

Document:-  
**A/CN.4/SR.2597**

**Summary record of the 2597th meeting**

Topic:  
**Law and practice relating to reservations to treaties**

Extract from the Yearbook of the International Law Commission:-  
**1999, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

## 2597th MEETING

Tuesday, 6 July 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

### Reservations to treaties<sup>1</sup> (*continued*)\* (A/CN.4/491 and Add.1-6,<sup>2</sup> A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,<sup>3</sup> A/CN.4/L.575)

[Agenda item 5]

#### DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines proposed by the Drafting Committee (A/CN.4/L.575), the titles and texts of which read:

##### 1.1.1 [1.1.4]\*\* *Object of reservations*

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

##### 1.1.5 [1.1.6] *Statements purporting to limit the obligations of their author*

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

##### 1.1.6 *Statements purporting to discharge an obligation by equivalent means*

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a

manner different from but equivalent to that imposed by the treaty constitutes a reservation.

##### 1.2 *Definition of interpretative declarations*

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

##### 1.2.1 [1.2.4] *Conditional interpretative declarations*

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subordinates its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

##### 1.2.2 [1.2.1] *Interpretative declarations formulated jointly*

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

##### 1.3 [1.3.1] *Distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to ascertain the purpose of its author by interpreting the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

##### 1.3.1 [1.2.2] *Phrasing and name*

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce. The phrasing or name given to the statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral declarations in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

##### 1.3.2 [1.2.3] *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it is established that it purports to exclude or modify the legal effect of certain provisions of the treaty or of specific aspects of the treaty as a whole, in their application to its author.

##### 1.4 *Unilateral statements other than reservations and interpretative declarations*

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

##### 1.4.1 [1.1.5] *Statements purporting to undertake unilateral commitments*

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to

\* Resumed from the 2586th meeting.

\*\* The numbers in square brackets correspond to the original numbers proposed by the Special Rapporteur in his third report (see footnote 2 below).

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

<sup>2</sup> See *Yearbook ... 1998*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1999*, vol. II (Part One).

undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

1.4.2 [1.1.6] *Unilateral statements purporting to add further elements to a treaty*

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] *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 constitutes a statement of non-recognition and is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] *General statements of policy*

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy and is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect the rights and obligations of the other contracting parties, constitutes a merely informative statement and is outside the scope of the present Guide to Practice.

1.5 *Unilateral statements in respect of bilateral treaties*

1.5.1 [1.1.9] *“Reservations” to bilateral treaties*

A unilateral statement formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice, however phrased or named.

1.5.2 [1.2.7] *Interpretative declarations in respect of bilateral treaties*

Guidelines 1.2 and 1.2.1 [1.2.4] are applicable to bilateral treaties.

1.5.3 [1.2.8] *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 *Scope of definitions*

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

2. Mr. CANDIOTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had held eight meetings from 3 to 22 June 1999. He wished to thank the Special Rapporteur for his guidance, cooperation and efficiency in assisting the Committee, its members for their constructive attitude and the Secretariat for its valuable assistance.

3. At the fiftieth session of the Commission, the Drafting Committee had considered and completed work on nine draft guidelines dealing primarily with the definition of reservations. The Commission had adopted seven of those guidelines<sup>4</sup> and had referred two back to the Drafting Committee for reconsideration. At the current session, the Commission had referred 10 draft guidelines to the Drafting Committee. He was pleased to report that the Drafting Committee had completed work on all of the draft guidelines referred to it so far.

4. To present the draft guidelines in a more coherent manner, the Drafting Committee had restructured chapter I, on definitions, of the Guide to Practice, breaking it down into six sections: section 1.1 (Definition of reservations), section 1.2 (Definition of interpretative declarations), section 1.3 (Distinction between reservations and interpretative declarations), section 1.4 (Unilateral statements other than reservations and interpretative declarations), section 1.5 (Unilateral statements in respect of bilateral treaties) and section 1.6 (Scope of definitions).

5. Concerning section 1.1, he pointed out that the Commission had decided to review draft guidelines 1.1.1 [1.1.4] (Object of reservations), and 1.1.3 [1.1.8] (Reservations having territorial scope), in the light of the discussion on interpretative declarations. Upon reconsidering the two draft guidelines, the Drafting Committee had decided that no changes were necessary for draft guideline 1.1.3 [1.1.8], but had proposed a new formulation for draft guideline 1.1.1 [1.1.4]. The Drafting Committee had noted that that draft guideline, which concerned the so-called transverse or across-the-board reservations, was useful, especially in view of the very frequent recourse to such reservations, that the field was not really covered by the 1969 Vienna Convention and that the Commission had already done very useful work in identifying and defining it. Three issues had been raised.

6. First, the text was very close to the definition of interpretative declarations, the expression “the way in which a State ... intends to apply the treaty” was a potential source of confusion and the element of intention was lacking from the general definition of reservations in section 1.1. Secondly, the use of the phrase “the treaty as a whole” did not exactly correspond to the situation that draft guideline 1.1.1 [1.1.4] purported to cover, namely transverse or across-the-board reservations, which excluded the application of the entire treaty but only in respect of certain categories of persons, objects, situations, specific circumstances, etc. Thirdly, there was still some uneasiness about the use of the word “may”, even though paragraph (11) of the commentary to the draft guideline adopted at the fiftieth session<sup>5</sup> made it clear that the word

<sup>4</sup> See *Yearbook ... 1998*, vol. II (Part Two), pp. 91 and 99, paras. 480 and 540, respectively.

<sup>5</sup> *Ibid.*, p. 102.

should not be interpreted in the permissive sense, i.e. implying that States and international organizations “have the right to”.

7. The Drafting Committee had slightly modified the wording of draft guideline 1.1.1 [1.1.4] in view of those considerations. The first part of the new version (“A reservation ... or of”) followed closely a phrase already included in the definition of reservations in section 1.1. The next part, the phrase, “specific aspects of the treaty as a whole”, rendered more accurately the case of across-the-board reservations, encompassing the phenomenon of exclusion of the application of the treaty as a whole only with regard to certain persons, objects, circumstances, etc. The final phrase “in their application ... formulates the reservation”, followed very closely a corresponding phrase in the definition of reservations. The title of the draft guideline remained unchanged. The commentary adopted at the fiftieth session, particularly paragraphs (11) and (12), should be modified to correspond to the new version.

8. The Drafting Committee had included two new draft guidelines in section 1.1: draft guidelines 1.1.5 [1.1.6] (Statements purporting to limit the obligations of their author) and 1.1.6 (Statements purporting to discharge an obligation by equivalent means). Draft guideline 1.1.5 [1.1.6] was one of those left over from the fiftieth session. It had been discussed at length by both the Commission and the Drafting Committee at that session. The text set out an obvious principle: a statement that purported to limit the obligations imposed on its author by a treaty constituted a reservation. The Drafting Committee had found that the draft guideline was undoubtedly useful because it included the words “to limit”. The Vienna definition of reservations used only the terms “to exclude or to modify”, although in practice they had been construed to have a limitative meaning, in the sense that they always aimed at something less than the treaty. A phrase in the original version referring to the rights of other parties to the treaty had been deleted as it might introduce some confusion. The temporal element incorporated in the original version had been retained, because it was necessary in the case of such statements. Reference had been made during the Drafting Committee’s discussions to so-called “late reservations”, namely reservations made after a State or international organization expressed consent to be bound by a treaty. Since the temporal element was already included in the Vienna definition of reservations, the Drafting Committee had thought it should be maintained in all definitions of reservations, on the understanding that the next chapter in the Guide to Practice, dealing with the formulation of reservations and interpretative declarations, would address the issue of late reservations in detail. It would be useful to include that understanding in the commentary to draft guideline 1.1.5 [1.1.6] in the interests of clarification. The title of the draft guideline remained practically unchanged, although in English the word “purporting” had been preferred to “designed”, for the sake of consistency with other draft guidelines and conformity with the Vienna definition.

9. Draft guideline 1.1.6 was a new text but also originated in draft guideline 1.1.6 proposed by the Special Rapporteur in his third report (A/CN.4/491 and Add.1-6). The Commission’s attention had been drawn at the fiftieth

session to the very specific practice of Japan<sup>6</sup> when making a reservation to the Food Aid Convention, 1971,<sup>7</sup> by which Japan reserved its right to discharge its obligations under the Convention by providing rice instead of wheat or other cereals as required by the Convention. It was not a “substitution” of an obligation, since the obligation under the treaty remained the same, but the State purported to discharge that obligation by equivalent means. By its very nature, such a statement purported to modify the legal effect of certain provisions of the treaty in their application to the statement’s author. Even if it could not take effect without the acceptance of the other parties, especially those directly affected by the discharge of the obligation, such too was the case with other reservations. The temporal element was also essential: it was when such statements were formulated at the time of consent to be bound by a treaty that they undoubtedly pertained to reservations. If they were made subsequent to the consent to be bound, they could at best constitute proposals for subsequent agreements, if not violations of the treaty.

10. The reference to discharging an obligation under a treaty “in a manner different from but equivalent to that imposed by the treaty” established the conditions specific to the draft guideline. If there was a diminishing of the obligation, then draft guideline 1.1.5 [1.1.6] applied. If, on the other hand, the obligation was increased, then the relevant draft guideline was 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments). The party formulating such reservations determined whether the alternative way of discharging the obligation was “equivalent” to the one imposed by a treaty. Should the other parties not hold the same view, they could always object to such a reservation.

11. Section 1.2 was headed by draft guideline 1.2 (Definition of interpretative declarations). While the text had been generally supported during the discussion in the Commission at its fiftieth session, a number of issues had been raised. The Drafting Committee had shared the general view that issues relating to the validity of interpretative declarations lay outside the definition of such declarations and were thus unrelated to chapter I.

12. Two general points had been raised in the Drafting Committee with respect to draft guideline 1.2 and others. First, concerning the character of declarations, the Drafting Committee had considered that interpretative declarations were subjective. They expressed the views of the declaring State or international organization about the treaty. The definition did not deal with the legal effect of the interpretative declaration: that was a point that would be explained in the commentary. The Drafting Committee had also noted that interpretative declarations were different from interpretations that States might make from time to time about specific treaties to which they were parties. The difference was the formality by which interpretative declarations, as opposed to other interpretations, were made. The Drafting Committee believed that that should be explained in the commentary to the draft guideline. The second issue was that for reasons of consistency throughout the draft guidelines, the French word *déclaration* had been translated in English as “statement”, the

<sup>6</sup> Ibid., p. 96, para. 523.

<sup>7</sup> United Nations, *Treaty Series*, vol. 800, No. 11400, p. 197.

word “declaration” being retained in English only when used as a term of art.

13. Five issues had been considered by the Drafting Committee with respect to the definition of interpretative declarations: (a) whether it should be couched not only in positive terms, saying what it included, but also in negative terms, indicating what it did not include; (b) whether it should use the word “interpret”; (c) whether an interpretative declaration could be addressed only to certain provisions of a treaty or also to the whole of a treaty; (d) whether an interpretative declaration could also be addressed to the way in which the treaty would be implemented; and (e) whether there was a time limit to making interpretative declarations.

14. On the issue of whether the definition should indicate what was not included in an interpretative declaration, the Drafting Committee believed that a parallel should be drawn with draft guideline 1.1 (Definition of reservations), which was couched in positive terms. On the second issue, the Drafting Committee thought that if the intention was to speak in definitional terms in a single guideline about various types of declarations, such as interpretative, conditional and simple declarations, it would have been useful to include the word “interpret”. Now that the text was limited to the definition of interpretative declarations, however, the word would only make the definition tautological and possibly confusing.

15. On the third issue, the Drafting Committee considered that there was nothing in the nature of interpretative declarations to prevent them from applying to the whole of the treaty and, therefore, no reason for ruling out that possibility. One example was a declaration to the effect that an entire treaty was not self-executing, which involved interpretation of the treaty as a whole to see whether it was self-sufficient, clear, etc.

16. The Drafting Committee thought that the fourth issue of whether interpretative declarations could also deal with the implementation of a treaty was covered by other draft guidelines. Although sometimes a State made a statement indicating the manner in which it intended to implement the treaty, such a statement did not interpret the treaty. It explained the attitude of the State to the application of the treaty.

17. As to the fifth issue, of the temporal element in making interpretative declarations, the Drafting Committee was of the view that, as a rule, interpretative declarations were not subject to any time limit, which would unduly restrict the rights of States. The formulation of an interpretative declaration, as distinguished from that of a reservation, should not be limited in time because it did not have the effect of a reservation. If a time limit was placed on making interpretative declarations, that might suggest that such declarations had the kind of effect that a reservation had. However, since the guidelines were not intended to encourage States to make interpretative declarations at any time, the commentary would explain that good practice would suggest that interpretative declarations be made at certain times. It would further address the question of good faith and the effect of late declarations. It could explain that when necessary, the treaty itself should indicate the time within which a party to the treaty

could make a declaration and also explain the broader goal of encouraging States to become parties to treaties.

18. Having considered those five issues, the Drafting Committee had found the text of draft guideline 1.2 proposed by the Special Rapporteur in his third report to be well drafted and had made no changes, although two editing corrections had been made to the English text. The phrase “a unilateral declaration” had been replaced by “a unilateral statement” to correspond to section 1.1. The words “specify or”, which had been omitted from the English version of the original proposal in French, had been inserted before the word “clarify”. The title of the draft guideline remained as proposed by the Special Rapporteur.

19. The Commission and the Drafting Committee had discussed whether, with respect to interpretative declarations, a draft guideline corresponding to draft guideline 1.1.1 [1.1.4] was necessary. The Drafting Committee had thought a comparable guideline unnecessary, since no definition of interpretative declarations was included in the 1969 Vienna Convention and the new definition adopted by the Drafting Committee was all-inclusive.

20. Draft guideline 1.2.1 [1.2.4] (Conditional interpretative declarations), provisionally adopted by the Drafting Committee, followed very closely the draft guideline proposed by the Special Rapporteur in his third report. In the debate in the Commission, the utility of the guideline had not been contested. A drafting suggestion had been made by Mr. He (2582nd meeting) to the effect that the list of methods of consent to be bound should be replaced by a more general expression, such as “when that State or that organization expresses its consent to be bound”. The Drafting Committee had decided to maintain the enumeration as originally proposed, even at the expense of elegance, because it had proved the clearest method, bearing in mind especially that such statements might be formulated at the time of signature and reconfirmed at the moment of expression of consent to be bound.

21. The Drafting Committee had discussed at length the words originally in square brackets at the end of draft guideline 1.2.1 [1.2.4], namely “which has legal consequences distinct from those deriving from simple interpretative declarations”. One view had been that they should be deleted, since legal consequences had been addressed nowhere else in the Guide to Practice and it would be inconsistent to do so in that particular draft guideline. Instead, such a phrase had its place in the commentary or in a footnote, where it could be clearly specified that the legal effects of conditional interpretative declarations were different from the effects of simple interpretative declarations. Another view had underlined the utility of indicating in the draft guideline itself that it was a special category, in the sense that conditional interpretative declarations could be regarded as being closer to reservations than to simple interpretative declarations. In any event, it seemed to belong to a third category of unilateral statements concerning treaties that were neither reservations nor (simple) interpretative declarations. The Drafting Committee had been unanimous on that point. In addition, the pedagogical and “utilitarian” character of the Guide to Practice argued for a less rigorous, more flexible conception. It had finally been decided to delete the words

between brackets for the sake of uniformity and pure logic, on the understanding that the question of the legal consequences of conditional interpretative declarations would be addressed at the appropriate time and that a guideline on that issue would have its place in the Guide to Practice.

22. The Drafting Committee had aligned the text of draft guideline 1.2.2 [1.2.1] (Interpretative declarations formulated jointly), on that of the corresponding draft guideline, 1.1.7 [1.1.1] (Reservations formulated jointly) simply replacing the word “reservation” by the words “interpretative declaration”. As in the case of reservations, the draft guideline confirmed that the joint formulation of interpretative declarations did not affect the unilateral character of an interpretative declaration. It reflected a well-established practice, which might be further extended in view of increasing economic and political integration among States. The draft guideline should not prejudice the fact that interpretative declarations could be made orally, unlike reservations, which were always in writing. The similarities in the drafting of the two guidelines did not mean that the joint formulation of reservations and that of interpretative declarations were governed by the same legal regime.

23. The Drafting Committee had also discussed the possibility of all parties to a treaty formulating an interpretative declaration. The question had been raised in the Commission as to whether the unilateral character of the interpretative declaration was altered and it became a “collective” act, pertaining more to a consensus or even some form of subsequent agreement. It was the Drafting Committee’s view that the unilateral character of the act concerned its origin and not its legal effects. That view was compatible with article 31, paragraphs 2 (a) and 3 (a), of the 1969 Vienna Convention. The reference in the draft guideline to “several” States or international organizations excluded the possibility of concluding that “all” States or international organizations concerned were involved in such an interpretative declaration, a situation in which certain legal consequences could arise, possibly affecting the unilateral character of the interpretative declaration. It would be worth explaining that in the commentary in order to remove any ambiguity. The title of the draft guideline had been revised to parallel that of draft guideline 1.1.7 [1.1.1].

24. Section 1.3 was headed by draft guideline 1.3 [1.3.1] (Distinction between reservations and interpretative declarations). The new title was more in keeping with the substance. In its consideration of the draft guideline, the Drafting Committee had taken note of the judgment of ICJ in the *Fisheries Jurisdiction* case, in which the Court had set out principles for interpretation of declarations or reservations. The original text of the draft guideline had referred to articles 31 and 32 of the 1969 Vienna Convention as setting out a general rule of interpretation of treaties and supplementary means of interpretation, respectively. Taking account of comments made in the Commission, the Drafting Committee had felt that the reference to another legal instrument was not desirable, although to some extent excusable in a guide to practice. It had also found the use of terms like *mutatis mutandis* inelegant. Although the rules of interpretation embodied in the Convention could be used *mutatis mutandis* for dis-

tinguishing reservations from interpretative declarations, rules primarily designed for treaties could not be directly transposed to unilateral statements. The intention of the author of the unilateral statement was of paramount importance.

25. In order to ascertain that intention, the draft guideline introduced an “objective” criterion, namely the interpretation of the unilateral statement in good faith and in accordance with the ordinary meaning to be given to its terms in the light of the treaty to which it referred. Only in that context was the application by analogy of the rules of interpretation of treaties in the 1969 Vienna Convention useful. It was understood that for the interpretation of the particular treaty in respect of which the unilateral statement was made, articles 31 and 32 of the Convention were applicable. As a supplementary means of interpretation, there was a more “subjective” temporal criterion, namely the intention of the State or the international organization concerned at the time the statement was formulated.

26. The current wording of the first sentence of draft guideline 1.3 [1.3.1] in a sense paraphrased article 31, paragraph 1, of the 1969 Vienna Convention, which stipulated that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The Drafting Committee had retained in the draft guideline those elements relevant to unilateral statements, i.e. the purpose of their author, good faith, which was essential in international law, and the ordinary meaning to be attached to the terms of such unilateral statements. The context was the treaty itself. The second sentence referred to the intention of the author of the unilateral statement. The Drafting Committee was of the view that, for purely practical reasons, no further reference should be made in the draft guideline to any *travaux préparatoires* or documents relating to the unilateral statement. With few exceptions, it was difficult for third parties to have access to the internal papers of States relating to and preceding the formulation of a unilateral statement.

27. As for draft guideline 1.3.1 [1.2.2] (Phrasing and name), the first sentence was a positively worded version of the first sentence as originally proposed by the Special Rapporteur. The Drafting Committee had thought that such drafting offered a useful clarification, because it focused on an important element in the definition of interpretative declarations—and reservations—namely the repudiation of “nominalism”. Consequently, the wording or naming of a unilateral declaration had only indicative value as far as its legal qualification was concerned. It had thus been essential for the first sentence to maintain that element, which in fact corresponded to the phrase “however phrased or named” in the definition of reservations (in draft guideline 1.1). In the same spirit, the word “seeks” had been replaced by “purports”, which had been used in the draft guidelines already adopted.

28. The second sentence was also useful in that it underlined that the phrasing or naming merely constituted an indication, not a presumption or evidence. Attempts to merge the two sentences, as had also been suggested by Mr. Pambou-Tchivounda (2581st meeting), had been abandoned for the sake of clarity and precision. More-

over, the word “however” in the original proposed by the Special Rapporteur had been deleted, since it had implied a contrast with regard to the first sentence, which might be misleading or confusing.

29. The Drafting Committee had debated at length whether to retain the third sentence or delete it and include it in the commentary. It had been felt that it constituted more a demonstration or illustration of the principle enunciated and that it could therefore be deleted. However, it had been ultimately decided that, in view of the didactic and “functional” role of the Guide to Practice, it would be more appropriate to keep it. For the sake of consistency and uniformity, the Drafting Committee had preferred to use the terms “phrasing and name”, which were those employed in the Vienna definition, and it had noted that that fact would be duly reflected in the commentary.

30. Draft guideline 1.3.2 [1.2.3] (Formulation of a unilateral statement when a reservation is prohibited) also addressed the relationship between interpretative declarations and reservations. The Drafting Committee had reformulated it to take account of the comments made in the Commission, where concerns had been expressed about the draft guideline’s basic objective and the language employed.

31. Like others in chapter I, draft guideline 1.3.2 [1.2.3] dealt with the question of definitions. It did not touch upon the legal effects of declarations. Its purpose was to consider situations in which a treaty prohibited reservations and a unilateral statement was made by a State with respect to the treaty. The issue was what that unilateral statement should be called in accordance with definitions provided in the Guide to Practice. The Drafting Committee shared the view of most members of the Commission that such a unilateral statement by a State should be “presumed” not to be a “reservation”. That presumption, which was based on the principle of good faith, was refutable. The rebuttal was based on the purpose of the unilateral statement. If the statement purported to exclude or modify the legal effects of certain provisions of the treaty or the treaty as a whole in their application to its author, it then fulfilled the definition of a reservation. The words “except when it is established” created the possibility of a rebuttal of the presumption. There again, the text of the draft guidelines was limited to providing definitions. Nevertheless, the commentary would explain that, in circumstances in which a treaty prohibited reservations, such a unilateral statement, when it was established that it had the intended effect of a reservation, became an impermissible reservation.

32. Draft guideline 1.3.2 [1.2.3] had been redrafted to form a single sentence, for the Drafting Committee found the new construction more economical and elegant. The draft guideline spoke of the legal effect of “certain provisions of the treaty or of specific aspects of the treaty as a whole”. The same language was used in draft guideline 1.1.1 [1.1.4]. The title had been changed slightly by replacing the words “an interpretative declaration” by the words “a unilateral statement”.

33. Section 1.4 was entitled “Unilateral statements other than reservations and interpretative declarations”.

During the plenary discussion on draft guidelines 1.2.5 (General declarations of policy) and 1.2.6 (Informative declarations) as proposed by the Special Rapporteur in his third report, suggestions had been made to collect in a separate section all the various unilateral statements that were neither reservations nor unilateral declarations and fell outside the scope of the Guide to Practice. The Drafting Committee had at first contemplated the idea of drafting only one guideline, which would include all cases of unilateral statements falling outside the scope of the Guide to Practice, but such a single guideline would have become very long and complicated and would not have been “user-friendly”. The Drafting Committee had therefore opted for a separate section comprising six guidelines.

34. Section 1.4 expressed the idea that the Guide to Practice would not cover every possible unilateral statement formulated with regard to treaties, but only reservations and interpretative declarations, which were within the mandate of the Commission. The purpose of the draft guidelines was to elucidate, because many other statements formulated with regard to treaties were often confused with interpretative declarations or reservations. The draft guidelines that followed were examples of such statements, which belonged to the general category of unilateral acts of States but remained outside the framework of the topic. The commentary should include the idea that the types of statements mentioned by the draft guidelines in section 1.4 were only illustrative and that the classification was not exhaustive. The draft guidelines in section 1.4 had no precise temporal element, because although such statements were most often made on the occasion of the expression of consent to be bound by a treaty—hence the risk of being confused with reservations or interpretative declarations—nothing precluded the possibility that they might also be made at any other time.

35. In all the draft guidelines in section 1.4, the last phrase read “which is outside the scope of the present Guide to Practice”.

36. Draft guideline 1.4.1 [1.1.5] (Statements purporting to undertake unilateral commitments) had been referred to the Drafting Committee at the fiftieth session. It dealt with statements usually made on the occasion of the expression of consent to be bound by a treaty whereby a State or an international organization purported to “increase” its obligations by undertaking additional commitments which went beyond those imposed by the treaty. The expression “in relation to a treaty” had been added to make it clear that such unilateral statements should be made in connection with a treaty. The term “unilateral commitment” had been felt to give an accurate description without prejudicing the exact legal nature of such statements, which, while usually made on the occasion of the expression of consent to be bound by a treaty, could also be made at other times. The draft guideline defined such statements instead of merely saying that they were not reservations nor interpretative declarations.

37. Draft guideline 1.4.2 [1.1.6] (Unilateral statements purporting to add further elements to a treaty), corresponded to the last phrase of draft guideline 1.1.6 origi-

nally proposed by the Special Rapporteur, which read “unless it adds a new provision to the treaty”.

38. Bearing in mind the discussions at the fiftieth session, and to avoid confusion, the Drafting Committee had reformulated the idea contained in the last phrase of draft guideline 1.1.6 as a separate guideline to cover cases in which a State or international organization added a “new provision” to a treaty when expressing its consent to be bound. That addition neither modified nor excluded the legal effect or the provisions of the treaty—in which case it would have been a reservation—nor went beyond the obligations imposed on it by the treaty—which would have fallen under draft guideline 1.4.1 [1.1.5]. It simply took the opportunity to add further elements to a treaty inspired by and along the same lines as some of its provisions. The classic example cited by the Special Rapporteur was the “reservation” by which Israel had tried to add the Red Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949.<sup>8</sup>

39. The Drafting Committee had also thought that the words “to add further elements to a treaty” were clearer and more appropriate than the original phrase “adds a new provision to the treaty”.

40. Draft guideline 1.4.3 [1.1.7] (Statements of non-recognition) had been revised in the fourth report of the Special Rapporteur (A/CN.4/499 and A/CN.4/478/Rev.1), taking into account the views expressed in the Commission at its fiftieth session. The Drafting Committee had worked on the proposed revised text, had adopted it with several modifications and put it in a different place. It dealt with a statement of non-recognition made in the context of a treaty. Since all draft guidelines in chapter I were given a designation, the Drafting Committee had also agreed with the designation of “statements of non-recognition” for that particular practice. However, that designation should be taken only for what it was, without any further general or legal implications in the specific context of a treaty.

41. As worded, the draft guideline covered all kinds of statements of non-recognition, such as “precautionary declarations” or those intended to prevent the application of the treaty as between the author and the non-recognized entity. The last phrase concerned precisely that possibility, so that no doubt could persist on that point. As had emerged from the debate, the issue of exclusion of the application of the treaty as between the declaring State and the non-recognized entity had been deemed confusing. That was particularly the case with respect to draft guideline 1.1.1 [1.1.4] as provisionally adopted by the Commission on first reading at its fiftieth session, which had referred to the possibility of a reservation related to the way in which its author intended to implement the treaty as a whole. The current text sought to dispel any doubt about the fact that statements of non-recognition were not reservations, even if they might seem to be similar to a certain category of “across-the-board” reservations.

42. Draft guideline 1.4.4 [1.2.5] (General statements of policy) was widely debated in the Commission. Several observations had been made with respect to the title and text. Some of the problems raised in the Commission had been addressed by the Drafting Committee’s decision to place all the unilateral statements in relation to a treaty, other than reservations or interpretative declarations, in a separate section. The Drafting Committee had replaced the words “without purporting to exclude or to modify the legal effect of its provisions, or to interpret it” by the phrase “without purporting to produce a legal effect on the treaty”, which was more precise and accurate.

43. The Drafting Committee was of the view that the new text of the draft guideline was more satisfactory in that it rendered exactly the very nature of such statements, which were made in relation to a treaty but had no legal effect on it whatsoever. In addition, the text was all-encompassing and designed to include all kinds of general policy statements, which did not affect the treaty in any way. The Drafting Committee had retained the original title of the draft guideline, but in English, the word “declarations” had been replaced by “statements”.

44. Draft guideline 1.4.5 [1.2.6] (Statements concerning modalities of implementation of the treaty at the internal level) was intended to cover statements by which States or international organizations indicated, without being called upon to do so, the manner in which they would implement a treaty at the internal level only. A typical example, extensively discussed by the Special Rapporteur in his third report, was the “Niagara Reservation” made by the United States of America in respect of the Treaty Relating to the Uses of the Waters of the Niagara River.<sup>9</sup> Bearing that in mind, the Drafting Committee had decided to replace the original phrase “to discharge its obligations at the internal level” by “to implement a treaty at the internal level”, which was more general and might include not only the manner in which a State or international organization discharged its obligations at the internal level but also the manner in which it exercised its rights. The Drafting Committee had also debated the appropriateness of the phrase “at the internal level” in connection with an international organization and concluded that it could be used in that context, since the words “internal law” of international organizations had become current with their development.

45. The Special Rapporteur and the Drafting Committee had been aware that statements on modalities of implementation of the treaty at the internal level might spill over into the international level, but the Drafting Committee had not dealt with that case, on the understanding that the Special Rapporteur would address it in his next report.

46. Draft guideline 1.4.5 [1.2.6] defined unilateral statements made by their authors with respect to the manner in which they intended to implement the treaty at the internal level. In the view of the Drafting Committee, while in general such statements might not have any effect on the treaty, they could do so under special circumstances, for example when the statements were followed up by subsequent behaviour of their authors. To exclude the latter

<sup>8</sup> United Nations, *Treaty Series*, vol. 75, No. 973, pp. 436 and 438.

<sup>9</sup> See 2584th meeting, para. 8.

possibility, the Drafting Committee had inserted the words “as such”. With that insertion, only international statements which did not affect as such the rights and obligations of the other contracting parties were taken into consideration in the draft guideline.

47. The last sentence of draft guideline 1.4.5 [1.2.6] was reworded in a positive manner to read “constitutes a merely informative statement”. The Drafting Committee had felt that the addition of the word “merely” before “informative” was necessary in order to stress the particular character of such statements, which were only informative, thus distinguishing them from all other statements which might also be informative but constituted essentially different categories.

48. With reference to draft guideline 1.5.1 [1.1.9] (“Reservations” to bilateral treaties), in general, the Commission had endorsed the text of the draft guideline as proposed by the Special Rapporteur in his third report. One issue raised both in the Commission and in the Drafting Committee had been whether such statements with respect to bilateral treaties were in fact reservations or counter-proposals. The Drafting Committee had agreed with the view that, in practice, both parties to a treaty looked on such unilateral statements as reservations. The Commission wanted to make it clear that they were not reservations within the meaning of the Guide to Practice. It was not concerned with what else they might be called by parties to the bilateral treaty or by others. Hence, the Drafting Committee had added the words “within the meaning of the present Guide to Practice”. For the same reason, it had deleted the last paragraph of the original draft guideline, which had stated that “The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty”. The Drafting Committee thought that issue could be elaborated in the commentary. It had also added the words “initialling or” before “signature”, so as to allow for all possible situations. The title had been retained.

49. Draft guideline 1.5.2 [1.2.7] (Interpretative declarations in respect of bilateral treaties) had also been accepted by the Commission. The Drafting Committee had made only a few adjustments to the reference to other guidelines in the light of the new structure and redrafting. The title also remained unchanged.

50. Draft guideline 1.5.3 [1.2.8] (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party) had also been accepted by the Commission, and the Drafting Committee had not made any changes to the text or title.

51. Section 1.6 was a “without prejudice” clause. At its fiftieth session, the Commission had adopted that provision without a number or title as a “without prejudice” clause applicable to reservations.<sup>10</sup> The Drafting Committee had revised the text to make it applicable to all the definitions in chapter I. The revised text provided that the definitions of unilateral statements included in chapter I of the Guide to Practice were without prejudice to the per-

missibility and effects of such statements under the rules applicable to them.

52. The CHAIRMAN said that before giving the floor to members to comment on the report of the Drafting Committee, he wished to welcome Judge Alexander Yankov, former member of the Commission, who was currently a member of the International Tribunal for the Law of the Sea.

53. Mr. KABATSI said that the Guide to Practice should be as easy to use as possible. It would be less confusing and cumbersome if the draft guidelines, instead of being itemized “something-point-something-point-something”, were numbered consecutively. Perhaps that approach could be taken for future chapters.

54. Mr. KATEKA said he agreed. The draft Guide to Practice was not user-friendly. He therefore endorsed Mr. Kabatsi’s proposal.

55. The CHAIRMAN pointed out that several draft guidelines had already been adopted at the fiftieth session on the basis of the Special Rapporteur’s numbering system.

56. Mr. KATEKA said that he did not see why the Commission was so conservative. Why wait for the future to make the text clearer?

57. Mr. PELLET (Special Rapporteur) said he, too, wished to voice his thanks to the Chairman and members of the Drafting Committee for their suggestions, which had made some marked improvements in his proposed text. It was rather difficult, however, to see why Mr. Candioti, the Chairman of the Drafting Committee, had made his statement in English, when the report on the draft guidelines had been written in French, and Mr. Candioti not only was a Spanish speaker, but also spoke perfect French.

58. As to the comments by Mr. Kabatsi and Mr. Kateka, he was very much opposed to the Commission proceeding as it usually did with the numbering of draft articles. Just because the Commission had numbered its articles consecutively in the past did not mean that it must continue to do so. The Guide to Practice was a new form of instrument and not a draft treaty. He would not object if, once the draft guidelines were completed, the Commission decided to number them paragraph by paragraph, provided that it did not call them “articles”. He wished to keep the current system for the moment because he intended to add a few draft guidelines even to chapter I before he submitted the continuation of his fourth report. While not being radically opposed to the idea of continuous numbering in each section, he thought that it would be even more complicated than the existing system since, when referring to a provision, it would be necessary to specify the paragraph, section and chapter in question. He recommended that the Commission should refrain from adopting a final position at the current session and from displaying overcautious conservatism.

59. The CHAIRMAN said that the Special Rapporteur’s suggestion did not prejudge the Commission’s final decision. For working purposes, it was advisable to have the provisional numbering which was less confusing than

<sup>10</sup> See *Yearbook ... 1998*, vol. II (Part Two), p. 99, para. 540 and footnote 209.

references to chapters, sections or subsections. A document recapitulating all the draft guidelines would be useful because the text before the Commission contained only the draft guidelines to be adopted or revised at the current session, but not those already adopted at the fiftieth session. He asked the Special Rapporteur to draw up a recapitulatory addendum in the light of deliberations at the current session.

60. He assumed that the Commission wanted to take up each draft guideline in turn and asked if the Commission wished first to adopt draft guideline 1.1.1 [1.1.4] as revised by the Drafting Committee.

#### GUIDELINE 1.1.1 [1.1.4] (Object of reservations)

61. Mr. PAMBOU-TCHIVOUNDA paid tribute to the work done by the Drafting Committee, but said that he had some difficulty in understanding the substance of the phrase “or of specific aspects of the treaty as a whole”. Was the notion of “specific aspects” not already covered by the words “certain provisions”? Even if the wording were amended to read “or of the treaty as a whole, with respect to certain particular aspects”, the problem still remained. How could a reservation be made to a treaty if the legal effects of that treaty as a whole were to be excluded or modified? Such a step would not be consonant with the definition of a reservation and would signify an attempt to enjoy both of two mutually exclusive alternatives: to be within the system and to stand aloof from it. Was the phrase not tautological and a departure from the very notion of a reservation? How could one exclude or modify the legal effect of a treaty as a whole with regard to certain aspects? Were those aspects reflected in all or only certain provisions of a treaty? He had similar problems with the words “or of specific aspects of the treaty as a whole, in their application to its author” in draft guideline 1.3.2 [1.2.3]. What did that mean? Perhaps an effort should be made to express the idea more intelligibly.

62. The CHAIRMAN said he understood that the matter had already been discussed in plenary and that the words “specific aspects” had been included so as to make it clear that the reservation did not apply to the whole treaty, which was an impossibility. Personally, he therefore thought that the additional words were justified.

63. Mr. ADDO said that he agreed entirely with Mr. Pambou-Tchivounda and had strong reservations about the phrase “or of specific aspects of the treaty as a whole”. Did “specific aspects” refer to some of the terms or provisions of a treaty? If so, that notion had been covered in the earlier phrase, namely “certain provisions of a treaty”. If, however, the intention was to exclude or modify specific aspects, why add the words “as a whole”? If the idea was one of excluding or modifying the legal effect of a whole treaty, it was not possible to speak of a reservation; the implication was that there was no wish to become a party to a treaty. The disputed phrase was more likely to confuse than to enlighten users of the Guide to Practice.

64. Mr. MELESCANU said that there was nothing to be gained from reiterating what had been said in earlier debates on the draft guidelines, when general agreement had been reached that there were two main categories of

reservations which purported to modify the legal effects of a treaty. As for the numbering to be used in the Guide to Practice, he was, however, of the opinion that an effort should be made to adopt a different, less conservative approach. Again, thought should likewise be given to the presentation of the document. The current version comprised a text and, much later, commentaries and a guide to practice. He proposed a different format, where each provision would be immediately followed by a commentary and a guide to practice, which, he thought, would provide a more precise indication of the procedure to be observed when making reservations.

65. Mr. AL-BAHARNA said that, since the wording of draft guideline 1.1.1 [1.1.4] was confusing, discussion of the matter was useful. If the principle was that a reservation could not modify the treaty as a whole, it would be best to delete “as a whole” and put a full stop after the word “treaty”. Alternatively, it might be possible to say “specific aspects of the treaty, not the treaty as a whole”, but he preferred the first suggestion.

66. Mr. CANDIOTI (Chairman of the Drafting Committee) explained that the phrase in question in draft guideline 1.1.1 [1.1.4] had been closely scrutinized by the Drafting Committee. The idea was to cover specific categories of reservations which related to the treaty as a whole, but only in respect of specific aspects. The Special Rapporteur had provided a thorough, accurate description of the issue in his third report and the commentary to the draft guideline<sup>11</sup> had likewise dealt with the subject of across-the-board reservations. Such reservations applied to the whole of a treaty but only with regard to certain categories of persons, objects, situations, territories or circumstances. There was no doubt that such reservations existed and both the Special Rapporteur and the Drafting Committee took the view that their existence should be reflected in the Guide to Practice. The conundrum was how to describe them and, after a long discussion, it had been decided to propose the concise formulation “or of specific aspects of the treaty as a whole”. He did not think that there were many alternatives to that wording; “certain” could be inserted before “specific” and the commentary could supply examples and clarify the meaning of the terms. The phrase “treaty as a whole” should not be deleted.

67. Mr. Sreenivasa RAO proposed that “of specific aspects of” should be replaced by “with respect to any matter pertaining to the treaty as a whole”, in order to remove the apparent contradiction between “specific aspects” and “as a whole”.

68. Mr. KABATSI said that, while he entirely agreed that the section dealt with two separate situations, the reference to “the treaty as a whole” remained cryptic, even after the explanations given by the Chairman of the Drafting Committee, since, to the layman, it might appear that reservations could be made to a whole treaty, which was impossible. He urged the Chairman of the Drafting Committee to accept either the wording proposed by Mr. Al-Baharna or that suggested by Mr. Sreenivasa Rao, although he was of the opinion that Mr. Al-Baharna’s

<sup>11</sup> Ibid., pp. 101-102.

version provided most enlightenment as to the sense of the draft guideline.

69. Mr. PELLET (Special Rapporteur) said that Mr. Pambou-Tchivounda's question had shown that the formulation of draft guideline 1.1.1 [1.1.4] was indeed a problem. The principle that the Guide to Practice must include the notion of an across-the-board reservation had been agreed at the fiftieth session and he was therefore far from pleased to hear some members of the Commission calling into question a draft guideline which had already been adopted and which reflected abundant practice, many examples of which had been cited in footnotes 225 to 230 of the report of the Commission on the work of its fiftieth session.<sup>12</sup> Nevertheless, one had to admit that draft guideline 1.1.1 [1.1.4] was not felicitously worded in either French or English. In the light of the proposals made by Mr. Al-Baharna and Mr. Sreenivasa Rao, he suggested the phrase "or of the treaty as a whole, with respect to specific aspects". That formulation did not amount to progressive development, but was merely codification of very widespread practice. Almost all the members of the Drafting Committee had been in favour of the wording he had just proposed, but the Chairman had been unable to present the proposal as it had been impossible to contact some of the members.

70. The CHAIRMAN pointed out that the members of the Commission had not objected to the idea of the draft guideline itself, but had merely been trying to improve the wording.

71. Mr. PAMBOU-TCHIVOUNDA said that the Commission was obliged to rule on the version proposed by the Drafting Committee, whose deliberations had taken account of the concerns which had been expressed about across-the-board reservations. Moreover, there was general agreement in the Commission that the problem was one of wording rather than of substance. He could accept that many examples of reservations had been made available, as the Special Rapporteur had just said but, he was unable to recall the relevant part of the Commission's activities at its fiftieth session, owing perhaps to an unavoidable absence.

72. The Commission was faced with a choice between the Special Rapporteur's proposed formula, which should be accepted provided an acceptable rendering could be found in English, and that proposed by Mr. Al-Baharna, which would be acceptable provided it could be made consistent with the concerns expressed about across-the-board reservations.

73. Mr. ROSENSTOCK said that the existing text, though not ideal, constituted the least troublesome version he had seen, in that it was relatively clear and did not stray beyond its objective. The material it contained might conceivably relate more properly to the scope of the treaty, but in the current context it offered useful guidance in an area which on the surface seemed inconsistent with the structure of the 1969 Vienna Convention, but on further examination was not. The concepts of "specific aspects" and "the treaty as a whole" should be retained.

To place insufficient emphasis on the former element would disturb the intended balance of the draft guideline.

74. Mr. AL-KHASAWNEH said the Commission was unquestionably dealing with a drafting matter, rather than attempting to change the substance of the draft guideline. He agreed with Mr. Al-Baharna that deletion of "on the whole" would improve matters. The text was concerned with three types of reservation, namely those which purported: to exclude certain provisions of the treaty, to exclude specific aspects of the treaty as a whole; and to modify the legal effects of specific aspects of the treaty, but not the whole treaty. To retain the words "as a whole" would be to exclude the third possibility. He therefore supported the proposal to delete them.

75. Mr. AL-BAHARNA said he agreed that it was not a question of changing the underlying principle of the draft guideline. However, in view of the number of objections raised to the phrase "as a whole", a solution would have to be found.

76. The Special Rapporteur's proposal referring to the "treaty as a whole, with respect to certain specific aspects" did not solve the problem, as it still placed undue emphasis on the idea of the treaty as a whole. Nor would it be helpful to retain "as a whole" if a formulation was used to speak of "across-the-board reservations". There, the only solution would be the one he had proposed, namely to place a full stop after "treaty", delete "as a whole", and introduce a separate commentary which emphasized the fact that it was not possible to formulate a reservation to an entire treaty, but only to some of its aspects.

77. Mr. LUKASHUK said he agreed with the Special Rapporteur that the wording of the provision under discussion did no more than bring it into line with current practice. He sympathized with those who objected to the inclusion of "as a whole", and supported Mr. Al-Baharna's proposal to remedy the situation by means of a commentary. However, he felt that the provision could be adopted by the Commission in its current form.

78. Mr. PAMBOU-TCHIVOUNDA said he could accept Mr. Al-Baharna's proposal to delete the phrase "as a whole". However, the resulting version would not be sufficient to convey the idea that specific aspects of the treaty were in fact covered by the provisions in respect of which the reservation was formulated.

79. He therefore proposed that the phrase "or of specific aspects of the treaty" be amended to read "or of specific aspects in respect of the treaty". The existing version left open the question whether "specific aspects" were found in the provisions themselves or were to be covered by phrases within the provisions. The words "as a whole" would be deleted.

80. Mr. PELLET (Special Rapporteur) said that in English his proposed change read "A reservation purports to exclude or modify the legal effect of certain provisions of a treaty, or of the treaty as a whole, with respect to specific aspects". His proposal was intended to maintain balance between the idea that, on the one hand, across-the-board reservations concerned the treaty as a whole and, on the other hand, that they could not cover the entire treaty,

<sup>12</sup> Ibid.

for in that case they would no longer constitute reservations: they would simply be a refusal to be engaged by the treaty. Accordingly, he did not regard Mr. Al-Baharna's proposal to delete "as a whole" as helpful.

81. He did not agree with Mr. Kabatsi that things were clear. Indeed Mr. Kabatsi's comment itself showed that matters were far from clear, for he had said that the issue was whether a reservation referred to a part of the treaty, and was therefore covered by its provisions, or whether it referred to the treaty as a whole. To delete the idea of the treaty "as a whole" would be to unbalance the meaning of the draft guideline.

82. He was not convinced by Mr. Al-Khasawneh's argument that there were three possible types of reservation. In the context of the draft guideline's objective, there could only be two possibilities—either the reservations addressed certain provisions, including specific aspects of them, or the provisions as a whole. Either one refused to accept an article, or one refused to accept the application of that article as it applied in a particular instance. The idea behind the words "treaty as a whole" was to cover reservations which were not covered in the strict sense meaning by the definition in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention. The third distinction made by Mr. Al-Khasawneh was implicit in the phrase "certain provisions". What was missing was decidedly the "as a whole" phrase. It was precisely to balance that notion that the phrase should be retained.

83. With regard to the separate commentary proposed by Mr. Al-Baharna, he saw no reason to relegate to a commentary an element which could be quite easily included in the draft guideline, and which would amplify its meaning.

84. He could accept Mr. Sreenivasa Rao's proposal to include "certain", so that it should read "... provisions of a treaty or the treaty as a whole, with respect to certain specific aspects", which clarified the meaning still further. He would like to introduce one further change, which could be dealt with immediately by the Chairman of the Drafting Committee. The current wording referred to "provisions of a treaty" and "the treaty as a whole"—the definite or indefinite article should be used in both cases, but they should not be mixed.

85. Mr. CANDIOTI (Chairman of the Drafting Committee) said that the debate had not changed his conviction that the words "as a whole" should be retained, as they had a very specific meaning in the context of the reservations covered by draft guideline 1.1.1 [1.1.4]. There were two possibilities: either a reservation purported to exclude or modify the legal effect of certain provisions, or it purported to exclude or modify the legal effect of the treaty as a whole, but with regard to certain specific aspects. Many relevant examples had been cited in the third report of the Special Rapporteur and in the report of the Commission on the work of its fiftieth session. He agreed with the Special Rapporteur that the phrase "as a whole" must be in the text of the draft guideline and not in a separate commentary and felt that the indefinite article would be more appropriate in the instances the Special Rapporteur had just cited.

86. In English, the text would read "A reservation purports to exclude or 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".

87. The inclusion of "or", in "or of the treaty" clearly indicated that the draft guideline was concerned with two alternatives.

88. Mr. AL-KHASAWNEH said he was still not convinced that there were not three possible types of reservation.

89. Mr. GOCO said that, in the beginning, he had been unconvinced of the need to include the phrase "as a whole". However, he could now accept the modified text, especially in the light of the clarification by the Chairman of the Drafting Committee that "or" was intended to have a disjunctive, and not conjunctive, meaning.

90. Mr. ROSENSTOCK said he was still unhappy with the inclusion of "certain" before "specific".

91. Mr. KATEKA said he too regarded it as tautological to include "certain" before "specific".

92. Mr. AL-BAHARNA said he had no objection to the final proposal made by the Special Rapporteur, especially as there seemed to be a general preference to retain "as a whole" in the light of the explanations given by the Special Rapporteur and the Chairman of the Drafting Committee. However, he wondered whether it might be helpful to reword the phrase after "treaty as a whole" so that it read "but with respect to specific aspects of it". Also, he would prefer to use the definite article and speak of "the treaty" and "the treaty as a whole", or to use a formulation which did not repeat the word "treaty".

93. The CHAIRMAN observed that there seemed to be some support for the idea of deleting "certain" from the text. He also wondered whether the Commission thought it might not be better to say "with respect to its specific aspects".

94. Mr. CANDIOTI (Chairman of the Drafting Committee) said that "certain specific aspects" rendered more accurately the idea that it was not the whole of the treaty in all its aspects that was being referred to, and also worked well in English, French and Spanish. He still preferred the indefinite article in both cases before "treaty", and felt that the inclusion of "its" would make the phrase more convoluted, although he had no objection in principle.

95. Mr. ROSENSTOCK said that the word "certain" suggested the idea of "some but not all", and was properly used the first time in the draft guideline. However, the whole thrust of the Commission's efforts in adopting the draft guideline was geared to the concept of "all but not only some" in the text. The word "certain" was thus being used in two different ways, which could have a slightly misleading effect.

96. Mr. KABATSI said he disagreed with Mr. Rosenstock. The inclusion of the second "certain" was very important, as it drew attention away from the idea of

the treaty as a whole. Also, the very fact that “certain provisions” and “certain specific aspects” embodied different notions meant that there was no question of tautological use. Finally, the second “certain” obviated the need to include “but” as Mr. Al-Baharna had proposed.

97. Mr. PELLET (Special Rapporteur) said he also regarded “certain specific” as tautological, but could go along with the Commission’s decision. However, he now realized with some regret that the use of the indefinite and definite articles before “treaty” in the current version echoed the wording of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, and he therefore wondered whether it should be retained after all.

98. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt draft guideline 1.1.1 [1.1.4] as orally revised by the Chairman of the Drafting Committee.

*It was so agreed.*

*Guideline 1.1.1 [1.1.4], as orally revised, was adopted.*

*The meeting rose at 1.05 p.m.*

## 2598th MEETING

*Wednesday, 7 July 1999, at 10.05 a.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

### **Tribute to the memory of Doudou Thiam, member of the Commission**

1. The CHAIRMAN announced the death of Doudou Thiam, member of the Commission since 1970.

2. Doudou Thiam had chaired the Commission at its thirty-third session, in 1981, and had been the Special Rapporteur for the topic of the draft Code of Crimes against the Peace and Security of Mankind from the thirty-fourth session (1982) to the forty-seventh session (1995). He had thus participated in the efforts to establish

the International Criminal Court.<sup>1</sup> A distinguished lawyer and active statesman, Doudou Thiam had made a significant contribution to the codification and development of international law, the promotion of international cooperation and greater understanding among nations. He had also rendered invaluable service to his country, Senegal, where he had held a number of important positions and ministerial portfolios, and he had headed the Senegalese delegation to numerous sessions of the General Assembly and the Security Council.

3. On behalf of the Commission, he offered his condolences to Doudou Thiam’s widow, present in the conference room, and to his entire family.

*At the invitation of the Chairman, the members of the Commission observed a minute of silence in memory of Doudou Thiam.*

4. Mr. Sreenivasa RAO recalled the man of culture, the statesman, the African sage and the humanist that Doudou Thiam had been. He had marked the history of law through his thoughts on the subject with which the Commission had entrusted him, the draft Code of Crimes against the Peace and Security of Mankind. The Commission would remember him as one of its warmest and most generous members.

5. Mr. PAMBOU-TCHIVOUNDA evoked the happy moments which the members of the Commission had shared with Doudou Thiam. A brilliant lawyer whose theory of African federalism had set a milestone, Thiam had from the outset taken very firm positions at the time of African decolonization. His subsequent contribution to the construction of a modern Senegal attested to his intellectual and human qualities. Africa had lost a herald, law a champion and the Commission one of its most outstanding members.

6. Mr. SEPÚLVEDA, speaking on behalf of the members of the Commission of Latin American origin, saluted the memory of Doudou Thiam. He recalled his human qualities, his cordiality to all and his exceptional generosity as a colleague and a lawyer. Doudou Thiam had been the very example of a man of talent who had dedicated himself to public service, notably during the construction of an independent Senegal. He was mourned not only by his country and Africa, but also by Latin America, with which he had had close affinities.

7. Mr. LUKASHUK, expressing his most heartfelt condolences to Mrs. Thiam and her son, said that the death of Doudou Thiam was also an irreparable loss for the members of the Commission, who for years to come would feel the absence of his wisdom, his practical experience and his humanity. Doudou Thiam had been an extraordinarily lucky man because few people had the chance to make such an important contribution in all their areas of endeavour. Doudou Thiam left behind many models; the history books would not fail to record that it was he who had prepared the Rome Statute of the International Criminal Court.

8. Mr. ROSENSTOCK joined others in expressing his condolences to the family of Doudou Thiam. It had been

<sup>1</sup> See 2575th meeting, para. 30.