[39] Ibid., pp. 236–284, paras. 47–413. Notwithstanding what the Special Rapporteur had hoped to do and had initially said he would do (ibid., p. 235, paras. 43 and 46) 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" (ibid., p. 299, para. 511) could not be dealt with.

[40] Ibid., para. 512.

[41] Ibid., pp. 236–284, paras. 47–413, and draft guidelines 1.1 and 1.1.1–1.1.8 (ibid., p. 299, para. 512).

[42] Ibid., p. 253, para. 177.

[43] Ibid., pp. 251–253, paras. 164–177.

[44] Paras. 44–53.

[45] Corresponds to draft guideline 1.1.4 in the report; it was understood that that draft guideline would be reconsidered in the light of the debate on interpretative declarations.

tion may be formulated), 1.1.3 (reservations having territorial scope),[46] 1.1.4 (reservations formulated when notifying territorial application)[47] and 1.1.7 (joint formulation of a reservation).[48] In addition, the Commission adopted the text of one "safeguard" guideline, proposed by the Special Rapporteur at the request of several members,[49] which states that "[d]efining a unilateral declaration as a reservation is without prejudice to its permissibility under the rules relating to reservations".[50] On the other hand, in full agreement with the 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.

21. Lastly, the Commission approved the commentaries on the draft articles it had adopted, which are reproduced in its report to the General Assembly.[51] The Special Rapporteur wishes, however, to draw attention to one aspect of the procedure followed which, although traditional, is less than satisfactory, namely, that although the report contains a summary of the debate on the draft texts which were not finally adopted,[52] it does not contain a summary of the debate on those which were, since the commentaries on those texts are supposed to take its place. That is a very debatable point, for the summary of discussions, on the one hand, and the commentaries, on the other, serve separate functions and meet different needs. Moreover, it is not logical that discussions on a provision which was not adopted or which was not accompanied by a commentary, owing to lack of time, should be summarized, while no summary is prepared of discussions on other draft articles or guidelines which may have been finally approved and on which the Special Rapporteur and the secretariat have had the time to prepare a commentary, which discussions may be just as interesting. This practice is unlikely to encourage special rapporteurs to hurry up and draft the commentaries on provisions adopted on first reading.

22. At the close of the fiftieth session, in 1998, the Special Rapporteur also submitted the part of his third report[53] which deals with the distinction between reservations and interpretative declarations.[54] 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.[55]

23. As to the part of the third report which deals with "reservations" and interpretative declarations on bilateral treaties,[56] it was not considered nor was it even submitted.

(b) *Consideration of the report of the Commission by the Sixth Committee*

24. During the debate on the section of the report of the Commission concerning reservations to treaties,[57] some delegations returned to topics considered in previous years. Those which did so were unanimous in restating their desire not to see the Vienna regime called into question,[58] although some believed that a specific reservations regime should apply to human rights treaties,[59] while others adamantly opposed the idea.[60]

25. Several delegations drew attention to the growing interest in the subject[61] and stressed the practical usefulness the Guide to Practice would have for States once it was completed.[62] 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 that the future Guide to Practice could take, the first guidelines of which have been submitted to the General Assembly along with commentaries, in accordance with the decisions taken in 1997.[63] It is encouraging to note that the exercise appeared convincing to those States which spoke on this point, none of which criticized the form selected.

26. More specifically, with regard to the "definition" exercise which the Commission began in 1998, and which it should complete in 1999, most delegations which spoke felt that it was useful and even very important,[64] even if

[46] Corresponds to draft guideline 1.1.8 in the report; it was understood that that draft guideline would be reconsidered together with guideline 1.1.1 (see footnote 44 above).

[47] Corresponds to draft guideline 1.1.3 in the report.

[48] Corresponds to draft guideline 1.1.1 in the report.

[49] See *Yearbook … 1998*, vol. I, inter alia, statements by Messrs Economides, 2545th and 2548 meetings, pp. 184 and 203, paras. 20 and 29 respectively; Simma, 2548th meeting, p. 202, para. 17; Hafner (ibid., p. 202, para. 15); Dugard (ibid., para. 14); Mikulka (ibid., para. 18); Crawford (ibid., para. 19); Pambou-Tchivounda (ibid., p. 203, para. 26); and the presentation of the Special Rapporteur (ibid., 2552nd meeting, p. 223, para. 1).

[50] The corresponding draft guideline proposed by the Special Rapporteur was the subject of a brief presentation in the third report (*Yearbook … 1998* (footnote 2 above), p. 284, paras. 407–413). The Commission decided that the title and placement of that guideline would be determined at a later stage (ibid. (Part Two), footnote 209).

[51] *Yearbook … 1998*, vol. II (Part Two), p. 99, para. 540.

[52] Ibid., pp. 96–98, paras. 521–539.

[53] *Yearbook … 1998* (see footnote 2 above), pp. 261–283, paras. 231–406.

[54] *Yearbook … 1998*, vol. I, 2551st meeting, pp. 217–223, and vol. II (Part Two), pp. 94–96, paras. 505–519.

[55] Ibid., vol. I, 2552nd meeting, p. 228, para. 56.

[56] *Yearbook … 1998* (see footnote 2 above), pp. 284–298, paras. 414–510.

[57] Ibid., vol. II (Part Two), pp. 90–99, paras. 469–540.

[58] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52 (United States); 16th meeting, para. 64 (France); 17th meeting, para. 5 (Sweden, on behalf of the Nordic countries); para. 20 (Pakistan); 18th meeting, para. 4 (Romania); para. 23 (Germany); para. 29 (Venezuela); para. 55 (Cuba); para. 57 (Tunisia); 19th meeting, para. 23 (Hungary); para. 27 (Singapore); 20th meeting, para. 9 (Islamic Republic of Iran); para. 36 (Portugal); 21st meeting, para. 34 (India); 22nd meeting, para. 14 (Egypt).

[59] Ibid., 17th meeting, para. 6 (Sweden, on behalf of the Nordic countries); and 18th meeting, para. 33 (Italy); see also 20th meeting, para. 50 (Ireland).

[60] Ibid., 19th meeting, paras. 27–28 (Singapore); 22nd meeting, para. 15 (Egypt); see also 20th meeting, para. 61 (Algeria) and 17th meeting, para. 45, statement by the AALCC Secretary-General.

[61] Ibid., 17th meeting, paras. 4 and 6 (Sweden, on behalf of the Nordic countries); 18th meeting, para. 23 (Germany); and 22nd meeting, para. 44 (Greece).

[62] Ibid., 14th meeting, para. 15 (United Kingdom); 17th meeting, para. 26 (Japan); 18th meeting, para. 33 (Italy) and para. 57 (Tunisia).

[63] Ibid., 16th meeting, para. 65: France disputed the use of the word "*directives*" and would have preferred the expression "*lignes directrices*"); the Special Rapporteur is not convinced that this change is warranted.

[64] Ibid., 15th meeting, para. 16 (Austria); 18th meeting, para. 33 (Italy) and para. 57 (Tunisia) ; and 22nd meeting, para. 41 (Slovakia).

some believed that the exercise should not stop there.[65] However, as some delegates and the Special Rapporteur once again have noted,[66] 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.

27. That is also why almost all delegations supported the intention of the Special Rapporteur to define interpretative declarations in relation to reservations and to conduct a parallel study of the legal regimes applying to each.[67] Moreover, some States supported the Special Rapporteur's position on the definition of interpretative declarations[68] or "reservations" to bilateral treaties,[69] although the Commission had been unable to examine these aspects of the third report at its fiftieth session in 1998.[70]

28. The draft guidelines adopted received overall approval from several delegations,[71] although others offered some criticisms, generally on points of detail, or made interesting drafting suggestions.[72]

29. Two delegations proposed amendments to guideline 1.1, replacing the word "modify" by "limit" or "restrict".[73] However, as one delegation and the Special Rapporteur noted, that would amount to amending the Vienna definition,[74] which the Commission had decided to avoid as far as possible.[75] Other speakers approved the composite method used to adopt the general definition contained in guideline 1.1.[76]

30. Four 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.[77] They agreed that it would be sufficient to return to that topic when the Commission addressed reservations from that angle, which it had planned to do in a special chapter of the Guide to Practice.[78]

31. Draft guideline 1.1.1 was approved by several delegations,[79] some nevertheless wondering about its degree of precision, which could appear to be inadequate,[80] while just one appeared to cast doubt on the possibility of "across-the-board" reservations.[81] In the opinion of the Special Rapporteur, this is supported by practice that is so generalized[82] that it would be pointless and counterproductive to question it. On the other hand, he agrees that it would perhaps be desirable to make the formulation of this guideline more precise, but that the adoption of a definition of interpretative declarations could be sufficient to clear up the uncertainties. The re-examination of draft guideline 1.1.1 in the light of the definition of interpretative declarations, which the Commission has already provided,[83] will be the time to adopt a final position in that regard.

32. The same will be true as far as draft guideline 1.1.3[84] is concerned; it should, however, be noted that it was generally approved,[85] although one delegation wondered whether it would be appropriate to extend its scope be-

[65] Ibid., 14th meeting, para. 15 (United Kingdom).

[66] He was able to take the floor in the Sixth Committee, in accordance with the very welcome practice instituted in 1997, as were all the special rapporteurs present in New York during the two weeks allocated by the Sixth Committee to the report of the Commission. See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, paras. 11–13 (Mr. Rao); 18th meeting, paras. 62–66 (Mr. Rodríguez Cedeño); 20th meeting, paras. 71–72 (Mr. Mikulka) and paras. 73–84 (Mr. Pellet); and 22nd meeting, paras. 50–54 (Mr. Crawford). The Chairmen of the Commission (ibid., para. 55) and of the Sixth Committee (ibid., para. 56) welcomed the new practice. In the view of the Special Rapporteur, it could be further improved if the special rapporteurs present in New York were to introduce the section of the report of the Commission for which they were responsible themselves, rather than the Chairman of the Commission; that would allow a genuine dialogue between the two bodies to be initiated.

[67] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 5 (Sweden on behalf of the Nordic countries); 18th meeting, para. 24 (Germany); para. 30 (Venezuela); para. 33 (Italy); para. 57 (Tunisia); 21st meeting, para. 5 (Slovenia); 22nd meeting, para. 41 (Slovakia); para. 45 (Greece); para. 47 (Bosnia and Herzegovina); para. 49 (Republic of Korea). Only the United Kingdom appeared to express doubts on this point (ibid., 14th meeting, para. 15).

[68] Ibid., 18th meeting, para. 15 (Mexico); and 22nd meeting, para. 45 (Greece)

[69] Ibid., 15th meeting, para. 98 (Argentina); and para. 30 (Venezuela).

[70] See paragraph 23 above.

[71] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting, para. 52 (United States); 15th meeting, para. 98 (Argentina); 20th meeting, para. 62 (Algeria); 21st meeting, para. 5 (Slovenia), and para. 34 (India).

[72] 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.

[73] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 66 (France); and 20th meeting, para. 66 (Switzerland).

[74] Ibid., 18th meeting, para. 16 (Mexico); and 20th meeting, paras. 74–75 (Mr. Pellet).

[75] See footnote 58 above.

[76] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, especially 16th meeting, para. 77 (Czech Republic); 18th meeting, para. 29 (Venezuela); para. 57 (Tunisia); 22nd meeting, para. 45 (Greece); and para. 47 (Bosnia and Herzegovina).

[77] Ibid., 16th meeting, paras. 81–83 (Czech Republic); 21st meeting, para. 5 (Slovenia); 20th meeting, para. 67 (Switzerland); and 22nd meeting, para. 47 (Bosnia and Herzegovina).

[78] See the second report (*Yearbook … 1996* (footnote 21 above), paras. 37–46).

[79] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 67 (France); and 18th meeting, para. 16 (Mexico).

[80] Ibid., 20th meeting, para. 66 (Switzerland); and 21st meeting, para. 17 (Bahrain).

[81] Ibid., 16th meeting, para. 77 (Czech Republic).

[82] See the third report (*Yearbook … 1998* (footnote 2 above), pp. 249–250, paras. 148–155).

[83] See footnote 45 above.

[84] See footnote 46 above.

[85] See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, inter alia, 16th meeting, para. 68 (France); 18th meeting, para. 17 (Mexico); para. 34 (Italy); 21st meeting, para. 17 (Bahrain) (Bahrain, however, expressed reservations about a point in the commentary expressly approved of by France (ibid., 16th meeting, para. 68 that will warrant consideration during the examination of the section of this report concerning the formulation of reservations); and 22nd meeting, para. 46 (Greece).

yond situations of colonialism[86] and another made some proposals for drafting changes.[87]

33. Subject to the possibility of referring to notifications of succession in cases of State succession,[88] draft guideline 1.1.2 met with unanimous approval,[89] as did guidelines 1.1.4[90] and 1.1.7, with several delegations expressly stating approval of their contribution to the progressive development of international law.[91]

34. The several delegations which commented on the unnumbered "safeguard" draft guideline also expressed approval of it.[92]

35. Many delegations responded to the question posed in paragraph 41 of the report of the Commission on the work of its fiftieth session.[93] The Committee was unanimous in its view that, as the Special Rapporteur had suggested,[94] a unilateral declaration by which a State (or an international organization) takes on obligations beyond those imposed by a treaty does not constitute a reservation;[95] however, in well-argued statements, several delegations showed that a different situation could if the reserving State intended to substitute one obligation for another.[96]

36. With regard to unilateral statements by which a State intended to increase the rights imposed on it under the treaty, the responses were more subtle, confirming the sensitivity of the problem, which the Commission had come up against at its fiftieth session in 1998.[97] The general feeling seems to be, however, that while the problem must be addressed expressly with a view to removing all ambiguity,[98] such statements do not constitute reservations within the meaning of treaty law which is therefore not applicable to them.[99] Some delegations said that, consequently, they were subject to the application of general rules concerning unilateral acts.[100] It was also noted in that regard that a distinction must be made according to the customary or exclusively conventional nature of the obligation in respect of which the reservation was made.[101]

37. These elements will be particularly valuable to the Commission during its fifty-first session in 1999, when it re-examines draft guidelines 1.1.5 and 1.1.6.

38. The same will be true for the several comments which were made on the subject of draft guideline 1.1.7 (according to the numbering used by the Special Rapporteur) on "Reservations relating to non-recognition", which the Commission will continue to examine in 1999.[102] Unfortunately, there have been just a few comments; all that can be concluded from them is that, in the view of the delegations making statements, the matter should be the subject of a guideline in the Guide to Practice.[103] Two delegations believed that the matter had more to do with State recognition under international law than with treaty law.[104]

(c) *Action by other bodies*

39. In his third report, the Special Rapporteur drew 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 had a cooperative relationship: the Council of Europe and AALCC.[105] These bodies continued their exploration of the topic in 1998–1999.

40. He had mentioned in the third report that AALCC 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, under the chairmanship of Mr. P. S. Rao.[106] During that session, a special meeting devoted to reservations to treaties, also chaired by Mr. Rao, was held on 14 April 1998. Mr. Yamada attended on behalf of the Chairman of the Commission and the Special Rapporteur for the topic of reservations to treaties.

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[86] Ibid., 18th meeting, para. 17 (Mexico); Mexico extended this observation to draft guideline 1.1.4.

[87] Ibid., 20th meeting, para. 68 (Switzerland).

[88] Ibid., 16th meeting, para. 82 (Czech Republic); and 20th meeting, para. 67 (Switzerland). See footnote 76 above.

[89] Ibid., 16th meeting, inter alia, para. 68 (France); 18th meeting, para. 16 (Mexico); para. 29 (Venezuela); and 21st meeting, para. 17 (Bahrain).

[90] Ibid., 21st meeting, para. 18 (Bahrain); and 22nd meeting, para. 46 (Greece).

[91] Ibid., 16th meeting, para. 84 (Czech Republic); 18th meeting, para. 18 (Mexico); para. 34 (Italy); 20th meeting, para. 69 (Switzerland); 21st meeting, para. 18 (Bahrain); and 22nd meeting, para. 46 (Greece).

[92] Ibid., 16th meeting, para. 70 (France); 19th meeting, para. 27 (Singapore); Bahrain, however, felt that the question of the definition could not be separated from that of the permissibility of reservations (ibid., 21st meeting, para. 19); on this point see paragraph 26 above.

[93] *Yearbook …1998*, vol. II (Part Two), p. 18. The question was posed as follows:

"The Commission would welcome comments and observations by Governments on whether unilateral statements by which a State purports to increase its commitments or its rights in the context of a treaty beyond those stipulated by the treaty itself, would or would not be considered as reservations."

[94] Ibid., vol. II (Part One) (see footnote 2 above), pp. 257–258, paras. 208–212.

[95] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 13th meeting, para. 50 (Mali); and 16th meeting, para. 69 (France).

[96] Ibid., 17th meeting, para. 18 (Israel); para. 26 (Japan); and 20th meeting, para. 41 (Guatemala).

[97] See paragraph 20 above.

[98] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 16th meeting, para. 69 (France); and 20th meeting, para. 70 (Switzerland) (Switzerland stressed the usefulness of draft guideline 1.1.5, but had more doubts about guideline 1.1.6). Only two States, Austria (ibid., 15th meeting, para. 16) and Sweden, on behalf of the Nordic countries (ibid., 17th meeting, para. 4), saw the problem as theoretical.

[99] Ibid., 16th meeting, para. 69 (France); 18th meeting, para. 18 (Mexico); para. 34 (Italy); para. 58 (Tunisia); 20th meeting, para. 10 (Islamic Republic of Iran); para. 42 (Guatemala); 21st meeting, para. 18 (Bahrain); 22nd meeting, para. 12 (Australia); and para. 42 (Slovakia).

[100] Ibid., 20th meeting, para. 42 (Guatemala); 22nd meeting, para. 12 (Australia); and para. 42 (Slovakia).

[101] Ibid., 16th meeting, para. 69 (France); and 18th meeting, para. 58 (Tunisia).

[102] See paragraphs 44–54 below.

[103] *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 17th meeting, para. 18 (Israel); and para. 26 (Japan).

[104] Ibid., 18th meeting, para. 24 (Germany); and 22nd meeting, para. 46 (Greece).

[105] *Yearbook … 1998* (see footnote 2 above), p. 233, paras. 27–30.

[106] Ibid., para. 30.

41. According to the report prepared by Mr. W. Z. Kamil,[107] who had been appointed rapporteur of this special meeting, the participants focused particular attention on the Commission's preliminary conclusions adopted in 1997.[108] Their discussions resulted in the following consensus views:

(*a*) The regime for reservations under the 1969 Vienna Convention 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 those on human rights; and, hence,

(*d*) Most of the participants opposed paragraph 5 of the preliminary conclusions.[109]

42. For its part, the Group of Specialists on Reservations to International Treaties (DI-S-RIT), whose terms of reference were approved by the Committee of Ministers of the Council of Europe,[110] continued its work and held a meeting in Paris from 14 to 16 September 1998, under the coordination of its Chairman, the representative of Austria. During that meeting, the Group engaged in a rapid 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 of Human Rights of the Council of Europe and an eminent specialist on the question of reservations to treaties. It also considered "Model-objection clauses to reservations to international treaties considered inadmissible", 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".

43. At its meeting held in Vienna on 5 March 1999, the Group, which had since become the Group of Experts on Reservations to International Treaties (DI-E-RIT), adopted a draft recommendation on reactions to inadmissible reservations to international treaties, together with an explanatory memorandum, which was transmitted to the Ad Hoc Committee of the Committee of Legal Advisers on Public International Law (CAHDI).[111] If this draft is adopted, the Comm(d) ittee of Ministers of the Council of Europe will call upon the Governments of Member States to be guided by the model response clauses to reservations, contained in the appendix to the recommendation.[112]

[107] *AALCC Bulletin*, vol. 22, issue No. 1 (New Delhi, June 1998), pp. 12–18. This same publication contains a summary of the portion of the Commission's report on reservations.

[108] See paragraph 7 above.

[109] *AALCC Bulletin* (see footnote 107 above), pp. 15–17.

[110] See *Yearbook … 1998* (footnote 2 above), p. 233, para. 28.

[111] See Council of Europe, CAHDI, document DI-E-RIT (99) 6 (Strasbourg, 16 August 1999), in particular the draft recommendation addressed to the Committee of Ministers (appendix 3, p. 12).

[112] Ibid.

(d) *Reconsideration of the draft guideline relating to "statements of non-recognition"*

44. Although the Commission decided to refer draft guideline 1.1.7 on reservations relating to non-recognition[113] to the Drafting Committee, the latter did not consider it. Taking into account the particular circumstances surrounding the referral and the fact that the Drafting Committee would have the responsibility of taking decisions in principle that would go considerably beyond its competence, the Special Rapporteur thought it would be useful to take up the question in this report, as he believed he had made a mistake in regard to it.

45. As mentioned above,[114] in his third report the Special Rapporteur had proposed a draft guideline 1.1.7 on "reservations relating to non-recognition". It read as follows:

> A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.[115]

46. In support of this proposal, the Special Rapporteur had indicated that, in his view, statements generally known as "reservations relating to non-recognition" were actually divided into two categories:[116] in some cases, States take a simple "precautionary step" by noting that their accession to a treaty to which an entity they do not recognize as a State is also a party does not amount to recognition, in accordance with a well-established practice; in other cases, States expressly exclude the application of the treaty between them and the non-recognized entity. While, in the first case, there can be no doubt that the statements in question, which actually have no effect on the application of the treaty, do not constitute reservations, the Special Rapporteur had initially believed that this was not true for the second category of unilateral statements. The premise for that conclusion had been that the Vienna definition[117] does not preclude the possibility that a reservation could have an effect *ratione personae*.

47. Differing views were expressed during the Commission's discussion of the topic at its fiftieth session in 1998.[118] Some speakers agreed with the distinction made by the Special Rapporteur.[119] Nonetheless, the overall tone of the debate was clearly leading to a conclusion that was opposite from the one he had initially reached.

[113] See *Yearbook … 1998*, vol. I, 2551st meeting, p. 220, para. 29.

[114] See paragraph 19 above.

[115] *Yearbook … 1998* (footnote 2 above), p. 253, para. 177.

[116] Ibid., pp. 250–253, paras. 154–176.

[117] *Yearbook … 1998*, vol. II (Part Two), p. 99, para. 540: draft guideline 1.1, interpreted by draft guideline 1.1.1, adopted (the latter, provisionally) by the Commission in 1998.

[118] Ibid., vol. I, 2550th and 2251st meetings, pp. 212 et seq., and the summary of the debates in the report of the Commission (ibid., vol. II (Part Two), pp. 97–98, paras. 527–532).

[119] Ibid., vol. I, 2550th meeting, p. 215, para. 34 (Mr. Yamada who also raised the question of whether a State could exclude all contractual relations with another State that it recognized and seemed to feel that the reply to that question was "yes"); 2551st meeting, p. 219, para. 20 (Mr. Simma); see also page 218, para. 12 (Mr. Hafner).

48. It was held that:

(*a*) The reservations regime, particularly the regime for objections, would be extremely difficult to apply to "reservations relating to non-recognition";[120]

(*b*) Similarly, it follows from practice that such statements are often made in reference to a treaty that categorically excludes reservations;[121]

(*c*) Such statements excluding the application of the entire treaty between the two States concerned would not be in keeping with the Vienna definition;[122]

(*d*) They do not concern the application of the treaty, but rather deny an entity the capacity to be bound by a treaty;[123] and

(*e*) They would be of a "political" nature.[124]

It was also observed that the possibility that such statements could be made at any time, as implied by the Special Rapporteur's proposed wording,[125] would give rise to serious complications and would be contrary to the general definition of reservations.[126]

49. In view of these difficulties, some speakers proposed that statements of non-recognition should not be dealt with in the Guide to Practice.[127] The Special Rapporteur believes, however, that the difficulties brought out by the debate do not necessarily imply that the Guide to Practice should be silent on the nature of such statements. He believes that precisely because the problem is difficult and important a clear solution should be adopted.[128] He is, however, receptive to the argument that the main problem here is one of non-recognition, which is tangential to the law on reservations.[129] Thus, the draft guideline that the Commission adopts on this point must be strictly confined to what is necessary within that narrow context and should not "spill over" into questions relating to the recognition of States in general and the effects of non-recognition.

50. What is most important in this regard is that the Commission should determine whether or not statements of non-recognition constitute reservations (or interpretative declarations). From this standpoint, it is not very useful to specify that we are dealing with *sui generis* acts:[130] apart from the fact that taking refuge in the concept of *sui generis* is always a solution of last resort and an admission of helplessness, this amounts to saying that we are not dealing with reservations, which is sufficient for the purposes of this draft. It would be different if, as was suggested,[131] the question were one of interpretative declarations; this description, however, does not appear to be very convincing: such declarations are aimed at specifying or clarifying the meaning attributed by the declarant *to the treaty* or to certain of its provisions[132] and this is not the case with statements of non-recognition, which have an effect on the application of a treaty but in no way interpret it.

51. The Special Rapporteur is not entirely convinced by some of the arguments against describing as statements of non-recognition reservations aimed at excluding the application of the treaty as between their author and the non-recognized entity. Thus, he does not believe that the inevitably political grounds for making such statements constitute a factor that could be used to distinguish them from reservations: the latter, too, are often politically motivated but they are reservations nonetheless. Similarly, it follows from draft guideline 1.1.1, provisionally adopted by the Commission during its fiftieth session,[133] that there can be "across-the-board" reservations which concern the application of the treaty as a whole; he finds this assertion hard to challenge, as that would risk calling into question an extremely widespread practice which, in itself, has never been disputed.[134] The Special Rapporteur is also well aware that, through an objection, accompanied by a clearly worded refusal to be bound by the treaty with respect to the reserving State, an objecting State can prevent the entry into force of the treaty as between itself and the reserving State, in accordance with the provisions of article 20, paragraph 4 (*b*), of the 1969 Vienna Convention;[135] there seems to be no prima facie reason why this could not be accomplished through a reservation as well.

52. However, the other arguments made in 1998, during the fiftieth session of the Commission regarding the use of the word "reservations" to refer to such statements, are extremely convincing.[136] One such argument involves the difficulty, and indeed the impossibility, of applying

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[120] Ibid., 2550th meeting, pp. 213–214, para. 16 (Mr. Bennouna); p. 214, paras. 21–22 (Mr. Galicki); p. 215, paras. 32–33 (Mr. Simma); and p. 216, paras. 40–41 (Mr. Mikulka).

[121] Ibid., p. 216, paras. 40–41 (Mr. Mikulka); and para. 42 (Mr. Rodríguez Cedeño).

[122] Ibid., pp. 213–214, para. 16 (Mr. Bennouna); p. 214, paras. 21–22 (Mr. Galicki); p. 215, paras. 29–31 (Mr. Economides); p. 216, para. 39 (Mr. Addo); and paras. 40–41 (Mr. Mikulka).

[123] Ibid., p. 214, para. 17 (Mr. Brownlie); p. 215, paras. 29–31, and 2551st meeting, p. 218, para. 10 (Mr. Economides); and p. 219, para. 17 (Mr. He).

[124] Ibid., 2550th meeting, p. 214, para. 20 (Mr. Hafner) ; p. 215, paras. 27–28 (Mr. Pambou-Tchivounda); p. 216, para. 43 (Mr. He); and 2551st meeting, p. 217, para. 2 (Mr. Illueca).

[125] See paragraph 45 above.

[126] *Yearbook … 1998*, vol. I, 2550th meeting, p. 214, para. 18 (Mr. Lukashuk); paras. 21–22 (Mr. Galicki); p. 215, paras. 27–28 (Mr. Pambou-Tchivounda); paras. 29–30 (Mr. Economides); and 2551st meeting, p. 217, para. 1 (Mr. Rosenstock).

[127] Ibid., 2550th meeting, p. 215, para. 36 (Mr. Crawford); and p. 216, para. 38 (Mr. Elaraby).

[128] This view is held by Mr. Dugard (ibid., p. 214, paras. 24–26); Mr. Lukashuk (ibid., 2551st meeting, p. 217, para. 3); Mr. Economides (ibid., p. 218, para. 10); Mr. He (ibid., p. 219, para. 17); Mr. Mikulka (ibid., para. 19); and Mr. Goco (ibid., p. 220, para. 27).

[129] *Yearbook … 1998*, vol. I, 2550th meeting, p. 214, para. 17 (Mr. Brownlie); see also 2551st meeting, pp. 218–219, para. 15.

[130] Ibid., 2550th meeting, p. 214, paras. 24–26 (Mr. Dugard); p. 216, paras. 44–45 (Mr. Al-Baharna); see also the statement by Mr. Economides, which contemplates referring to statements of non-recognition as "acts that can be classified as reservations" (p. 215, paras. 29–31); and Mr. Goco, (p. 216, para. 37).

[131] Ibid., pp. 213–214, para. 16 (Mr. Bennouna).

[132] In this connection, see the statement by Mr. Rosenstock (ibid., 2551st meeting, p. 234, para. 25). See also draft guideline 1.2 in the third report (*Yearbook … 1998* (footnote 2 above), p. 277, para. 354).

[133] See paragraph 20 above.

[134] See the third report (*Yearbook … 1998* (footnote 2 above), pp. 249–250, paras. 148–158) and the commentary to draft guideline 1.1.1 (*Yearbook … 1998*, vol. II (Part Two), p. 99, para. 540).

[135] See the statements by Mr. Yamada and Mr. Hafner, mentioned in footnote 118 above.

[136] Although they were not pursued in the Sixth Committee's discussions (see paragraph 38 above).

the reservation regime in such cases and the sensitive problems which would result from potential objections to them. Similarly, it would be unreasonable to conclude that such statements are prohibited under articles 19 (*a*) and (*b*) of the 1969 and 1986 Vienna Conventions if the treaty in question prohibits, or permits only certain types of, reservations.[137] Moreover, from a more theoretical point of view, such statements, unlike reservations, do not concern the treaty itself or its provisions but rather, as several Commission members have emphasized, the capacity of the non-recognized entity to be bound by the treaty.[138]

53. Thus, the only reasonable solution appears to be to take a position contrary to that proposed in the third report and to specify in the Guide to Practice that statements of non-recognition, whether "precautionary declarations" or those intended to prevent application of the treaty between their author and the non-recognized entity, do not constitute either reservations or interpretative declarations.[139] Such a guideline, provisionally numbered,[140] might state:

"1.1.7 *bis.* Statements of non-recognition

"A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize as a State does not constitute either a reservation or an interpretative declaration, even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity."

54. The Special Rapporteur realizes that this proposition, expressed in the negative, may be somewhat "frustrating"; however, as has been noted,[141] this is not an isolated case[142] and that conclusion, reached by the great majority of the members of the Commission, corresponds to the function of the section of the Guide to Practice devoted to definitions: it makes it possible to determine whether a unilateral statement, "however phrased or named", constitutes a reservation, subject to application of the rules applicable to reservations. This is not the case with "reservations relating to non-recognition".

[137] Furthermore, it must be acknowledged that recognizing them as reservations is incompatible with the literal definition provided by the Vienna Conventions since the cases in which such declarations may be made cannot be limited to those covered by article 2, paragraph 1 (*d*) of the 1969 Vienna Convention. In the Special Rapporteur's view, however, this argument is not conclusive since, as shown by draft guideline 1.1.2, adopted by the Committee, and by the discussion of reservations made at the time of State succession (see, inter alia, *Yearbook …1998*, vol. II (Part Two), pp. 62–63, para. 224; see also footnote 77 above), the list of cases where a reservation may be made that appears in article 2, paragraph 1 (*d*), of the Vienna Convention is not exhaustive.

[138] See footnote 123 above.

[139] In addition to the numerous statements mentioned above, see that of Mr. Economides (*Yearbook … 1998*, vol. I, 2551st meeting, pp. 217–218, para. 10); see also the Special Rapporteur's statements (ibid., pp. 217–219, paras. 5, 9 and 16–21).

[140] Since it specifies that the statements in question are neither reservations nor interpretative declarations, it would probably be logical to insert this text after the draft guidelines on interpretative declarations.

[141] By Mr. Galicki (*Yearbook … 1998*, vol. I, 2551st meeting, p. 219, para. 24).

[142] See, for example, draft guidelines 1.1.5 and 1.1.9 (*Yearbook … 1998* (footnote 2 above), p. 299, para. 512).

B. General presentation of the fourth report

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

(*b*)[143] 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 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.[144]

56. 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.[145] The Special Rapporteur views the conclusions as general guidelines to be used as a basis for consideration of the topic.

57. This report has been prepared according to the general method described in the third report on reservations to treaties.[146] This method is

(*a*) Empirical (the Special Rapporteur is unable to analyse the extensive documentation on the subject[147] as systematically as he might wish);

(*b*) "Viennese" (these arguments are consistently based on the three Vienna Conventions of 1969, 1978 and 1986, whose text, preparatory work, lacunae and implementation are described as systematically as possible); and

(*c*) "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.

58. The third report, devoted to the definition of reservations, covered the majority of part two of the provisional plan of the study set forth in chapter I of the second report.[148] 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.

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

[144] *Yearbook …1995*, vol. II (Part Two), p. 108, para. 487.

[145] *Yearbook … 1997*, vol. II (Part Two), pp. 52–53, paras. 116–123.

[146] *Yearbook … 1998* (see footnote 2 above), pp. 233–235, paras. 31–41.

[147] Despite the valuable assistance of the secretariat; the Special Rapporteur takes this opportunity to convey his deep appreciation.

[148] *Yearbook … 1996* (see footnote 21 above), para. 37.

59. In the second case, the omission was deliberate. As the Special Rapporteur indicated in his third report,[149] 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"[150] and where it must be determined to what extent they correspond to the legal regime applicable to reservations and to what extent 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.[151] This proposal met with the approval of both the members of the Commission who spoke on the matter[152] and the Sixth Committee.[153] Thus, that approach will be followed in this and any subsequent report.

60. 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 I of the report.[154]

61. In accordance with the above-mentioned provisional general outline,[155] 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.

62. 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.

63. This report will thus be organized as follows:

(*a*) Chapter I: Alternatives to reservations;

(*b*) Chapter II: Formulation and withdrawal of reservations and interpretative declarations;

(*c*) Chapter III: Formulation of acceptance of reservations;

(*d*) Chapter IV: Formulation and withdrawal of objections to reservations and interpretative declarations;

(*e*) [Chapter V: Effects of reservations, acceptances and objections—overview].

[149] *Yearbook … 1998* (see footnote 2 above), p. 235, para. 45.

[150] See the discussion of this issue in the third report (ibid., pp. 271–275, paras. 306–327 and 337–339, and pp. 280–281, paras. 381–391); see also the views expressed by Mr. Kateka (*Yearbook … 1998*, vol. I, 2552nd meeting, p. 225, paras. 24–27), Mr. Illueca (ibid., pp. 226–227, paras. 39–43) and Mr. Addo (ibid., p. 227, para. 44).

[151] *Yearbook … 1998* (see footnote 2 above), p. 235, para. 46.

[152] *Yearbook … 1998*, vol. I, 2552nd meeting. See the statements made by Mr. Brownlie (p. 225, para. 32), Mr. Simma (p. 226, para. 37), Mr. Al-Baharna (p. 227, para. 45), Mr. Herdocia Sacasa (para. 46), Mr. Economides (para. 47), Mr. Bennouna (para. 48) and Mr. Galicki (para. 49). See also *Yearbook … 1998*, vol. II (Part Two), p. 98, paras. 533–539.

[153] See paragraph 27 above.

[154] To be reproduced in *Yearbook … 2000*, vol. II (Part One).

[155] See paragraph 58 above.