

# RESERVATIONS TO TREATIES

[Agenda item 3]

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## Seventh report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur

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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, 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, No. 2889, p. 221.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, annex A, No. 2889, p. 7.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Political Rights of Women (New York, 31 March 1953)	<i>Ibid.</i> , vol. 193, No. 2613, p. 135.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, No. 3992, p. 191.
Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and material (New York, 4 June 1954)	<i>Ibid.</i>
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	<i>Ibid.</i> , vol. 282, No. 4101, p. 249.
Convention relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
European Convention on Establishment (Paris, 13 December 1955)	<i>Ibid.</i> , vol. 529, No. 7660, p. 141.
Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)	<i>Ibid.</i> , vol. 399, No. 5742, p. 189.
Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956)	<i>Ibid.</i> , vol. 268, No. 3850, p. 3.
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Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (New York, 10 December 1962)	<i>Ibid.</i> , vol. 521, No. 7525, p. 231.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	<i>Ibid.</i> , vol. 634, No. 9065, p. 221.
Convention on the unification of certain points of substantive law on patents for invention (Strasbourg, 27 November 1963)	<i>Ibid.</i> , vol. 1249, No. 20401, p. 369.
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## Introduction

1. As an introduction to his seventh report, the Special Rapporteur deems it useful to present, as he did in his previous reports,

(a) A brief summary of the lessons which in his view can be drawn from the consideration of his sixth report both by the Commission itself and by the Sixth Committee of the General Assembly (sect. B below);

(b) A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention (sect. C below);

(c) A general presentation of this report (sect. D below).

In addition, since the Commission is entering a new five-year period, he thought it necessary to preface these traditional comments with a brief summary of its earlier work on the topic (sect. A below).

### A. The Commission's earlier work on the topic

2. Initially, the Commission considered the topic of reservations to treaties in the broader context of the law of treaties; in 1995, it was included on the Commission's agenda as a separate topic.

#### 1. RESERVATIONS TO TREATIES AND THE LAW OF TREATIES<sup>1</sup>

3. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) defines a reservation as:

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.

Reservations are, therefore, collateral instruments and, quite naturally, successive special rapporteurs of the Commission on the law of treaties undertook to study them between 1950 and 1966.

4. However, although the actual concept of reservation did not pose any major problems, the Commission's views regarding the legal regime applicable to these instruments has evolved considerably. This is primarily due to exogenous factors and, in particular, to the extremely innovative advisory opinion adopted by ICJ on 28 May 1951 in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>2</sup>

<sup>1</sup> A much fuller account may be found in the first report on reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, chap. I (The previous work of the Commission on reservations and the outcome), pp. 126–141, paras. 8–90.

<sup>2</sup> *I.C.J. Reports 1951*, p. 15. Regarding the major contribution of this opinion, see Pellet, "La CIJ et les réserves aux traités: remarques cursives sur une révolution jurisprudentielle"; see also the studies cited in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/478, annex I: bibliography, p. 85, and *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/478/Rev.1, annex I: bibliography, p. 139, particularly pp. 142–143.

5. Initially, the Commission took the generally accepted conventional approach and subjected the possibility of accepting a treaty, with reservations, to acceptance of the reservations by all parties to the treaty.<sup>3</sup> Although, in its advisory opinion of 1951, ICJ had adopted a more flexible approach, at least with respect to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, in keeping with pan-American practice and based on the criterion of compatibility of the reservation with the object and purpose of the treaty,<sup>4</sup> the Commission, in accordance with the views of successive special rapporteurs,<sup>5</sup> adhered to this position until 1961.<sup>6</sup>

6. It was not until Sir Humphrey Waldock's first report on the law of treaties,<sup>7</sup> in 1962, that the Commission departed from the conventional approach and adopted a more "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"<sup>8</sup>, it being understood that the criterion of compatibility of the reservation with the object and purpose of the treaty should guide States in their assessment.<sup>9</sup>

7. Having been favourably received by the General Assembly, this change was confirmed on second reading, even though the draft finally adopted in 1966 differed significantly in certain respects from the 1962 draft, *inter alia* because the Commission came round more clearly to the ICJ view, and seemed to make compatibility with the object and purpose of the treaty a criterion for permissibility of the reservation.<sup>10</sup> The Commission's draft spelled out the rules applicable to the formulation of reservations (art. 16), acceptance of and objection to reservations (art. 17), procedure regarding reservations (art. 18), legal effects (art. 19) and withdrawal of reservations (art. 20).<sup>11</sup>

8. The United Nations Conference on the Law of Treaties preserved the structure<sup>12</sup> and general outlines

<sup>3</sup> See the first report of Mr. James L. Brierly on the law of treaties, *Yearbook ... 1950*, vol. II, p. 240, document A/CN.4/23, and the report of the Commission, *ibid.*, document A/1316, p. 381, para. 164.

<sup>4</sup> *I.C.J. Reports 1951* (see footnote 2 above), pp. 24 and 29–30.

<sup>5</sup> See, in particular, the first report of Sir Hersch Lauterpacht, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92 and 123–136, and the first report of Sir Gerald Fitzmaurice, *Yearbook ... 1956*, vol. II, A/CN.4/101, pp. 115–116 and 126–127.

<sup>6</sup> See, in particular, the Commission's report of 1951, one chapter of which is devoted especially to the issue of reservations, pursuant to a specific request from the General Assembly (*Yearbook ... 1951*, vol. II, document A/1858, p. 128, para. 24).

<sup>7</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 60–68.

<sup>8</sup> *Ibid.*, document A/5209, p. 180, para. (14) of the commentary to draft article 20.

<sup>9</sup> *Ibid.*, p. 176, draft art. 20, para. 2 (b).

<sup>10</sup> See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–207, draft art. 16 and the commentary thereon.

<sup>11</sup> *Ibid.*, pp. 202–209.

<sup>12</sup> However, the order of the articles was changed. In the 1969 Vienna Convention, the structure is as follows: art. 19: (Formulation

of the draft, while further broadening the possibility of formulating reservations and lessening the effects of objections. This resulted in articles 19–23 of the 1969 Vienna Convention, which were purely and simply transposed into the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

9. In addition, in connection with its work on succession of States in respect of treaties, the Commission wondered about “the position of the successor State in regard to reservations, acceptances and objections”<sup>13</sup> formulated by the predecessor State. This led to the inclusion, in the Vienna Convention on Succession of States in respect of treaties (hereinafter the 1978 Vienna Convention), of an article 20 which merely states concisely the rules relating to succession in respect of reservations, without going into what happens to acceptances and objections formulated by a predecessor State and, for the rest, refers to articles 19–23 of the 1969 Vienna Convention.

## 2. THE TOPIC “RESERVATIONS TO TREATIES”

10. The rules relating to reservations in the three Vienna Conventions of 1969, 1978 and 1986 constituted—and still do constitute—the framework for practice in respect of reservations both for States which have become party to the Conventions and for those which have not acceded thereto. On the whole, at the practical level, this framework is satisfactory.

11. Nonetheless, as Mr. Paul Reuter, Special Rapporteur, pointed out, “the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention have not eliminated all these difficulties”.<sup>14</sup> Serious problems of principle continue to arise, *inter alia*, concerning, on the one hand, the criterion of compatibility with the object and purpose of the treaty and, on the other, the statement by States parties of their position vis-à-vis the reservation through acceptance or objection. These problems have not inconsiderable practical repercussions. Furthermore, the provisions concerning reservations of the three Vienna Conventions contain numerous other ambiguities and gaps that are the source of difficulties for States and international organizations, particularly (but not exclusively) when acting as depositaries.<sup>15</sup>

(Footnote 12 continued.)

of reservations); art. 20 (Acceptance of and objection to reservations); art. 21 (Legal effects of reservations and of objections to reservations); art. 22 (Withdrawal of reservations and of objections to reservations); and art. 23 (Procedure regarding reservations).

<sup>13</sup> Third report of Sir Humphrey Waldock on succession in respect of treaties, *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 47, para. (1) of the commentary to article 9; see pages 46–52; see also the first report of Sir Francis Vallat on succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, pp. 50–55.

<sup>14</sup> Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, p. 56, para. 53.

<sup>15</sup> For a first survey of these ambiguities and gaps, see the first report on reservations to treaties, *Yearbook ... 1995* (footnote 1 above), chap. II (Brief inventory of the problems of the topic), pp. 141–150, paras. 91–149.

12. It was in order to try to remedy this situation that, in 1993, in accordance with suggestions made during discussions in the Sixth Committee of the General Assembly in 1989 and following proposals made by the Working Group regarding the long-term programme of work and by the Planning Group, the Commission decided to include the topic of reservations to treaties in its agenda.<sup>16</sup> The decision was approved by the General Assembly<sup>17</sup> and, the following year, the Commission appointed a special rapporteur; the latter has already submitted six reports.<sup>18</sup>

### (a) *The first two reports on reservations to treaties and the Commission's decisions*

13. The first two reports on reservations to treaties present specific features.

#### (i) *First report and the outcome*

14. The first report, entitled “First report on the law and practice relating to reservations to treaties”,<sup>19</sup> was submitted and discussed in 1995; it sought to present:

a. The Commission's earlier work on reservations;

b. Problems left pending;<sup>20</sup> and

c. The scope and form that the outcome of the Commission's future work on the topic might take.

15. At the end of the discussions, the Special Rapporteur drew the following conclusions:

(b)<sup>21</sup> The Commission should adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements should be interpreted with flexibility and, if the Commission felt that it must depart from them substantially, it could submit new proposals to the General Assembly on the form that the results of the work might take;

(d) There was a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.<sup>22</sup>

<sup>16</sup> See *Yearbook ... 1993*, vol. II (Part Two), p. 96, paras. 428–430. At the request of the Special Rapporteur, the Commission decided in 1996 to simplify the title of the topic, which initially was: “The law and practice relating to reservations to treaties” (see *Yearbook ... 1996*, vol. II (Part Two), p. 79, para. 105 (a)).

<sup>17</sup> General Assembly resolution 48/31 of 9 December 1993, para. 7.

<sup>18</sup> It will be recalled that, in fact, the Commission did not consider the fourth report (*Yearbook ... 1999* (see footnote 2 above), p. 127, document A/CN.4/499) and that its substance was repeated in the fifth report (*Yearbook ... 2000*, vol. II (Part One), p. 139, document A/CN.4/508 and Add.1–4).

<sup>19</sup> *Yearbook ... 1995* (see footnote 1 above).

<sup>20</sup> The first two chapters are very briefly summarized above (paras. 3–12).

<sup>21</sup> The first conclusion (a) concerned the change in the title of the topic (see footnote 16 above).

<sup>22</sup> *Yearbook ... 1996* (see footnote 16 above), para. 105.

16. These conclusions were supported by the Commission (and by the States that spoke on the topic during the debate in the Sixth Committee in 1995)<sup>23</sup> and have formed the basis on which the Commission and its Special Rapporteur have worked ever since. It would be regrettable, to say the least, if they were to be questioned at this stage.

17. At its forty-seventh session, in 1995, the Commission, in accordance with its previous practice, also “authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions”.<sup>24</sup> The secretariat sent the questionnaires to all States Members of the United Nations or members of specialized agencies or that are party to the ICJ Statute and to 65 intergovernmental organizations.<sup>25</sup> Answers were received from 33 States<sup>26</sup> and 24 international organizations.<sup>27</sup> The Special Rapporteur wishes again to draw attention to the fact that the European Community, which has an abundance of practice in respect of reservations and which does not have fewer resources for responding to such surveys than other international organizations, has thus far not answered. He keenly regrets that failure to respond.

(ii) *Second report and the outcome*

18. The second report, submitted in 1996, consisted of two entirely different chapters.<sup>28</sup> In the first, the Special Rapporteur presented an “overview of the study” and in particular, made a number of proposals with regard to the Commission’s future work on the topic of reservations to treaties.<sup>29</sup> That chapter contained a “provisional plan of the study”.<sup>30</sup>

<sup>23</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), para. 174.

<sup>24</sup> *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

<sup>25</sup> The questionnaires are reproduced in *Yearbook ... 1996* (see footnote 2 above), document A/CN.4/477 and Add.1, annexes II and III, pp. 97 and 107, respectively.

<sup>26</sup> Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, New Zealand, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. The Special Rapporteur wishes again to thank these States but no longer has much hope that other States will join them. He points out that this failure to reply skews the picture regarding practice, particularly since the geographic origin of the replies is very unbalanced.

<sup>27</sup> ALADI, BIS, Council of Europe, FAO, IAEA, ICAO, ILO, IMO, IFAD, IMF, ITU, OSCE, Pacific Islands Forum Secretariat, United Nations, UNESCO, UNIDO, UPU, WCO, World Bank (IBRD, IDA, IFC, MIGA), WHO, WIPO, WMO and WTO. The Special Rapporteur also wishes to thank these organizations and to express the hope that those which have not yet replied to the questionnaires will do so in the next few months.

<sup>28</sup> *Yearbook ... 1996* (see footnote 25 above), p. 37.

<sup>29</sup> *Ibid.*, pp. 44–51, paras. 9–50.

<sup>30</sup> *Ibid.*, pp. 48–49, para. 37; this outline was briefly commented on (*ibid.*, pp. 49–51, paras. 38–50).

19. Chapter II of the second report, entitled “Unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties)”<sup>31</sup> concluded that, although there were many different kinds of multilateral treaties, the regime of reservations to treaties outlined in articles 19–23 of the 1969 and 1986 Vienna Conventions, because of its flexibility was suited to all treaties, including those dealing with the protection of human rights. The Special Rapporteur had added to his report a draft resolution of the Commission concerning reservations to human rights treaties.<sup>32</sup>

20. Due to time constraints the report was not considered in 1996. However, at the forty-ninth session, in 1997, it was the subject of an in-depth debate<sup>33</sup> following which the Commission adopted not a formal resolution, as the Special Rapporteur had proposed, but preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,<sup>34</sup> and it decided to communicate the text to the human rights treaty monitoring bodies. Thus far, few of them have responded; those that have, have reacted in a somewhat negative fashion, giving reasons that are not well founded.<sup>35</sup>

21. Although some members of the Commission were of a different opinion, the Special Rapporteur remains convinced that it is preferable not to formally revise the preliminary conclusions adopted in 1997 before completing in first reading, if not the Guide to Practice as a whole, at least the draft guidelines concerning the effects of reservations. By that time he hopes that there will have been fuller consultation with the human rights bodies.

22. The Special Rapporteur had annexed a bibliography concerning reservations to treaties to his second report; a fuller and updated version is attached to his fourth report.<sup>36</sup>

(b) *The third and fifth reports: elaboration of the Guide to Practice*

23. What the third report<sup>37</sup> and the fifth report on reservations to treaties<sup>38</sup> have in common is that both documents introduce draft guidelines contained in the Guide to Practice in respect of reservations to treaties which

<sup>31</sup> *Ibid.*, pp. 52–83, paras. 55–260.

<sup>32</sup> *Ibid.*, p. 83, para. 260.

<sup>33</sup> See *Yearbook ... 1997*, vol. II (Part Two), pp. 44–57, paras. 44–157.

<sup>34</sup> *Ibid.*, p. 57.

<sup>35</sup> Regarding the reactions of the human rights bodies, see the third report (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 231, paras. 15–16, and the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), pp. 148–150, paras. 10–15. Independently of the debates held in 1997 within the Sixth Committee (see Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session (A/CN.4/483), paras. 64–89), several States have submitted comments concerning the Commission’s preliminary conclusions (see *Yearbook ... 2000* (mentioned above), pp. 150–151, para. 16).

<sup>36</sup> *Yearbook ... 1996* and *Yearbook ... 1999* (see footnote 2 above).

<sup>37</sup> *Yearbook ... 1998* (see footnote 35 above).

<sup>38</sup> See footnote 18 above.

the Commission has approved for drafting.<sup>39</sup> These draft guidelines, most of which have been adopted by the Commission, are the product of a uniform method of elaboration, whose main elements it might be useful to recall.

(i) *Draft guidelines which have been adopted*

24. As the question of the unity or diversity of the legal regime for reservations to multilateral treaties (particularly human rights treaties) was the topic of the second report, in accordance with the plan of work submitted in 1995,<sup>40</sup> the third report<sup>41</sup> and the first part of the fifth report<sup>42</sup> dealt with the question of the definition of reservations, which has turned out to be infinitely more complex than could have been imagined, since the aim was to distinguish carefully between the reservations of comparable institutions which could not be assimilated. This is the topic of part one of the Guide to Practice<sup>43</sup> (Definitions), which has 30 draft guidelines divided into seven sections:<sup>44</sup>

1.1 Definition of reservations (draft guidelines 1.1 and 1.1.1 to 1.1.8)

1.2 Definition of interpretative declarations (draft guidelines 1.2, 1.2.1 and 1.2.2)

1.3 Distinction between reservations and interpretative declarations (draft guidelines 1.3 and 1.3.1 to 1.3.3)

1.4 Unilateral statements other than reservations and interpretative declarations (draft guidelines 1.4.1 to 1.4.7)

1.5 Unilateral statements in respect of bilateral treaties (draft guidelines 1.5.1 to 1.5.3)

1.6 Scope of definitions (draft guideline 1.6), and

1.7 Alternatives to reservations and interpretative declarations (draft guidelines 1.7.1 and 1.7.2).

25. One of the concepts similar to reservations of particular importance in State practice—although it is neither dealt with nor even evoked in the 1969 and 1986 Vienna Conventions—is that of interpretative declarations, whose legal regime was to be considered at the same time as the legal regime for reservations and which is therefore dealt with in some of the provisions of the Guide to Practice.<sup>45</sup>

<sup>39</sup> See paragraphs 15–16 above.

<sup>40</sup> See paragraph 18 above.

<sup>41</sup> *Yearbook ... 1998* (see footnote 35 above), p. 221.

<sup>42</sup> *Yearbook ... 2000* (see footnote 35 above), pp. 159–180, paras. 66–213, on alternatives to reservations and interpretative declarations, and annex II on definitions, p. 201).

<sup>43</sup> All the draft guidelines adopted by the Commission or proposed by the Special Rapporteur thus far are annexed to the present report.

<sup>44</sup> The commentaries on these drafts are contained in the reports of the Commission on its fiftieth session (*Yearbook ... 1998*, vol. II (Part Two), pp. 99–107, para. 540), fifty-first session (*Yearbook ... 1999*, pp. 93–126, para. 470) and fifty-second session (*Yearbook ... 2000*, vol. II (Part Two), pp. 108–123, para. 663).

<sup>45</sup> See the fifth report, *Yearbook ... 2000* (footnote 18 above),

26. A problem, however, arose in that regard and cropped up again in the report of the Commission on the work of its fifty-third session in 2001.<sup>46</sup> The problem is as follows: the Commission distinguished between two categories of interpretative declarations: on the one hand, those which purport solely to specify or clarify the meaning or scope which the authors, States or international organizations attribute to a treaty or to certain of its provisions<sup>47</sup> and, on the other hand, those whereby the declarant, purporting to achieve the same objective of specifying or clarifying, subjects its consent to be bound to this interpretation. In accordance with much of the doctrine, the Commission called this latter type of declaration “conditional interpretative declarations”.<sup>48</sup> The distinction has not been contested. Nonetheless, as work on the draft progresses, it appears that the legal regime for conditional interpretative declarations is similar, and even identical, to that for reservations. Consequently, certain members of the Commission expressed their strong opposition to the draft dealing separately with conditional interpretative declarations. While the Special Rapporteur does not object to this in principle, he believes, as do other members, that no final decision should be taken on the matter until the effects of reservations and conditional interpretative declarations have been considered. If, *mutatis mutandis*, an identical regime applies to both, there would still be time to delete specific guidelines relating to conditional interpretative declarations and adopt a single guideline assimilating the legal regime applicable to conditional interpretative declarations to that of reservations.

27. The second part of the fifth report<sup>49</sup> and the sixth report<sup>50</sup> addressed seemingly minor problems with regard to the formulation of reservations and interpretative declarations, although some of them were of great practical significance. On the basis of the fifth report, the Commission, at its fifty-third session in 2001, adopted 11 draft guidelines included in part two of the Guide to Practice (Procedure)<sup>51</sup> concerning:

(a) Confirmation of reservations when signing (draft guidelines 2.2, 2.2.1 to 2.2.3);

(b) Late formulation of a reservation (draft guidelines 2.3, 2.3.1 to 2.3.4); and

p. 158, para. 61.

<sup>46</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 18, para. 20, p. 173, para. 123, and p. 176, para. 149. See also paragraphs 39 and 43 below.

<sup>47</sup> See draft guideline 1.2.

<sup>48</sup> See draft guideline 1.2.1.

<sup>49</sup> *Yearbook ... 2000* (footnote 18 above), pp. 183–199, paras. 230–332, on the moment of formulation of reservations and interpretative declarations.

<sup>50</sup> *Yearbook ... 2001*, vol. II (Part One), A/CN.4/518/Add.1 and Add.3, pp. 144–164, paras. 40–173, on the form, notification and publicity of reservations and interpretative declarations (and its annex (Procedure: consolidated text of all draft guidelines dealing with the formulation of reservations and interpretative declarations proposed in the fifth and sixth reports)). See section B below on the consideration of the sixth report.

<sup>51</sup> The text of and commentaries on these draft guidelines are reproduced in *Yearbook ... 2001*, vol. II (Part Two), pp. 180–195.

(c) Various aspects of the procedure relating to interpretative declarations (draft guidelines 2.4.3 to 2.4.7).

(ii) *Method of elaboration and adoption of draft guidelines*

28. For the elaboration and adoption of the draft guidelines adopted thus far, both the Special Rapporteur, in his reports, and the Commission limited themselves to a uniform method which is more fully described in the third report.<sup>52</sup>

29. In substance, in accordance with the indications given in 1998, the reports are based on the following general outline:

(a) Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions on the law of treaties and the *travaux préparatoires* leading to their adoption;

(b) Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires<sup>53</sup> which he has received will be particularly valuable;

(c) Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

(d) On the basis of this information, he proposes a series of draft articles that will form the Guide to Practice which the Commission intends to adopt;

(e) Where appropriate, the draft articles are accompanied by model clauses which States could use when derogating from the Guide to Practice in special circumstances or specific fields or, on the contrary, to give effect to it.<sup>54</sup>

30. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see subparagraph (b) above).

31. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice. The

<sup>52</sup> *Yearbook ... 1998* (see footnote 35 above), pp. 233–235, paras. 31–41.

<sup>53</sup> See paragraph 17 above.

<sup>54</sup> Thus far, model clauses have only been proposed in the fifth report on reservations to treaties (*Yearbook ... 2000* (see footnote 18 above), p. 197, para. 312). These drafts concern "Reservations formulated after the expression of consent to be bound"; anxious not to encourage the practice of late reservations (which is in fact highly questionable), the Commission did not refer these draft guidelines to the Drafting Committee.

Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the Guide to Practice under consideration: silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users"—legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations—a reference work that is as complete and comprehensive as possible. Thus, the Guide to Practice reproduces the relevant provisions of the three Vienna Conventions of 1969, 1978 and 1986, combining them where necessary.

32. This method met with the general approval of both the Sixth Committee and the Commission. Nonetheless, misunderstandings sometimes arose in connection with this second aspect of the Special Rapporteur's method, which was to reproduce word for word the provisions of the Vienna Conventions relating to reservations: certain members of the Commission strongly supported proposals to insert amendments in the draft guidelines of the Guide to Practice which, in their view, would improve them. This approach is unwise; not only is it hardly compatible with the basic premise that the Conventions should not be called into question,<sup>55</sup> but it also sows confusion and is unnecessarily ponderous. While the texts of the Conventions may seem obscure or ambiguous, that seems infinitely preferable to attempting to clarify or supplement them by adopting separate draft guidelines. Moreover, this is what the Commission decided in all cases where such problems arose. The Special Rapporteur fervently hopes that this sound approach will not be called into question in future.

33. Otherwise, the Commission is proceeding, in the elaboration of the Guide to Practice, as it does for all draft articles:<sup>56</sup>

(a) The Commission discusses in the plenary meeting the draft guidelines proposed by the Special Rapporteur;

(b) These draft guidelines are (or are not) referred to the Drafting Committee, which makes whatever changes it deems appropriate;

(c) The new version is again discussed in the plenary;

<sup>55</sup> See paragraph 15 above.

<sup>56</sup> The Special Rapporteur wishes to evoke in passing a (relatively minor) question on which he does not share the views of certain members of the Commission: the numbering of draft guidelines. One view holds that the numbering should follow the usual practice: article 1; article 2; article 3 ... The Special Rapporteur has always been against this: he believes that the current practice (1.1; 1.1.1; 1.2.1) has its advantages: first of all, it helps to draw a clear distinction between the Guide to Practice and the draft convention with which the Guide to Practice is not synonymous (moreover, certain draft guidelines which have already been adopted will never find their way into a treaty—see guidelines 1.7.1 or 1.7.2, for example). Secondly, with the numbering adopted, draft guidelines can be conveniently rearranged by, *inter alia*, chapters or sections; also, additions can be made to the Guide to Practice as work progresses without having to continually dismantle the whole structure. Furthermore, the fact is that, in practice, after an adjustment period, the numbering chosen no longer poses any problem and is adopted by both the members of the Commission and the speakers in the Sixth Committee.

(d) Once the final text is adopted, the Special Rapporteur prepares draft commentaries with the assistance of the Secretariat; and

(e) The commentaries are discussed, amended if necessary, and adopted by the Commission prior to their inclusion in the annual report of the Commission for consideration by the Sixth Committee.

34. It should be noted, however, that the debates in the Sixth Committee cannot have an immediate effect: unless it is prepared to turn its work (whether it is on the Guide to Practice in respect of reservations or any other draft) into a kind of Penelope's web and start over and over again, the Commission cannot be constantly revising its drafts to reflect the reactions of the representatives of States in the General Assembly. Such reactions are, and can only be, a means of "fixing a date" for the second reading. Nothing, however, precludes the Commission and special rapporteurs from taking into account the comments made in the Sixth Committee, which may prove useful in their *future* work. On the contrary, there is every reason to do so, and no one is more convinced than the Special Rapporteur on reservations to treaties that this should be done, even if there is no question of turning the Commission, a body of independent experts, into a mere rubber stamp for the unpredictable positions taken in an international political organ such as the General Assembly.

## B. Outcome of the sixth report on reservations to treaties

### 1. CONSIDERATION OF THE SIXTH REPORT BY THE COMMISSION

35. Like the question of the definition of reservations, the question of the formulation of reservations, when taken up, proved to be much more complex and delicate than had been expected. Not only did it have obvious concrete importance (it is important to know, among other things, in what form and at what moment a reservation may be made and the other contracting States and international organizations notified), but it also poses certain problems of principle as was shown, for example, in the Commission's rather lively discussions on the subject of late reservations, one of the subjects of the fifth report on reservations to treaties.

36. This is why, despite his efforts, the Special Rapporteur was unable in his fifth report to complete his examination of the problems associated with the formulation of reservations, as he had hoped to do. This he was able to do only in the sixth report.<sup>57</sup> The latter deals only with the form and notification of reservations and interpretative declarations,<sup>58</sup> including the important question of the role of the depositary.

<sup>57</sup> In response to criticisms of the slow progress of the work (criticisms which he recognizes have been less severe during the previous two years, perhaps because of a growing awareness of the scope of the task), the Special Rapporteur wishes to recall that he receives no assistance in the preparation of his reports, apart from whatever limited help the Secretariat of the Commission is able to provide and for which he is extremely grateful.

<sup>58</sup> See footnote 50 above.

37. At its fifty-third session in 2001, the Commission completed its consideration of the fifth report on reservations to treaties<sup>59</sup> and began consideration of the sixth. The discussion focused mainly on quite technical and very specific points, often in the form of useful opinions on which, in the absence of specific guidelines from the Commission,<sup>60</sup> the Drafting Committee will have to decide.

38. The Commission in fact referred to the Drafting Committee the entire set of draft guidelines proposed by the Special Rapporteur in his sixth report<sup>61</sup> on the form, notification and publication of reservations and interpretative declarations. Owing to lack of time, however, the Special Rapporteur was unable to consider them. He will therefore do so at the fifty-fourth session, in 2002.

### 2. CONSIDERATION OF CHAPTER VI OF THE REPORT OF THE COMMISSION BY THE SIXTH COMMITTEE

39. Chapter VI of the report of the Commission on the work of its fifty-third session in 2001 deals with reservations to treaties. A very brief summary is contained in chapter II<sup>62</sup> and specific issues on which comments would be of particular interest to the Commission are dealt with in chapter III. On the topic of reservations to treaties,<sup>63</sup> these issues concern:

(a) Conditional interpretative declarations (the question being whether draft guidelines specifically relating to such declarations should be included in the Guide to Practice);<sup>64</sup>

(b) Late formulation of reservations (two questions were posed to States on this issue: (i) should draft guideline 2.3.1 (Late formulation of a reservation) be retained in the Guide to Practice? (ii) is it advisable to use the term "objection" in the same draft guideline to signify opposition by a Contracting Party to such a formulation?);<sup>65</sup>

(c) Role of the depositary (does it lie with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is

<sup>59</sup> See paragraph 27 above.

<sup>60</sup> See summaries of the debates in the report of the Commission on the work of its fifty-third session, *Yearbook ... 2001* (footnote 46 above), pp. 172–177, paras. 118–154. See also the summary records of the 2677th to 2679th and 2689th to 2693rd meetings (*ibid.*, vol. I, pp. 67–86 and 145–177).

<sup>61</sup> *Yearbook ... 2001* (see footnote 46 above), p. 177, para. 155. Numbered draft guidelines 2.1.1 to 2.1.8 and 2.4.1, 2.4.2 and 2.4.9 appear in the sixth report (*ibid.* (footnote 50 above), annex). The text of these proposals is contained in italics in the annex to the present report.

<sup>62</sup> *Ibid.* (see footnote 46 above), p. 17, para. 13. The Special Rapporteur questions the usefulness of these "summaries", which are not very informative.

<sup>63</sup> *Ibid.*, p. 18, paras. 20–26.

<sup>64</sup> See paragraph 26 above.

<sup>65</sup> The problem lies in the fact that, according to the Special Rapporteur and certain members of the Commission, the use of this word is a source of confusion, since the objection is not to the content of the proposed reservation (as in articles 20–23 of the 1969 and 1986 Vienna Conventions), but to the very principle of its formulation. That is why, during the work of the Drafting Committee, the Special Rapporteur had proposed the use of a different term, such as "opposition" or "rejection".

manifestly inadmissible, particularly when it is prohibited by a provision of the treaty?).

40. This part of the report was the subject of debate in the Sixth Committee from 29 October to 9 November 2001,<sup>66</sup> during which representatives of 28 States or groups of States<sup>67</sup> spoke on the topic of reservations to treaties. Even though the Special Rapporteur has deep reservations about the way in which consultations take place between the Sixth Committee and the Commission,<sup>68</sup> he noted with satisfaction and appreciation that most of the speakers had focused on the issues raised by the Commission.<sup>69</sup>

41. As noted above,<sup>70</sup> many of the views expressed by States in the Sixth Committee can be taken into consideration only when the Commission proceeds to the second reading of the Guide to Practice. This observation evidently applies to the responses to the two questions posed with regard to the late formulation of reservations,<sup>71</sup> which was the subject of draft guidelines 2.3.1–2.3.4 now adopted.

42. Were it to be otherwise, it would no doubt be imprudent to seek clear guidelines in the statements made during the debates of the Sixth Committee on the topic. While certain States did indeed seem to be against the very principle of including in the Guide to Practice guidelines concerning the late formulation of reservations,<sup>72</sup> some of these declarations are in reality ambiguous.<sup>73</sup> Furthermore, other speakers, on the con-

<sup>66</sup> In principle, the Sixth Committee wished the different chapters of the report to be considered separately. Unfortunately, States paid little heed to this prudent recommendation. The relevant summary records are contained in *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee* (A/C.6/56/SR.11–15 and A/C.6/56/SR.17–24). The Special Rapporteur again expresses regret that the vast majority of the summary records sent to him were in English only. See also the very useful Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session (A/CN.4/521).

<sup>67</sup> Sweden spoke on behalf of the Nordic countries (Denmark, Finland, Iceland and Norway), on 2 November 2001, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 17th meeting (A/C.6/56/SR.17), paras. 18–24.

<sup>68</sup> The Special Rapporteur had occasion to give voice publicly to these concerns on 6 November 2001, *ibid.*, 21st meeting (A/C.6/56/SR.21), paras. 27–28 and 34.

<sup>69</sup> This is also true of the useful written observations which the United Kingdom kindly transmitted to him on 27 February 2002 through the secretariat.

<sup>70</sup> Para. 34.

<sup>71</sup> See paragraph 39 above.

<sup>72</sup> See the positions of the United States, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 14th meeting (A/C.6/56/SR.14), para. 84; and of Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 26, which expressed concern that the inclusion in the Guide to Practice of a guideline on the late formulation of a reservation might serve to encourage a practice that is open to criticism. Also expressing concern were Sweden, on behalf of the Nordic countries, *ibid.*, 17th meeting (A/C.6/56/SR.17), para. 24; Kenya, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 85; Haiti, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 39; and India, *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 5.

<sup>73</sup> As is the case of the written proposal of the United Kingdom (see footnote 69 above) which, after reiterating its opposition in principle to the late formulation of reservations, proposes new wording for draft guideline 2.3.1 which, in its view, is different from the one retained by the Commission only by the requirement (contrary to the current

trary, approved the inclusion.<sup>74</sup> States were also divided on the use of the term “objection” in draft guideline 2.3.1.<sup>75</sup>

43. It is less difficult to identify a broad trend in the positions taken by speakers in the Sixth Committee regarding the advisability of including in the Guide to Practice guidelines concerning the juridical regime applicable to conditional interpretative declarations. Indeed, while certain States took a firm position in favour<sup>76</sup> or against<sup>77</sup> such guidelines,<sup>78</sup> the vast majority of delegations that spoke supported the position of the Special Rapporteur<sup>79</sup> that this juridical regime is very likely identical or very similar to the regime of reservations, but it would be prudent to confirm that before taking a final decision on the matter.<sup>80</sup> In the present report, the Special Rapporteur will therefore continue to raise questions about the rules applicable to conditional interpretative declarations and will propose that the Commission take a decision on the matter only after consideration of the report which he will prepare on the

practice) of express acceptance: “If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all the other Contracting Parties expressly accept the late formulation of the reservation.” See also the comments of Austria, which argues that such declarations formulated after the expression of consent to be bound constitute reservations, but which does not seem to be opposed to its inclusion in the Guide to Practice (*ibid.*, 13th meeting (A/C.6/56/SR.13), para. 10); see further Japan (*ibid.*, 22nd meeting (A/C.6/56/SR.22), paras. 52–54) and the Russian Federation (*ibid.*, paras. 74–75).

<sup>74</sup> See the positions of Singapore, *ibid.*, 12th meeting (A/C.6/56/SR.12), para. 57; Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 41; Bahrain, *ibid.*, 19th meeting (A/C.6/56/SR.19), paras. 18–23; China, *ibid.*, para. 29; Italy, *ibid.*, paras. 40–42; Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 2; Poland, *ibid.*, para. 8; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 4; Greece, *ibid.*, 22nd meeting (A/C.6/56/SR.22), paras. 69–70. See also Romania, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 56, and Guatemala, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 12. In his statement, the Special Rapporteur recalled that no State had objected to the practice of the Secretary-General of the United Nations (and other depositaries) consisting in considering as accepted a reservation that is formulated late, in the absence of any “objection” within a specified period of time (*ibid.*, 21st meeting (A/C.6/56/SR.21), paras. 32–33).

<sup>75</sup> Singapore, *ibid.*, 12th meeting (A/C.6/56/SR.12), para. 58, and Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 41, declared that they had no objection to it. On the contrary, the United States, *ibid.*, 14th meeting (A/C.6/56/SR.14), para. 85, and Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 2, indicated their preference for other terms such as “opposition”, “denial” or “rejection”; see also the position taken by Poland, *ibid.*, para. 8.

<sup>76</sup> See China, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 28.

<sup>77</sup> See Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 40. See also the doubts expressed by Austria, *ibid.*, 13th meeting (A/C.6/56/SR.13), para. 11, and by the United Kingdom, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 16, and the written reactions of this State (footnote 69 above).

<sup>78</sup> Others have made no distinction (mistakenly, according to the Special Rapporteur) between simple interpretative declarations and conditional interpretative declarations (see Bahrain, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 26, or Israel, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 14).

<sup>79</sup> See paragraph 26 above.

<sup>80</sup> See United States, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 14th meeting (A/C.6/56/SR.14), para. 83; Romania, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 56; Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 1; France, *ibid.*, para. 4; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 3; Greece, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 71; Russian Federation, *ibid.*, para. 73; Kenya, *ibid.*, para. 84; and Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 25.

permissibility of reservations and interpretative declarations and their legal effects.

44. The last question posed by the Commission with regard to reservations was more exclusively prospective in nature, namely, whether the depositary may or should “refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty”.<sup>81</sup> The nuanced responses given to this question by the delegations of States to the Sixth Committee could serve as a useful guide to the Commission and its Drafting Committee during the consideration of the draft guidelines proposed by the Special Rapporteur in his sixth report which, as indicated above,<sup>82</sup> have been referred to the Drafting Committee, which had been unable to consider them. They will be particularly useful in the final elaboration of draft guideline 2.1.7 (Functions of depositaries),<sup>83</sup> which could be appropriately modified or complemented by another draft guideline specifically concerned with the question that was posed to States.

45. Generally speaking, States have expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof.<sup>84</sup> Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and that he should therefore limit himself to transmitting to the parties the reservations that were formulated.<sup>85</sup> However, a number of representatives in the Sixth Committee were of the view that, when a reservation is manifestly impermissible, it is incumbent upon the depositary to refuse to communicate it<sup>86</sup> or at least to first inform the author of the reservation of its position and, if the author maintains the reservation,<sup>87</sup> to communicate it and draw the attention of the other parties to the problem. Moreover, the United Kingdom underscored the role which the Guide to Practice could play in harmonizing the practice of depositaries in the matter.<sup>88</sup>

46. In view of the responses of States to the question posed by the Commission, the latter might perhaps wish to consider the possibility of including in the Guide to

Practice a draft guideline complementing draft guideline 2.1.7<sup>89</sup> that specifies the action to be taken by the depositary in cases where he considers the reservation that has been formulated to be manifestly impermissible. This draft guideline could be worded as follows:

**“2.1.7 bis Case of manifestly impermissible reservations**

“1. Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such impermissibility.

“2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation.”

47. In addition, during the debates in the Sixth Committee, a number of States made useful observations on the details of several of the draft guidelines proposed in the sixth report on reservations to treaties. These observations are summarized in the topical summary prepared by the Secretariat.<sup>90</sup> The Drafting Committee will of course keep these observations in mind when considering the draft guidelines.

**C. Recent developments with regard to reservations to treaties**

48. As far as the Special Rapporteur is aware, there have been few developments of any significance during the year just ended with regard to reservations to treaties.

49. Mention should be made, however, of the important report prepared by the Secretariat at the request of the Committee on the Elimination of Discrimination against Women,<sup>91</sup> which was submitted to this Committee at its twenty-fifth session.<sup>92</sup> This report includes a section on practices of human rights treaty bodies on reservations,<sup>93</sup> which examines the practice followed by:

<sup>81</sup> *Yearbook ... 2001* (see footnote 46 above), p. 18, para. 25.

<sup>82</sup> Para. 38.

<sup>83</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 161, para. 169; the text of this draft is reproduced in footnote 89 below.

<sup>84</sup> See Spain, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 12th meeting (A/C.6/56/SR.12), para. 42.

<sup>85</sup> See Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 42; China, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 30; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 5; Israel, *ibid.*, para. 15; Russian Federation, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 76; and Kenya, *ibid.*, para. 86.

<sup>86</sup> See Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 3.

<sup>87</sup> See the United States, *ibid.*, 14th meeting (A/C.6/56/SR.14), paras. 86–87; France, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 6; Poland, *ibid.*, para. 9; Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 27; and India, *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 5; and the written reactions of the United Kingdom (footnote 69 above).

<sup>88</sup> See the United Kingdom, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 18, and the written reactions of that State (footnote 69 above).

<sup>89</sup> The draft reads as follows (see footnote 83 above):

“*Functions of depositaries*

“1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

“2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of:

“(a) The signatory States and organizations and the contracting States and contracting organizations; or

“(b) Where appropriate, the competent organ of the international organization concerned.”

<sup>90</sup> A/CN.4/521 (see footnote 66 above), paras. 46–50.

<sup>91</sup> See *Yearbook ... 2001* (footnote 50 above), p. 141, para. 28.

<sup>92</sup> Held on 2–20 July 2001 (CEDAW/C/2001/II/4).

<sup>93</sup> *Ibid.*, paras. 20–56.

- (a) The Human Rights Committee;
- (b) The Committee against Torture;
- (c) The Committee on the Elimination of Racial Discrimination;
- (d) The Committee on Economic, Social and Cultural Rights; and
- (e) The Committee on the Rights of the Child.

50. The present report is not the appropriate place in which to summarize much less to comment on this document, which contains useful information. The document conveys, however, a general impression that is worthy of note: human rights treaty bodies have an attitude towards reservations that is no doubt less dogmatic than the text of general comment No. 24 of the Human Rights Committee suggests.<sup>94</sup> Indeed, it shows that the bodies reviewed are more anxious to engage in a dialogue with the States authors of the reservations to encourage them to withdraw the reservations when these appear to be abusive rather than to rule on their impermissibility. This, for example, is the practice of the Committee on the Elimination of Discrimination against Women.<sup>95</sup> Annex VI of the Secretariat's report contains a legal opinion of the Office of Legal Affairs,<sup>96</sup> the date of which is not indicated but which appears to have been overtaken by events on certain points.

51. At its twenty-fifth session, the Committee on the Elimination of Discrimination against Women took no decision on the report of the Secretariat nor did it take up the question of reservations at its following session (14 January–1 February 2002).

52. For its part, the Sub-Commission on the Promotion and Protection of Human Rights, despite the concerns that had been expressed by the Commission on Human Rights,<sup>97</sup> renewed in its resolution 2001/17 of 16 August 2001, entitled "Reservations to human rights treaties", its earlier decisions of 1999 and 2000 and decided (para. 1):

to entrust Ms. Françoise Hampson with the task of preparing an expanded working paper on reservations to human rights treaties based on her working paper [E/CN.4/Sub.2/1999/28 and Corr.1], as well as

<sup>94</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V. For a critical commentary on this general comment, see the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 52–53, paras. 59–62, and pp. 77–82, paras. 218–252.

<sup>95</sup> See CEDAW/C/2001/II/4, paras. 4, 7 (c) and 10; see also the report of the Committee on its thirteenth session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 38 (A/49/38)*; chap. 1, sect. C, para. 10).

<sup>96</sup> See CEDAW/C/2001/II/4. This opinion was annexed to the report of the Committee on its third session (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 45 (A/39/45)*, vol. II, annex III); see also the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 72–73, para. 194.

<sup>97</sup> See decision 2001/113 of 25 April 2001 (*Official Records of the Economic and Social Council, Fifty-seventh Session, Supplement No. 3 (E/2001/23–E/CN.4/2001/167)*, p. 348). For previous episodes of this ongoing debate, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 142–143, paras. 21–27.

the comments made and discussions that took place at the fifty-first and fifty-second sessions of the Sub-Commission, which study will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper, and of submitting the extended working paper to the Sub-Commission at its fifty-fourth session.<sup>98</sup>

The Sub-Commission further decided (para. 2):

to continue its consideration of the question of reservations to human rights treaties at its fifty-fourth session under the same agenda item.<sup>99</sup>

53. In the light of the concerns that had been expressed on the question at the fifty-third session of the Commission in 2001, the Special Rapporteur did not follow up on his intention to contact Ms. Hampson<sup>100</sup> and the latter did not take the initiative to do so. He is of the view, however, that coordination, if done in a spirit of openness and mutual understanding, would be useful and even necessary and he hoped that the debate on this subject would be renewed this year in the Commission. Generally speaking, it seemed a useful idea for the Commission to take the initiative in promoting closer consultations with the human rights bodies with a view to the re-examination in one or two years' time of the preliminary conclusions adopted in 1997.<sup>101</sup>

54. With regard to the Committee of Legal Advisers on Public International Law (CAHDI), there does not seem to be any important new development to report. In accordance with the decision taken at its meeting in Paris in 1998, CAHDI continued to act as a European unit for monitoring reservations to international treaties.<sup>102</sup> In this capacity, it prepares and updates a list of reservations and declarations to conventions, concluded both outside the Council of Europe and within the Council, which are likely to give rise to objections.<sup>103</sup>

55. The Special Rapporteur has no knowledge of other important recent developments in the matter of reservations. He would be grateful to the other members of the Commission and to any reader of this report for any additional information that might be provided on the question.

## D. General presentation of the seventh report

56. Learning from experience, the Special Rapporteur is making no firm commitment with regard to the content of the present report. Nevertheless, such objec-

<sup>98</sup> Report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session (E/CN.4/2002/2–E/CN.4/Sub.2/2001/40).

<sup>99</sup> *Ibid.*

<sup>100</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 143, para. 28.

<sup>101</sup> See paragraphs 20–21 above.

<sup>102</sup> See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), p. 157, para. 56.

<sup>103</sup> For the latest situation on this issue, see the note prepared by the secretariat for the twenty-second meeting of CAHDI (Strasbourg, 11–12 September 2001), CAHDI (2001) 6 and Add.

tives as he might have set himself may be described as follows.

57. The present report will consist of the continuation and end of the study on the formulation, modification and withdrawal of reservations to treaties and interpretative declarations. Since the second part of the fifth report was concerned with the time at which these instruments should be formulated<sup>104</sup> and the sixth report dealt with the modalities of this formulation,<sup>105</sup> it now remains to study the delicate questions of their withdrawal and, above all, their modification.

58. In accordance with the provisional plan of the study proposed in 1996 in the second report,<sup>106</sup> the

<sup>104</sup> *Yearbook ... 2000* (see footnote 18 above), pp. 182–199, paras. 223–332. See also paragraphs 27 and 35–37 above.

<sup>105</sup> *Yearbook ... 2001* (see footnote 50 above), pp. 144–164, paras. 36–173. See also paragraphs 27 and 35–38 above.

<sup>106</sup> See paragraph 18 above.

## Withdrawal and modification of reservations and interpretative declarations

61. Although the 1969 and 1986 Vienna Conventions devote several provisions to the withdrawal of reservations, they are silent regarding modifications that may be made to an earlier reservation. It is true that there are objections to such a procedure that seem, at first sight, difficult to surmount: unless the treaty provides otherwise, the times at which a reservation may be formulated are fixed in a precise manner by the provisions of the two Vienna Conventions defining reservations,<sup>108</sup> and no modification can be accepted, at least if it amounts to a new reservation. The case is different, however, if the modification can be seen as a partial withdrawal of the reservation. It would therefore be desirable first to clarify the rules applicable to the withdrawal of reservations before considering the rules which might apply to modifications of reservations, and which come under the heading of the progressive development of international law rather than its codification in the strict sense.

62. The same is true *a fortiori* with regard to withdrawal and modification of interpretative declarations, on which the Vienna Conventions are completely silent.<sup>109</sup> In line with the method followed in the preparation of earlier reports, the rules applicable, *de lege lata* or *de lege ferenda*, to withdrawal or modification of these legal instruments will be studied in the light of the rules relating to reservations and of practice, where it exists.

<sup>108</sup> See article 2, paragraph 1 (*d*), in the 1969 and 1986 Vienna Conventions and draft guideline 1.1 of the Guide to Practice. See also draft guidelines 1.1.2, 1.1.4 and 2.3.1 to 2.3.4; regarding interpretative declarations, see draft guidelines 2.4.3, 2.4.6 and 2.4.7. All the draft guidelines already adopted by the Commission or proposed by the Special Rapporteur are reproduced in the annex to this report, which also refers, as applicable, to the Commission's commentaries or to the Special Rapporteur's reports introducing the draft guidelines.

<sup>109</sup> See the first and third reports on reservations to treaties (*Yearbook ... 1995* (footnote 1 above), p. 147, paras. 128–129, and *Yearbook ... 1998* (footnote 35 above), pp. 261–305, paras. 231–305).

present report will deal with the formulation and withdrawal of acceptances to reservations and objections thereto.

59. Moreover, a final part will present an overview of the problems related to the permissibility of reservations (and interpretative declarations), their effects and the effects of their acceptance and of objections thereto. Unlike the preceding parts, this part will not contain draft guidelines. It will take the form of a summary so as to permit the Commission (and, if necessary, a working group) to carry out a broad review of the more thorny issues posed by the subject and, if possible, provide guidance for the future work of the Special Rapporteur.

60. Lastly, as indicated above,<sup>107</sup> an annex will reproduce the entire set of draft guidelines adopted thus far by the Commission or proposed by the Special Rapporteur.

<sup>107</sup> See footnotes 43 and 61 above.

### A. Withdrawal of reservations

#### 1. THE FORM AND PROCEDURE FOR WITHDRAWAL OF RESERVATIONS

63. Withdrawal of reservations, formerly unusual,<sup>110</sup> is today more frequent.<sup>111</sup> The increased recourse made to this possibility is largely due, first, to the accession of many States to independence, which has resulted in their reviewing reservations formulated by the predecessor States,<sup>112</sup> and, secondly and above all, to the change in political regime in the Eastern European countries, which have withdrawn quite a large number of reservations made at the time of the communist regimes, notably with regard to human rights or the submission of disputes to ICJ.<sup>113</sup>

64. Provisions of the 1969 and 1986 Vienna Conventions<sup>114</sup> directly concern the withdrawal of reservations. According to article 22:

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.

...

<sup>110</sup> See in this regard Imbert, *Les réserves aux traités multilatéraux*, pp. 291–293, and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 226.

<sup>111</sup> See Migliorino, “La revoca di riserve e di obiezioni a riserve”, p. 315.

<sup>112</sup> See footnote 160 below.

<sup>113</sup> See, for example, Migliorino, *loc. cit.*, and Bretton, “L'URSS et la compétence de la Cour internationale de Justice en matière de protection des droits de l'homme”.

<sup>114</sup> As a general rule, as with earlier reports, it is best to use the text of the 1986 Vienna Convention, which reproduces the 1969 text but extends it to treaties concluded by international organizations.

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.

According to article 23, paragraph 4:

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

65. These provisions give precise indications with regard to:

- The form of the withdrawal;
- The time at which it may be made;
- The lack of acceptance on the part of the other parties; and the time at which it takes effect.

By contrast, they make no reference to:

- The procedure to be followed, by the notifying State or others; and
- The effect of the withdrawal.

66. For the sake of simplicity: (a) the form of a withdrawal and the procedure governing it will be considered separately from (b) the effects of the withdrawal. The *travaux préparatoires* of the provisions cited above will be discussed at the same time.

(a) *Form of withdrawal of reservations*

(i) *A written unilateral act: articles 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions*

67. It follows from the provisions of article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions<sup>115</sup> that the withdrawal of a reservation is a unilateral act. This conclusion settled a controversy that was long a subject of heated debate among legal theorists as to the legal nature of a withdrawal: is it a unilateral decision or an act under a treaty?<sup>116</sup> This divergence of views played a perceptible if understated role in the *travaux préparatoires* for this provision.

68. The question of the withdrawal of reservations did not attract the attention of special rapporteurs on the law of treaties until fairly recently and even then to a limited degree. Mr. James Brierly and Sir Hersch Lauterpacht did not devote a single draft article to the question of the criterion for the admissibility of reservations. The furthest the latter went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the “Covenant of Human

Rights”, expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations to that effect.<sup>117</sup> Sir Gerald Fitzmaurice may have had that precedent in mind when, in his first report on the law of treaties, in 1956, he proposed the following wording for draft article 40, paragraph 3:

A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.<sup>118</sup>

69. The draft was not discussed by the Commission, but, in his first report on the law of treaties, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled “Power to formulate and withdraw reservations”, which posited the principle of “the absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States”.<sup>119</sup> Paragraph 6 of this draft article states:

A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.<sup>120</sup>

70. This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with the withdrawal of reservations, no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.<sup>121</sup> This draft was adopted with the addition of a provision in the first paragraph, at the request of Mr. Bartoš,<sup>122</sup> specifying when a withdrawal took legal effect.<sup>123</sup> According to draft article 22 at first reading:

1. 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. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.<sup>124</sup>

<sup>117</sup> *Yearbook ... 1954*, vol. II, document A/CN.4/87, second report on the law of treaties, pp. 131–132, para. 5 of the commentary to article 9.

<sup>118</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 116. In his commentary on this provision, Sir Gerald restricted himself to saying that it did not require any explanation (*ibid.*, vol. II, document A/CN.4/101, p. 116). In his commentary on this provision, Sir Gerald restricted himself to saying that it did not require any explanation (*ibid.*, p. 127, para. 101).

<sup>119</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 66, para. (12) of the commentary to draft article 17.

<sup>120</sup> *Ibid.*, p. 61.

<sup>121</sup> *Ibid.*, vol. I, 664th meeting, p. 234, para. 67.

<sup>122</sup> *Ibid.*, paras. 68–71.

<sup>123</sup> *Ibid.*, 667th meeting, p. 253, paras. 73–75.

<sup>124</sup> *Ibid.*, vol. II, document A/5209, p. 181; article 21 related to the application of reservations.

<sup>115</sup> See paragraph 64 above.

<sup>116</sup> On this disagreement on the theory, see particularly Imbert, *op. cit.*, p. 288, and Horn, *op. cit.*, pp. 223–224, and the accompanying references. It would not appear to be useful to quote verbatim from the parties to a disagreement that no longer exists.

71. Paragraph (1) of the commentary on these provisions, which focuses on the unilateral nature of the withdrawal, probably reflects the discussions in the Drafting Committee. It states:

It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.<sup>125</sup>

72. Only three States reacted to draft article 22,<sup>126</sup> which was consequently revised by the Special Rapporteur. He proposed that<sup>127</sup>

(a) The provision should take the form of a residuary rule;

(b) It should be specified that notification of a withdrawal should be made by the depositary, if there was one;

(c) A period of grace should be allowed before the withdrawal became operative.<sup>128</sup>

73. During consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.<sup>129</sup> This proposition received little support and the majority favoured the notion, expressed by Mr. Bartoš, that “normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated”.<sup>130</sup>

74. Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.<sup>131</sup> The new text was the one eventually adopted<sup>132</sup> and it became the final version of draft article 20 (Withdrawal of reservations):

<sup>125</sup> *Ibid.*, pp. 181–182.

<sup>126</sup> See the fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.I and 2, pp. 55–56. Israel considered that notification should be through the channel of the depositary, while the United States welcomed the “provision that the withdrawal of the reservation ‘takes effect when notice of it has been received by the other States concerned’”; the comment by the United Kingdom related to the effective date of the withdrawal; see paragraphs 116 and 157 below. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 351 (United States), 295, para. 14 (Israel), and 344 (United Kingdom).

<sup>127</sup> For the text of the draft article proposed by Sir Humphrey Waldock, see *Yearbook ... 1965* (footnote 126 above), p. 56, or *ibid.*, vol. I, 800th meeting, p. 174, para. 43.

<sup>128</sup> On this point, see paragraph 157 below.

<sup>129</sup> See the comments by Mr. Verdross and (less clearly) Mr. Amado, *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 49, and p. 176, para. 60.

<sup>130</sup> *Ibid.*, p. 175, para. 50.

<sup>131</sup> See paragraph 70 above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22.

<sup>132</sup> See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56–60, and *Yearbook ... 1966*, vol. I (Part Two), p. 327, para. 106.

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 or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.<sup>133</sup>

75. The commentary on the provision was, apart from a few clarifications, a repetition of that of 1962.<sup>134</sup> The Commission expressed the view that the parties to the treaty “ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty”.<sup>135</sup>

76. At the United Nations Conference on the Law of Treaties, the text of this draft article (which had by now become article 22 of the 1969 Vienna Convention) was incorporated unchanged in article 20 of the Convention, although several amendments of detail had been proposed.<sup>136</sup> However, on the proposal of Hungary, two important additions were adopted:

(a) First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;<sup>137</sup> and,

(b) Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.

<sup>133</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, document A/6009, p. 162).

<sup>134</sup> See paragraph 70 above.

<sup>135</sup> *Yearbook ... 1966* (see footnote 133 above).

<sup>136</sup> See the list and the text of these amendments and sub-amendments in *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), *Documents of the Conference*, report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 141–142, paras. 205–211. In its written commentary, Belgium expressed the opinion that “the consent of a State which has accepted the reservation would appear to be called for” for “withdrawal of reservations for which provision is not made in the treaty and which can take effect only with the express or tacit consent of the other signatory States” (“Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties” (A/CONF.39/5 (Vol. I)), p. 166). Belgium does not seem, however, to have subsequently reverted to this suggestion.

<sup>137</sup> For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 267; for the discussion of it, see the debates at the eleventh plenary meeting of the Conference (30 April 1969), *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. 36–38, paras. 14–41.

77. Several States made proposals to this effect,<sup>138</sup> with a view to bringing the provision “into line with article 18 [23 in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing”.<sup>139</sup> Although Mr. Yasseen (Iraq) considered that “an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible”,<sup>140</sup> the principle was unanimously adopted by 98 votes to none.<sup>141</sup> It had, however, ultimately seemed more logical to include this provision not in article 20 itself but in article 23, which dealt with “Procedure regarding reservations” in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.<sup>142</sup>

78. Basing himself on the principle that “there is no reason to put international organizations in a situation different from that of States in the matter of reservations”, Mr. Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting “draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention”, subject only to “minor drafting changes”.<sup>143</sup> So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.<sup>144</sup> These proposals were adopted by the Commission without amendment<sup>145</sup> and retained on second reading.<sup>146</sup> The 1986 United Nations Conference on the Law of Treaties did not bring about any fundamental change.<sup>147</sup>

<sup>138</sup> See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), pp. 141 and 267.

<sup>139</sup> *Ibid.*, Second session (see footnote 137 above), statement by Mrs. Bokor-Szegó (Hungary), p. 36, para. 13.

<sup>140</sup> *Ibid.*, p. 38, para. 39.

<sup>141</sup> *Ibid.*, para. 41.

<sup>142</sup> *Ibid.*, twenty-ninth plenary meeting, pp. 159–160, paras. 10–13. See Ruda, “Reservations to treaties”, p. 194. For a brief general presentation of the *travaux préparatoires* relating to articles 20 and 23, paragraph 4, see Migliorino, *loc. cit.*, pp. 319–320.

<sup>143</sup> *Yearbook ... 1975*, vol. II, document A/CN.4/285, pp. 36–37, paras. (2) and (5) of the general commentary on section 2.

<sup>144</sup> *Ibid.*, p. 38, and his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

<sup>145</sup> See the Commission’s discussions in 1977: *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–34; 1435th meeting, p. 103, paras. 1–2; 1451st meeting, pp. 194–195, paras. 12–16; and the report of the Commission to the General Assembly on the work of its forty-ninth session, *ibid.*, vol. II (Part Two), pp. 114–115.

<sup>146</sup> States and international organizations made no comment on these provisions. See the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64; the Commission’s discussions: *ibid.*, vol. I, 1652nd meeting, p. 54, paras. 27–29; 1692nd meeting, pp. 264–265, paras. 38–41; the reports of the Commission to the General Assembly on the work of its thirty-third and thirty-fourth sessions, *ibid.*, vol. II (Part Two), p. 140; and *Yearbook ... 1982*, vol. II (Part Two), p. 37.

<sup>147</sup> See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62–63. For the final text, see paragraph 64 above.

79. It appears from the *travaux préparatoires* of articles 22, paragraphs 1 and 3 (a), and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions that these provisions were hardly questioned. Even the once deeply debated theoretical question<sup>148</sup> of the purely unilateral nature of the act of withdrawal gave rise to little debate, both in the Commission<sup>149</sup> and at the Vienna Conferences.<sup>150</sup> This would appear quite correct: by definition, a reservation is a unilateral<sup>151</sup> act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations;<sup>152</sup> but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action. It would therefore be illogical to require agreement from the other Contracting Parties to undo what the unilateral expression of the will of a State has done.

80. It could, perhaps, be argued that, in accordance with article 20 of the 1969 and 1986 Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation—it gives effect to it, but the reservation is still a distinct unilateral act—and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,<sup>153</sup> the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,<sup>154</sup> is never forbidden under a treaty.<sup>155</sup>

81. Furthermore, to the best of the Special Rapporteur’s knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission’s questionnaire on reservations<sup>156</sup> has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,<sup>157</sup> or aim

<sup>148</sup> See paragraph 67 above.

<sup>149</sup> See footnotes 129–130 above.

<sup>150</sup> See the comments by Belgium (footnote 136 above).

<sup>151</sup> See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1 of the Guide to Practice.

<sup>152</sup> See draft guideline 1.7.1.

<sup>153</sup> See paragraph 73 above.

<sup>154</sup> See especially paragraphs 147 and 163 below.

<sup>155</sup> See Migliorino, *loc. cit.*, p. 319.

<sup>156</sup> See footnotes 25–26 above. See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

<sup>157</sup> See the examples given by Imbert, *op. cit.*, p. 287, footnote (19), and by Horn, *op. cit.*, p. 437, note 1. See also, for example, the Convention relating to the Status of Refugees, art. 42, para. 2; the Convention on the Continental Shelf, art. 12, para. 2; the European Convention on Establishment, art. 26, para. 3; and the text of the model

to encourage withdrawal by urging States to withdraw them “as soon as circumstances permit”.<sup>158</sup> In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.<sup>159</sup>

82. Such exhortations also confirm that the withdrawal of a reservation may take place “at any time”,<sup>160</sup> which could even mean before the entry into a treaty by a State which withdraws a previous reservation,<sup>161</sup> although the Special Rapporteur knows of no case in which this has occurred.<sup>162</sup>

83. Otherwise, the now customary nature of the rules contained in articles 22, paragraph 1, and 23, paragraph

4, of the 1969 and 1986 Vienna Conventions seems not to be in question<sup>163</sup> and is in line with current practice.<sup>164</sup>

84. In these circumstances, there seems no reason not to incorporate in the Guide to Practice the provisions under consideration, in accordance with the Commission’s decision in principle that there would have to be decisive reasons to depart, in the Guide to Practice, from the provisions of the Vienna Conventions with regard to reservations.<sup>165</sup>

85. Draft guideline 2.5.1 (which would be the first to appear in section 2.5 relating to the withdrawal and modification of reservations and interpretative declarations) could therefore adopt without change the wording of the 1986 Vienna Convention, article 22, paragraph 1:

“2.5 *Withdrawal and modification of reservations and interpretative declarations*

“2.5.1 *Withdrawal of reservations*

“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.”

86. This wording does not call for any particular criticism, although some fault could be found with the first phrase (“Unless the treaty otherwise provides ...”). It goes without saying that most of the provisions of the 1986 Vienna Convention, and all the rules of a procedural nature contained in it, are of a residuary, voluntary nature and must be understood to apply “unless the treaty otherwise provides”. The same must therefore be true, *a fortiori*, of the Guide to Practice.

87. The phrase, which appeared in the Commission’s final draft but not in that of 1962,<sup>166</sup> was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments,<sup>167</sup> and endorsed by the Drafting Committee at the seventeenth session in 1965.<sup>168</sup> The reference to treaty provisions seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of

(Footnote 157 continued.)

adopted in 1962 by the Council of Europe, which appears in “Model final clauses”, Secretariat memorandum prepared by the Directorate of Legal Affairs (CM (77) 222 of 16 November 1977, annex I, pp. 9–14).

<sup>158</sup> Convention on the Grant of European Patents, art. 167, para. (4); see also other examples cited by Imbert, *op. cit.*, p. 287, footnote (20), and by Horn, *op. cit.*, p. 437, note 2.

<sup>159</sup> For recent examples, see, amongst others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Covenants on Human Rights (para. 7); 54/137 of 17 December 1999 (para. 5) and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 6); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe recommendation 1223 (1993) of 1 October 1993 (para. 7).

<sup>160</sup> One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (see the 1978 Vienna Convention, art. 20, para. 1). However, in accordance with the general plan followed in drafting the Guide to Practice (see paragraph 18 above), this situation will be examined during the general consideration of the fate of reservations in the case of succession of States.

<sup>161</sup> This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol, relating to the importation of tourist publicity documents and material, and the Customs Convention on the Temporary Importation of Private Road Vehicles (see *Yearbook ... 1965*, vol. II, document A/5687, annex II, p. 105, para. 2). On the other hand, there is a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (see the examples given by Horn, *op. cit.*, pp. 345–346); but these are not strictly speaking withdrawals (see paragraphs 94–95 below).

<sup>162</sup> On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia’s reply to question 1.6.2.1 of the Commission’s questionnaire: the restrictions on its acceptance of annexes III–V of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), to which it had acceded on 16 December 1991, had been lifted on 18 August 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the Agreement establishing the Inter-American Development Bank. See also Migliorino, *loc. cit.*, p. 322, although in the examples he gives several years had elapsed between the making and the withdrawing of the reservation.

<sup>163</sup> See Migliorino, *loc. cit.*, pp. 320–321, and Szafarz, “Reservations to multilateral treaties”, p. 313.

<sup>164</sup> See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs (United Nations publication, Sales No. E.94.V.15), p. 64, para. 216. The few States which made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see Flauss, “Note sur le retrait par la France des réserves aux traités internationaux”, pp. 860–861.

<sup>165</sup> See paragraphs 16 and 31–32 above.

<sup>166</sup> See paragraphs 70 and 74 above.

<sup>167</sup> Fourth report on the law of treaties, *Yearbook ... 1965* (see footnote 126 above), pp. 55–56; see also *Yearbook ... 1965*, vol. I, 800th meeting, p. 174, para. 45.

<sup>168</sup> *Ibid.*, vol. I, 814th meeting, p. 272, para. 22.

the Commission and some governments about difficulties that might arise from the sudden withdrawal of a reservation.<sup>169</sup> Model clauses to meet these concerns are presented below, in the section relating to the effective date of a withdrawal.<sup>170</sup>

88. Similarly, there seems no reason not to include in the Guide to Practice a draft guideline reproducing the wording of article 23, paragraph 4, which is worded identically in both the 1969 and the 1986 Vienna Conventions.

89. Yasseen was doubtless correct, at the 1969 Conference, to emphasize that the withdrawal procedure “should be facilitated as much as possible”.<sup>171</sup> The burden imposed on a State by the requirement of a written withdrawal should not, however, be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,<sup>172</sup> it would be incongruous if a reservation,<sup>173</sup> about which there can surely be no doubt that it should be in writing, could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation but would not necessarily have been made aware of its withdrawal.<sup>174</sup>

90. Draft guideline 2.5.2 can, therefore, safely follow the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, at least insofar as the withdrawal of reservations is concerned; according to the plan for this part of the Guide to Practice, objections to reservations will form the subject of a separate section:

#### “2.5.2 Form of withdrawal

“The withdrawal of a reservation must be formulated in writing.”

#### (ii) *The question of implicit withdrawals*

91. It remains open to question whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

92. Certainly, as Ruda points out, “[t]he withdrawal of a reservation ... is not to be presumed”.<sup>175</sup> Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

93. It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so

in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.<sup>176</sup> The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, accedes also to the first, the impact of the reservation would be fully felt in that State’s relations with the reserving State.

94. Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,<sup>177</sup> cannot be interpreted as being a withdrawal of the reservation, which may well have been “formulated” but, for lack of formal confirmation, has not been “made” or “established”.<sup>178</sup> The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

95. Imbert argues against this reasoning, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the 1969 and 1986 Vienna Conventions; and, under article 23, paragraph 3, “an express acceptance, or an objection does not need to be renewed if made before confirmation of the reservation”.<sup>179</sup> The distinguished writer goes on to say that:

Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view.<sup>180</sup>

The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

96. It would even seem impossible to consider that an expired reservation has been withdrawn.

97. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations. Thus, for example, the Convention on the unification of certain

<sup>176</sup> In this connection, see Flauss, “Note sur le retrait ...”, pp. 857–858; but see also Tiberghien, *La protection des réfugiés en France*, pp. 34–35 (quoted by Flauss, p. 858, footnote (8)).

<sup>177</sup> See the 1969 and 1986 Vienna Conventions, art. 23, para. 2, draft guideline 2.2.1 and the commentary to it in the report of the Commission on the work of its fifty-third session, *Yearbook ... 2001* (footnote 46 above), pp. 180–183.

<sup>178</sup> Non-confirmation is, however, sometimes (wrongly) called “withdrawal”; see United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2001* (United Nations publication, Sales No. E.02.V.4), vol. I, p. 396, note 19, relating to the non-confirmation by the Government of Indonesia of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

<sup>179</sup> Imbert, *op. cit.*, p. 286.

<sup>180</sup> *Ibid.*

<sup>169</sup> See paragraph 157 below.

<sup>170</sup> See paragraphs 164 and 166 below.

<sup>171</sup> See paragraph 77 above.

<sup>172</sup> See paragraph 119 below.

<sup>173</sup> See draft guideline 2.1.2 proposed by the Special Rapporteur and the explanations contained in the sixth report on reservations to treaties (*Yearbook ... 2001* (footnote 50 above), pp. 144–146, paras. 40–52).

<sup>174</sup> In this connection, see Ruda, *loc. cit.*, pp. 195–196.

<sup>175</sup> *Ibid.*, p. 196.

points of substantive law on patents for invention provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles allows Belgium to make a (“negotiated”<sup>181</sup>) reservation for a three-year period starting from the date of entry into force of the Convention.<sup>182</sup> Other Council of Europe conventions authorize only temporary, but renewable reservations; examples include the European Conventions on the adoption of children (art. 25), and on the legal status of children born out of wedlock (art. 14):

A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.

Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraphs by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.<sup>183</sup>

98. This provision makes a very clear distinction between the withdrawal of a reservation, mentioned in the second paragraph, and its expiration in cases of non-renewal, which is the subject of the first paragraph. This distinction is current: whereas withdrawal is a unilateral act expressing the will of the reserving State, expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time.

99. The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the question on reservations,<sup>184</sup> Estonia stated that it had limited its reservation to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to one year, since one year was considered to be a sufficient period to amend the laws in question.<sup>185</sup> In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

<sup>181</sup> *Yearbook ... 2000* (footnote 18 above), pp. 174–175, paras. 164–170.

<sup>182</sup> See also the examples given by Spiliopoulou Åkermark, “Reservation clauses in treaties concluded within the Council of Europe”, pp. 499–500, and Imbert, *op. cit.*, p. 287, footnote (21); also article 124 of the Rome Statute of the International Criminal Court, which sets a seven-year time limit on the possibility of non-acceptance of the Court’s competence in respect of war crimes.

<sup>183</sup> The implementation of these provisions has caused great difficulties, owing to the insistence by certain States which had omitted to renew their reservations within the time limit on reformulating them. Eventually, the procedure applicable to the late formulation of reservations (see draft guideline 2.3.1) was implemented without opposition; see Polakiewicz, *Treaty-Making in the Council of Europe*, pp. 101–102. To avoid such problems, the Criminal Law Convention on Corruption (art. 38, para. 2), states that failure to renew a reservation would cause it to lapse.

<sup>184</sup> Replies to questions 1.6 and 1.6.1.

<sup>185</sup> Polakiewicz, *op. cit.*, pp. 102–104, gives many similar examples. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (see the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties ...* (footnote 178), p. 246); see also the reservation by Barbados to the International Covenant on Civil and Political Rights, *ibid.*, p. 183).

100. A more awkward situation arises in connection with what have been termed “forgotten reservations”.<sup>186</sup> A reservation is “forgotten”, in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. Flauss, who gives several examples of this in relation to France,<sup>187</sup> considers, no doubt correctly, although a full assessment is impossible, that “the number of ‘forgotten’ reservations ... is undoubtedly by no means negligible”.<sup>188</sup>

101. This situation, which is doubtless generally the product of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to total legal chaos, particularly in States with a tradition of legal monism:<sup>189</sup> judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter are adopted later.<sup>190</sup> The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. Moreover, since “municipal laws are merely facts” from the standpoint of international law,<sup>191</sup> whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at international level, will continue, in principle, to be fully effective and the reserving State will continue to have an advantage over the other parties, although such an attitude could be questionable in terms of the principle of good faith,<sup>192</sup> the scope of which, however, is still uncertain.

102. In these circumstances, it is worth considering whether it would not be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that have become obsolete or superfluous.

103. The Special Rapporteur confesses that he is uncertain on this point. Such a provision would probably not belong in a draft convention, for it could have only a very slight normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, “a code of recommended practices”.<sup>193</sup> It would therefore not be out of place to draw its users’ attention to the drawbacks of these “forgotten reservations” and to the benefits of withdrawing them. To that end, the following draft guideline could be adopted:

<sup>186</sup> Flauss, “Note sur le retrait ...”, p. 861, and Horn, *op. cit.*, p. 223.

<sup>187</sup> Flauss, “Note sur le retrait ...”, pp. 861–862.

<sup>188</sup> *Ibid.*, p. 861.

<sup>189</sup> The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent *domestic* law.

<sup>190</sup> See article 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries.

<sup>191</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

<sup>192</sup> In that context, see Flauss, “Note sur le retrait ...”, pp. 862–863.

<sup>193</sup> For this phrase, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 146, para. 51.

### “2.5.3 Periodic review of the usefulness of reservations

“1. States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer answer their purpose.

“2. In such a review, States and international organizations should devote particular attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give careful consideration to the usefulness of the reservations in relation to their internal legislation and to developments in that legislation since the reservations were formulated.”

104. Apart from the obvious practical benefit offered by such a provision in dealing with “forgotten reservations”, it would also have the merit of responding to the urgent appeals issued by the bodies responsible for the implementation and monitoring of treaties, especially—but not solely—in the field of human rights.<sup>194</sup>

105. It goes without saying that it should be regarded as no more than a recommendation (which is why the conditional tense is used) and that, after such a review, States would remain absolutely free to withdraw their reservations or not.

106. A final problem, which is quite as thorny, arises when the lawfulness of a reservation has been contested by a body, whether judicial or not, which is responsible for monitoring the application of a treaty.

107. The present report is not the place to reconsider the much debated question of reservations to normative treaties and, more particularly, to human rights treaties.<sup>195</sup> It seems difficult, however, to pass over completely in silence the question of whether a reservation declared impermissible is automatically “withdrawn from duty” as a result or whether it should or could be withdrawn by the reserving State.

108. The facts of the question were set out fairly clearly in the second report on reservations to treaties.<sup>196</sup> It will suffice to recall the basic features of the question:

(a) The human rights bodies recognize their right (and even their duty) to pronounce on the permissibility of reservations made with regard to treaties the implementation of which they are mandated to monitor; and

(b) Generally, they consider themselves entitled to act on their findings and to disregard any reservation that they have deemed inadmissible.

109. In the Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, adopted in

<sup>194</sup> See paragraph 81 and footnote 159 above.

<sup>195</sup> See paragraph 21 above.

<sup>196</sup> *Yearbook ... 1996* (see footnote 25 above), particularly pp. 67–82, paras. 164–252.

1997,<sup>197</sup> the Commission expressed its agreement with the first of those positions,<sup>198</sup> but considered that,

in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.<sup>199</sup>

110. While hoping that his proposal will not lead the Commission to repeat the whole discussion that led it to adopt this position, the Special Rapporteur believes that it would be illogical not to reflect it in a draft guideline on the withdrawal of reservations. In his view, it follows necessarily that:

(a) The finding that a reservation is inadmissible should not be deemed either an abrogation or, still less, a withdrawal of that reservation;

(b) The reserving State (or international organization) cannot, nonetheless, ignore the finding and has the duty to take action;

(c) It must eliminate the causes of the inadmissibility; and

(d) One of the ways of doing so—the most radical but the most satisfactory—is obviously to withdraw the disputed reservation or reservations.<sup>200</sup>

111. That was the course followed by Switzerland following the judgement in the *Belilos* case, in which the European Court of Human Rights ruled that the disputed declaration (which could in practice be considered a reservation) should be “held to be invalid”.<sup>201</sup> Not without some reluctance, Switzerland withdrew the reservation, at least partially.<sup>202</sup>

112. It is, all the same, open to question whether a draft guideline should be devoted exclusively to a situation in which a reservation is declared inadmissible by a body monitoring or overseeing the implementation of the treaty to which the reservation relates. Regularization is, after all, called for in all cases where a reservation is inadmissible, including cases in which the reserving State or international organization itself recognizes the inadmissibility, whether of its own accord or in response to objections by the other parties.

<sup>197</sup> *Yearbook ... 1997* (see footnote 33 above), p. 57, para. 157; see also paragraphs 19–20 above.

<sup>198</sup> *Ibid.*, para. 5 of the preliminary conclusions (although the Commission confines itself to recognizing the competence of these bodies to “comment upon [the admissibility of reservations] and express recommendations”).

<sup>199</sup> *Ibid.*, para. 10.

<sup>200</sup> On the problems resulting from the amendment of reservations, see section (b) below.

<sup>201</sup> *European Court of Human Rights, Series A: Judgments and Decisions*, vol. 132 (Registry of the Court, Council of Europe, Strasbourg, 1988), judgment of 29 April 1988, p. 28, para. 60.

<sup>202</sup> See section (b) below. On this point, 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”, p. 298.

113. Upon reflection, however, it seems preferable that the Commission should confine itself to cases in which inadmissibility is found by the body established under a treaty or dispute settlement. While it would be premature to rule on the purely procedural consequences of an inadmissible reservation without considering the more general question of its effect (or absence of effect), it would seem legitimate to give a ruling, in the section of the Guide to Practice relating to the withdrawal of reservations, on what should happen with reservations considered inadmissible by a monitoring body, in order to establish both that the mere finding of inadmissibility by such a body cannot be deemed a withdrawal of the reservation and that the withdrawal of that reservation by the reserving State or international organization is one of the possible responses—and probably the most satisfactory—to dealing with the problem.

114. Draft guideline 2.5.4 could therefore read as follows:

“2.5.4 *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty.*

“1. The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

“2. Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation.”<sup>203</sup>

(b) *Omissions from the 1969 and 1986 Vienna Conventions: procedure for withdrawal of reservations*

(i) *Silence of the 1969 and 1986 Vienna Conventions on the procedure for the withdrawal of reservations*

115. The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,<sup>204</sup> are entirely silent as to the procedure for their withdrawal. The question has not, however, been completely overlooked by several of the Commission’s special rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of “formal notice”,<sup>205</sup> but did not specify who should notify whom, or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.<sup>206</sup>

<sup>203</sup> In the opinion of the Special Rapporteur, the detailed justification for this draft guideline is provided by the statement contained in his second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), particularly pp. 72–76, paras. 194–210, and pp. 77–82, paras. 216–252.

<sup>204</sup> See paragraph 120 below.

<sup>205</sup> See paragraph 68 above.

<sup>206</sup> *Yearbook ... 1962* (see footnote 119 above), p. 61; see also

The distinguished jurist did not accompany this part of his draft with any commentary.<sup>207</sup>

116. Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it<sup>208</sup> and it was not restored by the Commission. During the brief discussion of the Drafting Committee’s draft, however, Sir Humphrey Waldock pointed out that “[n]otification of the withdrawal of a reservation would normally be made through a depositary”.<sup>209</sup> This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that topic,<sup>210</sup> and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal “becomes operative when notice of it has been received by the other States concerned from the depositary\*.”<sup>211</sup>

117. During the discussion in the Commission, Sir Humphrey Waldock explained that the omission of a reference to the depositary on first reading had been due solely to “inadvertence”<sup>212</sup> and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it “was not as clear as it appeared”<sup>213</sup> and suggested the adoption of a single text, grouping together all notifications made by the depositary.<sup>214</sup> Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,<sup>215</sup> who is not mentioned in the Commission’s final draft<sup>216</sup> either, nor in the text of the 1986 Vienna Convention itself.<sup>217</sup>

118. The silence of the 1969 and 1986 Vienna Conventions regarding the procedure for the withdrawal of reservations should be rectified by the Guide to Practice. To do this, the Commission might contemplate transposing the rules relating to the formulation of reservations. That calls for further consideration, however.

119. On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary, in 1966, on draft article 51 on the law of treaties, relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that “this theory reflects the constitutional practice of particular States and not a

paragraph 69 above.

<sup>207</sup> *Ibid.*, p. 66.

<sup>208</sup> See paragraph 70 above.

<sup>209</sup> *Yearbook ... 1962* (see footnote 121 above), 664th meeting, p. 234, para. 71.

<sup>210</sup> *Yearbook... 1965* (see footnote 126 above), p. 55.

<sup>211</sup> *Ibid.*, p. 56. See also paragraph 72 above.

<sup>212</sup> *Yearbook... 1965* (see footnote 129 above), 800th meeting, p. 174, para. 45.

<sup>213</sup> *Ibid.*, p. 176, para. 65.

<sup>214</sup> *Ibid.*, 803rd meeting, pp. 197–199, paras. 30–56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73.

<sup>215</sup> *Ibid.*, vol. I, 814th meeting, p. 272, para. 22; see also the comments by Mr. Rosenne and Sir Humphrey, *ibid.*, p. 273, paras. 26–28.

<sup>216</sup> Art. 20, para. 2; see the text of this provision in paragraph 74 above.

<sup>217</sup> See the text of the provisions relating to the withdrawal of reservations in the 1986 Vienna Convention (arts. 22–23).

rule of international law. In its opinion, international law does not accept the theory of the ‘*acte contraire*’.”<sup>218</sup> As Reuter pointed out, however, the “Commission stated that any form could in general be resorted to. A treaty may be modified by another written treaty emanating from lower-ranking organs or by an agreement in a less solemn form. According to the Commission, a written treaty may even be modified by a treaty based on oral or tacit consent.”<sup>219</sup> This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

120. On the other hand, it has to be said that the 1969 and 1986 Vienna Conventions contain few rules specifically relating to the procedure for making reservations, apart from article 23, paragraph 1, which merely states that they must be “communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty”.<sup>220</sup>

121. Since there is no treaty provision directly concerning the procedure for withdrawing reservations, and in view of the inadequacy even of those relating to the formulation of reservations, the Commission should thus consider the draft guidelines on these topics contained in the sixth report on reservations to treaties, examine them in the light of the current practice and the (rare) discussions of theory and consider the possibility and the appropriateness of transposing them, with modifications, to the withdrawal of reservations. This is the approach which will be followed below with regard to:

- (a) Competence to withdraw a reservation;
- (b) Communication of the withdrawal.<sup>221</sup>

<sup>218</sup> *Yearbook ... 1966* (footnote 126 above), p. 249, para. (3) of the commentary to draft article 51; see also the commentary to article 35, *ibid.*, pp. 232–233.

<sup>219</sup> Reuter, *Introduction to the Law of Treaties*, p. 137, para. 211; see also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 183. For a flexible position on the denunciation of a treaty, see the ICJ judgment of 21 June 2000 (*Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction*, *I.C.J. Reports 2000*, p. 25, para. 28).

<sup>220</sup> The Special Rapporteur has proposed that this text should be reproduced in draft guideline 2.1.5, paragraph 1, while a second paragraph would detail the procedure to be followed when the reservation relates to the constituent instrument of an international organization; see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 154, para. 113, and p. 157, para. 133.

<sup>221</sup> These problems, relating to the formulation of reservations, correspond to those dealt with in draft guidelines 2.1.3, 2.1.3 *bis* and 2.1.4, on the one hand, and 2.1.5 to 2.1.7, on the other, as proposed by the Special Rapporteur in his sixth report on reservations to treaties (*Yearbook ... 2001* (footnote 50 above)). There would appear to be no need to consider the possibility of using draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations) (see paragraph 46 above).

(ii) *Competence to withdraw a reservation*

122. The Special Rapporteur has proposed two alternative draft guidelines 2.1.3 (Competence to formulate a reservation at the international level). These draft guidelines, which are based on article 7 of the 1969 and 1986 Vienna Conventions (Full powers), have been sent to the Drafting Committee, which, however, has not yet considered them.<sup>222</sup> They read as follows:<sup>223</sup>

“[2.1.3 *Competence to formulate a reservation at the international level*

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

“[2.1.3 *Competence to formulate a reservation at the international level*

“1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

“(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

“(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

“2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

“(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

“(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

“(c) Representatives accredited by States to an international organization or one of its organs, for the purpose

As for the question of the effective date of communications relating to the withdrawal of reservations (see draft guideline 2.1.8 (Effective date of communications relating to reservations)), this will be considered below, in the general context of the effect of a withdrawal.

<sup>222</sup> See paragraph 38 above.

<sup>223</sup> For the presentation of the two alternative versions of the draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 146–148, paras. 53–71.

of formulating a reservation to a treaty adopted by that organization or body;

“[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization]”

123. Whichever version is adopted,<sup>224</sup> there seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations<sup>225</sup> apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with the competence to bind the State or international organization at the international level. This must, therefore, apply *a fortiori* to its withdrawal, which puts the seal on the reserving State's commitment.

124. The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had enquired about the “form in which the notifications of withdrawal”<sup>226</sup> of some reservations made in respect of the Convention on the Political Rights of Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages should be made. After noting that the 1969 Vienna Convention makes no reference to the subject and recalling the definition of “full powers” given in article 2, paragraph 1 (c),<sup>227</sup> the author of the letter adds:

Clearly the withdrawal of a reservation constitutes an important treaty action and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations.

And in conclusion:

Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make up for the resulting inconvenience.<sup>228</sup>

<sup>224</sup> *Ibid.*, p. 146, para. 68, on their respective advantages and disadvantages.

<sup>225</sup> *Ibid.*, p. 144, para. 56.

<sup>226</sup> *United Nations Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.1), p. 190.

<sup>227</sup> The Convention defines “full powers” as “a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty”.

<sup>228</sup> *United Nations Juridical Yearbook, 1974* (see footnote 226 above), p. 191. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: “A reservation must be formulated in writing (article 23, paragraph 1, of the [Vienna] Convention), and both reservations and withdrawals\* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention)” (*ibid.*, 1976 (United Nations publication, Sales No. E.78.V.5), p. 211).

125. Firm though this conclusion is, the words “in principle”, which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

on several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.<sup>229</sup>

126. This raises a question that the Special Rapporteur has already mentioned in relation to the formulation of reservations:<sup>230</sup> would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

127. After thorough consideration, however, the Special Rapporteur, although considering this progressive development “limited but welcome”,<sup>231</sup> has not proposed to adopt it, since he is anxious to depart as little as possible from the provisions of article 7 of the 1969 and 1986 Vienna Conventions. He will also forbear from including a provision on withdrawal. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*<sup>232</sup> so long as it is understood that a non-formalist conception<sup>233</sup> of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Conventions.

128. Moreover, it seems that the Secretary-General of the United Nations has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the

<sup>229</sup> *Ibid.*, 1974 (see footnote 226 above), pp. 190–191. This is confirmed by the memorandum of 1 July 1976: “On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations” (*ibid.*, 1976 (see footnote 228 above), footnote 121).

<sup>230</sup> Sixth report on reservations to treaties, *Yearbook ... 2001* (see footnote 50 above), p. 147, paras. 63–64.

<sup>231</sup> *Ibid.*, pp. 147–148, para. 66.

<sup>232</sup> See paragraph 119 above.

<sup>233</sup> *Ibid.*, Reuter's phrase.

Organization.<sup>234</sup> And, in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states: “Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty.”<sup>235</sup> There is no mention of any possible exceptions.

129. The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation<sup>236</sup> and withdrawal<sup>237</sup> of reservations by letters from the permanent representatives of the Council.

130. It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of over-rigid rules in the Guide to Practice. That would not be the case, however, if guideline 2.1.3 were transposed to the withdrawal of reservations, since both the two proposed versions<sup>238</sup> take care to maintain the “customary practices in international organizations which are depositaries of treaties”.

131. The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, the problem is the same as that relating the formulation of reservations. It is addressed by draft guidelines 2.1.3 *bis* and 2.1.4 proposed by the Special Rapporteur:

“**2.1.3 bis** *Competence to formulate a reservation at the internal level*<sup>239</sup>

“The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.

“**2.1.4** *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*<sup>240</sup>

“A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.”

132. The replies by States and international organizations to the questionnaire on reservations do not give any utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.

133. Thus, in Italy, problems arose in connection with the withdrawal, in 1989, of the “geographic limitation”<sup>241</sup> formulated by it in 1954 to the Convention relating to the Status of Refugees.<sup>242</sup> Although this reservation, which limited the application of the Convention to persons who had become refugees following the “events occurring in Europe”, had been formulated by the Executive, without any request from Parliament, its withdrawal was decided by a decree-law of 1989 and converted into law in 1990. Theoretically, this was unnecessary,<sup>243</sup> whereas reservations introduced at the request of the legislature require it to be consulted, those decided by the Executive alone do not, in accordance with the principle of parallelism of forms.

134. In France, “like the denunciation of treaties, which is the exclusive prerogative of the Government [244], the withdrawal of reservations lies within the competence of the Executive. No distinction is made between cases in which the treaty is submitted for parliamentary authorization through ratification or approval and those in which it is not”<sup>245</sup>.

135. A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.<sup>246</sup> There seems no reason, therefore, why the wording of draft guideline 2.1.3 *bis* should not be transposed to the withdrawal of reservations, if, that is, the former is retained by the Drafting Committee.<sup>247</sup>

136. The same applies to draft guideline 2.1.4,<sup>248</sup> which should, however, be retained in any case, whatever

<sup>234</sup> Flauss (“Note sur le retrait ...”, p. 860), however, mentions a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women), was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations.

<sup>235</sup> See footnote 164 above.

<sup>236</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 147, para. 64.

<sup>237</sup> See European Committee on Legal Cooperation, *CDCJ Conventions and reservations to the said Conventions*, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (99) 36 of 30 March 1999).

<sup>238</sup> See paragraph 122 above.

<sup>239</sup> For the presentation of the draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 148–149, paras. 72–77.

<sup>240</sup> *Ibid.*, pp. 149–150, paras. 78–82.

<sup>241</sup> Gaja, “Modalità singolari per la revoca di una riserva”, p. 905.

<sup>242</sup> *Ibid.*, pp. 905–907, for a detailed exposition.

<sup>243</sup> *Ibid.*, and Migliorino, *loc. cit.*, pp. 332–333.

<sup>244</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above) p. 149, para. 75.

<sup>245</sup> Flauss, “Note sur le retrait ...”, p. 863.

<sup>246</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 148–149, para. 73.

<sup>247</sup> *Ibid.*, p. 149, para. 77, on the Special Rapporteur’s uncertainty in that regard.

<sup>248</sup> See paragraph 131 above.

happens to guideline 2.1.3 *bis*, since it would seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its domestic law; this situation could very well arise in practice, although the Special Rapporteur does not know of any specific example.

137. There might be a case for applying to reservations the “defective ratification” rule of article 46 of the 1969 and 1986 Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. As the Special Rapporteur indicated in his sixth report on reservations to treaties,<sup>249</sup> however, he does not think that the principle stated in article 46 can be transposed to the question of formulating reservations, since the relevant rules are seldom spelled out in formal texts of a constitutional or even a legislative nature. This applies still more to the withdrawal of reservations, as is abundantly shown by the confusion felt by legal theorists concerning the procedure to be followed in situations where the problem might arise:<sup>250</sup> if specialists in such matters are in disagreement amongst themselves or criticize the practices of their own governments, other States or international organizations cannot be asked to delve into the mysteries and subtleties of internal law.

138. Since it appears that a modified version of draft guidelines 2.1.3, 2.1.3 *bis* and 2.1.4 could be applied to the withdrawal of reservations, the question arises as to the form in which that version should appear in chapter 2, section 5, of the Guide to Practice, which deals with the withdrawal and modification of reservations and interpretative declarations. In the view of the Special Rapporteur, two courses of action may be considered:

(a) Either the text could be reproduced in its entirety, only with the word “formulate” replacing the word “withdraw” (and with a few other adjustments);

(b) Or the guideline could be more of a synthesis, establishing the principle of parallelism of forms.

139. If the Commission opts for the first of these courses of action, the corresponding guidelines could read as follows:

“**2.5.5** *Competence to withdraw a reservation at the international level*<sup>251</sup>

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State of an international organization to be bound by a treaty is competent to withdraw a reservation on behalf of such State or international organization.]

<sup>249</sup> *Yearbook ... 2001* (footnote 50 above), p. 150, paras. 80–81.

<sup>250</sup> For Italy, in particular, see the articles cited in footnotes 241–243 above and the examples of legal theory given therein.

<sup>251</sup> This guideline is closely modelled on the short version of draft guideline 2.1.3.

“**2.5.5** *Competence to withdraw a reservation at the international level*<sup>252</sup>

“1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to withdraw a reservation on behalf of a State or an international organization if:

“(a) That person produces appropriate full powers for the purposes of that withdrawal; or

“(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

“2. By virtue of their functions and without having to produce full powers, the following are competent to withdraw a reservation at the international level on behalf of a State:

“(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

“(b) Representatives accredited by States to an international organization or one of its organs, for the purpose of withdrawing a reservation to a treaty adopted by that organization or body;

“[(c) Heads of permanent missions to an international organization, for the purpose of withdrawing a reservation to a treaty between the accrediting States and that organization].]

“**2.5.5 bis** *Competence to withdraw a reservation at the internal level*

“The determination of the competent body and the procedure to be followed for withdrawing a reservation at the internal level is a matter for the internal law of each State or international organization.

“**2.5.5 ter** *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

“A State or an international organization may not invoke the fact that a reservation has been withdrawn in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for the withdrawal of reservations as invalidating the withdrawal.”

140. Even apart from the replacement of the word “formulate” by the word “withdraw”, the transposition is not entirely word for word, at least as far as the long version of draft guideline 2.1.3 (for which the Special Rapporteur, and, it seems, the majority of the Commission, have a preference) is concerned:

<sup>252</sup> This guideline is closely modelled on the long version of draft guideline 2.1.3.

(a) Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound, and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));

(b) For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

141. Another way of proceeding would be to model the draft guidelines closely on those relating to the competence to formulate reservations. It could not be a straight transposition, however; for the reasons given above, some adaptation is needed. Draft guideline 2.5.5 could thus be worded as follows:

“[2.5.5 *Competence to withdraw a reservation*

“The determination of the competent body and the procedure to be followed for withdrawing a reservation are governed, *mutatis mutandis*, by the rules applying to the formulation of reservations given in guidelines 2.1.3, 2.1.3 *bis* and 2.1.4.]”

142. This second formulation certainly has the merit of conciseness. The Special Rapporteur is not, however, convinced that it is preferable to the first: the Guide to Practice is not a treaty; it is a “code of recommended practices” on reservations and it would seem preferable that the user should find them there directly, without having to refer to other provisions or to commentaries. Above all, the expression “*mutatis mutandis*”, the inclusion of which is essential, since a straight transposition is impossible, at least if the long version of draft guideline 2.1.3 is used,<sup>253</sup> would inevitably give rise to confusion. Despite the risk of seeming repetitive and slightly ponderous, the long versions of draft guidelines 2.5.5, 2.5.5 *bis* and 2.5.5 *ter* (which would, in that case, need to be renumbered) would thus seem more appropriate.

(iii) *Communication of withdrawal of reservations*

143. As shown above,<sup>254</sup> the 1969 and 1986 Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal but it does not specify either who should make this notification or the procedure to be followed. Here too, therefore, it might be best to follow the method adopted in respect of competence to withdraw and to consider whether it might not be possible and appropriate to use a modified form of the draft guidelines proposed by the Special Rapporteur in relation to the communication of reservations themselves.

144. The relevant draft guidelines are numbered 2.1.5 to 2.1.7 and read as follows:

2.1.5 *Communication of reservations*<sup>255</sup>

1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

2. A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 *Procedure for communication of reservations*<sup>256</sup>

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 *Functions of depositaries*<sup>257</sup>

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

145. The first remark that must be made is that, although the 1969 and 1986 Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

(a) Notification of withdrawal must be made by the depositary, if there is one; and

(b) The recipients of the notification must be “every State which is or is entitled to become a party to the treaty” and “interested States”.<sup>258</sup>

146. It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the

<sup>253</sup> See paragraph 140 above.

<sup>254</sup> Paras. 115–121.

<sup>255</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 152–157, paras. 99–129.

<sup>256</sup> *Ibid.*, pp. 157–161, paras. 135–154, for the presentation of this draft guideline.

<sup>257</sup> *Ibid.*, pp. 161–163, paras. 156–170, for the presentation of this draft guideline.

<sup>258</sup> See paragraphs 115–116 above.

rules relating to depositaries and notification, which constitute articles 76–78 of the 1969 Vienna Convention,<sup>259</sup> that these proposals were abandoned.<sup>260</sup> They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6, given above.<sup>261</sup>

147. This approach is endorsed by the legal theory on the topic,<sup>262</sup> meagre though it is, and is also in line with current practice. Thus,

(a) Both the Secretary-General of the United Nations<sup>263</sup> and the Secretary General of the Council of Europe<sup>264</sup> observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

(b) Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation for reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal<sup>265</sup> and even that he should communicate it to the Contracting Parties<sup>266</sup> or, more broadly, to “every State” entitled to become party or to “every State”, without specifying further.<sup>267</sup>

<sup>259</sup> And articles 77–79 of the 1986 Vienna Convention.

<sup>260</sup> See paragraph 117 above; see also the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 157–158, para. 136.

<sup>261</sup> Para. 144.

<sup>262</sup> See Migliorino, *loc. cit.*, p. 323, and Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, p. 302.

<sup>263</sup> See United Nations, *Multilateral Treaties ...* (footnote 178), vols. I and II, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations by China, Egypt and Mongolia, vol. I, p. 111, notes 15, 17 and 19; and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Colombia, Jamaica and the Philippines, *ibid.*, p. 427, notes 10, 11 and 13).

<sup>264</sup> See European Committee on Legal Cooperation, *CDCJ Conventions and reservations ...* (footnote 237 above) (withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, pp. 11–12).

<sup>265</sup> See, for example, the Convention on the Contract for the International Carriage of Goods by Road, art. 48, para. 2; the Convention on the limitation period in the international sale of goods, as amended by the Protocol amending the Convention on the limitation period in the international sale of goods, art. 40, para. 2; the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European communities or officials of member States of the European Union, art. 15, para. 2; and the Convention on cybercrime, art. 43, para. 1.

<sup>266</sup> See, for example, the European Agreement on Road Markings, arts. 15, para. 2, and 17 (f); and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, arts. 18 and 34 (c).

<sup>267</sup> See, for example, the Convention on psychotropic substances, arts. 32, para. 5, and 33 (d); the Customs Convention on containers, arts. 26, para. 3, and 27; the International Convention on the harmonization of frontier control of goods, arts. 21, para. 2, and 25, para. (e); and the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (notification “to States Members of the Hague Conference on Private International Law”), arts. 60, para. 2, and 63 (f).

148. As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations in draft guidelines 2.1.6 and 2.1.7,<sup>268</sup> which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention<sup>269</sup> and are in conformity with the principles on which the relevant Vienna rules are based:<sup>270</sup>

(a) Under article 78, paragraph 1 (e), the depositary is given the function of “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6, paragraph 1 (b);

(b) Draft guideline 2.1.7, paragraph 1, is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether “notification or communication relating to the treaty is in due and proper form and, if need be, bring [...] the matter to the attention of the State or international organization in question”; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);<sup>271</sup>

(c) Paragraph 2 of the same draft guideline carries through the logic of the “letter-box depositary” theory endorsed by the 1969 and 1986 Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

149. The same problem therefore arises as arose in connection with competence to withdraw a reservation:<sup>272</sup> since the rules contained in draft guidelines 2.1.5–2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to competence to withdraw a reservation, the Special Rapporteur indicated his preference for the fuller version, an adaptation of draft guidelines 2.1.3, 2.1.3. *bis* and 2.1.4.<sup>273</sup> That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible. The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 and 2.1.7 fits perfectly, with the simple replacement of the word “formulation” by the word “withdrawal”.

<sup>268</sup> See the text in paragraph 144 above.

<sup>269</sup> These correspond to articles 77–78 of the 1969 Vienna Convention.

<sup>270</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 157–161, paras. 135–154, and pp. 161–163, paras. 156–170.

<sup>271</sup> See paragraphs 124–125 above.

<sup>272</sup> See paragraph 138 above.

<sup>273</sup> See paragraph 142 above.

150. A reference to earlier guidelines thus seems less open to objection. In that spirit, the following draft guideline could, perhaps, be adopted:

“**2.5.6** *Communication of withdrawal of a reservation*

“The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 and 2.1.7.]”

151. If, however, the Commission considers that it would be preferable to avoid referring to these draft guidelines, it is possible to opt for transposition, as follows:

“**2.5.6** *Communication of withdrawal of reservations*

“1. The withdrawal of a reservation must be communicated [in writing<sup>274</sup>] to the contracting States and contracting organizations and other States and other international organizations entitled to become parties to the treaty.

“2. The withdrawal of a reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

“**2.5.6 bis** *Procedure for communication of withdrawal of reservations*

“1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to the withdrawal of a reservation to a treaty shall be transmitted:

“(a) If there is no depositary, directly by the author of the withdrawal to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

“(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

“**2.5.6 ter** *Functions of depositaries*

“1. The depositary shall examine whether the withdrawal by a State or an international organization of a reservation to a treaty is in due and proper form.

“2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of:

“(a) The signatory States and organizations and the contracting States and contracting organizations; or

<sup>274</sup> If this approach is adopted, the words “in writing” should probably be omitted from the text of draft guideline 2.5.6, since this requirement is the subject of draft guideline 2.5.2 (para. 90 above), which reproduces the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and which it would therefore not be appropriate to combine with draft guideline 2.5.6.

“(b) Where appropriate, the competent organ of the international organization concerned.]”

2. EFFECT OF THE WITHDRAWAL OF A RESERVATION

152. In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

(a) In the first place, article 22 of the 1969 and 1986 Vienna Conventions links the rules governing the form and procedure<sup>275</sup> of a withdrawal closely with the question of its effect; and

(b) In the second place, the effect of a withdrawal may be viewed simply as a matter of form, thus precluding the need to go into the infinitely more complex effect of the reservation itself; this is, in any case, the only reasonable way of apprehending the effect at this stage.

153. Article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal “becomes operative”. During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(a) *Time at which the withdrawal of a reservation becomes operative*

154. Under article 22, paragraph 3, of the 1986 Vienna Convention,

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.

155. This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Vienna Convention<sup>276</sup>

<sup>275</sup> Admittedly, only to the extent that paragraph 3 (a) refers to the “notice” of a withdrawal.

<sup>276</sup> See the fourth (*Yearbook ... 1975* (footnote 143 above), p. 38) and fifth (*Yearbook ... 1976* (footnote 144 above), p. 146) reports of Mr. Reuter on the question of treaties concluded between States and international organizations, or between two or more international organizations; for the (lack of) discussion by the Commission at its twenty-ninth session, see *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–35, and 1435th meeting, p. 103, paras. 1–2; also 1451st meeting, pp. 194–195, paras. 12–16, and the Commission’s report to the General Assembly of the same year, *ibid.*, vol. II (Part Two), pp. 114–116; and, for the second reading, see the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the thirtieth session of the Commission, *ibid.*, vol. I, 1652nd and 1692nd meetings, p. 54, paras. 27–28, and p. 265, para. 38, and the final text, *ibid.*, vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36–37.

or at the United Nations Conference of on the Law of Treaties, which did no more than clarify<sup>277</sup> the text adopted on second reading by the Commission.<sup>278</sup> Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

156. Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,<sup>279</sup> Sir Humphrey Waldock expressed no such intention in his first report, in 1962.<sup>280</sup> It was, however, during the Commission's discussions in that year that, for the first time, a provision was included, at the request of Mr. Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".<sup>281</sup>

157. Following the adoption of this provision on first reading, three States reacted:<sup>282</sup> the United States, which welcomed it; and Israel and the United Kingdom, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a subparagraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.<sup>283</sup> In this way, Sir Humphrey Waldock intended to give the other parties the opportunity to take "the requisite legislative or administrative action ..., where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.<sup>284</sup>

158. As well as criticizing the overcomplicated formulation of the admittedly rather strange solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Mr. Ruda, supported by Mr. Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case

of the entry into force of a treaty as a result of the consent given by a State to be bound.<sup>285</sup> Other members, however, including Mr. Tunkin and Sir Humphrey Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other States concerned, but on the will of the reserving State which decided to withdraw" it.<sup>286</sup>

159. When the text returned from the Drafting Committee, however, the period of grace had gone,<sup>287</sup> since the Commission "considered that such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".<sup>288</sup> The Commission thus reverted to the principle that a withdrawal became operative once the other Contracting Parties had been notified, although not, it seems, without some hesitation: in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation resulting from [the withdrawal of the reservation] ... would be going too far", the Commission

felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned.<sup>289</sup>

160. This raises another problem: the Commission had surreptitiously reintroduced, in the commentary, the exception that Sir Humphrey Waldock had, if clumsily, tried to incorporate in the text itself of what became article 22 of the 1969 Vienna Convention. And this was undoubtedly not a good course of action. True, the Commission linked the exception with the general principle of good faith, but, although it can constitute the basis for some rules, "the principle of good faith" is, as ICJ has observed, "[o]ne of the basic principles governing the creation and performance of legal obligations",<sup>290</sup> but "it is not in itself a source of obligation where none would otherwise exist".<sup>291</sup>

<sup>277</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 142, para. 211 (text of the Drafting Committee).

<sup>278</sup> The plural ("when notice of it has been received by the other contracting States", *Yearbook ... 1966* (footnote 126 above), p. 209) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (see the exposition by Mr. Yasseen, Chairman of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties* (footnote 137 above), p. 36, para. 11); see also paragraph 172 below. On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, 816th meeting, p. 285, and *Yearbook ... 1966*, vol. I, part II, 892nd meeting, p. 327.

<sup>279</sup> See paragraph 68 above and paragraph 177 below.

<sup>280</sup> See paragraph 69 above.

<sup>281</sup> See paragraph 70 above.

<sup>282</sup> See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965* (footnote 126 above), pp. 55–56.

<sup>283</sup> *Ibid.*, p. 56, para. 5: "(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

<sup>284</sup> *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 47.

<sup>285</sup> *Ibid.*, p. 176, para. 59 (Mr. Ruda), and p. 177, para. 76 (Mr. Briggs).

<sup>286</sup> *Ibid.*, p. 176, paras. 68–69 (Mr. Tunkin); see also pages 175, para. 54 (Mr. Tsuruoka), and 177, paras. 78–80 (Sir Humphrey Waldock).

<sup>287</sup> *Ibid.*, 814th meeting, p. 272, para. 22.

<sup>288</sup> *Ibid.*, para. 24, explanation given by Sir Humphrey Waldock.

<sup>289</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209, para. (2) of the commentary to draft article 20.

<sup>290</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; and (*New Zealand v. France*), *ibid.*, p. 473, para. 49.

<sup>291</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.

161. The question thus arises as to whether the Guide to Practice should include the clarification contained in the Commission's commentary of 1965: it makes sense to be more specific in this code of recommended practices than in the general conventions on the law of treaties. In this case, however, it would seem most inadvisable: the "rule" set out in the commentary manifestly contradicts that appearing in the 1969 Vienna Convention and its inclusion in the Guide would therefore depart from that rule. This would be acceptable only if it was felt to meet a clear need, which is probably not the case here. Sir Humphrey Waldock had, in 1965, "heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";<sup>292</sup> this would still seem to be the case 37 years later. The Special Rapporteur is therefore not in favour of this solution, nor of including in the commentary the Commission's questionable attempt, in its 1965 commentary, to soften the force of the provision.

162. It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1966 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be regulated by a specific provision in the treaty".<sup>293</sup> In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

163. This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than that given, in accordance with general law, in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.<sup>294</sup> Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, article 32, paragraph 3,

Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General\*

<sup>292</sup> See footnote 288 above.

<sup>293</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209, para. (2) of the commentary to article 20.

<sup>294</sup> See the examples given by Imbert, *op. cit.*, p. 290, footnote (36), and by Horn, *op. cit.*, p. 438, note 19. See also, for example, the United Nations Convention on contracts for the international sale of goods, art. 97, para. (4) (six months); the Convention on the conservation of migratory species of wild animals, art. XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary); and the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 24, para. (3) (three months after notification of the withdrawal).

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.<sup>295</sup> And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.<sup>296</sup>

164. In view of the foregoing, the right course of action would seem to be, first, to reproduce in the Guide to Practice the text of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, without the toning down suggested by the Commission's commentary in 1965, and, secondly, to accompany the text of the relevant guideline (2.5.9<sup>297</sup>) with a model clause A that would reflect the concerns expressed when the provision was drafted, and repeated by the Commission in 1965:

**"Model clause A: Deferment of the effective date of the withdrawal of a reservation**

"A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the expiration of a period of X [months] [days] after the date of receipt of the notification by [the depositary]."

165. Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary, rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.9, is deficient in several respects.<sup>298</sup> In the second place, in cases such as this, the parties are in possession of all the information indicating the probable timescale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

166. Conversely, situations may arise in which States agree that they prefer a shorter timescale. There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, whether by shortening the period required for the withdrawal to take effect or by giving the reserving State the power to determine the date on which

<sup>295</sup> Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: see the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, art. 8, para. 2; the European Agreement on the transmission of applications for legal aid, art. 13, para. 2; and the European Convention on Nationality, art. 29, para. 3.

<sup>296</sup> See the Protocol of Amendment to the International Convention on the simplification and harmonization of customs procedures, annex I, appendix I, art. 12, para. 2: "Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect."

<sup>297</sup> See paragraph 175 below.

<sup>298</sup> See paragraph 172 below.

the withdrawal should take effect. Model clauses B and C correspond to each of these situations:

**“Model clause B: Earlier effective date of withdrawal of a reservation**

“A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].”<sup>299</sup>

**“Model clause C: Freedom to set the effective date of withdrawal of a reservation**

“A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].”<sup>300</sup>

167. The question arises whether, in the absence of such a clause, a State is free to set the effective date of the withdrawal of a reservation that it has made. The answer must undoubtedly be in the affirmative, if that date is later than that resulting from the application of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions: the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes.

168. That is not the case, however, if the date is prior to the receipt of notification by the other Contracting Parties: in that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.<sup>301</sup> In such situations, in the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, if the other Contracting Parties object. It is, however, worth considering whether the category of treaties establishing “integral obligations” should not be retained, especially in the field of human rights; in such a situation, there can be no objection—quite the contrary—to the fact that the withdrawal of the reservation takes immediate, even retroactive, effect, if the State making the original reservation

so wishes, since the legislation of other States is, by definition, not affected.<sup>302</sup>

169. It would probably be useful if the Guide to Practice were to specify the cases in which article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions does not apply, not because of a derogation,<sup>303</sup> but because it was never intended to apply. This could be the subject of a draft guideline 2.5.10:

**“2.5.10 Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation**

“The withdrawal of a reservation takes effect on the date set by the withdrawing State where:

“(a) That date is later than the date on which the other contracting States or international organizations received notification of it; or

“(b) The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations.”

170. Subparagraph (a) of this draft guideline deliberately uses the plural (“the other contracting States or international organizations”) where article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions uses the singular (“that State or that organization”). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit nor the *raison d’être* of article 22, paragraph 3 (a), would have been respected. As for subparagraph (b), it addresses situations in which reservations have, in effect, been retroactively withdrawn.<sup>304</sup>

171. The principle remains that contained in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions which should definitely be reproduced in the Guide to Practice.

172. This principle is, of course, not above criticism. Apart from the problems—considered above<sup>305</sup>—arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph “does not really resolve the question of the time factor”,<sup>306</sup> although, thanks to the specific provision introduced at the United Nations Conference on the Law of Treaties in 1969,<sup>307</sup> the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate

<sup>299</sup> This wording is closely based on that of the European Convention on Transfrontier Television, art. 32, para. 3, given in paragraph 163 above.

<sup>300</sup> See footnote 296 above.

<sup>301</sup> See the example given by Imbert, *op. cit.*, p. 291, footnote (38) (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons). See also United Nations, *Multilateral Treaties ...* (footnote 178), p. 353, notes 9 and 13. See further the example given in footnote 162 above.

<sup>302</sup> In this connection, see Imbert, *op. cit.*, pp. 290–291.

<sup>303</sup> As would be the case in the situation discussed in paragraphs 159–161 above.

<sup>304</sup> See footnote 301 above.

<sup>305</sup> Paragraphs 157–162.

<sup>306</sup> Imbert, *op. cit.*, p. 290.

<sup>307</sup> See footnote 278 above.

effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become operational.<sup>308</sup> Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice<sup>309</sup> to justify “revising” the Vienna text.

173. It should be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b)<sup>310</sup> of the 1969 Vienna Convention provide. And that is how ICJ ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.<sup>311</sup>

[By] the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36 ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.<sup>312</sup>

174. The exception established by the provisions of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.<sup>313</sup> This concern must be commended.

175. It would therefore be appropriate to reproduce, in the Guide to Practice, the provisions of article 22, paragraph 3 (a), of the 1986 Vienna Convention, which includes international organizations.

### “2.5.9 Effective date of withdrawal of a reservation

“Unless the treaty otherwise provides, or it is otherwise agreed, 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.”

176. It may be noted in passing that the wording of this provision is open to the same objection as that of draft guideline 2.5.1,<sup>314</sup> in that it states that it applies only if the treaty does not otherwise provide; this is true of all the provisions of the 1969 and 1986 Vienna Conventions

<sup>308</sup> In this connection, see the comments by Mr. Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, p. 177, para. 75, and 814th meeting, p. 273, para. 25.

<sup>309</sup> See paragraph 161 above.

<sup>310</sup> Art. 79 (b) of the 1986 Vienna Convention.

<sup>311</sup> See *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections), Judgment, I.C.J. Reports 1998*, p. 293, para. 30.

<sup>312</sup> *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146; see also *I.C.J. Reports 1998* (footnote 311 above), p. 291, para. 25.

<sup>313</sup> See the Commission’s commentary to draft article 22, adopted on first reading, *Yearbook ... 1962* (footnote 124 above), pp. 181–182, and to that adopted on second reading, *Yearbook ... 1966* (footnote 126 above), p. 210.

<sup>314</sup> See paragraph 85 above.

and, therefore, of the guidelines in the Guide to Practice. Nevertheless, for the same reasons given with regard to draft guideline 2.5.1,<sup>315</sup> it seems preferable to make do with this questionable form of words.

### (b) Consequences of withdrawal of a reservation

177. During the *travaux préparatoires* of the 1969 Vienna Convention, consideration was given to devoting a provision to the effect of the withdrawal of a reservation:

(a) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn,

the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties;<sup>316</sup>

(b) Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that “[u]pon withdrawal of a reservation the provisions of article 21 [relating to the application of reservations] cease to apply”;<sup>317</sup> this sentence disappeared from the Commission’s final draft,<sup>318</sup> although;

(c) In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely “the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force”,<sup>319</sup> and,

(d) During the United Nations Conference on the Law of Treaties, several amendments aimed to re-establish a provision to that effect in the text of the 1969 Vienna Convention.<sup>320</sup>

178. The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.<sup>321</sup> This is only partially true.

179. There can be no doubt that “[t]he effect of withdrawal of a reservation is obviously to restore the original

<sup>315</sup> See paragraph 86 above.

<sup>316</sup> *Yearbook ... 1956* (see footnote 118 above), p. 116, art. 40, para. 3.

<sup>317</sup> *Yearbook ... 1962* (see footnote 124 above), p. 181; see also paragraph 70 above.

<sup>318</sup> It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (see footnote 283 above), without offering any comment (see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22).

<sup>319</sup> *Ibid.*, 800th meeting, p. 178, para. 86; in that context, see the statement by Mr. Rosenne, *ibid.*, para. 87.

<sup>320</sup> Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1) (see footnote 138 above), with a sub-amendment by the USSR (A/CONF.39/C.1/L.167), *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 141, para. 207 (iii).

<sup>321</sup> *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), Committee of the Whole, 70th meeting, statement by Mr. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

text of the treaty”.<sup>322</sup> A distinction should, however, be made between three possible situations.

180. In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the 1969 and 1986 Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): “In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made.”<sup>323</sup> Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of ICJ;<sup>324</sup> there had been no objection to this reservation and, as a result of the withdrawal, the Court’s competence to interpret and apply the Convention was established from the effective date of the withdrawal.<sup>325</sup>

181. The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected to, but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 31, paragraph 3, of the 1969 and 1986 Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: “In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation.”<sup>326</sup>

182. The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force<sup>327</sup> on the date on which the withdrawal takes effect. “For a state ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving state.”<sup>328</sup>

<sup>322</sup> Bowett, “Reservations to non-restricted multilateral treaties”, p. 87. See also Szafarz, *loc. cit.*, p. 313.

<sup>323</sup> Migliorino, *loc. cit.*, p. 325; in that connection, see Szafarz, *loc. cit.*, p. 314.

<sup>324</sup> See United Nations, *Multilateral Treaties ...*, (footnote 178 above), p. 400, note 18.

<sup>325</sup> Migliorino, *loc. cit.*, pp. 325–326.

<sup>326</sup> *Ibid.*, pp. 326–327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between themselves and Portugal (see United Nations, *Multilateral Treaties ...* (footnote 178 above), p. 111, note 20).

<sup>327</sup> See article 24 of the 1969 and 1986 Vienna Conventions, especially paragraph 3.

<sup>328</sup> Szafarz, *loc. cit.*, pp. 313–314; in that connection, see Ruda, *loc. cit.*, p. 202, Bowett, *loc. cit.*, p. 87; and Migliorino, *loc. cit.*, pp. 328–329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to article 66 of the 1969 Vienna Convention (see *Multilateral Treaties ...* (footnote 178 above), vol. II, p. 290, note 15); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

183. In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

184. For the sake of clarity, it would probably be appropriate to reflect these distinct effects in two separate draft guidelines:

#### “2.5.7 *Effect of withdrawal of a reservation*

“The withdrawal of a reservation entails the application of the treaty as a whole in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation.

#### “2.5.8 *Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization*

“The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization.”

### B. Modification of reservations

185. The question of the modification of reservations should be posed in connection with the questions of withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the “initial reservation”,<sup>329</sup> which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above. If, on the other hand, the effect of the modification is to strengthen an existing reservation, it would seem logical to start from the notion that what is being dealt with is the late formulation of a reservation, and to apply to it the rules applicable in this regard (see below).

186. While these two postulates appear to be virtually self-evident, it is appropriate to ascertain briefly their relevance in the light of practice.

<sup>329</sup> While the expression “initial reservation” is used for convenience, it is improper: it would be more accurate to speak of a reservation “as it was initially formulated”; as its name indicates, a “partial withdrawal” does not substitute one reservation for another, but rather one formulation for another.

### Reduction of the scope of reservations (partial withdrawal)

187. In accordance with the prevailing doctrine, “[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect”.<sup>330</sup> While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal.

188. Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect.<sup>331</sup> Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) provides that:

The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations.

189. In addition, reservation clauses expressly contemplating the total *or partial* withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the nationality of married women, provides that:

Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.<sup>332</sup>

The same applies to article 17, paragraph 2, of the Convention on the Protection of the Environment through Criminal Law, which reads as follows:

Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.<sup>333</sup>

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union:

<sup>330</sup> Aust, *Modern Treaty Law and Practice*, p. 128. See also Imbert, *op. cit.*, p. 293, and Polakiewicz, *op. cit.*, p. 96.

<sup>331</sup> This is also the case, of course, where the treaty authorizes the formulation of new reservations after its entry into force.

<sup>332</sup> See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: “A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations.”

<sup>333</sup> See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism: “Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.” For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see paragraph 97 above.

Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

190. The fact that they are mentioned simultaneously in numerous treaty clauses highlights the close relationship between total and partial withdrawal of reservations. This similarity, confirmed in practice, is, however, sometimes contested in the literature.

191. During the preparation of the draft articles on the law of treaties by the Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.<sup>334</sup> Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation “in part”,<sup>335</sup> although no reason for this modification can be inferred from the summaries of the discussions.

192. The most plausible explanation is that this seemed to be self-evident—“he who can do more can do less”—and the word “withdrawal” should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning “total or partial withdrawal”.

193. The fact remains that this is not entirely self-evident and that the literature appears to be somewhat undecided. Thus, in his masterwork on reservations, published in 1979, Imbert regrets that modifications aimed at diminishing the scope of the reservations with which he was familiar were possible only because of the “lack of objections on the part of the other Contracting Parties”, even as he stressed that “it would, however, be desirable to encourage this procedure, which enables States to gradually adapt their participation in the treaty to the evolution of their national law, and which may constitute a transition to the total withdrawal of reservations”.<sup>336</sup>

194. In practice, he seems to have been heard, at least in the European context. Polakiewicz cites a number of reservations concluded within the framework of the Council of Europe which were modified without arousing opposition.<sup>337</sup> For its part, the European Commission of Human Rights showed a certain flexibility as to the time requirement set out in article 64 of the Convention for the Protection of Human Rights and

<sup>334</sup> See draft article 17, paragraph 6, in Sir Humphrey’s first report on the law of treaties, *Yearbook ... 1962* (footnote 119 above), p. 61.

<sup>335</sup> *Ibid.*, pp. 71–72, art. 22; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see paragraph 70 above.

<sup>336</sup> *Op. cit.*, p. 293. Curiously, Flauss refers to this work (but to page 163—which says nothing of the kind) in stating his belief that “it is, it seems, accepted that a State party to a treaty can limit the scope of a reservation” (“Le contentieux de la validité ...”, p. 301).

<sup>337</sup> *Op. cit.*, p. 96; it is true that it seems to be more a matter of “[s]tatements concerning modalities of implementation of a treaty at the internal level” within the meaning of draft guideline 1.4.5 (*Yearbook ... 1999* (see footnote 44 above), p. 118) than of reservations as such.

## Fundamental Freedoms (European Convention on Human Rights):<sup>338</sup>

As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64 ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958–59) (2 *Yearbook* 88–91) covers ... the law of 5 July 1962, which did not have the result of enlarging, *a posteriori*, the area removed from the control of the Commission.<sup>339</sup>

195. This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *limits* the scope of the reservation that the Commission of Human Rights considered that it was covered by the law.<sup>340</sup> Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other Contracting Parties.<sup>341</sup>

196. The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law “goes no further than a law in force at the time when the reservation was made”.<sup>342</sup>

197. The outcome of the *Belilos* case<sup>343</sup> is, however, likely to raise doubts in this regard.

<sup>338</sup> Article 57 since the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby:

“(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

“(2) Any reservation made under this Article shall contain a brief statement of the law concerned.”

<sup>339</sup> Schabas, “Article 64”, p. 932. See the reports of the European Commission of Human Rights in the cases of *X v. Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 400, and *ibid.*, application No. 8180/78, Council of Europe, *Decisions and Reports*, vol. 20 (December 1980), pp. 26–28.

<sup>340</sup> See the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case: “Where the law in question is amended, the discrepancy to which the reservation relates could no doubt, if a strict view is not taken, be retained in the new text, but it could not of course be widened” (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 266 B, judgment of 25 August 1993, p. 40).

<sup>341</sup> See the successive partial withdrawals by Finland of its reservation to article 6 in 1996, 1998, 1999 and 2001 (<http://conventions.coe.int>).

<sup>342</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 48, case of *Campbell and Cosans*, judgment of 25 February 1982, p. 17, para. 37 (b).

<sup>343</sup> *Ibid.*, vol. 132, *Belilos* case, judgment of 29 April 1988, p. 28, para. 60.

198. Following the highly disputable<sup>344</sup> position taken by the European Court of Human Rights concerning the follow-up to its finding that the Swiss “declaration” made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,<sup>345</sup> Switzerland, after much hesitation, first modified its “declaration”—equated by the Court with a reservation, at least insofar as the applicable rules were concerned—so as to render it compatible with the judgment of 29 April 1988.<sup>346</sup> The “interpretative declaration” thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers “acting as a monitoring body for the enforcement of judgements of the Court”.<sup>347</sup> These notifications do not seem to have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.<sup>348</sup>

199. However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *F. v. R. and the Council of State of Thurgau Canton*, the Swiss Federal Tribunal decided, with regard to the grounds for the *Belilos* decision, that it was the entire “interpretative declaration” of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the European Convention on Human Rights<sup>349</sup> and in article 19 of the 1969 Vienna Convention.<sup>350</sup> On 29 August 2000, Switzerland

<sup>344</sup> See the second report on reservations to treaties, *Yearbook ... 1996* (see footnote 25 above), pp. 77–79, paras. 218–230. Paragraphs 198–201 of the present report largely restate the ideas expressed in the second report (*ibid.*, pp. 77–82, paras. 216–252).

<sup>345</sup> The Court held (see footnote 343 above) that “the declaration in question does not satisfy two of the requirements of Article 64 of the Convention [see footnote 338 above], with the result that it must be held to be invalid” and that, since “it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration” (which, frankly speaking, was no less disputable), the Convention should be applied to Switzerland irrespective of the declaration).

<sup>346</sup> Believing (correctly) that the Court’s rebuke dealt only with the “criminal aspect”, Switzerland had limited its “declaration” to civil proceedings.

<sup>347</sup> Flauss, “Le contentieux de la validité ...”, p. 298, note 9; see also Schabas, “Reservations to human rights treaties: time for innovation and reform”, p. 49. For references to these notifications, see United Nations, *Treaty Series*, vol. 1496, No. 2889, annex A, pp. 234–235; vol. 1525, p. 213; vol. 1561, pp. 386–387; and resolution DH (89) 24 concerning the judgment of the European Court of Human Rights of 29 April 1988 in the *Belilos* case, *Yearbook of the European Convention on Human Rights*, vol. 32 (1989), p. 245.

<sup>348</sup> Some authors have, however, contested their validity; see Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, p. 314, and the works cited in *F. v. R. and the Council of State of Thurgau Canton* (footnote 350 below), judgement of the Swiss Federal Tribunal (para. 6 (b)), and by Flauss, “Le contentieux de la validité ...”, p. 300, as well as the position of that author himself; nonetheless, these objections dealt more with the background than with the very possibility of modifying a (quasi?)-reservation.

<sup>349</sup> See footnote 338 above.

<sup>350</sup> Extensive portions of the Swiss Federal Tribunal’s decision are cited in French translation in the *Journal des tribunaux* (1995), pp. 533–537. The relevant passages are to be found in paragraph 7 of the decision in the French text.

officially withdrew its “interpretative declaration” concerning article 6 of the European Convention.<sup>351</sup>

200. Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

(a) The Swiss Federal Tribunal’s position is based on the idea that, in this case, the 1974 “declaration” was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights),<sup>352</sup> and, above all,

(b) In that same decision, the Tribunal stated that:

While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State’s commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.<sup>353</sup>

201. This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty’s integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.<sup>354</sup> Furthermore, as has been pointed out, without this option the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): “States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, *a fortiori*, with future Contracting Parties”<sup>355</sup> that would have the advantage of knowing the treaty body’s position regarding the validity of

reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

202. Moreover, it was such considerations<sup>356</sup> which led the Commission to state in 1997 in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties that, in taking action on the inadmissibility of a reservation,<sup>357</sup> the State may, for example, modify its reservation so as to eliminate the inadmissibility,<sup>358</sup> obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

203. In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations was the depositary, “47 have been withdrawn completely or partly.”<sup>359</sup> In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete withdrawal.<sup>360</sup> This trend, while not precipitous, has continued in subsequent years, as demonstrated by the following examples:

(a) On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance,<sup>361</sup>

(b) On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection

<sup>356</sup> See *Yearbook ... 1997* (footnote 33 above), p. 45, paras. 55–56; p. 49, para. 86; and p. 55, paras. 141–144; and the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 80–81, paras. 241–251.

<sup>357</sup> See footnote 356 above.

<sup>358</sup> See the preliminary conclusions, *Yearbook ... 1997* (footnote 33 above), p. 57, para. 10.

<sup>359</sup> Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (see article 20 of the 1978 Vienna Convention); however, as the Commission has decided, all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice (see *Yearbook ... 1995*, vol. II (Part Two), p. 107, para. 477, and *Yearbook ... 1997* (footnote 33 above), p. 68, para. 221).

<sup>360</sup> *Op. cit.*, p. 226; however, these statistics must be viewed with caution. For example, the author actually mentions only one case in which successive partial withdrawals culminated in the total withdrawal of a reservation (*ibid.*, p. 438): that of Denmark and the Convention relating to the Status of Refugees. In reality, (a) with one exception, the statistics are primarily for the total withdrawal of various reservations; and (b) one of the original Danish reservations was reformulated but retained (*Multilateral Treaties ...* (see footnote 178 above), pp. 334 and 345, note 18).

<sup>361</sup> *Multilateral Treaties ...* (see footnote 178 above), vol. II, p. 199, note 10; see also Sweden’s 1966 “reformulation” of one of its reservations to the Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (*ibid.*, vol. I, p. 345, note 25) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a reservation by Switzerland to that Convention (*ibid.*, note 26).

<sup>351</sup> See United Nations, *Treaty Series*, vol. 2123, No. 2889, p. 141.

<sup>352</sup> The Special Rapporteur is of the view, however, that this does not affect the reserving State’s right to modify its reservation in a manner that makes it permissible; moreover, in its 1997 preliminary conclusions on normative multilateral treaties including human rights treaties, the Commission concluded that it was the reserving State which had the responsibility for taking action in the event of inadmissibility of a reservation (*Yearbook ... 1997* (footnote 33 above), p. 57, para. 10 of the conclusions). It does not seem necessary to reopen (or to settle) the issue at this stage.

<sup>353</sup> *F. v. R. and the Council of State of Thurgau Canton* (see footnote 350 above), p. 535. Surprisingly, Flauss, who does not cite this passage in his otherwise noteworthy commentary on the above-mentioned decision, maintains that “initially, in the context of current Convention law and international treaty law, it is difficult to agree that “at-fault” States have a right to modify their reservations, even if this right is limited to cases of partial impermissibility” (“Le contentieux de la validité ...”, p. 298).

<sup>354</sup> See Horn, *op. cit.*, p. 223; however, the author states that he does not know of any actual cases where an objection was withdrawn under such circumstances. The Special Rapporteur is also unaware of such behaviour, although it would be very appropriate.

<sup>355</sup> Flauss, “Le contentieux de la validité ...”, p. 299; the author’s position here is (wrongly, in the Special Rapporteur’s view) *de lege ferenda*.

of Performers, Producers of Phonograms and Broadcasting Organisations;<sup>362</sup> and

(c) On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women, making it more specific.<sup>363</sup>

204. In all these cases (which provide only a few examples) the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

205. The Secretary-General's practice is not absolutely consistent, however, and in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations<sup>364</sup> and confines himself, "[i]n keeping with the ... practice followed in similar cases", to receiving "the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged".<sup>365</sup> This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "[W]hen States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations."<sup>366</sup> This position seems to be confirmed by a note verbale dated 4 April 2000 from the Legal Counsel of the United Nations, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so"<sup>367</sup> and extends the length of time during which parties may object from 90 days to 12 months.

206. Not only is this position counter to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale

<sup>362</sup> *Ibid.*, vol. II, p. 64, note 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (*ibid.*, note 6) and Norway's replacement of a reservation in 1989 (*ibid.*, note 7); in that case, however, it is not clear that the withdrawal was a partial one.

<sup>363</sup> *Ibid.*, vol. I, p. 264, note 35.

<sup>364</sup> See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), pp. 191–198, paras. 279–325.

<sup>365</sup> See, for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties ...* (footnote 178 above), p. 324, note 6).

<sup>366</sup> *Summary of Practice of the Secretary-General ...* (see footnote 164 above), p. 62, para. 206.

<sup>367</sup> Note verbale from the Legal Counsel (modification of reservations), 2000 (LA41/TR/221 (23–1)), *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 42. For further information on this time period, see the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), p. 198, paras. 320–324.

of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between a modification of an existing reservation and a partial withdrawal thereof. In the case of the second type of communication, the Legal Counsel shared the concerns expressed by Portugal that it was highly desirable that, as far as possible, communications which were no more than partial withdrawals of reservations should not be subjected to the procedure that was appropriate for modifications of reservations.

207. The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.<sup>368</sup> To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

208. Since this is not a new reservation but a limitation of an existing one, reformulated to bring the obligations of the reserving State more fully into line with those stipulated by the treaty, it is unlikely that the other Contracting Parties will object to the new formulation.<sup>369</sup> If they have adapted to the initial reservation, it is difficult to see how they could object to the new one, the effects of which, in theory, have been reduced. Just as a State cannot object to a pure and simple withdrawal, it cannot object to a partial withdrawal.

209. Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,<sup>370</sup> it is better to refer here to a "partial withdrawal".

210. A single draft guideline should be able to take into account the alignment of the rules applicable to the partial withdrawal of reservations with those governing total withdrawal; to avoid any confusion, however, it would seem useful to specify what is meant by a partial withdrawal. This guideline could be worded as follows:

<sup>368</sup> See draft guidelines 2.3.1–2.3.3 and the commentary thereon, *Yearbook ... 2001* (footnote 46 above), pp. 185–191).

<sup>369</sup> Nonetheless, they may certainly withdraw their initial objections which, like the reservations themselves, may be withdrawn at any time (see article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions); see also paragraph 201 above.

<sup>370</sup> See paragraphs 205–207 above.

**“2.5.11** *Partial withdrawal of a reservation*

“1. The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.

“2. The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.”

211. This definition is modelled as closely as possible on the definition of reservations resulting from article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and draft guidelines 1.1 and 1.1.1.

212. On the one hand, while the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal and may, without any problem, implicitly (or explicitly if the Commission deems that to be clearer) refer to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*], 2.5.6 [2.5.6 *bis*, 2.5.6 *ter*], 2.5.9, 2.5.10 and, perhaps, 2.5.3, on the other hand the difficulty lies in knowing whether the provisions of draft guidelines 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) may be transposed to cases of partial withdrawals.

213. The trickiest case is probably one where a treaty monitoring body has found that the initially formulated reservation was not valid.<sup>371</sup> The *Belilos* case of the European Court of Human Rights and the action taken on that basis by the Swiss Federal Tribunal in the *F. v. R. and the Council of State of Thurgau Canton* case<sup>372</sup> may imply that if the monitoring body invalidated the reservation (or if its irregularity may be deduced from the reasoning it followed), the only possible solution is the withdrawal pure and simple of the reservation (for no modification may be made to a reservation said to be null and void *ab initio*); in this case, the provisions of draft guideline 2.5.4 may not be extended, *mutatis mutandis*, to a partial withdrawal; the latter may not be envisaged, and the only way for the reserving State or international organization to fulfil its obligations in that respect is by totally withdrawing the reservation.

214. But this reasoning is far from self-evident. It rests on the assumption that a monitoring body itself may take action as a result of finding a reservation impermissible. This is not the position taken by the Commission in the preliminary conclusions it adopted in 1997.<sup>373</sup> All that matters is that the author of the reservation respects the conditions of validity of the reservation; if it may do

so by making a partial withdrawal, there is no reason it should be prevented from doing so—all the more so in that there is a risk of encouraging the pure and simple denunciation of the treaty, which is contrary to the often invoked principle of universality—while the modification of the reservation achieves the desired balance between the integrity of the treaty and the universality of participation (where the latter is a desired goal).

215. Thus, whereas the partial withdrawal is one of the means by which the State or international organization may fulfil its obligations if one of its reservations is found to be impermissible, the question arises as to whether it is useful to so specify in the Guide to Practice, and in what form. The Special Rapporteur sees three possibilities in this regard:

(a) It may suffice to specify it in the commentaries on draft guidelines 2.5.4 and/or 2.5.11; but the referral of clarifications to the commentary is often an easy option that is particularly questionable when it comes to drafting a guide to practice that must, as far as possible, provide users with answers to any legitimate questions they might have;

(b) A draft guideline could be modelled on draft guideline 2.5.4, paragraph 2, worded as follows:

**“2.5.11 *bis*** *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

“Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding.”

(c) Mention could be made, in draft guideline 2.5.4, paragraph 2, of the possibility of a partial withdrawal; but to proceed thus for this guideline alone, without doing the same for all the others which apply to both partial and total withdrawals, does not seem, *a priori*, very logical; and yet it does seem essential to individualize draft guideline 2.5.11.

216. The Special Rapporteur nevertheless prefers a solution of this type, provided that it does not lead to the elimination of draft guideline 2.5.11. This objective may be attained by combining draft guidelines 2.5.4 and 2.5.11 *bis* and by moving this single draft guideline to the end of section 2.5 of the Guide to Practice. This guideline might read as follows:

**“2.5.X** *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

“1. The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

<sup>371</sup> See draft guideline 2.5.4 (para. 114 above).

<sup>372</sup> See paragraphs 199–201 above.

<sup>373</sup> See footnote 356 and paragraph 202 above.

“2. Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.”

217. There should be little hesitation with regard to the effect of the partial withdrawal of a reservation, for it cannot be compared to that of a total withdrawal, nor can it be held that the *partial* “withdrawal of a reservation entails the application of a treaty *as a whole*\* of the provisions on which the reservation had been made in the relations between the State or international organization which” *partially* “withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it”.<sup>374</sup> Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other Contracting Parties; but not “as a whole” since, hypothetically, the reservation (in a more limited form, admittedly) remains.

218. Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,<sup>375</sup> even if those objections had been accompanied by the opposition of the entry into force of the treaty with the reserving State or international organization.<sup>376</sup> There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them, and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them;<sup>377</sup> they cannot be required to do so, however, and they may perfectly well maintain their objections if they deem it appropriate.<sup>378</sup>

<sup>374</sup> See draft guideline 2.5.7 (para. 184 above).

<sup>375</sup> *Ibid.* (“whether they had accepted or objected to the reservation”).

<sup>376</sup> See draft guideline 2.5.8 (para. 184 above): “The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization.”

<sup>377</sup> See paragraph 201 and footnote 369 above.

<sup>378</sup> Even though they may not take the opportunity offered by the partial withdrawal of a reservation to formulate new objections (see paragraph 208 above).

219. The only real question in this regard is to know whether they must formally confirm their objections or whether the latter must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, for, as indicated above,<sup>379</sup> there seems to be no case where the partial withdrawal of a reservation has led to a withdrawal of objections, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.<sup>380</sup> This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; *a priori*, the objections that were made to it rightly continue to apply as long as their authors do not withdraw them.

220. It seems essential, then, to devote a specific draft guideline to the effect of a partial withdrawal of a reservation. Such a guideline could be presented as follows:

“2.5.12 *Effect of a partial withdrawal of a reservation*

“The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them.”

221. Although the wording of the second sentence of this guideline does not seem to call for any particular explanation, it may be useful to indicate that the wording of the first sentence is based on the terminology used in article 21 of the 1969 and 1986 Vienna Conventions,<sup>381</sup> without entering into substantive discussion of the effects of reservations and objections made to them.

<sup>379</sup> Footnote 354.

<sup>380</sup> See footnote 366 above. The objections of Denmark, Finland, Mexico, the Netherlands, Norway and Sweden to the reservation formulated by the Libyan Arab Jamahiriya were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties ...* (see footnote 178 above), pp. 251–259.

<sup>381</sup> See article 21, paragraph 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.”

## CONSOLIDATED TEXT OF ALL DRAFT GUIDELINES ADOPTED BY THE COMMISSION OR PROPOSED BY THE SPECIAL RAPPORTEUR\*

### Guide to practice

#### 1. DEFINITIONS

##### 1.1 *Definition of reservations*<sup>1</sup>

“Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

##### 1.1.1 *Object of reservations*<sup>2</sup>

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

##### 1.1.2 *Instances in which reservations may be formulated*<sup>3</sup>

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

##### 1.1.3 [1.1.8] *Reservations having territorial scope*<sup>4</sup>

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

##### 1.1.4 *Reservations formulated when notifying territorial application*<sup>5</sup>

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

##### 1.1.5 *Statements purporting to limit the obligations of their author*<sup>6</sup>

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

##### 1.1.6 *Statements purporting to discharge an obligation by equivalent means*<sup>7</sup>

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

##### 1.1.7 *Reservations formulated jointly*<sup>8</sup>

The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation.

##### 1.1.8 *Reservations made under exclusionary clauses*<sup>9</sup>

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or

\*The draft guidelines proposed by the Special Rapporteur but not adopted by the Commission are in italics.

<sup>1</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

<sup>2</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

<sup>3</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 103–104.

<sup>4</sup> *Ibid.*, pp. 104–105.

<sup>5</sup> *Ibid.*, p. 105–106.

<sup>6</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 95–97.

<sup>7</sup> *Ibid.*, p. 97.

<sup>8</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 106–107.

<sup>9</sup> For the commentary to this draft guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 108–112.

some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

## 1.2 *Definition of interpretative declarations*<sup>10</sup>

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

### 1.2.1 *Conditional interpretative declarations*<sup>11</sup>

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

### 1.2.2 *Interpretative declarations formulated jointly*<sup>12</sup>

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

## 1.3 *Distinction between reservations and interpretative declarations*<sup>13</sup>

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

### 1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*<sup>14</sup>

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

<sup>10</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 91–103.

<sup>11</sup> *Ibid.*, pp. 103–106.

<sup>12</sup> *Ibid.*, pp. 106–107.

<sup>13</sup> *Ibid.*, p. 107.

<sup>14</sup> *Ibid.*, pp. 107–109.

### 1.3.2 *Phrasing and name*<sup>15</sup>

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

### 1.3.3 *Formulation of a unilateral statement when a reservation is prohibited*<sup>16</sup>

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

## 1.4 *Unilateral statements other than reservations and interpretative declarations*<sup>17</sup>

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

### 1.4.1 *Statements purporting to undertake unilateral commitments*<sup>18</sup>

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

### 1.4.2 *Unilateral statements purporting to add further elements to a treaty*<sup>19</sup>

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

### 1.4.3 *Statements of non-recognition*<sup>20</sup>

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

<sup>15</sup> *Ibid.*, pp. 109–111.

<sup>16</sup> *Ibid.*, pp. 111–112.

<sup>17</sup> *Ibid.*, pp. 112–113.

<sup>18</sup> *Ibid.*, pp. 113–114.

<sup>19</sup> *Ibid.*, p. 114.

<sup>20</sup> *Ibid.*, pp. 114–116.

#### 1.4.4 *General statements of policy*<sup>21</sup>

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

#### 1.4.5 *Statements concerning modalities of implementation of a treaty at the internal level*<sup>22</sup>

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

#### 1.4.6 *Unilateral statements made under an optional clause*<sup>23</sup>

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.4.7 *Unilateral statements providing for a choice between the provisions of a treaty*<sup>24</sup>

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

### 1.5 *Unilateral statements in respect of bilateral treaties*<sup>25</sup>

#### 1.5.1 *“Reservations” to bilateral treaties*<sup>26</sup>

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does

not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.5.2 *Interpretative declarations in respect of bilateral treaties*<sup>27</sup>

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

#### 1.5.3 *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*<sup>28</sup>

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

#### 1.6 *Scope of definitions*<sup>29</sup>

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

#### 1.7 *Alternatives to reservations and interpretative declarations*

##### 1.7.1 *Alternatives to reservations*<sup>30</sup>

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

##### 1.7.2 *Alternatives to interpretative declarations*<sup>31</sup>

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

<sup>21</sup> *Ibid.*, pp. 116–118.

<sup>22</sup> *Ibid.*, pp. 118–119.

<sup>23</sup> For the commentary to this guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 112–114.

<sup>24</sup> *Ibid.*, pp. 114–116.

<sup>25</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 119–120.

<sup>26</sup> *Ibid.*, pp. 120–124.

<sup>27</sup> *Ibid.*, pp. 124–125.

<sup>28</sup> *Ibid.*, pp. 125–126.

<sup>29</sup> *Ibid.*, p. 126.

<sup>30</sup> For the commentary to this draft guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 117–122.

<sup>31</sup> *Ibid.*, pp. 122–123.

## 2. PROCEDURE

## 2.1 Form and notification of reservations

2.1.1 Written form<sup>32</sup>

*A reservation must be formulated in writing.*

2.1.2 Form of formal confirmation<sup>33</sup>

*When formal confirmation of a reservation is necessary, it must be made in writing.*

[2.1.3 Competence to formulate a reservation at the international level<sup>34</sup>

*Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]*

## [2.1.3 Competence to formulate a reservation at the international level

*1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:*

*(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or*

*(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.*

*2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:*

*(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;*

*(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;*

*(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;*

*[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.]*

[2.1.3 bis Competence to formulate a reservation at the internal level<sup>35</sup>

*The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.]*

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations<sup>36</sup>

*A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.*

2.1.5 Communication of reservations<sup>37</sup>

*1. A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.*

*2. A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.*

2.1.6 Procedure for communication of reservations<sup>38</sup>

*1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:*

*(a) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or*

*(b) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.*

<sup>32</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1-3, p. 146, para. 49.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, pp. 146-148, paras. 53-71, for the presentation of the two alternative versions of this draft guideline.

<sup>35</sup> *Ibid.*, pp. 148-149, paras. 72-77, for the presentation of this draft guideline.

<sup>36</sup> *Ibid.*, pp. 149-150, paras. 78-82, for the presentation of this draft guideline.

<sup>37</sup> *Ibid.*, pp. 152-157, paras. 99-129, for the presentation of this draft guideline.

<sup>38</sup> *Ibid.*, pp. 157-161, paras. 135-154, for the presentation of this draft guideline.

2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

### 2.1.7 Functions of depositaries<sup>39</sup>

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

2. In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

### 2.1.7 bis Case of manifestly impermissible reservations<sup>40</sup>

1. Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such impermissibility.

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation.

### 2.1.8 Effective date of communications relating to reservations<sup>41</sup>

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.

## 2.2 Confirmation of reservations when signing

### 2.2.1 Formal confirmation of reservations formulated when signing a treaty<sup>42</sup>

If formulated when signing a 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.

### 2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty<sup>43</sup>

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

### 2.2.3 Reservations formulated upon signature when a treaty expressly so provides<sup>44</sup>

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

## 2.3 Late formulation of a reservation<sup>45</sup>

### 2.3.1 Late formulation of a reservation<sup>46</sup>

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the reservation.

### 2.3.2 Acceptance of late formulation of a reservation<sup>47</sup>

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

### 2.3.3 Objection to late formulation of a reservation<sup>48</sup>

If a Contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

### 2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations<sup>49</sup>

A Contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

<sup>39</sup> *Ibid.*, pp. 161–163, paras. 156–170, for the presentation of this draft guideline.

<sup>40</sup> For the presentation of this draft guideline, see paragraphs 44–46 of the present report above.

<sup>41</sup> For the presentation of this draft guideline, see *Yearbook ... 2001* (footnote 32 above), p. 161, para. 155.

<sup>42</sup> For the commentary to this draft guideline, see *Yearbook ... 2001*, vol. II (Part Two), pp. 180–183.

<sup>43</sup> *Ibid.*, p. 183.

<sup>44</sup> *Ibid.*, pp. 183–184.

<sup>45</sup> *Ibid.*, p. 184, for the commentary to this heading.

<sup>46</sup> *Ibid.*, pp. 185–189, for the commentary to this draft guideline.

<sup>47</sup> *Ibid.*, pp. 189–190.

<sup>48</sup> *Ibid.*, pp. 190–191.

<sup>49</sup> *Ibid.*, pp. 191–192.

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

## 2.4 Procedure regarding interpretative declarations

### 2.4.1 Formulation of interpretative declarations<sup>50</sup>

*An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.*

#### [2.4.1 bis Competence to formulate an interpretative declaration at the internal level<sup>51</sup>

1. *The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.*

2. *A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]*

#### 2.4.2 Formulation of conditional interpretative declarations<sup>52</sup>

1. *A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.*

2. *A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.*

#### 2.4.3 Time at which an interpretative declaration may be formulated<sup>53</sup>

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated at any time.

<sup>50</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 32 above), pp. 150–151, paras. 88–90.

<sup>51</sup> *Ibid.*, p. 151, paras. 91–95.

<sup>52</sup> *Ibid.*, p. 150, paras. 83–87.

<sup>53</sup> For the commentary to this draft guideline, see *Yearbook ... 2001* (footnote 42 above), pp. 192–193.

#### 2.4.4 Non-requirement of confirmation of interpretative declarations made when signing a treaty<sup>54</sup>

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

#### 2.4.5 Formal confirmation of conditional interpretative declarations formulated when signing a treaty<sup>55</sup>

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

#### 2.4.6 Late formulation of an interpretative declaration<sup>56</sup>

Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation of the interpretative declaration.

#### 2.4.7 Late formulation of a conditional interpretative declaration<sup>57</sup>

*A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other Contracting Parties objects to the late formulation of the conditional interpretative declaration.*

#### 2.4.9 Communication of conditional interpretative declarations<sup>58</sup>

1. *A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.*

2. *A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.*

<sup>54</sup> *Ibid.*, pp. 193–194.

<sup>55</sup> *Ibid.*, p. 194.

<sup>56</sup> *Ibid.*, pp. 194–195.

<sup>57</sup> *Ibid.*, p. 195.

<sup>58</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 32 above), pp. 163–164, paras. 171–173.