

# RESERVATIONS TO TREATIES

[Agenda item 4]

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

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#### Multilateral instruments cited in the present report

*Source*

Convention on the International Maritime Organization (Geneva, 6 March 1948)	United Nations, <i>Treaty Series</i> , vol. 289, No. 4214, p. 3.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	<i>Ibid.</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.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.

Convention on the High Seas (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 450, No. 6465, p. 11.
Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 516, No. 7477, p. 205.
European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959)	<i>Ibid.</i> , vol. 472, No. 6841, p. 185.
Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961)	<i>Ibid.</i> , vol. 520, No. 7515, p. 151.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague, 15 November 1965)	<i>Ibid.</i> , vol. 658, No. 9432, p. 163.
Agreement establishing the Asian Development Bank (Manila, 4 December 1965)	<i>Ibid.</i> , vol. 571, No. 8303, p. 123.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 19 December 1966)	<i>Ibid.</i>
Convention on road signs and signals (Vienna, 8 November 1968)	<i>Ibid.</i> , vol. 1091, No. 16743, p. 3.
European Agreement supplementing the Convention on road signs and signals (Geneva, 1 May 1971)	<i>Ibid.</i> , vol. 1142, No. 17935, p. 225.
Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals (Geneva, 1 March 1973)	<i>Ibid.</i> , vol. 1394, No. 23345, p. 263.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.
International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention) (London, 2 November 1973)	<i>Ibid.</i> , vol. 1340, No. 22484, p. 184.
Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (London, 17 February 1978)	<i>Ibid.</i> , p. 61.
Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (Geneva, 14 November 1975)	<i>Ibid.</i> , vol. 1079, No. 16510, p. 89.
International Convention against the taking of hostages (New York, 17 December 1979)	<i>Ibid.</i> , vol. 1316, No. 21931, p. 205.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000)	<i>Ibid.</i> , vol. 2171, No. 27531, p. 227.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	<i>Ibid.</i> , vol. 1989, No. 34028, p. 309.

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## Introduction

1. The seventh report on reservations to treaties presents a concise summary of the International Law Commission's earlier work on the subject.<sup>1</sup> This seemed appropriate since the Commission was entering a new five-year period. As in the earlier reports, it will be sufficient this year to summarize briefly the lessons which can be drawn from the consideration of the seventh report both by the Commission itself and by the Sixth Committee of the General Assembly and to give a concise account of the main developments with regard to reservations that occurred during the past year and were brought to the attention of the Special Rapporteur, before proceeding with a general presentation of this report.

### A. Seventh report on reservations to treaties and the outcome

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

2. At its fifty-fourth session in 2002 the Commission adopted the draft guidelines submitted in the sixth report of the Special Rapporteur,<sup>2</sup> and a draft submitted in the first part of the seventh report,<sup>3</sup> which had been referred to the Drafting Committee in 2001<sup>4</sup> and at the beginning of the fifty-fourth session<sup>5</sup> with the commentaries pertaining thereto.<sup>6</sup>

3. In spite of their number (11), these guidelines deal only with the formulation of reservations and interpretative declarations. They are far from covering all the questions which should be covered in part III of the Guide to Practice (Formulation and withdrawal of reservations, acceptances and objections) pursuant to the provisional plan of the study which the Special Rapporteur proposed in his second report<sup>7</sup> and which has been followed consistently since then.

4. The seventh report strove to fill some of these gaps by presenting a set of draft guidelines dealing with the form and procedure for the withdrawal of reservations, with the exception, however, of the rules applying to unilateral declarations by which a State or an international organization seeks to enlarge the scope of previous reservations. These drafts were referred to the Drafting Committee<sup>8</sup> with the exception of those dealing with the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty.<sup>9</sup>

5. With regard to the latter issue, some members of the Commission felt that the first subparagraph of the draft

<sup>7</sup> *Yearbook ... 1996*, vol. II (Part One), document A/CN.4.477 and Add.1, p. 48, para. 37.

<sup>8</sup> *Yearbook ... 2002* (see footnote 5 above), p. 24, para. 101.

<sup>9</sup> Draft guidelines 2.5.4 and 2.5.11 *bis*, which the Special Rapporteur had suggested should be combined in a draft guideline 2.5.X (see the seventh report, *Yearbook ... 2002* (footnote 1 above), pp. 23–24, paras. 106–114 and pp. 41–42, paras. 213–216). Draft guideline 2.5.X reads as follows:

“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 take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.”

<sup>1</sup> *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3, pp. 7–14, paras. 2–47.

<sup>2</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3, p. 137.

<sup>3</sup> *Yearbook ... 2002* (see footnote 1 above), draft guideline 2.1.7 *bis*, p. 14, para. 46.

<sup>4</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 177, para. 155.

<sup>5</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 16, para. 49.

<sup>6</sup> *Ibid.*, pp. 28–48, para. 103.

or drafts in question stated the obvious, while the second implied that the findings of monitoring bodies had a binding effect. Although he was unconvinced by these arguments (and remains so), the Special Rapporteur, recognizing that the consideration of this draft—which dealt mainly with the powers of monitoring bodies with regard to impermissible reservations—was probably premature, withdrew it.<sup>10</sup>

6. Owing to lack of time, the Drafting Committee was unable to consider the draft guidelines referred to it; it will need to do so during the fifty-fifth session in 2003.

## 2. CONSIDERATION OF CHAPTER IV OF THE REPORT OF THE COMMISSION IN THE SIXTH COMMITTEE

7. Chapter IV of the report of the Commission on the work of its fifty-fourth session is devoted to reservations to treaties. A very brief summary of the topic is provided in chapter II<sup>11</sup> and the specific issues on which comments would be of particular interest to the Commission are set out in chapter III. As regards reservations to treaties, the Commission posed two questions to States.<sup>12</sup>

8. The first question arose in the context of the second reading of the draft Guide to Practice (as it is not possible to review drafts already adopted from one year to the next). It dealt with draft guideline 2.1.6, paragraph 4, adopted on first reading in 2002, which reads as follows:

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In this case, the communication is considered as having been made on the date of the electronic mail or facsimile.<sup>13</sup> The Commission wished “to know whether this provision reflects the usual practice and/or seems appropriate”.<sup>14</sup>

9. Many delegations replied to this question, which may seem minor, but which is of considerable practical importance. The vast majority approved the provisions of draft guideline 2.1.6.<sup>15</sup> One delegation suggested that it would

be useful to set a time limit for such confirmation;<sup>16</sup> such a specification could indeed be considered, but the question would then arise of the consequences of not observing the time limit. Other delegations, however, considered that there was no reason for a reservation to produce effects on a date prior to that of receipt of written confirmation by the depositary,<sup>17</sup> while others contested the very principle of notification by electronic mail or facsimile.<sup>18</sup>

10. Broadening the discussion, some delegations suggested that consideration should be given to using modern means of communication for all communications relating to reservations and, more broadly still, to treaties themselves.<sup>19</sup> Others specified that all communications should be made in one of the authentic languages of the treaty.<sup>20</sup>

11. The Commission further stated that it would “welcome comments by States on [draft guideline 2.5.X]”<sup>21</sup> so that it could take them into account when it again dealt with the question of the fate of reservations held to be impermissible by a body monitoring the implementation of a treaty, when it addressed the question of the consequences of the inadmissibility of a reservation, or when it reconsidered its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>22</sup>

12. Several delegations approved the withdrawal of the draft at the current stage and felt that the Commission should revert to the questions posed therein when it considered the issues relating to the admissibility of reservations.<sup>23</sup> Others felt that the withdrawal of a reservation was a sovereign right of States,<sup>24</sup> unrelated to the activities of monitoring bodies,<sup>25</sup> and asked what conduct States should adopt following a finding by a monitoring body that a reservation was impermissible, while stressing that the withdrawal of the reservation was only one of the possibilities to be considered.<sup>26</sup> Several delegations drew attention to the various powers of the bodies in question<sup>27</sup> and stressed that, in principle, they did not have the

<sup>10</sup> See the summary of the debate and the Special Rapporteur's conclusions in *Yearbook ... 2002* (footnote 5 above), pp. 20–21, paras. 71–76, and pp. 23–24, paras. 95–100.

<sup>11</sup> *Ibid.*, p. 11, para. 14. The Special Rapporteur continues to have the greatest doubts as to the utility of these “summaries” which are scarcely informative and risk giving harried readers a poor excuse for not consulting the relevant chapters.

<sup>12</sup> *Ibid.*, p. 13, para. 26.

<sup>13</sup> *Ibid.*, p. 38.

<sup>14</sup> *Ibid.*, p. 13, para. 26 (a).

<sup>15</sup> See the views of Australia (which indicated that the draft reflected its practice—*Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 23rd meeting (A/C.6/57/SR.23), para. 72; Belarus, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 57; Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 6; China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 35; Cyprus, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 6; Greece, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 26; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 57; Italy, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 3; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46; Nigeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 83; Republic of Korea (which stated, however, that the draft did not reflect its usual practice—*ibid.*, para. 67); Sierra Leone, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 51; and Sweden on behalf of the Nordic countries, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 84. The Russian Federation was more reticent in its approval, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 66. Once again, the Special Rapporteur regrets that the summaries were sent to him in English only.

<sup>16</sup> Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 57.

<sup>17</sup> In this connection, see the views of Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 8, the Russian Federation, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 66, or Sweden, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 84.

<sup>18</sup> See the United States of America, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 51, and, to a lesser extent, New Zealand, *ibid.*, para. 29.

<sup>19</sup> See Chile, *ibid.*, 27th meeting (A/C.6/57/SR.27), para. 6.

<sup>20</sup> See the views of Austria, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 76.

<sup>21</sup> *Yearbook ... 2002* (see footnote 5 above), p. 13, para. 26 (b).

<sup>22</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

<sup>23</sup> See Israel, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 21st meeting (A/C.6/57/SR.21), para. 58; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46; New Zealand, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 28; Sweden, on behalf of the Nordic countries, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 83. Against: Belarus, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 57.

<sup>24</sup> See Algeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 40; China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 34; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 58; Japan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 40; Republic of Korea, *ibid.*, 26th meeting (A/C.6/57/SR.26), paras. 68–69.

<sup>25</sup> See Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 58.

<sup>26</sup> See France, *ibid.*, 22nd meeting (A/C.6/57/SR.22), para. 91.

<sup>27</sup> See China, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 33.

competence to judge the admissibility of reservations;<sup>28</sup> others, however, felt that the reserving State had an obligation to reconsider its position in good faith in the light of the findings of the monitoring body.<sup>29</sup> One delegation stressed its attachment to the preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>30</sup>

13. The other draft guidelines adopted by the Commission at its fifty-fourth session were generally approved and elicited relatively few comments,<sup>31</sup> some of which, however, are highly useful and will not fail to be taken into consideration by the Commission when it takes up its consideration of the draft Guide to Practice on second reading.

14. Numerous comments were made, however, on the role of the depositary and, more specifically, on draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations).<sup>32</sup> Generally speaking, and despite some opinions to the contrary,<sup>33</sup> the delegations which intervened on this issue expressed their attachment to the purely mechanical role conferred on the depositary by the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention)<sup>34</sup> and their hesitations concerning the possibility afforded to the depositary of drawing the attention of the author of the reservation to what is, in his view, the manifestly impermissible character of the reservation.<sup>35</sup>

15. Moreover, as usual, some speakers outlined the positions of their Government on general issues relating to the right of reservations.<sup>36</sup>

16. One such issue which drew the most attention is that of conditional interpretative declarations.<sup>37</sup> Several delegations expressed the view that they should be treated in the same manner as reservations and that the draft guidelines devoted to them should be abandoned.<sup>38</sup> In so

doing, they shared the concerns of some members of the Commission. In accordance with the position outlined in the seventh report of the Special Rapporteur,<sup>39</sup> it is very likely that there is no need for the legal regime applying to conditional interpretative declarations to differ from the regime applying to reservations; nevertheless, the Commission will take a final position in this regard only after deciding on the issues relating to the permissibility of reservations and interpretative declarations and their effects. In the meantime, the Special Rapporteur will continue to pose questions concerning the rules applying to conditional interpretative declarations.

## B. Recent developments with regard to reservations to treaties

17. During its fifty-fourth session in 2002, the Commission requested its Chairman and the Special Rapporteur on reservations to treaties to contact the human rights monitoring bodies in an effort to increase exchanges of views on the topic of reservations to human rights treaties.<sup>40</sup> To that end, letters<sup>41</sup> co-signed by the Chairman and the Special Rapporteur were sent on 13 August 2002 to the chairpersons of the following bodies: Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee on the Rights of the Child; Committee against Torture and to the Chairman of the Sub-Commission on the Promotion and Protection of Human Rights and to Ms. Françoise Hampson, who has been entrusted by the Sub-Commission with the preparation of a working paper on reservations to human rights treaties.<sup>42</sup> A copy of the preliminary conclusions adopted by the Commission in 1997 was again<sup>43</sup> attached to these letters.

18. Thus far, only one reply has been received; in a letter received by the Secretariat on 28 March 2003, the Chairman of the Committee on the Elimination of Racial Discrimination transmitted the preliminary opinion of the Committee on the issue of reservations to treaties on human rights, as revised on 13 March 2003.<sup>44</sup> In addition, a joint meeting with the members of the Committee against Torture is planned for the beginning of the Commission's current session so that an exchange of views can be held on this topic. The Special Rapporteur strongly hopes that the members of the Committee on Economic, Social and Cultural Rights, which he believes is also meeting in Geneva during this period, will also be able to

<sup>28</sup> See Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 46, the Russian Federation, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 64, and the United Kingdom, *ibid.*, para. 33.

<sup>29</sup> See Switzerland, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 34.

<sup>30</sup> See Japan, *ibid.*, para. 40. Against: Greece, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 27.

<sup>31</sup> See the still valuable "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-seventh session" (A/CN.4/529), paras. 85–91 and 101–102.

<sup>32</sup> *Ibid.*, paras. 61–72.

<sup>33</sup> See, for example, the views of Chile, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 27th meeting (A/C.6/57/SR.27), para. 4, and Romania, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 48.

<sup>34</sup> See Australia, *ibid.*, para. 74; Brazil, *ibid.*, 24th meeting (A/C.6/57/SR.24), para. 67; China, *ibid.*, para. 32; Cuba, *ibid.*, para. 60; Islamic Republic of Iran, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 5; Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 59; Jordan, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 45; Nigeria, *ibid.*, 26th meeting (A/C.6/57/SR.26), para. 82; and the Republic of Korea, *ibid.*, para. 66.

<sup>35</sup> See Israel, *ibid.*, 21st meeting (A/C.6/57/SR.21), para. 59.

<sup>36</sup> A/CN.4/529 (see footnote 31 above), paras. 50–60.

<sup>37</sup> *Ibid.*, paras. 81–84.

<sup>38</sup> See Japan, *Official Records of the General Assembly, Fifty-seventh Session, Sixth Committee*, 25th meeting (A/C.6/57/SR.25), para. 40; the Netherlands, *ibid.*, 23rd meeting (A/C.6/57/SR.23), para. 11; Switzerland, *ibid.*, 25th meeting (A/C.6/57/SR.25), para. 33; and the United Kingdom, *ibid.*, 23rd meeting (A/C.6/57/SR.23),

para. 34.

<sup>39</sup> *Yearbook ... 2002* (see footnote 1 above), pp. 13–14, para. 43.

<sup>40</sup> See *Yearbook ... 2002* (footnote 5 above), pp. 16–17, paras. 53–54, and p. 20, para. 67.

<sup>41</sup> The text of the model letter is reproduced in the annex to the present report.

<sup>42</sup> E/CN.4/Sub.2/2001/40.

<sup>43</sup> See footnote 22 above. This document had first been sent to the human rights bodies shortly after its adoption. Replies were few and rather thinly argued. On these replies, see the third report on reservations to treaties (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 231, paras. 15–16) and the fifth report (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4, paras. 10–15).

<sup>44</sup> CERD/C/62/Misc.20/Rev.3.

participate in this meeting; to that end, he has asked the Commission's secretariat to contact the Committee's secretariat. It would be useful to schedule similar meetings with the other universal human rights bodies.

19. Only a very brief commentary on the particularly stimulating document which the Chairman of the Committee on the Elimination of Racial Discrimination transmitted can be included in this report.<sup>45</sup> The document begins by stating that the International Convention on the Elimination of All Forms of Racial Discrimination provides a specific mechanism for determining the compatibility of a reservation with the object and purpose of the Convention,<sup>46</sup> but that this mechanism had proved inoperative. Interestingly, however, the document also notes that, in practice, States hardly ever invoke their (generally old) reservations during the Committee's consideration of periodic reports.

20. The Committee on the Elimination of Racial Discrimination makes the extremely significant statement that when considering the reports of States parties, it has better things to do than "opening a legal struggle with all the reservation States and insisting that some of their reservations have no legal effect ... which could detract the Committee from its main task" of promoting, to the extent possible, "a complete and uniform application of the Convention, and could detract States parties from issues concerning its implementation. A fruitful dialogue between the reservation State and the Committee may be much more beneficial for promoting the implementation of the Convention by the respective State".<sup>47</sup>

21. These extremely sensible views confirm the impression that can be formed from the report prepared by the Secretariat at the request of the Committee on the Elimination of Discrimination against Women and submitted to the Committee at its twenty-fifth session in 2001:<sup>48</sup> the human rights treaty 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.<sup>49</sup>

22. The Special Rapporteur has no knowledge of other important recent developments in the matter of reservations during 2002. In particular, it appears that the Committee on the Elimination of Discrimination against Women did not resume its discussion of the question of reservations to treaties at its twenty-sixth, twenty-seventh or twenty-eighth sessions.

23. At its twenty-third session (4–5 March 2002), however, the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe decided to enlarge the scope of the European Observatory on

Reservations to International Treaties to include treaties relating to the fight against terrorism.<sup>50</sup> As part of its role as an observatory of reservations, CAHDI has continued its consideration of declarations and reservations to international treaties and has begun to consider those relating to treaties concluded outside the Council of Europe.<sup>51</sup>

24. It should also be noted that on 4 July 2001, the Grand Chamber of the European Court of Human Rights delivered a judgement which the Special Rapporteur did not mention in his previous report, but which raises an interesting question concerning reservations.<sup>52</sup> The application was brought by several Moldovan nationals who had been sentenced to death or to terms of imprisonment by the "Supreme Court of the Moldovan Republic of Transnistria"; the application was brought against the Russian Federation and the Republic of Moldova. In ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Moldova had declared that it would be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region was finally settled.<sup>53</sup>

25. In considering the difficult issue of its competence and of the admissibility of the application, the European Court of Human Rights enquired into the nature of this declaration; the Government of Moldova maintained that it had to be interpreted as a reservation within the meaning of the present article 57 (formerly art. 64) of the European Convention on Human Rights. Noting that "Moldova's declaration does not refer to any particular provision of the Convention" and that it "does not refer to a specific law in force in Moldova", the Grand Chamber concluded that "the aforementioned declaration cannot be equated with a reservation within the meaning of the Convention, so that it must be deemed invalid". *Prima facie*, this position appears incompatible with draft guideline 1.1.3, which the Commission adopted in 1998.<sup>54</sup> However, insofar as the Court refers exclusively to the specific provisions of article 57 of the Convention, it might be excessive to draw overly categorical conclusions.

26. On 13 August 2002, at the fifty-fourth session of the Sub-Commission on the Promotion and Protection

<sup>50</sup> See the document prepared by the secretariat of the Directorate General of Legal Affairs of the Council of Europe for the 25th meeting of CAHDI (CAHDI (2002) 11 rev.), and the report on the 24th meeting of CAHDI, held in Bratislava on 9–10 September 2002 (Secretariat memorandum drafted by the Directorate General of Legal Affairs (CAHDI (2002) 16)), paras. 23–29.

<sup>51</sup> CAHDI (2002) 16 (see footnote 50 above), paras. 14–22; see also the list of outstanding reservations and declarations to international treaties, prepared for the 25th meeting of CAHDI held in Strasbourg, France, on 17–18 March 2003 (CAHDI (2003) 2).

<sup>52</sup> Application No. 48787/99, *Ilie Ilașcu and Others v. Moldova and the Russian Federation*, European Court of Human Rights, Grand Chamber decision of 4 July 2001 (unreported).

<sup>53</sup> See United Nations, *Treaty Series*, vol. 2045, No. 2889, p. 28.

<sup>54</sup> *Yearbook ... 1998*, vol. II (Part Two), p. 99. Draft guideline 1.1.3 on reservations having territorial scope states that "[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".

<sup>45</sup> *Ibid.*

<sup>46</sup> Under article 20, a reservation is held to be incompatible with the object and purpose of the Convention if at least two thirds of the States parties object to it.

<sup>47</sup> See footnote 44 above.

<sup>48</sup> CEDAW/C/2001/II/4.

<sup>49</sup> See the seventh report on reservations to treaties, *Yearbook ... 2002* (footnote 1 above), p. 15, para. 50.

of Human Rights, Ms. Hampson presented a preparatory working paper<sup>55</sup> the annex to which included a chart (hardly going beyond the information contained in the United Nations publication, *Multilateral Treaties Deposited with the Secretary-General*) showing the reservations to the six United Nations human rights treaties. In its resolution 2001/17 of 16 August 2001, adopted without a vote, the Sub-Commission took note of Commission on Human Rights decision 2001/113 of 25 April 2001 and decided to entrust Ms. Françoise Hampson with the task of preparing an expanded working paper on reservations to human rights treaties and of submitting it to the Sub-Commission at its fifty-fourth session.<sup>56</sup> The Commission on Human Rights makes no mention of the matter in its resolution 2003/59 of 24 April 2003 on the work of the Sub-Commission.<sup>57</sup> Ms. Hampson did not reply to the letter dated 13 August 2003 from the Chairman of the International Law Commission and the Special Rapporteur; however, the meeting of the Sub-Commission in Geneva, which will partly overlap with the second part of the International Law Commission's session, might provide an opportunity for an exchange of views between the two bodies.

27. The Special Rapporteur also wishes to inform the members of the Commission that in early May 2003, he finally received from the Legal Service of the European Commission a reply to section I of the questionnaire on reservations.<sup>58</sup> He welcomes this development and thanks

<sup>55</sup> E/CN.4/Sub.2/2002/34 of 8 August 2002.

<sup>56</sup> E/CN.4/2002/2-E/CN.4/Sub.2/2001/40.

<sup>57</sup> *Official Records of the Economic and Social Council, Commission on Human Rights, Fifty-ninth Session, Supplement No. 3 (E/2003/23-E/CN.4/2003/135)*, p. 223. On previous "episodes" of the difficult relations between the Commission on Human Rights and the Sub-Commission regarding this plan, see the sixth report of the Special Rapporteur on reservations to treaties, *Yearbook ... 2001* (footnote 2 above), pp. 142–143, paras. 21–27, and his seventh report, *Yearbook ... 2002* (footnote 1 above), p. 15, paras. 52–53.

<sup>58</sup> *Yearbook ... 1996* (see footnote 7 above), annex III, p. 107. On this questionnaire, see also *Yearbook ... 2002* (footnote 1 above), p. 9, para. 17. The reply from the Commission of the European Communities brings the number of international organizations which have replied

the authors; he is convinced that this carefully prepared document will be of great help to him in his continued work. The cover letter states that the Legal Service's replies to section II of the questionnaire are forthcoming, and he awaits them with the greatest impatience.

28. The Special Rapporteur again urges the members of the Commission and any reader of this report to kindly provide him with any information on recent developments with regard to reservations to treaties which may have escaped him.

### C. General presentation of the eighth report

29. As has too often been the case, in his seventh report the Special Rapporteur had been unable to cover all the objectives which he had set himself.<sup>59</sup> Thus, the first task will be to complete the section of the Guide to Practice on "Procedure" with regard to reservations.

30. The first chapter of the report will therefore endeavour to conclude the study on the modification of reservations and interpretative declarations by considering first the issue of modifications to reservations which enlarge their scope and then that of changes to interpretative declarations.

31. Chapter II will be devoted to the procedure for formulating acceptances of reservations and to the formulation of objections.

32. If time permits, the Special Rapporteur plans to include a third chapter on the basic problems which he sees in connection with the "permissibility" or "validity" of reservations.<sup>60</sup>

to the questionnaire to 25; once again, the Special Rapporteur thanks them. There has been no new response from States since last year.

<sup>59</sup> *Yearbook ... 2002* (footnote 1 above), pp. 15–16, paras. 56–59.

<sup>60</sup> On the problems raised by the use of these terms, which the Commission has decided to set aside for the moment, see *Yearbook ... 2002* (footnote 5 above), p. 46, para. (7) of the commentary to draft guideline 2.1.8.

## CHAPTER I

### Withdrawal and modification of reservations and interpretative declarations

33. Most of the seventh report on reservations to treaties was devoted to a consideration of withdrawal and modification of reservations.<sup>61</sup> Two questions remain to be examined: (a) enlargement of the scope of a reservation; and (b) withdrawal and modification of an interpretative declaration—if the notion makes sense. The purpose of this chapter is to fill those gaps.

#### A. Enlargement of the scope of reservations

34. As stated in the seventh report:

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>62</sup>, which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above ...<sup>63</sup> If, on the other hand, the effect of the modification is to strengthen an existing

<sup>62</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.

<sup>63</sup> This led the Special Rapporteur to propose the following wording for a draft guideline 2.5.11:

"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.

<sup>61</sup> *Yearbook ... 2002* (footnote 1 above), pp. 16–42, paras. 61–221.

(Continued on next page.)

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.<sup>64</sup>

35. Those rules are set forth in draft guidelines 2.3.1–2.3.3 adopted in 2001:

2.3.1 *Late formulation of a reservation*<sup>65</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>66</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>67</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.

36. If, after expressing its consent to be bound, along with a reservation, a State or an international organization wishes to “enlarge” the reservation, in other words, to modify in its favour the legal effect of the provisions of the treaty to which the reservation refers, such provisions shall be fully applicable, for the same reasons:

(a) It is essential not to encourage the late formulation of limitations on the application of the treaty;

(b) On the other hand, there may be legitimate reasons why a State or an international organization would wish to modify an earlier reservation, and in some cases it may be possible for the author of the reservation to denounce the treaty in order to re-ratify it with an “enlarged reservation”;

(c) It is always possible for the parties to a treaty to modify it at any time by unanimous agreement,<sup>68</sup> it

(Footnote 63 continued.)

“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.”

(*Yearbook ... 2002* (footnote 1 above), pp. 40–41, para. 210)

<sup>64</sup> *Ibid.*, para. 185.

<sup>65</sup> For the commentary on this provision, see *Yearbook ... 2001* (footnote 4 above), pp. 185–189.

<sup>66</sup> See commentary, *ibid.*, pp. 189–190.

<sup>67</sup> *Ibid.*, pp. 190–191. The Special Rapporteur is still dissatisfied with the use of the word “objection” to refer to the opposition expressed by a Contracting Party to the late formulation of a reservation (*ibid.*, p. 189, footnote 1076).

<sup>68</sup> See article 39 of the 1969 Vienna Convention and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

follows that they may also, by unanimous agreement, authorize a party to modify, again at any time, 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 that party.

37. Practical examples are rare, but the legal literature, to the meagre extent that it deals with the problem, is unanimous on this point.

38. Aust, for example, states very clearly that “[a] revision which would change the character or scope of the original [reservation] would not be permissible”.<sup>69</sup>

39. Polakiewicz, Deputy Head of the Legal Advice Department and Treaty Office of the Council of Europe, notes that within the Council framework

There have been instances where states have approached the Secretariat requesting information as to whether and how existing reservations could be modified. In its replies the Secretariat has always stressed that modifications which would result in an extension of the scope of existing reservations are not acceptable. Here the same reasoning applies as in the case of belated reservations ... Allowing such modifications would create a dangerous precedent which would jeopardise legal certainty and impair the uniform implementation of European treaties.<sup>70</sup>

40. The same author questions whether a State may denounce a treaty to which it has made reservations in order to ratify it subsequently with enlarged reservations. He feels that such a procedure may constitute an abuse of rights, while admittedly basing his arguments on grounds specific to the Council of Europe conventions.<sup>71</sup>

41. On the universal level, however, such a conclusion is undoubtedly too rigid. In any case, regardless of the answer to that question, it would not prevent the alignment of practice in the matter of enlarging the

<sup>69</sup> *Modern Treaty Law and Practice*, p. 130. See also Polakiewicz, *Treaty-Making in the Council of Europe*, p. 96, and, for a contrary opinion, Imbert, *Les réserves aux traités multilatéraux*, p. 293.

<sup>70</sup> *Op. cit.*, p. 96. This is comparable to the position taken by the European Commission of Human Rights in the case of *Chrysostomos et al. v. Turkey*, *Decisions and Reports*, Applications Nos. 15299/89, 15300/89 and 15318/89, vol. 68 (Strasbourg, 1993), pp. 216–253.

<sup>71</sup> Polakiewicz, *op. cit.*. One can interpret in this sense the Swiss Federal Supreme Court decision of 17 December 1992 in the case of *F. v. R. and the Council of State of Thurgau Canton*, *Journal des tribunaux* (1995), pp. 523–537; see also the seventh report on reservations to treaties, *Yearbook ... 2002* (footnote 1 above), pp. 38–39, paras. 199–200. On the same 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. 303. In this regard, it might be noted that on 26 May 1998, Trinidad and Tobago denounced the Optional Protocol to the International Covenant on Civil and Political Rights and ratified it again the same day with a new reservation (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2002* (United Nations publication, Sales No. E.03.V.3), vol. I, chap. IV.5, p. 214, note 3). After several objections and a decision by the Human Rights Committee dated 2 November 1999 (Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258—see the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 43 above), para. 12. Trinidad and Tobago again denounced the Optional Protocol on 27 March 2000 (*Multilateral Treaties ...*, p. 216). What was involved, however, was not the modification of an existing reservation but the formulation of an entirely new reservation.

scope of reservations with that regarding late formulation of reservations,<sup>72</sup> which appears to be a very logical approach.

42. Depositaries treat enlarging modifications in the same way as late reservations. Faced with such a request by one of the parties, they consult all the other parties and accept the new formulation of the reservation only if none of the parties opposes it within the time limit set in which to respond.

43. For example, Finland on 1 April 1985, upon acceding to the Protocol on road markings, additional to the European Agreement supplementing the Convention on road signs and signals, formulated a reservation to a technical provision of the instrument.<sup>73</sup> Ten years later, on 5 September 1995, Finland declared that its reservation also applied to a situation other than that originally mentioned.<sup>74</sup>

In keeping with the practice followed in similar cases, the Secretary-General proposed to receive 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. None of the Contracting Parties to the Protocol having notified the Secretary-General of an objection within a period of 90 days from the date of its circulation (on 20 December 1995), the said modification was accepted for deposit upon the expiration of the above-stipulated 90-day period, that is, on 19 March 1996.<sup>75</sup>

The procedure followed by the Secretary-General is the same as the one currently followed in the case of late formulation of reservations<sup>76</sup>—except that now the time limit envisaged would be 12 months rather than 90 days.<sup>77</sup>

44. As another example, the Government of Maldives notified the Secretary-General on 29 January 1999 that it wished to modify the reservations it had formulated upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women in 1993. Germany, which had objected to the original reservations, also opposed their modification, arguing, among other things, that:

<sup>72</sup> Gaja gives the example of the “rectification” by France on 11 August 1982 of the reservation formulated in its instrument of approval of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), which it deposited with the IMO Secretary-General on 25 September 1981 (“Unruly treaty reservations”, pp. 311–312). This is a somewhat unusual case, since at the time of the “rectification” the MARPOL Convention Protocol had not yet entered into force with respect to France; in this instance the depositary does not appear to have made acceptance of the new wording dependent on the unanimous consent of the other parties, some of whom did in fact object to the modified reservation (see *Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999* (J/7339), p. 77).

<sup>73</sup> In its original reservation with respect to the annex, paragraph 6, Finland reserved “the right to use yellow colour for the continuous line between the opposite directions of traffic” (*Multilateral Treaties ...* (see footnote 71 above), chap. XI.B.25, p. 793).

<sup>74</sup> *Ibid.*, “the reservation made by Finland also applies to the barrier line”.

<sup>75</sup> *Ibid.*, note 3, p. 794.

<sup>76</sup> See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 43 above), p. 193, paras. 297–298, or *Yearbook ... 2001* (footnote 4 above), p. 187, paras. (11) and (13) of the commentary on draft guideline 2.3.1 (Late formulation of a reservation).

<sup>77</sup> See *Yearbook ... 2000* (footnote 43 above), p. 198, paras. 319–323.

reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.<sup>78</sup>

45. However, just as it did not object to the formulation of the original reservation by Maldives in opposing its entry into force as between the two States, so Germany did not formally oppose the modification as such. This reinforces the doubts of the Special Rapporteur as to the advisability of using the term “objection” to refer to the opposition of States to late modification of reservations. A State might well find the modification *procedure* acceptable while objecting to the *content* of the modified reservation.<sup>79</sup> Since, however, contrary to his advice, the Commission decided to retain the word “objection” to refer to the opposition of States to late formulation of reservations in draft guidelines 2.3.2 and 2.3.3,<sup>80</sup> he will refrain from suggesting a different terminology at this point.

46. Since enlargement of the scope of a reservation can be viewed as late formulation of a reservation, it seems inevitable that the same rules should apply. It is sufficient simply to refer to the relevant guidelines already adopted by the Commission. Draft guideline 2.3.5 could then read as follows:

#### “2.3.5 *Enlargement of the scope of a reservation*

“The modification of an existing reservation for the purpose of enlarging the scope of the reservation shall be subject to the rules applicable to late formulation of a reservation [as set forth in guidelines 2.3.1, 2.3.2 and 2.3.3].”

47. The reference in square brackets would not be necessary if, as the Special Rapporteur suggests, the above draft guideline is included under section 2.3 of the Guide to Practice, entitled “Late formulation of a reservation”.<sup>81</sup>

48. Moreover, it should be sufficient to explain in the commentary on this provision what is meant by “enlargement” of the scope of a reservation. If the Commission thinks otherwise, it would be possible to add to draft guideline 2.3.5 a second paragraph reading as follows:

“Enlargement of the scope of a reservation means a modification for the purpose of excluding or modifying 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 the reserving State or international organization, in a broader manner than the initial reservation.”

<sup>78</sup> See *Multilateral Treaties ...* (footnote 71 above), chap. IV.8, p. 253, note 42. For Germany’s original objection, see page 240. Finland also objected to the modified Maldivian reservation, *ibid.* The German and Finnish objections were made more than 90 days after the notification of the modification, the time limit set at that time by the Secretary-General.

<sup>79</sup> See footnote 67 above.

<sup>80</sup> See the text of these draft guidelines in paragraph 35 above.

<sup>81</sup> *Yearbook ... 2001* (see footnote 4 above), p. 184.

## B. Withdrawal and modification of interpretative declarations

49. As with many questions relating to interpretative declarations, the question of whether States or international organizations that are parties to a treaty can withdraw or modify such declarations after the entry into force of the treaty must be framed differently depending on whether these declarations are or are not “conditional” in the sense of the definition given in draft guideline 1.2.1.<sup>82</sup> For ease of explanation, the issues relating to the withdrawal of interpretative declarations and conditional interpretative declarations will be distinguished from those relating to their modification.

### 1. WITHDRAWAL OF INTERPRETATIVE DECLARATIONS

50. It follows from draft guideline 2.4.3 that, except where a treaty provides otherwise,<sup>83</sup> a “‘simple’ interpretative declaration ... may ... be formulated at any time”.<sup>84</sup> It may, of course, be inferred therefrom that such a declaration may also be withdrawn at any time without any special procedure.

51. While States seldom withdraw their interpretative declarations, this does happen occasionally. On 1 March 1990, for instance, the Government of Italy notified the Secretary-General that “it had decided to withdraw the declaration by which the provisions of articles 17 and 18 [of the Convention relating to the Status of Refugees] were recognized by it as recommendations only”.<sup>85</sup> Likewise, “[o]n 20 April 2001, the Government of Finland informed the Secretary-General that it had decided to withdraw its declaration in respect of article 7 (2) made upon ratification” of the 1969 Vienna Convention (ratified by that country in 1977).<sup>86</sup>

52. It is sufficient to endorse this practice, which is compatible with the very informal nature of interpretative

<sup>82</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.” For the commentary on this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

<sup>83</sup> See *Yearbook ... 2001* (footnote 4 above), p. 194, draft guideline 2.4.6.

<sup>84</sup> *Ibid.*, p. 192, draft guideline 2.4.3.

<sup>85</sup> *Multilateral Treaties ...* (see footnote 71 above), chap. V.2, p. 340, note 23. There are also withdrawals of “statements of non-recognition” (see, for example, the withdrawal of the declarations by Egypt in respect of Israel concerning the International Convention on the Elimination of All Forms of Racial Discrimination or the Single Convention on Narcotic Drugs, 1961, following the Camp David Agreement (Framework for peace in the Middle East agreed at Camp David, signed in Washington, D.C. on 17 September 1978, United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39), *Multilateral Treaties ...*, chap. IV.2, p. 149, note 18, and chap. VI.15, p. 393, note 18), but such statements are “outside the scope of the ... Guide to Practice” (*Yearbook ... 1999* (see footnote 82 above), p. 114, draft guideline 1.4.3).

<sup>86</sup> *Multilateral Treaties ...* (see footnote 71 above), vol. II, chap. XXIII.1, p. 302, note 13. The declaration concerned the respective powers of the President of the Republic, the Head of Government and the Minister for Foreign Affairs to conclude treaties.

declarations, by adopting a guideline which could read as follows:

### “2.5.12 *Withdrawal of an interpretative declaration*

“Unless the treaty provides otherwise, an interpretative declaration may be withdrawn at any time following the same procedure as is used in its formulation and applied by the authorities competent for that purpose [in conformity with the provisions of guidelines 2.4.1 and 2.4.2].”

53. The question arises of whether to include the phrase in square brackets in the draft guideline. This is simply a matter of expediency; it might be deemed useful to do so in order to facilitate the use of the Guide to Practice, or it might be considered that this makes the wording needlessly cumbersome and that it is sufficient to make this reference in the commentary.

54. Conditional interpretative declarations, meanwhile, are governed insofar as their formulation is concerned by the legal regime of reservations: they must be formulated when the State or international organization expresses its consent to be bound,<sup>87</sup> except if none of the other Contracting Parties objects to their late formulation.

55. It follows inevitably that the rules applicable to the withdrawal of conditional interpretative declarations are necessarily identical to those applying to reservations in this regard, which can only strengthen the position of those members of the Commission who consider it unnecessary to devote specific draft guidelines to such declarations. The Special Rapporteur is inclined to share those views. Nevertheless, he believes that it would be premature to take a final decision in this regard as long as this “hunch” has not been verified in respect of the rules concerning the validity of both reservations and interpretative declarations.<sup>88</sup>

56. There is no need to dwell on this subject, however; it is probably sufficient to transpose, *mutatis mutandis*, to a provisional draft guideline on the withdrawal of conditional interpretative declarations the corresponding draft guidelines concerning reservations. Such a draft guideline could read as follows:

### “2.5.13 *Withdrawal of a conditional interpretative declaration*

“The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of a reservation to a treaty [given in guidelines 2.5.1 to 2.5.9].”

### 2. MODIFICATION OF INTERPRETATIVE DECLARATIONS

57. There would, however, be little point in extending to interpretative declarations the rules applying to the *partial* withdrawal of reservations. By definition, an interpretative declaration (whether or not it is conditional) “purports to specify or clarify the meaning or

<sup>87</sup> See draft guideline 1.2.1 (footnote 82 above).

<sup>88</sup> See paragraph 16 above.

scope attributed by the declarant to a treaty or to certain of its provisions".<sup>89</sup> A declaration cannot be partially withdrawn: at the very most, the author may modify it or cease to make it a condition for the entry into force of the treaty.

58. The Special Rapporteur is not aware of any precedent whereby a party to a treaty has ceased to make an interpretative declaration a condition for its participation in the treaty while maintaining the declaration "simply"<sup>90</sup> as an interpretation. That being the case, it is probably not helpful to devote a draft guideline to this academic hypothesis—particularly since this scenario would, in reality, amount to the withdrawal of the declaration in question as a conditional interpretative declaration and it would thus be a case of withdrawal pure and simple. It will therefore be sufficient to point this out in the commentary on draft guideline 2.5.13.

59. On the other hand, there is no question that an interpretative declaration, whether or not it is conditional, may be modified. Nevertheless, whereas in the case of reservations it is generally relatively easy to determine whether their modification may be interpreted as a partial withdrawal (the object of draft guidelines 2.5.10–2.5.11<sup>91</sup>) or consists in enlarging their scope (the object of draft guideline 2.3.5 suggested above<sup>92</sup>), this is virtually impossible in the case of modifications made by States to their interpretative declarations. Some declarations can no doubt be deemed more restrictive than others (and the withdrawal of one declaration in favour of another, more restrictive, one can be considered to "enlarge" it); nevertheless, this remains very subjective and it hardly seems appropriate to adopt a draft guideline which would transpose to interpretative declarations draft guideline 2.3.5 concerning the enlargement of the scope of reservations.

60. Consequently, there is no need to distinguish between modifications of interpretative declarations which have the effect of limiting the scope of the initial declaration or, on the contrary, enlarging it.<sup>93</sup> However, the distinction between conditional interpretative declarations and other interpretative declarations re-emerges in relation to the time at which a modification may be made.

<sup>89</sup> See draft guideline 1.2, *Yearbook ... 1999* (footnote 82 above), p. 92.

<sup>90</sup> There are, however, examples of statements specifying that interpretative declarations do not constitute reservations. See, for example, the "communication received subsequently" (the date is not given) by which the Government of France indicated that the first paragraph of the "declaration" made upon ratification of the International Convention on the Elimination of All Forms of Racial Discrimination "did not purport to limit the obligations under the Convention in respect of the French Government, but only to record the latter's interpretation of article 4 of the Convention" (*Multilateral Treaties ...* (see footnote 71 above), chap. IV.2, p. 149, note 19). See also, for example, the statements by Indonesia and Malaysia concerning the declarations which accompanied their ratifications of the Convention on the International Maritime Organization, *ibid.*, vol. II, chap. XII.1, p. 9, notes 14 and 16, or India's position with respect to the same Convention (*ibid.*, note 13); see also Schachter, "The question of treaty reservations at the 1959 General Assembly".

<sup>91</sup> *Yearbook ... 2002* (see footnote 1 above), p. 34, para. 169 and pp. 40–41, para. 210.

<sup>92</sup> Para. 46.

<sup>93</sup> In this respect, the legal regime of conditional interpretative declarations differs from that applying to reservations.

61. Conditional interpretative declarations may not be modified at will: in principle, they may only be formulated (or confirmed) when a State or an international organization expresses its consent to be bound<sup>94</sup> and any late formulation is precluded "except if none of the other contracting parties objects".<sup>95</sup> Any modification is thus similar to a late formulation which also must not be opposed by any of the other Contracting Parties. A draft guideline could so specify:

**"2.4.10 Modification of a conditional interpretative declaration"**

"A State or an international organization may not modify 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 modification of the conditional interpretative declaration."

62. It will be noted that the wording of this draft guideline is modelled very exactly on that of draft guideline 2.4.8 concerning the late formulation of a conditional interpretative declaration. If the Commission agrees to revise this draft guideline, adopted in 2001,<sup>96</sup> a more elegant solution could consist in combining the two draft guidelines in the following manner:

**"2.4.8 Late formulation or modification of a conditional interpretative declaration"**

"A State or an international organization may not formulate or modify 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 or modification of the conditional interpretative declaration."

The commentaries would of course need to be amended accordingly.

63. The problem may be stated differently in the case of "simple" interpretative declarations, those which constitute mere clarifications of the meaning of the treaty provisions, but on which the author's participation in the treaty does not depend. Such declarations may be formulated at any time<sup>97</sup> (unless the treaty provides otherwise<sup>98</sup>) and are not subject to the requirement of confirmation.<sup>99</sup> Consequently, there is nothing to prevent such declarations from being modified at any time, in the absence of a treaty provision indicating that the interpretation must be given at a specified time. This could be the object of a draft guideline 2.4.9:

<sup>94</sup> See draft guidelines 1.2.1 (footnote 82 above) and 2.4.5 (*Yearbook ... 2001* (footnote 4 above), p. 179).

<sup>95</sup> *Yearbook ... 2002* (see footnote 5 above), p. 28, draft guideline 2.4.8.

<sup>96</sup> *Yearbook ... 2001* (footnote 4 above), p. 180.

<sup>97</sup> *Ibid.*, p. 192, draft guideline 2.4.3.

<sup>98</sup> *Ibid.*, p. 194, draft guideline 2.4.6.

<sup>99</sup> *Ibid.*, p. 193, draft guideline 2.4.4.

### “2.4.9 Modification of interpretative declarations

“Unless the treaty provides that an interpretative declaration may be made [or modified] only at specified times, an interpretative declaration may be modified at any time.”

64. The expression in square brackets envisages a fairly unlikely scenario (and one which the Special Rapporteur has not encountered), where a treaty would expressly limit the possibility of *modifying* interpretative declarations. It could no doubt be safely omitted from the text of the draft guideline and simply be mentioned in the commentary.

65. Here again, the Commission will perhaps prefer to make minor revisions to the text of draft guidelines 2.4.3 and 2.4.6 (and the commentaries thereon) adopted in 2001<sup>100</sup> so as to accommodate modification alongside the formulation of interpretative declarations. In that case, the two draft guidelines would read as follows:

#### “2.4.3 Time at which an interpretative declaration may be formulated or modified

“Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 and 2.4.7, an interpretative declaration may be formulated *or modified* at any time.

#### “2.4.6 Late formulation of an interpretative declaration

“Where a treaty provides that an interpretative declaration may be made [*or modified*] only at specified times, a State or an international organization may not formulate *or modify* an interpretative declaration concerning that treaty subsequently except if none of the other Contracting Parties objects to the late formulation *or modification* of the interpretative declaration.”

66. There are few clear examples illustrating these draft guidelines. Mention may be made, however, of the modification by Mexico, in 1987, of the declaration concerning

<sup>100</sup> *Ibid.*, pp. 192–193 and 194–195.

article 16 of the International Convention against the taking of hostages, made upon accession in 1987.<sup>101</sup>

67. The modification by a State of unilateral statements made under an optional clause<sup>102</sup> or providing for a choice between the provisions of a treaty<sup>103</sup> also comes to mind; but such statements are “outside the scope of the ... Guide to Practice”.<sup>104</sup> Also, on 7 March 2002, Bulgaria amended a declaration made upon signature and confirmed upon deposit of its instrument of ratification (in 1994) of the European Convention on Mutual Assistance in Criminal Matters;<sup>105</sup> however, strictly speaking, it might be considered that this was more a case of interpreting a reservation than modifying an interpretative declaration.<sup>106</sup>

68. For all that, and despite the paucity of convincing examples (known to the Special Rapporteur), the proposed draft guidelines above seem to flow logically from the very definition of interpretative declarations.

<sup>101</sup> See *Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XVIII.5, p. 109.

<sup>102</sup> See, for example, the modification by Australia and New Zealand of the declarations made under article 24, paragraph 2 (ii), of the Agreement establishing the Asian Development Bank upon ratification of the said Agreement (*ibid.*, vol. I, chap. X.4, p. 491, notes 10–11).

<sup>103</sup> See, for example, the note by the Ambassador of Mexico to The Hague dated 24 January 2002 informing the depositary of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of the modification of Mexico’s requirements with respect to the application of article 5 of the said Convention ([www.hcch.net/](http://www.hcch.net/)).

<sup>104</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 107, draft guidelines 1.4.6 and 1.4.7.

<sup>105</sup> United Nations, *Treaty Series*, vol. 2182, No. A–6841, p. 51.

<sup>106</sup> See also the modification, in 1988, of the Swiss “interpretative declaration” of 1974 concerning article 6, paragraph 1, of the European Convention on Human Rights following the *Belilos* judgement of 29 April 1988. However, the European Court of Human Rights had classed this “declaration” as a reservation and Switzerland simply withdrew its declaration retroactively following the decision of the Swiss Federal Supreme Court of 17 December 1992 in the case of *F. v. R. and the Council of State of Thurgau Canton* (see footnote 71 above).

## CHAPTER II

### Formulation of objections to reservations and interpretative declarations—the “reservations dialogue”

69. In his second report on reservations to treaties, the Special Rapporteur presented a “provisional general outline of the study”.<sup>107</sup> This outline, which was endorsed by the Commission<sup>108</sup> and has been followed consistently thus far, divides part III (Formulation and withdrawal of reservations, acceptances and objections) into three sections, concerning formulation and withdrawal of reservations (A), formulation of acceptances of reservations (B) and formulation and withdrawal of objections to reservations (C). Upon reflection, this order seems illogical; it

<sup>107</sup> *Yearbook ... 1996* (see footnote 7 above), pp. 48–49, para. 37. This outline was also reproduced in the seventh report, *Yearbook ... 2002* (see footnote 1 above), p. 9, para. 18.

<sup>108</sup> *Yearbook ... 1997* (see footnote 22 above), pp. 52–53, paras. 116–123.

follows from article 20, paragraph 5, of the 1969 Vienna Convention that in most cases, acceptance of a reservation results from the absence of an objection. It seems preferable, therefore, to begin by describing the procedure for formulating objections—which presupposes active conduct with regard to the reservation on the part of the other Contracting Parties—before tackling acceptances, which are generally reflected in the parties’ silence.

70. Moreover, section C, as envisaged in the outline, contemplates only two issues linked to the formulation of objections, namely, the procedure for their formulation—which is covered in part by article 23, paragraphs 1 and 3, of the 1969 and 1986 Vienna Conventions—and their withdrawal, for which guidelines are given in article 22, paragraphs 2 and 3 (b), and article 23, paragraph 4, of

the same Conventions. This ignores the whole intermediate procedure, which may or may not culminate in withdrawal or in an intermediate solution, consisting of a dialogue between the reserving State and its partners which are urging it to abandon the reservation. This procedure, which may be termed the “reservations dialogue” and which is probably the most striking innovation of modern procedure for the formulation of reservations, will be the subject of a subsequent report; section 1 below is devoted to the formulation of objections to reservations. A subsequent section will, in due course, deal with their withdrawal, and another with equivalent issues linked to interpretative declarations.

71. As in the preceding reports, each of the questions dealt with in this chapter will be presented in the following manner:

(a) To the extent that they are covered by express provisions of the 1969 and 1986 Vienna Conventions, these provisions will be discussed in the light of the *travaux préparatoires*;

(b) Such provisions, which should be reproduced in the Guide to Practice,<sup>109</sup> will then be supplemented on the basis of an in-depth study,<sup>110</sup> as far as possible, of practice, jurisprudence and legal doctrine, with a view to:

(c) Drafting guidelines which are sufficiently clear to enable users of the Guide to find answers to any questions they may have.

72. It should also be noted that only questions relating to the form and procedure for formulating objections to reservations will be addressed. In accordance with the provisional general outline,<sup>111</sup> issues relating to the validity and effects of reservations will be covered in subsequent chapters.

### Section 1

#### Formulation of objections to reservations

73. Five provisions of the 1969 and 1986 Vienna Conventions are relevant to the formulation of objections to treaty reservations:

(a) Article 20, paragraph 4 (b), mentions “in passing” the potential authors of an objection;

(b) Article 20, paragraph 5, gives ambiguous indications as to the period in which an objection may be formulated;

(c) Article 21, paragraph 3, confirms the obligation imposed by article 20, paragraph 4 (b), on the author of an objection to state whether the latter therefore opposes the entry into force of the treaty between the author of the objection and the author of the reservation;

(d) Article 23, paragraph 1, requires that, like reservations themselves, objections be formulated in writing and communicated to the same States and international organizations as reservations; and

(e) Article 23, paragraph 3, states that an objection made previously to confirmation of a reservation does not itself require confirmation.

74. These various issues will be covered by future chapters in a different order. The plan of this section follows, *mutatis mutandis*, the one adopted in section 2.1 of the Guide to Practice concerning the form and notification of reservations.<sup>112</sup> Nevertheless, whereas the definition of reservations is the subject of several draft guidelines,<sup>113</sup> objections are not at present defined therein, any more than they are in the 1969 and 1986 Vienna Conventions; the first part of this section will endeavour to fill this gap (and will include comments on the author and content of objections). Subsequent parts will be devoted, respectively, to the form and notification of objections and to the period in which the latter can or should be formulated.

#### A. DEFINITION OF OBJECTIONS TO RESERVATIONS

75. The definition of reservations provided in article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice, contains five elements:

(a) The first concerns the nature of the act (“a unilateral statement”);

(b) The second concerns its name (“however phrased or named”);

(c) The third concerns its author (“made by a State or an international organization”);

(d) The fourth concerns when it should be made (when “expressing consent to be bound”<sup>114</sup>); and

(e) The fifth concerns its content or object (whereby it “purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization”<sup>115</sup>).

It seems reasonable to start with these elements in elaborating a definition of objections to reservations.

76. This does not mean, however, that the definition of objections should necessarily include all of them. It appears, in particular, that it would be better not to

<sup>109</sup> See *Yearbook ... 1998* (footnote 54 above), p. 99, para. (1) of the commentary on draft guideline 1.1 (Definition of reservations).

<sup>110</sup> The Special Rapporteur, eager to expedite the study of the topic and to respond to the wishes of States and of many of his colleagues in the Commission—wishes he is not certain that he shares, since speed does not seem to satisfy a particular need in relation to such a topic, which it seems to him should preferably be studied tranquilly and in depth, in order to put an end once and for all to the uncertainties and ambiguities that are impeding practice—has nonetheless resigned himself to proceeding in a less exhaustive manner than previously.

<sup>111</sup> Part IV (Effects of reservations, acceptances and objections), sects. B–C (footnote 107 above).

<sup>112</sup> *Yearbook 2002* (see footnote 5 above), p. 28.

<sup>113</sup> *Ibid.*, p. 24, draft guideline 1.1 of the Guide to Practice.

<sup>114</sup> *Ibid.*, draft guideline 1.1.2.

<sup>115</sup> *Ibid.*, see also draft guideline 1.1.1.

mention the moment when an objection can be formulated; the matter is not clearly resolved in the 1969 and 1986 Vienna Conventions, and it is probably preferable to examine it separately and seek to respond to it in a separate draft guideline.

77. Conversely, two of the elements in the definition of reservations should certainly be reproduced in the definition of objections, which, like reservations, are unilateral statements whose wording or designation is unimportant if their object makes it possible to characterize them as objections.

78. With regard to the first element, the provisions of the 1969 and 1986 Vienna Conventions leave not the slightest doubt: an objection emanates from *a* State or *an* international organization and can be withdrawn at any time.<sup>116</sup> It does not follow, however, that, like a reservation,<sup>117</sup> an objection cannot be formulated jointly by several States or international organizations. This possibility can be considered at the same time as the more general question of the author of the objection.

79. With regard to the second element, it is sufficient to recall that the law of treaties, as enshrined in the 1969 Vienna Convention, is wholly permeated by the notion that the intentions of States take precedence over the terminology which they use to express them. This is apparent from the definition given in the Convention of the term<sup>118</sup> “treaty”, which “means an international agreement ... whatever its particular designation”.<sup>119</sup> Likewise, a reservation is defined therein as “a unilateral statement, however phrased or named”,<sup>120</sup> and the Commission used the same term to define interpretative declarations.<sup>121</sup> The same should apply to objections: here again, it is the intention which counts. The question remains, however, which intention and by whom it can be expressed.

## 1. CONTENT OF OBJECTIONS

80. The word “objection” has nothing mysterious about it. In its common meaning, it designates a “reason which one opposes to a statement in order to counter it”.<sup>122</sup> From a legal perspective, it means, according to the *Dictionnaire de droit international public*, the “opposition

<sup>116</sup> Art. 20, para. 4 (b), art. 21, para. 3, and art. 22, paras. 2 and 3 (b). On this subject, see Baratta, *Gli effetti delle riserve ai trattati*, p. 341, or Szafarz, “Reservations to multilateral treaties”, p. 313.

<sup>117</sup> See *Yearbook ... 2002* (see footnote 5 above), p. 24, draft guideline 1.1.7.

<sup>118</sup> In the view of the Special Rapporteur, it is improper to use the term “expression” where the locution so designated consists of a single word. This terminological inflection is, however, enshrined by custom and it does not seem advisable to question it.

<sup>119</sup> Art. 2, para. 1 (a). See also, for example, the ICJ judgment of 1 July 1994 in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 120, para. 23: “[I]nternational agreements may take a number of forms and be given a diversity of names.”

<sup>120</sup> Art. 2, para. 1 (d), of the 1969 and 1986 Vienna Conventions.

<sup>121</sup> See draft guideline 1.2 and the commentary thereon in *Yearbook ... 1999* (footnote 82 above), in particular, p. 100, paras. (14)–(15), and the examples of “renaming” (*ibid.*, and in the commentary on draft guideline 1.3.2 (Phrasing and name), *ibid.*, pp. 109–111).

<sup>122</sup> *Grand Larousse encyclopédique*, vol. 7 (Paris, Larousse, 1963).

expressed by a subject of law to an act or a claim by another subject of law in order to prevent its entry into force or its opposability to the first subject”.<sup>123</sup> The same work defines “objection to a reservation” as follows:

Expression of rejection by a State of a reservation to a treaty formulated by another State, where the aim of the reservation is to oppose the applicability between the two States of the provision or provisions covered by the reservation, or, if such is the intention stated by the author of the objection, to prevent the entry into force of the treaty as between those two States.<sup>124</sup>

81. This latter clarification has its basis in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions, which add to the usual definition of objections to reservations an additional requirement (or opportunity), since this provision invites the author of the objection to indicate whether it opposes the entry into force of the treaty between it and the author of the reservation.

### “Generic” object of objections to reservations

82. Any objection to a reservation expresses its author’s opposition to a reservation formulated by a Contracting Party to a treaty, and its intention to prevent the reservation being opposable to it. What is at issue, therefore, is a reaction, and a negative one, to a reservation formulated by another party, it being understood that any reaction of this type is not necessarily an objection.

83. As the Court of Arbitration which settled the dispute between France and the United Kingdom of Great Britain and Northern Ireland concerning the delimitation of the continental shelf in the *English Channel* case stated in its decision of 30 June 1997:

Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.<sup>125</sup>

In this case, the Court did not expressly take a position on the nature of the United Kingdom’s “reaction”, but it “acted as if it were an objection”,<sup>126</sup> namely, by applying the rule laid down in article 21, paragraph 3, of the 1969 Vienna Convention, which, however, was not in force between the parties.<sup>127</sup>

84. While the award could be criticized in that regard, nonetheless it appears indisputable that the wording of the British statement in question clearly reflects the intention of the United Kingdom to object to the French reservation. The statement reads as follows:

The Government of the United Kingdom are unable to accept reservation (b).<sup>128</sup>

<sup>123</sup> Salmon, ed., p. 763.

<sup>124</sup> *Ibid.*, p. 764. It need hardly be stated that this definition applies also to an objection formulated by an international organization.

<sup>125</sup> *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 33, para. 39.

<sup>126</sup> Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”, p. 45.

<sup>127</sup> See below.

<sup>128</sup> UNRIAA (see footnote 125 above), para. 40.

The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning.

85. As the Franco-British Court of Arbitration noted, it can happen that a reaction to a reservation, even if critical of it, does not constitute an objection in the sense of articles 20–23 of the 1969 and 1986 Vienna Conventions. The reaction may simply consist of observations, in which a State or an international organization announces its (restrictive) interpretation of the reservation or the conditions under which it considers it to be valid. For example:

In 1979, the United Kingdom, Germany and France reacted to the reservation made by Portugal to the protection of property rights contained in Article 1 of the Protocol to the ECHR [European Convention on Human Rights]. By making this reservation, Portugal intended to exclude the sweeping expropriation and nationalisation measures, which had been adopted in the wake of the Carnations Revolution, from any challenge before the European Commission and Court of Human Rights. The reacting states did not formally object to the reservation made by Portugal, but rather made declarations to the effect that it could not affect the general principles of international law which required the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property. Following constitutional and legislative amendments, Portugal withdrew this reservation in 1987.<sup>129</sup>

86. The following examples can be interpreted in the same way:

(a) The communications whereby a number of States indicated that they did not regard “the statements<sup>130</sup> concerning paragraph (1) of Article 11 [of the Vienna Convention on Diplomatic Relations] made by the Byelorussian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and the Mongolian People’s Republic as modifying any rights or obligations under that paragraph”<sup>131</sup>; the communications could be seen as interpretations of the reservations in question (or of the provision to which they relate) rather than as true objections, particularly in contrast with other statements formally presented as objections;<sup>132</sup>

(b) The communication of the United States of America regarding the first reservation of Colombia to the United Nations Convention against Illicit Traffic in

<sup>129</sup> Polakiewicz, *op. cit.*, p. 106 (footnotes omitted).

<sup>130</sup> These statements, in which the parties concerned explained that they consider “that any difference of opinion regarding the size of a diplomatic mission should be settled by agreement between the sending State and the receiving State”, they expressly termed “reservations” (*Multilateral Treaties ...* (see footnote 71 above), chap. III.3, pp. 87–89 and 96, note 21).

<sup>131</sup> *Ibid.*, p. 89 (Australia); see also pages 90 (Canada), 91 (Denmark, France), 92 (Malta), 93 (New Zealand, Thailand) and 94 (United Kingdom).

<sup>132</sup> *Ibid.*, statements by Greece (p. 91), Luxembourg and the Netherlands (p. 92), or the United Republic of Tanzania (p. 94) or the more ambiguous statement by Belgium (p. 90). See also, for example, the final paragraph of the communication of the United Kingdom concerning the reservations and declarations accompanying the instrument of ratification deposited by the Union of Soviet Socialist Republics to the 1969 Vienna Convention (*ibid.*, vol. II, chap. XXIII.1, p. 300) or the reaction of Norway to the corrective “declaration” of France dated 11 August 1982 regarding the Protocol of 1978 to the MARPOL Convention (a declaration that clearly appears to be a reservation and to which Sweden and Italy had objected as such) stating that it considered it to be a declaration and not a reservation (J/7339 (see footnote 72 above), p. 77, note 1).

Narcotic Drugs and Psychotropic Substances, in which the United States Government says that it understands the reservation “to exempt Colombia from the obligations imposed by article 3, paragraphs 6 and 9, and article 6 of the Convention only insofar as compliance with such obligations would prevent Colombia from abiding by article 35 of its Political Constitution (regarding the extradition of Colombian nationals by birth), *to the extent that the reservation is intended to apply*”<sup>\*</sup> other than to the extradition of Colombian nationals by birth, the Government of the United States *objects to the reservation*<sup>\*\*</sup><sup>133</sup>; this is an example of a “conditional acceptance” rather than an objection strictly speaking; or

(c) The communications of Greece, Norway and the United Kingdom concerning the declaration of Cambodia on the Convention on the International Maritime Organization.<sup>134</sup>

87. Such “quasi-objections”, moreover, have tended to proliferate in recent years with the growth of the practice of the “reservations dialogue”, which will be discussed in due course. What the dialogue entails is that States (for the most part European States) inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but often they merely open a dialogue that could lead to an objection but could also result in the modification or withdrawal of the reservation. The reaction of Finland to the reservations made by Malaysia on its accession to the Convention on the Rights of the Child clearly falls into the first category and undoubtedly constitutes an objection:

The reservation made by Malaysia covers several central provisions of the [said Convention]. The broad nature of the said reservation leaves open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention. In the view of the Government of Finland reservations of such comprehensive nature may contribute to undermining the basis of international human rights treaties.

The Government of Finland also recalls that the said reservation is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. It is in the common interest of the States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfil the object and purpose of the treaty. Moreover, the internal legislation as well as the national policies are also subject to changes which might further expand the unknown effects of the reservation.

In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland *objects to such reservation*.<sup>\*</sup> The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.

The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].<sup>135</sup>

<sup>133</sup> *Multilateral Treaties ...* (see footnote 71 above), chap. VI.19, p. 419. Colombia subsequently withdrew the reservation (*ibid.*, p. 420, note 11).

<sup>134</sup> *Ibid.*, vol. II, chap. XII.1, p. 9, note 12.

<sup>135</sup> *Ibid.*, vol. I, chap. IV.11, pp. 294–295. For even clearer objections to the reservations of Malaysia, see the statements of Germany, Ireland, the Netherlands, Norway, Portugal and Sweden and the communications of Belgium and Denmark (*ibid.*, pp. 295–298 and 301, note 25). Malaysia subsequently withdrew part of its reservations (*ibid.*).

88. Whether or not the reaction of Austria to the same reservations, a reaction also thoroughly reasoned and directed towards the same purpose, can be considered an objection is more debatable; Austria's statement of 18 June 1996 contains no language expressive of a definitive rejection of the reservations of Malaysia and suggests instead a waiting stance:

Under article 19 of the Vienna Convention on the Law of Treaties which is reflected in article 51 of the [Convention on the Rights of the Child] a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with [the] object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.

The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations *a final assessment as to its admissibility under international law cannot be made without further clarification.*\*

Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].

Austria, however, objects to the admissibility of the reservations in question *if*\* the application of this reservation negatively affects the compliance of Malaysia ... with its obligations under the [Convention] essential for the fulfilment of its object and purpose.

Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties *unless*\* Malaysia ..., *by providing additional information or through subsequent practice*\* ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].<sup>136</sup>

Here again, rather than a straightforward objection, the statement can be considered a conditional acceptance (or conditional objection) with a clear intent (to induce the reserving State to withdraw or modify its reservation), but with uncertain legal status and effects, if only because the conditions for accepting or rejecting the reservation are not susceptible to an objective analysis and no particular time limit is set.

89. Such statements pose problems comparable to those raised by communications in which a State or an international organization reserves its position regarding the validity of a reservation made by another party, particularly with regard to their validity *ratione temporis*.<sup>137</sup> For example, there is some doubt as to the scope of the statement of the Netherlands to the effect that the Government of the Netherlands "reserve all rights regarding the reservations made by the Government of Venezuela on ratifying [the Convention on the Territorial Sea and the Contiguous Zone] in respect of article 12 and article 24, paragraphs 2 and 3".<sup>138</sup> The same could be said of the statement of the United Kingdom to the effect that it was

<sup>136</sup> *Ibid.*, p. 294. See also the reaction of Sweden to Canada's reservation to the Convention on Environmental Impact Assessment in a Transboundary Context, *ibid.*, vol. II, chap. XXVII.4, p. 396.

<sup>137</sup> See below.

<sup>138</sup> *Multilateral Treaties ...* (see footnote 71 above), vol. II, chap. XXI.1, p. 215. See also the examples given by Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 318 and 336 (Canada's reaction to France's reservations and declarations to the Convention on the Continental Shelf).

not however able to take a position on [the] purported reservations [of the Republic of Korea to the International Covenant on Civil and Political Rights] in the absence of a sufficient indication of their intended effect, in accordance with the terms of the Vienna Convention on the Law of Treaties and the practice of the Parties to the Covenant. Pending receipt of such indication, the Government of the United Kingdom reserve their rights under the Covenant in their entirety.<sup>139</sup>

Similarly, the nature of the reactions of several States<sup>140</sup> to the limitations that Turkey had set on its acceptance of the right of individual petition under former article 25 of the European Convention on Human Rights is not easy to determine. These States, using a number of different formulas, communicated to the Secretary General of the Council of Europe that they reserved their position pending a decision by the competent organs of the Convention, explaining that "the absence of a formal and official reaction on the merits of the problem should not ... be interpreted as a tacit recognition ... of the Turkish Government's reservations".<sup>141</sup> It is hard to see these as objections; rather, they are notifications of provisional "non-acceptance" associated with a waiting stance.

90. By contrast, an objection involves taking a formal position seeking, at the minimum, to prevent the application of the "provisions to which the reservation relates ... as between the reserving State or organization and the objecting State or organization to the extent of the reservation", to borrow the language of article 21, paragraph 3, of the 1986 Vienna Convention.

91. It does not follow that other reactions, of the same type as those mentioned above,<sup>142</sup> which the other parties to the treaty may have with respect to the reservations formulated by a State or an international organization are prohibited or even that they produce no legal effects. It simply means that they are not objections within the meaning of the 1969 and 1986 Vienna Conventions and their effects are not those envisaged in article 21, paragraph 3, of those Conventions. Rather, they relate to the interpretation of the treaty or the unilateral acts constituted by the reservations, or else they form part of the "reservations dialogue", whose components will be analysed more carefully in due course.

92. These uncertainties clearly illustrate the value of using precise and unambiguous terminology in the description of reactions to a reservation, in the wording and in the definition of the scope which the author of an objection intends to give to it.<sup>143</sup>

<sup>139</sup> *Multilateral Treaties ...* (see footnote 71 above), chap. IV.4, p. 181. See also the communication of the Netherlands concerning the Australian reservations to article 10 of the Covenant (*ibid.*, p. 178); on the other hand, the reaction of the Netherlands to the Australian reservations to articles 2 and 50 of the Covenant looks more like an interpretation of the reservations in question (*ibid.*).

<sup>140</sup> Belgium, Denmark, Luxembourg, Norway and Sweden. Such limitations do not constitute reservations within the meaning of the Guide to Practice (see draft guideline 1.4.6, paragraph 2 (footnote 104 above), but the example (given by Polakiewicz, *op. cit.*, pp. 106–107) is nonetheless striking by analogy.

<sup>141</sup> Statement of Luxembourg, *Loizidou v. Turkey (Preliminary Objections)*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310, *judgment of 23 March 1995* (Strasbourg, 1995), p. 12, para. 20. The text of these different statements is reproduced there, *ibid.*, pp. 12–13, paras. 18–24.

<sup>142</sup> Paras. 84–88.

<sup>143</sup> See in this respect the model response clauses to reservations

93. As to the first point—the description of the reaction—the most prudent solution is certainly to use the noun “objection” or the verb “object”.<sup>144</sup> Such other terms as “opposition/oppose”, “rejection/reject”,<sup>145</sup> and “refusal/refuse” must also, however, be regarded as signifying objection. Unless a special context demands otherwise, the same is true of expressions like “the Government of ... does not accept the reservation ...”<sup>146</sup> or “the reservation formulated by ... is impermissible/unacceptable/inadmissible”.<sup>147</sup> Such is also the case when a State or an international organization, without drawing any express inference, states that a reservation is “prohibited by the treaty”,<sup>148</sup> “entirely void”<sup>149</sup> or simply “incompatible with the object and purpose” of the treaty, which is extremely frequent.<sup>150</sup> In these last cases, this conclusion is the only one possible given the provisions of article 19 of the 1969 and 1986 Vienna Conventions: in such cases, a reservation cannot be formulated and, when a Contracting Party expressly indicates that this is the situation, it would be inconceivable that it would not object to the reservation.

94. This being so, despite the contrary opinion of some writers,<sup>151</sup> no rule of international law requires a State or an international organization to state its reasons for an objection to a reservation. Except where a specific

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appended to recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties adopted on 18 May 1999 by the Committee of Ministers of the Council of Europe. It should be noted that all the alternative wordings proposed in that document expressly utilize the word “objects”. On the disadvantages of vague and imprecise objections, see Horn, *op. cit.*, pp. 184–185; see also pages 191–197 and 221–222.

<sup>144</sup> See the objection of Finland to the reservation by Malaysia to the Convention on the Rights of the Child (para. 87 above).

<sup>145</sup> See, for example, the objection of Guatemala to the reservations of Cuba to the Vienna Convention on Diplomatic Relations (*Multilateral Treaties ...* (footnote 71 above), vol. I, chap. III.3, p. 92).

<sup>146</sup> See, for example, the objections of Australia to various reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, chap. IV.1, p. 125) and of the Netherlands to numerous reservations to the Convention on the High Seas (*ibid.*, vol. II, chap. XXI.2, p. 221). See also the objection of the United Kingdom to reservation (b) by France to article 6 of the Convention on the Continental Shelf (para. 84 above).

<sup>147</sup> See, for example, the reaction of Japan to reservations made to the Convention on the High Seas (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXI.2, p. 221) or that of Germany to the reservation by Guatemala to the Convention relating to the Status of Refugees (*ibid.*, vol. I, chap. V.1, p. 336).

<sup>148</sup> See, for example, all the communications relating to the declarations made under article 310 of the United Nations Convention on the Law of the Sea (*ibid.*, vol. II, chap. XXI.6, pp. 257–259).

<sup>149</sup> See, for example, the reactions of the European Community to the declarations of Bulgaria and the German Democratic Republic regarding the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) (*ibid.*, vol. I, chap. XI A.16, pp. 556–557).

<sup>150</sup> See, for example, the statement by Portugal concerning the reservations of Maldives to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8, p. 245) and that by Belgium concerning the reservations of Singapore to the Convention on the Rights of the Child (*ibid.*, chap. IV.11, p. 294).

<sup>151</sup> Lijnzaad, (*Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, p. 45) cites in this respect Kühner, *Reservations to Multilateral Treaties*, p. 183, and Szafarz, *loc. cit.*, p. 309; where the last-mentioned author is concerned, this does not, however, appear to be her true position. Practice demonstrates that States do not feel bound to state the reasons on which their objections are based; see, *inter alia*, Horn, *op. cit.*, p. 131 and pp. 209–219.

reservation is expressly authorized by a treaty,<sup>152</sup> the other Contracting Parties are always free to reject it and even to enter into treaty relations with its author. A statement drafted as follows:

The Government ... places on record the formal objection to the reservation made by ...<sup>153</sup>

is as valid and legally sound as a statement setting forth a lengthy argument.<sup>154</sup> There is, however, a recent but unmistakable tendency to specify and explain the reasons justifying the objection in the eyes of the author. This tendency, which seems to be instituting a “reservations dialogue”, should doubtless be encouraged.

95. As to the effect which the author of the objection intends it to have,<sup>155</sup> it is not always sufficient to rely implicitly on the rule laid down in article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions:<sup>156</sup> it may be that the State or international organization which intends to object wishes to modulate the effects of that position. In particular, it is apparent from established practice that there is an intermediate stage between the “minimum” effect of the objection, as envisaged by this provision, and the “maximum” effect, which results from the intention expressed by the author of the objection of preventing the treaty from entering into force between itself and the author of the reservation, in accordance with the provisions of article 20, paragraph 4 (b). There are situations in which a State wishes to be associated with the author of the reservation while at the same time considering that the exclusion of treaty relations should go beyond what article 21, paragraph 3, provides.<sup>157</sup> Clearly, such effects are not automatic and must be expressly indicated in the text of the objection itself.

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<sup>152</sup> See, in this respect, the arbitral award in the *English Channel* case: “Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance” (UNRIAA (footnote 125 above), p. 32, para. 39). Imbert even thinks that an expressly authorized reservation can be objected to (*op. cit.*, pp. 151–152). This question will be considered when the scope of article 20, paragraph 1, of the 1969 and 1986 Vienna Conventions is discussed.

<sup>153</sup> Among the many examples, see the statement by Australia concerning the reservation of Mexico to the Convention on the High Seas (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXI.2, p. 220) and those by Belgium, Finland, Italy, Norway and the United Kingdom with respect to the International Convention on the Elimination of All Forms of Racial Discrimination (*ibid.*, vol. I, chap. IV.2, pp. 140–143).

<sup>154</sup> For an example, see paragraph 87 above.

<sup>155</sup> It will be recalled that the purpose of this chapter is not to study the effects of an objection; the question is raised here only insofar as it is relevant to the *formulation* of an objection.

<sup>156</sup> According to this provision in the 1986 text: “When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.”

<sup>157</sup> See, for example, Canada’s objection to the Syrian Arab Republic’s reservation to the 1969 Vienna Convention: “... Canada does not consider itself in treaty relations with the Syrian Arab Republic in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable” (*Multilateral Treaties ...* (footnote 71 above), vol. II, chap. XXIII.1, p. 296). For other examples and for a discussion of the permissibility of this practice, see below. See also Edwards Jr., “Reservations to treaties”, p. 400.

96. Similarly, if there exists, as some writers think,<sup>158</sup> a “super-maximum” effect, consisting in the determination not only that the reservation objected to is not valid, but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States, this certainly should be mentioned in the statement made in reaction to the reservation, as Sweden did in its “objection” of 27 November 2002 to the reservation which Qatar made when acceding to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography:

This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.<sup>159</sup>

97. Whatever the validity of such a statement,<sup>160</sup> it is doubtful whether it qualifies as an objection within the meaning of the 1969 and 1986 Vienna Conventions: the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and article 20, paragraph 4 (b), of the Conventions. Whereas “unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State”,<sup>161</sup> in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection.

98. In view of the foregoing considerations, the definition of an objection to a reservation could be included in draft guideline 2.6.1—which would be placed at the head of section 2.6 of the Guide to Practice, entitled “Procedure regarding objections to reservations”<sup>162</sup> and might read as follows:

#### “2.6.1 Definition of objections to reservations

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international

<sup>158</sup> See Simma, “Reservations to human rights treaties: some recent developments”, pp. 667–668.

<sup>159</sup> *Multilateral Treaties ...* (see footnote 71 above), vol. I, chap. IV.11.C, p. 318; see also Norway’s objection of 30 December 2002 (*ibid.*, p. 317).

<sup>160</sup> Which can be recommended on the basis of the position adopted by the organs of the European Convention on Human Rights and general comment No. 24 of the Human Rights Committee (see the second report on reservations to treaties, *Yearbook ... 1996* (footnote 7 above), pp. 73–74, paras. 196–201), but is hardly compatible with paragraph 10 of the preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, adopted in 1997 (see *Yearbook ... 1997* (footnote 22 above), p. 57, para. 157) or with the principle *par in parem non habet jurisdictionem*. “To attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties” (*English Channel* case, UNRIIAA (see footnote 125 above), p. 42, para. 60). This matter will be studied further when the question of the effects of objections is taken up.

<sup>161</sup> Imbert, *op. cit.*, p. 419.

<sup>162</sup> This draft guideline could be placed in chapter 1 of the Guide to Practice (Definitions). However, the Special Rapporteur believes that it would be preferable to group together all the guidelines concerning objections in section 2.6.

organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.”

99. This definition was modelled very closely on the definition of reservations given in article 2, paragraph 1 (d) of the 1969 and 1986 Vienna Conventions and reproduced in draft guideline 1.1 of the Guide to Practice. It reproduces all its elements,<sup>163</sup> with the exception of the time element, for the reasons indicated above.<sup>164</sup> Apart from the foregoing considerations, certain aspects of the proposed definition call for a few additional remarks.

100. First, the Special Rapporteur is not suggesting that this definition should include a detail found in article 20, paragraph 4 (b), of the 1986 Vienna Convention, which refers to a “contracting\* State” and a “contracting\* organization”.<sup>165</sup> There are two reasons for this:

(a) On the one hand, article 20, paragraph 4 (b), settles the question whether an objection has *effects* on the entry into force of the treaty between the author of the reservation and the author of the objection; however, it leaves open the question whether it is possible for a State or an international organization that is not a Contracting Party in the meaning of article 2 (f) of the Convention to make an objection; the possibility that such a State or an organization might formulate an objection cannot be ruled out, it being understood that the objection would not produce the effect produced in article 20, paragraph 4 (b), until the State or organization has become a Contracting Party. Moreover, article 21, paragraph 3, does not reproduce this detail and refers only to “a State [*tout court*] or an international organization [*tout court*] objecting to a reservation”; this aspect will be studied more closely in due course;

(b) On the other hand, the definition of reservations itself gives no information about the status of a State or an international organization that is empowered to formulate a reservation.

101. Secondly, the phrase “in response to a reservation” (draft guideline 2.6.1 above) also deserves comment. According to the wording of draft guidelines 2.3.1–2.3.3, the Contracting Parties may also “object” not to the reservation itself but to the late formulation of a reservation. In its commentary on draft guideline 2.3.1, the Commission wondered whether it was appropriate to use the word “objects” to reflect the second hypothesis and noted that, given the possibility for a State to accept the late formulation of a reservation but object to its content,

<sup>163</sup> See paragraph 75 above.

<sup>164</sup> See paragraph 76 above. It might be noted that the definition of interpretative declarations adopted by the Commission in draft guideline 1.2 does not mention a time element.

<sup>165</sup> Article 20, paragraph 4 (b), of the 1969 Vienna Convention speaks only of the “contracting State”.

some members “wondered whether it was appropriate to use the word ‘objects’ in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation. Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable”.<sup>166</sup> This position leads to the question of whether the distinction between the two meanings of the word “objection” in relation to the right to enter reservations to treaties should not be made clearer. The Special Rapporteur, who persists in his view that the word “objection” should be replaced by “opposition” in draft guidelines 2.3.1–2.3.3, believes that it would be sufficient to make this clear in the commentary on draft guideline 2.6.1. If the Commission were to disagree, attention might be drawn to the problem through a draft guideline 2.6.1 *bis* (or draft guideline 2.6.1, paragraph 2):

“**2.6.1 bis** *Objection to late formulation of a reservation*

“‘Objection’ may also mean a unilateral statement whereby a State or an international organization opposes the late formulation of a reservation.”

102. Thirdly and lastly, the objective sought by the author of an objection is at the very heart of the definition of objections proposed above. This objective is the result of combining article 20, paragraph 4 (*b*), and article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions. The latter provision defines both the “maximum”<sup>167</sup> objective which a State or an international organization may seek in formulating a reservation: preventing the treaty from entering into force in its relations with the author of the reservation, and its minimum objective: preventing the application of the provisions to which the reservation relates, in those same relations, “to the extent of the reservation” (draft guideline 2.6.1 above).

103. This procedure is in keeping with that used in the definition of the reservations themselves, which must purport “to exclude or to modify the legal effect of certain provisions of the treaty in their application”<sup>168</sup> to the author of the reservation. And it is understood that, although this objective constitutes the very criterion of a reservation, its inclusion in the definition would not indicate, in any specific case, whether the reservation is valid and does indeed produce the effect sought. The same is true of an objection: to merit the term, a unilateral statement must purport to produce one of the effects provided for in the 1969 and 1986 Vienna Conventions, but that will not necessarily be the case: to that end, the objection itself must be permissible. This question is not one of definition, but of the legal regime of objections and will be discussed later on.

104. Another point is worthy of comment. Draft guideline 1.1.1, adopted by the Commission in 1999, states that a reservation purports to exclude or modify, as necessary,

the legal effect “of the treaty as a whole with respect to certain specific aspects in [its] application to the State or to the international organization which formulates the reservation”.<sup>169</sup> The question then arises whether this detail should not be reflected in the definition of objections. The definition proposed above<sup>170</sup> refers exclusively to the usual objective of reservations, which relates to certain provisions of the treaty; however, across-the-board reservations are far from isolated occurrences<sup>171</sup> and they, like all reservations, are obviously open to objection. This explanation could be included in the commentary on draft guideline 2.6.1; it would, however, be logical to echo draft guideline 1.1.1 in a special draft guideline supplementing the definition of objections, which might read as follows:

“**2.6.1 ter** *Object of objections*

“When it does not seek to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection, an objection purports to prevent the application of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which has formulated the objection, to the extent of the reservation.”

105. Another possibility would be to include this hypothesis in draft guideline 2.6.1 itself, which would then read as follows:

“**2.6.1** *Definition of objections to reservations*

“‘Objection’ means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates, or of the treaty as a whole with respect to certain specific aspects, between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.”

This is the most “economical” solution, its only disadvantage being its unwieldiness.

106. One last problem should be mentioned. As he indicates above,<sup>172</sup> the Special Rapporteur is firmly of the view that, *de lege lata*, a State or an international organization is not at all obliged to give the reasons for its objection to a reservation. It is purely a question of judgement, which may be based on legal reasons, but which may also, and quite legitimately, be related to political

<sup>166</sup> *Yearbook ... 2001* (see footnote 4 above), p. 189, para. (23) of the commentary on draft guideline 2.3.1.

<sup>167</sup> See paragraphs 96–97 above.

<sup>168</sup> *Yearbook ... 1999* (see footnote 82 above), p. 91, draft guideline 1.1.

<sup>169</sup> *Ibid.*

<sup>170</sup> See paragraph 98 above.

<sup>171</sup> See *Yearbook ... 1999* (footnote 82 above), pp. 93–94, para. (5) of the commentary on draft guideline 1.1.1.

<sup>172</sup> Para. 94.

concerns.<sup>173</sup> Nevertheless, it is probably advisable for the reasons motivating the objection to be communicated to the author of the reservation, especially if the author of the objection wishes to persuade it to review its position. The question therefore arises whether the Commission should make a recommendation to that effect to States and

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<sup>173</sup> This is very frequently the case—see, for example, Imbert, *op. cit.*, pp. 419–434.

international organizations, as it has done on other occasions.<sup>174</sup> The Special Rapporteur is therefore of the view that this question, which is one aspect of the “reservations dialogue”, should be revisited in a subsequent chapter.

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<sup>174</sup> See, for example, *Yearbook ... 2002* (footnote 1 above), pp. 22–23, para. 103, draft guideline 2.5.3 (Periodic review of the usefulness of reservations).

*Annex***MODEL LETTER ADDRESSED TO THE CHAIRPERSONS  
OF THE HUMAN RIGHTS BODIES**

13 August 2002

Sir/Madam,

In 1997, the International Law Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. A copy of the text is attached herewith.

The Commission intends to resume its consideration of this topic and adopt final conclusions, probably during its fifty-fifth session in 2003 or fifty-sixth session in 2004. We are therefore contacting you again to propose the fullest possible cooperation between the Committee over which you preside and the Commission so that we might hold an exchange of views.

It would thus be particularly appropriate for all the bodies concerned (to the Chairpersons of which we are addressing a letter similar to this one)\* and the Commission or their representatives, to hold one or more joint meetings, preferably at the Commission's next session, which is scheduled from 5 May to 6 June and from 7 July to 8 August 2003. We would be pleased to hear your reaction and that of the body over which you preside as soon as possible.

The International Law Commission is open to any suggestions you might wish to make on the topic covered by the 1997 preliminary conclusions, and we are available to provide any information or clarifications that you or your colleagues might wish to request.

We thank you in advance for your response to this letter.

Accept, Sir/Madam, the assurances of our highest consideration.

(Signed) Robert **Rosenstock**  
Chairman  
International Law Commission

(Signed) Alain **Pellet**  
Special Rapporteur on reservations to treaties

Mr. Ion Diaconou  
Chairperson  
Committee on the Elimination of Racial Discrimination  
Geneva

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\* Sub-Commission on the Promotion and Protection of Human Rights; Human Rights Committee; Committee on the Elimination of Racial Discrimination; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Discrimination against Women; Committee against Torture; Committee on the Rights of the Child.