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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTY-SECOND SESSION

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CHAPTER VII

RESERVATIONS TO TREATIES

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CHAPTER VII RESERVATIONS TO TREATIES

A. Introduction

1. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic “The law and practice relating to reservations to treaties”.
2. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.¹
3. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.²
4. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission’s consideration of the topic; they related to the title of the topic, which should now read “Reservations to treaties”; the form the results of the study would take which should be 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.³ 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. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.
5. In 1995, the Commission, in accordance with its earlier practice,⁴ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the

¹ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

² A/CN.4/470 and Corr.1.

³ Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

⁴ See Yearbook of the International Law Commission, 1993, vol. II (Part Two), para. 286.

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.⁵

6. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.⁶ The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative 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.⁷ Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

7. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

8. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.⁸

9. 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 International Law Commission of having their views on the preliminary conclusions.

⁵ As of 27 July 2000, 33 States and 24 international organizations had answered the questionnaire.

⁶ A/CN.4/477 and Add.1.

⁷ Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 137.

⁸ Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

10. At its fiftieth session, the Commission had before it the Special Rapporteur's third report on the topic,⁹ which dealt with the definition of reservations and interpretative declarations to treaties. Owing to lack of time, the Commission could not consider the third report in its entirety. It only considered part of it and referred to the Drafting Committee 11 draft guidelines included in the third report: 1.1 (Definition of reservations), 1.1.1 (Joint formulation of a reservation), 1.1.2 (Moment when a reservation is formulated), 1.1.3 (Reservations formulated when notifying territorial application), 1.1.4 (Object of reservations), 1.1.5 (Statements designed to increase the obligations of their author), 1.1.6 (Statements designed to limit the obligations of their author), 1.1.7 (Reservations relating to non-recognition), 1.1.8 (Reservations having territorial scope), 1.2 (Definition of interpretative declarations) and 1.4 (Scope of definitions). Those draft guidelines would be part of the Guide to Practice.

11. On the recommendation of the Drafting Committee, the Commission provisionally adopted at the same session draft guidelines 1.1 (Definition of reservations), 1.1.1 [1.1.4] (Object of reservations), 1.1.2 (Cases in which a reservation may be formulated), 1.1.3 [1.1.8] (Reservations having territorial scope), 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application), 1.1.7 [1.1.1] (Reservations formulated jointly) and a draft guideline with no title or number concerning the relationship between the definition and the permissibility of reservations.¹⁰

12. The Commission also adopted commentaries to the above draft guidelines. Draft guidelines 1.1.5, 1.1.6, 1.1.7 and 1.2 were still before the Drafting Committee, while draft guidelines 1.1.1 and 1.1.3 were provisionally adopted on the understanding that they would be re-examined in the light of the discussion on interpretative declarations and could be reformulated if necessary. Moreover, the guideline with no title or number was provisionally adopted by the Commission on the understanding that the Commission would consider the

⁹ A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Add.2/Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Add.4/Corr.1, Add.5 and Add.6 and Corr.1.

¹⁰ See Report of the International Law Commission on the work of its fiftieth session, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10 (A/53/10), para. 540.

possibility of referring, under a single caveat, both to reservations, which were provisionally the sole object of that guideline, and to interpretative declarations, which, in the view of some members, posed identical problems.

13. At the fifty-first session, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.¹¹ Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,¹² was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. The Commission referred to the Drafting Committee draft guidelines 1.1.9 ("Reservations" to bilateral treaties), 1.2.1 (Joint formulation of interpretative declarations), 1.2.2 (Phrasing and name), 1.2.3 (Formulation of an interpretative declaration when a reservation is prohibited), 1.2.4 (Conditional interpretative declarations), 1.2.5 (General statements of policy), 1.2.6 (Informative declarations), 1.2.7 (Interpretative declarations in respect of bilateral treaties), 1.2.8 (Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party), 1.3.1 (Method of distinguishing between reservations and interpretative declarations) and a revised version of draft guideline 1.7.7 (1.7.7 *bis*)¹³ (Statements of non-recognition), which was already before the Drafting Committee.

14. With regard to draft guidelines 1.3.0, 1.3.0 *bis* and 1.3.0 *ter*, appearing also in the Special Rapporteur's third report and dealing with the distinction between reservations and interpretative declarations, the Special Rapporteur had proposed them only tentatively. His main objective was to determine a series of criteria stemming from the general definition of reservations and interpretative declarations. The Commission was of the view, however, that these criteria were already inherent in the definitions and that these three draft guidelines would merely repeat them or overlap with them without adding a new element. The Commission decided not to refer them to the Drafting Committee, but to reflect their content in the relevant commentaries to draft guidelines on this issue.

¹¹ A/CN.4/499.

¹² A/CN.4/478/Rev.1.

¹³ The text of these draft guidelines can be found in document A/CN.4/491/Add.6.

15. On the recommendation of the Drafting Committee, the Commission adopted on first reading at the same session draft guidelines 1.1.5 [1.1.6]¹⁴ (“Statements purporting to limit the obligations of their author”), 1.1.6 (“Statements purporting to discharge an obligation by equivalent means”), 1.2 (“Definition of interpretative declarations”), 1.2.1 [1.2.4] (“Conditional interpretative declarations”), 1.2.2 [1.2.1] (“Interpretative declarations formulated jointly”), 1.3 (“Distinction between reservations and interpretative declarations”), 1.3.2 [1.2.2] (“Phrasing and name”), 1.3.3 [1.2.3] (“Formulation of a unilateral statement when a reservation is prohibited”), 1.4 (“Unilateral statements other than reservations and interpretative declarations”), 1.4.1 [1.1.5] (“Statements purporting to undertake unilateral commitments”), 1.4.2 [1.1.6] (“Unilateral statements purporting to add further elements to a treaty”), 1.4.3 [1.1.7] (“Statements of non-recognition”), 1.4.4 [1.2.5] (“General statements of policy”), 1.4.5 [1.2.6] (“Statements concerning modalities of implementation of a treaty at the internal level”), 1.5.1 [1.1.9] (“Reservations to bilateral treaties”), 1.5.2 [1.2.7] (“Interpretative declarations in respect of bilateral treaties”) and 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”) and the commentaries thereto. Moreover, in the light of the consideration of interpretative declarations, it adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

B. Consideration of the topic at the present session

16. At the present session, the Commission had before it the Special Rapporteur’s fifth report on the topic¹⁵ relating to alternatives to reservations and interpretative declarations and to the formulation, modification and withdrawal of reservations and interpretative declarations. It considered the report at its 2630th, 2631st, 2632nd, 2633rd, ... meetings, held on 31 May, 2, 6, 7 June, ... [and 8 and 9 August] 2000.

17. At its 2632nd and 2633rd [and ...] meetings, the Commission decided to refer to the Drafting Committee draft guidelines 1.1.8 (Reservations formulated under exclusionary clauses), 1.4.6 (Unilateral statements adopted under an optional clause), 1.4.7 (Restrictions contained in unilateral statements adopted under an optional clause), 1.4.8 (Unilateral statements providing

¹⁴ The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

¹⁵ A/CN.4/508 and Add.1-4.

for a choice between the provisions of a treaty), 1.7.1 (Alternatives to reservations), 1.7.2 (Different procedures permitting modification of the effects of the provisions of a treaty), 1.7.3 (Restrictive clauses), 1.7.4 ([“Bilateralized reservations”] [“Agreements between States having the same object as reservations”]), 1.7.5 (Alternatives to interpretative declarations)¹⁶ [and ...].

18. At its 2640th meeting, held on 14 July 2000, the Commission considered and adopted on first reading draft guidelines 1.1.8 [1.1.8] (Reservations made under exclusionary clauses), 1.4.6 [1.4.6, 1.4.7] (Unilateral statements made under an optional clause), 1.4.7 [1.4.8] (Unilateral statements providing for a choice between the provisions of a treaty), 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] (Alternatives to reservations) and 1.7.2 [1.7.5] (Alternatives to interpretative declarations). The text of these draft guidelines with the commentaries thereto is reproduced below in section C.

(The end of section “B. Consideration of the topic at the present session” will appear as document A/CN.4/L.596/Add.1).

¹⁶ The text of these draft guidelines can be found in document A/CN.4/508/Add.1 and Add.2.