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**Summary record of the 2549th meeting**

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*Summary records of the 2549th to 2564th meetings,  
held in New York from 27 July to 14 August 1998*

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**2549th MEETING**

*Monday, 27 July 1998, at 10.25 a.m.*

*Chairman:* Mr. João BAENA SOARES

*Present:* Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

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**United Nations Diplomatic Conference of  
Plenipotentiaries on the Establishment of an  
International Criminal Court**

1. Mr. CRAWFORD said that he had represented the Commission for two days at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held at Rome from 15 June to 17 July 1998. The Conference had adopted by consensus the Rome Statute of the International Criminal Court<sup>1</sup> that went well beyond what the Commission had thought possible, demonstrating that times had changed. Since the Conference had had a task relating not to codification but to the establishment of a new institution, he had merely outlined to the participants the evolution of legal thinking on the subject and the contribution made by the Commission in that area. He had thus pronounced on the Commission's behalf, not an imprimatur, but a *nihil obstat* of the results of the Conference.

2. Mr. LEE (Secretary to the Commission) read out the draft resolution adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to express its gratitude to the Commission. He noted that the substantive services of the Conference had been provided by the same members of the Codification Division who serviced the meetings of the Commission.

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<sup>1</sup> A/CONF.183/9.

**Reservations to treaties (*continued*) (A/CN.4/483,  
sect. B, A/CN.4/491 and Add.1-6,<sup>2</sup> A/CN.4/L.563  
and Corr.1)**

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

GUIDE TO PRACTICE (*continued*)

3. The CHAIRMAN invited the Special Rapporteur on the topic of reservations to treaties to introduce the three draft guidelines that had not yet been considered: draft guidelines 1.1.5, 1.1.6 and 1.1.7.

4. Mr. PELLET (Special Rapporteur) said that at the current stage, the work he was submitting focused exclusively on the definition of reservations and not on the relevant legal regime. The purpose was not to discuss the permissibility of a given type of reservation, but rather, to draw a distinction between what could be classified as a reservation and what could not.

DRAFT GUIDELINES 1.1.5 AND 1.1.6

5. Draft guidelines 1.1.5 and 1.1.6 had to be taken together, because they both addressed the problem of so-called extensive reservations—an idea developed in the doctrine but used by some to refer to reservations that increased the obligations of the reserving State and by others to mean exactly the opposite, that is to say, reservations that increased the obligations of the other parties vis-à-vis the said State. It was when the reserving State voluntarily entered into supplementary obligations that the fewest difficulties arose, but how often did such situations actually occur? The only clear example was that of a declaration whereby the Union of South Africa had undertaken commitments in respect of an article in the General Agreement on Tariffs and Trade that went beyond what the Agreement required of the parties.<sup>3</sup> Other examples that could be cited were of relatively little consequence, but as the South African precedent could be repeated, and as the Commission had taken up the problem at its sixteenth session, in 1964, and again at its forty-ninth session, in 1997, it seemed worth while to look into whether that type of declaration could be classified as a reservation. In his opinion, it would be hard to construe declarations like that of South Africa as reservations, if only because they could be made at any moment and not

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

<sup>3</sup> See Protocol modifying certain provisions of the General Agreement on Tariffs and Trade, p. 39.

solely at the time when the State making them consented to be bound by the treaty, and because they could relate exclusively to certain parts of a treaty, in other words, not to a treaty. To classify such declarations as reservations would be to enclose them artificially in what was in fact a relatively stringent regime. Such declarations were actually self-regulating unilateral acts such as those whose existence had been acknowledged by ICJ in the *Nuclear Tests* cases but whose validity and legal regime were entirely independent of the treaty which, in exceptional cases, served as the pretext for them. Draft guideline 1.1.5 indicated as much but added, in brackets, that such statements were governed by the rules applicable to unilateral legal acts. That language departed from the confines of the definition and encroached upon the terrain of legal regimes, but that seemed necessary in order to spare future users of the Guide to Practice any confusion as to the exact nature of that type of statement.

6. The problem of reservations designed to limit the obligations of their author was entirely different. They were true reservations, and one could not help but be surprised at the uncertainty of some of the doctrine and of a number of members of the Commission on that point. As Mr. Economides had stated (2548th meeting), limiting the effect of the provisions of a treaty in their application to the reserving State was, after all, one of the purposes most frequently served by reservations. Even if a reservation did not aim at excluding certain provisions of the treaty or the legal effect of those provisions, it inevitably aimed at limiting their application. The problem was not serious enough to merit changing the definition in the 1969 Vienna Convention so as to insert "limit" between "exclude" and "modify", or to replace "modify" by "limit", but it would be useful to specify that "modify" could mean only "limit". That clarification was all the more necessary since the problem had been badly presented in the literature, which had reduced it to the dichotomy between "extensive reservation" and "limitative reservation". If a typical limitative reservation existed, it was surely the one by which the former socialist countries of eastern Europe had expressed their disagreement with article 9 of the Convention on the High Seas, relating to the immunity of ships of State.<sup>4</sup> The reserving States had indicated that such immunity applied in general to all ships owned or operated by a State. A Polish writer, Renata Szafarz, had interpreted that reservation as being an extensive reservation,<sup>5</sup> however, on the grounds that by expanding their immunity under article 9, the reserving States expanded the obligations of other States. True, but those obligations were expanded only in relation to what was envisaged in the treaty. The reservation, like all others, merely neutralized the restructuring of rights and obligations induced by the provision it addressed and thereby caused a reversion to the situation *ex ante*, in other words to general international law: the common law that was applied outside the realm of treaties. The authors of the reservation had been pursuing the objective of all authors of reservations, namely of not having to apply a

specific provision in a treaty. As to whether the reservation to article 9 was permissible or not—even though that question had no bearing on the problem of definition—first, everything depended on the real scope of the rule of customary international law applicable to ships of State independently of the Convention, and secondly, the other States were entirely free to accept the reservation or not to accept it. If the interpretation of common law given by the authors of the reservation was not correct, then the reservation was impermissible and was devoid of legal effect, but in no case was a particular category of reservations involved.

7. It could so happen, however, that while leaving a treaty intact, a State might wish to use a statement to add something to the treaty that was not already there. The only two examples of such instances were the "reservation" by which Israel had tried to add the Shield of David to the emblems of the Red Cross and the Red Crescent under the Geneva Conventions of 12 August 1949,<sup>6</sup> and the one by which Turkey had similarly sought to add the Red Crescent to the Red Cross under the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention.<sup>7</sup> But in neither instance had the authors of the reservation intended to modify the effect of the treaty on themselves. They had simply wished to add to the treaty a sort of unwritten clause, not in fact a reservation but a draft amendment or a draft auxiliary agreement that other States were free to accept or reject. That was the sense of the final phrase in draft guideline 1.1.6, the formulation of which could perhaps be improved.

8. Mr. ECONOMIDES said that the case covered by draft guideline 1.1.5, a statement designed to increase the obligations of the author, was in fact extremely rare. If such a statement was not a reservation, as the text indicated, then one was entitled to ask what it was. First, it could be construed as a proposal for extension of a treaty made by a signatory State of its own volition and introducing a new provision extraneous to the subject matter of the treaty. If the proposal was accepted by the other States parties, it could acquire the character of a treaty provision by application in subsequent practice or even through a collateral agreement. Secondly, one could postulate that it was an interpretative declaration: a State, misunderstanding the meaning of the treaty it was signing, added to its own obligations in good faith. Again, the other States could subsequently, by their application, give that statement the status of a treaty provision.

9. In both cases, something other than a reservation was involved, and that should accordingly not be dealt with in the Guide to Practice; the content of draft guideline 1.1.5 could be mentioned, however, by way of explanation in the commentary to draft guideline 1.1 on the definition of reservations.

10. As for draft guideline 1.1.6, it contributed nothing new and merely gave an *a contrario* definition of reservations. It simply added to the general definition the idea that the author of the statement "intends to limit . . . the

<sup>4</sup> See *Multilateral Treaties . . .* (2542nd meeting, footnote 3), pp. 787-789 and United Nations, *Treaty Series*, vol. 450, p. 162, and vol. 905, pp. 80-81.

<sup>5</sup> R. Szafarz, "Reservations to multilateral treaties" . . . , op. cit. (see 2545th meeting, footnote 3), pp. 295-296.

<sup>6</sup> See United Nations, *Treaty Series*, vol. 75, pp. 436-438.

<sup>7</sup> See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 181 and 256.

rights which the treaty creates for the other parties”. But that was self-evident, by virtue of the principle of reciprocity that was rigorously applied in treaty matters, so the explanation was unnecessary. The reverse was true, however, of the phrase “unless it adds a new provision to the treaty”, which rightly brought up the case of statements that went beyond classical reservations. In his view, the content of draft guideline 1.1.6 should also be included in the draft guideline on the definition of reservations.

11. Mr. SIMMA said he endorsed the content of draft guideline 1.1.5 but agreed with Mr. Economides’ analysis of draft guideline 1.1.6. It was true that that provision was merely a paraphrase of the definition in draft guideline 1.1, with the sole difference that it spoke of “limiting” rather than “modifying” the obligations. He questioned whether that nuance really merited a separate guideline.

12. In paragraphs 97 et seq. of his third report on reservations to treaties (A/CN.4/491 and Add.1-6), the Special Rapporteur analysed what were, strictly speaking, extensive reservations. He identified three types, the last being statements that purported to impose new obligations not envisaged by the treaty upon the other parties thereto. If they were compared with the statements defined in draft guideline 1.1.6, one could see a progression between the two, since it was no longer a question of “imposing obligations” but of “limiting rights”. Did the second type of statement also constitute, strictly speaking, extensive reservations?

13. As Mr. Economides had pointed out, the final phrase of draft guideline 1.1.6 definitely had to be changed, because it was impossible to assert that a unilateral declaration could “add a new provision”. How could one imagine that a provision, in the proper sense of the term, could be added to a treaty by a simple unilateral declaration? All a State could do was to make a proposal for a new provision.

14. Mr. HAFNER said that draft guideline 1.1.5, which gave an *a contrario* definition that was far too broad, should be amended. As he saw it, there were indeed unilateral declarations that actually constituted reservations. He gave the example of the conclusion by a number of States of a treaty to suspend the application among themselves of a general regime establishing obligations under international law. If one of the States made a reservation to that treaty, it created new obligations: in other words, it revived those of general international law, and the declaration must be considered a reservation. Such cases deserved to be mentioned in the commentary.

15. The wording of draft guideline 1.1.6 was extremely close to that of the general definition given in draft guideline 1.1. It raised the question of whether there was a uniform regime, applicable to all declarations, under which they could modify contractual obligations. He cited the Rome Statute of the International Criminal Court that had just been adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>8</sup> The Rome Statute con-

tained a transitional provision (art. 124) by which a State, at the time of ratification, could make a declaration under which it reduced the scope and the nature of the obligations imposed upon it thereby. According to draft guideline 1.1.6, that was indeed a reservation. But the Rome Statute itself explicitly excluded the possibility of making a reservation. He therefore assumed that there were two regimes, one applicable to what were, strictly speaking, reservations, the other to declarations. The question that the Commission had to resolve was indeed whether there was a single regime for reservations.

16. Mr. BROWNLIE said that he was not entirely convinced by the distinction apparently being introduced in draft guidelines 1.1.5 and 1.1.6 between unilateral declarations that constituted reservations and those that did not. In his view, there was no substantial difference in the theory of the law between a declaration that alleviated and one that enhanced the obligations placed upon the author. It also seemed inappropriate to say that a statement by which a State undertook commitments going beyond the obligations in a treaty fell under a regime other than that of reservations.

17. Mr. ROSENSTOCK said he found the final phrase of draft guideline 1.1.6, “unless it adds a new provision to the treaty”, to be risky and thought its subject was unclear. On the other hand, the example of the Rome Statute given by Mr. Hafner was not entirely convincing. The provision he had cited offered States what was actually a menu approach: they were free to opt in or opt out of any given obligation. The exercise of that option was not a reservation per se.

18. Mr. FERRARI BRAVO said he thought the two draft guidelines were not of decisive importance for the theory of law but might simply be useful for States, and it was for that reason that they deserved to be included in the Guide to Practice.

19. The bracketed phrase “and is governed by the rules applicable to unilateral legal acts” in draft guideline 1.1.5 was fairly injudicious in that the Commission did not define the statement to which it referred, but merely observed that that type of statement did not constitute a reservation and cited the rules applicable to it. If that phrase was deleted, the draft guideline would be acceptable.

20. Draft guideline 1.1.6, too, failed to say what was meant by statements designed to limit the obligations of their author when they did not constitute reservations, and it likewise left open the question of what was a statement that added a new provision to the treaty.

21. Mr. BENNOUNA said that a distinction could indeed be drawn between a reservation and a unilateral statement designed to modify a treaty. But according to the definition in draft guideline 1.1, which was taken from the 1969 Vienna Convention, a reservation modified, not the treaty, but the “effect” thereof. In other words, it always remained within the scope of the treaty. To add a new provision was to go beyond the treaty as such and thereby to depart from the category of reservation.

<sup>8</sup> See footnote 1 above.

22. Draft guideline 1.1.6 was particularly badly worded in that the most important part, the phrase “unless it adds a new provision to the treaty”, was merely a subsidiary clause. The hypothesis set out in that phrase should be the central feature of the provision which, in fact, merely reproduced the classical definition of a reservation.

23. Draft guidelines 1.1.5 and 1.1.6 should be combined, since the second merely gave an *a contrario* definition of the legal device described in the first. As for the bracketed phrase in draft guideline 1.1.5, it would be better to delete it, because it raised an entirely different issue that was for the time being outside the topic.

24. Mr. MIKULKA said that, as Mr. Hafner had already pointed out, there were treaties that purported not to create obligations but rather to restrict those that were already in force under other instruments. An example could be taken from the field of diplomacy. General international law and multilateral treaties established certain norms in that field, but those norms were far from being peremptory and States were free to derogate from them by specific agreement—at the regional level, for example. One could thus imagine that in order to avoid abusive recourse to diplomatic immunity, the States of a region might agree to limit the privileges of their respective agents, thereby restricting the obligations of the host State with regard to diplomatic representatives. If one of the States made a reservation to that specific agreement which had the effect of making a provision inoperable, the regime of general international law would apply. That example definitely constituted a reservation, but one that did not meet the criteria set out in draft guideline 1.1.5. Such contradictions called for clarification in the commentary.

25. Mr. LUKASHUK, referring to draft guideline 1.1.1 on the joint formulation of a reservation, said the provision had no place in the draft, for a reservation was essentially a unilateral act for which the author was responsible unilaterally.

26. Referring to draft guideline 1.1.5, he said that unlike Mr. Ferrari Bravo and Mr. Brownlie, he saw it as a very useful provision, in that it settled the question of how to handle statements designed to increase the obligations of their author. Nevertheless, the bracketed phrase should be deleted, as other speakers had requested. The same remark—that it should be deleted—could be made of the final phrase, “unless it adds a new provision to the treaty”, in draft guideline 1.1.6.

27. Mr. GALICKI said he thought draft guidelines 1.1.5 and 1.1.6 should be included in the Guide to Practice, because a number of elements were missing from the definition of reservations in draft guideline 1.1, which indicated that a reservation was a unilateral declaration that purported to “exclude or modify the legal effect of certain provisions”. There was no problem with the term “exclude”, but the word “modify” raised a question: did that mean to increase or to decrease the obligations? As the Special Rapporteur had pointed out, the regime of reservations could not be applied to statements designed to increase the obligations imposed upon their authors. On the other hand, when statements were aimed at limiting

the obligations, they must be considered to be reservations, with all the consequences that that entailed. As for draft guideline 1.1.5, the most important aspect was clearly that the statements described therein were not governed by the regime of reservations, something which the Special Rapporteur had rightly emphasized. The final phrase in draft guideline 1.1.6 brought up another question: did it mean that if a statement added a new provision to the treaty, it did not constitute a reservation? It would be better to delete the phrase, although there was another possibility: to delete draft guideline 1.1.6 as a whole. After all, if it was indicated that statements designed to increase the obligations of their author were not reservations, then the logical conclusion was that those designed to limit such obligations were indeed reservations. In any event, if draft guideline 1.1.6 was retained, the phrase “unless it adds a new provision to the treaty” should be deleted.

28. Mr. CRAWFORD said that draft guidelines 1.1.5 and 1.1.6 raised difficulties that went beyond simple drafting problems. Referring to the final phrase of draft guideline 1.1.6, “unless it adds a new provision to the treaty”, he said it was obvious that a reservation could under no circumstances add a provision to a treaty. Reservations had the effect of modifying the obligations flowing from a treaty. The phrase therefore had no place in the draft. If one considered that a reservation was a statement that, depending on the manner in which it was received by the other States parties, modified the obligations of the reserving State and the other States in a number of ways, then why should statements designed to increase the obligations of their author be excluded? For example, a State party to a multilateral treaty could formulate a reservation that extended its obligations in the hopes of simultaneously extending, by reciprocal action, those of the other States parties. While it was obvious that a simple unilateral act that had the effect of increasing the obligations of its author was not a reservation, it was by no means self-evident that the same was true for other types of declarations that had the same effect. The Drafting Committee should look into that question more closely.

29. Mr. CANDIOTI endorsed draft guidelines 1.1.5 and 1.1.6. Regarding draft guideline 1.1.5, he said it would be wiser to delete the bracketed phrase, as the type of declaration to which it referred was not necessarily a unilateral act. It would be better to examine those declarations case by case. Concerning draft guideline 1.1.6, he thought that it was useful to specify that statements designed to limit the obligations of their author constituted reservations but that, as other speakers had pointed out, the final phrase, “unless it adds a new provision to the treaty”, should be deleted, because it was outside the context of the topic. The draft guidelines clarified the concept of the reservation and were therefore appropriate for inclusion in the Guide to Practice.

30. Mr. MELESCANU said that draft guidelines 1.1.5 and 1.1.6 raised two questions of crucial importance for the Guide to Practice. The first was whether, in formulating a reservation to a treaty, one could add or exclude provisions. The answer was obviously no. Consequently, the final phrase in draft guideline 1.1.6 had no place in the Guide. Second, if a reservation could modify the legal

effect of a provision, could it only reduce that effect or expand it as well? As Mr. Crawford had pointed out, it was difficult to see why a reservation should be able solely to reduce the legal effect of a provision of a treaty. Mr. Hafner, among others, had asked why, if the legal effect of a treaty could be expanded by the application of customary law, that could not be achieved by the formulation of a reservation? Lastly, he said it was clear that a reservation could neither add nor exclude a treaty provision, but it could modify the legal effect of any existing provision by reducing or enlarging it.

31. Mr. KABATSI said that draft guideline 1.1.5 clarified the definition of reservations set out in draft guideline 1.1, but at the present stage one could hardly assert that the type of statement to which it referred constituted a unilateral legal act. The bracketed phrase should therefore be deleted. As for draft guideline 1.1.6, it was generally acceptable, although the final phrase was superfluous.

32. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his proposals and said that he, too, thought they should be included in the Guide to Practice. He shared the view that unilateral declarations designed to increase the obligations of their author did not constitute reservations. They were autonomous acts representing a promise and did not require the acceptance of other States. As for the bracketed phrase, while it was clearly important to specify that the statements in question could be covered by other legal regimes, the draft guideline was too categorical, because such statements were not necessarily unilateral acts. The phrase could be deleted and an explanation of that point included in the commentary. Regarding draft guideline 1.1.6, it was important to include it in the Guide, even if it seemed repetitive. On the other hand, the final phrase was indeed superfluous. Subject to those amendments, he thought the two draft guidelines could be transmitted to the Drafting Committee.

33. Mr. GOCO requested the Special Rapporteur to indicate what would be the effect of the withdrawal by one State of a reservation formulated jointly with other States. He pointed out that according to the definition of reservations, a reservation was a statement that purported to exclude “or” modify, and not to exclude “and” modify, the effect of treaty provisions.

34. Mr. KUSUMA-ATMADJA said that the consideration of draft guidelines 1.1.5 and 1.1.6 had sparked a very interesting debate. It was highly desirable to elaborate a Guide to Practice for reservations to treaties, even if many treaties adopted since the 1980s—the United Nations Convention on the Law of the Sea being an example—prohibited reservations.

35. Mr. ILLUECA said the Commission must fill in the gaps in international law in the area of reservations and the difficulties it could encounter derived both from the technical nature of the topic and from the accompanying political considerations. In that regard, he welcomed the approach adopted by the Special Rapporteur, which was more pragmatic than dogmatic. Like many other members of the Commission, he thought that draft guidelines 1.1.5 and 1.1.6 should be retained, with the deletion of the

bracketed phrase in the first provision and of the final phrase, beginning with “unless”, in the second.

36. Mr. HE thanked the Special Rapporteur for his very clear introduction of the provisions under consideration. With regard to draft guideline 1.1.5, he believed it was appropriate to indicate clearly that a statement designed to increase the obligations of the author did not constitute a reservation, but was simply a unilateral declaration. On the other hand, it was not necessary to identify the rules that governed such statements, and that was why the bracketed phrase should be deleted. As to draft guideline 1.1.6, even if it appeared to state the obvious and to reproduce the definition set out in draft guideline 1.1, it should be retained, following the deletion of the final phrase.

37. Mr. YAMADA said that he, too, believed the final phrase in draft guideline 1.1.6 should be deleted. He endorsed the two provisions under consideration, but wished to ask a question of the Special Rapporteur. In 1971, Japan had signed with other countries the Food Aid Convention, 1971, under which the signatories had committed themselves to providing food aid to certain countries. Not being a producer of wheat, Japan had made a reservation<sup>9</sup> indicating that it would provide a quantity of rice equivalent in monetary terms to the quantity of wheat that it would have had to provide. None of the signatory States had objected. While the reservation had not modified the legal effect of the treaty for Japan, it had nevertheless replaced the obligation to provide wheat with the obligation to provide rice. He would like to know if that reservation should be considered a reservation or a unilateral declaration.

38. Mr. PELLET (Special Rapporteur) drew the attention of members of the Commission to his third report, the length of which was attributable to the complexity of the topic. He informed members that they would find therein the answers to many of the questions they had asked him about the Guide to Practice, which could not usefully be discussed without reference to the report. He would reply in detail at the next meeting to the questions and comments of members of the Commission. He wished to point out, however, that some members—including Mr. Economides and Mr. Simma—had given their own reading of the definition of reservations in the 1969 Vienna Convention: specifically, they saw the word “limit” where the Convention said “modify”. True, the legal effect of certain provisions was usually “limited”, but that was not what was said in the text. In response to the question raised by Mr. Melescanu, he said that according to the definition in the 1969 Vienna Convention, a reservation could exclude the legal effect of certain provisions of a treaty.

*The meeting rose at 1.10 p.m.*

<sup>9</sup> United Nations, *Treaty Series*, vol. 800, p. 197.