

## Chapter IV

### RESERVATIONS TO TREATIES

#### A. Introduction

34. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic “The law and practice relating to reservations to treaties”.

35. At its forty-sixth session, held in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.<sup>11</sup>

36. At its forty-seventh session, in 1995, the Commission received and considered the first report of the Special Rapporteur.<sup>12</sup>

37. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission’s consideration of the topic: they related to the title of the topic, which should now read “Reservations to treaties”; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission’s work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969 Vienna Convention, the Vienna Convention on succession of States in respect of treaties (hereinafter “1978 Vienna Convention”) and the 1986 Vienna Convention.<sup>13</sup> In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice was concerned, it would take the form of draft guidelines with commentaries, which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

38. Also at its forty-seventh session, the Commission, in accordance with its earlier practice,<sup>14</sup> authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions.<sup>15</sup> The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of

the Commission’s conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.<sup>16</sup>

39. At its forty-eighth session, in 1996, the Commission had before it the Special Rapporteur’s second report on the topic.<sup>17</sup> The Special Rapporteur had annexed to his report a draft resolution of the Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.<sup>18</sup>

40. At its forty-ninth session, in 1997, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.<sup>19</sup>

41. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission’s preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the Commission of having their views on the preliminary conclusions.

42. From its fiftieth session, in 1998, to its fifty-eighth session, in 2006, the Commission considered eight more reports<sup>20</sup> by the Special Rapporteur and provisionally adopted 76 draft guidelines and the commentaries thereto.

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

43. At the present session the Committee had before it the eleventh<sup>21</sup> and twelfth (A/CN.4/584) reports of the

<sup>16</sup> As of 31 July 2007, 33 States and 26 international organizations had answered the questionnaire.

<sup>17</sup> *Yearbook ... 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

<sup>18</sup> *Ibid.*, vol. II (Part Two), p. 83, para. 136 and footnote 238.

<sup>19</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

<sup>20</sup> Third report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6; fourth report: *Yearbook ... 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1; fifth report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4; sixth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3; seventh report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3; eighth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1; ninth report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/544; and tenth report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2. See a detailed historical presentation of the third to ninth reports in *Yearbook ... 2004*, vol. II (Part Two), paras. 257–269.

<sup>21</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574 (see footnote 6 above).

<sup>11</sup> See *Yearbook ... 1994*, vol. II (Part Two), p. 179, para. 381.

<sup>12</sup> *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470.

<sup>13</sup> *Ibid.*, vol. II (Part Two), p. 108, para. 487.

<sup>14</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 83, para. 286.

<sup>15</sup> See *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489. The questionnaires sent to Member States and international organizations are reproduced in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, Annexes II and III.

Special Rapporteur, on the formulation and withdrawal of acceptances and objections and on the procedure for acceptances of reservations, respectively. The eleventh report had been submitted at the fifty-eighth session, but the Commission had decided to consider it at the fifty-ninth session, owing to a lack of time.<sup>22</sup>

44. The Commission considered the eleventh report of the Special Rapporteur at its 2914th to 2920th meetings, on 7 to 11, 15 and 16 May 2007, and the twelfth report at its 2936th to 2940th meetings, on 13, 17 to 20 July 2007.

45. At its 2917th, 2919th and 2920th meetings, on 10, 15 and 16 May 2007, the Committee decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15 and 2.7.1 to 2.7.9 to the Drafting Committee, and to review the wording of draft guideline 2.1.6 in the light of the discussion. At its 2940th meeting on 20 July 2007, the Commission decided to refer draft guidelines 2.8, 2.8.1 to 2.8.12 to the Drafting Committee.

46. The Drafting Committee was instructed to take into account the interpretation of draft guideline 2.8.12 resulting from an indicative vote<sup>23</sup> and an analysis of the provisions of article 20, paragraph 5, of the 1969 Vienna Convention as creating a presumption of tacit acceptance without such acceptance being considered acquired.<sup>24</sup>

47. At its 2930th meeting, on 4 June 2007, the Commission considered and provisionally adopted draft guidelines 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), 3.1.6 (Determination of the object and purpose of the treaty), 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of *jus cogens*), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties) and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty).

48. At its 2950th and 2951st meetings, on 7 August 2007, the Commission adopted the commentaries relating to the aforementioned draft guidelines.

49. The text of the draft guidelines and the commentaries thereto are reproduced in section C.2 below.

#### 1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS ELEVENTH REPORT

50. The Special Rapporteur briefly reviewed the history of the topic “Reservations to treaties”, recalling the flexible regime established by the 1969 and 1986 Vienna Conventions, the uncertainties that the regime entailed and the Commission’s fundamental decision not to call into

question the work of the Vienna Conventions but to draw up a Guide to Practice consisting of guidelines which, while not binding in themselves, might guide the practice of States and international organizations with regard to reservations and interpretative declarations.

51. The first group of draft guidelines included in the eleventh report (2.6.3 to 2.6.6) concerned the freedom to make objections to reservations. The Special Rapporteur recalled that it was merely a freedom, given that the Commission had not made it conditional on the incompatibility of a reservation with the object and purpose of the treaty, and that the United Nations Conference on the Law of Treaties had followed the Commission in that regard, despite the doubts of some delegations. That approach was in keeping with the spirit of consensus pervading all of treaty law, in the sense that a State could not unilaterally impose on other contracting parties the modification of a treaty binding them by means of a reservation. Limiting the freedom to make objections exclusively to reservations that were incompatible with the object and purpose of the treaty would render the procedure for acceptance of and objections to reservations under article 20 of the 1969 Vienna Convention ineffective.

52. Yet the freedom to make objections was not arbitrary, but subject to conditions relating to both form and procedure, which were covered by draft guidelines 2.6.3 to 2.6.7. Grounds for objections could range from the (alleged) incompatibility of the reservation with the object and purpose of the treaty to political grounds. While the State was not obliged to mention incompatibility with the object and purpose of the treaty as the ground for its objection, surprisingly States very frequently invoked that very ground.

53. Draft guideline 2.6.3<sup>25</sup> conveyed the idea that any State or international organization enjoyed the freedom to make objections.

54. Turning to the relationship of the objection to entry into force of the treaty between the author of the reservation and the author of the objection, the Special Rapporteur recalled that although the Commission’s special rapporteurs had in the past considered that the objection automatically precluded the entry into force of the treaty between those two parties, Sir Humphrey Waldock had subsequently supported the advisory opinion of the ICJ of 1951,<sup>26</sup> which held that the State that was the author of the objection was free to draw its own conclusions concerning the effects of its objection on its relations with the reserving State. In the event that the objecting State remained silent on the matter, the presumption made by the Commission in 1966 was that the treaty would not enter into force between the two parties.<sup>27</sup>

<sup>25</sup> Draft guideline 2.6.3 reads as follows:

“2.6.3 Freedom to make objections

“A State or an international organization may formulate an objection to a reservation for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.”

<sup>26</sup> See *Yearbook ... 1962*, vol. I, 654th meeting, paras. 17 and 20. For the position of the ICJ, see *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 15, at p. 26.

<sup>27</sup> See *Yearbook ... 1966*, vol. II, pp. 202–208.

<sup>22</sup> The Commission held a meeting with United Nations and other human rights experts on 15 and 16 May 2007. See chapter X, section A.9, at p. 103 below.

<sup>23</sup> The Special Rapporteur having hoped that the Commission would take a clear position on this problem of principle in plenary meeting, the Commission did, following an indicative vote, express its support for retaining the principle set out in draft guideline 2.8.12.

<sup>24</sup> This interpretation was obtained by consensus.

That presumption, albeit logical, had nevertheless been reversed during the United Nations Conference on the Law of Treaties. As a result, the treaty was considered as being in force between the two parties concerned, with the exception of the provision covered by the reservation. Article 20, paragraph 4 (b), and article 21, paragraph 3, of the 1969 Vienna Convention reflected that presumption. While the Special Rapporteur was tempted to “revise” that wording, which was neither very logical nor satisfactory, he had ultimately decided not to change it, as it reflected current practice. It was therefore reproduced in draft guideline 2.6.4.<sup>28</sup>

55. Draft guideline 2.6.5<sup>29</sup> sought to answer a question that had been left pending by draft guideline 2.6.1, on the definition of objections, namely who had the freedom to make objections. Article 20, paragraph 4 (b), of the 1986 Vienna Convention provided guidance by referring to an objection by a contracting State or a contracting international organization. Any State or any international organization that was entitled to become a party to the treaty and that had been notified of the reservations could also formulate objections that would produce effects only when the State or organization became a party to the treaty.

56. With regard to draft guideline 2.6.6,<sup>30</sup> the Special Rapporteur said that in the absence of any relevant practice, the draft guidelines constituted an exercise in progressive development. It was the counterpart of draft guidelines 1.1.7 and 1.2.2 in the area of objections.

57. Introducing draft guidelines 2.6.7 to 2.6.15, on the form of and procedure for the formulation of objections, the Special Rapporteur recalled that, as far as form was concerned, article 23, paragraph 1, of the Vienna Conventions provided that objections must be formulated in writing; those were the terms used in draft guideline 2.6.7.<sup>31</sup>

58. Moreover, when a State or international organization intended that its objection should prevent the treaty from entering into force between it and the author of the

reservation, such an intention must be clearly expressed, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions. Although practice in that area was not conclusive, draft guideline 2.6.8<sup>32</sup> followed the wording of the Vienna Conventions. In the interests of legal security, the intention should be expressed at the latest when the objection will produce its full effects. For that reason, the Special Rapporteur thought that a phrase along the following lines should be added at the end of draft guideline 2.6.8: “in accordance with draft guideline 2.6.13”, since the latter concerned the time period for formulating an objection.

59. The Special Rapporteur then noted that the procedure for objections was no different from that for reservations. Thus it might be possible to consider reproducing all the draft guidelines that the Commission had already adopted on the procedure for formulating reservations, or else simply to refer to them, which was what draft guideline 2.6.9<sup>33</sup> did.

60. The question of the reasons for the objection, which was not covered in the Vienna Conventions, was taken up in draft guideline 2.6.10.<sup>34</sup> While the freedom to make objections was discretionary, it was nevertheless true that it would be useful to make the reasons for the objection known, both for the reserving State and for third parties called upon to assess the validity of the reservation, at least when the objection was based on incompatibility with the object and purpose of the treaty. The Special Rapporteur even wondered whether the Commission should not include a similar recommendation concerning the reasons for reservations in the Guide to Practice.

61. On the question of the confirmation of objections, the Special Rapporteur recalled that article 23, paragraph 3, of the 1986 Vienna Convention provided that objections did not require confirmation if they were made previously to confirmation of a reservation. That principle was also contained in draft guideline 2.6.11.<sup>35</sup> In his view, the same principle might also apply to the case in which a State or an international organization had formulated an

<sup>28</sup> Draft guideline 2.6.4 reads as follows:

“2.6.4 *Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation*

“A State or international organization that formulates an objection to a reservation may oppose the entry into force of the treaty as between itself and the reserving State or international organization for any reason whatsoever, in accordance with the provisions of the present Guide to Practice.”

<sup>29</sup> Draft guideline 2.6.5 reads as follows:

“2.6.5 *Author of an objection*

An objection to a reservation may be formulated by:

(a) any contracting State and any contracting international organization; and

(b) any State and any international organization that is entitled to become a party to the treaty.

<sup>30</sup> Draft guideline 2.6.6 reads as follows:

“2.6.6 *Joint formulation of an objection*

The joint formulation of an objection by a number of States or international organizations does not affect the unilateral nature of that objection.”

<sup>31</sup> Draft guideline 2.6.7 reads as follows:

“2.6.7 *Written form*

“An objection must be formulated in writing.”

<sup>32</sup> Draft guideline 2.6.8 reads as follows:

“2.6.8 *Expression of intention to oppose the entry into force of the treaty*

“When a State or international organization making an objection to a reservation intends to oppose the entry into force of the treaty as between itself and the reserving State or international organization, it must clearly express its intention when it formulates the objection.”

<sup>33</sup> Draft guideline 2.6.9 reads as follows:

“2.6.9 *Procedure for the formulation of objections*

“Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable *mutatis mutandis* to objections.”

<sup>34</sup> Draft guideline 2.6.10 reads as follows:

“2.6.10 *Statement of reasons*

“Whenever possible, an objection should indicate the reasons why it is being made.”

<sup>35</sup> Draft guideline 2.6.11 reads as follows:

“2.6.11 *Non-requirement of confirmation of an objection made prior to formal confirmation of a reservation*

“An objection to a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

objection before becoming party to a treaty, and that was reflected in draft guideline 2.6.12.<sup>36</sup>

62. Draft guideline 2.6.13<sup>37</sup> concerned the time when the objection should be formulated and was based on article 20, paragraph 5, of the 1986 Vienna Convention. However, the Special Rapporteur noted that the third paragraph of draft guideline 2.1.6 (already adopted and entitled “Procedure for communication of reservations”) dealt with the question of the period during which an objection could be raised, which might give rise to confusion. He therefore proposed that, in order to avoid any duplication with draft guideline 2.6.13, either the question should be reviewed on second reading or else the draft guideline 2.1.6 should be “revised” forthwith.

63. The Special Rapporteur then recalled a practice that had developed whereby States declared in advance that they would oppose certain types of reservations before they had even been formulated. Such pre-emptive objections seemed to fulfil one of the most important functions of objections, namely to give notice to the author of the reservation. Draft guideline 2.6.14<sup>38</sup> reflected that fairly widespread practice.

64. In contrast to pre-emptive objections, there were also late objections, formulated after the end of the time period specified in the Vienna Conventions. Such “objections” could not have the same effects as objections formulated on time or remove the implicit acceptance of the reservation. However, the Special Rapporteur thought that such “objections” were governed *mutatis mutandis* by the regime for interpretative declarations rather than by the regime for reservations and could still perform the function of giving notice. As practice reflecting that view did in fact exist, draft guideline 2.6.15<sup>39</sup> dealt with such late “objections”.

<sup>36</sup> Draft guideline 2.6.12 reads as follows:

“2.6.12 *Non-requirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty*

“If an objection is made prior to the expression of consent to be bound by the treaty, it does not need to be formally confirmed by the objecting State or international organization at the time it expresses its consent to be bound.”

<sup>37</sup> Draft guideline 2.6.13 reads as follows:

“2.6.13 *Time period for formulating an objection*

“Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it is notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.”

<sup>38</sup> Draft guideline 2.6.14 reads as follows:

“2.6.14 *Pre-emptive objections*

“A State or international organization may formulate an objection to a specific potential or future reservation, or to a specific category of such reservations, or exclude the application of the treaty as a whole in its relations with the author of such a potential or future reservation. Such a pre-emptive objection shall not produce the legal effects of an objection until the reservation has actually been formulated and notified.”

<sup>39</sup> Draft guideline 2.6.15 reads as follows:

“2.6.15 *Late objections*

“An objection to a reservation formulated after the end of the time period specified in guideline 2.6.13 does not produce all the legal effects of an objection that has been made within that time period.”

65. With regard to draft guidelines 2.7.1 to 2.7.9, the Special Rapporteur said that the Guide to Practice should contain guidelines on the withdrawal and modification of objections, even though practice in that area was virtually non-existent. He also thought that the guidelines should be modelled on those relating to the withdrawal and modification of reservations. Draft guidelines 2.7.1<sup>40</sup> and 2.7.2<sup>41</sup> merely reproduced article 22, paragraph 2, and article 23, paragraph 4, respectively, of the Vienna Conventions. Draft guideline 2.7.3<sup>42</sup> also referred to the relevant guidelines on reservations, transposing them to the formulation and communication of the withdrawal of objections.

66. On the other hand, the effect of the withdrawal of an objection could not be compared with the effect of the withdrawal of a reservation. That question could give rise to highly complex issues, but it would be better to consider that the withdrawal of an objection was tantamount to an acceptance of reservations, and that was the principle that was established in draft guideline 2.7.4.<sup>43</sup> The date on which the withdrawal of an objection took effect was dealt with in draft guidelines 2.7.5<sup>44</sup> and 2.7.6<sup>45</sup>, of which the former reflected the wording of article 22, paragraph 3 (b), of the 1986 Vienna Convention.

67. The Special Rapporteur also noted that, even in the absence of practice, it might be possible to contemplate the partial withdrawal of an objection, a situation which was covered by draft guideline 2.7.7.<sup>46</sup> As for

<sup>40</sup> Draft guideline 2.7.1 reads as follows:

“2.7.1 *Withdrawal of objections to reservations*

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

<sup>41</sup> Draft guideline 2.7.2 reads as follows:

“2.7.2 *Form of withdrawal of objections to reservations*

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

<sup>42</sup> Draft guideline 2.7.3 reads as follows:

“2.7.3 *Formulation and communication of the withdrawal of objections to reservations*

“Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable *mutatis mutandis* to the withdrawal of objections to reservations.”

<sup>43</sup> Draft guideline 2.7.4 reads as follows:

“2.7.4 *Effect of withdrawal of an objection*

“A State that withdraws an objection formulated earlier against a reservation is considered to have accepted that reservation.”

<sup>44</sup> Draft guideline 2.7.5 reads as follows:

“2.7.5 *Effective date of withdrawal of an objection*

“Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.”

<sup>45</sup> Draft guideline 2.7.6 reads as follows:

“2.7.6 *Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation*

“The withdrawal of an objection takes effect on the date set by its author where that date is later than the date on which the reserving State received notification of it.”

<sup>46</sup> Draft guideline 2.7.7 reads as follows:

“2.7.7 *Partial withdrawal of an objection*

“Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal limits the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation or on the treaty as a whole.

(Continued on next page.)

draft guideline 2.7.8,<sup>47</sup> it was modelled on draft guideline 2.5.11 (Effect of a partial withdrawal of a reservation). Draft guideline 2.7.9<sup>48</sup> dealt with a case in which a State or international organization that had made a simple objection wished to widen its scope. Considerations of good faith and the inability of the reserving State to state its views led him to believe that widening of the scope of the objection should be prohibited.

## 2. SUMMARY OF THE DEBATE

68. With regard to draft guidelines 2.6.3 and 2.6.4, it was observed that it was possible to deduce from the 1951 advisory opinion of the ICJ<sup>49</sup> that a distinction could be drawn between “minor” objections (not relating to the object and purpose of the treaty) and “major” objections based on that incompatibility. The effects would be different, and it could be maintained that although the 1969 Vienna Convention did not expressly make any distinction between those two types of objection, the regime of objections was not necessarily the same. One might well ask whether the presumption of article 20, paragraph 4 (b), of the Vienna Convention applied to all objections or to “minor” objections only. The difference in regimes might also explain the practice of some States whereby an objection to a reservation that was allegedly incompatible with the object and the purpose of the treaty did not preclude entry into force of the treaty between the reserving State and the objecting State. It was also pointed out that article 20, paragraph 4 (b), was consistent with article 19 only when it referred to “minor” objections. The Commission should not adopt texts that seemed to imply that a uniform regime did in fact exist.

69. The view was also expressed that it was not necessary to draw a distinction between “major” and “minor” objections, since a reservation that was incompatible with the object and purpose of the treaty was considered void and therefore produced no legal effects. Draft guideline 2.6.4 could be clearer and state directly that if the reserving State did not withdraw its reservation and the objecting State did not withdraw its objection, the treaty did not enter into force.

70. It was noted that the distinction between “major” and “minor” objections would have consequences for the time period for formulating an objection. From that standpoint, the time period of 12 months specified in article 20, paragraph 5, of the Vienna Convention would not

be applicable to objections relating to the validity of reservations (major objections), given that articles 20 and 21 of the Vienna Convention did not concern objections to the reservations mentioned in article 19.

71. Even if one considered that articles 20 and 21 applied to all types of reservations, the distinction between the two types of objections should not be systematically disregarded. It would be useful to have an additional guideline which would state that, in the absence of an express or implicit indication, an objection was presumed not to relate to the validity of the reservation.

72. Regarding the distinction between “making” and “formulating” [objections], the question arose as to whether it would not be simpler to use the term “formulate” throughout the Guide to Practice.

73. The view was also expressed that there was a discrepancy between the title and the content of draft guideline 2.6.3, given that the expression “to make” appeared in the title, whereas the term “to formulate” was used in the text of the guideline. It was also asked whether there were any limitations on the freedom to make objections, particularly with regard to treaties that expressly permitted certain derogations but called them “reservations”, such as the North American Free Trade Agreement (NAFTA). It was further asked whether the original presumption, namely that the treaty did not enter into force between the objecting State or international organization and the author of the reservation, was not preferable to the current presumption reflected in article 20, paragraph 4 (b).

74. Concerning draft guidelines 2.6.3 and 2.6.4, it was further observed that the term “freedom” was not entirely appropriate, since what was involved was actually a right. The expression “for any reason whatsoever” also needed to be qualified at least by a reference to the Vienna Conventions or to general international law, since the Guide to Practice should not include objections contrary to the principle of good faith or *jus cogens*.

75. The view was also expressed that if reservations were allowed, and the reservation formulated by a State or an international organization was clear, other States did not have the freedom to formulate an objection. The Guide to Practice should also contain a clearer description of the possible forms of acceptance of reservations (express or implicit) that might limit the freedom to make objections, with a view to making treaty relations more secure. It was also observed that the discretionary right to formulate an objection was independent of the question of whether a reservation was or was not compatible with the object and purpose of the treaty, and that might be included in draft guideline 2.6.3.

76. With regard to draft guideline 2.6.5, it was asked whether one could speak of an “objection” by a potential party. It would be better to speak of a conditional objection. It was also asked whether there was a difference between an objection formulated jointly by several States and parallel or overlapping objections formulated in identical terms.

“The partial withdrawal of an objection is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.”

<sup>47</sup> Draft guideline 2.7.8 reads as follows:

“2.7.8 *Effect of a partial withdrawal of an objection*

“The partial withdrawal of an objection modifies the legal effect of the objection to the extent of the new formulation of the objection.”

<sup>48</sup> Draft guideline 2.7.9 reads as follows:

“2.7.9 *Prohibition against the widening of the scope of an objection to a reservation*

“A State or international organization which has made an objection to a reservation cannot subsequently widen the scope of that objection.”

<sup>49</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 26 above), p. 27.

77. It was further asked whether it was justified that States that had no intention of becoming party to the treaty should have the same right as the contracting parties to formulate objections. In that connection, the practice of States and regional organizations, and not only the practice of the Secretary-General of the United Nations, should be taken into consideration.

78. It was also observed that the reference in draft guideline 2.6.5 to States or international organizations that were entitled to become party to the treaty was preferable to the criterion of “intention” to become a party, in that it was not easy to determine intention, which was closely linked to the internal procedures of States or international organizations. It was pointed out, however, that the problem stemmed from the inappropriate English translation of the original French text of the draft guideline. It was also noted that practice with regard to the formulation of objections by States or international organizations that were entitled to become party to the treaty was inconclusive.

79. It was also noted that at the time that the effects of objections were considered, it should be made clear that an objection formulated by a State or international organization entitled to become a party to the treaty would not produce legal effects until such time as the State or international organization in question had actually become party to the treaty.

80. As for guideline 2.6.6, the point was made that it did not seem useful as currently drafted, since it laid emphasis on the unilateral nature of joint objections.

81. The basic thrust of draft guideline 2.6.10 met with general approval; however, one point of view held that there would be no need to extend that recommendation to reservations: a reservation, provided that it was clear, did not have to include the reasons, which were often of an internal nature, why it had been made, unlike objections, whose reasons might facilitate determination of the reservation’s compatibility with the object and purpose of the treaty. According to another, more widely held point of view, such an extension to reservations would be desirable, since what was involved was only a recommendation.

82. Regarding draft guideline 2.6.12, it was asked whether it might not be going too far to exempt States or international organizations that had formulated an objection prior to the expression of their consent to be bound by the treaty (or even prior to signature) to confirm the objection at the time of expressing their consent. The guideline should be reconsidered, bearing in mind the often lengthy period of time that elapsed between the formulation of such an objection and the author’s expression of consent to be bound by the treaty.

83. The view was also expressed that the phrase “prior to the expression of consent to be bound by the treaty” was vague. If an objection was formulated prior to the signature of the treaty by a State, and if signature was subject to ratification, acceptance or approval, the objection would need to be confirmed when the instrument of ratification, acceptance or approval was deposited if the

State had not confirmed it at the time of signature. The question was also raised as to whether such “objections” made prior to the expression of consent to be bound by the treaty could be considered to be real objections. It was also maintained that only contracting parties should be able to make objections.

84. With regard to draft guideline 2.6.13, it was pointed out that the 12-month period ran from the date on which a State or international organization received notification of the reservation; it was therefore necessary to draw a clear distinction between that date and the date on which the reservation was communicated to the depositary. The same distinction was drawn in draft guideline 2.1.6, which had already been adopted. According to another point of view, in the light of draft guideline 2.1.6, the third paragraph of draft guideline 2.1.6 could be deleted. The view was expressed that the meaning of the term “notification” should be clarified further.

85. Concerning draft guideline 2.6.14, the view was expressed that “pre-emptive objections” could not have legal effects. States or international organizations should react to real reservations and not to hypothetical ones, and they had ample time to do so following notification of the reservation.

86. Moreover, it was considered that such objections were real objections, which produced all their effects but did not become operational until all conditions—namely the formulation and notification of the reservation—were met. It might therefore be more appropriate to speak of “conditional objections”. It was also noted that draft guideline 2.6.14 could give rise to confusion between political declarations and declarations intended to produce legal effects. According to one point of view, it was more a question of “preventive communications”, which, in order to be termed objections, should be confirmed once the reservation had been formulated. The possibility of excluding part of the treaty was also mentioned.

87. It was also observed that the expression “all the legal effects” in draft guideline 2.6.15 was not sufficiently clear; according to that view, late objections did not produce any legal effects. Rather, they could be likened to interpretative declarations, since they were an indication of the manner in which the objecting State interpreted the treaty. In any event, it had to be ascertained whether such objections were permissible and what kinds of effects they produced. That was why they were notified by the Secretary-General as “communications”. It might be appropriate to include in the Guide to Practice reactions or “objecting communications” which were not objections; that was done with declarations that did not constitute reservations, and would reflect current practice.

88. With respect to draft guideline 2.7.1, it was observed that the title ought in fact to read: “Time of withdrawal of objections to reservations”.

89. Several members expressed support for draft guidelines 2.7.2 and 2.7.3. It was asked whether the withdrawal and modification of objections also included pre-emptive and late objections.

90. With regard to draft guideline 2.7.4, the view was expressed that its title was too general, since the withdrawal of objections could have several effects. It would be better if the title was amended to read “Acceptance of a reservation by the withdrawal of an objection”.

91. Draft guideline 2.7.7 sought to address the extremely complex issue of the partial withdrawal of objections, but should perhaps be amplified in the light of future deliberations on the effects of reservations and objections. The second sentence of draft guideline 2.7.7 could be moved to draft guideline 2.7.8. The same held true for the title of draft guideline 2.7.8. It was pointed out in connection with that guideline that there was no exact parallel between the partial withdrawal of an objection and that of a reservation, since the purpose of the objection was first and foremost to safeguard the integrity of the treaty.

92. With regard to draft guideline 2.7.9, several members wondered whether an absolute prohibition, even during the 12-month period, could be justified by the lack of practice. The principle of good faith, which had not been invoked for the widening of the scope of reservations, was of little avail. Since the Commission had accepted the widening of the scope of reservations under certain conditions, it would be logical to accept such a widening for objections, at least during the 12-month period, given that the Vienna Conventions were silent on the matter. An absolute prohibition seemed far too categorical to be justified. For other members, it was not possible to draw an exact parallel between widening of the scope of a reservation and widening of the scope of an objection. Moreover, if a signatory State had formulated an objection to a reservation before formally becoming a party to the treaty, it must be able to formulate an aggravated objection by becoming a party to the treaty within the 12-month period.

93. Other members pointed out that if an objection had been made without preventing the entry into force of the treaty between the reserving State and the objecting State, any further widening of the scope of the objection would be virtually without effect. On the other hand, if several reservations had been made, there was nothing to prevent a State or an international organization from raising successive objections to different reservations, still within the 12-month period. There was nothing to indicate that all objections had to be made at the same time. Similarly, if a reservation was withdrawn, an objection to that reservation would automatically cease to have any effect. The view was also expressed that draft guideline 2.7.9 was acceptable in that States should not have the impression that such widening of the scope was permissible, as that would make it possible for the author of an objection to circumvent all or some of its treaty obligations *vis-à-vis* the author of the reservation. It was also observed that there would be no problem in limiting draft guideline 2.7.9 to a situation in which a State that had formulated an initial objection which did not preclude the entry into force of the treaty between it and the reserving State subsequently widened the scope of its objection, precluding treaty relations.

94. One widely held point of view was that a draft guideline should be added recommending that States should explain the reasons for the withdrawal of their objection,

which would help the treaty bodies understand why the reservation was being considered in another light; that might facilitate the “reservations dialogue”.

### 3. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

95. Summing up the discussion, the Special Rapporteur said that he was pleased to note that a consensus seemed to be emerging to refer the draft guidelines to the Drafting Committee. He was rather attracted by the distinction between major and minor objections, but remained sceptical as to its appropriateness, given that it was based on a somewhat rare and unconvincing practice. Nothing in article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions, the *travaux préparatoires* or the Soviet proposal made during the United Nations Conference on the Law of Treaties made it possible to draw such a distinction, which had been mentioned in passing in the 1951 advisory opinion of the ICJ. The Conference had been particularly concerned with the idea of making the formulation of reservations as easy as possible, and consequently of limiting the effects of objections. The reversal of the presumption in article 20, paragraph 4 (b), posed problems of consistency. At best, the Vienna Conventions were silent on whether the rules they contained were applicable to all reservations or only to those that had passed the test of compatibility with the object and purpose of the treaty. In any case, that distinction—intellectually interesting as it might be—could have an impact only on the effects of reservations.

96. The Special Rapporteur endorsed the comments made concerning the discrepancy between the title and the text of draft guideline 2.6.3. The title should be aligned with the text, and “to make” should be replaced with “to formulate”. He was sympathetic to the argument that the freedom to formulate objections was limited by rules of procedure and by the treaty itself, even if the treaty did permit certain reservations. He wondered, however, whether that last point ought to be mentioned in the text, given that the Guide to Practice only contained auxiliary rules, which States were free to follow or set aside by contrary treaty provisions.

97. The Special Rapporteur was also receptive to the argument that the phrase “for any reason whatsoever” should be understood in the context of the Vienna Conventions, general international law and the Guide to Practice itself. As for the freedom to formulate objections, he firmly believed that however discretionary that freedom might be, it was not arbitrary but circumscribed by law. He nevertheless found it difficult to imagine objections contrary to *jus cogens*, even if such objections were not totally inconceivable. The idea of stating that the freedom to formulate objections was independent of the validity of the reservation or of its compatibility with the object and purpose of the treaty seemed acceptable to him. Conversely, he was opposed to any reference in the Guide to Practice to the Vienna Conventions because the Guide to Practice should be self-contained.

98. The term “*faculté*” was perfectly appropriate in French, but in English a more satisfactory term than “freedom”, which was used in the English translation of the report, could be found.

99. The Special Rapporteur thought that all those observations could apply also to draft guideline 2.6.4, including with regard to the use of the term “freedom” in its title. The Drafting Committee might wish to give the matter careful consideration.

100. Turning to draft guideline 2.6.5, he said he felt that several criticisms were the result of linguistic misunderstandings. The expression used in French—“*Tout État ... ayant qualité pour devenir partie au traité*”—made no mention of intention. The text itself was based on article 23, paragraph 1, of the Vienna Conventions. If regional organizations or States did not, in the exercise of their functions as depositary, communicate reservations to States entitled to become party to the treaty, they were not acting in accordance with article 23, paragraph 1, of the Vienna Conventions. As to the distinction between the two types of authors of objections, it could be explained in greater detail in the commentary without necessarily changing the wording of the draft guideline.

101. With regard to draft guideline 2.6.6, the Special Rapporteur approved the observation that it was the possibility of the joint formulation of objections that should be stressed rather than their unilateral nature, which could simply be mentioned in the commentary. As for similar objections formulated by several States, he thought that they could not be considered as jointly formulated objections, but could be considered parallel, separate ones.

102. The Special Rapporteur noted that draft guidelines 2.6.7, 2.6.8 and 2.6.9 had met with general approval and did not call for any specific commentary.

103. Draft guideline 2.6.10 had elicited favourable comments; he found interesting the proposal that, in the event of silence on the part of an objecting State, a presumption could be established either along the lines that the objection was based on the incompatibility of the reservation with the object and purpose of the treaty or vice versa. However, he did not see the usefulness of such a presumption, since he doubted that the effects of the two types of objections were different.

104. The Special Rapporteur also noted that the proposal for an additional guideline recommending that States should give the reasons for their reservations had met with considerable support notwithstanding some hesitation.

105. He agreed with the comments made concerning draft guideline 2.6.12, namely that it would apply only to treaties that must be ratified or approved after signature and not to those which entered into force by signature alone, but he thought that this could be mentioned in the commentary. He was aware of the risk of too long a period elapsing between the time an objection was formulated and the time it took for the objection to produce the effects mentioned by some members, but he did not see how that risk could be avoided.

106. With respect to draft guideline 2.6.13, the Special Rapporteur noted that most members were in favour of deleting the third paragraph of guideline 2.1.6, which duplicated it.

107. Draft guidelines 2.6.14 and 2.6.15 had elicited the most criticism. The two draft guidelines concerned objections formulated outside the specified time period. Since he held a flexible view of the law, he had attributed to them effects that certain members had had difficulty in accepting. Pre-emptive objections produced their effects only when the reservation to which they referred was made. The question of pre-emptive objections with intermediate effect was complex and difficult, but it seemed to him that such objections could be compatible with the Vienna Conventions. The Special Rapporteur also thought that the terminology might be open to discussion; he was attracted by the English expression “objecting communications”, but wondered how it ought to be translated into French.

108. As far as draft guideline 2.6.15 was concerned, he thought that the question of validity was totally different from that of definition. A late objection, even if it was not valid, was always an objection. Yet from a positivist point of view it was correct to say that a late objection did not produce legal effects, and that could be reflected by rewording the draft guideline.

109. The Special Rapporteur agreed with those members who thought that the time of withdrawal should be mentioned in draft guideline 2.7.1. He noted that draft guidelines 2.7.2, 2.7.3, 2.7.4, 2.7.5, 2.7.6, 2.7.7 and 2.7.8 had been supported by speakers, aside from a few comments of a drafting nature, which could be taken up in the Drafting Committee.

110. Furthermore, he was not unsympathetic to criticisms of the way in which draft guideline 2.7.9 was worded. He thought that widening of the scope of an objection to a reservation could be permitted if it took place within the 12-month period, and provided that it did not have the effect of modifying treaty relations.

111. The Special Rapporteur noted that the draft guidelines on the withdrawal and modification of objections covered pre-emptive objections, which were genuine potential objections, but not late objections that had no legal effect.

112. In conclusion, the Special Rapporteur expressed the hope that all the draft guidelines would be referred to the Drafting Committee, which might wish to consider redrafting some of them.

#### 4. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS TWELFTH REPORT

113. In introducing his twelfth report, on the procedure for acceptances of reservations, the Special Rapporteur said that the report in fact constituted the second part of his eleventh report.<sup>50</sup> The starting point of that report was paragraph 5 of article 20 of the Vienna Conventions, which was not reproduced word for word in draft guideline 2.8;<sup>51</sup> rather, it was the main idea of that paragraph

<sup>50</sup> *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/574 (see footnote 6 above).

<sup>51</sup> Draft guideline 2.8 reads as follows:

“2.8 *Formulation of acceptances of reservations*

“The acceptance of a reservation arises from the absence of objections to the reservation formulated by a State or international



that was reflected, as the draft guideline set out the principle of the tacit acceptance of reservations. The Special Rapporteur also set out the conditions under which the absence of an objection is acquired, either because the contracting State or international organization may have made an express declaration (express acceptance) to that end or because the State remains silent (tacit acceptance). The Special Rapporteur did not think that the distinction between tacit acceptances of reservations (resulting from the silence of a State that ratifies when the reservation has already been made) and implicit acceptances (resulting from silence maintained for 12 months after the formulation of a reservation) produced specific effects. In both cases the silence was equivalent to acceptance, and that distinction need not form the subject of a guideline in the Guide to Practice. Furthermore, there was no reason to consider treaty provisions that expressly authorize a reservation as advance acceptances. Such provisions precluding the need for an acceptance derogate from the ordinary law of reservations.

114. Draft guideline 2.8.1 *bis*<sup>52</sup> reproduced the substance of the provisions of draft guideline 2.6.13. As the Commission had referred the latter guideline to the Drafting Committee, draft guideline 2.8.1 *bis* seemed superfluous.

115. Draft guideline 2.8.1,<sup>53</sup> meanwhile, had the advantage of showing that acceptances and objections to reservations were two sides of the same coin. One could only question whether there was any need to retain the phrase “Unless the treaty otherwise provides”, although it was also contained in article 20, paragraph 5, of the Vienna Convention. Maintaining it had the advantage of ensuring that the States negotiating the treaty could modify the 12-month time limit, a simple customary rule that was subject to derogation.

116. Draft guideline 2.8.2<sup>54</sup> illustrates the case of multilateral treaties with a limited number of participants

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organization on the part of the contracting State or contracting international organization.

“The absence of objections to the reservation may arise from a unilateral statement in this respect [(express acceptance)] or silence kept by a contracting State or contracting international organization within the periods specified in guideline 2.6.13 [(tacit acceptance)].”

<sup>52</sup> Draft guideline 2.8.1 *bis* reads as follows:

“2.8.1 *bis* Tacit acceptance of reservations

“Unless the treaty otherwise provides [or, for some other reason, an express acceptance is required], a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”

<sup>53</sup> Draft guideline 2.8.1 reads as follows:

“2.8.1 Tacit acceptance of reservations

“[Unless the treaty otherwise provides, a] [A] reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation in accordance with guidelines 2.6.1 to 2.6.14.”

<sup>54</sup> Draft guideline 2.8.2 reads as follows:

“2.8.2 Tacit acceptance of a reservation requiring unanimous acceptance by the other States and international organizations

“A reservation requiring unanimous acceptance by the parties in order to produce its effects is considered to have been accepted by all the contracting States or international organizations or all the

(referred to in article 20, paragraph 2, of the Vienna Conventions) or the requirement that unanimous acceptance should not be called into question by a new contracting State that opposed the reservation. The purpose of tacit acceptance—to ensure clarity and stability in treaty relations—would not be affected if each new accession threatened to call the participation of the author of the reservation to the treaty into question.

117. Draft guideline 2.8.3<sup>55</sup> provides that express acceptance of reservations can occur at any time before or after the 12-month time period.

118. Draft guidelines 2.8.4<sup>56</sup> and 2.8.5<sup>57</sup> deal with the form and the procedure for the formulation of express acceptances, respectively.

119. Draft guideline 2.8.6<sup>58</sup> reproduces in slightly modified form the provisions of article 23, paragraph 3, of the Vienna Conventions.

120. Draft guidelines 2.8.7 to 2.8.11 seek to solve problems specific to the acceptance of reservations to the constituent instrument of an international organization.

121. Draft guideline 2.8.7<sup>59</sup> reproduces the entire text of article 20, paragraph 3, of the Vienna Conventions, although the Special Rapporteur was aware that this principle was far from solving all the problems that arise, starting with the problem of the definition of the “constituent instrument of an international organization”. The Special Rapporteur was not in favour of making a distinction between the rules applicable to reservations to institutional provisions and those applicable to reservations to substantive provisions of the same treaty because it was not easy to distinguish between the two

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States or international organizations that are entitled to become parties to the treaty if they shall have raised no objection to the reservation by the end of a period of 12 months after they were notified of the reservation.”

<sup>55</sup> Draft guideline 2.8.3 reads as follows:

“2.8.3 Express acceptance of a reservation

“A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.”

<sup>56</sup> Draft guideline 2.8.4 reads as follows:

“2.8.4 Written form of express acceptances

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

<sup>57</sup> Draft guideline 2.8.5 reads as follows:

“2.8.5 Procedure for formulating express acceptances

“Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 apply *mutatis mutandis* to express acceptances.”

<sup>58</sup> Draft guideline 2.8.6 reads as follows:

“2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation

“An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.”

<sup>59</sup> Draft guideline 2.8.7 reads as follows:

“2.8.7 Acceptance of reservations to the constituent instrument of an international organization

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

types of provisions, which occasionally coexisted within a single article. Moreover, article 20 did not draw such a distinction.

122. On the other hand, the Special Rapporteur thought that attention should be devoted to another question that the Vienna Conventions had left unanswered, namely whether an acceptance required by the competent organ of the organization must be express or could be tacit. The Special Rapporteur was of the view that acceptance of the reservation by the competent organ of the organization could not be assumed because of the particular nature of constituent acts, and that was the principle that was reflected in draft guideline 2.8.8.<sup>60</sup>

123. Draft guideline 2.8.9<sup>61</sup> sought to fill another gap in the Vienna Conventions, namely the very definition of the “organ competent” to accept a reservation. This provision, which systematized an uncommon practice, was nevertheless far from solving all problems that may arise in this connection, one of the most difficult being the case in which a reservation was formulated before the constituent instrument entered into force and thus before any organ existed with competence to determine whether the reservation was admissible. It was this problem that draft guideline 2.8.10<sup>62</sup> sought to address by stipulating that if a reservation were formulated prior to the entry into force of the constituent instrument, the reservation should be subject to the acceptance of all States and international organizations concerned, even if the wording should probably be reviewed.

124. Draft guideline 2.8.11<sup>63</sup> took up another problem that was not resolved in the Vienna Conventions, namely that of whether the requirement of an express acceptance of reservations to the constituent act of an international organization precluded States from commenting

individually on the reservation. While the opposite argument could be advanced, the Special Rapporteur thought that it would be useful to know what the positions of the contracting States and international organizations were, even if those positions were devoid of any legal effect. Those positions could help the competent organ take its own position and afford an opportunity for a reservations dialogue.

125. Lastly, draft guideline 2.8.12<sup>64</sup> sought to establish the definitive and irreversible character of acceptances to reservations. Given the silence of the Vienna Conventions on the matter, the Special Rapporteur thought it would be contrary to the purpose and the object of article 20, paragraph 5, of the Conventions to state that, once an acceptance had been secured, the accepting State or international organization could reverse its acceptance, which would be counter to the general principle of good faith and might pose serious problems of legal security in terms of the reserving State’s participation.

## 5. SUMMARY OF THE DEBATE

126. With regard to draft guideline 2.8, it was noted that the words in brackets should be retained for the sake of clarity. The wording of the draft guideline could also be simplified. It was further pointed out that the clear predominance of the tacit acceptance was more akin to standard practice than to a rule. The view was also expressed that it would be useful to establish a guideline on implicit acceptances, provided for in article 20, paragraph 5, of the Vienna Conventions, or at any rate to draw a distinction between implicit and tacit acceptances. According to another point of view, there was no need to draw a distinction between implicit and tacit acceptances; rather, a single term should be used to indicate the absence of an express objection.

127. The view was also expressed that the Vienna Convention did not seem to preclude the possibility of formulating an acceptance of a reservation prior to the expression of consent to be bound by the treaty. In that case, such an acceptance would produce effects only when bilateral relations were established between the reserving State and the State accepting the reservation.

128. It was further pointed out that the phrase “considered to have been accepted” in article 20, paragraph 5, of the Vienna Conventions referred more to a determination than to a “presumption”. Another view was that, according to the Vienna Convention, the absence of an objection gave rise to the notion of presumption, and that the words “tacit acceptance” should be replaced with the words “presumption of acceptance” in draft guidelines 2.8, 2.8.1, 2.8.1 *bis* and 2.8.2. It was also suggested that such presumption applied only when reservations were valid in the sense of article 19 of the Vienna Convention.

<sup>60</sup> Draft guideline 2.8.8 reads as follows:

“2.8.8 *Lack of presumption of acceptance of a reservation to a constituent instrument*

“For the purposes of applying guideline 2.8.7, acceptance by the competent organ of the organization shall not be presumed. Guideline 2.8.1 is not applicable.”

<sup>61</sup> Draft guideline 2.8.9 reads as follows:

“2.8.9 *Organ competent to accept a reservation to a constituent instrument*

“The organ competent to accept a reservation to a constituent instrument of an international organization is the one that is competent to decide whether the author of the reservation should be admitted to the organization, or failing that, to interpret the constituent instrument.”

<sup>62</sup> Draft guideline 2.8.10 reads as follows:

“2.8.10 *Acceptance of a reservation to the constituent instrument of an international organization in cases where the competent organ has not yet been established*

“In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation requires the acceptance of all the States and international organizations concerned. Guideline 2.8.1 remains applicable.”

<sup>63</sup> Draft guideline 2.8.11 reads as follows:

“2.8.11 *Right of members of an international organization to accept a reservation to a constituent instrument*

“Guideline 2.8.7 does not preclude the right of States or international organizations that are members of an international organization to take a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.”

<sup>64</sup> Draft guideline 2.8.12 reads as follows:

“2.8.12 *Final and irreversible nature of acceptances of reservations*

“Acceptance of a reservation made expressly or tacitly is final and irreversible. It cannot be subsequently withdrawn or amended.”

129. Some members expressed a preference for the “simplified” version of draft guideline 2.8.1, maintaining that there was no need to repeat draft guideline 2.6.13, as that guideline had already been referred to the Drafting Committee. Several other members, however, expressed their preference for the version appearing in draft guideline 2.1.8 *bis*, on the grounds that it was clearer and more practical. The words appearing in brackets should also be retained, given that they were more consistent with article 20, paragraph 5, of the Vienna Conventions. Reference was also made to the situation in which a State or an international organization became a party to a treaty without formulating an objection to a reservation before the 12-month time period had elapsed. It was pointed out that in such cases the State or international organization still had the option of formulating a reservation up until the expiry of the 12-month period, in keeping with the letter of article 20, paragraph 5, of the Vienna Convention.

130. With regard to draft guideline 2.8.2, some members expressed concern about the possibility that a reservation might be accepted by States or international organizations that were not yet parties to the treaty. A possible solution in the form of an additional draft guideline to clarify that point was even mentioned. It was also noted that the draft guideline seemed inconsistent with the Vienna Convention in that it restricted tacit acceptance of a reservation to the 12-month period following notification of the reservation, without taking into consideration the fact that a State could formulate an objection to the reservation when it expressed its consent to be bound by the treaty, even if such expression occurred subsequent to the 12-month period.

131. Several members endorsed draft guidelines 2.8.3, 2.8.4, 2.8.5 and 2.8.6, subject to some editorial modification. Some doubts were expressed as to the absolute character of draft guideline 2.8.4.

132. With regard to draft guideline 2.8.7, it was noted that replacement of the word “when” with the phrase “as far as” might solve the problem of distinguishing between substantive and constitutional provisions.

133. With regard to draft guideline 2.8.8, it was observed that it might be preferable to state explicitly that acceptance must be expressed in writing, if that was the intention of the draft guideline. According to one view, the notion of presumption should be replaced by the notion of tacit acceptance. If, on the other hand, the guideline referred to a decision by the international organization, it was questionable whether that procedure was consistent with practice. Moreover, the draft did not make it possible to clearly determine which provisions of draft guideline 2.8.1 did not apply.

134. Some members wondered whether draft guideline 2.8.9 was really necessary, given that the organ competent to accept a reservation to the constituent act of an organization was determined by the internal rules of the organization or by the organization’s members. The view was also expressed that a distinction must be drawn between organs competent to decide on the admission of the author of the reservation to membership of the organization and organs competent to interpret the constituent act.

135. With regard to draft guideline 2.8.10, the question was raised as to whether the existence of two systems of acceptance of reservations to a constituent act of an international organization, depending on whether acceptance occurred before or after the entry into force of the act in question, did not undermine legal security. It should perhaps be stipulated that such a reservation would have to be accepted by all signatories to the treaty.

136. In addition, a preference was stated for replacing the word “concerned” with the phrase “which have expressed their consent to be bound by the treaty”, for the sake of accuracy and clarity. It was asked what would happen if all the States that ratified the instrument did so making a reservation.

137. It was observed that the English word “right” did not correspond to the original French word “*faculté*” in draft guideline 2.8.11 and that the title of the guideline did not reflect its contents because the position taken on a reservation could be an objection. Other drafting improvements could also be made to the draft guideline. It was pointed out that the phrase “devoid of legal effects” was either too categorical or superfluous. An opinion could have the value of an interpretative declaration, contributing to the “reservations dialogue”, or of a political declaration. The fact that the competent organ of the organization had accepted the reservation did not prevent States from formulating objections, and the question of legal effects of such objections should remain open.

138. With regard to draft guideline 2.8.12, some members considered that acceptances should not have, in all circumstances, a final and irreversible nature. It was also pointed out that an express acceptance should be considered final and irreversible only 12 months after the reservation was made, as was the case with tacit acceptances. During that period States should be able to withdraw their acceptance of a reservation, and such a regime should conform to the regime adopted for objections.

139. The view was also expressed that in certain cases, as, for example, when a State that had accepted a reservation discovered that the reservation had far wider repercussions than anticipated, or if a judicial interpretation was issued attributing to it significantly different content than had been supposed at the time it had been made, or if a fundamental change in circumstances occurred, the State that had accepted the reservation should be able to reconsider its position.

140. Another point of view held that in such cases the reaction of the State that had accepted the reservation should be a declaration explaining and interpreting the conditions of its acceptance.

## 6. SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

141. The Special Rapporteur observed that despite the dry, technical nature of the topic, all statements had been in favour of referring draft guidelines 2.8 to 2.8.12 to the Drafting Committee. Several suggestions from Commission members had been of an editorial nature or concerned translation, and the Drafting Committee was competent to rule on them.

142. It seemed to him that the variant proposed in draft guideline 2.8.1 *bis* was the preferred one; that question, which raised no problems of principle, could again be settled in the Drafting Committee. He agreed with those who held that the phrase “whichever is later” in article 20, paragraph 5, of the Vienna Conventions necessarily implied that the contracting States and international organizations had at least one year in which to comment on a reservation. However, he questioned whether that argument should have any impact on the wording of draft guideline 2.8.1.

143. The same was not true, however, for the observations made regarding draft guideline 2.8.2, which led to the conclusion that a distinction must be drawn among four cases: (a) if a treaty made its own entry into force contingent upon the unanimous ratification of all signatories, the principle set out in article 20, paragraph 5, of the Vienna Convention clearly applied, since the treaty could not enter into force until all signatories had ratified it without opposing the reservation. The other cases were more subtle: (b) one involved the question of whether the reservations must be accepted by all the parties for another reason; (c) in another, which concerned the States or international organizations that were supposed to become parties, the Special Rapporteur felt that if the Commission wished to remain faithful to the spirit of article 20, it must accept that the parties had 12 months as from the date of notification in which to ratify, and at that time, or during that portion of the 12-month period that had yet to elapse, they could conceivably not accept the reservation; (d) in a case where the treaty had not entered into force, the parties could take a position on the reservation throughout the period running from notification to expiry of the 12-month period following notification, or until entry into force, whichever was later. In all cases, however, the Special Rapporteur maintained that it was still draft guideline 2.8.1 or draft guideline 2.8.2 that applied. The Drafting Committee could consider those questions further and decide to which case each of the draft guidelines should be attached, bearing in mind the need to safeguard treaty relations.

144. The Special Rapporteur did not, however, feel that the question of whether the phrase “presumption of tacit acceptance” ought to replace the expression “tacit acceptance” in draft guidelines 2.8, 2.8.1 and 2.8.2 was a mere editorial question. He had in fact been convinced that the maintenance of silence during 12 months or until ratification created a simple presumption of acceptance by virtue of the fact that the reservation could turn out to be impermissible for several reasons, for example by being incompatible with the object and purpose of the treaty. That position of principle was also compatible solely with article 20, paragraph 5, of the Vienna Convention, which stated that the reservation was “considered to have been accepted”.

145. The Special Rapporteur believed that the insertion of the word “contracting” before the words “State or international organization” at the beginning of draft guideline 2.8.3 would be taken care of by the Drafting Committee.

146. The doubts expressed with regard to draft guideline 2.8.4 seemed to him unjustified; furthermore, they called into question one of the basic premises of the draft, which was respect for the text of the Vienna Convention,

article 23, paragraph 1, of which specifically stipulated that acceptance must be expressed in writing.

147. Nor was he any more favourably disposed to a proposal that a distinction should be drawn in draft guideline 2.8.6 between the institutional and substantive provisions of the constituent act of an international organization. That was not common practice, and one need not mention the theoretical and practical problems such a distinction would entail.

148. The Special Rapporteur did not think that a reference should be made to the rules of the international organization in draft guideline 2.8.8, for it was the transparency of the process and the certainty that must result therefrom that were important.

149. With regard to draft guideline 2.8.9, the Special Rapporteur believed that the principle of determination of the competent body by the rules of the organization did in fact need to be established, even if that in itself was not sufficient; the current wording remained valid in cases where the constituent act itself said nothing.

150. As to draft guideline 2.8.10, he believed that replacing the phrase “States and international organizations concerned” with the phrase “contracting States and international organizations” was likely to create problems; it might be preferable to refer to “signatory” States and international organizations.

151. He agreed that the title of draft guideline 2.8.11 did not correspond to the guideline’s content; some thought would have to be given to new wording. He also recognized that what was said regarding legal effects would have to be reconsidered to avoid giving the impression that the members of the international organization could cast doubt on the position taken by the competent organ, which was binding on all, and also to avoid the current wording in favour of an approach that was not so heavily negative, such as the phrase “without prejudice to the effects that might be produced by its exercise”.

152. Turning lastly to draft guideline 2.8.12, the Special Rapporteur saw no reason to align the legal regime of express acceptances with that of tacit acceptances. A State that had of its own accord taken the initiative of making a formal declaration of acceptance of a reservation could not take back that declaration, even if it had been made prior to the expiry of the 12-month period. That would be neither justified by the text of the Vienna Convention nor consistent with the principle of good faith. Moreover, an acceptance could produce fundamental effects on the situation of the reserving State insofar as the treaty was concerned, and the possibility of withdrawing an acceptance would be highly destabilizing from the standpoint of the security of legal relations. Nor did he agree with the suggestion that it ought to be possible to withdraw an express acceptance if it was made on the basis of a particular interpretation of the treaty that was subsequently refuted by a judicial interpretation. Such an interpretation would have the force of only relative *res judicata*, in which case the State that had accepted the reservation would have the possibility of formulating an interpretative declaration and could do so at any time, in accordance with draft guideline 2.4.3.

## C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

### 1. TEXT OF THE DRAFT GUIDELINES

153. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.<sup>65</sup>

#### RESERVATIONS TO TREATIES

##### GUIDE TO PRACTICE

##### Explanatory note

Some draft guidelines in the present Guide to Practice are accompanied by model clauses. The adoption of these model clauses may have advantages in specific circumstances. The user should refer to the commentaries for an assessment of the circumstances appropriate for the use of a particular model clause.

### 1. Definitions

#### 1.1 Definition of reservations

“Reservation” means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

##### 1.1.1 [1.1.4]<sup>66</sup> Object of reservations

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

##### 1.1.2 Instances in which reservations may be formulated

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention

<sup>65</sup> See the commentary to guidelines 1.1, 1.1.2, 1.1.3 [1.1.8], 1.1.4 [1.1.3] and 1.1.7 [1.1.1] in *Yearbook ... 1998*, vol. II (Part Two), pp. 99–107; the commentary to guidelines 1.1.1 [1.1.4], 1.1.5 [1.1.6], 1.1.6, 1.2, 1.2.1 [1.2.4], 1.2.2 [1.2.1], 1.3, 1.3.1, 1.3.2 [1.2.2], 1.3.3 [1.2.3], 1.4, 1.4.1 [1.1.5], 1.4.2 [1.1.6], 1.4.3 [1.1.7], 1.4.4 [1.2.5], 1.4.5 [1.2.6], 1.5, 1.5.1 [1.1.9], 1.5.2 [1.2.7], 1.5.3 [1.2.8] and 1.6 in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–126; the commentary to guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] and 1.7.2 [1.7.5] in *Yearbook ... 2000*, vol. II (Part Two), pp. 108–123; the commentary to guidelines 2.2.1, 2.2.2 [2.2.3], 2.2.3 [2.2.4], 2.3.1, 2.3.2, 2.3.3, 2.3.4, 2.4.3, 2.4.4 [2.4.5], 2.4.5 [2.4.4], 2.4.6 [2.4.7] and 2.4.7 [2.4.8] in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 180–195; the commentary to guidelines 2.1.1, 2.1.2, 2.1.3, 2.1.4 [2.1.3 bis, 2.1.4], 2.1.5, 2.1.6 [2.1.6, 2.1.8], 2.1.7, 2.1.8 [2.1.7 bis], 2.4, 2.4.1, 2.4.2 [2.4.1 bis] and 2.4.7 [2.4.2, 2.4.9] in *Yearbook ... 2002*, vol. II (Part Two), pp. 28–48; the commentary to the explanatory note and to guidelines 2.5, 2.5.1, 2.5.2, 2.5.3, 2.5.4 [2.5.5], 2.5.5 [2.5.5 bis, 2.5.5 ter], 2.5.6, 2.5.7 [2.5.7, 2.5.8] and 2.5.8 [2.5.9], to model clauses A, B and C, and to guidelines 2.5.9 [2.5.10], 2.5.10 [2.5.11] and 2.5.11 [2.5.12] in *Yearbook ... 2003*, vol. II (Part Two), pp. 70–92; the commentary to guidelines 2.3.5, 2.4.9, 2.4.10, 2.5.12 and 2.5.13 in *Yearbook ... 2004*, vol. II (Part Two), pp. 106–110; the commentary to guidelines 2.6, 2.6.1 and 2.6.2 in *Yearbook ... 2005*, vol. II (Part Two), and the commentary to guidelines 3, 3.1, 3.1.1, 3.1.2, 3.1.3 and 3.1.4, as well as the commentary to guidelines 1.6 and 2.1.8 [2.1.7 bis] in its new version, in *Yearbook ... 2006*, vol. II (Part Two). The commentary to guidelines 3.1.5, 3.1.6, 3.1.7, 3.1.8, 3.1.9, 3.1.10, 3.1.11, 3.1.12 and 3.1.13 are reproduced in section 2 below.

<sup>66</sup> The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

##### 1.1.3 [1.1.8] Reservations having territorial scope

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

##### 1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

##### 1.1.5 [1.1.6] Statements purporting to limit the obligations of their author

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

##### 1.1.6 Statements purporting to discharge an obligation by equivalent means

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

##### 1.1.7 [1.1.1] Reservations formulated jointly

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

##### 1.1.8 Reservations made under exclusionary clauses

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

### 1.2 Definition of interpretative declarations

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

##### 1.2.1 [1.2.4] Conditional interpretative declarations

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

##### 1.2.2 [1.2.1] Interpretative declarations formulated jointly

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

### 1.3 Distinction between reservations and interpretative declarations

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

### 1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

### 1.3.2 [1.2.2] *Phrasing and name*

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

### 1.3.3 [1.2.3] *Formulation of a unilateral statement when a reservation is prohibited*

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

### 1.4 *Unilateral statements other than reservations and interpretative declarations*

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

#### 1.4.1 [1.1.5] *Statements purporting to undertake unilateral commitments*

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

#### 1.4.2 [1.1.6] *Unilateral statements purporting to add further elements to a treaty*

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

#### 1.4.3 [1.1.7] *Statements of non-recognition*

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

#### 1.4.4 [1.2.5] *General statements of policy*

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

#### 1.4.5 [1.2.6] *Statements concerning modalities of implementation of a treaty at the internal level*

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal

level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

#### 1.4.6. [1.4.6, 1.4.7] *Unilateral statements made under an optional clause*

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.4.7 [1.4.8] *Unilateral statements providing for a choice between the provisions of a treaty*

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

### 1.5 *Unilateral statements in respect of bilateral treaties*

#### 1.5.1 [1.1.9] *"Reservations" to bilateral treaties*

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.5.2 [1.2.7] *Interpretative declarations in respect of bilateral treaties*

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

#### 1.5.3 [1.2.8] *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

### 1.6 *Scope of definitions*<sup>67</sup>

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the validity and effects of such statements under the rules applicable to them.

### 1.7 *Alternatives to reservations and interpretative declarations*

#### 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] *Alternatives to reservations*

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) the insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) the conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

<sup>67</sup> This draft guideline was reconsidered and modified during the fifty-eighth session of the Commission, in 2006. For the new commentary, see *Yearbook ... 2006*, vol. II (Part Two), chapter VIII, section C.2, pp. 156–157.

### 1.7.2 [1.7.5] *Alternatives to interpretative declarations*

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- (a) the insertion in the treaty of provisions purporting to interpret the same treaty;
- (b) the conclusion of a supplementary agreement to the same end.

## 2. *Procedure*

### 2.1 *Form and notification of reservations*

#### 2.1.1 *Written form*

A reservation must be formulated in writing.

#### 2.1.2 *Form of formal confirmation*

Formal confirmation of a reservation must be made in writing.

#### 2.1.3 *Formulation of a reservation at the international level*

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is considered as representing a State or an international organization for the purpose of formulating a reservation if:

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

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

2. By virtue of their functions and without having to produce full powers, the following are considered as representing a State for the purpose of formulating a reservation at the international level:

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

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

(c) representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

(d) heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.

#### 2.1.4 [2.1.3 bis, 2.1.4] *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*

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

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

#### 2.1.5 *Communication of reservations*

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

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

### 2.1.6 [2.1.6, 2.1.8] *Procedure for communication of reservations*

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

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

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

2. A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon receipt by the State or by the organization to which it was transmitted or, as the case may be, upon its receipt by the depositary.

3. The period during which an objection to a reservation may be raised starts at the date on which a State or an international organization received notification of the reservation.

4. 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 such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

#### 2.1.7 *Functions of depositaries*

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, if need be, bring the matter to the attention of the State or international organization concerned.

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

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

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

### 2.1.8 [2.1.7 bis] *Procedure in case of manifestly invalid reservations*<sup>68</sup>

1. Where, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation.

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.

#### 2.2.1 *Formal confirmation of reservations formulated when signing a treaty*

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

<sup>68</sup> *Idem.*

### 2.2.2 [2.2.3] *Instances of non-requirement of confirmation of reservations formulated when signing a treaty*

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

### 2.2.3 [2.2.4] *Reservations formulated upon signature when a treaty expressly so provides*

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

...<sup>69</sup>

### 2.3.1 *Late formulation of a reservation*

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*

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*

If a contracting party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

### 2.3.4 *Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations*

A contracting party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

- (a) interpretation of a reservation made earlier; or
- (b) a unilateral statement made subsequently under an optional clause.

### 2.3.5 *Widening of the scope of a reservation*

The modification of an existing reservation for the purpose of widening its scope shall be subject to the rules applicable to the late formulation of a reservation. However, if an objection is made to that modification, the initial reservation remains unchanged.

## 2.4 *Procedure for interpretative declarations*

### 2.4.1 *Formulation of interpretative declarations*

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

### [2.4.2 [2.4.1 bis] *Formulation of an interpretative declaration at the internal level*

1. The determination of the competent authority and the procedure to be followed at the internal level for formulating an interpretative declaration is a matter for the internal law of each State or relevant rules of each international organization.

2. A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

### 2.4.3 *Time at which an interpretative declaration may be formulated*

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

### 2.4.4 [2.4.5] *Non-requirement of confirmation of interpretative declarations made when signing a treaty*

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

### 2.4.5 [2.4.4] *Formal confirmation of conditional interpretative declarations formulated when signing a treaty*

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

### 2.4.6 [2.4.7] *Late formulation of an interpretative declaration*

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting parties objects to the late formulation of the interpretative declaration.

### [2.4.7 [2.4.2, 2.4.9] *Formulation and communication of conditional interpretative declarations*

1. A conditional interpretative declaration must be formulated in writing.

2. Formal confirmation of a conditional interpretative declaration must also be made in writing.

3. A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

4. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

### 2.4.8 *Late formulation of a conditional interpretative declaration*<sup>70</sup>

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the conditional interpretative declaration.

### 2.4.9 *Modification of an interpretative declaration*

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.

### 2.4.10 *Limitation and widening of the scope of a conditional interpretative declaration*

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively

<sup>69</sup> Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

<sup>70</sup> This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session of the Commission, in 2002.



applicable to the partial withdrawal and the widening of the scope of reservations.

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

### 2.5.1 *Withdrawal of reservations*

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

### 2.5.2 *Form of withdrawal*

The withdrawal of a reservation must be formulated in writing.

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

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

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

### 2.5.4 [2.5.5] *Formulation of the withdrawal of a reservation at the international level*

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

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

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

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

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

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

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

### 2.5.5 [2.5.5 bis, 2.5.5 ter] *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

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

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

### 2.5.6 *Communication of withdrawal of a reservation*

The procedure for communicating the withdrawal of a reservation follows the rules applicable to the communication of reservations contained in guidelines 2.1.5, 2.1.6 [2.1.6, 2.1.8] and 2.1.7.

### 2.5.7 [2.5.7, 2.5.8] *Effect of withdrawal of a reservation*

1. The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

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

### 2.5.8 [2.5.9] *Effective date of withdrawal of a reservation*

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

#### Model clauses

##### A. *Deferment of the effective date of the withdrawal of a reservation*

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

##### B. *Earlier effective date of withdrawal of a reservation*

A contracting party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].

##### C. *Freedom to set the effective date of withdrawal of a reservation*

A contracting party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].

### 2.5.9 [2.5.10] *Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation*

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

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

(b) the withdrawal does not add to the rights of the withdrawing State or international organization, in relation to the other contracting States or international organizations.

### 2.5.10 [2.5.11] *Partial withdrawal of a reservation*

1. The partial withdrawal of a reservation limits the legal effect of the reservation and achieves a more complete application of the provisions of the treaty, or of the treaty as a whole, to the withdrawing State or international organization.

2. The partial withdrawal of a reservation is subject to the same formal and procedural rules as a total withdrawal and takes effect on the same conditions.

### 2.5.11 [2.5.12] *Effect of a partial withdrawal of a reservation*

1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent of the new formulation of the reservation. Any objection made to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.

2. No objection may be made to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect.

### 2.5.12 *Withdrawal of an interpretative declaration*

An interpretative declaration may be withdrawn at any time by the authorities competent for that purpose, following the same procedure applicable to its formulation.

### 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 reservations.

### 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 former State or organization purports to exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.

### 2.6.2 *Definition of objections to the late formulation or widening of the scope of a reservation*

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

## 3. *Validity of reservations and interpretative declarations*

### 3.1 *Permissible reservations*

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

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

#### 3.1.1 *Reservations expressly prohibited by the treaty*

A reservation is expressly prohibited by the treaty if it contains a particular provision:

- (a) prohibiting all reservations;
- (b) prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or
- (c) prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

#### 3.1.2 *Definition of specified reservations*

For the purposes of guideline 3.1, the expression “specified reservations” means reservations that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects.

### 3.1.3 *Permissibility of reservations not prohibited by the treaty*

Where the treaty prohibits the formulation of certain reservations, a reservation which is not prohibited by the treaty may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

#### 3.1.4 *Permissibility of specified reservations*

Where the treaty envisages the formulation of specified reservations without defining their content, a reservation may be formulated by a State or an international organization only if it is not incompatible with the object and purpose of the treaty.

#### 3.1.5 *Incompatibility of a reservation with the object and purpose of the treaty*

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

#### 3.1.6 *Determination of the object and purpose of the treaty*

The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.

#### 3.1.7 *Vague or general reservations*

A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.

#### 3.1.8 *Reservations to a provision reflecting a customary norm*

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

#### 3.1.9 *Reservations contrary to a rule of jus cogens*

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

#### 3.1.10 *Reservations to provisions relating to non-derogable rights*

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

#### 3.1.11 *Reservations relating to internal law*

A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.

#### 3.1.12 *Reservations to general human rights treaties*

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the

importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

### 3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:

(a) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or

(b) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.

## 2. TEXT OF THE DRAFT GUIDELINES ON RESERVATIONS TO TREATIES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FIFTY-NINTH SESSION

154. The text of the draft guidelines with commentaries thereto adopted by the Commission at its fifty-ninth session is reproduced below.

### 3.1.5 Incompatibility of a reservation with the object and purpose of the treaty

A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d'être* of the treaty.

#### Commentary

(1) The compatibility of a reservation with the object and purpose of the treaty constitutes, in the terms of article 19 (c) of the Vienna Convention, reflected in guideline 3.1, subparagraph (c), the fundamental criterion for the permissibility of a reservation. It is also the criterion that poses the most difficulties.

(2) In fact the concept of the object and purpose of the treaty is far from being confined to reservations. In the Vienna Convention, it occurs in eight provisions,<sup>71</sup> only two of which—articles 19 (c) and 20, paragraph 2—concern reservations. However, none of them defines the concept of the object and purpose of the treaty or provides any particular “clues” for this purpose.<sup>72</sup> At most, one can infer that a fairly general approach is required: it is not a

question of “dissecting” the treaty in minute detail and examining its provisions one by one, but of extracting the “essence”, the overall “mission” of the treaty:

– It is unanimously accepted that article 18, paragraph (a), of the Vienna Convention does not oblige a signatory State to *respect* the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound;<sup>73</sup>

– Article 58, paragraph 1 (b) (ii), is drafted in the same spirit: one can assume that it is not a case of compelling respect for the treaty, the very object of this provision being to determine the conditions in which the operation of the treaty may be suspended, but rather of preserving what is essential in the eyes of the contracting parties;

– Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the “effective execution ... of the treaty *as a whole*”<sup>74</sup> in the event that it is modified between certain of the contracting parties only;

– Likewise, article 60, paragraph 3 (b), defines a “material breach” of the treaty, in contrast to other breaches, as “[t]he violation of a[n *essential*]” provision”; and

– According to article 31, paragraph 1, and article 33, paragraph 4, the object and purpose of the treaty are supposed to clarify its overall meaning, thereby facilitating its interpretation.<sup>75</sup>

(3) There is little doubt that the expression “object and purpose of the treaty” has the same meaning in all of these provisions: one indication of this is that Waldock, who without exaggeration can be considered to be the father of the law of reservations to treaties in the Vienna Convention, referred to them<sup>76</sup> explicitly in order to justify the inclusion of this criterion in article 19, subparagraph (c), through a kind of *a fortiori* reasoning: since “the objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty” and since

the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, refrain from acts calculated to frustrate its objects... [i]t would seem somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized.<sup>77</sup>

<sup>73</sup> See, for example, P. Reuter, *Introduction au droit des traités*, 3rd ed. revised and expanded by Ph. Cahier, Paris, Presses universitaires de France, 1995, p. 62, who defines the obligation arising from article 18 as an obligation of conduct, or Ph. Cahier, “L’obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur”, *Mélanges Fernand Dehousse*, Paris, Nathan, 1979, vol. I, p. 31.

<sup>74</sup> In this provision, the words “of the object and purpose”, which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

<sup>75</sup> See *The Pajzs, Csáky, Esterházy Case*, Judgment of 16 December 1936, P.C.I.J., Series A/B, No. 68, p. 30, at p. 60; see also S. Bastid, *Les traités dans la vie internationale—conclusion et effets*, Paris, Économica, 1985, p. 131, or S. Sur, *L’interprétation en droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1974, pp. 227–230.

<sup>76</sup> More precisely, to (the current) articles 18 and 31.

<sup>77</sup> Fourth report of Special Rapporteur Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 51, para. 6.

<sup>71</sup> Cf. articles 18, 19 (c), 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b). A connection can be made with the provisions relating to the “essential bas[e]s” or “condition[s] of the consent to be bound” (P. Reuter, “Solidarité et divisibilité des engagements conventionnels”, in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht, Martinus Nijhoff, 1989, p. 627; also reproduced in P. Reuter, *Le développement de l’ordre juridique international: Écrits de droit international*, Paris, Économica, 1995, p. 366.

<sup>72</sup> As Isabelle Buffard and Karl Zemanek have noted, the Commission’s commentaries to the draft article in 1966 are virtually silent on the matter (see I. Buffard and K. Zemanek, “The ‘object and purpose’ of a treaty: an enigma?”, *Austrian Review of International and European Law*, vol. 3, No. 3 (1998), pp. 311–343, at p. 322).

However, this does not solve the problem: it simply demonstrates that there is a criterion, a unique and versatile criterion, but as yet no definition. As has been noted, “the object and purpose of a treaty are indeed something of an enigma”.<sup>78</sup> Certainly, the attempt made in article 19, subparagraph (c), pursuant to the 1951 advisory opinion of the ICJ,<sup>79</sup> to introduce an element of objectivity into a largely subjective system is not entirely convincing.<sup>80</sup> “The claim that a particular reservation is contrary to object and purpose is easier made than substantiated.”<sup>81</sup> In their joint opinion in 1951, the dissenting judges had criticized the solution retained by the majority in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, emphasizing that it could not “produce final and consistent results”,<sup>82</sup> and this had been one of the main reasons for the Commission’s resistance to the flexible system adopted by the Court in 1951:

Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively.<sup>83</sup>

(4) Sir Humphrey Waldock himself still had hesitations in his all-important first report on the law of treaties in 1962:<sup>84</sup>

[T]he principle applied by the Court is essentially subjective and unsuitable for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of “compatibility with the object and purpose of the treaty” could always be brought to independent adjudication; but that is not the case ...

<sup>78</sup> I. Buffard and K. Zemanek, *loc. cit.* (footnote 72 above), p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, A. Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press, 2007, p. 111; P.-M. Dupuy, *Droit international public*, 8th ed., Paris, Dalloz, 2006, p. 286; G. G. Fitzmaurice, “Reservations to multilateral conventions”, *International and Comparative Law Quarterly*, vol. 2 (January 1953), p. 12; M. Rama-Montaldo, “Human rights conventions and reservations to treaties”, in *Héctor Gros Espiell Amicorum Liber: Human Person and International Law*, vol. II, Brussels, Bruylant, 1997, p. 1265; Ch. Rousseau, *Droit international public*, vol. I, *Introduction et sources*, Paris, Sirey, 1970, p. 126; or G. Teboul, “Remarques sur les réserves aux traités de codification”, *Revue générale de droit international public*, vol. 86 (1982), pp. 695–696. See also the first report of the Special Rapporteur on the law and practice relating to reservations to treaties (footnote 12 above), p. 143, para. 109.

<sup>79</sup> See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (footnote 26 above): “It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.”

<sup>80</sup> According to Jean Kyongun Koh, “[t]he International Court thereby introduced purposive words into the vocabulary of reservations which had previously been dominated by the term ‘consent’” (J. K. Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, *Harvard International Law Journal*, vol. 23 (1982–1983), p. 85).

<sup>81</sup> L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, T.M.C. Asser Instituut, Dordrecht, Martinus Nijhoff, 1994, pp. 82–83.

<sup>82</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 26 above), p. 44.

<sup>83</sup> Report of the Commission covering the work of its third session, *Yearbook ... 1951*, vol. II, document A/1858, p. 123, at p. 128, para. 24.

<sup>84</sup> It was this report that introduced the “flexible system” to the Commission and vigorously defended it, *Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, pp. 72–74).

Nevertheless, the Court’s criterion of “compatibility with the object and purpose of the convention” does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State. ... The Special Rapporteur, although also of the opinion that there is value in the Court’s principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State’s status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States.<sup>85</sup>

No doubt, this was a case of tactical caution, for the “conversion” of the self-same Special Rapporteur to compatibility with the object and purpose of the treaty, not only as a test of the validity of reservations, but also as a key element to be taken into account in interpretation,<sup>86</sup> was swift.<sup>87</sup>

(5) This criterion has considerable merit. Notwithstanding the inevitable “margin of subjectivity”—which is limited, however, by the general principle of good faith—article 19, subparagraph (c), is undoubtedly a useful guideline capable of resolving in a reasonable manner most problems that arise.

(6) The preparatory work on this provision is of little assistance in determining the meaning of the expression.<sup>88</sup> As has been noted,<sup>89</sup> the commentary to draft article 16, adopted by the usually more prolix Commission in 1966, is confined to a single paragraph and does not even allude to the difficulties involved in defining the object and

<sup>85</sup> *Ibid.*, pp. 65–66, para. 10; along the same lines, see Waldock’s oral statement, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a “test” (*ibid.*, p. 145, para. 85—this paragraph also shows that, from the outset, in Waldock’s mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a), which was proposed by the Special Rapporteur, reflects this uncertainty: “When formulating a reservation under the provisions of paragraph 1 (a) of this article [with respect to this provision, see the commentary to draft guideline 3.1.1, paragraph 3, *Yearbook ... 2006*, vol. II (Part Two), chapter VIII, section C.2], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty” (*Yearbook ... 1962*, vol. II, p. 60). This principle met with general approval during the Commission’s debates in 1962 (see, in particular, Briggs, *ibid.*, vol. I, 651st meeting, p. 140, para. 23; Lachs, p. 142, para. 54; Rosenne, pp. 144–145, para. 79, who had no hesitation in speaking of a “test” (see also para. 82, and 653rd meeting, 29 May 1962, p. 156, para. 27; and Castrén, 652nd meeting, 28 May 1962, p. 148, para. 25), and in 1965 (see Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 149–150, para. 20; Tunkin, p. 150, para. 25); see, however, the objections by de Luna, *Yearbook ... 1962*, vol. I, 652nd meeting, p. 148, para. 18, and 653rd meeting, p. 160, para. 67; Gros, 652nd meeting, p. 150, paras. 47–51; or Ago, 653rd meeting, p. 157, para. 34; or, during the debate in 1965, those of Ruda, *Yearbook ... 1965*, vol. I, 796th meeting, 4 June 1965, p. 147, para. 55, and 797th meeting, p. 154, para. 69; and Ago, 798th meeting, 9 June 1965, p. 161, para. 71). To the end, Tsuruoka opposed subparagraph (c) and, for that reason, abstained in the voting on draft article 18 as a whole (adopted by 16 votes to none with one abstention on 2 July 1965, *ibid.*, 816th meeting, 2 July 1965, p. 283, para. 42).

<sup>86</sup> See article 31, paragraph 1, of the 1969 Vienna Convention.

<sup>87</sup> See Buffard and Zemanek, *loc. cit.* (footnote 72 above), pp. 320–321.

<sup>88</sup> *Ibid.*, pp. 319–321.

<sup>89</sup> C. Redgwell, “The law of reservations in respect of multilateral conventions”, in J. P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions*, London, British Institute of International and Comparative Law, 1997, p. 7.

purpose of the treaty, other than very indirectly, through a simple reference to draft article 17:<sup>90</sup> “The admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States.”<sup>91</sup>

(7) The discussion of subparagraph (c) in the Commission<sup>92</sup> and subsequently at the United Nations Conference on the Law of Treaties<sup>93</sup> does not shed any more light on the meaning of the expression “object and purpose of the treaty” for the purposes of this provision. Nor does international jurisprudence enable us to define it, even though it is in common use.<sup>94</sup> There are, however, some helpful hints, particularly in the 1951 advisory opinion of the ICJ on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

(8) The expression seems to have been used for the first time in its current form<sup>95</sup> in the advisory opinion of the PCIJ of 31 July 1930 on the *Greco-Bulgarian “Communities”* case.<sup>96</sup> However, it was not until 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case<sup>97</sup> that the Court put an end to what has been described as “terminological chaos”,<sup>98</sup> no doubt influenced by the 1969 Vienna Convention.<sup>99</sup> It is difficult,

<sup>90</sup> Future article 20 of the 1969 Vienna Convention. The article in no way resolves the issue, which is left pending.

<sup>91</sup> *Yearbook ... 1966*, vol. II, p. 207, para. 17. The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)) is no more forthcoming (see *Yearbook ... 1962*, vol. II, p. 180, para. 15).

<sup>92</sup> See footnote 85 above.

<sup>93</sup> It is significant that none of the amendments proposed to the Commission’s draft article 16—including the most radical ones—called this principle into question. At most, the amendments by Colombia, Spain and the United States proposed adding the concept of the “nature” of the treaty or substituting it for that of the object (see paragraph 6 of the commentary to draft guideline 3.1.1, *Yearbook ... 2006*, vol. II (Part Two), chapter VIII, section C.2, p. 149, footnote 759).

<sup>94</sup> See Buffard and Zemanek, *loc. cit.* (footnote 72 above), pp. 312–319, and footnote 99 below.

<sup>95</sup> Buffard and Zemanek note (*loc. cit.* (footnote 72 above), p. 315) that the expression “the aim and the scope” had already been used in the advisory opinion of the PCIJ of 23 July 1926 on *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* in reference to Part XIII of the Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), *Advisory Opinion of 23 July 1926, P.C.I.J., Series B, No. 13*, p. 18. The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court’s case law (Buffard and Zemanek, *loc. cit.* (footnote 72 above), pp. 315–316).

<sup>96</sup> *The Greco-Bulgarian “Communities”, Advisory Opinion of 31 July 1930, P.C.I.J., Series B, No. 17*. The terms are inverted, however: the Court bases itself on “the aim and object” of the Convention between Greece and Bulgaria respecting Reciprocal Emigration, signed at Neuilly-sur-Seine on 27 November 1919, (*ibid.*, p. 21). For the text of the Convention, *ibid.*, p. 37.

<sup>97</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 135–137, paras. 271–273, p. 138, para. 275, or pp. 140–141, para. 280.

<sup>98</sup> Buffard and Zemanek, *loc. cit.*, p. 316.

<sup>99</sup> Henceforth, the terminology used by the Court seems to have been firmly established; cf.: *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment of 20 December 1988, I.C.J. Reports 1988*, p. 69, at p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38, at pp. 49–51, paras. 25–27; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*,

however, to infer a great deal from this relatively abundant case law regarding the method to be followed for determining the object and purpose of a given treaty: the Court often proceeds by simple affirmations<sup>100</sup> and, when it seeks to justify its position, it does so empirically.<sup>101</sup>

(9) It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to delink the concept of the “object and purpose of the treaty” by looking first for the object and then for the purpose. For example, during the discussion of draft article 55 concerning the rule of *pacta sunt servanda*, Reuter emphasized that “the object of an obligation was one thing and its purpose was another”.<sup>102</sup> While the distinction is common in French (or francophone) doctrine,<sup>103</sup> it provokes scepticism among authors trained in the German or English systems.<sup>104</sup>

(10) However, one (French) author has shown convincingly that the question cannot be settled by reference

*Judgment of 3 February 1994, I.C.J. Reports 1994*, p. 6, at pp. 25–26, para. 52; *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 813, para. 27; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 7, at pp. 64–65, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment of 11 June 1998, I.C.J. Reports 1998*, p. 275, at p. 318, para. 98; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment of 13 December 1999, I.C.J. Reports 1999*, p. 1045, at pp. 1072–1073, para. 43; *LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, p. 466, at pp. 502–503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Merits, Judgment of 17 December 2002, I.C.J. Reports 2002*, p. 625, at p. 652, para. 51; *Avena and Other Mexican Nationals (Mexico v. the United States of America), Judgment of 31 March 2004, I.C.J. Reports 2004*, p. 12, at p. 48, para. 85; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 279, at p. 319, para. 102; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006*, p. 6, at p. 32, paras. 66–67, and p. 35, para. 77; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment of 26 February 2007*, p. 43, at pp. 109–110, para. 160, and p. 126, para. 198.

<sup>100</sup> See, for example, *Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion of 8 December 1927, P.C.I.J., Series B, No. 14*: “It is obvious that the object of the Treaty of Paris [of 1856] ... has been to assure freedom of navigation” (p. 64); *International Status of South-West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 128, at pp. 136–137, and the following judgments cited in the previous note: *Maritime Delimitation in the Area between Greenland and Jan Mayen* (judgment of 14 June 1993), pp. 50–51, para. 27; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* (judgment of 25 September 1997), p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections* (judgment of 11 June 1998), p. 318, para. 98; *LaGrand* (judgment of 27 June 2001), pp. 502–503, para. 102; and *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, (judgment of 15 December 2004), p. 319, para. 102.

<sup>101</sup> See paragraph (3) of the commentary to draft guideline 3.1.6 below.

<sup>102</sup> *Yearbook ... 1964*, vol. I, 726th meeting, 19 May 1964, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see Reuter, “Solidarité...”, *loc. cit.* (footnote 71 above), p. 625 (also reproduced in Reuter, *Le développement ...*, *op. cit. (ibid.)*, p. 363).

<sup>103</sup> See Buffard and Zemanek, *loc. cit.* (footnote 72 above), pp. 325–327.

<sup>104</sup> *Ibid.*, pp. 322–325 and 327–328.

to international jurisprudence,<sup>105</sup> particularly since neither the object—defined as the actual content of the treaty<sup>106</sup>—still less the purpose (the outcome sought)<sup>107</sup> remain immutable over time, as the theory of emergent purpose advanced by Sir Gerald Fitzmaurice clearly demonstrates: “[T]he notion of object and purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention.”<sup>108</sup> Thus, it is hardly surprising that the attempts made in scholarly writing to define a general method for determining the object and purpose of the treaty have proven to be disappointing.<sup>109</sup>

(11) As Ago argued during the debate in the Commission on draft article 17 (now article 19 of the Vienna Convention):

The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.<sup>110</sup>

<sup>105</sup> G. Teboul, *loc. cit.* (footnote 78 above), p. 696.

<sup>106</sup> See, for example, J.-P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1972, p. 142: the object of an instrument resides in the rights and obligations to which it gives rise.

<sup>107</sup> *Ibid.*

<sup>108</sup> G. G. Fitzmaurice, “The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points”, *BYBIL*, vol. 33 (1957), p. 208. See also G. Teboul, *loc. cit.* (footnote 78 above), p. 697, or W. A. Schabas, “Reservations to the Convention on the rights of the child”, *Human Rights Quarterly*, vol. 18 (1996), p. 479.

<sup>109</sup> The most successful method, devised by Buffard and Zemanek, would involve a two-stage process: in the first stage, one would have “recourse to the title, preamble and, if available, programmatic articles of the treaty”; in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty, Buffard and Zemanek, *loc. cit.* (footnote 72 above), p. 333. However, the application of this apparently logical method (even though it reverses the order stipulated in article 31 of the Vienna Convention, under which the “terms of the treaty” are the starting point for any interpretation; see also the advisory opinion of the Inter-American Court of Human Rights on *Restrictions to the Death Penalty* (arts. 4(2) and 4(4) *American Convention on Human Rights*), *Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3*, para. 50) to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method (the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the 1969 Vienna Convention, the general human rights conventions and the International Convention on the Elimination of All Forms of Discrimination against Women, as well as the other human rights treaties dealing with specific rights; the method proposed proves convincing only in the latter instance (Buffard and Zemanek, *loc. cit.* (footnote 72 above)) and conclude that the concept indeed remains an “enigma” (see above, paragraph (3) of the present commentary). Other scholarly attempts are scarcely more convincing, despite the fact that their authors are often categorical in defining the object and purpose of the treaty studied. Admittedly, they are often dealing with human rights treaties, which lend themselves easily to conclusions influenced by ideologically-oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extremes, is tantamount to precluding any reservation from being valid)—for a critique of this extreme view, see Schabas, “Reservations to the Convention on the rights of the child”, *loc. cit.* (footnote 108 above), pp. 476–477, or “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?”, *Brooklyn Journal of International Law*, vol. 21, No. 2 (1995–1996), pp. 291–293. On the position of the Human Rights Committee, see paragraph (2) of the commentary to draft guideline 3.1.12.

<sup>110</sup> *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 141, para. 35.

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;<sup>111</sup> and, on that basis, reservations to the “essential”<sup>112</sup> clauses, and only to such clauses, are rejected.

(12) In other words, it is the “*raison d’être*”<sup>113</sup> of the treaty, its fundamental core<sup>114</sup> that is to be preserved in order to avoid the “effectiveness”<sup>115</sup> of the treaty as a whole to be undermined. “It implies a distinction between all obligations in the treaty and the core obligations that are the treaty’s *raison d’être*.”<sup>116</sup>

(13) Even if the general approach is fairly clear, it is no easy matter to reflect this in a simple formulation. In the view of some members of the Commission, the “threshold” has been set too high in draft guideline 3.1.5 and may well unduly facilitate the formulation of reservations. Most members, however, have taken the view that by definition any reservation “purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application” to the author of the reservation<sup>117</sup> and that the definition of the object and purpose of the treaty should not be so broad as to impair the capacity to formulate reservations. By limiting the incompatibility of the reservation with the object and purpose of the treaty to cases in which (a) it impairs an essential element, (b) necessary to the general thrust of the treaty, (c) thereby compromising the *raison d’être* of the treaty, the formulation in draft guideline 3.1.5 strikes an acceptable balance between the need to preserve the integrity of the treaty and the concern to facilitate the broadest possible participation in multilateral conventions.

(14) Although a definition of each of these three inseparable elements is doubtless not possible, some clarification may be useful:

(a) The term “essential element” is to be understood in terms of the object of the reservation as formulated by

<sup>111</sup> What is involved is an examination of whether the reservation is compatible “with the general tenor” of the treaty (Bartoš, *ibid.*, pp. 141–142, para. 40).

<sup>112</sup> And not those that “related to detail only” (Paredes, *ibid.*, p. 146, para. 90).

<sup>113</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 26 above), p. 21: “none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d’être* of the convention”.

<sup>114</sup> Statement by the representative of France to the Third Committee at the eleventh session of the General Assembly, *Official Records of the General Assembly, Eleventh Session, Third Committee, 703rd meeting*, 6 December 1956, quoted in A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*, Paris, Centre national de la recherche scientifique, 1962, vol. I, p. 277, No. 552.

<sup>115</sup> See *Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, Application no. 15318/89, European Court of Human Rights, Series A: Judgments and Decisions*, vol. 310, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights “would ... diminish the effectiveness of the convention as a constitutional instrument of European public order (*ordre public*)”.

<sup>116</sup> Lijnzaad, *op. cit.* (see footnote 81 above), p. 83; see also p. 59 or L. Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, *Austrian Review of International and European Law*, vol. 1, No. 1 (1996), p. 76.

<sup>117</sup> See draft guideline 1.1.1.

the author and is not necessarily limited to a specific provision. An “essential element” may be a norm, a right or an obligation which, interpreted in context,<sup>118</sup> is essential to the general thrust of the treaty and whose exclusion or amendment would compromise its *raison d’être*. This would generally be the case if a State sought to exclude or significantly amend a provision of the treaty which embodied the object and purpose of the treaty. Thus a reservation which excluded the application of a provision comparable to article I of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and the Islamic Republic of Iran, signed in Tehran on 15 August 1955<sup>119</sup> would certainly impair an “essential element” within the meaning of guideline 3.1.5, given that this provision “must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied”;<sup>120</sup>

(b) This “essential element” must thus be “necessary to the general thrust of the treaty”, that is the balance of rights and obligations which constitute its substance or the general concept underlying the treaty.<sup>121</sup> While the Commission has had no difficulty in adopting, in French, the term “*économie générale du traité*”, which seems to it to accurately reflect the concept that the essential nature of the point to which the reservation applies must be assessed in the context of the treaty as a whole, it has been somewhat more hesitant as regards the English expression to be used. After having vacillated between “general framework”, “general structure” and “overall structure”, it appeared to the Commission that the expression “general thrust” had the merit of placing the emphasis on the global nature of the assessment to be made and of not imposing too rigid an interpretation. Thus the ICJ has determined the object and purpose of a treaty by reference not only to its preamble, but also to its “structure”, as represented by the provisions of the treaty taken as a whole.<sup>122</sup>

(c) Similarly, in an endeavour to avoid too high a “threshold”, the Commission chose the adjective “necessary” in preference to the stronger term “essential”, and decided on the verb “impair” (rather than “vitiate”) to qualify the “*raison d’être*” of the treaty, it being understood that this can be simple and unambiguous (the “*raison d’être*” of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is clearly defined by its title) or much more complex (in the case of a general human rights treaty<sup>123</sup> or an environmental protection convention or commitments relating to a broad range of questions) and that the question arises of whether it may change over time.<sup>124</sup>

(15) The fact remains that draft guideline 3.1.5 indicates a direction rather than establishing a clear criterion that can be directly applied in all cases. Accordingly, it seems appropriate to complement it in two ways: on the one hand, by seeking to specify means of determining the object and purpose of a treaty—as in draft guideline 3.1.6, and, on the other hand, by illustrating the methodology more clearly by means of a series of examples chosen from areas in which the question of permissible reservations frequently arises (draft guidelines 3.1.7 to 3.1.13).

### 3.1.6 *Determination of the object and purpose of the treaty*

**The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context. Recourse may also be had in particular to the title of the treaty, the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice agreed upon by the parties.**

#### *Commentary*

(1) It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a process undoubtedly requires more “*esprit de finesse*” than “*esprit de géométrie*”,<sup>125</sup> like any act of interpretation, for that matter—and this process is certainly one of interpretation.

(2) Given the great variety of situations and their susceptibility to change over time,<sup>126</sup> it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable—however, that is not uncommon in law in general and in international law in particular.

(3) In this context, it may be observed that the ICJ has deduced the object and purpose of a treaty from a number of highly disparate elements, taken individually or in combination:

- from its title;<sup>127</sup>

<sup>125</sup> B. Pascal, *Pensées, Œuvres complètes*, Paris, Bibliothèque de la Pléiade, N. R. F.-Gallimard, 1954, p. 1091.

<sup>126</sup> See above paragraph (10) of the commentary to draft guideline 3.1.5. The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see B. Clark, “The Vienna Convention reservations regime and the Convention on Discrimination Against Women”, *AJIL*, vol. 85 (1991), p. 314, and or R. J. Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women”, *Virginia Journal of International Law*, vol. 30 (1989–1990), pp. 706–707).

<sup>127</sup> See *Certain Norwegian Loans, Judgment of 6 July 1957, I.C.J. Reports 1957*, p. 9, at p. 24; but see *Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment of 27 June 1986* (footnote 97 above), pp. 136–137, para. 273, and *Oil Platforms, Preliminary Objection* (see footnote 99 above), p. 814, para. 28.

<sup>118</sup> See draft guideline 3.1.6.

<sup>119</sup> United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93.

<sup>120</sup> *Oil Platforms* (see footnote 99 above), p. 814, para. 28.

<sup>121</sup> Since not all treaties are necessarily or entirely based on a balance of rights and obligations (see in particular those treaties relating to “integral obligations”, including the human rights treaties) (second report on the law of treaties of Special Rapporteur G. G. Fitzmaurice, *Yearbook ... 1957*, vol. II, document A/CN.4/107, pp. 54–55, paras. 125–128).

<sup>122</sup> See *Oil Platforms* (footnote 99 above), pp. 813–814, para. 27, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (*ibid.*), p. 652, para. 51.

<sup>123</sup> See draft guideline 3.1.12.

<sup>124</sup> See paragraph (10) above and paragraph (7) of the commentary to draft guideline 3.1.6 below.



- from its preamble;<sup>128</sup>
- from an article placed at the beginning of the treaty that “must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied”;<sup>129</sup>
- from an article of the treaty that demonstrates “the major concern of each contracting party” when it concluded the treaty;<sup>130</sup>
- from the preparatory works on the treaty;<sup>131</sup> and
- from its overall framework.<sup>132</sup>

(4) It is difficult, however, to regard this as a “method” properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a “general impression”, in which subjectivity inevitably plays a considerable part.<sup>133</sup> Since, however, the basic problem is one of interpretation, it would appear to be legitimate, *mutatis mutandis*, to transpose the principles in articles 31 and 32 of the 1969 and 1986 Vienna Conventions applicable to the interpretation of treaties—the “general rule of interpretation” set forth in article 31 and the “supplementary means of interpretation” set forth in article 32<sup>134</sup>—and to adapt them to the determination of the object and purpose of the treaty.

<sup>128</sup> See the advisory opinion of the PCIJ on *The Greco-Bulgarian “Communities”* (footnote 96 above), p. 19, or the judgments of the ICJ in *Rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, I.C.J. Reports 1952, p. 176, at p. 196; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, (footnote 97 above) p. 138, para. 275; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (footnote 99 above), pp. 25–26, para. 52; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (ibid.)*, p. 652, para. 51; see also the dissenting opinion of Judge Anzilotti appended to the advisory opinion on the *Interpretation of the Convention of 1919 concerning Employment of Women During the Night*, Advisory Opinion of 15 November 1932, P.C.I.J., Series A/B, No. 50, p. 384.

<sup>129</sup> *Oil Platforms* (see footnote 99 above), p. 814, para. 28.

<sup>130</sup> *Kasikili/Sedudu Island*, Judgment of 13 December 1999, I.C.J. Reports 1999 (see footnote 99 above), pp. 1072–1073, para. 43.

<sup>131</sup> Often, as a way of confirming an interpretation based on the text itself; see the judgments of the ICJ in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (footnote 99 above), pp. 27–28, paras. 55–56; *Kasikili/Sedudu Island (ibid.)*, pp. 1074–1075, para. 46; or *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (ibid.)*, p. 179, para. 109; see also the dissenting opinion of Judge Anzilotti in *Interpretation of the Convention of 1919 concerning Employment of Women During the Night* (footnote 128 above), pp. 388–389. In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 26 above), the ICJ gives some weight to the “origins” of the Convention (p. 23).

<sup>132</sup> See the advisory opinions of the PCIJ on *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* (footnote 95 above), p. 18, and *The Greco-Bulgarian “Communities”* (footnote 96 above), p. 20; or the judgments of the ICJ in *Oil Platforms* (see footnote 99 above), pp. 813–814, para. 27, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (ibid.)*, p. 652, para. 51.

<sup>133</sup> “One could just as well believe that it was simply by intuition” (Buffard and Zemanek, *loc. cit.* (footnote 72 above), p. 319).

<sup>134</sup> See the advisory opinion of 8 September 1983 of the Inter-American Court of Human Rights on *Restrictions to the Death Penalty* (footnote 109 above), para. 63; see also Sucharipa-Behrmann, *loc. cit.* (footnote 116 above), p. 76. While showing that it was aware that the rules on interpretation of treaties could not be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the Commission

(5) The Commission is fully aware that this position is to some extent tautological,<sup>135</sup> since paragraph 1 of article 31 reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose\*.

(6) That said, however, the determination of the object and purpose of a treaty is indeed a question of interpretation, whereby the treaty must be interpreted as a whole, in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account practice<sup>136</sup> and, when appropriate, the preparatory work of the treaty and the “circumstances of its conclusion”.<sup>137</sup>

(7) These are the parameters underlying draft guideline 3.1.6, which partly reproduces the terms of articles 31 and 32 of the Vienna Conventions, in that it highlights the need for determination in good faith based on the terms of the treaty in their context. Given that, for the purposes of interpretation,<sup>138</sup> this latter comprises the text, including the preamble, it was not deemed useful to reproduce it.<sup>139</sup> On the other hand, mention of the preparatory works and of the circumstances of the conclusion is of indisputably greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions, as is the case with the title of the treaty, which is not mentioned in articles 31 and 32 of the Vienna Conventions but which is of importance in determining the treaty’s object and purpose. As for the phrase “the subsequent practice agreed upon by the parties”, this reflects paragraphs 2, 3 (a) and 3 (b) of article 31, since most members of the Commission were of the view that the object and purpose of a treaty was likely to evolve over time.<sup>140</sup> Furthermore, even though it was argued that this mention was redundant in subsequent practice, since objections, if there are any, must be made during the year following the formulation of the reservation, it was pointed out that the reservation could be assessed by third parties at any time, even years after its formulation.

(8) In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, by which a State sought to reserve the right to commit some of the

recognized that those rules constituted useful guidelines in that regard (see draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations) and the commentary thereto, adopted by the Commission at its fifty-first session, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–109). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose of the treaty itself.

<sup>135</sup> See W. A. Schabas, “Reservations to human rights treaties: time for innovation and reform”, *The Canadian Yearbook of International Law* 1994, p. 48.

<sup>136</sup> See article 31, paragraph 3.

<sup>137</sup> Article 32.

<sup>138</sup> Article 31, paragraph 2.

<sup>139</sup> Mention of the text also appeared to suffice for the purposes of including the provisions setting out the general objects of the treaty; these objects might, however, be of particular significance in a determination of the “general thrust” of the treaty (see footnote 129 above).

<sup>140</sup> See above, paragraph (10) of the commentary to draft guideline 3.1.5, and paragraph (2) of the present commentary.



prohibited acts in its territory or in certain parts thereof, would be incompatible with the object and purpose of the Convention.<sup>141</sup>

(9) Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

The reservation made in respect of article 6 is contrary to the principle ‘*aut dedere au iudicare*’ which provides that offences are brought before the court or that extradition is granted to the requesting States.

The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2 paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.

The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention.<sup>142</sup>

(10) It can also happen that the prohibited reservation relates to less central provisions but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the Vienna Convention displays towards reservations to constituent instruments of international organizations.<sup>143</sup> For example, the German Democratic Republic, when ratifying the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.<sup>144</sup> Luxembourg objected to that “declaration” (which was actually a reservation), arguing, correctly, that the effect would be “to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention”.<sup>145</sup>

(11) It is clearly impossible to draw up an exhaustive list of the potential problems that may arise concerning the compatibility of a reservation with the object and purpose of the treaty. It is also clear, however, that reservations to certain categories of treaties or treaty provisions or reservations having certain specific characteristics raise particular problems that should be examined, one by one, in an attempt to develop guidelines that would be helpful to States in formulating reservations of that kind or in responding to them knowledgeably. This is the intent of draft guidelines 3.1.7 to 3.1.13, the preparation of which was prompted by the relative frequency with which problems arise; these draft guidelines are of a purely illustrative nature.

### 3.1.7 Vague or general reservations

**A reservation shall be worded in such a way as to allow its scope to be determined, in order to assess in particular its compatibility with the object and purpose of the treaty.**

#### Commentary

(1) Since, under article 19 (c) of the 1969 and 1986 Vienna Conventions, reproduced in draft guideline 3.1, a reservation must be compatible with the object and purpose of the treaty, and since other States are required, under article 20, to take a position on this compatibility, it must be possible for them to do so. This will not be the case if the reservation in question is worded in such a way as to preclude any determination of its scope, in other words, if it is vague or general, as indicated in the title of draft guideline 3.1.7. This is not, strictly speaking, a case in which the reservation is incompatible with the object and purpose of the treaty: rather, it is a hypothetical situation in which it is impossible to assess this compatibility. This shortcoming seemed sufficiently serious to the Commission for it to come up with particularly strong wording: “shall be worded” rather than “should be worded” or “is worded”. Furthermore, use of the term “worded” highlights the fact that this is a requirement of substance and not merely one of form.

(2) In any event, the requirement for precision in the wording of reservations is implicit in their very definition. It is clear from article 2, paragraph 1 (d), of the Vienna Conventions, from which the text in draft guideline 1.1 of the Guide to Practice is taken, that the object of reservations is to exclude or to modify “the legal effect of

<sup>141</sup> The question is particularly relevant with regard to the scope of the “colonial clause” in article XII of the Convention, a clause contested by the Soviet bloc countries, which had made reservations to it (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005*, vol. I (United Nations publication, Sales No. E.06.V.2), pp. 126–134 (chap. IV.1)), but the focus here is on the validity of that quasi-reservation clause.

<sup>142</sup> *Ibid.*, p. 466 (chap. VI.19); in the same vein see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, and the less explicitly justified objections of Austria and France, *ibid.*, pp. 466–468. See also the objection of Norway, and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the 1961 Convention on the reduction of statelessness, *ibid.*, pp. 400–401 (chap. V.4). Another significant example is provided by the declaration of Pakistan concerning the 1997 International Convention for the Suppression of Terrorist Bombings, which excluded from the application of the Convention “struggles, including armed struggle, for the realization of the right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law”, *ibid.*, vol. II, pp. 135–136 (chap. XVIII.9). A number of States considered that “declaration” to be contrary to the object and purpose of the Convention, which is “the suppression of terrorist bombings, irrespective of where they take place and of who carries them out”; see the objections of Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Italy, Japan (with a particularly clear statement of reasons), the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America, *ibid.*, pp. 137–143. Similarly, Finland justified its objection to the reservation made by Yemen to article 5 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination by the argument that “provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination”, *ibid.*, vol. I, pp. 145–146 (chap. IV.2).

<sup>143</sup> Cf. article 20, paragraph 3: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.”

<sup>144</sup> See *Multilateral Treaties ...*, vol. I (footnote 141 above), p. 308, (chap. IV.9); see also R. W. Edwards, Jr., “Reservations to treaties”, *Michigan Journal of International Law*, vol. 10, No. 2 (1989), pp. 391–393 and 400.

<sup>145</sup> *Multilateral Treaties ...*, vol. I (see footnote 141 above), p. 309. Fifteen other States raised objections on the same grounds.

certain provisions of the treaty in their application” to their authors.<sup>146</sup> Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although “across-the-board” reservations are common practice, they are, as specified in draft guideline 1.1.1 of the Guide to Practice,<sup>147</sup> valid only if they purport “to exclude or modify the legal effect ... of the treaty as a whole with respect to certain specific aspects”.

(3) Furthermore, it follows from the inherently consensual nature of the law of treaties in general,<sup>148</sup> and the law of reservations in particular,<sup>149</sup> that, although States are free to formulate (not to make<sup>150</sup>) reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its scope to be assessed.

(4) This is often the case when a reservation invokes the internal law of the State which has formulated it without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code. In these cases, the reference to

<sup>146</sup> See the comments of the Government of Israel on the Commission’s first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word “some” to “certain” (fourth report of the Special Rapporteur, Sir Humphrey Waldock, on the law of treaties (footnote 77 above), p. 15); see also Chile’s statement at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, first session, Vienna, 26 March–24 May 1968, Summary records of plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), Committee of the Whole, fourth meeting, 29 March 1968: “the words ‘to vary the legal effect of certain provisions of the treaty’ (subparagraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided” (p. 21, para. 5).

<sup>147</sup> *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95. See also the remarks by Rosa Riquelme Cortado in *Las reservas a los tratados: Lagunas y ambigüedades del Régimen de Viena*, Universidad de Murcia, 2004, p. 172.

<sup>148</sup> See P. Reuter, *Introduction au droit des traités*, op. cit. (footnote 73 above), pp. 20–21; C. Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16 and 17 of the ILC’s draft articles on the law of treaties”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 27 (1967), p. 466. See also, for example, the judgment of PCIJ of 17 August 1923 in *SS “Wimbledon”, Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25, or the advisory opinion of the ICJ of 11 July 1950 on *International Status of South-West Africa* (footnote 100 above), p. 139.

<sup>149</sup> The ICJ specified in this connection in its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (see footnote 26 above) that “[i]t is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto” (p. 21). The authors of the joint dissenting opinion accompanying the advisory opinion expressed this idea still more strongly: “The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later” (*ibid.*, pp. 31–32). See also the arbitral award of 30 June 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (also known as the *English Channel case*), in UNRIIA, vol. XVIII (Sales No. E/F.80.V.7), pp. 41–42, paras. 60–61; and W. W. Bishop, Jr., “Reservations to treaties”, *Recueil des Cours de l’Académie de Droit International*, vol. 103 (1961-II), p. 255.

<sup>150</sup> See paragraph (6) of the commentary to draft guideline 3.1, *Yearbook ... 2006*, vol. II (Part Two), chap. VIII, sect. C.2.

the domestic law of the reserving State is not *per se* the problem,<sup>151</sup> but the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the United Nations Conference on the Law of Treaties seeking to add the following subparagraph (d) to future article 19 of the Convention:

(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law.<sup>152</sup>

(5) Finland’s objections to the reservations of several States parties to the 1989 Convention on the rights of the child are certainly more solidly reasoned on that ground than by a reference to article 27 of the 1969 Vienna Convention;<sup>153</sup> for instance, in response to the reservation by Malaysia, which had accepted a number of the provisions of the Convention on the rights of the child “only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia”,<sup>154</sup> Finland considered that the “broad nature” of that reservation left open “to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention”.<sup>155</sup> Thailand’s interpretative declaration to the effect that it “does not interpret and apply the provisions of this Convention [the International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws”<sup>156</sup> also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general

<sup>151</sup> See below paragraph (4) of the commentary to draft guideline 3.1.11.

<sup>152</sup> *Official Records of the United Nations Conference on the Law of Treaties, first and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Report of the Committee of the Whole, A/CONF.39/14, pp. 133–134, para. 177; see the explanations of the representative of Peru at the 21st plenary meeting of the Conference, on 10 April 1968, *Official Records of the United Nations Conference on the Law of Treaties, first session...* (footnote 146 above), p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (25th plenary meeting, 16 April 1968, *ibid.*, p. 135, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number of delegations, like Italy, considered it “unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty” (22nd plenary meeting, 11 April 1968, *ibid.*, p. 120, para. 75); along these same lines, see R. Szafarz, “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3 (1970), p. 302.

<sup>153</sup> See below paragraph (4) of the commentary to draft guideline 3.1.11. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created “uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 130–132 (chap. IV.1)) is more convincing than the argument based on an invocation of domestic law (see, below, the first two footnotes to paragraph (4) of the commentary to draft guideline 3.1.11).

<sup>154</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 326 (chap. IV.11).

<sup>155</sup> *Ibid.*, pp. 331–332. See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*, pp. 330–335.

<sup>156</sup> *Ibid.*, p. 142 (chap. IV.2).

reservation which made reference to the limits of national legislation, the content of which was not specified.<sup>157</sup>

(6) The same applies when a State reserves the general right to have its constitution prevail over a treaty,<sup>158</sup> as for instance in the reservation by the United States to the Convention on the Prevention and Punishment of the Crime of Genocide:

[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.<sup>159</sup>

(7) Some of the so-called “sharia reservations”<sup>160</sup> give rise to the same objection, a case in point being the reservation by which Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women “in each and every one of its parts which are not contrary to Islamic Sharia”.<sup>161</sup> Here again, the problem lies not in the very fact that Mauritania is invoking a law of religious origin which it applies,<sup>162</sup> but, rather that, as

<sup>157</sup> *Ibid.*, pp. 148–149. See the objections of Norway and Sweden of 15 March and 14 December 1999, respectively, which follow the same line of thinking with regard to Bangladesh’s reservation to the Convention on the Political Rights of Women of 31 March 1953, *ibid.*, vol. II (footnote 142 above), pp. 85–86 (chap. XVI.1) or the objections by Finland to a reservation by Guatemala to the Vienna Convention on the Law of Treaties and by Austria, the Netherlands and Sweden to a comparable reservation by Peru to the same Convention, in *ibid.*, pp. 380–384 (chap. XXIII.1).

<sup>158</sup> See Pakistan’s reservation to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, vol. I (footnote 141 above), p. 253 (chap. IV.8)), and the objections made by Austria, Finland, Germany, the Netherlands and Norway (*ibid.*, pp. 256, 260–263, 264–265 and 267–272) and by Portugal (*ibid.*, p. 286, footnote 52).

<sup>159</sup> *Ibid.*, p. 128 (chap. IV.1).

<sup>160</sup> For a discussion of the various schools of thought, see especially A. Sassi, “General reservations to multilateral treaties” *Comunicazioni e Studi*, vol. 22 (2002), pp. 96–99. With regard specifically to the application of the reservation to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, see Clark, *loc. cit.* (footnote 126 above), pp. 299–302 and pp. 310–311; J. Connors, “The Women’s Convention in the Muslim world” in Gardner (ed.), *op. cit.* (footnote 89 above), pp. 85–103; Cook, *loc. cit.* (footnote 126 above), pp. 690–692; J. McBride, “Reservations and the capacity of States to implement human rights treaties” in Gardner (ed.), *op. cit.* (footnote 89 above), pp. 149–156 (with a great many examples) or Y. Tyagi, “The conflict of law and policy on reservations to human rights treaties”, *BYBIL*, vol. 71 (2000), pp. 198–201 and, more specifically A. Jenefsky, “Permissibility of Egypt’s reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, *Maryland Journal of International Law and Trade*, vol. 15 (1991), pp. 200–233.

<sup>161</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 251 (chap. IV.8). See also the reservations by Saudi Arabia, citing “the norms of Islamic law” (*ibid.*, p. 253) and by Malaysia (*ibid.*, p. 250), or again the initial reservation by Maldives: “The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded” (*ibid.*, p. 284, footnote 43); the latter reservation having elicited several objections, the Government of the Maldives modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (*ibid.*). Likewise, several States formulated objections to the reservation by Saudi Arabia to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which made the application of its provisions subject to the condition that “these do not conflict with the precepts of the Islamic Shariah” (*ibid.*, pp. 141 and 144–149 (chap. IV.2)).

<sup>162</sup> The Holy See ratified the 1989 Convention on the rights of the child provided that “the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law” (*ibid.*, pp. 324–325). As has been pointed

Denmark noted, “the general reservations with reference to the provisions of Islamic law ... are of unlimited scope and undefined character”.<sup>163</sup> Thus, as the United Kingdom put it, such a reservation “which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention”.<sup>164</sup>

(8) Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the 1969 Vienna Convention. As the Human Rights Committee pointed out:

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the [International Covenant on Civil and Political Rights] and indicate in precise terms its scope in relation thereto.<sup>165</sup>

(9) According to article 57 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), “[r]eservations of a general character shall not be permitted”. The European Court of Human Rights, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention on Human Rights because it was “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope”.<sup>166</sup> But it is unquestionably the European Commission on Human Rights that most clearly formulated the principle

out (Schabas, “Reservations to the Convention on the rights of the child”, *loc. cit.* (footnote 108 above), pp. 478–479), this text raises, *mutatis mutandis*, the same problems as the “sharia reservation”.

<sup>163</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 258–259 (chap. IV.8).

<sup>164</sup> *Ibid.*, pp. 277–278. See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (*ibid.*, pp. 256, 260–263, 264–265, 267–272 and 274–278). The reservations of many Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less criticisable on that basis, although a number of them also drew objections from some States parties. (For example, whereas Clark, *op. cit.* (footnote 126 above), p. 300, observes that Iraq’s reservation to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden, *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 267–269 and 274–277 (chap. IV.8).)

<sup>165</sup> General Comment No. 24, Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, Annex V, para. 19; see also paragraph 12, which links the issue of the invocation of domestic law to that of “widely formulated reservations”.

<sup>166</sup> *Belilos v. Switzerland, Judgement of 29 April 1988, Application no. 10328/83, European Court of Human Rights, Series A: Judgments and Decisions*, vol. 132, p. 26, para. 55. See paragraph (8) of the commentary to draft guideline 3.1.2, *Yearbook ... 2006*, vol. II (Part Two), chap. VIII, sect. C.2. For a detailed analysis of the condition of generality raised by article 57 of the Convention, see especially I. Cameron and F. Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”, *German Yearbook of International Law*, vol. 33 (1990), pp. 97–109, and R. St. J. MacDonald, “Reservations under the European Convention on Human Rights”, *Revue belge de droit international*, vol. 21 (1988), pp. 433–438 and 443–448.

applicable here when it judged that “a reservation is of a general nature ... when it is worded in such a way that it does not allow its scope to be determined”.<sup>167</sup>

(10) Draft guideline 3.1.7 reflects this fundamental notion. Its title gives an indication of the (alternative) characteristics which a reservation needs to exhibit to come within its scope: it applies to reservations which are either “vague” or “general”. The former might be a reservation which leaves some uncertainty as to the circumstances in which it might be applicable<sup>168</sup> or to the extent of the obligations effectively entered into by its author. The latter corresponds to the examples enumerated above.<sup>169</sup>

(11) Although the present commentary may not be the right place for a discussion of the effects of vague or general reservations, it must still be noted that they raise particular problems. It would seem difficult, at the very outset, to maintain that they are invalid *ipso jure*: the main criticism that can be levelled against them is that they make it impossible to assess whether or not the conditions for their substantive validity have been fulfilled.<sup>170</sup> For that reason, they should lend themselves particularly well to a “reservations dialogue”.

### 3.1.8 Reservations to a provision reflecting a customary norm

**1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.**

**2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.**

#### Commentary

(1) Draft guideline 3.1.8 relates to a problem which arises fairly often in practice: that of the validity of a reservation to a provision which is restricted to reflecting a customary norm—the word “reflect” is preferred here to “enunciate” in order to demonstrate that the process of enshrining the norm in question in a treaty has no effect on its continued operation as a customary norm. This

principle of the persistence of customary norms (and of the obligations flowing therefrom for the States or international organizations bound by them) is also reflected in paragraph 2 of the draft guideline, which recalls that the author of a reservation to a provision of this type may not be relieved of his obligations thereunder by formulating a reservation. Paragraph 1, meanwhile, underlines the principle that a reservation to a treaty rule which reflects a customary norm is not *ipso jure* incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

(2) In some cases, States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose under the pretext that they were contrary to well-established customary norms. Thus, Austria declared, in cautious terms, that it was

of the view that the Guatemalan reservations [to the 1969 Vienna Convention on the Law of Treaties] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention] ...<sup>171</sup>

For its part, the Netherlands objected to the reservations formulated by several States in respect of various provisions of the 1961 Vienna Convention on Diplomatic Relations and took “the view that this provision remains in force in relations between it and [the said States in accordance] with international customary law”.<sup>172</sup>

(3) It has often been thought that this inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the judgment of the ICJ in the *North Sea Continental Shelf* cases:<sup>173</sup>

speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.<sup>174</sup>

<sup>171</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), p. 380 (chap. XXIII.1); see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (*ibid.*, pp. 381 and 383–385). In the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (footnote 149 above), the United Kingdom maintained that France’s reservation to article 6 of the Convention on the Continental Shelf was aimed at “the rules of customary international law” and was “inadmissible as a reservation to Article 6” (p. 38, para. 50).

<sup>172</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 96 (chap. III.3); in reality, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see below, paragraphs (13)–(16) of the present commentary). See also Poland’s objections to the reservations of Bahrain and the Libyan Arab Jamahiriya (*ibid.*, p. 96) and D. W. Greig, “Reservations: equity as a balancing factor?”, *Australian Year Book of International Law*, vol. 16 (1995), p. 88.

<sup>173</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3. See the dissenting opinion of Judge Morelli, appended to the judgment (pp. 198–199) and the many commentaries cited in P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1978, p. 244, footnote 20; see also G. Teboul, *loc. cit.* (footnote 78 above), p. 685.

<sup>174</sup> *North Sea Continental Shelf* (see footnote 173 above), pp. 38–39, para. 63.

<sup>167</sup> *Temeltasch v. Switzerland, Application No. 9116/80*, Council of Europe, European Commission of Human Rights, *Decisions and Reports*, vol. 31, 1983, p. 120, para. 90. See P.-H. Imbert, “Les réserves à la Convention européenne des droits de l’homme devant la Commission de Strasbourg (Affaire Temeltasch)”, *Revue générale de droit international public*, vol. 87 (1983), pp. 580–625.

<sup>168</sup> See Malta’s reservation to the 1966 International Covenant on Civil and Political Rights: “While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with article 14, paragraph 6, of the Covenant” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 182–183 (chap. IV.4)).

<sup>169</sup> See paragraphs (5)–(9) of the present commentary.

<sup>170</sup> See paragraphs (1) and (4) above.

(4) While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context. The Court goes on to exercise caution in respect of the deductions called for by the exclusion of certain reservations. Noting that the faculty of reservation to article 6 of the 1958 Convention on the Continental Shelf (delimitation) was not excluded by article 12 on reservations,<sup>175</sup> as it was in the case of articles 1 to 3, the Court considered it “normal” and “a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law”.<sup>176</sup>

(5) Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;<sup>177</sup> it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1 to 3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court’s own conclusion.

(6) Furthermore, the judgment itself states, in an often-neglected dictum, that “no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf]”.<sup>178</sup> Judge Morelli, dissenting, does not contradict this when he writes: “Naturally the power to make reservations affects only the contractual obligation flowing from the convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified.”<sup>179</sup> This clearly implies that the customary nature of the norm reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: “the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law”.<sup>180</sup>

<sup>175</sup> See paragraph (5) of the commentary to draft guideline 3.1.2, *Yearbook ... 2006*, vol. II (Part Two), chap. VIII, sect. C.2, pp. 150–151.

<sup>176</sup> *North Sea Continental Shelf* (see footnote 173 above), p. 40, para. 66; see also pp. 38–39, para. 63. In support of this position, see the individual opinion of Judge Padilla Nervo, *ibid.*, p. 89; against it, see the dissenting opinion of Vice-President Koretsky, *ibid.*, p. 163.

<sup>177</sup> P.-H. Imbert, *Les réserves aux traités multilatéraux*, op. cit. (footnote 173 above), p. 244, and, in the same vein, A. Pellet, “La C.I.J. et les réserves aux traités—Remarques cursives sur une révolution jurisprudentielle”, in N. Ando, E. McWhinney and R. Wolfrum (eds.), *Liber Amicorum Judge Shigeru Oda*, vol. 1, The Hague, Kluwer Law International, 2002, pp. 507–508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to “the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty” (*North Sea Continental Shelf* (see footnote 173 above), p. 182); this confuses the question of the faculty to make a reservation with that of the reservation’s effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature. (Strangely, Judge Tanaka considers that the equidistance principle “must be recognized as *jus cogens*” (*ibid.*).

<sup>178</sup> *Ibid.*, p. 40, para. 65.

<sup>179</sup> *Ibid.*, p. 198.

<sup>180</sup> Dissenting opinion of *ad hoc* Judge Sørensen, *ibid.*, p. 248.

(7) Moreover, although this principle is sometimes challenged,<sup>181</sup> it is recognized in the preponderance of doctrine,<sup>182</sup> and rightly so:

– Customary norms are binding on States, independently of their expression of consent to a conventional rule<sup>183</sup> but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation<sup>184</sup>—providing that the latter is valid—but this is precisely the question raised;

– A reservation concerns only the expression of the norm in the context of the treaty, not its existence as a customary norm, even if, in some cases, it may cast doubt on the norm’s general acceptance “as of right”,<sup>185</sup> as the United Kingdom remarked in its observations on General Comment No. 24 of the Human Rights Committee, “there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law”,<sup>186</sup>

– If this nature is clear, States remain bound by the customary norm, independently of the treaty;<sup>187</sup>

– Appearances to the contrary, there may be an interest (and not necessarily a laudable one) involved—for example, that of avoiding application to the relevant obligations of the monitoring or dispute settlement

<sup>181</sup> See the position taken by Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (footnote 149 above), p. 123.

<sup>182</sup> See M. Coccia, “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, vol. 15 (1985), pp. 31–32; G. Gaja, “Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario”, *Rivista di diritto internazionale*, vol. 79 (1996), pp. 451–452; P.-H. 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”, *Annuaire français de droit international*, vol. 24 (1978), p. 48; Riquelme Cortado, op. cit. (footnote 147 above), pp. 159–171; and Sucharipa-Behrmann, loc. cit. (footnote 116 above), pp. 76–77.

<sup>183</sup> See Finland’s objection to Yemen’s reservations to article 5 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination: “By making a reservation a State cannot contract out from universally binding human rights standards [but this is true as a general rule]” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 145 (chap. IV.2)).

<sup>184</sup> In that regard, see the dissenting opinion of *ad hoc* Judge Sørensen in the *North Sea Continental Shelf* cases (footnote 173 above), p. 248; see also M. Coccia, loc. cit. (footnote 182 above), p. 32. See, however, below, paragraph (3) of the commentary to draft guideline 3.1.9.

<sup>185</sup> See article 38, paragraph 1 (b), of the Statute of the International Court of Justice. In that regard, see R. R. Baxter, “Treaties and customs”, *Collected Courses of the Hague Academy of International Law*, vol. 129 (1970-I), p. 50; M. Coccia, loc. cit. (footnote 182 above), p. 31; G. Gaja, loc. cit. (*ibid.*), p. 451; and G. Teboul, loc. cit. (footnote 78 above), pp. 711–714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (see Imbert, *Les réserves aux traités multilatéraux*, op. cit. (footnote 173 above), p. 246, and Reuter, “Solidarité...”, loc. cit. (footnote 71 above), p. 631, footnote 16 (also reproduced in Reuter, *Le développement...*, op. cit. (*ibid.*), pp. 370–371)).

<sup>186</sup> *Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (see footnote 165 above), pp. 131–132, para. 7.

<sup>187</sup> See below paragraphs (13)–(16) of the present commentary.

mechanisms envisaged in the treaty or of limiting the role of domestic judges, who may have different competences with respect to conventional rules, on the one hand, and customary rules, on the other;<sup>188</sup>

– Furthermore, as noted by France in its observations on General Comment No. 24 of the Human Rights Committee, “the State’s duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves”;<sup>189</sup>

– And, lastly, a reservation may be the means by which a “persistent objector” manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a norm which cannot be invoked against it under general international law.<sup>190</sup>

(8) Here again, however, the question is whether this solution can be transposed to the field of human rights.<sup>191</sup> The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.<sup>192</sup>

(9) First, it should be noted that the Committee confirmed that reservations to customary norms are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the rights of individuals. But this premise does not have the consequences that the Committee attributes to it<sup>193</sup> since, on the one hand, a reservation to a human rights treaty provision which reflects a customary norm in no way absolves the reserving State of its obligation to respect

the norm as such<sup>194</sup> and, on the other hand, in practice, it is quite likely that a reservation to such a norm (especially if the latter is peremptory) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules.<sup>195</sup> It is these considerations which led the Commission to indicate, at the outset, that: “[t]he fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation”.

(10) On the more general issue of codification conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that the desire to codify is normally accompanied by a concern to preserve the rule being affirmed:<sup>196</sup> if it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would fail in its objectives,<sup>197</sup> to the point that reservations and, in any case, multiple reservations, have been viewed as the very negation of the work of codification.<sup>198</sup>

<sup>194</sup> See above paragraph (7) of the present commentary. According to the Human Rights Committee, “a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language” (General Comment No. 24, *Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (see footnote 165 above), para. 8). This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the International Covenant on Civil and Political Rights are prohibited; if these rights must be respected, it is because of their customary and, in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see Gaja, *loc. cit.* (footnote 182 above), p. 452. Furthermore, the Human Rights Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that “[t]he ‘ought’ merges with the ‘is’, the *lex ferenda* with the *lex lata*” (T. Meron, “The Geneva Conventions as customary norms”, *AJIL*, vol. 81 (1987) p. 361; see also Schabas’s well-argued critique concerning articles 6 and 7 of the Covenant (“Invalid reservations...” *loc. cit.* (footnote 109 above), pp. 296–310).

<sup>195</sup> In that regard, see Françoise Hampson’s working paper on reservations to human rights treaties (E/CN.4/Sub.2/1999/28), para. 17, and her final working paper on that topic (footnote 190 above), para. 51: “In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion.”

<sup>196</sup> Imbert, *Les réserves aux traités multilatéraux*, *op. cit.* (footnote 173 above), p. 246; see also Teboul, *op. cit.* (footnote 78 above), p. 680, who notes that while both are useful, the concept of a reservation is incompatible with that of a codification convention; this study gives a clear overview of the whole question of reservations to codification conventions (pp. 679–717, *passim*).

<sup>197</sup> Reuter, “Solidarité...”, *loc. cit.* (footnote 71 above), pp. 630–631 (also reproduced in Reuter, *Le développement... op. cit. (ibid.)*, p. 370). The author adds that, for this reason, the treaty would also give rise to a situation further from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (*ibid.*). This second statement is more debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see below footnote 206).

<sup>198</sup> R. Ago in *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 153, para. 58.

<sup>188</sup> Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *Recueil des décisions du Conseil d’Etat*, 1989, p. 190, Frydman’s conclusions, and the 6 June 1997 decision in the *Aquarone* case, *Recueil des décisions du Conseil d’Etat*, 1997, p. 206, Bachelier’s conclusions.

<sup>189</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 104, para. 5; in the same vein, see the comment by the United States of America (*ibid.*, *Fiftieth Session* (footnote 165 above), pp. 129–130. See also G. Cohen-Jonathan, “Les réserves dans les traités institutionnels relatifs aux droits de l’homme. Nouveaux aspects européens et internationaux”, *Revue générale de droit international public*, vol. 100 (1996), pp. 932–933.

<sup>190</sup> See the final working paper submitted in 2004 by Ms. Françoise Hampson on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), endnote 45.

<sup>191</sup> See the second report on reservations to treaties by Mr. Alain Pellet, Special Rapporteur (footnote 17 above), paras. 143–147.

<sup>192</sup> General Comment No. 24, *Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (see footnote 165 above), para. 8.

<sup>193</sup> For an opposing view, see T. Giegerich, “Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien: Ein konstitutioneller Ansatz”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law*, vol. 55 (1995), p. 744 (English summary, pp. 778–782, at pp. 779–780).

(11) This does not mean that, in essence, any reservation to a codification treaty is incompatible with its object and purpose:

– It is certain that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty;<sup>199</sup>

– The very concept of a “codification convention” is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and the progressive development thereof.<sup>200</sup> How many rules of customary origin must a treaty contain in order to be defined as a “codification treaty”?<sup>201</sup>

– The status of the rules included in a treaty changes over time: a rule which falls under the heading of “progressive development” may become pure codification and a “codification convention” often crystallizes into a rule of general international law a norm which was not of this nature at the time of its adoption.<sup>202</sup>

(12) Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same restrictions) as any other treaty and the arguments that can be put forward, in general terms, in support of the ability to formulate reservations to a treaty provision that sets forth a customary norm<sup>203</sup> are also fully transposable thereto. Furthermore, there is well-established practice in this area: there are more reservations to human rights treaties (which are, moreover, to a great extent codifiers of existing law) and codification treaties than to any other type of treaty.<sup>204</sup> And while some objections may have been based on the customary nature of the rules concerned,<sup>205</sup> the specific nature of these conventions seems never to have been invoked

in support of a declaration of incompatibility with their object and purpose.

(13) Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once established, it prevents application of the conventional rule which is the object of the reservation in the reserving State’s relations with the other parties to the treaty, but it does not eliminate that State’s obligation to respect the customary norm (the content of which may be identical).<sup>206</sup> The reason for this is simple and appears quite clearly in the famous dictum of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case:

The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.<sup>207</sup>

(14) Thus, the United States of America rightly considered, in its objection to the Syrian Arab Republic’s reservation to the Vienna Convention on the Law of Treaties, that

the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties.<sup>208</sup>

(15) In his dissenting opinion appended to the 1969 judgment of the ICJ in the *North Sea Continental Shelf* cases, *ad hoc* Judge Sørensen summarized the rules applicable to reservations to a declaratory provision of customary law as follows:

the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is ‘generally declaratory of established principles of international law’. Some of these reservations have been objected to by other contracting

<sup>199</sup> G. Teboul, *loc. cit.* (footnote 78 above), p. 700.

<sup>200</sup> See, for example, the Commission’s reports on its eighth (1956) and forty-eighth (1996) sessions, *Yearbook ... 1956*, vol. II, pp. 255–256, para. 26, and *Yearbook ... 1996*, vol. II (Part Two), p. 86, paras. 156–157.

<sup>201</sup> Reuter, “Solidarité...”, *loc. cit.* (footnote 71 above), p. 632 (also reproduced in Reuter, *Le développement ...*, *op. cit. (ibid.)*, p. 371).

<sup>202</sup> See below paragraph (17) of the present commentary; on the issue of the death penalty from the point of view of articles 6 and 7 of the 1966 Covenant on Civil and Political Rights (taking a negative position), see Schabas, “Invalid reservations...”, *loc. cit.* (footnote 109 above), pp. 308–310.

<sup>203</sup> See above paragraph (2) of the present commentary.

<sup>204</sup> For example, on 31 December 2003, the Vienna Convention on Diplomatic Relations was the object of 57 reservations or declarations (of which 50 are still in force) by 34 States parties (currently, 31 States have reservations still in force) (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 90–100 (chap. III.3)) and the 1969 Vienna Convention was the subject of 70 reservations or declarations (of which 60 are still in force) by 35 States (32 at present) (*ibid.*, vol. II (footnote 142 above), pp. 340–351. For its part, the 1966 Covenant on Civil and Political Rights, which (now, at least) seems primarily to codify the general international law currently in force, was the object of 218 reservations or declarations (of which 196 are still in force) by 58 States (*ibid.*, pp. 173–184).

<sup>205</sup> See above paragraph (2) of the present commentary.

<sup>206</sup> In support of this position, see *Oppenheim’s International Law*, 9th ed., vol. I, *Peace*, R. Y. Jennings and A. D. Watts (eds.), Harlow, Longman, 1992, pp. 1243–1244; Teboul, *loc. cit.* (footnote 78 above), p. 711; and P. Weil, “Vers une normativité relative en droit international?”, *Revue générale de droit international public*, vol. 86 (1982), pp. 43–44. See also the authors cited in footnote 185 above or Schabas, “Reservations to human rights treaties”, *loc. cit.* (footnote 135 above), p. 56. Paul Reuter takes the opposing view, arguing that the customary norm no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a conventional mechanism subsequent to the establishment of the customary rule, its application has been suspended (Reuter, “Solidarité...”, *loc. cit.* (footnote 71 above), p. 631 (also reproduced in Reuter, *Le développement ...*, *op. cit. (ibid.)*, p. 370); for a similar argument, see Teboul, *loc. cit.*, pp. 690 and 708. There are serious objections to this view; see below paragraph (2) of guideline 3.1.9.

<sup>207</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 392, at pp. 424–425, para. 73; see also Judge Morelli’s dissenting opinion in the *North Sea Continental Shelf* cases (footnote 173 above), at p. 198.

<sup>208</sup> See *Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), p. 385 (chap. XXIII.1); see also the objections of the Netherlands and Poland, cited in paragraphs (6) and (7) above.



States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.<sup>209</sup>

(16) This means that the (customary) nature of the rule reflected in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation, but that such a reservation can in no way call into question the binding nature of the rule in question in relations between the reserving State or international organization and other States or international organizations, whether or not they are parties to the treaty.

(17) The customary nature of the rule “reflected” in the treaty provision pursuant to which a reservation is formulated must be determined at the moment of such formulation. Nor can it be excluded that the adoption of the treaty might have helped crystallize this nature, particularly if the reservation was formulated long after the conclusion of the treaty.<sup>210</sup>

(18) The somewhat complicated wording of the last part of draft guideline 3.1.8, paragraph 2, may be explained by the diversity *ratione loci* of customary norms: some may be universal in application while others have only a regional scope<sup>211</sup> and may even be applicable only at the purely bilateral level.<sup>212</sup>

### 3.1.9 Reservations contrary to a rule of *jus cogens*

**A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.**

#### *Commentary*

(1) Draft guideline 3.1.9 is a compromise between two opposing lines of argument which emerged during the Commission’s debate. Some members held that the

peremptory nature of the norm to which the reservation related made the reservation in question invalid, while others maintained that the logic behind draft guideline 3.1.8, on reservations to a provision reflecting a customary norm, should apply and that it should be accepted that such a reservation was not invalid in itself, provided it concerned only some aspect of a treaty provision setting forth the rule in question and left the norm itself intact. Both groups agreed that a reservation should not have any effect on the content of the binding obligations stemming from the *jus cogens* norm as reflected in the provision to which it referred. This consensus is reflected in draft guideline 3.1.9; without adopting a position as to whether these opposing arguments are founded or unfounded, it establishes that a reservation should not permit a breach of a peremptory norm of general international law.

(2) According to Paul Reuter, since a reservation, through acceptances by other parties, establishes a “contractual relationship” among the parties, a reservation to a treaty provision that sets forth a peremptory norm of general international law is inconceivable: the resulting agreement would automatically be null and void as a consequence of the principle established in article 53 of the Vienna Convention.<sup>213</sup>

(3) This reasoning is not, however, axiomatic, but is based on one of the postulates of the “opposability” school, according to which the issue of the validity of reservations is left entirely to the subjective judgement of the contracting parties and depends only on the provisions of article 20 of the 1969 and 1986 Vienna Conventions.<sup>214</sup> Yet this reasoning is far from clear;<sup>215</sup> above all, it regards the reservations mechanism as a purely treaty-based process, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it “purports to exclude or to modify the legal effect of *certain provisions of the treaty* in their application” to the reserving State<sup>216</sup> and, if it is accepted, those are indeed its consequences;<sup>217</sup> however, whether or not it is accepted, “neighbouring” international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.<sup>218</sup> Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects a peremptory norm of general international law, either without giving any explanation,<sup>219</sup> or arguing

<sup>209</sup> *North Sea Continental Shelf* (see footnote 173 above), p. 248.

<sup>210</sup> In its judgment of 20 February 1969 in the *North Sea Continental Shelf* cases (see footnote 173 above), the ICJ also recognized that “a norm-creating provision [may constitute] the foundation of, or [generate] a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed” (p. 41, para. 71).

<sup>211</sup> See, in particular, the judgments of the ICJ in *Colombian-Peruvian asylum case*, Judgment of 20 November 1950, *I.C.J. Reports* 1950, p. 266, at pp. 27–277; *Fisheries (United Kingdom v. Norway)*, Judgment of 18 December 1951, *I.C.J. Reports* 1951, p. 116, at pp. 136–139; and *Rights of Nationals of the United States of America in Morocco* (footnote 128 above), p. 200.

<sup>212</sup> See *Right of Passage over Indian Territory, Merits*, Judgment of 12 April 1960, *I.C.J. Reports* 1960, p. 6, at p. 39.

<sup>213</sup> See Reuter, “Solidarité...”, *loc. cit.* (footnote 71 above), p. 625 (also reproduced in Reuter, *Le développement ...*, *op. cit.* (footnote 71 above), p. 363). See also Teboul, *loc. cit.* (footnote 78 above), pp. 691–692.

<sup>214</sup> “The validity of a reservation depends, under the Convention’s system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty” (J. M. Ruda, “Reservations to treaties”, *Collected Courses of the Hague Academy of International Law*, 1975–III, vol. 146 (1977), p. 190).

<sup>215</sup> See the first report of Special Rapporteur Alain Pellet on the law and practice relating to reservations to treaties (footnote 12 above), paras. 100–105.

<sup>216</sup> Article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in draft guideline 1.1; see also draft guideline 1.1.1.

<sup>217</sup> See article 21 of the Vienna Conventions.

<sup>218</sup> See above paragraph (13) of the commentary to draft guideline 3.1.8.

<sup>219</sup> See, for example, Riquelme Cortado, *op. cit.* (footnote 147 above), p. 147. See also the second report of Special Rapporteur Alain Pellet on reservations to treaties (footnote 17 above), paras. 141–142.



that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.<sup>220</sup>

(4) This is also the position of the Human Rights Committee in its General Comment No. 24: “Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.”<sup>221</sup> This formulation is debatable<sup>222</sup> and, in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

(5) It has, however, been asserted that the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts.<sup>223</sup> This is certainly true and in fact constitutes the only intellectually convincing argument for not transposing to reservations to peremptory provisions the reasoning that would not exclude, in principle, the ability to formulate reservations to treaty provisions embodying customary rules.<sup>224</sup>

(6) Conversely, it should be noted that when formulating a reservation, a State may indeed seek to exempt itself from the rule to which the reservation itself relates, and in the case of a peremptory norm of general international law this is out of the question<sup>225</sup>—all the more so because it is inconceivable that a persistent objector

could thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,<sup>226</sup> and on this point there is no reason why the logic followed in respect of customary rules which are merely binding should not be transposed to peremptory norms.

(7) However, as regrettable as this may seem, reservations do not have to be justified, and in fact they seldom are. In the absence of clear justification, therefore, it is impossible for the other contracting parties or for monitoring bodies to verify the validity of the reservation, and it is best to adopt the principle that any reservation to a provision which formulates a rule of *jus cogens* is null and void *ipso jure*.

(8) Yet, even in the eyes of its advocates, this conclusion must be accompanied by two major caveats. First, this prohibition does not result from article 19 (c) of the Vienna Convention but, *mutatis mutandis*, from the principle set out in article 53. Secondly, there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to “secondary” articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision.<sup>227</sup>

(9) This dissociation is illustrated by the line of argument followed by the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*:

In relation to the DRC’s argument that the reservation in question [to article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination] is without legal effect because, on the one hand, the prohibition on racial discrimination is a peremptory norm of general international law and, on the other, such a reservation is in conflict with a peremptory norm,

the Court referred

to its reasoning when dismissing the DRC’s similar argument in regard to Rwanda’s reservation to Article IX of the Genocide Convention (see paragraphs 64–69 above [<sup>228</sup>]): the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court’s jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination.<sup>229</sup>

<sup>226</sup> See paragraph (7) of the commentary to draft guideline 3.1.8.

<sup>227</sup> In this regard, see, for example, the reservations of Malawi and Mexico to the 1979 International Convention Against the Taking of Hostages, subjecting the application of article 16 (dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to article 36 (2) of the Statute of the International Court of Justice, *Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), p. 112 (chap. XVIII.5). There can be no doubt that such reservations are not prohibited in principle; see draft guideline 3.1.13 and the commentary thereto.

<sup>228</sup> On this aspect of the judgment, see below paragraphs (2) and (3) of the commentary to draft guideline 3.1.13.

<sup>229</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006* (see footnote 99 above), p. 35, para. 78.

<sup>220</sup> See also the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases (see footnote 173 above), p. 182.

<sup>221</sup> *Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (see footnote 165 above), para. 8. In its comments, France argued that “[p]aragraph 8 of general comment No. 24 (52) is drafted in such a way as to link the two distinct legal concepts: of ‘peremptory norms’ and rules of ‘customary international law’ to the point of confusing them” (*Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (see footnote 189 above), vol. I, Annex VI, p. 104, para. 3).

<sup>222</sup> See the doubts expressed on this subject by the United States of America which, in its commentary on General Comment No. 24, transposes to provisions which set forth peremptory norms the solution that is essential for those norms that formulate rules of customary law: “[i]t is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 165 above), vol. I, p. 132).

<sup>223</sup> Teboul, *loc. cit.* (footnote 78 above), p. 707, note 52, referring to J.-D. Sicault, “Du caractère obligatoire des engagements unilatéraux en droit international public”, *Revue générale de droit international public*, vol. 83 (1979), p. 663, and the legal writings quoted therein.

<sup>224</sup> This is true *a fortiori* if one considers the reservation/acceptance “pair” as an agreement amending the treaty in the relations between the two States concerned. (See Coccia, *loc. cit.* (footnote 182 above), pp. 30–31; see also the position of Reuter referred to above in paragraph (2) of the present commentary); this analysis, however, is unconvincing (see paragraph (3) of the present commentary).

<sup>225</sup> There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*. See, however, the reservation formulated by Myanmar when it acceded, in 1993, to the 1989 Convention on the rights of the child. Myanmar reserved the right not to apply article 37 of the Convention and to exercise “powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation” in respect of children, in order to “protect the supreme national interest” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 339, note 29 (chap. IV.11)); this reservation, to which four States expressed objections (on the basis of referral to domestic legislation, not the conflict of the reservation with a peremptory norm), was withdrawn in 1993 (*ibid.*).

In this case, it is clear that the Court found that the peremptory nature of the prohibition on racial discrimination did not invalidate the reservations relating not to the prohibitory norm itself but to the rules surrounding it.

(10) Since it proved impossible to opt for one or the other of these two opposing lines of argument, the Commission decided to tackle the question from a different angle, namely that of the legal effects which a reservation could (or could not) produce. Having its basis in the actual definition of reservations, draft guideline 3.1.9 states that a reservation cannot in any way exclude or modify the legal effect of a treaty in a manner contrary to *jus cogens*. For the sake of conciseness, it did not seem necessary to reproduce the texts of draft guidelines 1.1 and 1.1.1 in full, but the phrase “exclude or modify the legal effect of a treaty” must be understood to mean to exclude or modify both the “legal effect of certain provisions of the treaty” and “the legal effect ... of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation”.

(11) The draft guideline covers the case in which, although no rule of *jus cogens* was reflected in the treaty, a reservation would require that the treaty be applied in a manner conflicting with *jus cogens*. For instance, a reservation could be intended to exclude a category of persons from benefiting from certain rights granted under a treaty, on the basis of a form of discrimination that would be contrary to *jus cogens*.

(12) Some Commission members did not think that draft guideline 3.1.9 had a direct bearing on the questions examined in this part of the Guide to Practice and had to do more with the effects of reservations than with their validity. The same members also contended that the draft guideline did not answer the question, which was nevertheless significant, of the material validity of reservations to treaty provisions reflecting *jus cogens* norms.

### 3.1.10 Reservations to provisions relating to non-derogable rights

**A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.**

#### Commentary

(1) In appearance, the question of reservations to non-derogable obligations contained in human rights treaties, as well as in certain conventions on the law of armed conflict,<sup>230</sup> environmental protection<sup>231</sup> or diplomatic

relations,<sup>232</sup> is very similar to the question of reservations to treaty provisions reflecting peremptory norms of general international law. It could, however, be resolved in an autonomous manner.<sup>233</sup> States frequently justify their objections to reservations to such provisions on grounds of the treaty-based prohibition on suspending their application whatever the circumstances.<sup>234</sup>

(2) Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.<sup>235</sup> However, the two are not necessarily identical.<sup>236</sup> According to the Human Rights Committee:

While there is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.<sup>237</sup>

This last point is question-begging and is undoubtedly motivated by reasons of convenience, but is not based on any principle of positive law and could only reflect the progressive development of international law, rather than codification *stricto sensu*. Incidentally, it follows a *contrario* from this position that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation.

(3) The Inter-American Court on Human Rights declared in its advisory opinion of 8 September 1983 on *Restrictions to the Death Penalty*:

Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or

wastes and their disposal), they very often prohibit all reservations. See also article 311, paragraph 3, of the United Nations Convention on the Law of the Sea.

<sup>232</sup> See article 45 of the 1961 Vienna Convention on Diplomatic Relations. See also *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 3, at p. 40, para. 86.

<sup>233</sup> On this issue, see Riquelme Cortado, *op. cit.* (footnote 147 above), pp. 147–159.

<sup>234</sup> See article 4, paragraph 2, of the 1966 International Covenant on Civil and Political Rights, article 15 (2) of the European Convention on Human Rights (see also article 3 of Protocol No. 6, article 4 (3) of Protocol No. 7 and article 2 of Protocol No. 13), and article 27 of the American Convention on Human Rights: “Pact of San José, Costa Rica”. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter on Human and Peoples' Rights contain clauses of this type (see F. Ouguergouz, “L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général”, *Revue générale de droit international public*, vol. 98 (1994), pp. 289–336).

<sup>235</sup> See the Human Rights Committee's General Comment No. 24: “some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms ... —the prohibition of torture and arbitrary deprivation of life are examples” (*Official Records of the General Assembly, Fiftyth Session, Supplement No. 40* (see footnote 165 above), para. 10).

<sup>236</sup> See General Comment No. 29 Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40* (A/56/40), vol. I, Annex VI, para. 11. See also Riquelme Cortado, *op. cit.* (footnote 147 above), pp. 153–155, or K. Teraya, “Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights”, *European Journal of International Law*, vol. 12, No. 5 (2001), pp. 917–941.

<sup>237</sup> General Comment No. 24, *Official Records of the General Assembly, Fiftyth Session, Supplement No. 40* (see footnote 165 above), para. 10.

<sup>230</sup> The principles set out in common article 3, paragraph 1, of the 1949 Geneva Conventions for the protection of war victims are non-derogable and must be respected “at any time and in any place”.

<sup>231</sup> Although most environmental protection conventions contain rules considered to be non-derogable (see article 11 of the Basel Convention on the control of transboundary movements of hazardous

derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.<sup>238</sup>

(4) In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question is excluded by the treaty, “with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are ... without any *caveat*, incompatible with the object and purpose of those treaties”.<sup>239</sup> This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.<sup>240</sup> It is this second problem that needs to be resolved.

(5) It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out—either because they would hold in check a peremptory norm, assuming that such reservations are impermissible,<sup>241</sup> or because they would be contrary to the object and purpose of the treaty—this is not necessarily always the case.<sup>242</sup> The non-derogable nature of a right protected by a human rights treaty reveals the importance with which it is viewed by the contracting parties, and it follows that any reservation aimed purely and simply at preventing its implementation is without doubt contrary

to the object and purpose of the treaty.<sup>243</sup> It does not follow, however, that this non-derogable nature in itself prevents a reservation from being formulated to the provision setting out the right in question, provided that it applies only to certain limited aspects relating to the implementation of that right.

(6) This balanced solution is well illustrated by Denmark’s objection to the United States reservations to articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights:

Denmark would like to recall article 4, para 2 of the Covenant according to which no derogation from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with regard to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.<sup>244</sup>

Denmark objected not only because the reservations of the United States related to non-derogable rights, but also because their wording was such that they left essential provisions of the treaty empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.<sup>245</sup>

(7) Naturally, the fact that a provision may in principle be the object of a derogation does not mean that all reservations relating to it will be valid.<sup>246</sup> The criterion of compatibility with the object and purpose of the treaty also applies to them.

(8) This leads to several observations:

– First, different principles apply in evaluating the validity of reservations, depending on whether they relate to provisions setting forth rules of *jus cogens* or to non-derogable rules.

– In the first case, questions persist as to whether it is possible to formulate a reservation to a treaty provision setting out a peremptory norm, because the reservation

<sup>238</sup> *Restrictions to the Death Penalty* (see footnote 109 above), para. 61.

<sup>239</sup> Separate opinion of Judge Antonio Augusto Cançado Trindade, appended to the decision of the Inter-American Court dated 22 January 1999 in *Blake (Reparations (Art. 63(1) of the American Convention on Human Rights), Judgement of 22 January 1999, Series C, No. 48*, para. 11; see the favourable comment by Riquelme Cortado, *op. cit.* (footnote 147 above), p. 155. To the same effect, see the objection by the Netherlands mentioning that the United States reservation to article 7 of the 1966 International Covenant on Civil and Political Rights “has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogation, not even in times of public emergency, are permitted” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), (chap. IV.4)).

<sup>240</sup> See the commentary by the United Kingdom on General Comment No. 24 of the Human Rights Committee: “Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing” (*Official Records of the General Assembly, Fiftieth session, Supplement No. 40* (see footnote 165 above) p. 131, para. 6).

<sup>241</sup> Regarding this ambiguity, see above draft guideline 3.1.9 and the commentary thereto.

<sup>242</sup> See the final working paper submitted in 2004 by Ms. Françoise Hampson on reservations to human rights treaties (footnote 190 above), para. 52; R. Higgins, “Human rights: some questions of integrity”, *The Modern Law Review*, vol. 52, No. 1 (1989), p. 15; McBride, *loc. cit.* (footnote 160 above), pp. 163–164; J. Polakiewicz, *Treaty-Making in the Council of Europe*, Strasbourg, Council of Europe, 1999, p. 113, or C. J. Redgwell, “Reservations to treaties and Human Rights Committee General Comment No. 24 (52)”, *International and Comparative Law Quarterly*, vol. 46 (1997), p. 402; *contra*: Lijnzaad, *op. cit.* (footnote 81 above), p. 91.

<sup>243</sup> See above draft guideline 3.1.5: “A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty ...”.

<sup>244</sup> *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 189 (chap. IV.4); see also, although they are less clearly based on the non-derogable nature of articles 6 and 7, the objections of Belgium, Finland, Germany, Italy, the Netherlands, mentioned above, and of Norway, Portugal or Sweden (*ibid.*, pp. 194–196).

<sup>245</sup> See the many examples given by Schabas relating to the 1966 International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights: “Pact of San José, Costa Rica”, Schabas, “Reservations to human rights treaties...”, *loc. cit.* (footnote 135 above), pp. 51–52, footnote 51.

<sup>246</sup> See Redgwell, *loc. cit.* (footnote 242 above), p. 402.

might threaten the integrity of the norm, the application of which (unlike that of customary rules, which permit derogations) must be uniform.

– In the second case, however, reservations remain possible provided they do not call into question the principle set forth in the treaty provision; in that situation, the methodological guidance contained in draft guideline 3.1.6<sup>247</sup> is fully applicable.

– Nevertheless, it is necessary to proceed with the utmost caution, and this is why the Commission has drafted the first sentence of draft guideline 3.1.10 in the negative (“A State or an international organization *may not* formulate a reservation ... *unless* ...”), as it has done on several occasions in the past when it wished to draw attention to the exceptional nature of certain behaviour in relation to reservations.<sup>248</sup>

– Moreover, in elaborating this draft guideline the Commission took care not to give the impression that it was introducing an additional criterion of permissibility with regard to reservations: the assessment of compatibility referred to in the second sentence of the provision concerns the reservation’s relationship to “the essential rights and obligations arising out of [the] treaty”, the effect on “an essential element of the treaty” being cited as one of the criteria for incompatibility with the object and purpose.<sup>249</sup>

### 3.1.11 Reservations relating to internal law

**A reservation by which a State or an international organization purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific norms of the internal law of that State or rules of that organization may be formulated only insofar as it is compatible with the object and purpose of the treaty.**

#### *Commentary*

(1) A reason frequently put forward by States in support of their formulation of a reservation relates to their desire to preserve the integrity of specific norms of their internal law.

(2) Although similar in certain respects, a distinction must be drawn between such reservations and those arising out of vague or general reservations. The latter are often formulated by reference to internal law in general or to whole sections of such law (such as constitutional, criminal or family law) without any further detail, thus making it impossible to assess the compatibility of the reservation in question with the object and purpose of the treaty. The question which draft guideline 3.1.11 seeks to

answer is a different one, namely whether the formulation of a reservation—clearly expressed and sufficiently detailed—could be justified by considerations arising from internal law.<sup>250</sup>

(3) Here again, in the Commission’s view, a nuanced response is essential, and it is certainly not possible to respond categorically in the negative, as certain objections to reservations of this type would seem to suggest. For instance, several States have objected to the reservation made by Canada to the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, on the grounds that the reservation “render[s] compliance with the provisions of the Convention dependent on certain norms of Canada’s internal legislation”.<sup>251</sup> Similarly, Finland objected to reservations made by several States to the 1989 Convention on the rights of the child on the “general principle of observance of treaties according to which a party may not invoke the provisions of its internal law as justification for failure to perform its treaty obligations”.<sup>252</sup>

(4) This ground for objection is unconvincing. Doubtless, in accordance with article 27 of the Vienna Convention,<sup>253</sup> no party may invoke the provisions of its domestic law as justification for failure to apply a treaty.<sup>254</sup> The assumption, however, is that the problem is settled, in the sense that the provisions in question are applicable to the reserving States, but that is precisely the issue. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its domestic law, which it is not in a position to amend,<sup>255</sup> at least initially.<sup>256</sup> Moreover,

<sup>250</sup> See above paragraphs (4) to (6) of the commentary to draft guideline 3.1.7.

<sup>251</sup> See the objection by Spain, as well as those by France, Norway, Ireland, Luxembourg and Sweden in *Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), pp. 495–498 (chap. XXVII.4).

<sup>252</sup> Objections by Finland to the reservations of Indonesia, Malaysia, Oman, Qatar and Singapore, *ibid.*, vol. I, pp. 331–332 (chap. IV.11). See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, *ibid.*, pp. 130–131 (chap. IV.1); for the text of the reservation itself, see above paragraph (6) of the commentary to draft guideline 3.1.7; see also paragraph (4) of the same commentary.

<sup>253</sup> Expressly invoked, for instance, by Estonia and the Netherlands to support their objections to this same reservation by the United States, *ibid.*, pp. 130–131.

<sup>254</sup> In the words of article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46” (which has to do with “imperfect ratifications”). The rule set out in article 26 of the Convention concerns treaties in force, whereas, by definition, a reservation purports to exclude or to modify the legal effect of the provision in question in its application to the author of the reservation.

<sup>255</sup> See Schabas, “Reservations to the Convention on the rights of the child”, *loc. cit.* (footnote 108 above), pp. 479–480 and also “Reservations to human rights treaties...”, *loc. cit.* (footnote 135 above), p. 59.

<sup>256</sup> Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of Estonia’s reservation to the application of article 6, or Lithuania’s to article 5, paragraph 3, of the European Convention on Human Rights which gave one-year time limits (<http://conventions.coe.int/>)), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, commitments which were in fact kept—see *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 281, note 25,

<sup>247</sup> “Determination of the object and purpose of the treaty.”

<sup>248</sup> See draft guidelines 2.3.1 (“Late formulation of a reservation”), 2.4.6 (“Late formulation of an interpretative declaration”), 2.4.8 (“Late formulation of a conditional interpretative declaration”), 2.5.11 (“Effect of a partial withdrawal of a reservation”), 3.1.3 (“Permissibility of reservations not prohibited by the treaty”) and 3.1.4 (“Permissibility of specified reservations”).

<sup>249</sup> See above draft guideline 3.1.5 and, in particular, paragraph (14) (b) of the commentary thereto.

article 57 of the European Convention on Human Rights does not simply authorize a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts even that authority exclusively to instances where “a law ... in force in its territory is not in conformity with the provision”.<sup>257</sup> Besides the European Convention on Human Rights, there are indeed reservations relating to the implementation of internal law that give rise to no objections and have in fact not met with objections.<sup>258</sup> On the other hand, this same article expressly prohibits “reservations of a general character”.

(5) What matters here is that the State formulating the reservation should not use its domestic law<sup>259</sup> as a cover for not actually accepting any new international obligation,<sup>260</sup> even though the treaty’s aim is to change the

and p. 283, note 40 (chap. IV.8)); see also Indonesia’s statement upon accession to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal of 22 March 1989, *ibid.* vol. II, p. 487 (chap. XXVII.3)). It is also not unusual for a State to withdraw a reservation made without any time indication after it has amended the provisions of its national law that had prompted the reservation: as in the case of withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women (see *ibid.* vol. I, pp. 281–282, notes 28 and 32, and pp. 286–287, note 58 (chap. IV.8)); see also the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservations to article 6, paragraph 1, of the European Convention on Human Rights (<http://conventions.coe.int/>). Such practices are laudable and should definitely be encouraged (see draft guideline 2.5.3 in the Guide to Practice and the commentary thereto, *Yearbook ... 2003*, vol. II (Part Two), p. 76); yet they cannot be used as an argument for the invalidity of the principle of draft reservations on the grounds of domestic law.

<sup>257</sup> See paragraph (8) of the commentary to draft guideline 3.1.2, *Yearbook ... 2006*, vol. II (Part Two), chap. VIII, sect. C.2.

<sup>258</sup> See, for example, Mozambique’s reservation to the International Convention against the taking of hostages of 17 December 1979, *Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), p. 112 (chap. XVIII.5). A reservation regarding the extradition of Mozambican nationals that reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism, *ibid.*, p. 167 (chap. XVIII.11), the reservations by Guatemala and the Philippines to the 1962 Convention on Consent for Marriage, Minimum Age for Marriage and Registration of Marriages, *ibid.*, p. 93 (chap. XVI.3); all the reservations by Colombia (made upon signature), Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *ibid.*, vol. I, pp. 462–464 (chap. VI.19). France’s reservation to article 5, paragraph 1, of the European Convention on Human Rights has given rise to more discussion: see N. Questiaux, “La Convention européenne des droits de l’homme et l’article 16 de la Constitution du 4 octobre 1958”, *Revue des Droits Humains/Human Rights Journal*, vol. 3, No. 4 (1970), pp. 651–663; A. Pellet, “La ratification par la France de la Convention européenne des droits de l’homme”, *Revue du droit public et de la science politique en France et à l’étranger*, vol. 90 (1974), pp. 1358–1365; or V. Coussirat-Coustère, “La réserve française à l’article 15 de la Convention européenne des droits de l’homme”, *Journal du droit international*, vol. 102, No. 2 (1975), pp. 269–293.

<sup>259</sup> Or in the case of international organizations their “rules of the organization”: the term is taken from articles 27 and 46 of the 1986 Vienna Convention. It also appears (and is defined) in article 4, paragraph 4, of the Commission’s articles on responsibility of international organizations (see *Yearbook ... 2004*, vol. II (Part Two), p. 48). However, the reference to the rules of the organization may not raise a similar problem if the reservation only applies to the relations between the organization and its members.

<sup>260</sup> In its concluding observations of 6 April 1995 on the initial report of the United States of America on its implementation of the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee “regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken

practice of States parties to the treaty. While article 27 of the Vienna Conventions cannot rightly be said to apply to the case in point,<sup>261</sup> it should nevertheless be borne in mind that national laws are “merely facts” from the standpoint of international law<sup>262</sup> and that the very aim of a treaty can be to lead States to modify them.

(6) The Commission preferred the term “particular norms of internal law” to the term “provisions of internal law”, which ran the risk of suggesting that only the written rules of a constitutional, legislative or regulatory nature were involved, whereas draft guideline 3.1.11 applied also to customary norms or norms of jurisprudence. Similarly, the term “rules of the organization” means not only the “established practice of the organization” but also the constituent instruments and “decisions, resolutions and other acts taken by the organization in accordance with the constituent instruments”.<sup>263</sup>

(7) The Commission is aware that draft guideline 3.1.11 may, on first reading, seem to be merely a repetition of the principle set out in article 19 (c) of the Vienna Conventions and reproduced in draft guideline 3.1. Its function is important, nonetheless: it is to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of particular norms of internal law—it being understood that, as in the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate.

(8) A proposal was also made to create an additional draft guideline dealing with reservations to treaty clauses relating to the implementation of the treaty in internal law.<sup>264</sup> Without underestimating the potential significance of this issue, the Commission was of the view that it was premature to devote a separate draft article to it, given that, in practical terms, the problem did not seem to have arisen and that the purpose of draft articles 3.1.7 to 3.1.13 was to illustrate the general guidance given in draft guideline 3.1.5, with examples chosen on the basis of their

together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 165 above), para. 279). See the analyses by Schabas, “Invalid reservations...”, *loc. cit.* (footnote 109 above), pp. 277–325; and J. McBride, *loc. cit.* (footnote 160 above), p. 172.

<sup>261</sup> See above paragraph (4) of the present commentary.

<sup>262</sup> See *Certain German interests in Polish Upper Silesia, Merits, Judgment No. 7, 25 May 1926, P.C.I.J., Series A, No. 7*, p. 19; see also Arbitration Commission of the Conference on Yugoslavia, *Opinion No. 1 of 29 November 1991*, reproduced in ILM, vol. 31 (1992), p. 1494. The principle is confirmed in article 4 of the articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session, in 2001, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 40–42.

<sup>263</sup> *Yearbook ... 2004*, vol. II (Part Two), p. 48 (draft articles on responsibility of international organizations, art. 4, para. 4).

<sup>264</sup> See, for example, article I of the Convention relating to a uniform law on the formation of contracts for the international sale of goods (The Hague, 1 July 1964); article 1 of the European Convention providing a Uniform Law on Arbitration (Strasbourg, 20 January 1966); or articles 1 and 2 of the International Convention against the taking of hostages (New York, 17 December 1979).

practical importance for States.<sup>265</sup> The Commission in fact considers that reservations to provisions of this type would not be valid if they had the effect of hindering the effective implementation of the treaty.

### 3.1.12 Reservations to general human rights treaties

**To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.**

#### Commentary

(1) It is in the area of human rights that the most reservations have been made and the liveliest debates on their validity have taken place. Whenever necessary, the Commission has drawn attention to specific problems that could arise.<sup>266</sup> It was nonetheless deemed useful to have a specific draft guideline dealing with reservations made to general treaties such as the European, Inter-American and African conventions or the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>267</sup>

(2) In the case of the latter, the Human Rights Committee stated in its General Comment No. 24 that:

In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.<sup>268</sup>

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.<sup>269</sup> That is not, however, the

position of States parties which have not systematically formulated objections to reservations of this type,<sup>270</sup> and the Committee itself does not go that far because, in the paragraphs following the statement of its position of principle, it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant.<sup>271</sup> It does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be invalid as such.

(3) Likewise, in the case of the 1989 Convention on the rights of the child, a great many reservations have been made to the provisions concerning adoption.<sup>272</sup> As has been noted, “[i]t would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose”.<sup>273</sup>

(4) In contrast with treaties relating to a particular human right, such as the conventions on torture or racial discrimination, the object and purpose of general human rights treaties is a complex matter. These treaties cover a wide range of human rights and are characterized by the global nature of the rights that they are intended to protect. Nevertheless, some of the protected rights may be more essential than others;<sup>274</sup> moreover, even in the case of essential rights, one cannot preclude the validity of a reservation dealing with certain limited aspects of the implementation of the right in question. In this respect reservations to general human rights treaties pose similar problems to reservations to provisions relating to non-derogable rights.<sup>275</sup>

*organisé conjointement par le Gouvernement de la République fédérale d'Allemagne et le secrétariat général du Conseil de l'Europe (Frankfort, 9–12 avril 1980), Paris, Pedone, 1982, p. 99 (also in English: “Reservations and human rights conventions”, *The Human Rights Review*, vol. 6, No. 1 (1981), p. 28) or *Les réserves aux traités multilatéraux*, op. cit. (footnote 173 above), p. 249. See also Coccia, loc. cit. (footnote 182 above), p. 16, or R. P. Anand, “Reservations to multilateral conventions”, *The Indian Journal of International Law*, vol. 1, No. 1 (July 1960), p. 88; see also the commentaries on Human Rights Committee General Comment No. 24 (see footnote 165 above), by E. A. Baylis, “General Comment 24: confronting the problem of reservations to human rights treaties”, *Berkeley Journal of International Law*, vol. 17 (1999), pp. 277–329; Redgwell, “Reservations to treaties...”, loc. cit. (footnote 242 above), pp. 390–412; R. Higgins, “Introduction”, in Gardner (ed.), op. cit. (footnote 89 above), pp. xvii–xxix; or K. Korkeila, “New challenges to the regime of reservations under the International Covenant on Civil and Political Rights”, *European Journal of International Law*, vol. 13, No. 2 (2002), pp. 437–477.*

<sup>270</sup> See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (see *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 182–183 (chap. IV.4)). See also the reservation by Barbados to article 14, paragraph 3, or the reservation by Belize to the same provision (*ibid.*, p. 179); or the reservation by Mauritius to article 22 of the Convention on the rights of the child (*ibid.*, p. 326 (chap. IV.11)).

<sup>271</sup> General Comment No. 24 (see footnote 165 above); these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see above draft guidelines 3.1.8–3.1.10.

<sup>272</sup> Articles 20 and 21; see *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 321–335 (chap. IV.11).

<sup>273</sup> Schabas, “Reservations to the Convention on the rights of the child”, loc. cit. (footnote 108 above), p. 480.

<sup>274</sup> See above paragraph (3) of the present commentary.

<sup>275</sup> See above draft guideline 3.1.10, and in particular paragraphs (4) to (8) of the commentary thereto.

<sup>265</sup> See above paragraph (15) of the commentary to draft guideline 3.1.5.

<sup>266</sup> With regard to guidelines on the permissibility of reservations, see in particular paragraphs (8) and (9) of the commentary to draft guideline 3.1.7 (Vague or general reservations), paragraphs (8) and (9) of the commentary to draft guideline 3.1.8 (Reservations to a provision reflecting a customary norm) or paragraph (4) of the commentary to draft guideline 3.1.9 (Reservations contrary to a rule of jus cogens) and the commentary to draft guideline 3.1.10 (*Reservations to provisions relating to non-derogable rights*), *passim*.

<sup>267</sup> These treaties are not the only ones covered by this draft guideline: a treaty such as the 1989 Convention on the rights of the child also seeks to protect a very wide range of rights. See also the 1979 International Convention on the Elimination of All Forms of Discrimination against Women or the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

<sup>268</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 165 above), para. 7. See the final working paper submitted in 2004 by Ms. Françoise Hampson on reservations to human rights treaties (footnote 190 above), para. 50.

<sup>269</sup> Some authors have maintained that the reservations regime is completely incompatible with human rights. See P.-H. Imbert, who does not share this radical view, “La question des réserves et les conventions en matière de droits de l’homme”, *Actes du cinquième colloque international sur la Convention européenne des droits de l’homme*,

(5) Draft guideline 3.1.12 attempts to strike a particularly delicate balance between these different considerations by combining three elements:

- “the indivisibility, interdependence and interrelatedness of the rights set out in the treaty”;
- “the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty”; and
- “the gravity of the impact the reservation has upon it”.

(6) The wording of the first element is taken from paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the 1993 World Conference on Human Rights. It emphasizes the global nature of the protection afforded by general human rights treaties and is intended to prevent their dismantling.<sup>276</sup>

(7) The second element qualifies the previous one by recognizing—in keeping with practice—that certain rights protected by these instruments are no less important than other rights—and, in particular, non-derogable ones.<sup>277</sup> The wording used signals that the assessment must take into account both the rights concerned (substantive approach) and the provision of the treaty in question (formal approach), since it has been noted that one and the same right may be the subject of several provisions. As for the expression “general thrust of the treaty”, it is taken up in draft guideline 3.1.5.<sup>278</sup>

(8) Lastly, the reference to “the gravity of the impact the reservation has upon” the right or the provision with respect to which it was made indicates that even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.

### 3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty

**A reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty is not, in itself, incompatible with the object and purpose of the treaty, unless:**

**(a) the reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*; or**

**(b) the reservation has the effect of excluding the reserving State or international organization from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that it has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect.**

<sup>276</sup> Vienna Declaration and Programme of Action (A/CONF.157/24 (Part I), chap. III). This wording has since been regularly adopted—see in particular General Assembly resolutions on human rights, which systematically use the expression.

<sup>277</sup> See draft guideline 3.1.10 above.

<sup>278</sup> See in particular paragraph (14) (b) of the commentary to draft guideline 3.1.5 above.

## Commentary

(1) In his first report on the law of treaties, Fitzmaurice categorically stated: “It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties.”<sup>279</sup> His position, obviously inspired by the cold war debate on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, is too sweeping; moreover, it was rejected by the ICJ, which, in its orders of 2 June 1999 in response to Yugoslavia’s requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which gives the Court jurisdiction to hear all disputes relating to the Convention,<sup>280</sup> even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.<sup>281</sup>

(2) In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the ICJ came to the same conclusion with regard to the reservation of Rwanda to that same provision, stating that “that reservation does not bear on the substance of the law, but only on the Court’s jurisdiction” and that “it therefore does not appear contrary to the object and purpose of the Convention”.<sup>282</sup> It upheld that position in its judgment of 3 February 2006: in response to the Democratic Republic of the Congo, which had held that the Rwandan reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide “was invalid”, after reaffirming the position it had taken in its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>283</sup> according to which a reservation to that Convention would be permitted provided it was not incompatible with the object and purpose of the Convention, the Court concluded:

Rwanda’s reservation to Article IX of the [Convention on the Prevention and Punishment of the Crime of Genocide] bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation,

<sup>279</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, para. 96; this was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (*ibid.*, p. 115).

<sup>280</sup> See *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 761, at p. 772, paras. 29–33, and (*Yugoslavia v. United States of America*), *ibid.*, p. 916, at pp. 923–924, paras. 21–25.

<sup>281</sup> See *Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), pp. 129–132 (chap. IV.1) (see in particular the clear objections to that effect of Brazil, China, Mexico and the Netherlands).

<sup>282</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 219, at p. 246, para. 72.

<sup>283</sup> See I.C.J. Reports 1951, p. 15.



application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.<sup>284</sup>

The ICJ, confirming its prior case law, thus gave effect to Rwanda's reservation to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide. This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.<sup>285</sup>

(3) In their joint separate opinion, however, several judges stated the view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty's object and purpose: it depended on the particular case.<sup>286</sup>

(4) The Human Rights Committee, meanwhile, felt that reservations to the 1966 International Covenant on Civil and Political Rights relating to guarantees of its implementation and contained both in the Covenant itself and in the Optional Protocol thereto could be contrary to the object and purpose of those instruments:

These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.<sup>287</sup>

<sup>284</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006* (see footnote 99 above), para. 67.

<sup>285</sup> See in this connection Riquelme Cortado, *op. cit.* (footnote 147 above), pp. 192–202. As it happens, objections to reservations to dispute settlement clauses are rare. Apart from the objections raised to reservations to article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, however, see the objections formulated by several States to the reservations to article 66 of the 1969 Vienna Convention, in particular the objections of Germany, Canada, Egypt, the United States of America (which argued that the reservation of the Syrian Arab Republic “is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference” (*Multilateral Treaties Deposited with the Secretary-General*, vol. II (see footnote 142 above), p. 385 (chap. XXIII.1)), Japan, New Zealand, the Netherlands (“provisions regarding the settlement of disputes, as laid down in Article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected” (*ibid.*, p. 382)), the United Kingdom (“These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference.” (*ibid.*, p. 384)) and Sweden (espousing essentially the same position as the United Kingdom (*ibid.*, p. 383)).

<sup>286</sup> Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma to the judgment of 3 February 2006 referred to in footnote 284 above, para. 21.

<sup>287</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 165 above), para. 11; see also the final working paper submitted in 2004 by Ms. Françoise Hampson on reservations to human rights treaties (footnote 190 above), para. 55.

With respect to the Optional Protocol, the Committee adds:

A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with the obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.<sup>288</sup>

Based on this reasoning, the Human Rights Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.<sup>289</sup>

(5) The European Court of Human Rights, in the *Loizidou* case, concluded from an analysis of the object and purpose of the European Convention on Human Rights “that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their ‘jurisdiction’ from supervision by the Convention institutions”<sup>290</sup> and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.<sup>291</sup>

(6) This body of case law led the Commission to:

(a) recall that the formulation of reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty is not in itself precluded; this is the purpose of the “*chapeau*” of draft guideline 3.1.13;

(b) unless the regulation or monitoring in question is the purpose of the treaty instrument to which a reservation is being made; and

<sup>288</sup> *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (see footnote 165 above), para. 13. In the following paragraph, the Committee “considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose”.

<sup>289</sup> Communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, 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.A, para. 6.7. To justify its reservation Trinidad and Tobago argued that it accepted “the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, [but it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant” (*Multilateral Treaties Deposited with the Secretary-General*, vol. I (see footnote 141 above), p. 234 (chap. IV.5)). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole (*ibid.*, pp. 236–237, note 3).

<sup>290</sup> *Loizidou v. Turkey* (see footnote 115 above), p. 28, para. 77.

<sup>291</sup> *Ibid.*, paras. 70–89; see in particular paragraph 79. See also the decision of 4 July 2001 of the Grand Chamber on the admissibility of Application no. 48787/99 in the case of *Ilie Ilașcu et al. v. Moldova and the Russian Federation*, p. 20, or the judgment of the Grand Chamber of 8 April 2004 in the case of *Assanidze v. Georgia* (Application no. 71503/01), para. 140.



(c) nevertheless indicate that a State or an international organization cannot minimize its substantial prior treaty obligations by formulating a reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty at the time it accepts the provision.

(7) Although some members have disagreed, the Commission felt that there was no reason to draw a

distinction between these two types of provisions: even if their purposes are somewhat different,<sup>292</sup> the reservations that can be formulated to both types give rise to the same type of problems, and splitting them into two separate draft guidelines would have entailed setting out the same rules twice.

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<sup>292</sup> In part simply because the (non-binding) settlement of disputes could be one of the functions of a treaty monitoring body and could be part of its overall task of monitoring.