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**First report on the law and practice relating to reservations to treaties, by Mr. Alain Pellet,
Special Rapporteur**

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THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

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General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	United Nations, <i>Treaty Series</i> , vol. 55, p. 187.
Convention establishing the Inter-Governmental Maritime Consultative Organization (Geneva, 6 March 1948)	<i>Ibid.</i> , vol. 289, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, p. 221.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	<i>Ibid.</i> , vol. 606, p. 267.
Single Convention on Narcotic Drugs (New York, 30 March 1961)	<i>Ibid.</i> , vol. 520, p. 151.
Protocol amending the Single Convention on Narcotic Drugs of 1961 (Geneva, 25 March 1972)	<i>Ibid.</i> , vol. 976, p. 3.
International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vols. 993, p. 3, and 999, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) [hereinafter called the 1969 Vienna Convention]	<i>Ibid.</i> , vol. 1155, p. 331.
American Convention on Human Rights (San José, Costa Rica, 22 November 1969)	<i>Ibid.</i> , vol. 1144, p. 123.

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Introduction

1. At the forty-fourth session of the Commission, in 1992, the Planning Group of the Enlarged Bureau established a working group to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission.¹ These included the law and practice relating to reservations to treaties, which had been suggested as a possible topic by various delegations at the forty-sixth session of the Assembly.²

2. This topic, which had aroused special interest among the members of the Commission,³ formed the subject, in accordance with the procedure fixed by the Commission on the recommendation of the Planning Group,⁴ of an explanatory outline indicating: (a) the major issues raised by the topic; (b) any applicable treaties, general principles and relevant national legislation or judicial decisions; (c) existing doctrine; and (d) the advantages and disadvantages of preparing a report, a study or a draft convention, if the Commission decided to proceed with the topic.⁵

3. After considering the outline, the working group established by the Planning Group recommended the inclusion in the agenda of the Commission of the topic entitled "The law and practice relating to reservations to treaties". For reasons that will be discussed below, the Commission adopted this recommendation at its forty-fifth session and decided that, subject to approval by the General Assembly, the topic would be included in the agenda.⁶

4. In the debate in the Sixth Committee of the General Assembly at its forty-eighth session, the ILC decision to

include the topic in its agenda was generally endorsed. It was pointed out that the topic had the merit of precision, responding to clear, current needs of the international community and offering ILC an opportunity to make a direct contribution, on a realistic timescale, to the formation and development of State practice.⁷

5. Accordingly, in resolution 48/31 of 9 December 1993, the General Assembly endorsed the ILC decision to include in its agenda the topic of "The law and practice relating to reservations to treaties", "on the understanding that the final form to be given to the work on [this topic] shall be decided after a preliminary study is presented to the General Assembly".

6. At its forty-sixth session, the Commission appointed the Special Rapporteur for this topic.⁸

7. The present report has no doctrinal pretensions, in that it endeavours to enumerate the main problems raised by the topic, without in any way prejudging the possible response of the Commission regarding their substance. On the other hand, in keeping with the General Assembly's wish to have a preliminary study to determine "the final form to be given to the work" on this topic, it has been deemed advisable to submit to the Commission comparatively precise proposals in this regard. Furthermore, as the topic has already been taken up on a number of occasions by the Commission in connection with earlier, more general studies, this report tries to give an overview of that work and to suggest solutions that will not jeopardize earlier advances yet will allow for the codification and progressive development of the law on reservations to treaties. To this end, it will consist of three chapters dealing with the previous work of the Commission on reservations (chap. I), the problems left in abeyance (chap. II) and the possible forms of the results of the work of the Commission on the topic (chap. III).

¹ See *Yearbook ... 1992*, vol. II (Part Two), p. 54, para. 368.

² See A/CN.4/L.469, para. 422.

³ See A/CN.4/L.473/Rev.1, para. 23.

⁴ See *Yearbook ... 1992*, vol. II (Part Two), p. 54, para. 369.

⁵ See *Yearbook ... 1993*, vol. II (Part One), pp. 228–237, document A/CN.4/454.

⁶ *Ibid.*, vol. II (Part Two), pp. 96–97, paras. 427–430 and 440.

⁷ See A/CN.4/457, para. 433.

⁸ *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

CHAPTER I

The previous work of the Commission on reservations and the outcome

8. Three topics considered by the Commission since its inception have caused it to study, from different standpoints, the question of reservations to treaties. It has done so in the context of the codification of:

(a) The law of treaties;

(b) Succession of States in respect of treaties;

(c) The question of treaties concluded between States and international organizations or between two or more international organizations.

9. These three topics led to the adoption by diplomatic conferences of three conventions, the Vienna Convention on the Law of Treaties (hereinafter called the 1969 Vienna Convention), the Vienna Convention on Succession of States in respect of Treaties (hereinafter called the 1978 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter called the 1986 Vienna Convention). All three instruments contain provisions on reservations.

A. The law of treaties

10. The Special Rapporteurs of the Commission on the topic of the law of treaties, Mr. James L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, engaged in a study of the question of reservations to treaties. All of them laid special emphasis on the problem of the admissibility of reservations.

11. A turning point came, however, in the position of the Commission on this point in 1962, following the first report by Sir Humphrey Waldock;⁹ from then on, the Commission gave up the rule of unanimity it had advocated thus far and favoured the flexible system adopted by ICJ in its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁰

1. THE WORK OF THE COMMISSION FROM 1950 TO 1961

(a) *Consideration of the reports of Mr. James L. Brierly (1950–1951)*

12. In his first report on the law of treaties, submitted to the Commission at its second session, in 1950, the first Special Rapporteur on this topic, Mr. Brierly, briefly took up the question of reservations and was very clearly in favour of the unanimity rule, which was formulated in draft article 10, paragraph 3, proposed to the Commission, in the following terms:

The acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.¹¹

13. This principle was adopted with virtually no discussion by the Commission, which, in its report to the General Assembly on its second session, said that:

... a reservation requires the consent at least of all parties to become effective. But the application of these principles in detail to the great variety of situations which may arise in the making of multilateral treaties was felt to require further consideration.¹²

14. The problem resurfaced, however, in the same year. Following the debate in the Sixth Committee of the General Assembly on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, on 16 November 1950, the Assembly adopted resolution 478 (V) in which it requested an advisory opinion by ICJ on the matter and it also invited ILC:

(a) In the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee.

15. Further to this request, the Commission had before it, at its third session, a report by the Special Rapporteur,¹³ and two memorandums, submitted by Messrs Gilberto Amado and Georges Scelle.¹⁴

16. In his report, the Special Rapporteur argued that:

... In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. One of the ways in which international law is developed is by a consistent rule of general application being laid down in multilateral (or what amounts in practice to the same thing, a succession of closely similar bilateral) conventions. An example of this may be seen in the rule, now fairly generally accepted, and yet of entirely conventional origin, that *consuls de carrière* possess certain personal immunities, though under customary international law they originally possessed none. Frequent or numerous reservations by States to multilateral conventions of international concern hinder the development of international law by preventing the growth of a consistent rule of general application.

... Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. It may be assumed, from the very fact that they are multilateral, that the subjects with which they deal are of international concern, i.e., matters which are not only susceptible of international regulation but regarding which it is desirable to reform or amend existing law. If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible. An example of this may be seen in the Red Cross Convention of 1949 signed by some 60 States. These are Conventions to which it is clearly desirable to have as many ratifications as possible.¹⁵

17. The Special Rapporteur concluded that the best solution would be to include express provisions tailored to the different types of treaty, some examples of which he gave in annex E of his report.¹³ He also thought it necessary to envisage the possibility that States would not follow this recommendation and to give guidance to the depositary if the treaty was silent on that point; however, having noted that the opinions of writers were far from unanimous and the practice far from homogeneous,¹⁶ he thought that the drafting should wait

⁹ See *Yearbook ... 1962*, vol. II, pp. 31–35, 60–68 and 73–80, document A/CN.4/144, arts. 1 (I) and 17–19, and appendix (Historical summary of the question of reservations to multilateral conventions). A fundamental change in the Commission's approach to reservations was noted by Sinclair in *The Vienna Convention on the Law of Treaties*, pp. 58–61.

¹⁰ *I.C.J. Reports 1951*, p. 15.

¹¹ *Yearbook ... 1950*, vol. II, pp. 238–242, document A/CN.4/23, in particular p. 240.

¹² *Ibid.*, p. 381, document A/1316, para. 164.

¹³ *Yearbook ... 1951*, vol. II, p. 1, document A/CN.4/41. The report had five annexes (A. Summary of debates in the Sixth Committee of the General Assembly; B. Opinions of writers; C. Examples of clauses in conventions regarding reservations; D. Practice with regard to reservations; E. Draft articles on reservations).

¹⁴ *Ibid.*, pp. 17 and 23 respectively, documents A/CN.4/L.9 and A/CN.4/L.14.

¹⁵ *Ibid.*, pp. 3–4, document A/CN.4/41, paras. 11–12.

¹⁶ *Ibid.*, pp. 2–4, paras. 8–11.

for the advisory opinion of ICJ requested by the General Assembly.

18. The Court rendered its opinion on 28 May 1951¹⁰ and the discussion in the Commission focused basically on this opinion, which Mr. Scelle had vigorously criticized in his memorandum¹⁴ which found hardly any support among the other members of the Commission during the discussions.

19. In its report on the work of its third session, the Commission noted that:

the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose.¹⁷

The Commission declared itself

... impressed with the complexity of the task which he [the Secretary-General] would be required to discharge if reserving States can become parties to multilateral conventions despite the objections of some of the parties to their reservations.¹⁸

20. While noting that “multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory”,¹⁹ the Commission nevertheless suggested that:

in the absence of contrary provisions in any multilateral convention and of any organizational procedure applicable, the following practice should be adopted with regard to reservations to multilateral conventions, especially those of which the Secretary-General of the United Nations is the depositary:

(1) The depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention.

(2) The depositary of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a State fails to make its attitude towards the reservation known to the depositary, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depositary of a multilateral convention should communicate all replies to its communications, in respect of any reservation to the convention, to all States which are or which are entitled to become parties to the convention.

¹⁷ *Yearbook ... 1951*, vol. II (A/1858), p. 128, para. 24. It can be noted that in general terms the majority position in the Commission at that time was broadly the same as the position stated in the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo attached to the ICJ advisory opinion of 28 May 1951 (*I.C.J. Reports 1951*, pp. 31–48).

¹⁸ *Yearbook ... 1951*, vol. II (A/1858), p. 129, para. 25.

¹⁹ *Ibid.*, para. 28.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force,

(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed, or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.²⁰

21. After lengthy debate, the Sixth Committee of the General Assembly adopted by a narrow majority the text that was to become resolution 598 (VI) of 12 January 1952.²¹ In paragraph 3, the General Assembly:

Requests the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the [International] Court [of Justice] of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

22. This “non-decision” was poorly received by writers on law,²² but it nevertheless constituted the guidance followed by the Secretary-General in his practice as

²⁰ *Ibid.*, pp. 130–131, para. 34.

²¹ Adopted by 23 votes to 18, with 7 abstentions. For the debate, see *Official Records of the General Assembly, Sixth Session, Sixth Committee*, 264th–278th meetings, and *ibid.*, *Annexes*, agenda item 49, pp. 8–11, document A/2047.

²² See in particular Fenwick, “When is a treaty not a treaty?”, especially p. 296: “The decision of the General Assembly of the United Nations on 12 January in the matter of reservations to multilateral treaties cannot be said to have clarified the situation. Rather it would seem only to have added to the confusion and left us with a rule which is no rule at all.”

depository²³ until 1959, when the problem resurfaced in connection with the declaration made by India on the occasion of the deposit of its instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization.²⁴ Once again, the debates were inconclusive and their only concrete consequence was the invitation to the Secretary-General, in General Assembly resolution 1452 B (XIV) of 7 December 1959, to apply the above-mentioned paragraph 3 (b) of resolution 598 (VI) to all the agreements of which he was the depository, which did not contain provisions to the contrary, even if they had been concluded before 1952.

(b) *The reports of Sir Hersch Lauterpacht (1953–1954)*

23. The position taken by the Commission in 1951 was to have a powerful influence on its work on reservations to treaties in subsequent years.

24. In his first report on the law of treaties (1953), Sir Hersch Lauterpacht, who had succeeded Mr. Brierly as Special Rapporteur, took up the problem of reservations once again. He proceeded in a rather unusual manner by proposing a draft article *de lege lata*, but matching it with four alternative proposals *de lege ferenda*, which gave the impression that the Special Rapporteur thought that the existing laws were not satisfactory and that he hoped to have them modified by persuading the Commission to engage in the progressive development of international law.²⁵

25. Draft article 9 stated the principle of unanimity very clearly:

A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty.²⁶

According to the Special Rapporteur,

...

article 9 as here drafted must be regarded as probably still representing the existing law.

...

However, although nothing decisive has occurred to dislodge the principle of unanimous consent as a rule of existing international law,

the Commission, for reasons stated in the comment which follows, is not now of the view that it constitutes a satisfactory rule and that it can—or ought to—be maintained.²⁷

26. From that time on, the four alternative proposals weakened the rigour of the principle. The “principal considerations underlying the alternative drafts” were presented by the Special Rapporteur in the following way:

A. It is desirable to recognize the right of States to append reservations to a treaty and become at the same time parties to it provided these reservations are not of such a nature to meet with disapproval on the part of a substantial number of the States which finally accept the obligations of the treaty;

B. It is not feasible or consistent with principle to recognize an unlimited right of any State to become a party to a treaty while appending reservations however sweeping, arbitrary, or destructive of the reasonably conceived purpose of the treaty and of the legitimate interests and expectations of the other parties;

C. The requirement of unanimous consent of all parties to the treaty as a condition of participation in the treaty of a State appending reservations is contrary to the necessities and flexibility of international intercourse.²⁸

27. There is no need to go into the details of each of these alternatives—some of which proposed bold solutions.²⁹ As Ruda pointed out, “The main characteristics of these Alternatives is that they were offered as new proposals, as a compromise between the unanimity rule and the principle of a sovereign right to formulate reservations. They had the flexibility of the Pan-American rules, but they provided more guarantees against the abuse on making reservations. ... The impact of the new realities of international life and the Advisory Opinion of the International Court of Justice had begun to shake the basis of a well-established rule of international law”.³⁰

28. Apart from one small change to the draft article *de lege lata*, the Special Rapporteur repeated his 1953 proposals in 1954.³¹ In his second report on the law of treaties, he argued forcefully in favour of a progressive development of the existing rules and commented, not without malice:

It is a matter for reflection that while the International Court of Justice, whose function is to *apply* existing law, in its advisory opinion on the question of Reservations to the Convention on Genocide, devoted itself mainly to the *development* of the law in this sphere by laying down the novel principle of compatibility of reservations with the purpose of the treaty, the International Law Commission whose task is both to codify and develop international law, limited itself substantially to a statement of existing law.³²

²³ See “Summary of Practice of the Secretary-General as Depository of Multilateral Treaties” (ST/LEG/7), particularly p. 39, para. 80.

²⁴ On this problem, see, *inter alia*, the report of the Secretary-General to the fourteenth session of the General Assembly (*Official Records of the General Assembly, Fourteenth Session, Annexes*, pp. 2 *et seq.*, document A/4235), the records of the debates of the Sixth Committee at the fourteenth session of the Assembly (*ibid.*, *Fourteenth Session, Sixth Committee*, 614th–629th meetings), and the report of the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (document A/5687). See also Schachter, “The question of treaty reservations at the 1959 General Assembly”.

²⁵ *Yearbook ... 1953*, vol. II, pp. 91 and 123–136, document A/CN.4/63. It must be pointed out that, since the Commission did not state a view, the report reflects the views of the Special Rapporteur alone.

²⁶ *Ibid.*, p. 91.

²⁷ *Ibid.*, pp. 123–124.

²⁸ *Ibid.*, p. 125.

²⁹ Such as the solution of entrusting the Chamber of Summary Procedure of ICJ with responsibility for ruling on the admissibility of reservations (alternative D) (*ibid.*, p. 134).

³⁰ Ruda, “Reservations to treaties”, p. 158.

³¹ See *Yearbook ... 1954*, vol. II, pp. 131–133, document A/CN.4/87. The Special Rapporteur proposed that the words “Unless otherwise provided by the treaty,” should precede the text of draft article 9 (para. 25 above).

³² *Ibid.*, p. 131, para. 3.

29. Moreover, the Special Rapporteur drew attention to the current discussions about reservations to the future international covenant on human rights and, in particular, to the British proposal which drew extensively on the deliberations of Sir Gerald Fitzmaurice—who would succeed Sir Hersch Lauterpacht the following year following his election to ICJ—in an article published in 1953.³³

(c) *The first report of Sir Gerald Fitzmaurice (1956)*

30. Since, for lack of time, the reports of Sir Hersch Lauterpacht were not discussed by the Commission, the new Special Rapporteur, Sir Gerald Fitzmaurice, in his first report on the law of treaties, drafted in 1956, once again took up the question of reservations, which was the subject of articles 37 to 40 of the code which he proposed should be adopted.³⁴

31. The Special Rapporteur's proposals, which drew extensively on the article cited above (para. 29), to which it referred explicitly, did not depart very far in their general spirit from those of his predecessor. Like him, he started from the principle of unanimity, which he applied strictly to bilateral and "plurilateral" treaties,³⁵ but he too tried to weaken the rigour of the principle by taking a relatively timid line in that respect, for the system which he proposed rested on an entirely consensual basis: in cases where the treaty is silent, a reservation has effect only in the following cases:

(a) If the intention to make it was stated during the negotiation of the treaty without meeting with any objection; or

(b) If the States concerned,³⁶ to which the reservation must be communicated, do not raise any objection.

But if "a reservation meets with objection, ... the reserving State ... cannot become ... a party ... unless the reservation is withdrawn".³⁷

32. The Special Rapporteur also tried to provide a rigorous definition of the notion of reservation:

Only those reservations which involve a derogation of some kind from the substantive provisions of the treaty concerned are properly to be regarded as such, and the term reservation herein is to be understood as limited in that sense.³⁸

33. The provisions concerning reservations proposed in the Special Rapporteur's first report were not considered by the Commission and he did not have an opportunity to return to them subsequently before his election to ICJ in 1961.

2. THE WORK OF THE COMMISSION
FROM 1962 TO 1965

34. The first report of Sir Gerald Fitzmaurice constitutes the swansong of the principle of unanimity, which was abandoned by the Commission following the reports of his successor as Special Rapporteur, Sir Humphrey Waldock.

(a) *Consideration of the first report of Sir Humphrey Waldock (1962)*

35. The first report by Sir Humphrey Waldock deals with the conclusion, entry into force and registration of treaties and includes copious developments with respect to the commentaries to the three draft articles relating to reservations.³⁹ In addition, in draft article 1, paragraph 1, the Special Rapporteur proposed a definition of the word "reservation" which he characterized—in contrast to "[a]n explanatory statement or statement of intention or of understanding"—by the fact that it "will vary the legal effect of the treaty in its application between [the State making the reservation] and the other party or parties to the treaty".

36. Taking up the distinction, already drawn by Sir Gerald Fitzmaurice,⁴⁰ between bilateral and plurilateral treaties⁴¹ on the one hand and multilateral treaties on the other, the Special Rapporteur focuses his attention on reservations to the latter category of instruments and comes out firmly in favour of a "flexible" system, adducing, *inter alia*, the following arguments³⁹:

(a) The proposals formulated by the Commission in 1951, which differed from the opinion of ICJ delivered that same year,¹⁰ did not commend themselves to a majority of States in the General Assembly;

(b) The international community itself has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable;

³³ Fitzmaurice, "Reservations to multilateral conventions".

³⁴ *Yearbook ... 1956*, vol. II, pp. 115–116 and 126–127, document A/CN.4/101.

³⁵ Article 38, *ibid.*, pp. 115 and 127. The Special Rapporteur defines plurilateral treaties as treaties "made between a limited number of States for purposes specially interesting those States".

³⁶ This notion was subjected to quite complicated tinkering.

³⁷ Article 39, para. 3 (footnote 34 above), pp. 115 and 127.

³⁸ Article 37, para. 1 (*ibid.*, p. 115); see also article 13 (*l*) (*ibid.*, p. 109).

³⁹ See the draft articles and commentaries presented by the Special Rapporteur (*Yearbook ... 1962*, vol. II, pp. 60–68, document A/CN.4/144, articles 17 ("Power to formulate and withdraw reservations"), 18 ("Consent to reservations and its effects") and 19 ("Objection to reservations and its effects"); see also the "Historical summary of the question of reservations to multilateral conventions" (*ibid.*, appendix, pp. 73–80).

⁴⁰ See paragraph 31 and footnote 35 above.

⁴¹ Which, according to the Special Rapporteur, pose no particular problems: reservations to those categories of agreements must, in principle, be accepted by the other party or parties.

(c) Since the adoption of General Assembly resolution 598 (VI) (see para. 21 above), the system which has been in operation de facto for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the “flexible” system advocated by the larger of the two main groups of States in the General Assembly in 1951;

(d) The essential interests of each individual State are safeguarded by a flexible system, as, through an objection to a reservation, the objecting State may prevent the treaty from entering into force between itself and the reserving State and as States which have accepted the reservation are not bound to the reserving State by the provision to which the reservation applies;

(e) Such a system should have no sensible effect on the drafting of multilateral treaties, the text of which would, in any case, require the approval of a two-thirds majority of the negotiating States;

(f) The integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States, if only because of the threat of objections by the other States;

(g) Furthermore, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved may be the one most suited to the immediate needs of the international community.

37. Taking those premises as his starting point, the Special Rapporteur proposed a system which differed in many respects from those envisaged by his predecessors.

38. He started from the principle that, unless expressly or implicitly forbidden by the treaty itself, “A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate⁴² a reservation ...”,⁴³ provided that it “shall have regard to the compatibility of the reservation with the object and purpose of the treaty”.⁴⁴

39. The Special Rapporteur thus referred, for the first time in the Commission, to the criterion adopted by ICJ in 1951 and rejected by the Commission that same year. However, although also of the opinion “that there is value in the Court’s principle as a general concept”, the Special Rapporteur expressed his doubts as to that highly subjective concept and refused to use it “as a *criterion* of a reserving State’s status as a party to a treaty in combination with the objective criterion of the acceptance or

rejection of the reservation by other States”.⁴⁵ Consequently, draft article 18 provided that:

1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent ...³⁹

In paragraph 3 (b) the same article stated that that presumption could result from the silence of States which are, or are entitled to become, parties to the treaty, for a period of 12 months.

40. The most original feature of Sir Humphrey Waldock’s draft was not, however, that presumption.⁴⁶ Rather, it concerned the effects resulting from the acceptance, express or implied, of a reservation, since, according to draft article 18, paragraph 4 (b) (ii):

The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.⁴⁷

41. Conversely, if an objection to a reservation causes a bilateral treaty to “fall to the ground” and excludes the participation of the State that has formulated the reservation to a bilateral treaty, according to draft article 19, paragraph 4 (c):³⁹

In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation.

42. The debate in the Commission revealed profound divisions among its members; nevertheless, a majority concluded that

in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a “collegiate” system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.⁴⁸

43. As to the detail, however, the Special Rapporteur’s proposals have been substantially transformed by the Commission:

(a) The distinction between “plurilateral” treaties, multilateral treaties not of a general character and general multilateral treaties has been abandoned. The rules pro-

⁴² The Special Rapporteur rightly points out that “there is an inherent ambiguity in saying ... that a State may ‘make’ a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively ‘made’ unless and until it has been assented to by the other interested States” (draft art. 9 (footnote 39 above), p. 62, Commentary, para. (1)).

⁴³ Draft article 17, para. 1 (a) (footnote 39 above), p. 60.

⁴⁴ *Ibid.*, para. 2 (a), p. 60.

⁴⁵ *Ibid.*, p. 66, Commentary, para. (10).

⁴⁶ The two previous Special Rapporteurs had proposed shorter periods, of three months.

⁴⁷ This rule was to be applicable only in the absence of contrary rules provided in the treaty itself and, for the constituent instruments of international organizations, subject to the consent of the competent organ.

⁴⁸ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14).

posed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained;⁴⁸

(b) The draft articles adopted by the Commission⁴⁹ no longer cover reservations to a bilateral treaty, which “presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty”;⁵⁰

(c) Some minor drafting changes, generally with a view to simplification, were made to the draft articles proposed by the Special Rapporteur;

(d) Instead of three, these draft articles became five, devoted respectively to Formulation of reservations (art. 18), Acceptance of and objection to reservations (art. 19), The effect of reservations (art. 20), The application of reservations (art. 21) and The withdrawal of reservations (art. 22).⁵¹

44. However, the main change introduced by the Commission to the system proposed by the Special Rapporteur is the link established by article 20, paragraph 2 (b), between the principle of compatibility with the object and purpose of the treaty—thereby elevated to the rank of a true “criterion” (see para. 39 above)—and the effect of objections to reservations, since

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.⁵⁰

45. The purely consensual system adopted by the Special Rapporteur was thus altered by the inclusion of an eminently subjective criterion, without the respective roles of the one and the other being clearly defined and with the Commission itself acknowledging, in its commentary on article 20, that

The criterion of “compatibility with the object and purpose of the treaty” ... is to some extent a matter of subjective appreciation; and

...

This necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty.⁵²

This ambiguity, which has never been completely removed, gave rise to many discussions subsequently and to a number of difficulties, but it no doubt enabled the

⁴⁸ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14).

⁴⁹ For the text of the draft articles on the law of treaties, as adopted by the Commission, see *Yearbook ... 1966*, vol. II, pp. 177–188, document A/6309/Rev.1.

⁵⁰ *Yearbook ... 1962*, vol. II, p. 177, document A/5209, para. 23, Draft articles, arts. 18–20, Commentary, para. (1).

⁵¹ For articles 18–20, *ibid.*, pp. 175–176 and for articles 21–22, *ibid.*, p. 181.

⁵² *Ibid.*, p. 181, Commentary to article 20, para. (22).

system to be adopted and is even perhaps the explanation for its relative success.

46. Despite this ambiguity—or perhaps, because of it!—the draft of the Commission was favourably received during the debates in the General Assembly.⁵³ Bolstered by that broad majority support, the “flexible” system had then supplanted the “traditional” system; it would no longer be called into question in the future.

(b) *The adoption of the draft articles on the law of treaties (1965–1966)*

47. In 1965, Sir Humphrey Waldock submitted to the Commission his fourth report on the law of treaties,⁵⁴ in which he proposed a revision of the draft articles to take account of the comments of Governments. In addition to that report, the Commission had before it the following documents: “Resolutions of the General Assembly concerning the law of treaties: note prepared by the Secretariat”⁵⁵ and “Depositary practice in relation to reservations: report of the Secretary-General”.⁵⁶

48. The fourth report of the Special Rapporteur dealt, *inter alia*, with the provisions relating to reservations,⁵⁷ to which it proposed certain amendments, in line with the wishes of some States.

49. The Special Rapporteur was receptive to a criticism by the Danish Government⁵⁸ about the general structure of the draft articles relating to reservations, regarded as unnecessarily complicated and liable to cause confusion, particularly inasmuch as it might give the impression that the procedure for implied acceptance of reservations (see para. 39 above) might be applicable to reservations prohibited by the treaty. Consequently, the title and the contents of the first three articles were changed (see para. 43 above) so as clearly to distinguish cases of “treaties permitting or prohibiting reservations” (art. 18) from those “silent concerning reservations” (art. 19), with article 20 on the “procedure regarding reservations” and the titles of articles 21 (The application of reservations) and 22 (The withdrawal of reservations) remaining unchanged.

⁵³ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 736th–744th meetings*, and *ibid.*, *Annexes*, agenda item 76, document A/5287, p. 14, para. 24.

⁵⁴ *Yearbook ... 1965*, vol. II, p. 3, document A/CN.4/177 and Add.1 and 2.

⁵⁵ *Yearbook ... 1963*, vol. II, pp. 18–28, document A/CN.4/154, paras. 106–124.

⁵⁶ *Yearbook ... 1965*, vol. II, pp. 74 *et seq.*, document A/5687. See in particular pp. 103–107, annexes I (Questionnaire annexed to the Secretary-General’s letter of 25 July 1962 with respect to depositary practice in relation to reservations in accordance with General Assembly resolution 1452 B (XIV), II (Examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations) and III (General Assembly resolutions governing the practice of the Secretary-General in respect of reservations).

⁵⁷ *Ibid.*, document A/CN.4/177 and Add.1 and 2, p. 15 (art. 1, para. 1 (f)) and pp. 45–56 (arts. 18–22).

⁵⁸ *Ibid.*, pp. 46 and 50.

50. Albeit with some nuances, it is certain that, on the whole, Governments approved of the “flexible” system adopted by the Commission in 1962 and the Special Rapporteur was certainly justified in considering that:

Although they criticize certain aspects of the Commission’s proposals, the comments of Governments, taken as a whole, appear ... to endorse the Commission’s decision to try to work out a solution of the problem of reservations to multilateral treaties on the basis of the flexible system followed in the existing texts of articles 18-20.⁵⁹

51. It is no less clear that Governments showed themselves perplexed about the exact role of the criterion of compatibility of the reservation with the purpose and object of the treaty in the globally consensual mechanism retained by the Commission (see para. 45 above). Their comments were, however, the result of greatly differing considerations which often led them to opposite conclusions:

(a) In the view of some, this criterion might lead to an abusive restriction of the right to formulate reservations;⁶⁰

(b) Others considered it too vague⁶¹ or unnecessary;⁶²

(c) Others again considered that it should be strengthened and, if possible, “objectivized”.⁶³

52. Faced with these differences of opinion, the Special Rapporteur firmly maintained the principle adopted by the Commission, pointing out, in the first place, that a reservation incompatible with the purpose and object of the treaty would be contrary to the principle of good faith and, in the second place, that it seemed very unlikely that that criterion would exercise a material influence in inhibiting participation in multilateral treaties.⁶⁴ He therefore proposed a new wording for draft article 19, paragraph 1, which merely positively reaffirmed the principle stated in 1962:

Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty ...⁶⁵

However, this express limitation on the right to formulate reservations is not expressly referred to in draft article 19, paragraph 4, which deals with the effect of acceptance or objection and, according to the Special Rapporteur, this means that “incompatible” reservations are

prohibited, whereas “compatible” reservations may be the subject of objections.⁶⁶

53. Paragraph 4 of the new draft article proposed by the Special Rapporteur thus read:

...

(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.⁶⁵

54. The other changes proposed by the Special Rapporteur were relatively minor:

(a) Unanimous acceptance by the parties is required when it “appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty”;⁶⁷

(b) The obligation to raise an objection to a reservation within a period of 12 months is limited to States parties only;⁶⁸

(c) Several procedural or drafting simplifications were introduced.

55. However, the Special Rapporteur rejected the suggestion by the Japanese⁶⁹ and British⁷⁰ Governments that he should include a provision clearly drawing a distinction between a reservation and an interpretative declaration, stating that declarations “are not reservations and appear to concern the interpretation rather than the conclusion of treaties”.⁵⁹ Although some members raised that point again during the discussions of the Commission,⁷¹ he subsequently maintained his position.⁷² In its commentary to the final version of article 2, however, the Commission explained that a “declaration” made by a State when it signed, ratified, accepted, approved or acceded to a treaty “may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted”.⁷³

⁶⁶ This emerges in particular from paragraph 10 of the commentary to article 19 (*ibid.*, p. 52), the meaning of which is not, however, absolutely clear and was not elucidated during the debates.

⁶⁷ Article 19, para. 2 (*ibid.*, p. 54).

⁶⁸ Article 20, para. 4 (*ibid.*).

⁶⁹ *Ibid.*, p. 49 and document A/CN.4/175 and Add.1-4.

⁷⁰ *Ibid.*, p. 49.

⁷¹ See, for example, the statements by Messrs Verdross and Ago, *Yearbook ... 1965*, vol. I, 797th and 798th meetings, pp. 151-152, paras. 36-44, and pp. 161-162, paras. 68-76, respectively.

⁷² *Ibid.*, 799th meeting, p. 165, paras. 11-19.

⁷³ *Yearbook ... 1966*, vol. II, pp. 189-190, document A/6309/Rev.1, Commentary to draft article 2, para. (11).

⁵⁹ *Ibid.*, p. 50.

⁶⁰ *Ibid.*, p. 47 (Poland).

⁶¹ *Ibid.*, p. 46 (Denmark).

⁶² *Ibid.*, p. 48 (Argentina).

⁶³ *Ibid.*, pp. 46-48 (Canada, the United Kingdom of Great Britain and Northern Ireland and the United States of America).

⁶⁴ *Ibid.*, p. 51.

⁶⁵ *Ibid.*, p. 54.

56. Subject to last-minute drafting amendments in 1966,⁷⁴ the final text of the articles on reservations⁷⁵ was provisionally adopted in 1965,⁷⁶ although the final commentary was published only the following year with the draft articles as a whole.⁷⁷ The Commission did not discuss the structure of the draft again and the “flexible” system adopted in 1962 was not questioned. Following lengthy and difficult discussions, however, major changes were made to the new proposals by the Special Rapporteur.

57. The most important changes are the following:

(a) Draft article 16, now restricted to the “formulation of reservations”, makes compatibility with the object and purpose of the treaty one of the general conditions to which the right to formulate a reservation is subject,⁴⁹ this same principle was applied by ICJ in its 1951 advisory opinion in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case.¹⁰ The above-mentioned ambiguity (para. 45 above) is far from having been dispelled, however, since the Commission stated in its commentary that:

The admissibility or otherwise of a reservation under paragraph (c) [which establishes the requirement of compatibility], on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations.⁷⁸

(b) In draft article 17, paragraph 2,⁷⁹ the words “limited number of the *contracting* States*” are replaced by the words “limited number of the *negotiating* States*”. There is thus no longer any reference to “the circumstances” of the conclusion of the treaty and, in particular, the concept of the nature of the treaty is replaced by that of its object and purpose.

(c) A clarification is added in draft article 17, paragraph 4 (b), which provides that

an objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States *unless a contrary intention is expressed by the objecting State**⁸⁰

⁷⁴ Ibid., vol. I (Part Two), 887th and 892nd meetings, respectively pp. 292–293, paras. 64–67, and pp. 326–327, paras. 101–106.

⁷⁵ These articles were renumbered as follows: article 16 (Formulation of reservations), article 17 (Acceptance of and objection to reservations), article 18 (Procedure regarding reservations), article 19 (Legal effects of reservations) and article 20 (Withdrawal of reservations).

⁷⁶ *Yearbook ... 1965*, vol. I, 796th–800th, 813th, 814th and 816th meetings, pp. 143–178, 263–273 and 283–285.

⁷⁷ *Yearbook ... 1966*, vol. II, pp. 189–190 (footnote 73 above) and pp. 202–209, document A/6309/Rev.1, draft articles 16–21.

⁷⁸ Ibid., p. 207, Commentary to article 16, para. (17).

⁷⁹ Corresponding to article 19, paragraph 2, of the draft articles submitted by the Special Rapporteur.

⁸⁰ See footnote 49 above. The Special Rapporteur himself suggested this addition (*Yearbook ... 1965*, vol. II, p. 55, document A/CN.4/177 and Add.1 and 2).

This opened the door to the possibility that the reserving State and the State that had raised the objection might nevertheless be bound by the treaty. By the same token, the Commission admitted that an objection was not necessarily based on the incompatibility of a reservation with the object and purpose of the treaty.⁸¹

3. THE UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES (1968–1969) AND THE QUESTION OF RESERVATIONS

58. The United Nations Conference on the Law of Treaties was convened by General Assembly resolution 2287 (XXII) of 6 December 1967 and held its two sessions in Vienna from 26 March to 24 May 1968 and from 9 April to 22 May 1969. Although the provisions ultimately adopted were largely based on the proposals of the Commission, it is no exaggeration to say that, together with the “all States” clause and *jus cogens*, the question of reservations gave rise to one of the main discussions which divided the participating States and on which the Conference spent the most time.⁸²

59. Although some States expressed a preference during the Conference not for the traditional system, but for closer checking of reservations, and even submitted amendments along those lines, the text finally adopted embodies the “flexible” system and even makes it more flexible on some important points. Thus, the Conference adopted an amendment proposed by Poland to article 16 (b),⁸³ designed to authorize additional reservations, as appropriate to a treaty listing certain implied reservations if the list is not exhaustive; article 16 (c) was also amended accordingly. And, in particular, on the basis of an amendment proposed by the Union of Soviet Socialist

⁸¹ “[O]bjections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States” (*Yearbook ... 1966*, vol. II, p. 207, document A/6309/Rev.1, Commentary to article 17, para. (21)).

⁸² See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 106–138, 21st–25th plenary meetings; *ibid.*, *Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 1–42, 1st–6th plenary meetings, pp. 179–180, 33rd plenary meeting, and pp. 218–222, 85th plenary meeting; and *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole (A/CONF.39/14 and A/CONF.39/15), pp. 111–113, 132–142 and 239–240. See also the proposals and amendments submitted to the Plenary Conference, *ibid.* (A/CONF.39/14), pp. 265–267, as well as the analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties, prepared by the Secretariat (A/CONF.39/5 (vol. I)), pp. 158–172.

⁸³ Corresponding to article 16 (b) of the 1969 Vienna Convention. See *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole (A/CONF.39/14), p. 134.

Republics,⁸⁴ the presumption established by article 17, paragraph 4 (b) (see also paragraph 57 (c) above), was reversed in the corresponding article of the 1969 Vienna Convention,⁸⁵ which adopts the principle that an objection to a reservation does not preclude the entry into force of the treaty as between the reserving and objecting States unless the latter has “clearly expressed” the contrary intention. Article 21, paragraph 3, of the Convention was also amended accordingly. Strangely enough, the expert consultant, Sir Humphrey Waldock, did not object to that change, considering that “the problem was merely that of formulating a rule one way or the other”.⁸⁶

60. The articles of the 1969 Vienna Convention relating to reservations are as follows:

PART I. INTRODUCTION

...

Article 2. USE OF TERMS

1. For the purposes of the present Convention:

...

(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

...

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

...

SECTION 2. RESERVATIONS

Article 19. FORMULATION OF RESERVATIONS

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20. ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of

the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21. LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22. WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23. PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the

⁸⁴ *Ibid.*, pp. 265–266, proposals and amendments submitted to the Plenary Conference (A/CONF.39/L.3). Previous amendments along the same lines, proposed by Czechoslovakia, Syria and the USSR (*ibid.*, Reports of the Committee of the Whole (A/CONF.39/14)), pp. 133 and 135, had earlier been rejected by the Committee of the Whole.

⁸⁵ Article 20, para. 4 (b).

⁸⁶ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 34, para. 74, 10th plenary meeting. The reversal of the presumption may, however, seem less innocuous.

treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

CONCLUSION

61. This brief survey of the preparatory work on the provisions of the 1969 Vienna Convention relating to reservations calls for the following comments:

(a) Their gestation was laborious and difficult; often lively differences of opinion between the members of the Commission and between States and groups of States were, in many cases, settled only by means of compromises based on judicious ambiguities;

(b) The most remarkable of these ambiguities results from the exact role of the “criterion” of the compatibility of the reservation with the object and purpose of the treaty, to which the Convention “doctrinally” pays tribute, but from which it does not draw any clear-cut conclusions;

(c) Despite resistance and hesitation, the history of these provisions shows a definite trend towards an increasingly stronger assertion of the right of States to formulate reservations;

(d) The system finally adopted might be characterized more as “consensual” than as “flexible” in the sense that, ultimately, the contracting States may change the system of reservations and objections as they see fit and practically without restriction, either in the treaty itself or, if the treaty is silent in this regard and except in the case of treaties whose integrity must be preserved for some reason and of the constituent instruments of international organizations, through interrelated unilateral instruments.

B. Succession of States in respect of treaties

62. A short while after the adoption of the 1969 Vienna Convention, Sir Humphrey Waldock, who, in 1967, had been appointed Special Rapporteur on succession of States in respect of treaties, submitted his third report on the topic to the Commission.⁸⁷ The report contained a draft article 9 on “Succession in respect of reservations to multilateral treaties”, its purpose being to determine the position of the successor State in regard to reservations, acceptances and objections.⁸⁸

63. After referring to certain “logical principles” and noting that the—still developing—practice of depositar-

ies was not wholly consistent with them, the Special Rapporteur concluded “that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred”.⁸⁹

64. Accordingly, he proposed that rules should be adopted to reflect:

(a) A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1);

(b) The possibility for the successor State to formulate new reservations, in which case (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2);

(c) The application of these rules, *mutatis mutandis*, to objections to reservations (para. 3 (a)), although, “in cases falling under Article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a successor State to a reservation which has been accepted by all the parties to the treaty” (para. 3 (b)).⁸⁸

65. The proposals were examined only in 1972 and did not give rise to very lively discussions.⁹⁰ The Commission endorsed the pragmatic and flexible approach to the treatment of reservations and objections⁹¹ recommended by its Special Rapporteur (see paras. 63–64 above). Apart from drafting changes, it made only one really substantive amendment to his draft: draft article 15 (which replaced draft article 9), paragraph 1 (a), stipulated that only a reservation “incompatible” with that of the predecessor State on the same subject (and no longer a “different” reservation) replaced it.⁹²

66. However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned it not to the letter at least to the spirit of the Sir Humphrey Waldock’s proposal, though he described the change in question as minor.⁹³ Subject to a further drafting change, the Commission agreed with him on that point.⁹⁴

⁸⁹ *Ibid.*, pp. 47 and 50, Commentary, paras. (2) and (11) respectively.

⁹⁰ *Yearbook ... 1972*, vol. I, 1166th, 1167th and 1187th meetings, pp. 92–99 and 213–214.

⁹¹ *Ibid.*, vol. II, p. 264, document A/8710/Rev.1.

⁹² *Ibid.*, p. 260.

⁹³ *Yearbook ... 1974*, vol. II (Part One), p. 3, document A/CN.4/278 and Add.1–6, in particular p. 54, para. 287.

⁹⁴ *Ibid.*, document A/9610/Rev.1, p. 222 (art. 19).

⁸⁷ *Yearbook ... 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1.

⁸⁸ *Ibid.*, pp. 46–52.

67. Moreover, the text emerged from its consideration in the Drafting Committee⁹⁵ somewhat “pruned”. In particular, paragraph 3 (b) of draft article 9 (see para. 64 above), which, it was rightly said, dealt with the general law applicable to reservations and was not concerned with a problem specific to State succession, was deleted.

68. On the other hand, it is interesting to note that the Special Rapporteur did not take up two other sets of proposals put forward with some insistence by a few States, namely, proposals made, *inter alia*, by the Australian, Belgian, Canadian and Polish Governments to reverse the presumption (of continuity) in paragraph 1, and the wish expressed by the Polish Government for an express provision that the successor State would not automatically succeed to the objections of the predecessor State to reservations formulated by third States.⁹⁶ The Commission did not endorse those suggestions either.⁹⁷

69. This provision gave rise to little discussion at the United Nations Conference on Succession of States in respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption in draft article 9, paragraph 1, should be reversed having regard to the “clean slate” principle,⁹⁸ the Committee of the Whole, and then the Conference itself, approved the article on reservations (which had become article 20) as proposed by ILC, apart from some very minor drafting adjustments.

70. The relevant article of the 1978 Vienna Convention reads:

Article 20. Reservations

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject-matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of

⁹⁵ *Ibid.*, vol. I, pp. 112–118, 1272nd meeting and pp. 239–240, 1293rd meeting.

⁹⁶ *Ibid.*, vol. II (Part One) (footnote 93 above), respectively pp. 52–53, paras. 278–286 and p. 54, para. 289.

⁹⁷ *Ibid.*, vol. I (footnote 95 above), p. 118, and vol. II (Part One) (footnote 94 above), p. 226.

⁹⁸ See *Official Records of the United Nations Conference on Succession of States in respect of Treaties, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. III (United Nations publication, Sales No. E.79.V.10), pp. 115–116. See also the analytical compilation of comments of Governments on the final draft articles on succession of States in respect of treaties prepared by the Secretariat (A/CONF.80/5 and Corr.1, pp. 227–230).

the Vienna Convention on the Law of Treaties apply in respect of that reservation.

71. It is interesting to note that this article, whose drafting gave rise to little discussion, sets forth, in a concise manner, the rules governing succession of States to reservations (but does not deal with the question of what to do about objections to reservations formulated by the predecessor State) (see para. 68 above). Otherwise, it simply refers to articles 19 to 23 of the 1969 Vienna Convention (see para. 60 above),⁹⁹ whose authority is thus strengthened, and confirms the open, flexible and consensual approach adopted in 1969 (see para. 61 above).

C. Treaties concluded between States and international organizations or between two or more international organizations

72. In accordance with the recommendation set forth in the resolution adopted by the United Nations Conference on the Law of Treaties relating to article 1 of the 1969 Vienna Convention¹⁰⁰ and in General Assembly resolution 2501 (XXIV) of 12 November 1969, the Commission decided, in 1970, to include in its general programme the question of treaties concluded between States and international organizations or between two or more international organizations; and, in 1971, it appointed Paul Reuter Special Rapporteur for the topic.

73. In 1975, the Special Rapporteur submitted to the Commission his fourth report, the first to deal with reservations at length.¹⁰¹ In the general commentary to section 2 (Reservations), the Special Rapporteur made comments of a general nature that should be quoted at length, since they shed light on all the subsequent discussions.

74. The Special Rapporteur first stated the principle that the inclusion in the draft articles of provisions on reservations met a logical need in law, but that it should be of only limited practical interest:

Articles 19 to 23 of the 1969 Convention, dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the régime of multilateral conventions. It must therefore be admitted at the outset that analogous provisions prepared with the object of the present draft articles in mind are only of limited immediate practical interest. It has been said, and should be constantly repeated, that treaties concluded by international organizations are almost always bilateral treaties, for which reservations may come into play in theory but are of no interest in practice. The few multilateral treaties to which international organizations are

⁹⁹ The actual referral procedure was, however, sharply criticized in the Commission, but the objection related to methodology, not to substance: see *Yearbook ... 1972*, vol. I, pp. 98–99, 1168th meeting, and, pp. 213–214, 1187th meeting; *ibid.*, vol. II, p. 265, document A/8710/Rev.1; and *Yearbook ... 1974*, vol. I, pp. 115 and 117, 1272nd meeting.

¹⁰⁰ See *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 82 above) (document A/CONF.39/26, pp. 281 *et seq.*).

¹⁰¹ See *Yearbook ... 1975*, vol. II, p. 25, document A/CN.4/285, in particular pp. 36–38.

parties are all treaties which fall under the provisions of article 20, paragraph 2; in other words, they only allow a very limited play to the reservations mechanism. Multilateral treaties open to a large number of signatories constitute the area in which reservations have a real practical function, and it is well-known that at present there are still very serious obstacles to the accession of international organizations to such treaties. To devote draft articles to reservations, therefore, meets a logical need which is only beginning to emerge in concrete form.¹⁰²

75. Having made that comment, the Special Rapporteur nonetheless considered that there was no valid reason for denying international organizations the right to formulate reservations on the same conditions as States so long as they had been fully accepted into the treaty regime as “parties”, to enable them to defend their own interests. He did not hide the fact that this principle could lead to “all sorts of complications”, but he considered that that was part of a more general problem, involving the risks of overlapping jurisdiction as between the organization and its member States, and this explained “why it cannot be accepted without precautions that an organization should be party to a treaty at the same time as its own members”.¹⁰³

76. Consequently the Special Rapporteur submitted, without any special commentary, draft articles 19 to 23, which were closely modelled on the corresponding provisions of the 1969 Vienna Convention, subject only to minor drafting changes.¹⁰¹

77. The discussion of the draft articles at the twenty-seventh session of the Commission¹⁰⁴ revealed how difficult the problems they caused were. The two main problems were summarized by the Special Rapporteur in his fifth report, which was submitted in 1976 and dealt entirely with reservations:

The first may be summed up as follows: is it necessary to provide, in certain cases and on certain points, for a régime fundamentally different from that of the Vienna Convention? The second, which goes beyond the scope of the problem of reservations but arises very clearly in that connexion, is the following: what provisions are needed to define clearly the respective spheres of application of the draft articles and the 1969 Vienna Convention, especially when a treaty originally designed to establish treaty relations between States and international organizations loses that character wholly or partially?¹⁰⁵

78. With regard to the first point, it suffices to recall that the Commission finally decided not to adopt a rigid position of principle. As it states in its final commentary to the draft articles,

it sought to take a balanced view denying organizations some of the facilities granted to States by the Vienna Convention and applying to organizations certain rules whose flexibility had been considered appropriate for States alone. However, it has maintained for international organizations the benefit of the general rules of consensuality

wherever that presented no difficulties and seemed to be consistent with certain trends emerging in the modern world.¹⁰⁶

79. The response of the Commission to the first problem raised by the Special Rapporteur (see para. 77 above) testifies to this pragmatic and balanced approach, which has no other purpose than to meet the needs “of the modern world”.

80. As a first step, the Special Rapporteur, responsive to the forthright views stated by some members of the Commission,¹⁰⁷ thoroughly revised his draft articles 19 and 20, making them much less accommodating of the freedom to make reservations:¹⁰⁸ the new draft article 19 reversed the presumption and stated the principle that any reservation was prohibited unless:

(a) It was expressly authorized by the treaty (para. 1 (a));

(b) It was “expressly accepted by all the States and international organizations parties” to the treaty (para. 1 (b)); or

(c) If the international organizations were parties to the treaty on the same footing as States, under the conditions laid down in the 1969 Vienna Convention.

81. The Commission did not take a definitive position in 1975¹⁰⁹ and, the following year, the Special Rapporteur made new proposals, reverting to the principle of the “[f]reedom to formulate reservations combined with a number of exceptions for treaties between two or more international organizations, and the application to reservations of an express authorization régime with certain exceptions for treaties between States and international organizations”,¹¹⁰ in order to take into consideration the difference of nature between States and organizations and to prevent organizations from formulating reservations affecting the rights or duties of States.¹¹¹

82. These proposals were accepted in principle by the Commission after protracted discussion at its twenty-ninth session.¹¹² But the system adopted was profoundly transformed and complicated in its details,¹¹³ since it resulted in a separation of the regime applicable to reservations to treaties concluded between several organizations—aligned with that of the 1969 Vienna Convention—and the regime applicable to reservations to treat-

¹⁰⁶ See *Yearbook ... 1982*, vol. II (Part Two), p. 13, para. 43.

¹⁰⁷ In particular, Mr. Ushakov: see *Yearbook ... 1975*, vol. I (footnote 104 above), p. 239, 1348th meeting.

¹⁰⁸ *Ibid.*, p. 246, 1350th meeting.

¹⁰⁹ *Yearbook ... 1975*, vol. II, pp. 170–171, document A/10010/Rev.1, para. 135.

¹¹⁰ *Yearbook ... 1976*, vol. II (Part One) (footnote 105 above), para. 12 (c).

¹¹¹ *Ibid.*, p. 140, para. 15.

¹¹² See *Yearbook ... 1977*, vol. I, pp. 71 *et seq.*, 1429th–1435th, 1446th, 1448th, 1451st and 1464th meetings.

¹¹³ *Ibid.*, vol. II (Part Two), pp. 96–98 and 105–115.

¹⁰² *Ibid.*, General commentary on section 2, para. (1).

¹⁰³ *Ibid.*, para. (4).

¹⁰⁴ See *Yearbook ... 1975*, vol. I, pp. 237–249, 1348th–1350th meetings.

¹⁰⁵ See *Yearbook ... 1976*, vol. II (Part One), p. 137, document A/CN.4/290 and Add.1, particularly p. 139, para. 11.

ties concluded between organizations and States, which was restrictive for organizations and liberal for States (arts. 19 and 19 *bis*); the same separation was made in the cases of objections (art. 19 *ter*) and of the acceptance of reservations (arts. 20 and 20 *bis*).

83. After the adoption of the draft articles on first reading, the Special Rapporteur was prompted to re-examine it in his tenth report in 1981¹¹⁴ in the light of the comments of States and international organizations. Declining to consider any possibilities other than the ones envisaged in the draft articles, although some States had invited him to do so, “because such an investigation would not be in the spirit of the Vienna Convention, which sought to allow practice of some measure of freedom so that the general principles laid down in the Convention could be given concrete application”,¹¹⁵ The Special Rapporteur came out in favour of the maintenance of the draft articles with some clarification and simplification of the text.

84. However, following discussions which were again difficult,¹¹⁶ the Commission reverted, essentially, to the provisions which had originally been proposed by the Special Rapporteur (see para. 76 above) and which sought to transpose the rules contained in draft articles 19 to 23 of the 1969 Vienna Convention (see para. 60 above)—by means of an addition to article 19 (*a*)¹¹⁷—subject to three substantive differences affecting article 20:¹¹⁸

(a) The removal from paragraph 2 of all reference to the limited number of negotiating States;

(b) The deletion of paragraph 3 concerning the constituent instruments of international organizations; and

(c) The omission of any period for the acceptance of a reservation by an international organization, remedies for the problems resulting from this omission being left to the practice.

85. After further discussion¹¹⁹ and for reasons connected with the adoption of a draft article 5 correspond-

ing to article 5 of the 1969 Vienna Convention,¹²⁰ the Commission restored paragraph 3 of article 20, but, for the rest of the text, approved the 1981 draft articles in 1982.¹²¹ This text was transmitted with the relevant commentary to the General Assembly, which, in its resolution 39/86 of 13 December 1984, convened the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, which was held in Vienna from 18 February to 21 March 1986.

86. Moreover, annexed to its resolution 40/76 of 11 December 1985, the General Assembly transmitted to the Conference “a list of draft articles of the basic proposal, for which substantive consideration is deemed necessary” (these were the ILC draft articles). This list included articles 19 (Formulation of reservations) and 20 (Acceptance of and objection to reservations), which had been the subject of various comments and observations by States and international organizations.¹²²

87. Several amendments were submitted to articles 19 and 20 at the Conference itself. These amendments consisted of:

(a) Deleting the new language added to article 19 (*a*) (see para. 60 above);

(b) Limiting the right of international organizations to formulate reservations to the area of their competence as such or to reservations compatible with their constituent instruments;

(c) Setting a period during which organizations may formulate objections to reservations;

(d) Restoring, in article 20, paragraph 2, the idea that unanimity of acceptance is required when such a requirement is made necessary not only by the object and purpose of the treaty, but also by the limited number of negotiating participants.

88. At the end of the discussion—which focused mainly on the question of the extent to which, for the purposes of these provisions, international organizations could be assimilated to States and enjoy the same rights and have the same duties as States—the Conference adopted articles that assimilated organizations more closely to States,¹²³ something the draft articles of the Commission

¹¹⁴ See *Yearbook ... 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1, in particular pp. 56–64.

¹¹⁵ *Ibid.*, p. 59, para. 64.

¹¹⁶ See *Yearbook ... 1981*, vol. I, pp. 28–54 and 263–265, 1648th–1651st and 1692nd meetings.

¹¹⁷ It was made clear that a reservation was possible unless “the reservation is prohibited by the treaty or it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited*” (see *Yearbook ... 1981*, vol. II (Part Two), p. 137, draft article 19, para. 1 (*a*)). The commentary on the draft article does not give any explanation of this change; however, see the explanation given by Mr. Reuter in 1986 at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (A/CONF.129/16 (vol. I), 11th meeting, paras. 29–32).

¹¹⁸ See *Yearbook ... 1981*, vol. II (Part Two), pp. 138–139.

¹¹⁹ See *Yearbook ... 1982*, vol. I, pp. 177–178 and 316, 1727th and 1748th meetings.

¹²⁰ Article 5 of the 1969 Vienna Convention reads as follows: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.”

¹²¹ See *Yearbook ... 1982*, vol. II (Part Two), pp. 32–37.

¹²² See the analytical compilation of comments and observations by States and principal international intergovernmental organizations on the final draft articles on the law of treaties between States and international organizations or between international organizations, prepared by the Secretariat (A/CONF.129/5 and Add.1), pp. 137–144.

¹²³ Especially with regard to the acceptance period (art. 20, para. 5).

did not do, and were more closely modelled on the articles of the 1969 Vienna Convention.

89. The relevant articles of the 1986 Vienna Convention read as follows:

PART I. INTRODUCTION

...

Article 2 USE OF TERMS

1. For the purposes of the present Convention:

...

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization;

...

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 2. RESERVATIONS

Article 19 FORMULATION OF RESERVATIONS

A State or an international organization may, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20 ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the contracting States and contracting organizations or, as the case may be, by the contracting organizations unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and negotiating organizations or, as the case may be, of the negotiating organizations and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance of a reservation by a contracting State or by a contracting organization constitutes the reserving State or international organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force for the reserving State or organization and for the accepting State or organization;

(b) an objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization unless a contrary intention is definitely expressed by the objecting State or organization;

(c) an act expressing the consent of a State or of an international organization to be bound by the treaty and containing a reservation is effective as soon as at least one contracting State or one contracting organization has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21 LEGAL EFFECTS OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State or international organization in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State or international organization.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

Article 22 WITHDRAWAL OF RESERVATIONS AND OF OBJECTIONS TO RESERVATIONS

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State or of an international organization which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

Article 23 PROCEDURE REGARDING RESERVATIONS

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

90. The main problems encountered during the preparatory work on these provisions were of a technical nature and related, in this case, to the difficulties of transposing to international organizations the rules applicable to States or

of combining them or to difficulties of an ideological and doctrinal nature owing to the hostility of certain States—mainly the industrialized countries with, at the time, centrally planned economies—to the notion of according broad competence to organizations, a hostility which seemed to lose its edge as the work progressed. On the other hand, the rules on reservations contained in the 1969 Vienna Convention were not in principle contested at any stage. The reaffirmation of these rules in the 1986 Vienna Convention further strengthens their authority.

CHAPTER II

Brief inventory of the problems of the topic¹²⁴

91. In his first report on the law of treaties, Sir Hersch Lauterpacht noted that “[t]he subject of reservations to multilateral treaties is one of unusual—in fact baffling—complexity and it would serve no useful purpose to simplify artificially an inherently complex problem”.¹²⁵ Like an echo almost 30 years later, Mr. Paul Reuter, Special Rapporteur, noted in turn that the question of reservations had always been a thorny and controversial issue, and even the provisions of the Vienna Convention had not eliminated all those difficulties.¹²⁶

92. In general, authors share this view and emphasize that the Vienna Conventions of 1969, 1978 and 1986 have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations, especially when they are confronted with difficult concrete problems when acting as depositaries.¹²⁷

93. The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole,¹²⁸ and even in the treaties and manuals on general international law. To this should be added the large number of monographs devoted to the study of national practice in the area of reservations, to reservations to a particular convention or a particular type of treaty, or to some specific issues. The relevant bibliography is proof of the abundance of these doctrinal works, often of high academic quality, whose “flow rate” has not slowed since 1969—quite the contrary.

94. In other words, although it can legitimately be maintained that the regime of reservations, as it has emerged from the 1969 Vienna Convention and subsequent conventions, constitutes a success (see chapter III below), many questions nevertheless persist and the implementation of the regime has not always proceeded without problems; and for a quarter of a century, the solutions to these problems found by practice and jurisprudence have certainly helped to complicate even further the problems of the topic.

95. In a very pragmatic manner and without attempting at this stage to incorporate these elements into a global statement of the problems, this present report does endeavour in the following sections to present an inventory of the problems pending owing, either to ambiguities in the provisions on reservations in the Vienna Conventions on the Law of Treaties, or to gaps in these provisions.

¹²⁴ This chapter consists of a revised, corrected and expanded version of Part 2 of the outline submitted in 1993 (see footnote 5 above), pp. 228–237.

¹²⁵ See *Yearbook ... 1953*, vol. II (footnote 25 above), p. 124.

¹²⁶ *Yearbook ... 1981*, vol. II (Part One) (footnote 114 above), p. 56, para. 53. See also *Yearbook ... 1982*, vol. II (Part Two), p. 32, General commentary to section 2 of the draft articles, para. (1).

¹²⁷ In accordance with the Commission’s usual working methods, the Under-Secretary-General for Legal Affairs, the Legal Counsel of the United Nations, at the request of the Special Rapporteur, sent a letter on 14 December 1994 to his colleagues in all the specialized agencies, the Council of Europe, the Organization of American States and the Organization of African Unity, requesting them to communicate any relevant information about the practice of their organization with regard to reservations. As of 15 May 1995, the following organizations had responded to this request: Council of Europe, Food and Agriculture Organization of the United Nations, International Civil Aviation Organization, International Labour Organization, International Maritime Organization, International Monetary Fund, International Telecommunication Union, Organization of American States and World Intellectual Property Organization. In addition, there is a wealth of documentation produced by the Secretariat on the practice of the Secretary-General of the United Nations. It was not possible to use all this information in this report; it nevertheless shows that many problems persist with regard to reservations and it will be particularly useful for the further consideration of the topic.

¹²⁸ See more particularly, and only as examples, among the most current works on the law of treaties: Bastid, *Les traités dans la vie internationale: conclusion et effets*, pp. 71–77; Combacau, *Le droit des traités*, pp. 53–63; Elias, *The Modern Law of Treaties*, pp. 27–36; McNair, *The Law of Treaties*, pp. 158–177; Reuter, *Introduction to the Law of Treaties*, pp. 77–85; Rosenne, *Developments in the Law of Treaties 1945–1986*, pp. 424–436; and Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–82.

A. The ambiguities of the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

96. It has been endlessly reiterated that the question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law.¹²⁹ These controversies have been both doctrinal and political¹³⁰ and, as pointed out above (see paras. 45, 51, 57 and 61 above), the differences have been overcome only by compromises based on ambiguities or carefully judged silences. The ambiguity is most obvious with respect to the permissibility of reservations and to their effects, since the second problem, that of effects, is closely linked to the regime of objections.

1. THE PERMISSIBILITY OF RESERVATIONS

97. In the 1993 outline on the law and practice relating to reservations to treaties, the current Special Rapporteur had stated that to his mind the “determination of the validity of reservations” was probably the point on which “the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious”.¹³¹ The term “validity of reservations” was criticized at the time by Mr. D. W. Bowett, who thought that the notion confused two different questions, namely permissibility of a reservation, and the opposability of a reservation (i.e. whether it can be invoked against another party).

98. Since the Commission used this term in its report on the work of its forty-fifth session,¹³² the representative of the United Kingdom stated in the Sixth Committee of the General Assembly on 2 November 1993 that:

His delegation experienced some unease over the Commission’s use of the term “validity of reservations” in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (d) of the Vienna Convention, by referring to a reservation not only as a “unilateral” statement which “purported” to achieve an exclusion or modification of treaty terms, but even more so articles 19 *et seq.*, in their careful references to “formulation” of reservations, made it plain that any such statement was ipso facto a “reservation”, but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission’s commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty,

were referred to in article 19 as “reservations”, and why article 21 referred to a reservation “established” with regard to another party.¹³³

99. In fact, to the mind of the current Special Rapporteur, the word “validity” was fairly neutral and did indeed encompass the question of the opposability of the reservation which, in his view, was closely linked to the question of the legal regime of objections, even though it did not necessarily depend exclusively on that regime. Moreover, if the word “permissibility” seemed more appropriate, there was no problem in using it. It was in fact more accurate.

100. However, it must be borne clearly in mind that the explanations offered both by Mr. Bowett and by the British Government in support of their opposition to use of the word “validity” assumed the prior solution of the problem which lay at the centre of the controversies in that matter. This is the problem: can the question of the permissibility or impermissibility of a reservation be decided “objectively” and in the abstract or does it depend in the end on a subjective determination by the contracting States? To take a concrete example: can a reservation which obviously clashes with the object and purpose of the treaty, or even a reservation prohibited by the treaty, but accepted by all the other parties to the treaty, be described as an “impermissible” reservation?

101. The reply implicit in the explanations mentioned above is in the affirmative: for Mr. Bowett and for the British Government, such a reservation alone is a nullity which means that the reservation is impermissible and the question of opposability arises only at a second stage and, it appears, only in respect of permissible reservations. This, moreover, was the thesis argued by Mr. Bowett in 1977:

The issue of “permissibility”¹³⁴ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptable or not. The consequence of finding a reservation “impermissible” may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.¹³⁵

102. This particularly authoritative opinion represents the quintessence of one of the doctrinal standpoints, which has been described as the “permissibility school”, in contrast to the “opposability school”.¹³⁶ For writers

¹²⁹ See Ruda, *loc. cit.*, p. 101. See also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

¹³⁰ As Cox suggested in 1952, there can be little doubt that “the source of much of the doctrinal discord which followed the [1951] Court’s opinion is really to be found in the ‘Cold War’” (“Reservations to multipartite conventions”, p. 29).

¹³¹ See *Yearbook ... 1993*, vol. II (Part One) (footnote 5 above), p. 231, para. 21.

¹³² The Commission had stated that “the validity of reservations” was “a question which encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State” (see *Yearbook ... 1993*, vol. II (Part Two), p. 96, para. 428).

¹³³ See *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 24th meeting, para. 42, and corrigendum.

¹³⁴ It is not obvious that “permissibility” and “lawfulness” are absolute synonyms.

¹³⁵ See Bowett, “Reservations to non-restricted multilateral treaties”, p. 88. The British Government seems to exclude the second possibility.

¹³⁶ See Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, pp. 71–116, *passim*, in particular, pp. 75–77; see also Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, in particular, pp. 263–269; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 81, footnote 78.

who claim allegiance to this second school, in the Vienna Convention system, “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”. Hence, article 19 (c) is seen “as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.¹³⁷

103. It is certainly too early for the Commission to come out in favour of one or other of these theses or to try to reconcile them. They have been mentioned briefly here only to show the importance of the doctrinal debate which was and is still generated by the reservations provisions of the 1969 and 1986 Vienna Conventions.

104. It is certain that, if these two theses were pushed to their limits, they would have very different practical consequences. For example, according to the “opposability” thesis, it could be argued that dispute settlement organs, whether jurisdictional or not, ought to refrain from ruling on the permissibility of a reservation if there is no objection by the other parties.¹³⁸ In contrast, the “permissibility” thesis might give the impression that an objection to a reservation which is incompatible with the object and purpose of the treaty or prohibited by the treaty has no particular effect, since the reservation is in any event null and void.

105. The issues underlying the doctrinal differences described briefly above are difficult and, once again, there can be no question of resolving them at this preliminary stage—while acknowledging that they must be resolved. Moreover, it may be asked whether the analysts,¹³⁶ by emphasizing the conflicts between the two “schools”, of “opposability” and of “permissibility”, have not exaggerated their differences. They certainly start from different analyses of articles 19 and 20 of the 1969 and 1986 Vienna Conventions, but: (a) they do have a number of common positions, which prompt the adher-

¹³⁷ Ruda, loc. cit., p. 190. For similar standpoints, see Combacau, op. cit., p. 60; Gaja, “Unruly treaty reservations”, pp. 313–320; Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, pp. 134–137; Reuter, op. cit., p. 74; and Zemaneck, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 331–333.

¹³⁸ This is not the case in practice. See, for example, the judgements of the European Court of Human Rights in the *Belilos* case (*Series A: Judgments and Decisions*, vol. 132, *Judgment of 29 April 1988*, Registry of the Court, Council of Europe, Strasbourg, 1988, paras. 50–60), the *Weber* case (*ibid.*, vol. 177, *Judgment of 22 May 1990*, Registry of the Court, Council of Europe, Strasbourg, 1990), the *Loizidou v. Turkey (Preliminary Objections)* case (*ibid.*, vol. 310, *Judgment of 23 March 1995*, Registry of the Court, Council of Europe, Strasbourg, 1995), and the decision of the European Commission of Human Rights in the *Chrysostomos et al.* case (*Decisions and Reports*, March 1991, *Revue universelle des droits de l’homme*, vol. 3, No. 3, 1991, p. 193). See also General Comment No. 24 (1994) adopted by the Human Rights Committee on 2 November 1994, on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, in particular para. 18). The peculiar nature of human rights treaties might, however, limit the value of these precedents.

ents of the two theses to ask themselves often identical questions; (b) the essential difference in the replies to these questions is that the supporters of opposability think that permissibility and opposability go hand in hand (hence, often, the use of the word “validity”), whereas the permissibility enthusiasts think that these are clearly separate problems which must be examined in sequence; (c) in all cases, however, the will of the contracting States must prevail, but, depending on the standpoint, the emphasis will be placed on the initial will of the negotiators or on the subsequent will of the States making reservations or objections.

106. All the writers who have studied the problem acknowledge that there is a presumption in favour of the permissibility of reservations. That is, moreover, consistent with the clear text of article 19 of the two Vienna Conventions, of 1969 and of 1986, and is confirmed by study of the preparatory work (see paras. 38 and 53 above).

107. Everybody also agrees that this presumption is not invulnerable and that it falls if the reservation is prohibited explicitly (art. 19 (a)) or implicitly (art. 19 (b)) by the treaty, or if it is “incompatible with the object and purpose of the treaty”(art. 19 (c)).¹³⁹

108. It remains to be seen—and it is here that the real problems arise—on the one hand, how to determine whether these conditions are met and, on the other hand, what the effects may be of a reservation which would be impermissible according to these criteria.

109. On the first point—the compatibility of the reservation with the provisions of the treaty relating to reservations (art. 19 (a) and (b))—problems can arise, in particular, when the reservation is vague and general.¹⁴⁰ But it is primarily the determination of the compatibility of the reservation with the object and purpose of the treaty which causes the problems. As Reuter put it: “If the treaty is silent, the only prohibited reservations are those which would be incompatible with its ‘object and purpose’, a concept again used by the Vienna Conventions, although its interpretation remains as uncertain as when it first appeared in the Court’s Advisory Opinion of 1951.”¹⁴¹ Therefore, it would no doubt be appropriate for the Commission to undertake a study of the very notion of object and purpose of the treaty.¹⁴²

¹³⁹ It can be added that the presumption also falls if the integrality of the treaty is an essential condition for its application and if all the parties have not accepted the reservation (art. 20, para. 2) or if the competent organ of an international organization has not accepted a reservation to its constituent instrument (art. 20, para. 3); but in these two cases it is undeniable that the permissibility of the reservation depends exclusively on its acceptance.

¹⁴⁰ See Schabas, “Reservations to human rights treaties: time for innovation and reform”, pp. 39–82.

¹⁴¹ Op. cit., p. 82.

¹⁴² Which is found in other provisions of the 1969 and 1986 Vienna Conventions, in particular in articles 18, 31 (para. 1) and 60 (para. 1).

110. Still from this standpoint, it can be further noted that these uncertainties are not dispelled, but are, on the contrary, intensified, by article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions, which reintroduces the criterion of the object and purpose of the treaty with respect to restricted multilateral treaties (“plurilateral” treaties) and seems to imply *a contrario* that “a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties”.¹⁴³ Moreover, the definition of these treaties themselves—and, therefore, the conditions of application of article 20, paragraph 2—remains extremely uncertain.¹⁴⁴

111. However, it is “downstream” of this first category of problems that the most difficult questions arise; these are also the questions which generate most doctrinal discussion (see paras. 100–104 above).

112. Let us suppose that a reservation seems “impermissible”, either because it is prohibited by the treaty or because it is incompatible with the treaty’s object or purpose. What happens then?

(a) Must the reservation be regarded as void, but the expression of consent to be bound by the treaty as valid?

(b) On the contrary, does the impermissibility of the reservation affect the reliability of the expression of consent itself?

(c) Does the impermissibility of the reservation produce effects independently of any objections which may be raised to it?

(d) At most, have the other contracting States (or international organizations) an obligation in such circumstances to raise an objection to an impermissible reservation?

(e) Or may they, rather, accept such a reservation, either expressly or tacitly?

113. These, it seems, are some of the main questions which arise in connection with the permissibility of reservations and which will perhaps receive the attention of the Commission.

114. However, four points must be made clear:

(a) The questions raised above (paras. 109, 110 and 112) are, in the Special Rapporteur’s opinion, the principal and most difficult questions, but they are not necessarily the only ones; others remain not entirely resolved. For example, who is competent to determine the permissibility of a reservation (including a reserva-

tion to the constituent instrument of an international organization), whether a reservation can be partly impermissible or whether a State making an impermissible reservation may, once its impermissibility has been determined, either regard itself as freed from its treaty obligations or formulate a new reservation,¹⁴⁵ etc.?

(b) The purpose of this present report is not to outline answers to these questions; it is only to note that they arise and that it would certainly be useful to give some thought in the future to possible answers to them;

(c) To this end, the Special Rapporteur proposes, if the Commission agrees, to undertake a systematic study of the practice of States and international organizations. However, the possibility of such a study proving a disappointment cannot be ruled out: a preliminary cursory review seems to show that this practice is relatively scarce and that there are *prima facie* uncertainties;

(d) Furthermore, the debate is far from being a purely doctrinal one and, whatever the uncertainties of practice—or because of them—these questions worry States and international organizations acting as depositaries.¹²⁷ The Committee of Legal Advisers on Public International Law of the Council of Europe, meeting in Strasbourg in March 1995, took up the question of reservations to multilateral treaties; the discussion, introduced by an Austrian working paper, once again focused essentially on the question of the permissibility of reservations and the effects of an impermissible reservation.¹⁴⁶

2. THE REGIME FOR OBJECTIONS TO RESERVATIONS (THE OPPOSABILITY OF RESERVATIONS)

115. The doctrinal controversy referred to above (para. 114) has significant repercussions on the regime for objections to reservations. It is probably not overstating the case to say that, for those who espouse the thesis of opposability (see para. 102 above), the answers to questions about the permissibility of reservations (see para. 112 above), which are wholly subjective, are to be found in the provisions of article 20 of the 1969 and 1986 Vienna Conventions:

The validity of a reservation depends, under the Convention’s system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty.¹⁴⁷

The advocates of the permissibility thesis on the other hand, take it for granted that an impermissible reserva-

¹⁴³ Reuter, *op. cit.*, p. 82. See also Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties—comments on arts. 16,17”, p. 479.

¹⁴⁴ See Imbert, “Les réserves aux traités multilatéraux . . .”, pp. 109–120, and Dehaussy, “Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies”.

¹⁴⁵ See the consequences of the *Belilos* case (footnote 138 above). See, for example, Redgwell, *loc. cit.*, pp. 267–268.

¹⁴⁶ Subsequent to the meeting, the Committee decided the following: “The Secretariat [of the Council of Europe] will submit [the Austrian document—CAHDI (1995)] together with a copy of the meeting report, to the Special Rapporteur of ILC indicating at the same time that the Committee takes a keen interest in this issue and was willing to contribute to the study.” (CAHDI (95)5, 18 April 1995, para. 34.)

¹⁴⁷ Ruda, *loc. cit.*, p. 190.

tion is not opposable to other contracting States or international organizations; thus

The issue of opposability is the secondary issue and pre-supposes that the reservation is permissible. Whether a party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting State, is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.¹⁴⁸

116. Irrespective of the merits (or weakness) of each of these theses, it is certain that these contrasting positions reflect the doctrinal unease that the representatives of States (see in particular paragraph 114 (*d*) above) seem to share with regard to the regime for the acceptance of reservations and objections to reservations which was introduced by articles 20 and 21 of the 1969 Vienna Convention, was restated in the 1986 Convention and is, to say the least, lacking in clarity.

117. An initial problem¹⁴⁹ is to determine whether the counterpart to the freedom in principle to formulate reservations (see paras. 38, 53 and 106 above) is an equivalent freedom to make objections to reservations. Although arguments both for and against can be found in the body of their texts, the Vienna Conventions are silent on the matter and leave the door open to the most extreme propositions. It can, for example, be argued that an objection is possible only to an impermissible reservation—in other words, the objecting State must be guided by the same rule as the reserving State, namely, the need to preserve the object and purpose of the treaty—or, conversely, that only a permissible reservation is open to objection, since, in any event, an impermissible reservation would be null and void. The question of freedom of objections seems to be particularly difficult to resolve as practice may not be of much help, for States generally refrain from justifying their objections or, if they do so, give reasons that are very vague and difficult to interpret.¹⁵⁰ The question also arises whether States are not, or should not be, required to justify their objections.¹⁵¹

118. When an objection has been formulated, the question that arises is what effect it has. In order not to pre-judge the answer to that question—which is advisable at this preliminary stage—it is necessary, once again, to distinguish between objections to *permissible* reservations, on the one hand, and to *impermissible* reservations, on the other.

119. The 1969 Vienna Convention makes no such distinction, merely providing that “an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless the contrary intention is definitely

expressed by the objecting State”.¹⁵² In this case, “the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation”.¹⁵³

120. It may, however, be asked whether these rules can and should be applied when the reservation is impermissible—that is to say, contrary to the provisions of the treaty relating to reservations or incompatible with its object and purpose. In other words, can the objection have the paradoxical result of “cloaking” the impermissibility and, ultimately—apart only from the provisions excluded by the reservation—have the same effect as acceptance, that is to say, make the reserving State a party to the treaty vis-à-vis the objecting State? That is tantamount to conferring on the objection a value which is comparable to that of an interpretative declaration, seeing the matter in the best possible light.¹⁵⁴

121. Also, regardless of whether the objection is made to a permissible reservation or to an impermissible reservation, the question arises whether the all-or-nothing system that seems to result from the provisions referred to above (para. 119) must be rigidly applied if, on the basis of the principle that “the greater includes the lesser”, the objecting State could not permit the entry into force as between itself and the reserving State only of particular parts of the treaty designated by it. Such a solution would, moreover, lead to a further question: in that case, would the reserving State be required to submit to the will of the objecting State or could it, in turn, make an “objection to the objection” or refuse to regard the treaty as being in force with that State?

122. These questions are not just a matter of speculation and we have seen, “in treaty practice, some attempts on the part of the objecting States to give to their objections some effects that are not equivalent to those pertaining to acceptance of reservations”,¹⁵⁵ but without, however, going so far as to exclude the entry into force of the treaty as a whole with the reserving State. A conventional basis for such practices, which are apparently still at the tentative stage, may be found in the expression used in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which stipulates that “the provisions to which the reservation relates do not apply ... *to the extent of the reservation**”. However, it is not always

¹⁵² Article 20, paragraph 4 (*b*). The wording of article 20, paragraph 4 (*c*), of the 1986 Vienna Convention is the same apart from an added reference to contracting organizations.

¹⁵³ 1969 Vienna Convention, art. 21, para. 3.

¹⁵⁴ See Reuter, *op. cit.*, p. 84. Similarly, in addition to the decision of 30 June 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)* (United Nations, *Collection of Arbitral Judgements*, vol. XVIII (Sales No. E/F.80.V.7), pp. 130 *et seq.*), see Koh, *loc. cit.*, pp. 102–103; Nisot, “Les réserves aux traités et la Convention de Vienne du 23 mai 1969”, p. 203; Ruda, *loc. cit.*, p. 199; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 76–77; and Zemanek, *op. cit.*, pp. 332–333.

¹⁵⁵ Gaja, *op. cit.*, p. 327. See also Edwards Jr., “Reservations to treaties”, pp. 399–400, and Zemanek, *op. cit.*, pp. 335–336.

¹⁴⁸ Bowett, “Reservations ...”, p. 88.

¹⁴⁹ Which the permissibility and opposability schools solve in completely opposite ways.

¹⁵⁰ See Redgwell, *loc. cit.*, pp. 275 *et seq.*, and Zemanek, *op. cit.*, p. 334.

¹⁵¹ See Bowett, “Reservations...” p. 75.

easy to determine “the extent of the reservation” and difficult problems have arisen in this regard, particularly in connection with objections made by Sweden and other States to the Syrian and Tunisian reservations to the 1969 Vienna Convention itself.¹⁵⁶ Once again, therefore, it might be useful to attempt to explain the meaning of the words “the extent of the reservation” in the light of the practice followed by States.

123. Furthermore, the problem does not arise only with regard to objections to reservations. Article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions uses the same expression with respect to the legal effect of the reservation itself (which means that it also applies in the case of reservations accepted).

124. While the doctrinal backdrop which sheds light on (or obscures!) the problems dealt with in this section cannot be completely disregarded, it should certainly not be allowed to “impress”. Without claiming to put an end to the controversy, the purpose of the above discussion was simply to highlight the ambiguities in the provisions of the 1969 and 1986 Vienna Conventions relating to reservations and to pinpoint the main questions that seem to arise. To recapitulate, these questions are as follows:

(a) What is the precise meaning of the expression “compatibility with the object and purpose of the treaty”?

(b) When should a convention be regarded as a limited multilateral treaty (art. 20, para. 2)?

(c) Is an impermissible reservation null and void in itself and does its nullity give rise (or not give rise) to the nullity of the expression of consent by the State (or international organization) to be bound?

(d) Is an impermissible reservation null and void regardless of the objections that may be made?

(e) Can the other contracting States or international organizations accept an impermissible reservation?

(f) What are the effects of such acceptance?

(g) If due note has been taken (by whom?) of the impermissibility of a reservation, can the reserving State replace it with another reservation or withdraw from the treaty?

(h) Are the contracting States free to formulate objections irrespective of the impermissibility of the reservation?

(i) Must they, or should they, indicate the grounds for their objections?

(j) What exactly are the effects of an objection to a permissible reservation?

(k) And to an impermissible reservation?

(l) How are such effects distinguishable from the effects of an acceptance of the reservation where the objecting State does not clearly express the intention that the treaty should not enter into force as between it and the reserving State?

(m) In such a case, can the objecting State exclude the applicability of treaty provisions other than those covered by the reservation?

(n) And is the reserving State required to accept such exclusions?

(o) Lastly, what is the precise meaning of the expression “to the extent of the reservation”?

125. This list of questions, which is the outcome of a superficial examination of practice and also of an analysis of the provisions of the 1969 and 1986 Vienna Conventions, is certainly not exhaustive. Rather, some of the questions are closely interlinked and overlap to a considerable extent, whereas others are more self-contained. There is no doubt that the replies to these questions are uneven in their complexity and, while some are quite obvious, others appear *prima facie* to be almost impossible to find if approached without preconceived ideas. Nonetheless, the list gives some idea of the extent of the problems to which the ambiguities in the wording of the “treaty of treaties” give rise. There are, in addition, problems that were not dealt with in 1969 and 1986 and the main ones will be listed far more briefly in the section that follows.

B. Gaps in the provisions relating to reservations in the Vienna Conventions on the Law of Treaties

126. The Vienna Conventions of 1969 and 1986 leave a number of general problems unsolved, neglect problems connected with the specific object of certain treaties and remain silent on the drawbacks of certain treaty techniques. The 1978 Vienna Convention, for its part, completely skips over certain problems that may arise in connection with reservations in the event of State succession.

1. SOME GAPS OF A GENERAL NATURE

(a) *Reservations to bilateral treaties and interpretative declarations*

127. Satisfactory in so far as it goes, the definition of “reservation” common to the 1969 Vienna Convention (art. 2, para. 1 (d)), the 1978 Convention (art. 2, para. 1 (j)) and the 1986 Convention (art. 2, para. 1 (d)) has omissions that give rise to uncertainties which can often be very awkward. The first point left in the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem nevertheless arises as a result of the amendment by the United Nations Conference on the Law of Treaties of the title of Part II, section 2, of the

¹⁵⁶ See De Visscher, “Une réserve de la République arabe de Syrie à la Convention de Vienne (1969) sur les traités”, as well as Edwards Jr., loc. cit., p. 400; Imbert, *Les réserves aux traités multilatéraux* ..., p. 265; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

1969 Vienna Convention (“Reservations” instead of “Reservations to multilateral treaties”); the ambiguity of the *travaux préparatoires*;¹⁵⁷ and the view of some authors who accept the fact that “reservations may come into play in theory” for bilateral treaties.¹⁵⁸

128. Of much greater practical concern is the distinction between reservations and the interpretative declarations which States seem to resort to with increasing frequency and on which the Conventions are silent.¹⁵⁹

129. The conclusion to be drawn from recent jurisprudence is that nominalism must be set aside on this point and that an interpretative declaration must be taken to be a genuine reservation if it is consistent with the definition given in the conventions. In this connection, reference is made to the decision in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)*,¹⁶⁰ the report of the European Commission of Human Rights in the *Temeltasch* case,¹⁶¹ the judgements of the European Court of Human Rights in the *Belilos* case¹⁶² and the *Loizidou v. Turkey* case;¹⁶³ and the decision of the Human Rights Committee in the cases of *T. K. v. France*

¹⁵⁷ See Edwards Jr., loc. cit., pp. 402–405.

¹⁵⁸ See the fourth report of the Special Rapporteur, Mr. Paul Reuter (footnote 101 above), p. 36, General commentary on section 2 of the draft articles, para. (1).

¹⁵⁹ See, especially, McRae, “The legal effects of interpretative declarations” and, more generally, on the definition of reservations, Gamble Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, pp. 373–376; Piper, “Reservations to multilateral treaties: the goal of universality”, pp. 299–300; Ruda, loc. cit., pp. 103–108; Sinclair, *The Vienna Convention on the Law of Treaties*, pp. 51–54; and Tomuschat, loc. cit., pp. 464–466.

¹⁶⁰ See the decision (footnote 154 above), p. 175, and comments by: Bowett, “The arbitration between the United Kingdom and France concerning the continental shelf boundary in the English Channel and south-western approaches”; Boyle, “The law of treaties and the Anglo-French continental shelf arbitration”; Brown, “The Anglo-French continental case”; Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”; Quéneudec, “L’affaire de la délimitation du plateau continental entre la France et le Royaume-Uni”; Rigaldies, “L’affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”; and Zoller, “L’affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord—Décision du 30 juin 1977”.

¹⁶¹ Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31 (Strasbourg, April 1983), pp. 120–136. See comments by: Cohen-Jonathan and Jacqué, “Activité de la Commission européenne des droits de l’homme”, pp. 524–530; and Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: (the *Temeltasch* case)”.

¹⁶² The *Belilos* case (footnote 138 above). See the comments by: Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”; Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”; Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”; and Marks, “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”.

¹⁶³ See footnote 138 above.

and *M. K. v. France*.¹⁶⁴ But these decisions also testify to the fact that it is extremely difficult to make a distinction between qualified interpretative declarations and mere interpretative declarations.¹⁶⁵ Furthermore, the legal effects of the latter remain unclear.

(b) *Effects of reservations on the entry into force of a treaty*

130. This important and widely debated question has caused serious difficulties for depositaries and has not been answered in the relevant conventions. The practice which is followed by the Secretary-General in his capacity as depositary and which was amended in 1975,¹⁶⁶ has been the subject of rather harsh doctrinal criticism.¹⁶⁷

131. In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession, whether or not the State had formulated a reservation.¹⁶⁸ This position was accepted in some circles,¹⁶⁹ but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the 1969 and 1986 Vienna Conventions.¹⁷⁰ There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the American Convention on Human Rights rather than any general considerations (see paras. 138–142 below).

(c) *Problems unsolved by the Vienna Convention on Succession of States in respect of Treaties*

132. Article 20 of the 1978 Vienna Convention scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.

¹⁶⁴ Communications Nos. 220/1987 and 222/1987 (decisions adopted on 8 November 1989) (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, pp. 118–134, in particular pp. 122–123 and 130–131, para. 8.6). See comment by Cohen-Jonathan, “Note sur les décisions et constatations du Comité des droits de l’homme des Nations Unies relatives à la France (1989)”.

¹⁶⁵ McRae, loc. cit., p. 160. The practice of ILO in respect of declarations on international labour conventions on which no reservations may be made is of particular interest in this regard.

¹⁶⁶ See the *Repertory of Practice of United Nations Organs, Supplement No. 5*, vol. V, covering the period 1 February 1970 to 31 December 1978, art. 102.

¹⁶⁷ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 277–282, and “À l’occasion de l’entrée en vigueur de la Convention de Vienne sur le droit des traités—réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l’exercice de ses fonctions de dépositaire”; see also Han, “The U. N. Secretary-General’s treaty depositary function: legal implications”.

¹⁶⁸ Advisory Opinion OC–2/82 of 24 September 1982, *Inter-American Court of Human Rights, Judgments and Opinions*, Series A, No. 2; see also ILR, vol. 67, 1984, pp. 559–571, and ILM, vol. 22, No. 1 (January 1983), pp. 37–50.

¹⁶⁹ See Rosenne, op. cit., pp. 435–436.

¹⁷⁰ See, for example, Edwards Jr., loc. cit., pp. 401–402, and Gaja, op. cit., pp. 321–322.

133. First, it should be noted that the article is contained in Part III of the Convention, which deals with “newly independent States”; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, “treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates” (art. 15 (a)). It is equally true that the extension of treaties of the successor State to the territory (art. 15 (b)) appears to entail necessarily the automatic extension of reservations which the latter might have formulated. Problems nevertheless continue to exist with regard to “newly independent States formed from two or more territories”; on this assumption, articles 16 to 29 (and hence article 20) probably apply in principle in accordance with article 30, paragraph 1, but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions on reservations.

134. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Nonetheless, this may seem logical if it is recognized that, in maintaining a former reservation, the new State is exercising an inherent right and is not acting as though it has the rights of the predecessor State.¹⁷¹

135. Lastly, and this is a serious lacuna, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations—whereas the initial proposals of Sir Humphrey Waldock did deal with this point—and the reasons for this omission are not clear.¹⁷²

2. PROBLEMS CONNECTED WITH THE SPECIFIC OBJECT OF CERTAIN TREATIES OR PROVISIONS

136. Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations, treaties relating to human rights and, more generally, directly establishing individual rights and codification treaties themselves (or specific provisions of such a nature).

(a) Reservations to constituent instruments of international organizations

137. Although the 1969 and 1986 Vienna Conventions are not totally silent on this point, common article 20, paragraph 3, is far from resolving all the problems which can and do arise:

(a) The concept of a constituent instrument is not unambiguous and it may be asked whether the rule set out in article 20, paragraph 3, applies to any normative provisions such instruments may include;

(b) Does this rule include interpretative declarations and, if so, who determines their exact nature (see paras. 128–129 above)?

(c) What body is competent to accept reservations of this kind?

(d) What is the exact scope of such acceptance? In particular, are the other member States bound by it and thus prevented from objecting to the reservation?¹⁷³

(b) Reservations to human rights treaties

138. Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity,¹⁷⁴ a concept difficult to transpose to the field of human rights or indeed to other fields.¹⁷⁵ As they are intended to apply without discrimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

139. Thus, in its General Comment No. 24 (1994), paragraph 17,¹⁷⁶ the Human Rights Committee considered that human rights treaties and the International Covenant on Civil and Political Rights specifically, were not a web of inter-State exchanges of mutual obligations. They concerned the endowment of individuals with rights. The principle of inter-State reciprocity had no place; and that “... the operation of the classic rules on reservations is so inadequate ...”¹⁷⁷

¹⁷³ On all these points, see especially, Imbert, *Les réserves aux traités multilatéraux ...*, pp. 120–134, and Mendelson, “Reservations to the constitutions of international organizations”.

¹⁷⁴ See the *Certain Norwegian Loans* case, Judgment of 6 July 1957, *I.C.J. Reports 1957*, p. 24.

¹⁷⁵ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 250 and 260.

¹⁷⁶ See footnote 138 above.

¹⁷⁷ It has, however, been questioned whether these specific features justify a special legal regime for reservations to human rights treaties: see Schmidt, *Reservations to United Nations human rights treaties—the case of the two Covenants*; see also the comments of the British delegate at the meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe in March 1995 (report of the meeting (footnote 146 above), para. 31).

¹⁷¹ See Marcoff, “Accession à l’indépendance et succession d’États aux traités internationaux”, pp. 345–346.

¹⁷² See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 318–322.

140. More so than other treaties, human rights treaties include monitoring mechanisms and the question is whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area because of the “objective obligations” deriving from the European Convention on Human Rights, signed in Rome on 4 November 1950.¹⁷⁸ Similarly, in its General Comment No. 24 (1994), the Human Rights Committee considered that “It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant ... in part because ... it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions”.¹⁷⁶

141. This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on participation in a treaty by the reserving State? In the *Belilos* case, the European Court of Human Rights took the view that the reserving State remained, “without question”, a party to the Convention.¹⁷⁹

142. The specific nature of the problems raised by reservations to treaties relating to human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations. There is an abundance of literature on this subject which it is impossible to comment on at this stage, but which will be of great value for the future work of ILC with regard both to the special problems of reservations to human rights treaties—a concept which is not in itself very precise—and to the legal regime of reservations.¹⁸⁰

¹⁷⁸ See the report of the European Commission of Human Rights in the *Temeltasch* case (footnote 161 above), paras. 63–65, and, though less clearly, the judgements of the European Court of Human Rights in the *Belilos* case (footnotes 138 and 162 above), para. 50, and in the *Weber* case (footnote 138), para. 37, and especially the very recent *Loizidou* judgement (ibid.).

¹⁷⁹ Ibid. For the results of the case, see Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6 § 1”. See also the *Loizidou* judgement (footnote 138 above) and the report of the European Commission of Human Rights in the *Chrysostomos et al.* case (ibid.).

¹⁸⁰ See, especially: Blay and Tsamenyi, “Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”; Bonifazi, “La disciplina delle riserve alla Convenzione europea dei diritti dell’uomo”; Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)” (see also “Una nuova sulle riserve” and “Su alcune ‘riserve’ alla convenzione sui diritti politici della donna”); Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, pp. 281–321; Coccia, “Reservations to multilateral treaties on human rights”; Colella, “Les réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés”; Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women”; Frowein, “Reservations to the European Convention on Human Rights”; Imbert, “La question des réserves et les conventions en matière de droits de l’homme”; Macdonald, “Reservations under the European Convention on Human

(c) *Reservations to provisions codifying customary rules*

143. Curiously, the 1969 and 1986 Vienna Conventions do not deal with the question of reservations to codification conventions or, to be more precise, codification clauses.

144. Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the ICJ Judgment of 20 February 1969 in the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands).¹⁸¹ However, it has been pointed out that this rule, which would be an additional criterion for the non-validity of reservations under article 19, “is debatable with regard to the intention of the parties to the Convention”¹⁸² and creates a regrettable confusion between *jus cogens* and *jus dispositivum*.¹⁸³

3. PROBLEMS ARISING FROM CERTAIN SPECIFIC TREATY APPROACHES

145. Because they were required to confine themselves to a very general level, the drafters of the 1969 Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(a) *Reservations and additional protocols*

146. When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other not, or they may both contain such clauses but the clauses may be incompatible. The situation is relatively rare, but does occur,¹⁸⁴ raising extremely tricky problems.¹⁸⁵ In addition, when ratifying a protocol (or accepting an optional clause), a

Rights”; Marcus-Helmons, “L’article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l’homme”; Pilloud, “Les réserves aux Conventions de Genève de 1949”; Ruiz-Moreno, “Reservations to treaties relating to human rights” (for the debate during the fifth-fourth Conference of the International Law Association, see Report of the Fifty-fourth Conference held at The Hague, August 23rd to August 29th, 1970, pp. 596–625F; for the resolutions, ibid., pp. xiv–xv); Schabas, loc. cit.; Schmidt, op. cit.; Shelton, “State practice on reservations to human rights treaties”, pp. 206–234. See also the comments referred to above (footnotes 161–163).

¹⁸¹ *I.C.J. Reports 1969*, pp. 3 *et seq.*, in particular pp. 38–39, para. 63.

¹⁸² Reuter, op. cit., p. 82.

¹⁸³ On this difficult problem, see especially Teboul, “Remarques sur les réserves aux conventions de codification”. See also General Comment No. 24 (1994) of the Human Rights Committee, para. 8 (footnote 138 above), and Schabas, loc. cit.

¹⁸⁴ See the Convention relating to the Status of Refugees (art. 42, para. 1) and the Protocol relating to the Status of Refugees (art. VII), as well as the Single Convention on Narcotic Drugs (arts. 49–50) and the Protocol amending the Single Convention (art. 21).

¹⁸⁵ See Imbert, *Les réserves aux traités multilatéraux ...*, pp. 213–214, and Colella, loc. cit., pp. 451–452.

State may be tempted to formulate a belated reservation to the basic treaty.¹⁸⁶

(b) *Reservations and the bilateralization approach*

147. This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past,¹⁸⁷ the system spread rapidly in the 1970s in particular: see articles 21 and 23 of the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters and article 34 of the Convention on the Limitation Period in the International Sale of Goods. This flexible approach emerged as a “rival” to the reservations approach, but it also raises specific problems concerning the reservations *stricto sensu* which can be formulated concerning these conventions.¹⁸⁸

148. The above remarks do not call for any particular conclusions at this stage. Their purpose was not to outline solutions to the problems posed by the gaps in the 1969, 1978 or 1986 Vienna Conventions, but simply to note that such problems exist. Although the list is undoubtedly far from exhaustive and they are of varying difficulty and importance, the main problems noted above are the following:

(a) Is it legitimate to speak of reservations to a bilateral treaty?

(b) If so, are those reservations subject to a special legal regime?

(c) In what respect(s) does an interpretative declaration differ from a reservation?

(d) Is an interpretative declaration which in fact corresponds to the definition of reservations, subject to the legal rules applicable to reservations?

(e) What are the legal effects of a “genuine” interpretative declaration?

(f) And, more generally, to what legal regime are such declarations subject?

(g) Does the formulation of a reservation to a treaty that has not yet entered into force have an effect on that entry into force when the treaty makes such entry into force conditional on an expression of consent to be

bound by its provisions on the part of a minimum number of States or international organizations?

(h) What legal regime is applicable to reservations when a succession of States takes the form of the creation of a newly independent State formed from two or more territories or in the case of unification of States?

(i) May contracting States formulate an objection to the maintenance of a reservation of the predecessor State by the successor State, *inter alia*, when the reservation appears to them to be incompatible with a new reservation introduced by the successor State?

(j) What is/are the legal regime or regimes applicable to objections to reservations in the context of a succession of States, irrespective of the form it takes?

(k) Should the specific object of certain treaties or treaty provisions lead to a change in the rules applicable to the formulation and to the effects of reservations and objections?

(l) What rules, other than the very general indications given in article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions, are applicable to reservations to constituent instruments of international organizations?¹⁸⁹

(m) Are the rules on reservations appropriate for international human rights instruments?

(n) If not, how should they be adjusted in order to take account of the specific characteristics of such instruments?

(o) Is a reservation to a provision codifying a customary rule of international law admissible?

(p) If so, what would be the effects of such a reservation?

(q) If not, how is one to distinguish a reservation to a codifying rule from a reservation to a peremptory rule of general international law?

149. To this already long, though incomplete, list of questions not covered by the Vienna Conventions can be added others relating to the existence of what one might call “rival” institutions of reservations aimed at modifying participation in treaties, but, like them, putting at risk the universality of the conventions in question (additional protocols, bilateralization, right to selective acceptance of certain provisions, etc.).

¹⁸⁶ See Cohen-Jonathan, “Note sur les décisions ...”; Cohen-Jonathan and Jacqué, “Activités de la Commission européenne des droits de l’homme”, pp. 562–565; and Zanghi, “La déclaration de la Turquie relative à l’art. 25 de la Convention européenne des droits de l’homme”.

¹⁸⁷ See the 1947 General Agreement on Tariffs and Trade.

¹⁸⁸ On this question, see Imbert, *Les réserves aux traités multilatéraux* ..., pp. 199–201; and, in particular, Majoros, “Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye”.

¹⁸⁹ See, in this connection, the more specific questions raised in paragraph 137 above.

CHAPTER III

The scope and form of the future work of the Commission

150. The topic of the present report is entitled “The law and practice relating to reservations to treaties”. As the Special Rapporteur indicated in the outline prepared in 1993,¹⁹⁰ this title seems rather academic. Moreover, the wording suggests that there might be some opposition between “the law” on the one hand and “practice” on the other. It is true that some practices do not, *prima facie*, seem readily compatible with the rules set forth in the three relevant Vienna Conventions (see para. 159 below), but to oppose the law and practice in this way would be inappropriate; the latter enriches and develops the former and, in the same way as treaty provisions, forms part of the “legal landscape” whose contours ILC is called upon to draw in every detail; and one of the great merits of the “Vienna rules” relating to reservations is their flexibility, which offers the advantage of allowing the law to adapt itself to the requirements of States and international organizations (see para. 166 below).

151. For these various reasons, the Commission may deem it reasonable to choose a title that is as neutral and comprehensive as possible and does not prejudice the results of its work and to propose an amendment along those lines to the General Assembly on the understanding that the title may be changed or made more specific at a later stage if it should appear advisable to limit the scope of the topic. The title might be: “Reservations to treaties”.

152. In any event, it is in this spirit of neutrality and out of a concern not to prejudice either the form or the contents of the work of the Commission that the present report has been drafted and the methodological suggestions set out below formulated. These relate, successively, to the problems arising from the existence of earlier instruments which partially regulate the issue and the achievements of which ought to be preserved and to the form which the work of the Commission on the topic might take.

A. Preserving what has been achieved

153. There is no doubt that the provisions on reservations to be found in the 1969 Vienna Convention did not, at the time of their adoption, constitute an exercise in mere codification. They were then far more a matter of the progressive development of international law and completed the development that started with pan-American practice even before the Second World War, continued with the advisory opinion of ICJ in 1951¹⁹¹ and was consolidated by the change made in 1962 by Sir Humphrey Waldock’s first report (see paras. 35–46

above) and accepted by a majority of the members of the Commission.

154. It may be considered, however, that, with the passage of time, the question whether the rules relating to reservations laid down in 1969 are an aspect of codification or of progressive development has become largely obsolete. On the one hand, the 1969 Vienna Convention consolidated or “crystallized” earlier trends that were already well under way.¹⁹² Moreover and more especially in the 26 years “that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that treaty have come to be seen as basically wise and to have introduced desirable certainty”.¹⁹³

155. This consolidation, which is partial (see paras. 160–161 below), is the result of several factors, especially:

(a) The rules reflected the conditions of international society at the time they were adopted;

(b) They were part of a general tendency to make multilateral conventions more flexible and more open;

(c) They were, moreover, adopted almost unanimously at the United Nations Conference on the Law of Treaties;

(d) They were included in the 1986 Vienna Convention (see paras. 88 and 90 above).

156. These considerations have also led States to respect these provisions in the main, whether or not they have ratified the Vienna Convention¹⁹⁴ and even if, like France, they have not signed it. Although disputes in this area have been fewer in number than the uncertainties of the law might suggest, the arbitrators or judges who have had to deal with them often refer, expressly or by implication, to the provisions of the Convention,¹⁹⁵ and it is

¹⁹² See, for example, Baxter, “Treaties and custom”, p. 48.

¹⁹³ See Edwards Jr., *loc. cit.*, p. 365.

¹⁹⁴ See, for example, in the case of the United Kingdom of Great Britain and Northern Ireland, the statements of Sir Ian Sinclair (“The Vienna Convention on the Law of Treaties: the consequences of participation and nonparticipation”, pp. 273–274, and, in the case of the United States of America, those of Mr. Robert E. Dalton (“The Vienna Convention on the Law of Treaties: consequences for the United States”, p. 278. *The Restatement of the Law Third (Foreign Relations Law of the United States)*, vol. 2 (St. Paul, Minn., American Law Institute Publishers, 1987) essentially reiterates the rules of the 1969 Vienna Convention with some additional details designed to meet the requirements of the domestic practice of the United States. See in this connection (with regard to the *Restatement of the Law Second*), Piper, *op. cit.*, p. 317.

¹⁹⁵ See, in particular, the case law referred to above (footnotes 160–164) and the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez

¹⁹⁰ See footnote 5 above.

¹⁹¹ See footnote 10 above.

interesting to note that, even the Human Rights Committee, which rejects the validity of the solutions adopted in 1969 with regard to instruments relating to human rights (see para. 139 above), takes these provisions as the starting point and seems to think that they represent general international law in this field (*ibid.*).

157. It may thus be said that, even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by article 2, paragraph 1 (*d*), and articles 19 to 23 have now acquired customary force.

158. This conclusion can, however, be maintained only subject to verification. The wording of the decisions on which it is based in part is not without ambiguity. For example:

(*a*) In the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Channel Islands case)*, the Court of Arbitration refers to the definition of a reservation contained in article 2, paragraph 1 (*d*), of the 1969 Vienna Convention, pointing out that it is accepted by both parties, and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification;¹⁹⁶ and,

(*b*) In the *Temeltasch* case, the European Commission of Human Rights considers that the Convention *primarily* lays down rules that exist in customary law and is *essentially* in the nature of a codification.¹⁹⁷

159. In addition, State practice, or the practice of some States, and even that of international organizations as depositaries, sometimes contradicts the very terms of the 1969 Vienna Convention. Thus, in a very detailed study, Gaja examines successively, giving examples, the practices relating to:

(*a*) Reservations subsequent to ratification¹⁹⁸ (contrary to the provisions of article 2, paragraph 1 (*d*), and article 19 of the Convention);

(*b*) The disregard States have shown for the provisions of article 19 concerning reservations,¹⁹⁹ although it is true that the wording of this provision is ambiguous (see paras. 108 *et seq.* above);

(*c*) The non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention, as provided for in article 20, paragraph 5;²⁰⁰

(*d*) The effect of objections to reservations,²⁰¹ although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous (see paras. 117 *et seq.* above).

160. Reference may also be made, and this is only one example among many, to the position of the Secretary-General of the United Nations regarding the time period in which States may raise objections to reservations:

The Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions.²⁰²

161. In any event, the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (see chapter II above), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time. As Edwards Jr. has written:

Calm has been introduced by the Vienna Convention on the Law of Treaties ... However, the Vienna Convention—perhaps the most successful international effort at codification ever undertaken—has not frozen the law. Rather, the rules in the Convention structure its future development.²⁰³

162. Truth to tell, there is but one clear conclusion that can be drawn from the foregoing considerations: the 1969 Vienna Convention is, at one and the same time, the culminating point of a development which began long ago and which consists in facilitating participation in multilateral conventions to the maximum extent while preserving their purpose and their object, and the starting point of a multifaceted and not always consistent practice, which, on the whole, seems to be much more the result of considerations of political expediency based on a case-by-case approach than of firm legal beliefs.

163. The Commission is therefore faced with a choice: either it can go back to the drawing board with the rules adopted in 1969—confirmed in 1986—and in 1978, so that, at one go, the ambiguities can be removed, the gaps filled, and they can be given the consistency they sometimes seem to lack, or it can take it that the treaty rules are well established and simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility.

de Aréchaga and Waldock in the case of *Nuclear Tests (Australia v. France)* (*Order of 20 December 1974*), *I.C.J. Reports 1974*, pp. 312–371, in particular p. 349).

¹⁹⁶ Decision of 30 June 1977 (see footnote 154 above), paras. 55 and 61.

¹⁹⁷ See footnote 161 above.

¹⁹⁸ *Op. cit.*, pp. 310–313.

¹⁹⁹ *Ibid.*, pp. 313–320.

²⁰⁰ *Ibid.*, pp. 320–324.

²⁰¹ *Ibid.*, pp. 324–329.

²⁰² See United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 204, and *Juridical Yearbook 1981* (Sales No. E.84.V.1), p. 150.

²⁰³ *Loc. cit.*, p. 405.

164. There are, undoubtedly, very good arguments in favour of the first limb of that alternative, for instance:

(a) There are considerations of a political nature which, to a large extent, lay at the origin of the—often carefully contrived—ambiguities in the provisions relating to reservations in the 1969, 1986 (see paras. 61, 90 and 96 above) and perhaps even the 1978 Vienna Conventions; but such obstacles to a more consistent approach have no longer obtained since the completion of political decolonization *stricto sensu* and the end of the cold war in particular;

(b) Some of the difficulties encountered derive from the incompatibility that exists, according to some analysts at least, between the various provisions of the 1969 and 1986 Vienna Conventions (for example, between article 19 (c) and article 20, paragraph 4, or article 21, paragraph (3)); it will be possible to overcome these only if their wording is amended;

(c) Even if these rules have acquired customary force, there is nothing to prevent them from being amended; and that is desirable, for some provisions, though clear, are open to criticism.²⁰⁴

165. Notwithstanding the weight of these arguments, the Special Rapporteur is very much attracted by the second approach referred to above (see para. 163), which preserves what has been achieved by existing provisions. Admittedly, such a choice is not without its drawbacks; in particular, the Commission will have to bear with any inconsistencies in the existing provisions and must not attempt to find an “ideal solution”. But, as the Commission noted as far back as 1951, “no single rule uniformly applied can be wholly satisfactory”,²⁰⁵ so that the search for such a solution would inevitably result in a dispersal of rules that would probably be the source of major complications.

166. On the other hand, what should be termed a “modest approach”²⁰⁶ certainly offers great advantages:

(a) Amendment of the existing provisions would run into considerable technical difficulty: a State party to one of the existing conventions in force, or that might become a party, might very well refuse to accept such amendments as could be adopted;²⁰⁷ the result would be a dual legal regime of reservations that would be the source of very great difficulty under international law—at the present stage of its development, there is no means of imposing harmonization of the rules in force;

(b) The view may be taken that the present ambiguities, which are obvious, can be removed if the existing rules are clarified and that they are due not so much to the inconsistency as to the excessive brevity. Consequently, if the Commission could undertake the task of clarifying the existing provisions, that would at least make it possible to overcome most of the difficulties encountered;

(c) In their statements in the Sixth Committee of the General Assembly in 1993 and 1994, the representatives of States, while endorsing the inclusion of the topic of reservations in the ILC agenda (see para. 4 above), expressed their support for the existing provisions.²⁰⁸ Above all, whatever their defects, the rules adopted in 1969 have proved their worth in that, on the one hand, they comply with the objective of flexibility which seems to have the support of States as a whole and, on the other, although their application gives rise to some difficulties, it has never degenerated into a serious dispute and, although, from the standpoint of principle, the protagonists have in some cases remained on opposite sides, they have always been reconciled in practice.

167. One study often quoted shows that the adoption of the 1969 Vienna Convention has not led to an increase in the formulations of reservations and also that, on the whole, those that were formulated concerned relatively minor points.²⁰⁹ However, it must be noted that this study was published in 1980 and that it is evident from the statistics it gives that a number of reservations and objections analysed are what might be termed “cold war” reservations and objections, since a significant proportion of the reservations were made by central and eastern European States and based on ideological grounds—refusing settlement of dispute clauses, for instance—and those grounds in many cases also explain the objections of the “Western” countries. One may therefore think that the new diplomatic deal helps to dedramatize still further the problem of reservations. In a more limited context, this also seems to be confirmed by a recent study by Schmidt on reservations to the International Covenant on Economic, Social and Cultural Rights and on the International Covenant on Civil and Political Rights, which concludes that “[c]ontrary to what the large number of reservations to the Covenants might suggest, ... they do not represent a massive deviation from the obligations of States parties”.²¹⁰

168. Accordingly and regardless of their deficiencies, the provisions already adopted on reservations, which have at least served as a guide to practice, have proved their usefulness and have certainly not made matters worse in that regard. Subject to the reactions of the Sixth Committee, whose special attention it would perhaps be

²⁰⁴ For instance, the presumption of the applicability of the treaty between the reserving State and the objecting State, as laid down in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions and adopted almost by surprise at the United Nations Conference on the Law of Treaties (1968–1969), is the subject of much lively criticism.

²⁰⁵ See footnote 19 above.

²⁰⁶ But this certainly does not mean that it is the easy way out, as ILC will have to try to find a variety of solutions, compatible with the present provisions.

²⁰⁷ Either as formal amendments or in an additional protocol.

²⁰⁸ The discussions in the Committee of Legal Advisers on Public International Law of the Council of Europe (see para. 114 (d) above) in March 1995 also seem to reflect a majority view to that effect.

²⁰⁹ Gamble Jr., loc. cit., passim; see also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

²¹⁰ Op. cit.

advisable to draw to that point, ILC would probably be well advised to decide to confine its task to filling the gaps and to removing the ambiguities in the existing rules, but without embarking on their amendment.

169. ILC should nonetheless be aware that, by adopting that approach, it would be prevented from proposing amendments to the 1969, 1978 and 1986 Vienna Conventions. That could have drawbacks in the case of certain categories of treaties and, in particular, of the international legal human rights instruments of which the Human Rights Committee recently stated that “the operation of the classic rules on reservations is ... inadequate” (see para. 139 above). However, apart from the fact that this view, which is not unanimously shared,²¹¹ calls for closer examination, it is not impossible to conceive of solutions. It should be borne in mind, in particular, that the rules on reservations which appear in the 1969 and 1986 Vienna Conventions are of a residual nature only; States can derogate from them in the “substantive” conventions they conclude. In the circumstances, the Commission would be entirely free to suggest model clauses adapted to special categories of multilateral treaties and, in particular, to human rights treaties. That suggestion leads to a question as to the forms that the results of the work of the Commission on the topic of reservations to treaties might take.

B. The form that the results of the work of the Commission might take

170. Under the terms of article 1, paragraph 1, of its statute, the Commission “shall have for its object the promotion of the progressive development of international law and its codification”. But there are many ways of performing that function and, while the statute speaks of “drafts” with regard both to progressive development and to codification,²¹² it imposes no particular form on them.

171. It is true that, in respect of progressive development, article 15 of the statute seems to assign the Commission the task of drafting conventions, but, in fact, the dividing line between codification and progressive development has never been clear-cut and, in view of the uncertainties of practice on at least some aspects of the subject under consideration, it would definitely be impossible to establish such a line in the present case. It has happened in the past, moreover, that, in carrying out certain tasks, the Commission has not prepared a proper set of draft articles; this was the case, in particular, as far back as the question of reservations to multilateral conventions, which, in 1951, was dealt with in a chapter of the report of the Commission to the General Assembly in the conclusions in which the Commission suggested the practice to be adopted with regard to “reservations to multilateral conventions, especially those of which the

Secretary-General of the United Nations is the depositary” (see para. 20 above), but those suggestions were not submitted formally as a set of draft articles with commentaries.

172. In its resolution 48/31 of 9 December 1993 (see para. 5 above), the General Assembly left in abeyance the question of the form to be given to the work of the Commission on the topic pending the submission of a preliminary study. The Commission will therefore probably have to send the Assembly some recommendations on the matter following its discussion of the present report.

173. In any event, many options seem to be available and General Assembly resolution 48/31 has not ruled out any given solution. Here again, the Commission has to make a choice.

174. It should also be noted that its decision on the final form of its work is quite independent of the decision it will take on the content of that work (see para. 163 above). Or, rather, while it is obvious that, if the Commission proposes amendments to existing conventions, its recommendations should take the form of a draft convention, a decision to “preserve what has been achieved” will leave the issue of form entirely open.

175. Under this approach, the one preferred by the Special Rapporteur (see paras. 165–168 above), one possibility would be to prepare draft protocols to existing conventions, it being understood that the conventions are not to be amended, but, rather, that the provisions adopted in 1969, 1978 and 1986 are to be supplemented and refined. Then, theoretically, the above-mentioned complications (see para. 166 above), which would be the result of the coexistence of incompatible rules in force between two groups of States, would no longer arise. States that ratified the protocol or protocols would simply be bound by clearer and more detailed rules than those that were parties only to the “basic” conventions.

176. Another way of achieving the same result would be to formulate a set of consolidated draft articles on reservations to treaties by combining, in a single text, provisions scattered throughout the three relevant Vienna Conventions and new rules intended to refine and supplement them. It would then be up to the General Assembly to determine the fate of that draft. However, even if it was to become a “Convention on the Law of Reservations to Treaties”, it would theoretically not conflict with existing conventions, since it would merely reproduce their provisions word for word.

177. There is one fairly strong argument in favour of choosing one of these two solutions: it is precisely that these treaty rules exist and it might seem appropriate to continue along the same lines and consolidate the treaty regime for reservations.

178. As indicated above (see paras. 170–174), however, the Commission is by no means bound to prepare a

²¹¹ See footnote 177 above.

²¹² See, in particular, articles 16, 21 and 22 of the statute.

proper set of draft articles in the form either of a draft protocol or of a “consolidated” convention. It can just as easily opt for only a detailed study of the problems involved or even an article-by-article commentary on existing provisions, a sort of guide to the practice of States and international organizations on reservations. Such a document would carry the weight of a text formally endorsed by the Commission and might subsequently be the subject of a recommendation by the General Assembly. This approach also offers a number of advantages. More easily than a formal set of articles, it would allow the specific features of certain types of treaty to be taken fully into consideration, especially as the Commission would

simultaneously be adopting model clauses for various situations (see para. 169 above).²¹³

179. Even if the Commission leaned towards the more classical solutions of one or more sets of draft articles (see paras. 175 and 177 above), nothing would stop it from recommending the inclusion of any model clauses it might adopt in future multilateral conventions on specific topics for which the application of general rules would seem inappropriate.

²¹³ These clauses might derogate from existing law, since they would be intended for inclusion in specific conventions, but they would not call in question the provisions of existing conventions.

Conclusion

180. The provisions of the 1969, 1978 and 1986 Vienna Conventions relating to reservations certainly have their weaknesses, but they also offer the great advantage of flexibility and adaptability. In the Special Rapporteur’s view, it would be regrettable to go back on solutions that have proved their worth in order to take up instead an abstract line of thinking and to search for an ideal solution that probably does not exist.

181. On the other hand, and herein lies the crux of the issue, it would certainly be advantageous to fill the gaps in existing texts and, insofar as possible, to do away with

their ambiguities. Yet that endeavour, which is useful and salutary in many respects, must be carried out prudently and with due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions, while simultaneously safeguarding their basic objectives.

182. There are several ways of achieving this goal—draft articles additional to existing treaties, “consolidated” draft articles, a “guide to practice”, model clauses or a combination of these approaches. It is up to ILC, in close consultation with the Sixth Committee, to determine which are the most appropriate.