



# General Assembly

Distr.: Limited  
4 August 2011  
English  
Original: French

## International Law Commission

### Sixty-third session

Geneva, 26 April–3 June and 4 July–12 August 2011

## Draft report of the International Law Commission on the work of its sixty-third session

*Rapporteur:* Mr. A. Rohan Perera

### Chapter V Reservations to treaties

#### Contents

	<i>Paragraphs</i>	<i>Page</i>
A. Introduction.....		
B. Consideration of the topic at present session .....		
1. Consideration of the seventeenth report of the Special Rapporteur.....		
(a) Introduction by the Special Rapporteur.....		
(b) Action taken on the seventeenth report .....		
C. Recommendation of the Commission concerning the Guide to Practice on Reservations to Treaties .....		
D. Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties .....		
E. Tribute to the Special Rapporteur .....		
F. Text of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session.....		
1. Text of the guidelines constituting the Guide to Practice .....		
2. Text of the Guide to Practice, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography.....		

## A. Introduction

1. The Commission, at its forty-fifth session (1993), decided to include the topic “The law and practice relating to reservations to treaties”<sup>1</sup> in its programme of work and, at its forty-sixth session (1994), appointed Mr. Alain Pellet Special Rapporteur for the topic.<sup>2</sup>

2. At the forty-seventh session (1995), following the Commission’s consideration of his first report,<sup>3</sup> the Special Rapporteur summarized the conclusions he had drawn from the Commission’s debate, including a change of the title of the topic to “Reservations to treaties”; the form the results of the study should take, namely, a guide to practice in respect of reservations; the flexible way in which the Commission’s work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties.<sup>4</sup> In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. The Guide to Practice would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; the guidelines would, if necessary, be accompanied by model clauses. At the same session (1995), the Commission, in accordance with its earlier practice,<sup>5</sup> authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission’s conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.<sup>6</sup>

3. At its forty-eighth (1996) and its forty-ninth (1997) sessions, the Commission had before it the Special Rapporteur’s second report,<sup>7</sup> to which was annexed a draft resolution on reservations to normative multilateral treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.<sup>8</sup> At the latter session (1997), the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>9</sup> In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission’s preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

---

<sup>1</sup> The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the Commission.

<sup>2</sup> *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10)*, para. 382.

<sup>3</sup> A/CN.4/470 and Corr.1 and 2.

<sup>4</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10)*, para. 491.

<sup>5</sup> See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

<sup>6</sup> As of 31 July 2011, 33 States and 26 international organizations had responded to the questionnaire. However, see also the comments and observations mentioned in paragraph 6 below.

<sup>7</sup> A/CN.4/477 and Add.1.

<sup>8</sup> *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10)*, para. 137.

<sup>9</sup> *Ibid.*, *Fifty-second Session, Supplement No. 10 (A/52/10)*, para. 157.

4. From its fiftieth session (1998) to its sixty-first session (2009), the Commission considered 14 more reports<sup>10</sup> and a note<sup>11</sup> by the Special Rapporteur, along with a memorandum by the Secretariat on reservations to treaties in the context of succession of States,<sup>12</sup> and provisionally adopted 199 draft guidelines and the commentaries thereto.<sup>13</sup>

5. At its sixty-second session (2010), the Commission, having completed the provisional adoption of the Guide to Practice on Reservations to Treaties, indicated that it intended to adopt the final version of the Guide to Practice during its sixty-third session (2011), and that, in doing so, it would take into consideration the observations of States and international organizations as well as the organs with which the Commission cooperates, made since the beginning of the examination of the topic, together with further observations received by the Secretariat of the Commission before 31 January 2011.<sup>14</sup>

## B. Consideration of the topic at the present session

6. At the present session, the Commission had before it the seventeenth report of the Special Rapporteur (A/CN.4/647 and Add.1), which it considered at its 3099th, 3104th and 3106th meetings, on 6, 13 and 15 July 2011, as well as the comments and observations received from Governments on the Guide to Practice as provisionally adopted by the Commission at its sixty-second session (A/CN.4/639 and Add.1).

7. At its 3080th meeting, on 26 April 2011, the Commission decided to establish a working group on reservations to treaties, chaired by Mr. Marcelo Vázquez-Bermúdez, to work on finalizing the Guide to Practice as envisaged by the Commission at its sixty-second session (2010).<sup>15</sup> The Working Group reviewed the version of the Guide to Practice provisionally adopted in 2010 on the basis of the changes proposed by the Special Rapporteur in the light of the oral and written observations made by States on the topic since 1995.

8. At its 3090th meeting, on 20 May 2011, the Commission took note of the first report of the Chairman of the Working Group on Reservations to Treaties, in which he presented to the Commission the text of the guidelines constituting the Guide to Practice on Reservations to Treaties (A/CN.4/L.779), as finalized by the Working Group.

9. At its 3099th meeting, on 6 July 2011, the Commission entrusted the Working Group on Reservations to Treaties with the task of finalizing the text of a draft recommendation or conclusions of the Commission on the reservations dialogue contained in the Special Rapporteur's seventeenth report (A/CN.4/647, para. 68). At its 3106th meeting, on 15 July 2011, the Commission also referred to the Working Group a draft recommendation of the Commission on technical assistance and assistance in the settlement

<sup>10</sup> Third report (A/CN.4/491 and Corr.1, Add.1, Add.2 and Corr.1, Add.3, Add.4 and Corr.1, Add.5 and Add.6 and Corr.1); fourth report (A/CN.4/499); fifth report (A/CN.4/508, Add.1–4); sixth report (A/CN.4/518 and Add.1–3); seventh report (A/CN.4/526 and Add.1–3); eighth report (A/CN.4/535 and Add.1); ninth report (A/CN.4/544); tenth report (A/CN.4/558 and Corr.1, Add.1 and Corr.1 and Add.2); eleventh report (A/CN.4/574); twelfth report (A/CN.4/584); thirteenth report (A/CN.4/600); fourteenth report (A/CN.4/614 and Add.1 and 2); fifteenth report (A/CN.4/624 and Add.1 and 2); and sixteenth report (A/CN.4/626 and Add.1).

<sup>11</sup> A/CN.4/586.

<sup>12</sup> A/CN.4/616.

<sup>13</sup> For a detailed historical overview, see *Official Documents of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 257–269.

<sup>14</sup> *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), para. 45.

<sup>15</sup> See paragraph 5 above.

of disputes concerning reservations, as proposed by the Special Rapporteur in the addendum to his seventeenth report (A/CN.4/647/Add.1).

10. At its 3114th meeting, on 28 July 2011, the Commission took note of the second report of the Chairman of the Working Group on Reservations to Treaties and the recommendations of the Working Group with respect to (1) conclusions and a recommendation on the reservations dialogue, intended to appear in an annex to the Guide to Practice on Reservations to Treaties (A/CN.4/L.793), and (2) a draft recommendation of the Commission to the General Assembly on mechanisms of assistance in relation to reservations (A/CN.4/L.795).

11. At its ... meetings, from ... July to ... August 2011, the Commission adopted the guidelines and commentaries constituting the Guide to Practice on Reservations to Treaties, including an introduction to the Guide to Practice and an annex setting out conclusions and recommendation of the Commission on the reservations dialogue.

12. The text of the guidelines constituting the Guide to Practice on Reservations to Treaties is reproduced in section F.1 below; the text of the Guide to Practice including an introduction, commentaries, an annex on the reservations dialogue and a bibliography is reproduced in the continuation of section F.2, contained in an addendum to this report (A/66/10/Add.1).

13. In accordance with its statute, the Commission submits to the General Assembly the Guide to Practice on Reservations to Treaties, together with the recommendation set forth in section C below.

14. The Commission also submits to the General Assembly the recommendation on mechanisms of assistance in relation to reservations set forth in section D below.

## **1. Consideration of the seventeenth report of the Special Rapporteur**

### *(a) Introduction by the Special Rapporteur*

15. The seventeenth report (A/CN.4/647) dealt with the question of the reservations dialogue, while the addendum to it (A/CN.4/647/Add.1) addressed the question of assistance in the resolution of disputes concerning reservations and proposed a draft introduction on how to use the Guide to Practice.

16. The Special Rapporteur recalled that the phrase “reservations dialogue” was not a term of art with a precise meaning but an expression he himself had coined in the addendum to his eighth report (A/CN.4/535/Add.1). The expression “reservations dialogue” alluded to the fact that, independently of the substantive and procedure rules applicable to reservations, contracting States and contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of the reservations or objections to reservations formulated by a contracting State or a contracting organization. Such a dialogue, which could take place before as well as after a reservation was formulated, could take many forms and employ a wide variety of methods. While the normal interplay of objections and acceptances often served to start a reservations dialogue, the practice revealed the existence of *sui generis* reactions to reservations, reactions that constituted neither acceptances nor objections but that could nonetheless be taken into account by the author of the reservation — who might, in some cases, be induced to withdraw its reservation or limit its scope — or by dispute settlement bodies or treaty monitoring bodies. A particular form of reservations dialogue took place under the auspices of treaty monitoring bodies, especially those charged with monitoring the implementation of human rights treaties. The Special Rapporteur stressed that the reservations dialogue offered advantage, notably, that it sought to prevent positions from becoming fixed, to allow the author of the reservation to explain its reasons and to facilitate

better understanding among the parties concerned. The Special Rapporteur therefore thought that the Commission should not only take the practice into account but should encourage it, while taking care not to destroy its spontaneity and effectiveness through a legal formalism that might make it inflexible. That was the purpose of the draft recommendation or conclusions on the reservations dialogue proposed in the seventeenth report,<sup>16</sup> which was intended to encourage States and international organizations to engage

<sup>16</sup> The draft recommendation, contained in paragraph 68 of the seventeenth report (A/CN.4/647), read as follows:

**Draft recommendation or conclusions of the International Law Commission on the reservations dialogue**

*The International Law Commission,*

*Recalling* the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

*Bearing in mind* the need to safeguard the integrity of multilateral treaties while ensuring the universality of those for which universal accession is envisaged,

*Recognizing* the usefulness of reservations to treaties formulated within the limits imposed by the law of treaties, including article 19 of the Vienna Conventions and concerned at the large number of reservations that appear incompatible with these requirements,

*Aware* of the difficulties that States and international organizations face in assessing the validity of reservations,

*Convinced* of the usefulness of a pragmatic dialogue with the author of a reservation and of cooperation among all reservations stakeholders,

*Welcoming* the efforts made in recent years, including within the framework of human rights treaty bodies and certain regional organizations,

1. *Calls upon* States and international organizations wishing to formulate reservations to ensure that they are not incompatible with the object and purpose of the treaty to which they relate, to consider limiting their scope, to formulate them as clearly and concisely as possible, and to review them periodically with a view to withdrawing them if appropriate;

2. *Recommends* that in formulating a reservation, States and international organizations should indicate, to the extent possible, the nature and scope of the reservation, why the reservation is deemed necessary, the effects of the reservation on fulfilment by the author of the reservation of its treaty obligations arising from the instrument in question, and whether it plans to limit the reservation's effects, modify it or withdraw it according to a specific schedule and modalities;

3. *Recommends also* that States and international organizations should state the reason for any modification or withdrawal of a reservation;

4. *Recalls* that States, international organizations and monitoring bodies may express their concerns about a reservation and stresses the usefulness of such reactions for assessment of the validity of a reservation by all the key players;

5. *Encourages* States, international organizations and monitoring bodies to explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, to request any clarification that they deem useful;

6. *Recommends* that States, international organizations and monitoring bodies should, if they deem it useful, call for the full withdrawal of reservations, reconsideration of the need for a reservation and gradual reduction of the scope of a reservation through partial withdrawals, and should encourage States and international organizations that formulate reservations to do so;

7. *Encourages* States and international organizations to welcome the concerns and reactions of other States, international organizations and monitoring bodies and to address

in such a dialogue whenever possible in the manner they deemed appropriate. The Special Rapporteur thought it preferable to address the question of the reservations dialogue, not in the body of the Guide to Practice, but in an annex to the Guide that could take the form of recommendations or conclusions.

17. The Special Rapporteur noted that the reservations dialogue was not always successful and sometimes ended without resolving differences of opinion that could have practical consequences. Nonetheless, it was not appropriate for the Commission to propose a full-fledged dispute settlement mechanism in the context of reservations, in view, among other things, of the flexible nature of the Guide to Practice. The Special Rapporteur thought it preferable that the Commission should suggest a flexible mechanism of assistance in relation to reservations, one that could provide both technical advice and assistance in resolving differences concerning reservations. The main features of such a mechanism were outlined in the draft recommendation on technical assistance and assistance in the settlement of disputes concerning reservations contained in the addendum to the seventeenth report.<sup>17</sup>

---

those concerns and take them duly into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

8. *Calls on* all States, international organizations and monitoring bodies to cooperate as closely as possible in order to exchange views on problematic reservations and to coordinate the measures to be taken; and

9. *Expresses* the hope that States, international organizations and monitoring bodies will initiate, undertake and pursue such dialogue in a pragmatic and transparent manner.

<sup>17</sup> The draft recommendation, contained in paragraph 101 of the addendum (A/CN.4/647/Add.1) read as follows:

**Draft recommendation of the International Law Commission on technical assistance and assistance in the settlement of disputes concerning reservations**

*The International Law Commission,*

*Having completed* preparation of the Guide to Practice on Reservations to Treaties,

*Aware of* the difficulties faced by States and international organizations in the interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,

*Attaching great importance* to the principle that States should resolve their international disputes by peaceful means,

*Convinced* that adoption of the Guide to Practice should be supplemented by the establishment of a flexible assistance mechanism for States and international organizations that face difficulties in implementation of the legal rules applicable to reservations,

1. *Recalls* that States and international organizations that disagree as to the interpretation, permissibility or effects of a reservation or an objection to a reservation must, first of all, as with any international dispute, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice;

2. *Recommends* that a reservations and objections to reservations assistance mechanism should be established; and

3. *Suggests* that this mechanism should take the form described in the annex to this recommendation.

**Annex**

1. A reservations and objections to reservations assistance mechanism is hereby established.

18. The draft introduction to the Guide to Practice, also contained in the addendum to the seventeenth report,<sup>18</sup> was intended to provide clarification as to the content, purposes and structure of the Guide and the legal nature of the rules set out in the guidelines that constituted it.

(b) *Action taken on the seventeenth report*

19. Since the idea of a draft recommendation or conclusions on the reservations dialogue had been favourably received by the Commission members, the Commission instructed the Working Group on Reservations to Treaties to finalize the text in question.<sup>19</sup> The Commission subsequently decided to attach an annex to the Guide to Practice, containing conclusions and a recommendation on the reservations dialogue.<sup>20</sup>

20. Although some members had expressed doubts about the idea of proposing a specific mechanism of assistance in relation to reservations to treaties, the Commission entrusted the Working Group on Reservations to Treaties with the task of considering the draft recommendation on that subject proposed by the Special Rapporteur.<sup>21</sup> The Commission subsequently adopted the recommendation contained in section D below.

21. The proposal of the Special Rapporteur to preface the Guide to Practice with an introduction was favourably received by the Commission.<sup>22</sup>

### C. Recommendation of the Commission concerning the Guide to Practice on Reservations to Treaties

22. At its ... meeting, on ... August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly ...

---

2. The mechanism shall consist of 10 government experts, who shall be selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law.

3. The mechanism shall meet, as needed, to consider problems related to the interpretation, permissibility and effects of reservations, or objections to and acceptances of reservations, that are submitted to it by concerned States and international organizations. To that end, it may suggest that States trust it to find solutions for the resolution of their disputes. States or international organizations that are parties to a dispute concerning a reservation may undertake to accept the mechanism's proposals for its resolution as compulsory.

4. The mechanism may also provide a State or international organization with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States or international organizations.

5. In making such proposals, the mechanism shall take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice.

<sup>18</sup> See paragraph 105 of the addendum (A/CN.4/647/Add.1).

<sup>19</sup> See paragraphs 9 and 10 above.

<sup>20</sup> See paragraph 11 above.

<sup>21</sup> See paragraphs 9 and 10 above.

<sup>22</sup> See paragraph 11 above.

## D. Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties

23. At its ... meeting, held on ... August 2011, the Commission decided to transmit to the General Assembly the following recommendation:

*“The International Law Commission,*

*Having completed the preparation of the Guide to Practice on Reservations to Treaties,*

*Aware of the difficulties faced by States in the formulation, interpretation, assessment of the permissibility, and implementation of reservations and objections thereto,*

*Attaching great importance to the principle that States should engage in the pacific settlement of their international disputes,*

*Considering that the adoption of the Guide to Practice could be supplemented by the establishment of flexible mechanisms to assist States in the implementation of the legal rules applicable to reservations,*

*Suggests that the General Assembly:*

1. Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation;
2. Consider establishing within its Sixth Committee an ‘observatory’ on reservations to treaties, and also recommend that States consider establishing similar ‘observatories’ at the regional and subregional levels.<sup>23</sup>

### Annex

- (i) The reservations and objections to reservations assistance mechanism could consist of a limited number of experts, selected on the basis of their technical competence and their practical experience in public international law and, specifically, treaty law.
- (ii) The mechanism could meet, as needed, to consider problems related to reservations, or objections to and acceptances of reservations, that are submitted to it.
- (iii) The mechanism could make proposals to requesting States in order to settle differences of view concerning reservations. States that have such differences could undertake to accept proposals for their resolution as compulsory.
- (iv) The mechanism could also provide a State with technical assistance in formulating reservations to a treaty or objections to reservations formulated by other States.<sup>24</sup>

<sup>23</sup> Such “observatories” could draw their inspiration from the observatory established within the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI). For more information, see the Council of Europe website ([www.coe.int](http://www.coe.int)).

<sup>24</sup> The experts who would be called to assist States for the settlement of differences of view in accordance with paragraph (iii) should be different from those who would have provided assistance to one of the parties under paragraph (iv).



(v) In making its proposals, the mechanism should take into account the provisions on reservations contained in the 1969, 1978 and 1986 Vienna Conventions on the Law of Treaties and the guidelines contained in the Guide to Practice.”

## **E. Tribute to the Special Rapporteur**

24. At its ... meeting, on ... 2011, the Commission, after adopting the complete Guide to Practice on Reservations to Treaties, adopted the following resolution by acclamation:

*“The International Law Commission,*

*Having adopted the Guide to Practice on Reservations to Treaties,*

*Expresses its deep appreciation and warm congratulations to the Special Rapporteur, Mr. Alain Pellet, for the outstanding contribution he has made to the preparation of the Guide to Practice on Reservations to Treaties through his tireless efforts and devoted work, and has no doubt that the Guide to Practice will be a valuable tool in solving numerous problems posed by reservations to treaties and interpretative declarations.”*

## **F. Text of the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session**

### **1. Text of the guidelines constituting the Guide to Practice**

25. The text of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session is reproduced below.

...

### **2. Text of the Guide to Practice, comprising an introduction, the guidelines and commentaries thereto, an annex on the reservations dialogue and a bibliography**

26. The text of the Guide to Practice on Reservations to Treaties, comprising an introduction, the guidelines and commentaries thereto, and an annex on the reservations dialogue, adopted by the Commission at its sixty-third session, is reproduced in an addendum to the present report (A/66/10/Add.1).

---