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

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THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

[Agenda item 5]

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

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Multilateral instruments cited in the present report

	<i>Source</i>
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	Ibid., vol. 213, p. 221.
Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions (Strasbourg, 6 May 1963)	Ibid., vol. 1496, p. 245.
Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (Strasbourg, 28 April 1983)	Ibid., p. 281.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	Ibid., vol. 189, p. 137.
Protocol relating to the Status of Refugees (New York, 31 January 1967)	Ibid., vol. 606, p. 267.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	Ibid., vol. 276, p. 191.
Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and material (New York, 4 June 1954)	Ibid., p. 191.
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	Ibid., vol. 282, p. 249.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956)	Ibid., vol. 266, p. 3.
Convention on the Nationality of Married Women (New York, 20 February 1957)	Ibid., vol. 309, p. 65.
Convention against Discrimination in Education (Paris, 14 December 1960)	Ibid., vol. 429, p. 93.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961)	Ibid., vol. 496, p. 43.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	Ibid., vol. 660, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	Ibid., vol. 999, p. 171.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	Ibid., vol. 1155, p. 331.
American Convention on Human Rights: (San José, 22 November 1969)	Ibid., vol. 1144, p. 123.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975)	Ibid., vol. 976, p. 105.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	Ibid., vol. 1946, p. 3.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	Ibid., vol. 1249, p. 13.

	<i>Source</i>
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	<i>Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations</i> , vol. II (United Nations publication, Sales No. E.94.V.5).
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg, 26 November 1987)	United Nations, <i>Treaty Series</i> , vol. 1561, p. 363.
Convention on the Rights of the Child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, p. 3.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990)	<i>Official Records of the General Assembly, Forty-fifth Session, Supplement No. 49A</i> , resolution 45/158, annex.
Protocol to the Antarctic Treaty on Environmental Protection (Madrid, 4 October 1991)	<i>International Legal Materials</i> (Washington, D.C.), vol. XXX, No. 6 (November 1991), p. 1461.
United Nations Framework Convention on Climate Change (New York, 9 May 1992)	United Nations, <i>Treaty Series</i> , vol. 1771, p. 107.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	<i>Ibid.</i> , vol. 1760, p. 79.
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Paris, 13 January 1993)	<i>Ibid.</i> , vol. 1974, p. 45.

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CHAPTER I

Overview of the study

A. First report on reservations to treaties and the outcome

1. In accordance with the wishes of the General Assembly,¹ the Special Rapporteur presented to the forty-seventh session of the Commission a preliminary report on the law and practice relating to reservations to treaties.² In three chapters, this report:

(a) Gave a brief description of the Commission’s previous work on reservations and the outcome;

(b) Provided a brief inventory of the problems of the topic; and

(c) Put forward a number of suggestions as to the scope and form of the Commission’s future work.

2. In accordance with the Commission’s consideration of the topic, the Special Rapporteur summarized as follows the conclusions he had drawn from these debates:

(a) The Commission considers that the title of the topic should be amended to read “Reservations to treaties”;

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

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

(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.³

3. In the Commission’s view, these conclusions constituted “the result of the preliminary study requested by General Assembly resolutions 48/31 and 49/51. The Commission understood that the model clauses on reservations, to be inserted in multilateral treaties, would be designed to minimize disputes in the future”.⁴

4. Following the Sixth Committee’s discussions of the report of the Commission, the General Assembly, in its resolution 50/45 of 11 December 1995, noted the beginning of the work of the Commission on this topic and invited it “to continue its work on [this topic] along the lines indicated in the report”.⁵

5. Moreover, at its 2416th meeting on 13 July 1995, the Commission “authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions”.⁶ In its above-mentioned resolution 50/45, the General Assembly had invited “States and international organizations, particularly those which are depositaries, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties”.⁷

6. In accordance with these provisions, the Special Rapporteur prepared a detailed questionnaire, the text of which was sent by the Secretariat to States Members of the United Nations or of a specialized agency, or parties to the ICJ Statute and will be distributed at the forty-eighth

¹ General Assembly resolution 48/31 of 9 December 1993, para. 7.

² *Yearbook ... 1995*, vol. II (Part One), p. 121, document A/CN.4/470.

³ *Ibid.*, vol. II (Part Two), p. 108, para. 487.

⁴ *Ibid.*, para. 488.

⁵ General Assembly resolution 50/45, para. 4.

⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

⁷ Paras. 4–5 of the resolution.

session of the Commission.⁸ Thus far, twelve States⁹ have replied to the questionnaire. With the exception of San Marino, these States have answered only the questions to which the Special Rapporteur particularly drew attention and which most closely concern the matters dealt with in this report;¹⁰ several of them have included with their replies a large amount of very interesting documentation on their practice with regard to reservations.

7. Furthermore, the Special Rapporteur has prepared a similar type of questionnaire that will soon be sent to international organizations that are depositories of multilateral treaties, the text of which is reproduced as annex III to this report.

8. In addition, as the Special Rapporteur promised in 1995,¹¹ a non-exhaustive bibliography on the question of reservations to treaties has been distributed and is reproduced as annex I to this report.

B. The future work of the Commission on the topic of reservations to treaties

1. AREA COVERED BY THE STUDY

9. In his preliminary report, the Special Rapporteur endeavoured to draw up a “brief inventory of the problems of the topic”,¹² noting that it was far from exhaustive, and without placing the topics in order of their importance or of their logical relationship to each other.

10. Although establishing a “general problem” had not been central to the Commission’s discussions on this topic at its forty-seventh session, these had allowed some useful clarifications to be made in this respect.¹³ Five main substantial issues were fully debated during the discussion of the preliminary report:¹⁴

(a) The definition of reservations, the distinction between these and interpretative declarations and the differences of legal regime which characterize the two institutions;¹⁵

⁸ Reproduced as annex II to this report.

⁹ Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Special Rapporteur wishes to express his profound gratitude to these States. He hopes it will be possible for them to complete their replies and that other States will reply to the questionnaire in the near future.

¹⁰ See paragraph 6 of the covering note of the questionnaire (annex III to the present report).

¹¹ *Yearbook ... 1995*, vol. I, 2400th meeting, p. 148, para. 7.

¹² *Ibid.*, vol. II (Part One), document A/CN.4/470, chap. II, pp. 141–150; see in particular paragraphs 124, 148 and 149, in which the Special Rapporteur had enumerated the main problems which, according to him, are connected with the ambiguities and gaps in the provisions relating to reservations in the 1969, 1978 and 1986 Vienna Conventions.

¹³ *Ibid.*, vol. II (Part Two), pp. 104–106, paras. 442–466.

¹⁴ *Ibid.*, p. 107, paras. 473–478, and vol. I, 2412th meeting, pp. 220–227.

¹⁵ *Ibid.*, vol. I, 2401st meeting, statement by Mr. Tomuschat, pp. 154–155; 2402nd meeting, statements by Mr. Robinson, pp. 157–159, Mr. Lukashuk, pp. 159–161, and Mr. He, pp. 161–162, 2404th meeting, statements by Mr. Pambou-Tchivounda, pp. 167–169, Mr. Elaraby, pp. 170–171, and Mr. Sreenivasa Rao, pp. 171–172; 2407th meeting, statements by Mr. Yamada, pp. 190–192, and Mr. Eiriksson, pp. 192–193; and 2412th meeting, statement by Mr. Al-Baharna, pp. 220–222.

(b) The doctrinal quarrel (which has, however, important practical consequences) between the permissibility and opposability schools,¹⁶ which will have a bearing, eventually, on what may probably be considered *prima facie* as the main problem raised by the subject: conditions for the permissibility and opposability of reservations;¹⁷

(c) The settlement of disputes;¹⁸

(d) The effects of the succession of States on reservations and objections to reservations;¹⁹ and

(e) The question of the unity or diversity of the legal regime applicable to reservations based on the subject of the treaty to which they are made.²⁰

11. Accordingly, the members of the Commission have given the Special Rapporteur useful information, if not on the order in which problems should be dealt with,²¹ then at least on the matters to which special attention should be paid.

12. Likewise, the discussions of the Sixth Committee during the fiftieth session of the General Assembly make it possible to have a more precise idea of the points which preoccupy States in this regard.²² It should be noted in particular that their representatives stressed two essential, basic problems:

(a) The question of reservations and human rights treaties;²³ and

¹⁶ Briefly, the “permissibilists” may be thought of as considering that a reservation incompatible with the object and purpose of the treaty is invalid *ab initio*, while the “opposabilists” think that the sole criterion for the validity of a reservation is the position taken by the other contracting States. For further (but preliminary) details on this point, see *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 100–107.

¹⁷ See *Yearbook ... 1995*, vol. I, 2401st meeting, statements by Mr. Tomuschat, p. 155, and Mr. Bowett, p. 155; 2404th meeting, statement by Mr. Elaraby, pp. 170–171; 2407th meeting, statements by Mr. Kabatsi, p. 190; and Mr. Yamada, pp. 190–192.

¹⁸ *Ibid.*, 2402nd meeting, statement by Mr. Robinson, pp. 157–159; and 2403rd meeting, statement by Mr. Villagrán Kramer, pp. 163–164.

¹⁹ *Ibid.*, 2406th meeting, statement by Mr. Mikulka, p. 186; and 2407th meeting, statement by Mr. Eiriksson, pp. 192–193.

²⁰ *Ibid.*, 2402nd meeting, statement by Mr. Robinson, pp. 157–159; 2403rd meeting, statement by Mr. Villagrán Kramer, pp. 163–164; 2404th meeting, statements by Mr. de Saram, pp. 165–167, and Mr. Sreenivasa Rao (Chairman), pp. 171–172; 2407th meeting, statements by Mr. Idris, pp. 189–190; and Mr. Yamada, pp. 190–192.

²¹ Some members of the Commission, however, have expressed useful opinions in this respect. It is worth noting in particular that several members remarked that “the problems related to State succession in matters of reservations and objections to treaties should have a low degree of priority in the future work of the Commission” (*Yearbook ... 1995*, vol. II (Part Two), p. 106, para. 461).

²² See the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), paras. 143–174.

²³ *Ibid.*, paras. 155–161; see also *Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), view of the United States, paras. 50–53; 18th meeting (A/C.6/50/SR.18), view of Pakistan, para. 62; 22nd meeting (A/C.6/50/SR.22), view of Spain, para. 44; 24th meeting (A/C.6/50/SR.24), view of Sri Lanka, para. 82; and 25th meeting (A/C.6/50/SR.25), view of Lebanon, para. 20.

(b) The distinction between interpretative declarations and reservations.²⁴

Moreover, some representatives called upon the Commission to clarify the following points: the effects of non-permissible reservations; the regime of objections to reservations; and both the precise difference between reservations and interpretative declarations and the exact definition of the legal effect of the latter.²⁵

13. It is interesting and, in many respects, comforting, to see such a striking unanimity of views between the positions adopted by the members of the Commission on the one hand²⁶ and the representatives of States on the other, regarding the “hierarchy” of problems posed—or left unresolved—by the current legal regime governing reservations to treaties.

14. It therefore seems legitimate to consider, since “the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts”²⁷ agree on the special importance of certain topics, that those topics should be studied particularly carefully. Without a doubt, that is the case with:

- (a) The question of the very definition of reservations;
- (b) The legal regime governing interpretative declarations;
- (c) The effect of reservations which clash with the purpose and object of the treaty;
- (d) Objections to reservations;
- (e) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

15. This list of particularly important questions does not, however, limit the Commission’s field of study regarding reservations to treaties. Both the Commission itself in raising this topic²⁸ and the General Assembly in approving its proposal²⁹ alluded in the general sense to the “law and practice relating to reservations to treaties” without specifying or circumscribing the questions which should be the subject of such a study. Moreover, it seems difficult to make a serious study of the questions listed above³⁰ and to usefully elaborate draft articles in respect of them without placing them in the wider context of the law relating to reservations to treaties. In addition, it would be hard to envisage drawing up a “guide to practice” that would only contain controversial points; if such a guide is to be used by States and international organizations, its “users” should be able to find in it the answers to all their questions on the topic.

²⁴ A/CN.4/472/Add.1, paras. 162–167; see also *Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 24th meeting (A/C.6/50/SR.24)*, views of Venezuela, para. 56, and of the Republic of Korea, para. 93.

²⁵ A/CN.4/472/Add.1, para. 148.

²⁶ See paragraph 10 above.

²⁷ General Assembly resolution 50/45.

²⁸ See *Yearbook ... 1993*, vol. II (Part Two), p. 96, para. 427.

²⁹ General Assembly resolution 48/31, para. 7.

³⁰ See paragraph 14 above.

16. It therefore seems logical to take account of the broader picture in considering questions relating to reservations which are imperfectly addressed or not addressed at all by existing conventions on codification,³¹ while at the same time devoting particular and primary attention to questions which the Commission and the Sixth Committee both consider to be of special importance, and recalling the applicable rules as codified by existing conventions or resulting from practical application.

17. Moreover, as the preliminary report on the topic states, the relatively long list of questions partially or not covered by the 1969, 1978 and 1986 Vienna Conventions should be supplemented by other questions relating to the existence of what one might call “rival” institutions of reservations aimed at modifying participation in treaties but, like them, putting at risk the universality of the conventions in question (additional protocols; bilateralization; selective acceptance of certain provisions, etc.).³² There is no doubt that, considered in themselves, such approaches are not part of the field of study, in that they are not reservations. However, to the extent that they have similar aims and comparable consequences, it would seem useful to take account of them when necessary, if only to draw the attention of States to the options which they offer in certain cases; after all, they can prove useful alternatives to the employment of reservations when recourse to the latter meets objections of a legal or political nature. Moreover, reservations to these instruments themselves raise specific problems which cannot be ignored.³³

2. FORM OF THE STUDY (REVIEW)

18. As mentioned above,³⁴ the Commission decided in principle during its forty-seventh session to draw up a “guide to practice in respect of reservations” and took the view that there were insufficient grounds for amending the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, it being understood that the draft would, if necessary, be accompanied by “model clauses”. These conclusions, which were endorsed by the majority of the members of the Sixth Committee,³⁵ were approved by the General Assembly.³⁶

(a) *Preserving what has been achieved*

19. The decision to preserve what has been achieved by the Vienna Conventions with regard to reservations provides a firm basis for the Commission’s future work.³⁷ Specifically, it follows from this that the starting point for the present study should necessarily comprise:

³¹ See footnote 13 above and the questionnaires sent to States and international organizations (annexes II and III to the present report).

³² See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 150, para. 149.

³³ *Ibid.*, paras. 145–147; the brief examples listed relate to additional protocols on the one hand and the bilateralization approach—employed frequently in conventions relating to private international law—on the other.

³⁴ Paras. 2–3 above.

³⁵ See A/CN.4/472/Add.1, para. 147.

³⁶ General Assembly resolution 50/45, para. 4.

³⁷ See on this topic *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 151–154, paras. 153–169.

(a) Articles 2, paragraph 1 (d), and 19–23 of the 1969 Vienna Convention;

(b) Articles 2, paragraph 1 (j), and 20 of the 1978 Vienna Convention; and

(c) Articles 2, paragraph 1 (d), and 19–23 of the 1986 Vienna Convention.³⁸

20. This decision is also a constraint in that the Commission must ensure that the draft articles which it will eventually adopt conform in every respect to these provisions, with regard to which it should simply clarify any ambiguities and fill in any gaps.³⁹

21. The Special Rapporteur therefore undertook in subsequent reports to repeat systematically the relevant provisions of existing conventions in respect of each point he took up in order to indicate their connection with the draft articles whose adoption he was proposing and to establish their conformity with the letter and spirit of those provisions.

22. Moreover, it would probably be advisable to quote the actual text of the existing provisions at the beginning of each chapter of the draft guide to practice in respect of reservations.

(b) *Draft articles accompanied by commentaries ...*

23. These provisions should in each case be followed by a statement of additional or “clarificatory” regulations which would comprise the actual body of the study and, as the Commission indicated during its forty-seventh session,⁴⁰ the guide would be presented in accordance with its usual practice, in “the form of draft articles whose provisions, together with commentaries, would be guidelines”.

(c) *... and model clauses*

24. In addition, the draft articles themselves would, if necessary, be followed by model clauses which, pursuant to the instructions of the Commission, would be worded in such a way as “to minimize disputes in the future”.⁴¹

25. The function of these model clauses should be clearly understood.

26. The “guide to practice” which the Commission intends to draw up is intended to indicate to States and international organizations “guidelines for [their] practice

in respect of reservations”.⁴² It will therefore consist of general rules designed to be applied to all treaties, whatever their scope,⁴³ in cases where the treaty provisions are silent. However, like the actual rules of the Vienna Conventions⁴⁴ and the customary norms which they enshrine,⁴⁵ these rules will be purely residual where the parties concerned have no stated position; they cannot be considered binding and the contracting parties will naturally always be free to disregard them. All the negotiators need to do is incorporate the specific clauses relating to the reservations into the treaty.

27. The interest shown in the idea of incorporating clauses relating to reservations into multilateral treaties has frequently been commented on.⁴⁶ Thus, in its advisory opinion of 28 May 1951 regarding Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ noted the disadvantages that could result from the profound divergence of views of States regarding the effects of reservations and objections and asserted that “an article concerning the making of reservations could have obviated [such disadvantages]”.⁴⁷ Moreover, the Commission stated in its 1951 report to the General Assembly that:

It is always within the power of negotiating States to provide in the text of the convention itself for the limits within which, if at all, reservations are to be admissible and for the effect that is to be given to objections taken to them, and it is usually when a convention contains no such provisions that difficulties arise. It is much to be desired, therefore, that the problem of reservations to multilateral conventions should be squarely faced by the draftsmen of a convention text at the time it is being drawn up; in the view of the Commission, this is likely to produce the greatest satisfaction in the long run.⁴⁸

And in its resolution 598 (VI) of 12 January 1952, the General Assembly recommended:

that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them.

⁴² *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 487 (b).

⁴³ See chapter II below.

⁴⁴ See, *inter alia*, Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, pp. 289 and 304; Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultative donné par la Cour internationale de Justice le 28 mai 1951*, pp. 160–161 and 223–230; Ruda, “Reservations to treaties”, *Collected Courses ... 1975–III*, p. 180; and Reuter, *Introduction to the Law of Treaties*, pp. 80–82; this was also the position of ICJ (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951*, p. 15, para. 27, cited below) and of the authors of the joint dissenting opinion (“... States negotiating a convention are free to modify both the rule [the customary rule which they believe to exist] and the practice by making the necessary express provision in the convention and frequently do so”, *ibid.*, p. 30).

⁴⁵ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 151–152, paras. 154–157.

⁴⁶ Even if no panacea has been identified; see in this regard Imbert, *op. cit.*, who says that reservation clauses are not an ideal solution in every case, but are always preferable to silence in the treaty (p. 214); see also the chapter devoted to the reduced role of treaty clauses in the law on the admission of reservations (pp. 202–230).

⁴⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15.

⁴⁸ *Yearbook ... 1951*, vol. II, document A/1858, p. 129, para. 27.

³⁸ *Ibid.*, paras. 60, 70 and 89. These provisions are reproduced *in extenso*.

³⁹ Of course, the Commission also considered that the arrangements which it had adopted, including the steps to preserve what had been achieved, should “be interpreted with flexibility” and that, if it felt “that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take” (*ibid.*, vol. II (Part Two), p. 108, para. 487 (c)), which implies that if there is a pressing need, it could suggest that some of the rules articulated in the 1969, 1978 and 1986 Vienna Conventions should be reconsidered.

⁴⁰ See paragraphs 2–3 above.

⁴¹ See paragraph 3 above.

28. These clauses may have a triple function:

(a) They may refer to the rules articulated in the 1969 and 1986 Vienna Conventions explicitly⁴⁹ or implicitly by reproducing the wording of some of their provisions;⁵⁰

(b) They may fill in any gaps and clarify any ambiguities by amplifying obscure points or points that were not addressed in the Vienna Conventions;

(c) They may derogate from the Vienna rules by stipulating a special regime in respect of reservations which contracting parties would consider more suitable for the purposes of the particular treaty they had concluded.

29. The model clauses which the Commission intends to suggest as part of the study on reservations to treaties cannot be patterned after the first of these examples: although such clauses would indubitably ensure the uniform application of a reservations regime, whether the parties to the treaty have ratified the Vienna Conventions or not, they would leave intact all the gaps and ambiguities in the relevant provisions of those conventions. Moreover, it will not be the function of the model clauses to fill in those gaps or clarify those ambiguities: that is, precisely, the purpose of the “guide to practice” which the Commission is to prepare. On the other hand, it might be useful if in future contracting States and international organizations were to incorporate reservations clauses reproducing the draft articles to be included in the future guide to practice so as to ensure that those articles become crystallized into customary norms.

30. However, the model clauses to be appended to the draft articles proper will have a different function. The sole aim will be to encourage States to incorporate in certain specific treaties the model clauses concerning reservations, which derogate from general law and are better adapted to the special nature of these treaties or the circumstances in which they are concluded. This would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances, thus preserving the flexibility to which both the Commission and the representatives of States are rightly attached, without calling in question the unity of the general law applicable to reservations to treaties.

31. Of course, this technique can only be used for treaties that are concluded in the future. In the case of treaties already in force there are only two options, either to amend them or to adopt an additional protocol on reservations, a course which would certainly raise difficult problems.

⁴⁹ See article 75 of the American Convention on Human Rights: “This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.”

⁵⁰ See, for example, article 28, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women (which, moreover, repeats the wording of article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination and hence predates the adoption of the 1969 Vienna Convention), which states that: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted”; see also article 51, paragraph 2, of the Convention on the Rights of the Child, or article 91, paragraph 2, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

(d) *Final form of the guide to practice*

32. The guide to practice in respect of reservations which the Commission intends to prepare in accordance with the General Assembly’s invitation should be divided into chapters.⁵¹ Each of these chapters should take the following form:

(a) Review of the relevant provisions of the 1969, 1978 or 1986 Vienna Conventions;

– Commentary on those provisions, bringing out their meaning, their scope and the ambiguities and gaps therein;⁵²

(b) Draft articles aimed at filling the gaps or clarifying the ambiguities;

– Commentary to the draft articles;

(c) Model clauses which could be incorporated, as appropriate in specific treaties and derogating from the draft articles;

– Commentary to the model clauses.

3. GENERAL OUTLINE OF THE STUDY

(a) *Characteristics of the proposed outline*

33. In accordance with General Assembly resolution 48/31, the preliminary study which the Assembly requested the Commission to prepare concerned the final form to be given to the Commission’s work on reservations to treaties, rather than the content of the study to be undertaken. Although it is probably unnecessary to establish at the outset a complete and rigid plan for the study, it would nevertheless seem useful to think about a general outline on which the Commission could base its future work on the topic.

34. The Special Rapporteur considers that such an outline should meet the following requirements:

(a) It should make it possible to cover the entire topic of “reservations to treaties”, so that States and international organizations can find in the guide to practice that will be the outcome of the Commission’s work all the elements that are useful in this regard;

(b) It should also highlight the problems to which no satisfactory solution has yet been found and about which States and international organizations are rightly concerned;

(c) It should, moreover, be sufficiently clear and simple to enable the members of the Commission and the representatives of States in the General Assembly to follow the progress of the work without too much difficulty;

(d) It should result in a guide to practice that is really *utilizable* by States and international organizations;

⁵¹ See paragraphs 164–252 below.

⁵² This should consist essentially of a brief review, based on the relevant passages of the Special Rapporteur’s first report on the law and practice relating to reservations to treaties (see footnote 2 above).

although the study can certainly not ignore theoretical considerations completely—if only because they have substantial practical consequences—such considerations should not dictate the general approach to the topic, which according to the Special Rapporteur should be pragmatic rather than theoretical; and

(e) It should provide a general framework that can be adapted and supplemented as required as the Commission proceeds with its work.

35. The Special Rapporteur based the outline which follows (see paragraph 37 below) on the following elements:

(a) The relevant provisions of the 1969, 1978 and 1986 Vienna Conventions, which in the Special Rapporteur's view seem to be the essential starting point for any thinking about the content of the study, since it has been agreed that the latter must "preserve what has been achieved";⁵³

(b) The non-exhaustive summary of the problems posed by the topic which the Special Rapporteur attempted to provide in his first report;⁵⁴ although this list was drawn up on the basis of a cursory study of the *travaux préparatoires* for the three Vienna Conventions and of doctrine, no fundamental objections were raised to it during the discussion of that report;

(c) The discussions in the Commission and subsequently in the Sixth Committee of the General Assembly on the topic of reservations to treaties, which made it possible to gain a more complete and more accurate idea of the problems posed by the topic and to "hierarchize" them in the light of the concerns expressed by the members of the Commission and the representatives of States;⁵⁵

(d) The replies of States to the questionnaire drawn up by the Special Rapporteur⁵⁶ and the documents received from international organizations.⁵⁷

36. Moreover, this outline is entirely provisional and is intended to give the members of the Commission an overall view of the Special Rapporteur's current intentions; he would welcome their reactions and suggestions in that connection.

(b) *Provisional general outline of the study*

37. PROVISIONAL PLAN OF THE STUDY⁵⁸

I. UNITY OR DIVERSITY OF THE LEGAL REGIME FOR RESERVATIONS TO MULTILATERAL TREATIES (RESERVATIONS TO HUMAN RIGHTS TREATIES)

A. Unity of rules applicable to general multilateral treaties (para. 148 (k))

1. The legal regime for reservations is generally applicable;
2. The legal regime for reservations is generally applied.

⁵³ See paragraphs 19–22 above.

⁵⁴ See paragraph 9 above and the references given in footnote 13.

⁵⁵ See paragraphs 1 and 9–17 above.

⁵⁶ See paragraph 6 above.

⁵⁷ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 141, para. 92, footnote 127.

⁵⁸ The relevant articles of the 1969, 1978 and 1986 Vienna Conventions (where no number is noted, the problem is not dealt with in these conventions) and references to the questions formulated in paragraphs 124, 148 and 149 of the Special Rapporteur's first report (footnote 2 above) are noted in parentheses following each heading.

B. Control mechanisms (paras. 124 (g), 148 (m) and (n))

1. Use of control mechanisms to evaluate the permissibility of reservations;
2. Consequences of the determination of a non-permissible reservation.

II. DEFINITION OF RESERVATIONS

1. Positive definition (1969 and 1986, art. 2.1 (d); 1978, art. 1 (j));
2. Distinction between reservations and other procedures aimed at modifying the application of treaties (para. 149);
3. Distinction between reservations and interpretative declarations (para. 148 (c));
4. The legal regime of interpretative declarations (para. 148 (d), (e) and (f));
5. Reservations to bilateral treaties (para. 148 (a)–(b)).

III. FORMULATION AND WITHDRAWAL OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS⁵⁹

A. Formulation and withdrawal of reservations

1. Acceptable times for the formulation of a reservation (1969 and 1986, art. 19, *chapeau*);
2. Procedure regarding formulation of a reservation (1969 and 1986, art. 23, paras. 1 and 4);
3. Withdrawal (1969 and 1986, arts. 22, paras. 1 and 3 (a), and 23, para. 4).

B. Formulation of acceptances of reservations

1. Procedure regarding formulation of an acceptance (1969 and 1986, art. 23, paras. 1 and 3);
2. Implicit acceptance (1969 and 1986, art. 20, paras. 1 and 5);
3. Obligations and express acceptance (1969 and 1986, art. 20, paras. 1–3) (paras. 124 (b), 148 (l)).

C. Formulation and withdrawal of objections to reservations

1. Procedure regarding formulation of an objection (1969 and 1986, art. 23, paras. 1 and 3);
2. Withdrawal of an objection (1969 and 1986, arts. 22, paras. 2 and 3 (b), and 23, para. 4).

IV. EFFECTS OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS

Permissibility or opposability? Statement of the problem

A. Prohibition of certain reservations

1. Difficulties relating to the application of reservation clauses (1969 and 1986, art. 19 (a)–(b));
2. Difficulties relating to the determination of the object and purpose of the treaty (1969 and 1986, art. 19 (c));

⁵⁹ To the extent that the role of depositories seems, in the predominant system, to have been exclusively "mechanical", this chapter will probably be the logical—although probably not exclusive—place to discuss that topic.

3. Difficulties relating to the customary nature of the rule to which the reservation applies (para. 148 (o)–(q));

B. The effects of reservations, acceptances and objections in the case of a reservation that complies with the provisions of article 19 of the 1969 and 1986 Vienna Conventions

1. On the relations of the reserving State or international organization with a party that has accepted the reservation (1969 and 1986, arts. 20, para. 4 (a) and (c), and 21, para. 1) (para. 124 (o));
2. On the relations of the reserving State or international organization with an objecting party⁶⁰ (1969 and 1986, arts. 20, para. 4 (b), and 21, para. 3) (para. 124 (h)–(j) and (l–n)).

C. The effects of reservations, acceptances and objections in the case of a reservation that does not comply with the provisions of article 19 of the 1969 and 1986 Vienna Conventions

1. On the relations of the reserving State or international organization with a party that has accepted the reservation⁶¹ (1969 and 1986, arts. 20, para. 4 (a) and (c), and 21, para. 1) (para. 124 (e)–(f));
2. On the relations of the reserving State or international organization with an objecting party⁶² (1969 and 1986, arts. 20, para. 4 (b), and 21, para. 3) (para. 124 (k)–(l));
3. Should a reservation that does not comply with the provisions of article 19 be considered null independently of any objection? (para. 124 (c)–(d)).

D. The effects of reservations on relations with other contracting parties

1. On the entry into force of the treaty (para. 148 (g));
2. On relations with other parties inter se (1969 and 1986, art. 21, para. 2).

V. STATUS OF RESERVATIONS, ACCEPTANCES AND OBJECTIONS IN THE CASE OF SUCCESSION OF STATES

Significance of article 20 of the 1978 Vienna Convention dealing with newly independent States

A. In the case of newly independent States

1. Selective maintenance of reservations (1978, art. 20, para. 1);
2. Status of acceptances of reservations by the predecessor State in the case of a maintenance of a reservation (para. 148 (i));
3. Status of objections to the reservations of the predecessor State in the case of a maintenance of a reservation (para. 148 (j));
4. Possibility of a newly independent State formulating new reservations, and their consequences (1978, arts. 20, paras. 2–3) (para. 148 (i));
5. Status of objections and acceptances by the predecessor State with regard to reservations formulated by third States.

⁶⁰ Including the question of the permissibility of an objection on this assumption.

⁶¹ Including the question of the permissibility of an acceptance on this assumption.

⁶² Including the question of the need for an objection on this assumption.

B. Other possibilities with regard to the succession of States (para. 148 (i)–(j))

1. In cases where part of a State's territory is concerned;
2. In the case of the unification or division of States (para. 148 (h));
3. In the case of the dissolution of States.

VI. THE SETTLEMENT OF DISPUTES LINKED TO THE REGIME FOR RESERVATIONS

1. The silence of the Vienna Conventions and its negative consequences (para. 124 (g));
2. Appropriateness of mechanisms for the settlement of disputes—standard clauses or an additional protocol.

(c) *Brief commentary on the proposed outline*

(i) *Unity or diversity of the legal regime for reservations to treaties*

38. It is a question here of determining whether the legal regime for reservations, as established under the 1969 Vienna Convention, is applicable to all treaties, regardless of their object. The question could have been posed on a case-by-case basis with regard to each of the rules. Nevertheless, there are three reasons for conducting a separate and preliminary study:

(a) First, the terms of the problem are, at least partially, the same, regardless of the provisions in question;

(b) Secondly, its consideration may be an opportunity for inquiring into some basic general aspects of the regime for reservations, which is preferably done *in limine*;

(c) Lastly, this question is at the heart of very topical discussions relating above all to reservations to human rights treaties, which justifies placing the emphasis on the consideration of the specific problems that concern them.

This also involves one of the main difficulties which were stressed by both the members of the Commission at its forty-seventh session as well as the representatives of States in the Sixth Committee at the fiftieth session of the General Assembly.⁶³

(ii) *Definition of reservations*

39. The same holds true with regard to the definition of reservations, a question that was constantly linked during the discussions to the difference between reservations and interpretative declarations and to the legal regime for the latter.⁶⁴ It also seems useful to link the consideration of this question to that of other procedures, which, while not constituting reservations, are, like them, designed to and do, enable States to modify obligations under treaties to which they are parties; this is a question of alternatives to reservations, and recourse to such procedures may likely make it possible, in specific cases, to overcome some problems linked to reservations.

40. For reasons of convenience, the Special Rapporteur also plans to deal with reservations to bilateral treaties in

⁶³ See paragraphs 10–16 and footnotes 21 and 24 above.

⁶⁴ *Ibid.* and footnotes 16 and 25.

connection with the definition itself of reservations: the initial question posed by reservations to bilateral treaties is that of determining whether they are genuine reservations, the precise definition of which is therefore a necessary condition for its consideration. Furthermore, although consideration of the question regarding the unity or diversity of the legal regime for reservations could have been envisaged, it appears at first glance that that question relates to a different problem.

(iii) *Formulation and withdrawal of reservations, acceptances and objections*

41. Except for some problems linked to the application of paragraphs 2 and 3 of article 20 of the 1969 and 1986 Vienna Conventions,⁶⁵ this chapter does not appear, *prima facie*, to involve questions giving rise to serious difficulties. It is nevertheless necessary to include it in the study: this is a matter of practical questions which arise constantly, and one could hardly conceive of a “guide to practice” which would not include developments in this regard.⁶⁶

(iv) *Effects of reservations, acceptances and objections*

42. This is, without any doubt, the most difficult aspect of the study, and the Commission members and the representatives of States in the Sixth Committee agreed on this point.⁶⁷ This is also the aspect with regard to which apparently irreconcilable doctrinal trends were most clearly in opposition.⁶⁸

43. No one denies that some reservations are prohibited; and this is, furthermore, most clearly evident from the provisions of article 19 of the 1969 and 1986 Vienna Conventions. Nevertheless, their implementation will not be problem-free. These difficulties will have to be dealt with under section IV.A (see paragraph 37 above).

44. Disagreement arises really with regard to the effects of reservations, their acceptance and objections that are made to them, as well as the circumstances in which acceptances or objections are either permissible (or impermissible), or necessary (or superfluous). This is at the heart of the opposition between the schools of “admissibility” or “permissibility” on the one hand, and “opposability” on the other.⁶⁹ In the opinion of the Special Rapporteur, it is certainly premature to take a position at this stage and it is not out of the question that the Commission may propose specific guidelines providing useful guidance for the practice of States and international organizations without having to decide between these opposing doctrinal positions. It is also possible that the Commission will be persuaded to borrow from both of them in order to arrive at satisfactory and balanced practical solutions.

⁶⁵ An exact definition of limited multilateral treaties and gaps in the regime applicable to reservations to the constituent instruments of international organizations, in particular.

⁶⁶ See paragraph 15 above.

⁶⁷ See paragraphs 10–16 and footnote 18 above.

⁶⁸ See *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 142–143, paras. 97–108, and pp. 144–146, paras. 115–123.

⁶⁹ *Ibid.*

45. This is the reason why the general outline reproduced above⁷⁰ does not take any position, even implicitly, on the theoretical questions that divide doctrine.⁷¹ Assuming that there are, without any doubt, permissible and impermissible reservations,⁷² the Special Rapporteur felt that the most “neutral” and objective method was to deal separately with the effects of reservations, acceptances and objections when the reservation is permissible on the one hand (para. 37, sect. IV.B) and when it is non-permissible on the other (para. 37, sect. IV.C), since it is necessary to consider separately two specific problems which, *prima facie*, are defined in the same terms as a reservation, whether permissible or not, and which concern the effect of a reservation on the relations of the other parties among themselves (para 37, sect. IV.D).

(v) *Status of reservations, acceptances and objections in the case of succession of States*

46. As is evident from the Special Rapporteur’s first report⁷³ and some statements made during the discussions in the Commission in 1995,⁷⁴ the 1978 Vienna Convention left numerous gaps and questions with regard to this problem, which article 20 of the Convention deals with only as concerns the case of newly independent States and without addressing the question of the status of the acceptances of the predecessor State’s reservations and objections that had been made to them or acceptances and objections formulated by the predecessor State to reservations made by third States to a treaty to which the successor State establishes its status as a party.

(vi) *The settlement of disputes linked to the regime for reservations*

47. The Commission is not in the habit of providing the draft articles that it elaborates with clauses relating to the settlement of disputes.⁷⁵ The Special Rapporteur considers that there is no reason *a priori* to depart from this practice in most cases: in his opinion, the discussion of a regime for the settlement of disputes diverts attention from the topic under consideration strictly speaking, gives rise to useless debates and is detrimental to efforts to complete the work of the Commission within a reasonable period. It seems to him that, if States deem it necessary, the Commission would be better advised to draw up draft articles which are general in scope and could be incorporated, in the form of an optional protocol, for example, in the body of codification conventions.

⁷⁰ Para. 37, sect. IV.

⁷¹ It should be pointed out again, however, that these questions, “theoretical” as they may be, have very important practical implications.

⁷² See paragraphs 37, sect. IV.A of the general outline, and 43 above.

⁷³ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, pp. 136–137, paras. 62–71.

⁷⁴ *Ibid.*, vol. II (Part Two), paras. 458–460.

⁷⁵ The draft articles on the responsibility of States are the exception: in 1975, it was anticipated that the Commission might decide to add to them a third part on the question of the settlement of disputes and the implementation of responsibility (*Yearbook ... 1975*, vol. II, document A/10010/Rev.1, pp. 55–59, paras. 38–51); since 1985 “the Commission assumed that a part three on the settlement of disputes and the implementation of international responsibility would be included in the draft articles” (*Yearbook ... 1995*, vol. II (Part Two), p. 43, para. 233); it adopted the text of that part three in its first reading in 1995 (*ibid.*, p. 64, para. 364).

48. Nevertheless, the problem arises perhaps in a somewhat particular manner with regard to the subject of reservations to treaties.

49. As some members of the Commission pointed out during the debate on the subject at the forty-seventh session, although there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely or not at all utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty.⁷⁶ Moreover, when such mechanisms exist, as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations.⁷⁷

50. Under these conditions, it may be useful to consider the establishment of mechanisms for the settlement of disputes in this specific area since, in the view of the Special Rapporteur, these mechanisms could be provided for, either in standard clauses that States could insert in future treaties to be concluded by them, or in an additional optional protocol that could be added to the 1969 Vienna Convention.

Conclusion

51. It is very clear that the provisional outline of the study proposed above could not be immutable: it must be able to be adapted, supplemented and revised in the course of further work which, quite obviously, will uncover new difficulties or, on the contrary, will reveal the artificial nature of some of the problems anticipated.

⁷⁶ *Yearbook ... 1995*, vol. II (Part Two), p. 105, para. 455.

⁷⁷ As a result, the position that the existence of provisions establishing a mechanism for the settlement of disputes obviates the need to insert a clause on reservations is at least debatable; see in this regard Imbert, *op. cit.*, which gives the example of the statement by the representative of Greece, Mr. Eustathiadès, at the United Nations Conference on the Representation of States in Their Relations with International Organizations, and according to which the adoption of a protocol on the settlement of disputes would have an advantage in that "the delicate problem of reservations would be avoided" (United Nations Conference on the Representation of States in Their Relations with International Organizations (United Nations publication, Sales No. E.75.V.11), p. 327, para. 50).

52. It also stands to reason that the study is a mere proposal by the Special Rapporteur, who will gratefully welcome any suggestion that can make it clearer or more complete. Nevertheless, he urges the members of the Commission to bear in mind, in making criticisms and suggestions, the requirements which such an outline must meet in order to carry out its functions fully.⁷⁸

53. The study should, in particular, enable the members of the Commission and the representatives of States in the Sixth Committee, on the one hand, to ascertain that the concerns which they expressed during the "preliminary phase" have indeed been taken into account and, on the other hand, to gain in future a rather precise idea of the degree of progress made in the work as it progresses. The outline is designed to be, as it were, a "compass" enabling the Special Rapporteur to make progress, under the supervision of the Commission, in the difficult mission entrusted to him. It should also constitute the framework for the guide to practice, which the Commission has undertaken the task of elaborating.

54. The Special Rapporteur feels that, subject to unforeseen difficulties, the task can and should be carried out within four years. If the above-mentioned outline is followed, and taking into account the fact that chapter II of this report deals with the question of the unity or diversity of the legal regime for reservations (chap. I of the provisional outline of the study):

(a) Chapters II (Definition of reservations) and III (Formulation and withdrawal of reservations, acceptances and objections) could be submitted to the Commission at its forty-ninth session;

(b) The very important and difficult chapter IV (Effects of reservations, acceptances and objections) could be dealt with the following year; and

(c) The first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V (Status of reservations, acceptances and objections in the case of succession of States) and VI (The settlement of disputes linked to the regime for reservations), it being clearly understood that, like the general outline itself, these indications are only and can be only of a purely contingent nature.

⁷⁸ See paragraph 34 above.

CHAPTER II

Unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties)

55. This chapter relates to item I of the general outline proposed on a provisional basis in chapter I above.⁷⁹ Its object is to determine if the rules applicable to reservations to treaties, whether codified in articles 19 to 23 of the 1969 and 1986 Vienna Conventions, or customary, are applicable to all treaties, whatever their object, and in particular to human rights treaties.

1. NECESSITY AND URGENCY OF CONSIDERATION OF THE QUESTION BY THE COMMISSION

56. As recalled above, the question was raised with some insistence both in the Commission at its forty-seventh session and in the Sixth Committee of the General Assembly at its fiftieth session.⁸⁰ It is easy to understand these concerns.

57. Their origin doubtless lies in initiatives in respect of reservations taken recently by certain monitoring bodies established by human rights treaties, which in recent years have considered themselves entitled to assess the permissibility of reservations formulated by States to the instruments under which they are established, and, where appropriate, to draw far-reaching conclusions from such observations.

58. The origins of this development may be found in the practice of the Commission and of the European Court of Human Rights, which, in several significant decisions, have noted that a reservation (or an “interpretative declaration” which, on analysis, proves to be a reservation) was impermissible or did not have the scope attributed to it by the respondent State, and have drawn the conclusions both that the State concerned could not invoke the impermissible reservation before them and that the State was no less bound by its ratification of the European Convention on Human Rights.⁸¹ The Inter-American Court of Human Rights has taken a similar position.⁸²

⁷⁹ See paragraph 37 above.

⁸⁰ See paragraphs 10 and 12, and footnotes 19 and 22 above.

⁸¹ See the cases of *Temelashvili v. Switzerland* (Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application No. 9116/80, vol. 31 (Strasbourg, April 1983), p. 120); *Belilos v. Switzerland* (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 132, *judgment of 29 April 1988*, Registry of the Court, Council of Europe, Strasbourg, 1988, paras. 50–60); *Chrysostomos et al. v. Turkey* (Council of Europe, European Commission of Human Rights, *Decisions and Reports*, Application Nos. 15299/89, 15300/89 and 15318/89, vol. 68 (Strasbourg, 1993), pp. 216–253; *F. and M. L. v. Austria* (Council of Europe, *Yearbook of the European Convention on Human Rights*, Application No. 17588/90, vol. 37 (The Hague/London/Boston, Kluwer Law International, 1994); *Gradinger v. Austria* (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 328, *judgment of 23 October 1995* (Registry of the Court, Council of Europe, Strasbourg, 1996)); *Loizidou v. Turkey (Preliminary Objections)* (ibid., vol. 310, *judgment of 23 March 1995*), (Registry of the Court, Council of Europe, Strasbourg, 1995); and *Fischer v. Austria* (ibid., vol. 312, *judgment of 26 April 1995*). These decisions are analysed in more detail in section C of this chapter.

⁸² Inter-American Court of Human Rights, *The effect of reservations on the entry into force of the American Convention (arts. 74 and 75)*, Advisory Opinion OC–2/82 of 24 September 1982, Series A, No. 2; and *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.

59. The monitoring bodies established by human rights treaties concluded under United Nations auspices, traditionally cautious in this regard,⁸³ have thereby been encouraged to be somewhat bolder:

(a) The persons chairing the human rights treaty bodies have twice expressed their concern at the situation arising from reservations to treaties under their scrutiny and recommended that those bodies should draw the attention of States to the incompatibility of some of those reservations with the applicable law,⁸⁴

(b) The Committee on the Elimination of Discrimination against Women amended its guidelines on the preparation of initial and periodic reports by the inclusion of a section indicating the form in which States parties making reservations were to report them,⁸⁵ and

welcomed the request of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, in its resolution 1992/3 on contemporary forms of slavery, to the Secretary-General:

To seek the views of the Committee on the Elimination of Discrimination against Women and the Commission on the Status of Women on the desirability of obtaining an advisory opinion on the validity and legal effect of reservations to the Convention on the Elimination of All Forms of Discrimination against Women ...

[and] ... decided that it should support steps taken in common with other human rights treaty bodies to seek an advisory opinion from the International Court of Justice that would clarify the issue of reservations to the human rights treaties and thereby assist States parties in their ratification and implementation of those international instruments. Such an opinion would also help the Committee in its task of considering the progress made in the implementation of the Convention.⁸⁶

(c) Above all, perhaps, the Human Rights Committee, on 2 November 1994, adopted its general comment No. 24 on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, in which it took a clear position in favour of a broad view of its own powers to examine the compatibility of such reservations and declarations with the purpose and object of the Covenant.⁸⁷

60. These positions have provoked some disquiet among States and drawn strong criticism from some of them,⁸⁸ probably linked to the review of the question of reserva-

⁸³ See paragraphs 165–176 below.

⁸⁴ See the reports of the fourth and fifth meetings of persons chairing the human rights treaty bodies (A/47/628, annex, paras. 36 and 60–65, and A/49/537, annex, para. 30).

⁸⁵ See fifteenth session, 15 January–2 February 1996, “Guidelines regarding the form and content of initial reports of States parties” (CEDAW/C/7/Rev.2), para. 9.

⁸⁶ Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Forty-eighth Session, Supplement No. 38* (A/48/38), chap. I, paras. 3 and 5.

⁸⁷ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V.

⁸⁸ See, in particular, the extremely critical remarks on general comment No. 24 by the United States, the United Kingdom (ibid., annex

tions to treaties being undertaken in various forums, in particular, the Council of Europe.⁸⁹

61. It is thus certainly not redundant for the Commission to take a position on these questions at an early date. The position of the Special Rapporteur, which induced him to amend somewhat the order in which he proposed to take up the questions raised in connection with the matter entrusted to him, does not spring from any desire to follow a trend.

62. While it is obviously fundamental for human rights bodies to state their views on the question, the Commission must also make heard the voice of international law⁹⁰ in this important domain, and it would be unfortunate for it not to take part in a discussion which is of concern to the Commission above all: on the one hand, the questions raised by States and human rights bodies relate to the applicability of the rules on reservations codified by the 1969 Vienna Convention, in the drafting of which the Commission played such an influential role; on the other hand, under its statute, the Commission “shall have for its object the promotion of the progressive development of international law and its codification”,⁹¹ meaning “the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine”.⁹² These two aspects are at the centre of the debate, one of the prerequisites being to determine whether the problem arises in terms of codification or of progressive development.

63. Given the opposing views which have emerged, the Special Rapporteur considers that the Commission might usefully seek to clarify the terms of the problem as it arises with respect to general public international law and adopt a resolution on the question which could be brought to the attention of States and human rights bodies by the General Assembly. A draft resolution along these lines is included in the conclusion to this chapter (para. 260).

2. OBJECT AND PLAN OF THE CHAPTER

64. However, since the function of the Commission is to contribute to the codification and progressive de-

velopment of international law as a whole, and as the question of “reservations to treaties” covers treaties as a whole, it seems appropriate to re-situate the specific problems raised by reservations to human rights treaties in a broader context and to consider the more general question of the unity or diversity of the legal regime or regimes applicable to reservations.

65. A first element of diversity could stem in this respect from the opposition between treaty norms laid down in articles 19 and 23 of the 1969 and 1986 Vienna Conventions⁹³ and customary rules in this area. There is, however, no reason to make such a distinction: while it can doubtless be maintained that at the time of their adoption the Vienna rules stemmed, at least in part, from the progressive development of international law rather than its codification in the strict sense, that is certainly no longer true today; relying on the provisions of the 1969 Vienna Convention, confirmed in 1986, practice has been consolidated in customary norms.⁹⁴ In any event, notwithstanding the nuances which may be ascribed to such an opinion,⁹⁵ the concern expressed by Commission members as well as within the Sixth Committee of the General Assembly to preserve what has been achieved under the existing Vienna Conventions⁹⁶ renders the question somewhat moot: it must be placed in the context of the norms set out in these conventions.

66. This artificial problem being set aside, the question of the unity or diversity of the legal regime governing reservations may be stated thus: do, or should, certain treaties escape application of the Vienna regime by virtue of their object? Should the answer be yes, to what specific regime or regimes are, or should, these treaties be subject with respect to reservations?⁹⁷ If the treaties which are recognized by the 1969 and 1986 Vienna Conventions themselves as having a specific status are set apart, the problem has essentially been posed with respect to the “normative” treaties, of which it has been affirmed that they would be antinomical with the very idea of reservations (sect. A).

67. In this view (but with the specific problem of human rights treaties still in the background), it has been

VI) and France (*ibid.*, *Fifty-first Session, Supplement No. 40 (A/51/40)*, vol. I, annex VI).

⁸⁹ See in particular, Council of Europe, *Texts Adopted*, recommendation 1223 (1993) on reservations made by member States to Council of Europe conventions, adopted by the Parliamentary Assembly on 1 October 1993 (Strasbourg, 1993), and *ibid.*, *Documents*, adopted by the Committee of Ministers on the same question on 17 February 1994, and the work of CAHDI at its meeting of 21–22 March 1995 (document CAHDI(95)5 and corrigendum, paras. 23–34); at the conclusion of the meeting it was decided that “[t]he Secretariat will submit this document [CAHDI(95)7, working paper presented by the delegation of Austria], together with a copy of the meeting report, to the Special Rapporteur of the ILC, indicating at the same time that the CAHDI takes a keen interest in this issue and was willing to contribute to the study. This item will be kept on the agenda for the Spring 1996 meeting of the CAHDI when first indications will have been received on how the ILC study was progressing”.

⁹⁰ In its formulation of General Comment No. 24, the Human Rights Committee did not focus its attention on the general rules of international law on reservations but on the International Covenant on Civil and Political Rights itself; see the comment by Mrs. Higgins who criticized the initial draft for making excessive reference to the 1969 Vienna Convention in comparison with the Covenant, which should be the central concern of the Committee (1366th meeting of the Committee (CCPR/C/SR.1366), para. 58).

⁹¹ Art. 1, para. 1.

⁹² Art. 15.

⁹³ It would appear prudent to leave to one side, at this stage, the problems raised by article 20 of the 1978 Vienna Convention; besides the fact that a consensus seems to have emerged within the Commission that it is not a priority problem (see footnote 21 above), it arises in quite specific terms. Suffice to say that the question of succession to reservations (and to acceptances and objections) appears *prima facie* only as ancillary to the more general question of succession to the treaty itself. This being so, the Commission, when it considers the problems of succession to reservations, will perhaps need to reflect, at least incidentally, on the question of determining whether the object of a treaty plays a role in the modalities for succession to treaties. It is possible that, in the meantime, the judgement to be delivered by ICJ on preliminary objections raised by Yugoslavia in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* will offer new elements in this regard.

⁹⁴ See the first report of the Special Rapporteur (footnote 2 above), pp. 151–152, paras. 153–157.

⁹⁵ *Ibid.*, paras. 158–162.

⁹⁶ See paragraphs 2–4 and 18–20 above.

⁹⁷ The problem has been put in more or less exactly these terms with regard to reservations to human rights treaties: “The basic question concerning treaties on human rights is whether or not they are to be considered as a category separate from other multilateral treaties and in particular, whether the rules on reservations ... apply to them with equal force” (Coccia, “Reservations to multilateral treaties on human rights”, p. 16).

remarked that the general question leads to another, more specific: “There are in effect two separate but related issues: should reservations to normative treaties be permitted, and should the validity of such reservations be assessed by a system other than that pertaining to treaties in general?”⁹⁸ If the problem is put thus, “the reality is that we are speaking of *two sorts* of rules—substantive and procedural”.⁹⁹

68. These two categories of rules may be linked, and here again it may be imagined that the monitoring bodies established by certain multilateral treaties have specific powers with regard to reservations by virtue of the object of the treaty. But it may also be considered that the problem of the extent of these powers arises in many forms, independently of the object of the treaty, in all cases where a treaty instrument creates a body responsible for monitoring its implementation; in such a case, the specificity of the reservations regime would stem from the existence of the body and not from the specific characteristics of the treaty—unless it is considered that treaties establishing monitoring bodies constitute a separate category ...

69. It thus appears methodologically sound to distinguish the problem of principle—substantive—of the unity or diversity of the rules applicable to reservations (sect. B) from that—procedural—of the application of such rules and, in particular, of the powers of monitoring bodies where they exist (sect. C).

A. Diversity of treaties and the legal regime for reservations

1. LIMITATION OF THE STUDY TO NORMATIVE TREATIES

70. Two conflicting considerations may lead to expansion or, conversely, to limitation of the scope of this chapter: on the one hand, the question of the unity or diversity of the legal regime of reservations arises with some acuteness and urgency only with regard to human rights treaties; but, on the other hand, it is the case that other categories of treaties present particular problems with regard to the nature of the applicable rules or the modalities of their application; this is very certainly true of:

- (a) Limited treaties;
- (b) Constituent instruments of international organizations; and
- (c) Bilateral treaties.

71. It would seem wise, however, to exclude these various categories of treaties from consideration at this stage, for both theoretical and practical reasons. While the “universality or diversity” problem is partially common to all treaties, it is also, as a logical necessity, specific to each category; after all, it is in the light of the particular features of each category that the question arises of whether common rules are applicable to all treaties or whether, on

the contrary, they should be ruled out. Put differently, the problem of unity is one thing by definition, but, by the same token, the problem of diversity is many things.¹⁰⁰ In other words, it may be necessary to consider each individual category separately, and there is no disadvantage in giving such consideration to certain types of treaties and not to others for the time being, since they pose different problems, at least in part.

72. Moreover, in the 1969 and 1986 Vienna Conventions themselves, limited treaties and constituent instruments of international organizations are given separate treatment which is reflected in specific rules.¹⁰¹ Reservations to bilateral treaties, meanwhile, pose very specific problems relating to the very definition of the concept of reservations,¹⁰² and it would probably be advantageous to address them in the chapter devoted to that definition.¹⁰³

73. Codification treaties raise more difficult questions. The belief has occasionally been expressed that reservations to such treaties pose specific problems.¹⁰⁴ However widespread,¹⁰⁵ this notion is not devoid of ambiguity; the boundary between the codification of international law on the one hand and its progressive development on the other is, to say the least, unclear (assuming that it exists);¹⁰⁶ many treaties contain “codification clauses”, in other words, *provisions* which reproduce customary norms, without constituting “codification treaties” as such, since these provisions are set forth alongside others that are not of the same nature (this, incidentally, is the problem posed by numerous human rights treaties).¹⁰⁷ It is quite unlikely, then, that the category of codification treaties would, in and of itself, be “operational” for the purposes of this chapter.¹⁰⁸

74. Unquestionably, however, there is a need to determine whether a reservation to a customary norm repeated in a treaty provision is permissible.¹⁰⁹ In keeping with the “provisional plan of the study” in paragraph 37 above,¹¹⁰

¹⁰⁰ See the similar comments made by Mr. de Saram in the debate on the first report of the Special Rapporteur, *Yearbook ... 1995*, vol. I, 2404th meeting, pp. 165–167.

¹⁰¹ See article 20, paras. 2–3.

¹⁰² See the doubts expressed during the forty-seventh session of the Commission by Mr. Idris (*Yearbook ... 1995*, vol. I, 2407th meeting, pp. 189–190), Mr. Kabatsi (*ibid.*, p. 190) and Mr. Yamada (*ibid.*, pp. 190–192) concerning the appropriateness of the topic itself.

¹⁰³ See paragraph 37, Provisional plan of the study, sect. II.5, and paragraph 40 above.

¹⁰⁴ See, for example, Téboul, “Remarques sur les réserves aux conventions de codification”, and the literature cited on page 684, footnotes 9–10.

¹⁰⁵ See, for example, Imbert, *op. cit.*, pp. 239–249, and Téboul, *loc. cit.*

¹⁰⁶ See *The Work of the International Law Commission*, 4th ed. (United Nations publication, Sales No. E.88.V.1), pp. 14–15.

¹⁰⁷ See paragraphs 85–86 below.

¹⁰⁸ It is chiefly for similar reasons, moreover, that the once important distinction between “law-making treaties” and “contractual treaties” has now fallen into disfavour: “... most treaties certainly have no homogeneous content, and rules of all kinds can be cast into the same treaty as into a mould ... If material legal distinctions were to be applied to treaties, all their provisions would in any case have to be examined separately: a superficial overview would not be enough (Reuter, *op. cit.*, p. 27).

¹⁰⁹ See the first report of the Special Rapporteur (footnote 2 above), p. 149, paras. 143–144, and the statement made by Mr. Lukashuk during the debate on that report (*Yearbook ... 1995*, vol. I, 2402nd meeting, pp. 159–161).

¹¹⁰ See paragraph 37 above, sect. IV.A.3.

⁹⁸ Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, p. 279.

⁹⁹ Higgins, “Introduction”, *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions*, p. xx.

the Special Rapporteur promises to deal more fully with this complex problem at a later stage in the study. This decision seems to him justified by the fact that what is at issue is not the *subject* but the dual nature (both contractual and customary) of the provision to which the reservation relates.

75. Nevertheless, the problem is clearly not wholly unrelated to the one with which this chapter deals. In the view of the Special Rapporteur, a practical approach is called for in this regard. Some of the questions being addressed at this stage are unavoidably of a “vertical” nature and relate to the entire topic under consideration; they cannot be ignored altogether, as the Commission must feel completely free to make subsequent improvements in the provisional and partial conclusions reached at the 1996 session.

76. Conversely, it is the conviction of the Special Rapporteur that consideration of the “vertical” problem addressed in this chapter, which runs through the whole topic of reservations to treaties, can be very beneficial for the rest of the study, by providing it with useful reference points and analysing it from a particular angle.

2. NORMATIVE TREATIES AND PROVISIONS

77. “Normative” treaties pose special problems. It is in discussing them that academic writers have not only dwelt most heavily on the unsuitability of the general legal regime governing reservations, but have even gone so far as to assert that such instruments, by their nature, do not permit reservations. Before considering these questions, however (which are, to a large extent, separate),¹¹¹ it is necessary to inquire into the substance and the very existence of this category of treaty.

78. According to some writers,

Multilateral conventions have become one of the most common means of establishing rules of conduct for all States, not only in their relations with other States, but also in their relations with individuals. States thus tend to make their contributions to the formation of international law through such instruments, by articulating a general requirement of the international community.¹¹²

It is this peculiarity of “normative” Conventions, namely, that they operate in, so to speak, the absolute, and not relatively to the other parties—*i.e.*, they operate for each party *per se*, and not *between* the parties *inter se*—coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* States, that gives these Conventions their special juridical character.¹¹³

79. Treaties of this type are found in widely differing fields, such as the legal (“conventions on codification”¹¹⁴ of public and private international law, including uniform law conventions), economic, technical, social, humanitarian, and other fields. General conventions on environmental protection usually have this character, and disarmament conventions frequently do so as well.

80. It is in the human rights field, however, that these peculiarities have most frequently come to light,¹¹⁵ the term “human rights” being understood here in the broad sense. For the purposes of this chapter, there are no grounds for distinguishing between humanitarian law on the one hand and human rights, strictly speaking, on the other; considerations which apply to one term apply just as well to the other.¹¹⁶

81. Nevertheless, even from a broad standpoint, the categorization of a treaty as a human rights (or disarmament or environmental protection) treaty is not always problem-free;¹¹⁷ a family law or civil status convention may contain some provisions which relate to human rights and others which do not. Moreover, assuming that this problem can be solved, two other difficulties arise.

82. First, the category of “human rights treaties” is, by all indications, far from homogeneous.

The United Nations Covenants and the European Convention [on Human Rights], which govern very nearly all aspects of life in society, cannot be considered on the same footing as the Genocide Convention or the Convention on racial discrimination which are concerned only to safeguard a single right.¹¹⁸

These two subcategories of “human rights treaties” pose quite different problems as regards the definition of their object and purpose, which plays such a central role in evaluating the permissibility of reservations.¹¹⁹

83. Secondly, within a single treaty, clauses that vary greatly in their “importance” (which, legally speaking, can be reflected in whether they are binding or non-binding and whether they may or may not be derogated from),¹²⁰ their nature (customary or non-customary)¹²¹ or their substance (“normative” or contractual) can be set forth side by side. While all these factors have a bearing on the question under consideration,¹²² it is clearly this last factor, the “normative” character attributed to human rights treaties, which has the greatest impact.

84. According to a widely held view, the main peculiarity of such treaties is that their object is not to strike a balance between the rights and advantages which the States parties mutually grant to one another, but to establish common international rules, reflecting shared values, that all parties undertake to observe, each in its own sphere. As ICJ stated forcefully, with regard to the Convention on the Prevention and Punishment of the Crime of Genocide:

¹¹⁵ See paragraphs 84 and 148–152 below.

¹¹⁶ For an outline and a justification of the distinction, see Vasak, “Le droit international des droits de l’homme”, *Collected Courses ... 1974-IV*, pp. 350 et seq.

¹¹⁷ See, in this regard, Redgwell, *loc. cit.*, p. 280.

¹¹⁸ Imbert, “Reservations and human rights conventions”, p. 28.

¹¹⁹ See, in this regard, McBride, “Reservations and the capacity to implement human rights treaties”, to be published in *Human Rights as General Norms ...* (footnote 99 above), and Schabas, “Reservations to human rights treaties: time for innovation and reform”, p. 48.

¹²⁰ See, on this point, the moderate position taken by the Human Rights Committee in its general comment No. 24 (A/50/40), para. 10 (footnote 87 above), and the commentary by McBride, *loc. cit.*, pp. 163–164; see also Imbert, “Reservations and human rights conventions”, pp. 31–32.

¹²¹ See paragraphs 73–74 above.

¹²² See paragraphs 90–98 below.

¹¹¹ See paragraph 83 below.

¹¹² Imbert, *op. cit.*, pp. 435–436; see also the extensive bibliography cited by this author, particularly footnotes 92 and 95.

¹¹³ Fitzmaurice, “Reservations to multilateral conventions”, p. 15.

¹¹⁴ See paragraph 73 above.

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.¹²³

85. It is, however, necessary to beware of taking an overly straightforward and simplistic view of things. While, as a rule, provisions that protect human rights have a marked normative character, human rights treaties also include typically contractual clauses. Awkward as this may be, the “Hague law” applicable to the conduct of warring parties in armed conflicts remains fundamentally contractual, and the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes are still applied on a reciprocal basis (despite the lapsing of the celebrated *si omnes* clause),¹²⁴ similarly, the inter-State application machinery established by article 24 of the European Convention on Human Rights¹²⁵ and article 45 of the American Convention on Human Rights are based on reciprocity, and it has even been possible, in speaking of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, to state that it

contains stipulations of a normative character and stipulations of a contractual character. However, as is clear from its text and from the whole history of United Nations dealing with the problem of genocide, the intention of its framers was equally to codify, at least in part, substantive international law, and to establish international obligations to facilitate international co-operation in the prevention and punishment of the crime. Consequently, the Convention cannot be regarded as a single indivisible whole, and its normative stipulations are divisible from its contractual stipulations.¹²⁶

86. Here again, the problem does not seem to have been posed in the proper terms. While this has been done with respect to “human rights treaties”, all that is involved is “human rights clauses” of a normative character, or, more broadly, “normative clauses”, regardless of the subject of the treaty in which they are articulated.

87. Indeed, while it is clear that human rights treaties display these characteristics in a particularly striking way, it must also be recognized that they are not unique in doing so. The same is true of most environmental protection or disarmament treaties and, in a broader sense, all “normative” treaties by which the parties enact uniform rules which they undertake to apply.

88. Naturally, this observation does not obviate the need to inquire whether there are subcategories within this category—if it does in fact have legal status—which

pose specific problems with regard to reservations and, in particular, whether human rights treaties pose such problems. Nevertheless, thinking must start from more general premises, unless conclusions are to be posited at the outset of the process. Hence, while human rights treaties will be emphasized for the reasons outlined above,¹²⁷ the body of law-making multilateral treaties will form the broader focus of this chapter.

B. Unity of the main rules applicable to reservations

89. The adaptation to normative multilateral treaties of the “Vienna rules” relating to reservations cannot be evaluated in the abstract. It must be viewed in the light of the functions assigned to reservations regimes and the intentions of their authors.

1. FUNCTIONS OF THE LEGAL REGIME OF RESERVATIONS

90. Two opposing interests are at stake. The first interest is the extension of the convention. It is desirable for this convention to be ratified by the largest possible number of States; consequently, adjustments which make it possible to obtain the consent of a State will be accepted. The other concern relates to the integrity of the Convention: the same rules must apply to all parties; there is no point in having a treaty regime that has loopholes or exceptions, in which the rules vary according to the States concerned.¹²⁸

The function of the rules applicable to reservations is to strike a balance between these opposing requirements: on the one hand, the search for the broadest possible participation; on the other hand, the preservation of the *ratio contrahendi* (ground of covenant), which is the treaty’s reason for being. It is this conflict between universality and integrity which gives rise to all reservations regimes,¹²⁹ be they general (applicable to all treaties which do not provide for a specific regime) or particular (established by express clauses incorporated into the treaty).

91. As far as human rights treaties are concerned, Mrs. Higgins has expressed the problem in the following terms:

The matter is extremely complex. At the heart of it is the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights.¹³⁰

92. The first of these requirements, universality, militates in favour of widely expanding the right of States to formulate reservations, which clearly facilitates universal

¹²³ Advisory opinion cited above (footnote 47), p. 23; see also paragraphs 148–152 below.

¹²⁴ See, on this point, Imbert, *op. cit.*, pp. 256–257.

¹²⁵ See Imbert, “Reservations and human rights conventions”, p. 36.

¹²⁶ Statement made by Mr. Shabtai Rosenne on behalf of the Government of Israel during consideration of the request by the General Assembly for an advisory opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Pleadings, Oral Arguments, Documents, Advisory Opinion of 28 May 1951*, pp. 356–357; see also Scovazzi, *Esercitazioni di diritto internazionale*, pp. 69–71. Likewise, in a Memorandum by the Director of ILO on the Admissibility of Reservations to General Conventions (League of Nations, *Official Journal*, 8th year, No. 7, July 1927, annex 967a, p. 882), it was noted that international labour conventions “appear to be legal instruments partaking of the nature both of a law and of a contract”.

¹²⁷ See paragraphs 56–63 above.

¹²⁸ Bastid, *Les traités dans la vie internationale: conclusions et effets*, pp. 71–72.

¹²⁹ See, in this regard, Halajczuk, “Les Conventions multilatérales entre l’universalité et l’intégrité”, pp. 38–50 and 147–158; Ruda, *loc. cit.*, p. 212; Gamble Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, pp. 372–373; Piper, “Reservations to multilateral treaties: the goal of universality”, pp. 297, 305 and 317; Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, pp. 683–684 and 686; Blay and Tsamenyi, “Reservations and declarations under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, p. 557; and Nguyen Quoc, Daillier and Pellet, *Droit international public*.

¹³⁰ Higgins, “Introduction”, p. xv.

participation in “normative” treaties. And the same applies with respect to human rights:

... the possibility of formulating reservations may well be seen as a strength rather than a weakness of the treaty approach, insofar as it allows a more universal participation in human rights treaties.¹³¹

93. Nevertheless, such freedom on the part of States to formulate reservations cannot be unlimited. It clashes with another, equally pressing requirement—preserving the very essence of the treaty. For instance, it is absurd to believe that a State could become a party to the Convention on the Prevention and Punishment of the Crime of Genocide while objecting to the application of articles I–III, i.e. the only substantial clauses of the Convention.

94. The problem can also be posed in terms of consent.¹³²

95. By its very definition, the law of treaties is consensual. “Treaties are binding by virtue of the will of States to be bound by them. They are juristic acts, involving the operation of human will.”¹³³ States are bound by treaties *because* they have undertaken—*because* they have consented—so to be bound. They are free to make this commitment or not, and they are bound only by obligations which they have accepted freely, with full knowledge of the consequences.¹³⁴ “No State can be bound by contractual obligations it does not consider suitable.”¹³⁵

96. The same applies to reservations: “The fundamental basis remains, that no state is bound in international law without its consent to the treaty. This is the starting-point for the law of treaties, and likewise for our international law rules dealing with reservations.”¹³⁶ As ICJ has stated: “It 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.”¹³⁷ Likewise, in the arbitration

¹³¹ Coccia, *loc. cit.*, p. 3. The author refers to Schachter, Nawaz and Fried, *Toward Wider Acceptance of UN Treaties*, p. 148, and adds: “This UNITAR study shows statistically that ‘the treaties ... which permit reservations, or do not prohibit reservations, have received proportionally larger acceptances than treaties which either do not permit reservations to a part or whole of the treaty, or which contain only one substantial clause, making reservations unlikely.’”

¹³² See the first report on the law of treaties by Sir Hersch Lauterpacht, in which he explains that the problem of consent “is a question closely, though indirectly, connected with that of the intrinsic justification of reservations” (*Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 125).

¹³³ Reuter, *op. cit.*, p. 23.

¹³⁴ Unless they are otherwise bound, but this is a different problem. See also, in this regard, the statement made by the United States representative in the Sixth Committee during the fiftieth session of the General Assembly (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 53).

¹³⁵ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16, 17”, p. 466. See, for example, in this regard, the case of the *S.S. “Wimbledon”*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25, and *International Status of South-West Africa, Advisory Opinion, I.C.J. Reports 1950*, p. 139.

¹³⁶ Bishop Jr., “Reservations to treaties”, *Recueil des cours ... 1961–II*, p. 255.

¹³⁷ ICJ opinion cited above (footnote 47), p. 21. The authors of the dissenting opinion express 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 dispute between France and the United Kingdom of Great Britain and Northern Ireland with regard to the *English Channel* case, the Court emphasized the need to respect the “principle of mutuality of consent” in evaluating the effects of reservations.¹³⁸

97. The rules applicable to reservations must therefore strike a dual balance between (a) the requirements of universality and integrity of the treaty; and (b) the freedom of consent of the reserving State and that of the other States parties, it being understood that these two “dialectical pairs” overlap to a large extent.

98. In the light of these requirements, it is necessary to inquire whether the legal regime for reservations envisaged by the 1969 and 1986 Vienna Conventions is generally applicable and, in particular, whether it is suited to the particular natures of normative treaties (or, more specifically, of the “normative clauses” articulated in general multilateral treaties).¹³⁹ As a first step, it can be determined that the authors of this regime showed themselves to be mindful of these requirements, and that they intended to adopt generally applicable rules to satisfy them.

2. A REGIME DESIGNED FOR GENERAL APPLICATION

99. Since the very beginning of its work on reservations, the Commission has been aware of the need to strike the above-mentioned dual balance¹⁴⁰ between the requirements of universality and integrity on the one hand and, on the other, between respect for the wishes expressed by the reserving State and that of the other parties, although the Commission has taken a number of very different positions as to the best way of achieving such a balance.

100. In accordance with its position of principle in favour of the rule of unanimity, the first report by Mr. Briery merely stresses the need for consent to the reservation, while admitting—and this is in itself an element of flexibility—that such consent could be implicit.¹⁴¹ However, beginning the following year, in response to the General Assembly’s invitation to the Commission to study the question of reservations to multilateral conventions,¹⁴² the Special Rapporteur fully discussed the question:

In approaching this task it would appear that the Commission has to bear in mind two main principles. First there is the desirability of maintaining the integrity of international multilateral conventions. It is to be

of the proposal of the reservations or at the same time or later” (*ibid.*, pp. 31–32). Moreover, it is clear that the majority and the dissenting judges held very divergent views on the way in which consent to a reservation should be expressed, but this difference does not affect the “principle of mutuality of consent” (see footnote 138 below), and it seems debatable to assert, as some eminent writers do, that in the opinion of the majority (which is the source of the Vienna regime), “the very principle of consent has been shaken” (Imbert, *op. cit.*, p. 69; see also pages 81 and 141 et seq.).

¹³⁸ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 42, paras. 60–61).

¹³⁹ See paragraphs 73–74 and 85–86 above; in the rest of this report, these two terms are used interchangeably.

¹⁴⁰ See paragraph 97 above.

¹⁴¹ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 240.

¹⁴² General Assembly resolution 478 (V) of 16 November 1950; see the first report of the Special Rapporteur (footnote 2 above), p. 127, para. 14.

preferred that some degree of uniformity in the obligations of all parties to a multilateral instrument should be maintained. ...

Secondly, and on the other hand, there is the desirability of the widest possible application of multilateral conventions. ... If they are to be effective, multilateral conventions must be as widely in force or as generally accepted as possible.¹⁴³

101. The Commission agreed with the Special Rapporteur on this question but at the same time was somewhat uneasy:

When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. ... On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it may often be more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it.¹⁴⁴

Faced with this dilemma,

The Commission believes that multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory.¹⁴⁵

It concludes, nonetheless,

that its problem is not to recommend a rule which will be perfectly satisfactory, but that which seems to it to be the least unsatisfactory and to be suitable for application in the majority of cases,¹⁴⁶

it being understood that this rule can always be rejected, since States and international organizations are invited to “consider the insertion [in multilateral conventions] of provisions relating to ... reservations”.¹⁴⁷

102. It does not make much difference which system is decided on at this stage. It is significant that the Commission, while perfectly aware of the diversity of situations, has shown a firm determination since the outset to separate out a single, unique system of ordinary law, one that does the least possible harm and can be applied in all cases where the treaty is silent.

103. The reports submitted by Sir Hersch Lauterpacht in 1953 and 1954 are written along the same lines.¹⁴⁸ However, it is important to note that after a long section on the debates concerning reservations in the draft¹⁴⁹ Covenant on Human Rights,¹⁵⁰ the Special Rapporteur on the law of treaties concluded that it was incumbent on the General Assembly to choose a suitable system, and that the great variety of existing practice suggested “that it is neither necessary nor desirable to aim at a uniform solution”; he nevertheless went on to say:

What is both necessary and desirable is that the codification of the law of treaties shall contain a clear rule for the cases in which the parties have made no provision on the subject.¹⁵¹

¹⁴³ *Yearbook ... 1951*, vol. II, document A/CN.4/41, pp. 3–4, paras. 11–12 and 16.

¹⁴⁴ *Ibid.*, document A/1858, para. 26.

¹⁴⁵ *Ibid.*, para. 28.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, para. 33.

¹⁴⁸ See the first report of the Special Rapporteur (footnote 2 above), pp. 129–130, paras. 23–29.

¹⁴⁹ The only one at the time.

¹⁵⁰ *Yearbook ... 1954*, vol. II, document A/CN.4/87, commentary on draft article 9, pp. 131–133.

¹⁵¹ *Ibid.*, p. 133.

104. The only report in which Sir Gerald Fitzmaurice dealt with the question of reservations is the first one, submitted in 1956.¹⁵² It is of twofold interest with regard to the problem at issue here:

(a) Endorsing the views of his predecessor, the Special Rapporteur felt that “even as a matter of *lex lata*, the strict traditional rule about reservations could be regarded as mitigated in practice by the following considerations which, taken together, allow an appreciable amount of latitude to States in this matter, and should meet all reasonable needs”,¹⁵³ thus reaffirming the idea that flexibility is a gauge of adaptability;

(b) In addition, Sir Gerald Fitzmaurice again pointed out the difference noted in an article published in 1953¹⁵⁴ between “treaties with limited participation” on the one hand and, on the other, “multilateral treaties”.¹⁵⁵

105. This distinction, mentioned again in 1962 by Sir Humphrey Waldock in his first report,¹⁵⁶ is the direct source of the current provisions of paragraphs 2 and 3 of the 1969 and 1986 Vienna Conventions. This result was not without its problems, however. The lengthy discussions on the Special Rapporteur’s suggestions¹⁵⁷ bear witness to profound differences on this point among the members of the Commission. The controversy was mainly about the validity of the exception to the general rule, as proposed by the Special Rapporteur and discussed in another form by the Drafting Committee, concerning “multilateral treaties concluded by a restricted group of States”.¹⁵⁸ Summarizing the debate, the Special Rapporteur noted that two courses were open to the Commission:

One was to draw a distinction between general multilateral treaties and other multilateral treaties; the other was to draw a distinction between treaties which dealt with matters of concern only to a restricted group of states and treaties which dealt with matters of more general concern.¹⁵⁹

106. The first of these two courses was defended by some members,¹⁶⁰ while others, even more clearly, asked expressly that the criterion of the object of the treaty should be reintroduced.¹⁶¹ These views, strongly opposed by other members,¹⁶² nonetheless remained minority

¹⁵² See the first report of the Special Rapporteur (footnote 2 above), paras. 30–33.

¹⁵³ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 126, para. 92.

¹⁵⁴ “Reservations to multilateral conventions”, p. 13.

¹⁵⁵ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 127, paras. 97–98. Note, however, that while Sir Gerald Fitzmaurice spoke expressly in the above-mentioned article (footnote 154 above) about “Conventions of the ‘normative’ types”, he did not use that expression in his report.

¹⁵⁶ *Yearbook ... 1962*, vol. II, document A/CN.4/144, draft arts. 17, para. 5, and 18, para. 3 (b).

¹⁵⁷ For a brief discussion of these debates, see the first report of the Special Rapporteur (footnote 2 above), paras. 43–45.

¹⁵⁸ See especially *Yearbook ... 1962*, vol. I, 663rd and 664th meetings, pp. 225–234.

¹⁵⁹ *Ibid.*, 664th meeting, p. 233, para. 48.

¹⁶⁰ *Ibid.*, the positions of Mr. Verdross (642nd meeting, p. 80, para. 56) or Sir Humphrey Waldock (663rd meeting, p. 228, paras. 91–93).

¹⁶¹ *Ibid.*, the positions of Messrs Jiménez de Aréchaga (652nd meeting, p. 146), Yasseen (664th meeting, p. 232) and Bartoš (664th meeting, p. 233).

¹⁶² See especially the very firm position of Mr. Ago (*ibid.*, 664th meeting, p. 233).

views and, after referral to the Drafting Committee, they were ultimately rejected. In its report, the Commission merely stated the following:

... the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of States and general multilateral treaties. The rules proposed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained.¹⁶³

107. Neither the States in their commentaries on the draft articles nor the Commission itself ever returned to this point,¹⁶⁴ and in 1966, in its final report on the law of treaties, the Commission used the same formula—almost word-for-word—as in 1962:

... the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.¹⁶⁵

108. The problem resurfaced briefly during the United Nations Conference on the Law of Treaties after the United States proposed an amendment which sought to introduce the nature of the treaty as one of the criteria to be taken into consideration in determining whether a reservation was permissible.¹⁶⁶ Supported by some States¹⁶⁷ and opposed by others,¹⁶⁸ the proposal was sent to the Drafting Committee,¹⁶⁹ which rejected it.¹⁷⁰ The Conference does not seem to have discussed the view expressed by WHO that draft article 19¹⁷¹ “should be interpreted as authorizing reciprocity only to the extent to which it is compatible with the nature of the treaty and of the reservation”.¹⁷²

¹⁶³ *Yearbook ... 1962*, vol. II, p. 180, document A/5209, para. 23, Draft articles on the law of treaties, arts. 18–20, Commentary, para. (14). See also pages 178 and 181.

¹⁶⁴ Except in passing; see the statement by Mr. Briggs during the 1965 debates, *Yearbook ... 1965*, vol. I, 798th meeting, p. 163.

¹⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 206, para (14). At the forty-seventh session, Mr. de Saram drew attention to this sentence (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 166); see also the position of Mr. Srineevasa Rao (*ibid.*, pp. 171–172) and that of the United States during the Sixth Committee debate (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 50).

¹⁶⁶ *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), Reports of the Committee of the Whole (A/CONF.39/14), p. 134.

¹⁶⁷ *Ibid.*, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.68.V.7): United States, 21st meeting, p. 108, and 24th meeting, p. 130; Spain, 21st meeting, p. 109; and China, 23rd meeting, p. 121.

¹⁶⁸ *Ibid.*, Ukrainian SSR, 22nd meeting, p. 115; Poland, p. 118; Ghana, p. 119; Italy, p. 120; Hungary, 23rd meeting, p. 122; Argentina, 24th meeting, p. 130; and USSR, 25th meeting, p. 134.

¹⁶⁹ *Ibid.*, 25th meeting, p. 135.

¹⁷⁰ *Ibid.*, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.70.V.6), 11th plenary meeting, reaction of the United States, p. 35.

¹⁷¹ Became article 21.

¹⁷² Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties (A/CONF.39/5 (vol. I)), p. 166.

109. The *travaux préparatoires* for the 1986 Vienna Convention do not reflect the substantive debate on this question. At the most, one can observe that, after some discussion,¹⁷³ the Commission disregarded the wishes of certain members to have a special regime for reservations by international organizations; in its 1982 report it stated:

After a thorough review of the problem, a consensus was reached in the Commission, which, choosing a simpler solution than the one it had adopted in first reading, assimilated international organizations to States for the purposes of the formulation of reservations.¹⁷⁴

110. Bringing the regime of reservations to treaties to which international organizations are parties into line with the regime applicable to treaties involving only States was highlighted once again at the 1986 United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations.¹⁷⁵ Here the fundamental unity of the reservation regime laid out in the 1969 and 1986 Vienna Conventions was made complete and confirmed, the sole exceptions being certain treaties concluded between a limited number of States and constituent instruments of international organizations.¹⁷⁶

111. The documents tracing the drafting of the 1969 and 1986 Vienna Conventions leave no doubt whatsoever: the Commission and, later, the codification conferences, deliberately, and after a thorough debate, sought to establish a single regime applicable to reservations to treaties regardless of their nature or their object. The Commission did not set out with any preconceived ideas to this end; as it clearly stated in 1962 and in 1966,¹⁷⁷ it had observed that there were no specific reasons for proceeding differently—and it is interesting to note, first, that the Commission adopted this reasoned position by looking specifically at the regime governing reservations to human rights treaties¹⁷⁸ and, secondly, that in the two cases in which it felt special rules were needed on certain points, it did not hesitate to derogate from the general regime.¹⁷⁹

3. THE LEGAL REGIME OF RESERVATIONS IS GENERALLY APPLICABLE

112. This argument is a familiar one. Whatever manifestation it takes, it holds that, given the importance of normative treaties for the international community as a whole, reservations to such instruments must be excluded, or at least discouraged, whereas the “flexible system” of the 1969 and 1986 Vienna Conventions unduly facilitates their formulation and amplifies their effects.

¹⁷³ See the first report of the Special Rapporteur (footnote 2 above), pp. 137–139, paras. 72–85.

¹⁷⁴ *Yearbook ... 1982*, vol. II (Part Two), p. 34, para. (13) of the general commentary to section 2.

¹⁷⁵ See the first report of the Special Rapporteur (footnote 2), pp. 139–140, paras. 87–88.

¹⁷⁶ See paragraph 72 above.

¹⁷⁷ See paragraphs 106–107 above.

¹⁷⁸ Particularly with regard to the International Covenants on Human Rights; see paragraph 103 and footnote 149 above.

¹⁷⁹ See article 20, paras. 2–3, of the 1969 and 1986 Vienna Conventions.

113. However, it is doubtless a matter of good doctrine to draw a distinction between two separate problems even if they are related: the very general problem of whether or not reservations to such instruments are appropriate and the more technical question of determining whether the “Vienna regime” addresses the various concerns expressed. But if the answer to the first question cannot be objective and depends far more on political—indeed, ideological—preferences than on legal technicalities, the latter considerations in turn make it possible to take a firm position with regard to the second question. And the two can in fact be considered separately.

(a) *A debate with no possible conclusion: the appropriateness of reservations to normative treaties*

114. The terms of the debate are clearly evident in the opposition between the majority and the dissenting judges in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case. The former held that:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.¹⁸⁰

For the minority judges, on the other hand,

It is ... not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity, that is of paramount importance. ... In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.¹⁸¹

These [“multilateral conventions of a special character”¹⁸²], by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.¹⁸³

115. This marked opposition of points of view elicits three observations:

(a) It arises at the outset of the controversy in connection with a human rights treaty par excellence, which as such falls in the subcategory of normative treaties, the category around which the debate has recently resurfaced.¹⁸⁴

(b) The two “camps” start from exactly the same premises (the aims of the Convention, which are pursued in the interest of all mankind) to reach radically opposing conclusions (reservations to the Convention must/must not be permitted);

(c) Everything was said in 1951; the ensuing dialogue of the deaf has gone on unabated for 45 years without either side displaying any fundamental change in its position.

116. As there is no possible way of ending the debate, let us content ourselves with setting out the undisputed facts.¹⁸⁵

117. Reservations to “normative” treaties are deleterious because:

(a) Permitting them is tantamount to encouraging partial acceptance of the treaty,¹⁸⁶ and

(b) Less careful drafting, since the parties can in fact modify their obligations later;¹⁸⁷

(c) The accumulation of reservations ultimately voids these treaties of any substance where the reserving State is concerned;¹⁸⁸ and

(d) In any event, compromises their quasi-legislative functioning and the uniformity of their implementation.¹⁸⁹

118. More specifically, as regards human rights treaties,

(a) The terms “reservations” and “human rights” seem at first to contradict each other. It is hard to see how a State can agree to be bound by a treaty on human rights if it is not in a position to honour its obligations in full, and needs a “reserved domain”,¹⁹⁰

(b) It is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.¹⁹¹

(c) Accompanying ratification with a series of reservations could give the reserving State an opportunity to enhance its international “image” at little cost without having really to accept any restrictive commitments.¹⁹²

¹⁸⁵ Subject to the more technical aspects of the debate, see paragraphs 126–162 below.

¹⁸⁶ Fitzmaurice, “Reservations to multilateral conventions”, pp. 17 and 19–20.

¹⁸⁷ *Ibid.*, p. 19.

¹⁸⁸ See Schabas, “Reservations to human rights treaties ...”, p. 41.

¹⁸⁹ See, in the area of environmental protection, Stewart, “Enforcement problems in the Endangered Species Convention: reservations regarding the reservation clauses”, p. 438 and, albeit indirectly, in the field of disarmament, Boniface, *Les sources du désarmement*, p. 68.

¹⁹⁰ Imbert, “Reservations and human rights conventions”, p. 28; see also Coccia, *loc. cit.*, p. 16; both authors endorse this opinion but do not claim it as their own. See also the position of Mr. Robinson during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2402nd meeting, pp. 157–159).

¹⁹¹ A/50/40 (footnote 87 above), vol. I, annex V, para. 4.

¹⁹² See Anand, “Reservations to multilateral conventions”; Imbert, *op. cit.*, p. 249; and Schabas, “Reservations to human rights treaties ...”, p. 41.

¹⁸⁰ Advisory Opinion, *I.C.J. Reports 1951*, p. 24.

¹⁸¹ *Ibid.*, Joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, p. 47.

¹⁸² *Ibid.*, Dissenting opinion of Judge Alvarez, p. 51.

¹⁸³ *Ibid.*, p. 53.

¹⁸⁴ See paragraphs 56–62 above.

119. Conversely, it is argued that:

(a) Reservations are a “necessary evil”¹⁹³ resulting from the current state of international society; they

cannot be qualified at the ethical level; they reflect a fact, namely that there are minorities whose interests are as respectable as those of majorities;¹⁹⁴

(b) More positively, they are an “essential condition of life, of the dynamics” of treaties¹⁹⁵ that promotes the development of international law in the process;¹⁹⁶

(c) By “facilitating the conclusion of multilateral conventions”;¹⁹⁷ and

(d) By allowing a greater number of States to become parties;¹⁹⁸

(e) Since, ultimately, partial participation is better than no participation at all.¹⁹⁹

120. These considerations carry even more weight in the area of human rights:

(a) The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in [such treaties] nonetheless to accept the generality of obligations in that instrument;²⁰⁰

(b) Indeed, it could be argued that there is a particular need for a margin of flexibility in respect of human rights treaties which tend to touch on matters of particular sensitivity to States ...²⁰¹

¹⁹³ *Yearbook ... 1965*, vol. I, 797th meeting, statement by Mr. Ago, p. 151.

¹⁹⁴ *Yearbook ... 1975*, vol. II, document A/CN.4.285, fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations by Mr. Paul Reuter, Special Rapporteur, p. 36, para. (3) of the general commentary on section 2.

¹⁹⁵ Imbert, *op. cit.*, p. 463.

¹⁹⁶ *Ibid.*, p. 464.

¹⁹⁷ *I.C.J. Reports 1951* (footnote 47 above), p. 22. See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2404th meeting, pp. 171–172, paras. 42–50).

¹⁹⁸ See, for example, Lachs, “Le développement et les fonctions des traités multilatéraux”, *Recueil des cours...* 1957–II, p. 311. See also the views expressed during the debate on the first report of the Special Rapporteur by Mr. Villagrán Kramer (*Yearbook ... 1995*, vol. I, 2403rd meeting, pp. 163–164) and Mr. Elaraby (“In a sense, reservations were the price paid for broader participation”, *ibid.*, 2404th meeting, p. 170, para. 35) and, in the area of the environment, Stewart, *loc. cit.*, p. 436.

¹⁹⁹ This is what Sir Gerald Fitzmaurice called, speaking in highly critical terms, “the half-a-loaf doctrine” (“Reservations to multilateral conventions”, p. 17): “... that in any case half a loaf is better than no bread—that it is better (especially as regards the law-making, social and humanitarian type of Convention) that States should become parties even if they cannot (or will not) carry out certain of the obligations involved, and that they should be bound by at least some of the obligations of the Convention, even if they disengage themselves from the rest” (*ibid.*, p. 11). For examples in a similar vein, see De Visscher, *Théories et réalités en droit international public*, pp. 292–293, and Imbert, *op. cit.*, pp. 372 and 438.

²⁰⁰ See footnote 191 above.

²⁰¹ Redgwell, *loc. cit.*, p. 279; see also Imbert, “Reservations and human rights conventions”, p. 30. Giegerich shows how *kultureller Relativismus* (cultural relativism) is often invoked in the area of human rights (“Reservations to human rights agreements: admissibility, validity, and review powers of treaty bodies—a constitutional approach”). See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (footnote 197 above).

(c) Particularly when the terms of the convention are backed up by a monitoring mechanism which ensures a dynamic interpretation of the instrument;²⁰²

(d) The formulation of reservations would seem to constitute proof that States take their treaty obligations seriously; and

(e) Gives them an opportunity to harmonize their domestic law with the requirements of the convention while obligating them to abide by the most important provisions;

(f) Especially since the implementation of human rights treaties takes time;²⁰³ and

(g) Takes more resources, particularly financial resources, than it would appear at first.²⁰⁴

121. Similarly, it is argued that the usefulness of reservations in the area of human rights is borne out concretely by the fact that very few conventions concluded in this area exclude reservations²⁰⁵ and that this option is available even when a treaty is concluded among a small number of States.²⁰⁶ It is also obvious that the periodic calls for withdrawal of reservations to human rights treaties elicit only a faint response,²⁰⁷ which would seem to point out the usefulness of such reservations.

122. The same authors maintain that in reality, the scope of reservations to law-making treaties, including those in the field of human rights, is limited,²⁰⁸ a view contested by the doctrine opposing the use of reservations.²⁰⁹ Again, the question is one of appreciation, and this serves merely to confirm that there can be no objective answer to the question of whether the drawbacks of reservations to these instruments outweigh their advantages or vice versa.

123. The “truth” probably lies somewhere in between; everything depends on the circumstances and the purpose of the provisions in question. However, leaving the question unanswered presents few drawbacks: it is true that article 19 of the 1969 and 1986 Vienna Conventions sets out the principle of the right to formulate reservations;

²⁰² Imbert, “Reservations and human rights conventions”.

²⁰³ See McBride, *loc. cit.* See also the position of Mr. Sreenivasa Rao during the debate on the first report of the Special Rapporteur (footnote 197 above).

²⁰⁴ See McBride, *loc. cit.*

²⁰⁵ See paragraph 124 below.

²⁰⁶ As in the case of the Council of Europe; see article 64 of the European Convention on Human Rights (Imbert, “Reservations and human rights conventions”, p. 38).

²⁰⁷ See Parliamentary Assembly of the Council of Europe, “Reply to recommendation 1223 (1993) on reservations made by member states to Council of Europe conventions” (Doc. 7031, 21 February 1994); see also Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, p. 288.

²⁰⁸ See Coccia, *loc. cit.*, p. 34; Gamble Jr., *loc. cit.*, *passim*; Imbert, *op. cit.*, pp. 347 et seq., and “Reservations to human rights conventions”, p. 31; Shelton, “State practice on reservations to human rights treaties”, pp. 225–227; Schmidt, “Reservations to United Nations human rights treaties: the case of the two Covenants”; and Sinclair, *The Vienna Convention on the Law of Treaties*, p. 77.

²⁰⁹ See Schabas, “Reservations to human rights treaties ...”, pp. 42 and 64; see also the concerns expressed by the Human Rights Committee, the Committee on the Elimination of Discrimination against Women and the chairpersons of human rights treaty bodies (paragraph 59 above).

however, like all rules governing reservations (and like the vast majority of other rules) set out in these Conventions, this is an optional residual rule which negotiators can reject if they find it useful to do so. If they feel that the treaty does not lend itself to the formulation of reservations, they need only insert a clause expressly excluding them, which is precisely the case contemplated in article 19 (a).

124. It is remarkable, however, that such provisions should be so rare in normative human rights treaties;²¹⁰ they seem to be equally rare in disarmament treaties.²¹¹

125. This infrequency of clauses prohibiting reservations would seem to be explained by the ordinary-law regime laid down in the 1969 and 1986 Vienna Conventions which is applied owing to the frequent silence²¹² of these treaties on the matter of reservations. Another striking phenomenon seems *prima facie* to lead to this conclusion: this is the wide range of reservation clauses found in normative treaties. While these treaties might seem by their very nature to warrant a different reservation regime than that applicable to other types of treaties, one might also expect to see parties use this system, if not regularly, then at least frequently. This is not the case, however. Where reservation clauses do exist in such treaties, including human rights treaties, they are notable for their great diversity.²¹³ These hints at the “acceptability” of the “Vienna regime” are confirmed when one looks at the special treatment given to this regime in human rights treaties.

(b) *Adapting the “Vienna regime” to the particular characteristics of multilateral normative treaties*

126. In the Special Rapporteur’s view, the real legal question here is not whether or not it is appropriate to authorize reservations to multilateral normative treaties, but whether, when contracting parties remain silent on the legal regime of reservations, the rules set out in the 1969 and 1986 Vienna Conventions can be adapted to any type of treaty, including “normative” treaties, and those in the field of human rights.

127. In truth, it would seem hard to argue that the answer to this question must be in the affirmative. Should one do so, however, it is not because reservations are a “good” thing or a “bad” thing in general either for nor-

native treaties or for human rights, but because the rules which are applicable to them under the 1969 and 1986 Vienna Conventions strike a good balance between the concerns raised by the “advocates” of reservations and those raised by their opponents, and provide a reasonable answer to their respective arguments on which a position need no longer be taken.

128. The general and uniform applicability of the legal regime of reservations set out in the 1969 and 1986 Vienna Conventions is related to the particular characteristics of this regime, which its architects sought to make flexible and adaptable precisely so that it could be applied in all situations. In fact, the system is adapted to the special features of general multilateral law-making treaties, including the requirements of human rights conventions.

(i) *Flexibility and adaptability of the “Vienna regime”*

129. The unique nature of the regime of reservations to treaties is due to the regime’s fundamental features, which enable it to meet the specific needs of all types of treaties and related instruments. Its flexibility guarantees its adaptability.

130. The system of unanimity which was the rule, at least at the universal level, until the ICJ advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,²¹⁴ was cumbersome and rigid. It was this rigidity that led to a preference for the pan-American system, which became widespread after 1951. As the Court noted with regard to the above-mentioned Convention:

Extensive participation in conventions of this type has already given rise to greater *flexibility* in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for *flexibility* in the operation of multilateral conventions.*²¹⁵

131. “Flexibility”—this is the keyword of the new legal regime of reservations which is gradually replacing the old regime and becoming enshrined in the Vienna Conventions.

132. The first report of Sir Humphrey Waldock in 1962, which marks a departure by the Commission from the old reservation regime, contains a lengthy appeal, which is particularly eloquent and complete, in favour of a so-called “flexible system” under which, “as under the unanimity system, the essential interests of each individual State are to a very great extent safeguarded ...”.²¹⁶ The Special Rapporteur wishes to stress that the rules he is proposing—which have their origin largely in the rules set out in the 1969 and 1986 Vienna Conventions—are most likely to promote the universality of treaties yet will

²¹⁰ See, however, examples in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (art. 9), the Convention against discrimination in education (art. 9), Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (art. 4) or the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (art. 21), all of which prohibit any reservations to their provisions.

²¹¹ See, however, article XXII of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The clauses prohibiting reservations seem to be more common in the field of environmental protection; see the Protocol to the Antarctic Treaty on Environmental Protection (art. 24), the United Nations Framework Convention on Climate Change (art. 24), and the Convention on Biological Diversity (art. 37), all of which exclude reservations.

²¹² See paragraph 134 below.

²¹³ On this question see Imbert, *op. cit.*, pp. 193–196, and Schabas, “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?”, p. 286.

²¹⁴ *I.C.J. Reports 1951*, p. 15.

²¹⁵ *Ibid.*, pp. 21–22.

²¹⁶ *Yearbook ... 1962*, vol. II (document A/CN.4/144), p. 64. See also the first report of the Special Rapporteur (footnote 2 above), pp. 130–131, para. 36.

have only a minimal effect on both the integrity of the text of the treaty and the principle of agreement.²¹⁷

133. The principal elements that make this possible are the following:

(a) The permissibility of reservations must be considered in the light of the object and purpose of the treaty;²¹⁸ this fundamental rule in itself makes it pointless to modify a reservation regime in terms of the object of the treaty, for the object is taken into account in the very wording of the basic rule;

(b) The freedom of the other contracting parties to agree is entirely preserved, since they can change the scope of the reservations as they choose practically without restriction, through the mechanism of acceptances and objections;²¹⁹

(c) “The right to make reservations as recognized by the Vienna Conventions has a residual character: any treaty may restrict it, in particular by prohibiting reservations or certain types of reservations”;²²⁰ it can also institute its own regime for admissibility and monitoring reservations. Accordingly, the Vienna rules are simply a safety net which negotiators are free to reject or modify, particularly if they find it useful to do so because of the nature or the object of the treaty.

134. Moreover, it is not immaterial that, notwithstanding this possibility, many treaties do not contain reservation clauses, but simply refer implicitly to the regime set out in the 1969 and 1986 Vienna Conventions.

This silence no longer means what it once did: it is not solely a consequence of the need to avoid questioning an agreement of the inability for States to agree on a joint text; it corresponds largely to the desire of most States to submit reservations to the “flexible” system developed by the United Nations. The treaty’s silence then becomes the result of a positive choice,²²¹ and the residual rules then become the ordinary law deliberately chosen by the parties.²²²

135. It is likewise not immaterial that this solution of implicit—and, occasionally, explicit²²³—reference was used in a number of general multilateral normative treaties, in fields including human rights. This would seem to establish that the Vienna regime is suited to the particular characteristics generally attributed to treaties of this type.

(ii) *The “Vienna regime” is suited to the particular characteristics of normative treaties*

136. The objections made to the “flexible” regime of pan-American origin²²⁴ used in the 1969 and 1986 Vienna Conventions were synthesized forcefully and with skill by Sir Gerald Fitzmaurice in an important article published

in 1953. In it he stressed in particular the drawbacks the regime would present in the case of reservations to “normative” treaties.²²⁵ These arguments have been repeated numerous times since and revolve principally around three ideas: the pan-American or “Vienna” regime²²⁶ is ostensibly unsuitable to this type of treaty and especially to human rights treaties because:

(a) It would undermine the integrity of the rules set out therein, and uniform implementation of these rules is essential for the community of contracting States;

(b) It would be incompatible with the absence of reciprocity in commitments undertaken by the parties under such instruments; and

(c) It would fail to preserve equality between the parties.

a. *Problems related to the “integrity” of normative treaties*

137. It is undeniable that the “Vienna regime” does not guarantee the absolute integrity of treaties. Furthermore, the very concept of reservations is incompatible with this notion of integrity;²²⁷ by definition, a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty”.²²⁸ Thus far the only way to preserve this integrity completely has been to prohibit any reservations whatsoever; this, it cannot be repeated too often, is perfectly consistent with the 1969 and 1986 Vienna Conventions.²²⁹

138. The fact remains that, where a treaty is silent, the rules set out in the 1969 and 1986 Vienna Conventions, by not fully addressing the concerns of those who would defend the absolute integrity of normative treaties, guarantee, to all intents and purposes, that the essence of the treaty is preserved.

139. Article 19 (c) in fact prohibits the formulation of reservations that are incompatible “with the object and purpose of the treaty”, which means that in no case can the treaty be weakened by a reservation, contrary to the fears occasionally expressed by the proponents of the restrictive school.²³⁰ And this can lead to the prohibition of *any* reservations, because it is perfectly conceivable that a treaty on a very specific topic may have a small number of provisions that form an indissoluble whole. This situation, however, is probably the exception, if only because “purely normative” treaties are themselves rare.²³¹

140. This, however, is the rationale given by the ILO representative, Mr. C. W. Jenks, in his statement on 1 April 1968 to the United Nations Conference on the Law

²¹⁷ Ibid., pp. 64–65.

²¹⁸ See article 19 (c), of the 1969 and 1986 Vienna Conventions.

²¹⁹ See articles 20, paras. 3–5, and 21–22. See also the first report of the Special Rapporteur (footnote 2 above), p. 136, para. 61.

²²⁰ Reuter, *op. cit.*; see also paragraph 26 and the other references cited in footnote 44 above.

²²¹ Imbert, *op. cit.*, pp. 226–227.

²²² Ibid., p. 226.

²²³ See footnotes 18 and 19 above.

²²⁴ This origin was rightly emphasized by Mr. Barboza during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 169).

²²⁵ Fitzmaurice, “Reservations ...”, pp. 15–22 in particular.

²²⁶ In reality, the two regimes differ somewhat in the way they are implemented, but they are identical in spirit, and have thus received similar criticism.

²²⁷ As ICJ noted: “It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.” (See advisory opinion, *I.C.J. Reports 1951*, p. 24.)

²²⁸ Art. 2, para. 1 (d), of the 1969 and 1986 Vienna Conventions.

²²⁹ See paragraph 133 above.

²³⁰ See paragraph 117 above.

²³¹ See paragraph 85 above.

of Treaties in support of the traditional prohibition of any reservation to international labour conventions.²³² According to him, ILO practice concerning reservations was based on the principle recognized in article 16²³³ that reservations incompatible with the object and purpose of the treaty were inadmissible. Reservations to international labour conventions were incompatible with the object and purpose of those conventions.²³⁴ Actually, this explanation seems somewhat artificial, and it is probably better to assume that in this specific case the prohibition of reservations is based on a practice which, most likely, assumed a customary value owing more to do with the tripartite structure of ILO than with the object and purpose of the treaty.²³⁵

141. The reserving State's obligation to respect them is not the only legal guarantee against the weakening of a treaty, normative or not, by means of reservations. Indeed, there can be no doubt that the provisions concerning peremptory norms of general international law (*jus cogens*) cannot be the subject of reservations. General comment No. 24 of the Human Rights Committee links this prohibition with the prohibition against any action contrary to the object and purpose of the treaty: "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant."²³⁶ This wording is open to discussion²³⁷ and cannot, in any event, be generalized: one can well imagine a treaty referring, very indirectly, to a norm of *jus cogens* without that norm having anything to do with the object and purpose of the treaty. A reservation to such a provision would still be impermissible, for one cannot imagine a State using a reservation to a treaty provision, to avoid having to respect a rule which it was in any case obliged to respect as "a norm from which no derogation is permitted".²³⁸

142. Whatever its basis, the rule is no less definite and can have concrete effects in the area of human rights. There is no question that certain rules which seek to protect human rights are of a peremptory character; the Commission in fact provided two such examples in the commentary to draft article 50 (which became article 53 of the 1969 Vienna Convention) in its 1966 report: the prohibition of genocide and of slavery.²³⁹ However, this

²³² To which Mr. Razafindralambo drew attention during the debate on the first report of the Special Rapporteur (*Yearbook ... 1995*, vol. I, 2402th meeting, pp. 156–157).

²³³ Became article 19 of the Convention.

²³⁴ The text of this statement was transmitted to the Special Rapporteur by the ILO Legal Counsel. It was summarized in *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 167 above), 7th meeting, p. 37, para. 11.

²³⁵ In the same statement, the ILO representative added that the procedural arrangements concerning reservations embodied in the draft articles were entirely inapplicable to ILO by reason of its tripartite character as an organization in which, in the language of its Constitution, "representatives of employers and workers" enjoyed "equal status with those of governments". See also League of Nations, International Labour Conference—third session (Geneva, 1921), vol. II, third part (Appendices and Index), Appendix XVIII—Report of the Director presented to the Conference, p. 1046, and the Memorandum by the ILO Director dated 15 June 1927 (footnote 126 above).

²³⁶ A/50/40 (footnote 87 above), vol. I, annex V, para. 8.

²³⁷ See the doubts expressed in this connection by the United States in its observations (footnote 88 above) on general comment No. 24 (52) (A/50/40).

²³⁸ Art. 53 of the 1969 and 1986 Vienna Conventions.

²³⁹ *Yearbook ... 1966*, vol. II, p. 248.

is not the case with all rules that seek to protect rights,²⁴⁰ and the identification of these norms is not easy; this is in fact the main flaw in the notion of *jus cogens*. Yet the principle is not really debatable: peremptory provisions in treaties cannot be the subject of reservations, and this, taken together with respect for the object and purpose of the treaty, provides a further guarantee for the integrity of normative conventions, particularly in the field of human rights.

143. Should one go further and consider that reservations to treaties which reflect the rules of customary international law are always impermissible? The Human Rights Committee affirmed this, basing itself on the special 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.²⁴¹

144. This would seem to be debatable *prima facie*.

145. One might, after further study,²⁴² agree with the Human Rights Committee that reservations to customary norms are not excluded a priori—such norms are binding on States independently of whether they have expressed their acceptance of the treaty norm; however, unlike the case of peremptory norms, States can derogate from customary norms by agreement inter se. And one should not overlook the phenomenon of the "persistent objector", the party who can indeed refuse to apply a rule which it cannot oppose under general international law. As the United Kingdom pointed out in its observations on general comment No. 24, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law."²⁴³ But if this reasoning is correct, it is hard to see why it would not also apply to reservations to human rights treaties.

146. By way of justification, the Human Rights Committee limits itself to noting that these instruments are designed to protect the rights of individuals. What is involved is a simple matter of principle: implicitly, the Committee starts from the assumption that human rights treaties are legislative, not only in the material sense—which, with some reservations, is acceptable²⁴⁴—but also in the formal sense, which is not acceptable and is the product of a highly questionable amalgam.

147. In making this assumption, the Human Rights Committee is forgetting that these instruments, even though they are "designed to protect individuals", are still

²⁴⁰ See, for example, Coccia, loc. cit., p. 17; McBride, loc. cit.; Schabas, "Reservations to human rights treaties ...", pp. 49–50; however, see also the doubts raised by Suy, "Droits des traités et droits de l'homme", pp. 935–939.

²⁴¹ A/50/40 (footnote 87 above), annex V, para. 8. France, in its remarks (see footnote 88 above), rightly pointed out 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".

²⁴² See paragraph 74 above.

²⁴³ A/50/40 (footnote 88 above), annex VI, p. 132, para. 7. (However, one may well question what real motives a State might have for doing so.)

²⁴⁴ See paragraph 85 above.

treaties: it is true that they benefit individuals directly, but only because—and after—States have expressed their willingness to be bound by them. The rights of the individual derive from the State's consent to be bound by such instruments. Reservations are inseparable from such consent, and the Special Rapporteur believes that the order of factors cannot be reversed by stating—as the Committee does—that the rule exists as a matter of principle and is binding on the State, at least by virtue of the treaty, if the State has not consented to it. If, as the Committee maintains, States can “reserve *inter se* application of rules of general international law”, there is no legal reason why the same should not be true of human rights treaties; in any event, the Committee does not give any such reason.

b. *Problems with regard to the “non-reciprocity” of undertakings*

148. In fact, this somewhat marginal issue of whether reservations can be made to treaty provisions reproducing rules of customary law ties in with another, broader issue, that of whether the Vienna regime is not incompatible with the non-reciprocity that is one of the essential characteristics of human rights treaties and, more generally, normative treaties.

149. According to a recent article,

In contrast to most other multilateral treaties, human rights agreements do not establish a network of bilateral legal relationships among the states parties, but rather an objective regime for the protection of values accepted by all of them. A reservation entered by one state therefore cannot have the reciprocal effect of releasing one or all the other states parties from its or their treaty obligations.²⁴⁵

150. These arguments are largely correct, but while they may perhaps lead one to think that reservations to human rights treaties should be prohibited or permitted restrictively²⁴⁶—a decision that is solely up to the contracting parties—they do not in any way allow one to conclude that the common regime of reservations is inapplicable to such instruments.

151. These statements should first of all be qualified:

(a) If they are valid, they are not valid only for human rights, and while a rigorous quantitative analysis is not possible here, one might ask whether normative treaties are not the largest category of multilateral treaties so far concluded;

(b) While it is true that human rights treaties assume that the parties accept certain common values, it is still an open question whether they must necessarily accept *all* the values conveyed by a complex human rights treaty;

(c) It must also be admitted that the concept of reciprocity is not totally absent from normative treaties, including those in the area of human rights.²⁴⁷

²⁴⁵ Giegerich, loc. cit., English summary, p. 780; see also, *inter alia*, Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)”, p. 268; Clark, loc. cit., p. 296; and Cook, loc. cit., p. 646.

²⁴⁶ See paragraphs 97–105 above.

²⁴⁷ See paragraph 85 above.

152. It is nevertheless true that reciprocity is certainly less omnipresent in human rights treaties than in other treaties and that, as the European Commission of Human Rights has noted, the obligations resulting from such treaties

are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties.²⁴⁸

Or, in the words of the Inter-American Court of Human Rights:

In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.²⁴⁹

153. Secondly, however, it is highly doubtful that this specific feature of human rights treaties would make the reservations regime inapplicable as a matter of principle.

154. Of course, force of circumstance and the actual nature of the “non-reciprocal” clauses to which the reservations apply result in a situation where “[t]he reciprocal sanction of the reservation mechanism is almost meaningless”.²⁵⁰

It would be simply absurd to conclude that the objections by the various European states to the United States reservations on the death penalty discharge them from their obligations under Articles 6 and 7 [of the International Covenant on Civil and Political Rights] as concerns the United States, and this is surely not their intention in making the objection.²⁵¹

155. But all that the Special Rapporteur can deduce from this is that when a State enters a reservation to a treaty provision that must apply without reciprocity, the provisions of article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions do not apply; that is all. Moreover, the same is true when it is not the provision to which the reservation applies but the reservation itself that, by its nature, does not lend itself to reciprocity.²⁵² This is the case with reservations that are territorial in scope: it is hardly conceivable, for instance, that France might respond to a reservation by which Denmark reserved the right not to apply a treaty to Greenland, by deciding not to apply that treaty to its own overseas departments. Besides, very generally speaking, the principle of reciprocity assumes “a certain equality in the positions of the parties in order for a State to be able to ‘respond’ to a reservation”.²⁵³

²⁴⁸ Council of Europe, Decision of the Commission as to the admissibility of application No. 788/60 lodged by the Government of the Republic of Austria against the Government of the Republic of Italy (11 January 1961), *Yearbook of the European Convention on Human Rights*, 1961, vol. 4 (The Hague, Martinus Nijhoff, 1962), pp. 116–183, at p. 140, para. 30.

²⁴⁹ Advisory Opinion OC–2/82 (footnote 82 above), para. 29.

²⁵⁰ Higgins, “Human rights: some questions of integrity”, p. 12; see also “Introduction”, p. xv.

²⁵¹ Schabas, “Reservations to human rights treaties ...”, p. 65. In the same vein, see Fitzmaurice, “Reservations to multilateral conventions”, pp. 15–16, and Higgins, “Introduction”.

²⁵² See to this effect Imbert, op. cit., p. 258, and the somewhat diverse examples given by that author, pp. 258–260.

²⁵³ Ibid.

156. But, unless it is by “doctrinal decree”, reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime.²⁵⁴ Integrity and universality are reconciled in a treaty by preserving its object and its purpose, independently of any consideration having to do with the reciprocity of the parties’ undertakings, and it is hard to see why a reciprocity that the convention rules out would be reintroduced by means of reservations.

157. In fact, there are two choices:

(a) Either the provision to which the reservation applies imposes reciprocal obligations, in which case the exact balance of rights and obligations of each party is guaranteed by means of reservations, acceptances and objections, and article 21, paragraph 3, can and must be applied in full;

(b) Or the provision is “normative” or “objective”, and States do not expect reciprocity for the undertakings they have given; there is no point then in speculating about possible violations of a reciprocity which is not a precondition for the parties’ undertakings, and the provisions of article 21, paragraph 3, are not relevant. One simply cannot say here that the reservation is “established *with regard to another party*”.*

158. This does not mean that the reservations regime instituted by the 1969 and 1986 Vienna Conventions does not apply in this second case:

(a) The limitations imposed by article 19 on the freedom to formulate reservations remain entirely valid;

(b) Under article 20, paragraph 4 (b), an objecting State is always free to refuse to allow the treaty to enter into force as between itself and the reserving State;

(c) Even if this is not the case, objections are not without effect. In particular, they can play a major role in the interpretation of a treaty either by any bodies which the treaty may set up²⁵⁵ or by external mechanisms for the settlement of disputes,²⁵⁶ or even by national jurisdictions.

c. *Problems of equality between the parties*

159. Many authors link so-called problems of reciprocity to the fact that the reservations regime instituted by the 1969 and 1986 Vienna Conventions allegedly violates the principle of equality between the parties to normative treaties. Imbert sums up this argument²⁵⁷ as follows:

²⁵⁴ See paragraph 1 above.

²⁵⁵ See Imbert, “Reservations and human rights conventions” and the examples cited on pages 37–38; see also Clark, loc. cit., p. 318; and Schabas, “Invalid reservations ...”, pp. 313–314.

²⁵⁶ In the *Loizidou v. Turkey* case (footnote 81 above), the European Court of Human Rights based itself on the “subsequent reaction of various Contracting Parties to the Turkish declarations”, in view of “Turkey’s awareness of the legal position” created by declarations which the Court deemed invalid (para. 95).

²⁵⁷ Of which Sir Gerald Fitzmaurice was an ardent proponent (see “Reservations to multilateral conventions”, p. 16, and “The law and procedure of the International Court of Justice, 1951–4: treaty interpretation and other treaty points”, pp. 278, 282 and 287).

This lack of reciprocity meant that these reservations may strike a blow at another fundamental principle: that of equality between the Contracting Parties. States that do not formulate reservations are obliged to apply the treaty in full, including those provisions which the reserving State has declared it will not apply. The latter State will thus be in a privileged situation. ...

Nor can this inequality be alleviated by objections to reservations, as the objecting State will in any case be obliged to honour all its obligations even if it refuses to be bound with the reserving State.²⁵⁸

160. In his first report, Sir Humphrey Waldock countered this argument, noting that:

Too much weight ought not, however, to be given to this point. For normally the State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States,²⁵⁹ even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not made in any respect more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation.²⁶⁰

The reservation does not create inequality, but attenuates it by enabling the author of the reservation, who without it would have remained outside the circle of contracting parties, to be partially bound by the treaty.²⁶¹

161. Once the reservation²⁶² has been made, article 19 and subsequent articles of the 1969 and 1986 Vienna Conventions guarantee the equality of the contracting parties in that:

(a) “The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*” (art. 21, para. 2); and

(b) These other parties may formulate an objection and draw whatever inferences they see fit.

However, by virtue of article 20, paragraph 4, the objecting State may restore the equality which it considers threatened by the reservation by preventing the entry into force of the treaty as between itself and the reserving State. This puts the two States in the same position as if the reserving State had not expressed its consent to be bound by the treaty.

²⁵⁸ Imbert, “Reservations and human rights conventions”, p. 34. The Commission showed itself sympathetic to this argument in *Yearbook ... 1951*, vol. II (footnote 48 above), in which it noted that, in treaties of a “law-making type”: “[e]ach State accepts limitations on its own freedom of action on the understanding that the other participating States will accept the same limitations on a basis of equality” (pp. 127–128, para. 22).

²⁵⁹ And, the Special Rapporteur might add, by reason of the very nature of the treaty.

²⁶⁰ *Yearbook ... 1962*, vol. II, p. 64. The Commission endorsed this reasoning (see its reports to the General Assembly in 1962, *ibid.*, p. 179, and 1966, *Yearbook ... 1966*, vol. II, p. 205).

²⁶¹ Cassese rightly emphasizes that equality could be adversely affected by the implementation of certain “collegiate” mechanisms for monitoring the permissibility of reservations (loc. cit., pp. 301–302). However, this is a very different problem, involving the possible breakdown of equality *between reserving States*, and is in any case caused not by the “Vienna regime” (which is not collegiate) but by the waiving of that regime.

²⁶² Which, it will be recalled, is a unilateral statement (art. 2, para. 1 (d), of the 1969 Vienna Convention).

162. Furthermore, both the argument based on the loss of equality between the parties and that based on non-reciprocity are difficult to comprehend in that it is hard to see why and how they could apply in the case of treaties which are specifically not based on reciprocity of obligations between the parties but rather constitute clusters of unilateral undertakings pursuing the same ends. It is illogical to suggest that each contracting party should consent to be bound only “because the others will do likewise, since its obligations are not the counterpart of those assumed by the others”.²⁶³ And it is not a little ironic that it is precisely the authors who insist most on the non-reciprocal nature of normative treaties, beginning with human rights instruments, who also invoke the adverse effects which the formulation of reservations has on reciprocity and equality: how could reservations affect the reciprocity ... of non-reciprocal undertakings?

Conclusion: the “Vienna regime” is generally applicable

163. In concluding this analysis, it appears that:

(a) The reservations regime embodied in the 1969 and 1986 Vienna Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, whatever their object,²⁶⁴ with the exception of certain treaties concluded among a limited number of parties and constituent instruments of an international organization, for which some limited exceptions were made;

(b) Because of its flexibility, this regime is suited to the particular characteristics of normative treaties, including human rights instruments;²⁶⁵

(c) While not ensuring their absolute integrity, which would scarcely be compatible with the actual definition of reservations, it preserves their essential content and guarantees that this is not distorted;

(d) This conclusion is not contradicted by the arguments alleging violation of the principles of reciprocity and equality among the parties; if such a violation occurred, it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections are hardly compatible with the actual nature of

normative treaties, which are not based on reciprocity of the undertakings given by the parties;

(e) There is no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it is felt that they must be prohibited, the parties are entirely free to exclude them or to limit them as necessary by including an express clause to this effect in the treaty, a procedure which is perfectly compatible with the purely residual rules embodied in the 1969 and 1986 Vienna Conventions.

C. Implementation of the general reservations regime (application of the “Vienna regime” to human rights treaties)

164. The current controversy regarding the reservations regime applicable to human rights treaties²⁶⁶ is probably based, in part at least, on a misunderstanding. Despite what may have been understood from certain ambiguous or clumsy formulas, the monitoring bodies established by the human rights instruments do not challenge the principle of the applicability to these treaties of the rules relating to reservations contained in the 1969 and 1986 Vienna Conventions and, in particular, they do not deny that the permissibility of reservations must be determined, where the treaty is silent on the matter, on the basis of the fundamental criterion of the object and purpose of the treaty. The real problems lie elsewhere and relate to the existence and extent of the determining powers of these bodies in this matter.

1. THE FUNDAMENTAL CRITERION OF THE OBJECT AND PURPOSE OF THE TREATY

165. An examination of the practice of States and international organizations and of the bodies established to monitor the implementation of treaties, including human rights treaties, confirms that the regime for reservations established by the 1969 and 1986 Vienna Conventions is not only generally applicable, but is also very widely applied. This examination shows in particular that the criterion of the object and purpose of the treaty, referred to in article 19 (c), is used principally in the case where the treaty is silent, although it is also used in those cases where there are reservation clauses.

166. Although it marked the starting point of the worldwide radical transformation of the reservation regime,²⁶⁷ the ICJ advisory opinion of 1951 was given on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. It was, moreover, the special nature of this treaty which led the Court to distance itself from what was undeniably the dominant system at the time,²⁶⁸ namely unanimous acceptance of reservations, and to favour the more flexible system of the Pan American Union:

²⁶³ Imbert, *op. cit.*, p. 372.

²⁶⁴ To use the formula adopted by Mr. Sreenivasa Rao in discussing the first report of the Special Rapporteur, it achieves “a certain diversity in unity” (*Yearbook ... 1995*, vol. I, 2404th meeting, p. 171, para. 45).

²⁶⁵ This was, moreover, the position taken by most States whose representatives spoke on this point in the Sixth Committee at the fiftieth session of the General Assembly; see, *inter alia*, the statements on behalf of Algeria (Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 23rd meeting (A/C.6/50/SR.23), para. 65), India (*ibid.*, 24th meeting (A/C.6/50/SR.24), para. 43) and Sri Lanka (*ibid.*, para. 82) emphasizing the desirable unity of the reservations regime; and the United States (*ibid.*, 13th meeting (A/C.6/50/SR.13), paras. 50–53), Pakistan (*ibid.*, 18th meeting (A/C.6/50/SR.18), para. 62), Spain (*ibid.*, 22nd meeting (A/C.6/50/SR.22), para. 44), France (*ibid.*, para. 54), Israel (23rd meeting (A/C.6/50/SR.23), para. 15), the Czech Republic (*ibid.*, para. 46) or Lebanon (*ibid.*, 25th meeting (A/C.6/50/SR.25), para. 20) rejecting the idea of a special regime for human rights treaties; see also the more tentative statements by Australia (*ibid.*, 24th meeting (A/C.6/50/SR.24), para. 10) and Jamaica (*ibid.*, paras. 19 and 21).

²⁶⁶ See paragraphs 56–60 above.

²⁶⁷ See Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 323–336.

²⁶⁸ As is convincingly shown by the joint dissenting opinion quoted above (footnote 137), *I.C.J. Reports 1951*, pp. 32–42.

(a) The Court confined its answers strictly to the questions put to it, which related exclusively to the 1948 Genocide Convention: “The questions [asked by the General Assembly] ... having a clearly defined object, the replies which the Court is called upon to give to them are necessary and strictly limited to that Convention”,²⁶⁹ and

(b) It referred expressly to the special character of this Convention: “The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect”,²⁷⁰ and

(c) It stressed the “purely humanitarian and civilizing purpose” of the contracting States and the fact that they did “not have any interests of their own”,²⁷¹ and

(d) The Court concluded by stating: “The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.”²⁷²

167. It was therefore difficulties connected with reservations to a highly “normative” human rights treaty that gave rise to the definition of the present regime. As the United Kingdom pointed out in its observations on general comment No. 24 of the Human Rights Committee: “It was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations.”²⁷³

168. In this regard, Judge Higgins observed that:

Although the Genocide Convention was indeed a “human rights treaty”, the Court was in 1951 concerned with the broad distinction between “contract treaties” and “normative treaties”. And the issue it was addressing was whether the old unanimity rule on reservations would prevail, and whether the contract/normative distinction was relevant to this answer. *The only questions* put to the Court related to the legal consequences, between ratifying States, of reservations made that had been objected to (and sometimes objected to by some States but not by others).

The Court favoured a “flexible” answer, rather than the unanimity rule, in respect of the precise questions asked of it; and it found no difference in that regard between contract and normative treaties.

She added, however:

But that cannot be said to determine the very different question: in a human rights treaty, in respect of which a monitoring body has been given certain functions, is it implicit in its functions and in the operation of the principles of Article 19(3) of the Vienna Convention, that the treaty body rather than Contracting States should decide whether a reservation is or is not compatible with the objects and purpose of the treaty?²⁷⁴

²⁶⁹ Ibid. p. 20; see also the operative part, pp. 29–30. Several statements made to the Court emphasized this point; one of these was the written statement of the United States (*I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 33 and 42–47); this is particularly noteworthy as that country then applied the rule of unanimous consent in the exercise of its functions as depositary State (see Imbert, *op. cit.*, p. 61, footnote 98).

²⁷⁰ *I.C.J. Reports 1951* (footnote 47 above), p. 22–23.

²⁷¹ Ibid., p. 23; see also paragraph 114 above.

²⁷² Ibid., p. 24.

²⁷³ A/50/40 (footnote 88 above), p. 130, para. 4.

²⁷⁴ Higgins, “Introduction”, p. xix.

169. This is, indeed, a different question, which will be examined in detail further on.²⁷⁵ With regard to the question considered here, however, it will be noted that Mrs. Higgins recognized that it could be inferred from the 1951 opinion that ICJ rejected the distinction between “contract treaties” and “normative treaties” as regards the implementation of the reservations regime and that, in its view, general comment No. 24, in the preparation of which she played a determining role,²⁷⁶ did not reject this conclusion.

170. Quite surprisingly, moreover, the Human Rights Committee itself, in this general comment, considers that, in the absence of any express provision on the subject in the International Covenant on Civil and Political Rights, “[t]he matter of reservations ... is governed by international law”²⁷⁷ and goes on to make express reference to article 19, paragraph 3, of the 1969 Vienna Convention. Admittedly, it considers this as providing only “relevant guidance”,²⁷⁸ but the Committee immediately adds, in a footnote:

Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980—i.e., after the entry into force of the Covenant—its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in *The Reservations to the Genocide Convention Case* of 1951.²⁷⁹

and makes use of this provision to give its view on the admissibility of reservations to the Covenant²⁸⁰ by adding:

Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.²⁸¹

The Committee again applied this criterion in 1995, during the consideration of the first report of the United States. Applying the principles enunciated in general comment No. 24, it noted that it believed certain reservations to the Covenant by the United States²⁸² “to be incompatible with the object and purpose of the Covenant”.²⁸³

171. This position seems to apply to all cases, including those where there are no reservation clauses. Thus, although the ILO practice, which results in a prohibition of reservations to the international labour conventions, is due, in fact, to other factors, that organization nevertheless justifies it on grounds based on respect for the object and purpose of those instruments.²⁸⁴ Similarly, in 1992 the persons chairing the human rights treaty bodies noted that some of the reservations lodged “would appear to

²⁷⁵ See paragraph 2 above and, in particular, paragraph 178 below.

²⁷⁶ See CCPR/C/SR.1366, para. 54, CCPR/C/SR.1380, para. 2 and CCPR/C/SR.1382, para. 11.

²⁷⁷ A/50/40 (footnote 87 above), para. 6.

²⁷⁸ Ibid.

²⁷⁹ Ibid., footnote e.

²⁸⁰ The question of the validity of this position cannot be dealt with in the present report.

²⁸¹ A/50/40 (footnote 87 above), para. 6.

²⁸² *Multilateral treaties deposited with the Secretary-General* (United Nations publication, Sales No. E.96.V.5, document ST/LEG/SER.E/14), chap. IV.4, p. 130.

²⁸³ A/50/40, para. 279, and annex VI (see footnotes 87–88 above); see also the observations made by the Chairman of the Committee, Mr. Aguilar, during the consideration of the report (CCPR/C/SR.1406, paras. 2–5).

²⁸⁴ See paragraph 140 above.

give rise to serious questions as to their compatibility with the object and purpose of the treaties in question”²⁸⁵ and, even more characteristically, they recommended in 1984 that treaty bodies “state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law”.²⁸⁶ It should be noted that, in doing so, they addressed bodies charged with monitoring treaties that contained or did not contain reservation clauses, thus showing their belief that this criterion constitutes a principle applying generally.

172. This same position is shown by the actual wording of the reservation clauses contained in international instruments, the variety of which has already been pointed out.²⁸⁷ However, despite this diversity, the constant desire of the drafters of the treaties to promote a reservations regime based on that of article 19 of the 1969 and 1986 Vienna Conventions²⁸⁸ is striking:

(a) As far as the Special Rapporteur is aware, it is the area of human rights in which the only treaty clause that expressly refers to the provisions of the 1969 Vienna Convention relating to reservations is to be found,²⁸⁹

(b) Many human rights treaties make express reference to the object and purpose as a criterion for determining the permissibility of reservations,²⁹⁰ and

(c) It is clear from the *travaux préparatoires* of treaties which do not contain reservations clauses that this silence must be interpreted as an implicit but deliberate reference to the ordinary-law regime established by the 1969 Vienna Convention.

173. Here too, the example of the International Covenant on Civil and Political Rights is significant. After much tergiversation,²⁹¹ it was decided not to include any reservations clause in this treaty, but the treaty silence on this matter must be interpreted, not as a rejection of reservations, but as reflecting the intention of the negotiators to rely on the “accepted principle of international law” that any State had the right “to make reservations to a multilateral treaty ... subject to the proviso that such reservations were not incompatible with the object and purposes of the treaty”.²⁹²

174. The European Convention on Human Rights, for its part, includes a reservations clause, but the clause

makes no reference to this criterion.²⁹³ The view that reservations to this instrument must not only fulfil the requirements of article 64, but must also be consistent with the purpose and object of the treaty seems difficult to support, according to some commentators.²⁹⁴ Nevertheless, the European Commission of Human Rights—quite clearly—and the European Court of Human Rights—less clearly—consider reservations whose permissibility is challenged before them in the light of the fundamental criterion of the object and purpose of the treaty.²⁹⁵ This approach, which seems quite a logical one—provided it is recognized that a reservation may distort the meaning of a treaty—confirms the universality of the object and purpose criterion and would seem to imply that every treaty includes an implicit clause limiting in this way the possibility of making reservations.

175. The objections of States to reservations to human rights treaties are also frequently expressly motivated by the incompatibility of the reservations with the object and purpose of these instruments. This is all the more true as States generally seem disinclined to express objections²⁹⁶ and, when they do so, they rarely give the reasons for their actions.²⁹⁷ It is therefore highly symptomatic that, for example, nine States parties to the Convention on the Elimination of All Forms of Discrimination against Women²⁹⁸ gave this as the reason for their objections to certain reservations,²⁹⁹ one of them³⁰⁰ referring expressly to article 19 (c) of the 1969 Vienna Convention.³⁰¹ Similarly, several

²⁹³ Article 64:

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

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

²⁹⁴ Schabas, “Article 64”, p. 938; versus: Velu and Ergec, *La Convention européenne des droits de l’homme: extrait du Répertoire pratique du droit belge*, pp. 159–160.

²⁹⁵ See footnote 81 above: the Commission’s decision in the *Chryso-stomos et al. v. Turkey* case, p. 277, para. 19; the Court’s judgement in the case of *Loizidou v. Turkey* (paras. 73 and 75), in which the Court bases its decision on the object and purpose of articles 25 and 46 of the Convention but appears to refer more to the rules concerning the interpretation of treaties than to those concerning reservations; and in the *Temeltasch v. Switzerland* case, the Commission considered that the provisions of the 1969 Vienna Convention enunciated essentially customary rules relating to reservations (para. 68) and based itself on the definition in article 2, paragraph 1 (d), of the Convention in determining the true nature of an interpretative declaration by the defending State (paras. 69 et seq.). See, on this point, Coccia, loc. cit., pp. 14–15.

²⁹⁶ See Coccia, loc. cit., pp. 34–35, and appendix, pp. 50–51; Imbert, op. cit., pp. 419–434; and Shelton, loc. cit., pp. 227–228.

²⁹⁷ See Bowett, “Reservations to non-restricted multilateral treaties”, p. 75; Redgwell, loc. cit., p. 276; and Zemanek, loc. cit., p. 334. See also the views expressed by the Human Rights Committee in general comment No. 24 (A/50/40 (footnote 87 above), annex V, para. 17).

²⁹⁸ Austria, Canada, Finland, Germany, Mexico, Netherlands, Norway, Portugal and Sweden.

²⁹⁹ Including those of Bangladesh, Brazil, Egypt, India, Iraq, Jamaica, Jordan, Libyan Arab Jamahiriya, Malawi, Maldives, Mauritius, Morocco, New Zealand, Republic of Korea, Thailand and Tunisia.

³⁰⁰ Portugal.

³⁰¹ Concerning these objections (and, more generally, concerning the reservations to the Convention on the Elimination of All Forms of Discrimination against Women), see Clark, loc. cit., pp. 299–302, and Cook, loc. cit., pp. 687–707; see also Jenefsky, “Permissibility of Egypt’s reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, pp. 199–233.

²⁸⁵ A/47/628 (footnote 84 above), annex, para. 60; and also para. 36.

²⁸⁶ A/49/537 (footnote 84 above), annex, para. 30.

²⁸⁷ See paragraph 125 above.

²⁸⁸ Or, in the case of earlier treaties, on the pan-American “flexible regime” adopted in the 1951 ICJ opinion (footnote 47 above).

²⁸⁹ American Convention on Human Rights, art. 75 (footnote 49 above). In its 1983 advisory opinion on restrictions to the death penalty (footnote 82 above), the Inter-American Court of Human Rights considered that the reservations of Guatemala to article 4, paragraphs 2 and 4, of the Convention were permissible in view of their compatibility with the object and purpose of the Convention.

²⁹⁰ See the examples given in footnote 50 above.

²⁹¹ See Imbert, op. cit., pp. 223–224, and Higgins, “Derogations under human rights treaties”, pp. 317–318.

²⁹² *Official Records of the General Assembly, Twenty-first Session*, document A/6546, para. 142; see also the statements by the representatives of several States quoted by Imbert, op. cit., pp. 224 and 411–412.

objections to reservations to the International Covenant on Civil and Political Rights advanced as their justification, the incompatibility of the reservations with the object and purpose of the treaty. Thus, the 11 European States which filed objections to the reservations of the United States³⁰² gave as justification for their position the incompatibility of some of these reservations with the object and purpose, either of the Covenant as a whole, or of some of its provisions.³⁰³

176. It is therefore undeniable that “there is a general agreement that the Vienna principle of ‘object and purpose’ is the test”.³⁰⁴ With regard to this fundamental point, the central element of the “flexible system” adopted by ICJ in 1951 and enshrined in the 1969 and 1986 Vienna Conventions, namely the special nature of human rights treaties or, more generally, of normative treaties, therefore does not affect the reservations regime.

2. THE MACHINERY FOR MONITORING IMPLEMENTATION OF THE RESERVATIONS REGIME

177. One of the main “mysteries” of the reservations regime established by the 1969 and 1986 Vienna Conventions is clearly that of the relations which exist, might exist, or should exist, between article 19, on the one hand, and the following articles, on the other. There can be no question of attempting, within the framework of the present report, to dispel this mystery, as this would be tantamount to taking sides, prematurely, in the quarrel concerning “opposability” and “admissibility”.³⁰⁵

178. It is perhaps sufficient to note that “[i]n general, most of the problems posed by article 19 (c) disappear in practice”³⁰⁶ and that the modalities and effects of monitoring the permissibility of reservations are problems that are, primarily, of a practical nature. It would not be correct, however, to say that these problems “disappear” when a treaty establishes machinery for monitoring its implementation. In addition to the uncertainties inherent in the “Vienna regime”, there are other ones of which the drafters of the 1969 and 1986 Vienna Conventions do not seem to have thought³⁰⁷ and which are due to the concurrence of systems for verifying the permissibility of reservations

³⁰² See paragraph 170 above. These States are Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden.

³⁰³ See Schabas, “Invalid reservations ...”, pp. 310–314; and p. 289 for other examples.

³⁰⁴ Higgins, “Introduction”, p. xxi.

³⁰⁵ See paragraphs 42–45 above and the first report of the Special Rapporteur (footnote 2 above), pp. 142 et seq., paras. 97–108 and 115–123.

³⁰⁶ Imbert, *op. cit.*, p. 138.

³⁰⁷ As Mrs. Higgins wrote: “This question was simply never before the International Court in the *Reservations* case—nor at issue in the preparation of the Vienna Convention. Indeed, it could not have been. Neither in 1951 nor in 1969 did there yet exist the web of multilateral human rights treaties with their own treaty bodies. That phenomenon was to come later” (“Introduction”, p. xix); see also paragraph 168 above and, similarly: Shelton, *loc. cit.*, p. 229. Some commentators soon revealed their perplexity on this point. See, for example, Maresca: “There may be some perplexity and questions may need to be answered, particularly regarding *three aspects of the codified norm*: (a) what subject, what body and what entities have the power of determining whether the reservation made is *compatible* or not with the object and purpose of the treaty?” (*op. cit.*, p. 304).

that may be envisaged: in accordance with the—more “imprecise” than “flexible”—rules on this point, deriving from these conventions, on the one hand, or by the monitoring mechanisms themselves, on the other? And if the answer to this question leads to these mechanisms being taken into account, a second question has immediately to be answered: what is or what should be the effect of the verification they perform?

(a) *Determination by the monitoring bodies of the permissibility of reservations*

179. As was seen earlier,³⁰⁸ the “Vienna regime”, intended to be of general application, is substantively adapted to the particular requirements of the human rights treaties and the general mechanisms for determining the permissibility of reservations can also apply to reservations made in this area. However, the last 15 years have seen the development of additional forms of control carried out directly by the human rights treaty monitoring bodies, the existence, if not the permissibility, of which can scarcely be questioned. This raises the problem of the coexistence and combination of these two types of control.

(i) *Role of the traditional mechanisms*

180. Apart from any uncertainties which may exist regarding the link between articles 19 and 20 of the 1969 and 1986 Vienna Conventions, there is general agreement that the reservations regime which they establish “is based on the consensual character of treaties”.³⁰⁹ This view constitutes the fundamental “creed” of the “opposability” school, which is based on the idea that “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”.³¹⁰ It is not rejected, however, by the supporters of “admissibility”. Thus, for example, Bowett points out that where a treaty contains no provisions concerning the settlement of disputes, “there is at present no alternative to the system in which each Party decides for itself whether another Party’s reservations are permissible”.³¹¹

181. This conventional—and imperfect—mechanism for verifying the permissibility of reservations is employed in the case of the human rights treaties:

(a) Certain reservations clauses included in these treaties “are definitely subject to the ‘play of acceptance and objection’”;³¹²

(b) States do not hesitate to object to reservations to such treaties made by other parties, even in the absence of any express provision in the treaties;³¹³ and

³⁰⁸ Paras. 70–88 above.

³⁰⁹ Elias, *The Modern Law of Treaties*, p. 34. See also Bishop Jr., *loc. cit.*, p. 337; Redgwell, *loc. cit.*, p. 268; and Tomuschat, *loc. cit.*, p. 466.

³¹⁰ Ruda, *loc. cit.*, p. 190. See also the first report of the Special Rapporteur (footnote 2 above), pp. 142–143, para. 102.

³¹¹ Bowett, *loc. cit.*, p. 81.

³¹² Imbert, “Reservations and human rights conventions”, p. 40; see, for example, article 8 of the Convention on the nationality of married women and article 75 of the American Convention on Human Rights (footnote 49 above), which makes reference to the 1969 Vienna Convention.

³¹³ See paragraph 175 above.

(c) The other parties may induce the State making the reservation to withdraw the latter;³¹⁴

(d) While the treaty monitoring bodies may take account of this in interpreting the treaty or determining the fate of the reservation;³¹⁵ and

(e) The persons chairing the human rights treaty bodies believe: “[I]t is essential, if the present system relating to reservations is to function adequately, that States that are already parties to a particular treaty should give full consideration to lodging an objection on each occasion when that may be appropriate.”³¹⁶

182. There is nothing, of course, to prevent the parties from adopting a different system—either collegial or jurisdictional—for determining the validity of reservations. Both of these possibilities were envisaged on various occasions during the *travaux préparatoires* for the 1969 Vienna Convention, but were eventually rejected. Thus, the first two of the four “alternative drafts” proposed *de lege ferenda* by Sir Hersch Lauterpacht in his first report on the law of treaties in 1953 was based on a collegial control of the validity of reservations by two thirds of the States concerned,³¹⁷ while under the two other drafts this control was entrusted to a committee appointed by the parties,³¹⁸ or to an ICJ chamber of summary procedure.^{319, 320}

183. Although these proposals were not incorporated in the 1969 and 1986 Vienna Conventions, they were included in some of the reservations clauses inserted in multilateral treaties. Thus, in the area of human rights, article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination provides as follows:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible

³¹⁴ Australia and the Republic of Korea withdrew some of their reservations to the International Covenant on Civil and Political Rights following objections lodged by other States parties (see *Multilateral treaties deposited with the Secretary-General* (footnote 282 above), pp. 122, 127 and 131–134).

³¹⁵ See paragraph 158 above.

³¹⁶ A/47/628, annex (footnote 84 above), para. 64; see also paragraph 36, and the Report of the Committee on the Elimination of Discrimination against Women (A/48/38(footnote 86 above)), p. 2, para. 4 (d).

³¹⁷ *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 124–133.

³¹⁸ *Ibid.*, pp. 133–134.

³¹⁹ *Ibid.*, pp. 134–135.

³²⁰ See also the position taken by Sir Hersch Lauterpacht, “Some possible solutions of the problem of reservations to treaties”, pp. 108 et seq. Surprisingly, Sir Gerald Fitzmaurice, who considered a collegial system to be “an ideal system” (“Reservations to multilateral conventions”, pp. 23–26), did not take up this idea in his first report (*Yearbook ... 1956*, vol. II, document A/CN.4/101, pp. 126–128). During the deliberations in 1962 several members of the Commission supported the adoption of such a system, while others successfully opposed the idea (see Cassese, loc. cit., p. 272); some States also submitted amendments to this effect at the United Nations Conference on the Law of Treaties: see, for example, the proposals of Japan (*Official Records of the United Nations Conference on the Law of Treaties ...*, document A/CONF.39/C.1/L.133/Rev.1, p. 133, and *ibid.*, First Session (footnote 167 above), 21st meeting, pp. 109–110) and of the United Kingdom (*ibid.*, pp. 113–114).

or inhibitive if at least two thirds of the States Parties to this Convention object to it.³²¹

184. In cases such as these, determination of the admissibility of a reservation is entrusted, not to each State acting for itself, but to the totality of the parties as a collective body. This does not, however, modify the essence of the system: the consent of the parties is expressed (a) by adoption of the reservations clause itself; (b) collectively by the traditional system of acceptance (which may be tacit) or objection.

185. This second element of the consensual principle disappears if control of the admissibility of the reservation is entrusted to a jurisdictional or quasi-jurisdictional type of body.

186. As far as the Special Rapporteur is aware, there is no express reservations clause providing for this last arrangement. The Special Rapporteur may, however, consider that the mere fact that a treaty provides for the settlement of disputes connected with its implementation through a jurisdictional or arbitral body automatically empowers the latter to determine the admissibility of reservations or the validity of objections.

The question of permissibility, since it is governed by the treaty itself, is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some other general treaty requiring legal settlement of disputes requires the Parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question.³²²

Here too, we remain in the context of mechanisms that are well established in general international law.

187. There does exist, moreover, an arbitral and judicial practice of this nature, although it is admittedly limited.

188. In the *English Channel* case, for example, the United Kingdom of Great Britain and Northern Ireland maintained before the arbitral tribunal to which the dispute was submitted, that the three French reservations to article 6 of the Convention on the Continental Shelf “should be left out of consideration altogether as being either inadmissible or not true reservations”.³²³ In its decision of 30 June 1977, the tribunal implicitly recognized itself competent to rule on these matters and considered “that the three reservations to Article 6 are true reservations and admissible”.³²⁴

189. Similarly, in the case concerning *Right of Passage over Indian Territory*, ICJ examined, and rejected, India’s

³²¹ For a detailed commentary on this provision, see Cassese, loc. cit., pp. 266–304. Comparable clauses exist in other areas; see, for example, article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles, article 20 of the Convention concerning Customs Facilities for Touring (and article 14 of the Additional Protocol thereto, relating to the importation of tourist publicity documents and material) and article 50 of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961. Other treaties, including treaties concluded under the auspices of FAO, incorporate the principle of the unanimous consent of the parties (see Imbert, op. cit., pp. 174–175).

³²² Bowett, loc. cit., p. 81. Likewise: Coccia, loc. cit., p. 26. The latter considers, however, that a State which accepts a reservation is no longer entitled to take advantage of its inadmissibility.

³²³ See decision of 30 June 1977 (footnote 138 above), para. 49.

³²⁴ *Ibid.*, para. 56; see also paragraphs 50–55.

first preliminary objection that “the Portuguese Declaration of Acceptance of the jurisdiction of the Court of December 19th, 1955, is invalid for the reason that the Third Condition of the Declaration is incompatible with the object and purpose of the Optional Clause”.³²⁵ Although the Court itself never declared impermissible a reservation to an optional declaration of acceptance of its compulsory jurisdiction, Sir Hersch Lauterpacht twice held in well-supported opinions, that the Court should have done so.^{326, 327}

190. What the Court can do in litigious cases, it can obviously also do in consultative matters. As the Court observed, the questions submitted to it in 1951 were

purely abstract in character. They refer neither to the reservations which have, in fact, been made to the Convention by certain States, nor to the objections which have been made to such reservations by other States. They do not even refer to the reservations which may in future be made in respect of any particular article; nor do they refer to the objections to which these reservations might give rise.³²⁸

However, there is nothing to prevent this being the case and the human rights treaty monitoring bodies would be perfectly entitled to seek an advisory opinion regarding the permissibility of reservations to these instruments, as some have, moreover, contemplated doing,³²⁹ and, juridically, there is nothing to prevent such a body requesting the Economic and Social Council or the General Assembly, as appropriate, “to request an advisory opinion on the issue from the International Court of Justice” in relation to reservations with the object and purpose of the treaty, nor, from a legal standpoint, is there anything to prevent the inclusion in a future human rights treaty of “a provision permitting the relevant treaty body to request an advisory opinion from the International Court of Justice in relation to any reservation that it considers might be incompatible with the object and purpose of the treaty”, as was suggested by the chairpersons of the human rights treaty bodies in 1992.³³⁰

191. The Inter-American Court of Human Rights could also exercise its consultative competence in this area, including the matter of problems that might arise in the interpretation or implementation of treaties other than the American Convention on Human Rights³³¹ and the same

³²⁵ *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1958*, p. 141; see the Court’s response, pp. 141–144.

³²⁶ *Case of Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, separate opinion of Sir Hersch Lauterpacht, pp. 34–66; and case of *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, dissenting opinion of Sir Hersch Lauterpacht, pp. 95–122; see also pp. 75–82 and 85–94, dissenting opinions of President Klaestad and of Judge Armand-Ugon, respectively.

³²⁷ In its judgement in the *Loizidou v. Turkey* case, the European Court of Human Rights considered that reservations concerning its competence could not be judged according to the same criteria as those applicable to determination of the permissibility of reservations to declarations made under Article 36, paragraph 2, of the ICJ Statute (footnote 81 above), paras. 83–85. While there may be doubts regarding this distinction, it relates to the substance of the applicable law and not to the modalities of control.

³²⁸ *I.C.J. Reports 1951* (footnote 47 above), p. 21.

³²⁹ See A/48/38 (footnote 86 above).

³³⁰ A/47/628 (footnote 84 above), paras. 61 and 65.

³³¹ See article 64, para. 1, of the Convention and “*Other Treaties Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC–1/82 of 24 September 1982, Series A, No. 1; see also Cook, loc. cit., p. 711.

applies to the European Court of Human Rights,³³² to which it was proposed to submit, preventively, the question of the conformity of future reservations with article 64 of the European Convention on Human Rights.³³³

192. From all these standpoints, the mechanisms for verifying the permissibility of reservations to human rights treaties are entirely conventional:

(a) The ordinary-law mechanism is the ordinary-law inter-State system, as reflected in article 20 of the 1969 and 1986 Vienna Conventions;

(b) It is sometimes modified or corrected by specific reservation clauses calling for majority or unanimous determination of permissibility;

(c) The jurisdictional or arbitral organs having competence to settle disputes connected with the implementation of treaties have never hesitated to give their opinion, where necessary, regarding the permissibility of reservations made by the parties;

(d) A fortiori, these organs have the competence to give advisory opinions on this matter.

(ii) *Role of the human rights treaty monitoring bodies*

193. To these traditional mechanisms for determining the permissibility of reservations have been added, since the early 1980s, other such mechanisms in the area of human rights, because the bodies for monitoring the implementation of treaties concluded in this area have deemed themselves to have in this regard a right and a duty of control which do not, in principle, seem likely to be challenged.

a. *Development of the practice of the monitoring bodies*

194. Initially, it is true these bodies showed themselves to be very hesitant and reserved on this point:

(a) In 1978, in accordance with a very firm legal opinion given to the Director of the Division of Human Rights by the Office of Legal Affairs,³³⁴ the Committee on the Elimination of Racial Discrimination decided: “The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect”.³³⁵

³³² See Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions.

³³³ See *Chorherr v. Austria*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 266–B, judgment of 25 August 1993, partly dissenting opinion of Judge Valticos (Council of Europe, Strasbourg, 1993), p. 42.

³³⁴ Memorandum of 5 April 1976 (see in particular paragraph 8, whose wording was almost fully repeated by the Committee), United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), pp. 219–221. See also Note by the Secretary-General (CERD/C/R.93).

³³⁵ *Official Records of the General Assembly, Thirty-third Session, Supplement No. 18 (A/33/18)*, para. 374 (a). See in this connection the observations of Imbert, “Reservations and human rights conventions”, pp. 41–42, and Shelton, loc. cit., pp. 229–230.

(b) The Legal Counsel of the United Nations took the same position regarding the powers of the Committee on the Elimination of Discrimination against Women,³³⁶ and, although some members of the Committee questioned the government representatives during the consideration of the country reports, regarding the scope of the reservations made,³³⁷ the Committee itself refrained from taking a position on the matter until 1987.³³⁸

(c) The Human Rights Committee, for its part, has long maintained a prudent waiting policy in this regard. During the examination of country reports some of its members expressed themselves in favour of consideration of the validity of reservations to the International Covenant on Civil and Political Rights, while others opposed the idea.³³⁹ However, it is felt that the Committee, although prepared to “reclassify” an interpretative declaration as a reservation, if necessary, seemed not inclined to determine the permissibility of reservations.³⁴⁰

195. At the regional level, the bodies established under the European Convention on Human Rights also adopted a waiting attitude, for a long time, and avoided taking sides in the debate between the experts on the question of whether those bodies were entitled to give an opinion on the question of the permissibility of reservations to the Convention.³⁴¹ From the outset, the European Commission of Human Rights and the European Court considered that they should interpret these reservations and give them practical meaning,³⁴² but the bodies themselves refrained from going any further or even implying that they might undertake a verification of permissibility.

³³⁶ See the Report of the Committee on the Elimination of Discrimination against Women, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 45 (A/39/45)*, vol. II, annex III.

³³⁷ See the examples given in this connection by Cook, loc. cit., p. 708, footnote 303.

³³⁸ See Clark, loc. cit., pp. 283–289.

³³⁹ See the examples of this given by Imbert, “Reservations and human rights conventions”, pp. 42–43 and Shelton, loc. cit., pp. 230–231.

³⁴⁰ See *M. K. v. France* and *T. K. v. France* (communication Nos. 220/1987 and 222/1987), decisions on admissibility of 8 November 1989, *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. II, annex X, pp. 118–123 and 127–131, respectively, in which the Committee declares the complaints inadmissible on the ground that the French “declaration” relating to article 27 of the Covenant constitutes a genuine reservation; versus: the opinion of Mrs. Higgins (ibid., appendix II, pp. 125–126 and 133–134) who considers that the declaration is one that is not binding on the Committee, which, *a contrario*, seemed to indicate, in both cases, that the Committee lacked the competence to determine the permissibility of reservations formulated by the States parties. See, on this point: Schmidt, loc. cit., pp. 20–34.

³⁴¹ See, in particular, the controversy between Golsong (*Actes du quatrième colloque international sur la Convention européenne des droits de l’homme* (Council of Europe, Strasbourg, 1976), meeting of 7 November 1975, pp. 269–270, and “Les réserves aux instruments internationaux pour la protection des droits de l’homme”, pp. 23–42) and Imbert (“Reservations and human rights conventions”, pp. 35–36).

³⁴² See, for example, Council of Europe, *Application No. 473/59*, decision of the Commission of 29 August 1959, *Yearbook of the European Convention on Human Rights*, 1958–1959, vol. 2 (The Hague, Martinus Nijhoff, 1960), pp. 400–406, at p. 405, and *Application No. 1008/61*, decision of the Commission of 5 March 1962, ibid., 1962, vol. 5, pp. 82–86, at p. 86; and, in particular, the extracts referred to by Imbert, op. cit., pp. 176–277.

196. The report adopted by the European Commission on 5 May 1982 in the *Temeltasch v. Switzerland* case,³⁴³ constitutes a turning point in this regard. The Commission points out that,

even assuming that some legal effect were to be attributed to an acceptance or an objection made in respect of a reservation to the Convention, this could not rule out the Commission’s competence to express an opinion on the compliance of a given reservation or an interpretative declaration with the Convention,³⁴⁴

and, basing itself on the “specific nature” of the European Convention on Human Rights, it “considers that the very system of the Convention confers on it the competence to consider whether, in a specific case, a reservation or an interpretative declaration has or has not been made in accordance with the Convention.”³⁴⁵ Consequently, the Commission finds that the Swiss interpretative declaration concerning article 6, paragraph 3 (e), of the Convention constitutes a reservation³⁴⁶ and it finds, also, that the declaration is not in conformity with the provisions of article 64 of the Convention.³⁴⁷

197. As the European Commission of Human Rights, surprisingly, did not refer this matter to the European Court of Human Rights, it was the Committee of Ministers that, pursuant to article 32 of the European Convention, approved the Commission’s report on this case³⁴⁸ and it was only six years later, by its judgement in the *Belilos* case, that the Court adopted the Commission’s position of principle.³⁴⁹ In its turn, it proceeded to “reclassify” as a reservation an “interpretative declaration” of Switzerland (concerning article 6, paragraph 1, of the Convention)³⁵⁰ and held that “the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid”,³⁵¹ after having noted that

[t]he Court’s competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Articles 45 and 49 of the Convention ... and from Article 19 and the Court’s case-law (see, as the most recent authority, the *Ettl and Others* judgment of 23 April 1987, Series A no. 117, p. 19, § 42).³⁵²

³⁴³ Application No. 9116/30 (footnote 81 above); see Cohen-Jonathan, *La Convention européenne des droits de l’homme*, pp. 86–93; Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case”.

³⁴⁴ Application No. 9116/30 (footnote 81 above), para. 61.

³⁴⁵ Ibid., para. 65.

³⁴⁶ Ibid., paras. 68–82.

³⁴⁷ Ibid., paras. 83–92.

³⁴⁸ Ibid., resolution DH (83) 6 of 24 March 1983, p. 153.

³⁴⁹ *Judgment of 29 April 1988* (footnote 81 above); see Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”; Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”; Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”; Macdonald, “Reservations under the European Convention on Human Rights”; and Marks, “Reservations untinged: the *Belilos* case before the European Court of Human Rights”.

³⁵⁰ *Judgment of 29 April 1988* (footnote 81 above), paras. 40–49.

³⁵¹ Ibid., para. 60; see also paragraphs 51–59.

³⁵² Ibid., para. 50; in paragraph 42 of the case of *Ettl and Others* (European Court of Human Rights, Series A: *Judgments and Decisions*, vol. 117, *judgment of 23 April 1987* (Council of Europe, Strasbourg, 1987), the Court made use of the reservation of Austria to article 6, paragraph 1, of the Convention and referred to its judgement in the *Ringeisen* case (ibid., *judgment of 16 July 1971*, pp. 40–41, para. 98), which merely draws the consequences of this reservation, which is interpreted in a very liberal manner (in favour of the State).

198. Since that time, the European Commission and the European Court of Human Rights have made use of this jurisprudence on a virtually routine basis³⁵³ and have extended it to reservations formulated by States in respect of their own competence. Thus, in its decision of 4 March 1991 concerning the admissibility of three applications made against Turkey,³⁵⁴ the Commission considered that certain restrictions of its competence formulated by the respondent State in its declaration of acceptance of individual applications under article 25 were “not permitted by this Article”.³⁵⁵ More categorically, in its judgement in the *Loizidou v. Turkey* case,³⁵⁶ the Court held that “the object and the purpose of the Convention system”³⁵⁷ precludes States from limiting the scope of their declarations under articles 25 and 46 of the Convention by means of declarations or reservations, which confirms the practice followed by States parties:

Taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 in their context and in the light of their object and purpose and the practice of Contracting Parties, the Court concludes that the restrictions *ratione loci* attached to Turkey’s Article 25 and Article 46 declarations are invalid.³⁵⁸

199. As far as the Special Rapporteur is aware, the Inter-American Court of Human Rights has not as yet had to determine, in contentious proceedings, the permissibility of reservations formulated by States parties under article 75 of the American Convention on Human Rights. It can, however, be deduced from some of its advisory opinions that, in appropriate cases, it would adopt a position similar to that of the European Court of Human Rights. Thus, in its Advisory Opinion OC-2/82, *The effect of reservations on the entry into force of the American Convention (arts. 74 and 75)*,³⁵⁹ it considered that the parties have a legitimate interest in opposing reservations incompatible with the purpose and object of the Convention and “are free to assert that interest through the adjudicatory and advisory machinery established by the Convention”.³⁶⁰ In particular, in its Advisory Opinion OC-3/83 of 8 September 1983 in the *Restrictions to the death penalty* case,³⁶¹ the Inter-American Court held that certain reservations by Guatemala were inadmissible.³⁶²

200. It is in this context that the monitoring bodies established under the universal human rights instruments adopted a much more critical attitude regarding the validity of reservations, compared with the very prudent attitude they had traditionally maintained.³⁶³ This is particularly noteworthy in the case of the Committee on the Elimination of Discrimination against Women³⁶⁴ and, especially, the Human Rights Committee.

201. In general comment No. 24,³⁶⁵ the Committee states:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because ... it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles.³⁶⁶

b. Basis of the control exercised by the monitoring bodies

202. This ground, which is similar to that invoked by the European and inter-American regional organs,³⁶⁷ is also the one invoked by some of those writers who believe the human rights treaty monitoring bodies have competence to verify the permissibility of reservations. For example, it has been asserted that:

(a) The special character of these treaties excludes

the possibilities of objection or acceptance by the other contracting States which customary international law has developed since the advisory opinion of the International Court of Justice in the case of the Convention on the Prevention and Punishment of the Crime of Genocide, traces of which are to be found in articles 19 to 23 of the Vienna Convention on the Law of Treaties;³⁶⁸

(b) Their objective character would seem to call for an objective control;³⁶⁹

(c) It would be impossible for the bodies they establish to perform their general monitoring functions “without establishing which obligations bind the party concerned”;³⁷⁰

(d) In practice, the objections system would not really function.³⁷¹

203. These arguments have been challenged and are certainly not all of equal validity.

204. In the first place, as has been made clear above,³⁷² neither the allegedly “objective” character of human rights treaties, nor the absence of reciprocity characterizing most of their substantive provisions, constitutes convincing reasons for a regime departing from ordinary law. This might at most be a ground for saying that it might be *desirable* for the permissibility of reservations to those instruments to be determined by an independent and technically qualified body, but that would not result in the ex-

³⁵³ See the examples quoted in footnote 81 above.

³⁵⁴ *Chrysostomos et al. v. Turkey* (see footnote 81 above).

³⁵⁵ *Ibid.*, para. 42.

³⁵⁶ See footnote 81 above.

³⁵⁷ *Judgment of 23 March 1995* (footnote 81 above), para. 75.

³⁵⁸ *Ibid.*, para. 89; see also paragraphs 65–89.

³⁵⁹ See footnote 82 above.

³⁶⁰ Advisory Opinion OC-2/82 (see footnote 82 above), para. 38.

³⁶¹ See footnote 82 above.

³⁶² See footnote 289 above.

³⁶³ See paragraph 194 above.

³⁶⁴ See paragraph 59 above.

³⁶⁵ A/50/40 (footnote 87 above).

³⁶⁶ *Ibid.*, para. 18.

³⁶⁷ See paragraphs 196–199 above.

³⁶⁸ Golsong, *Actes du quatrième colloque ...* (footnote 341 above), p. 269; see also the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case (footnote 333 above), p. 41.

³⁶⁹ See Giegerich, *loc. cit.*, pp. 780–781, and Higgins, “Introduction”, p. xxii.

³⁷⁰ Schabas, “Reservations to human rights treaties ...”, p. 68.

³⁷¹ See McBride, *loc. cit.*, and Higgins, “Introduction”, p. xxiv.

³⁷² See, in particular, paragraphs 136–162.

isting machinery being vested with such competence if it was not provided for in the treaties by which the bodies were established.³⁷³

205. As for the claim that the acceptance and objection mechanism does not function satisfactorily, that is a matter of judgement, which, in any event, does not constitute an argument either; the fact that the existing mechanism may be questionable does not mean that the alternative system would be legally acceptable. In particular, the criticisms of the effectiveness of the “Vienna regime” are, in fact, tantamount to a challenging of the very bases of contemporary international law. As was noted by Sir Humphrey Waldock, speaking as expert-consultant at the United Nations Conference on the Law of Treaties:

It was true that, although the International Law Commission had intended to state an objective criterion, the method of application proposed in the draft articles was subjective, in that it depended on the judgement of States. *But that situation was characteristic of many spheres of international law in the absence of a judicial decision, which in any case would bind only the State concerned and that only with respect to the case decided.*³⁷⁴

This may be seen as an unfortunate situation, but it is a fundamental characteristic of international law as a whole and, as such, affects the implementation of any treaty, irrespective of its object.

206. In fact, from the standpoint of the reservations regime, the truly special nature of the International Covenant on Civil and Political Rights and the European and American conventions on human rights, as well as many instruments of more limited scope, is not that they are human rights treaties, but that they establish bodies for monitoring their implementation. Once such bodies are established, they have, in accordance with a general legal principle that is well established and recognized in general international law, the competence that is vested in them by their own powers. This is the only genuinely convincing argument in favour of determination of the permissibility of reservations: these bodies could not perform the functions vested in them if they could not determine the exact extent of their competence vis-à-vis the States concerned, whether in examining applications by States or by individuals or periodic reports or in exercising a consultative competence.

207. The point has been made, in this connection, that these bodies function in a context that is “quite distinct” from that of ICJ, which “is called on *inter alia* to examine any legal dispute between States that might occur in any part of the globe” and “any area of international law”, whereas the role of the monitoring bodies is “exclusively limited to direct supervisory functions in respect of a law-making treaty”, and that, consequently, there can be no possible analogy between the competencies of these bodies and those of the Court.³⁷⁵ This is a very debatable and even harmful argument.

³⁷³ See the statement by Jamaica (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee, 24th meeting (A/C.6/50/SR.24)*, para. 20).

³⁷⁴ *Official Records of the United Nations Conference on the Law of Treaties ...* (footnote 167 above), p. 126, para. 10.

³⁷⁵ *Loizidou v. Turkey* case (footnote 81 above), paras. 84–85.

208. The first ground justifying the exercise by human rights treaty monitoring bodies of the power to determine the permissibility of reservations lies in the need for these bodies to check their own competence, and therefore to determine the exact extent of the commitments entered into by the State involved; and this is possible only on the basis of any reservations which that State has attached to its undertaking. As the possibility of formulating reservations is not unlimited, this necessarily implies that the reservations must be permissible. This reasoning applies to these bodies as it does to ICJ³⁷⁶ or any other jurisdictional or quasi-jurisdictional organ which has to apply any treaty, and is based on the “principle of mutuality of consent”³⁷⁷ which must be respected, in particular, in the case of a dispute between States. It is pointed out in this connection that the functions of human rights treaty monitoring bodies are never limited exclusively to the consideration of applications from individuals; these bodies are also all vested with certain powers to hear complaints from other States parties³⁷⁸ and, in the circumstances, they have, undeniably, to determine the extent of their competence.

209. It is therefore not because of their undeniably special nature that human rights treaties require determination of the permissibility of reservations formulated in respect of them, by monitoring bodies, but rather because of the “ordinariness” of these bodies. Being established by treaties, they derive their competence from those instruments and must verify the extent of that competence on the basis of the consent of the States parties and of the general rules of the law of treaties.

210. To this it may be added that, even if the validity of this conclusion were to be challenged, the now many concurring positions taken by the human rights treaty monitoring bodies have probably created a situation which it would probably be difficult to alter. Particularly since, regarding the very principle of control, the attitude of the States concerned is not such as would establish the existence of a contrary *opinio juris*:

(a) Switzerland, although it contemplated doing so,³⁷⁹ did not denounce the European Convention on Human Rights following the judgements of the European Court of Human Rights in the *Belilos* and *Weber* cases;

(b) Nor did Turkey do so following the *Loizidou* judgement;

(c) The Committee of Ministers of the Council of Europe approved the solution adopted by the European Commission of Human Rights in the *Temeltasch v. Switzerland* case;³⁸⁰

(d) The Parliamentary Assembly of the Council of Europe wishes to develop the jurisprudence of the organs of the Convention in this area;³⁸¹

³⁷⁶ See paragraph 189 above.

³⁷⁷ See paragraph 96 above.

³⁷⁸ See article 41 of the International Covenant on Civil and Political Rights, article 24 of the European Convention on Human Rights and article 45 of the American Convention on Human Rights; see the observations of the United Kingdom on general comment No. 24 (footnote 88 above), para. 5.

³⁷⁹ See Cameron and Horn, loc. cit., p. 117.

³⁸⁰ See paragraph 197 above.

³⁸¹ See recommendation 1223 (1993) (footnote 89 above), para. 7.A.ii.

(e) Guatemala appears to have taken the desired action following the advisory opinion given by the Inter-American Court of Human Rights in the matter of *Restrictions to the Death Penalty*;³⁸² and

(f) Although some States reacted negatively to the Human Rights Committee's general comment No. 24,³⁸³ their criticisms related more to the Committee's consequential action following its verification of the permissibility of reservations than to the actual principle of such verification.³⁸⁴

(iii) *Combination of different methods of determining the permissibility of reservations*

211. The present situation regarding verification of the permissibility of reservations to human rights treaties is therefore one in which there is concurrence, or at least coexistence, of several mechanisms for determining the permissibility of these reservations:

(a) One of these—which constitutes the ordinary law—is the purely inter-State one provided for in the 1969 and 1986 Vienna Conventions. This can be adapted by special reservation clauses contained in the treaties concerned;

(b) Where the treaty establishes a body to monitor its implementation, it is now accepted—for reasons which are not all improper—that that body can also give its view on the permissibility of reservations;

(c) But this still leaves the possibility for the States parties to have recourse, where appropriate, to the customary methods of peaceful settlements of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;³⁸⁵

(d) It may well be, moreover, that national courts, like those in Switzerland,³⁸⁶ also consider themselves entitled to determine the validity of a reservation in the light of international law.

212. The number of these various possibilities of verifying permissibility presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).³⁸⁷

³⁸² See Cerna, "La Cour interaméricaine des droits de l'homme: ses premières affaires", p. 312.

³⁸³ See paragraph 60 above.

³⁸⁴ Thus: "The United Kingdom shares the analysis that the Committee must necessarily be able to take a view of the status and effect of a reservation where this is required in order to permit the Committee to carry out its substantive functions under the Covenant" (A/50/40 (footnote 88 above), p. 132, para. 11).

³⁸⁵ Subject, however, to the existence of "self-contained regimes". These certainly include those established by the European and American conventions on human rights (see Simma, "Self-contained regimes", pp. 130 et seq., and Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 230 et seq.).

³⁸⁶ See *Elisabeth F. v. Council of State of the Canton of Thurgau*, decision of the Federal Tribunal of 17 December 1992, *Europäische Grundrechte Zeitschrift*, vol. 20, No. 31 (March 1993), p. 72; see, more generally, the very well-informed article by Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l'article 6 § 1".

³⁸⁷ See, in particular, Imbert, "Reservations to the European Convention ...", pp. 590–591; the writer draws attention to the risks of

However, this risk is in fact inherent in any verification system—over time, any given body may take conflicting decisions—and it is perhaps better to have too much verification than no verification at all.

213. A more serious danger is that constituted by the succession of verifications over time, in the absence of any limitation of the duration of the period during which the verifications may be carried out. The problem does not arise in the case of the "Vienna regime" because article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions sets a time limit of 12 months following the date of receipt of notification of the reservation (or expression by the objecting State of its consent to be bound by the Treaty),³⁸⁸ on the period during which a State may formulate an objection. A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional control, which must be assumed to be aleatory and to depend on reference of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.³⁸⁹ Apart from the fact that none of the relevant texts currently in force provide for such a limitation, the limitation seems scarcely compatible with the very basis for action by monitoring bodies, which is designed to ensure respect for the general principles of international law (preservation of the purpose and object of the treaty). Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;³⁹⁰ the same problem is liable to arise a fortiori in the case of the monitoring bodies, as a result of which the latter may find themselves paralysed.

214. It seems, moreover, that the possibilities of cross-verifications in fact strengthen the opportunity for the reservations regime to play its real role. The problem is not one of setting one up against the other or, in the case of a single system, of seeking to affirm its monopoly over the others,³⁹¹ but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim is always to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation.³⁹² It is only natural that the States which wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play

incompatibility within the European Convention system, in particular between the position of the Court and that of the Committee of Ministers.

³⁸⁸ It should be noted, however, that a problem nevertheless arises owing to the spreading over time of ratifications and accessions.

³⁸⁹ See Imbert, *op. cit.*, p. 146, footnote 25, and "Reservations and human rights conventions", pp. 36 and 44; versus: Golsong, "Les réserves aux instruments ...", p. 34, and Edwards Jr., "Reservations to treaties", pp. 387–388.

³⁹⁰ See Clark, *loc. cit.*, pp. 312–314.

³⁹¹ This is in fact their natural tendency; see the conflict between the points of view of the Human Rights Committee: "it is an inappropriate task for States parties in relation to human rights treaties" (A/50/40 (footnote 87 above), para. 18) (see paragraph 201 above), and France: "it is therefore for the [States parties], and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty" (see A/51/40 (footnote 88 above), p. 106, para. 14).

³⁹² See paragraphs 90–98 above.

fully the role of guardians of the treaty entrusted to them by the parties.

215. This does not exclude—in fact it implies—a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control. In particular, it is essential that, in determining the permissibility of a reservation, the monitoring bodies (as well as the organs for the settlement of disputes) should take fully into account the positions taken by contracting parties through acceptances and objections. Conversely, the States, which are required to abide by the decisions taken by the monitoring bodies, when they have given those bodies a power of decision, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though they may not be able to take legally binding decisions.³⁹³

(b) *Consequences of the findings of monitoring bodies*

216. This raises, very directly, the question of the consequences of a finding of impermissibility of a reservation by a human rights treaty monitoring body.

217. Once it is recognized that such a body can determine whether a reservation meets the permissibility requirements of ordinary law (compatibility with the object and purpose of the treaty) or of a special reservations clause, “it remains to be determined what the [Human Rights] Committee is empowered to do should it consider that a particular reservation does not meet this requirement”, a “particularly important and delicate” question, as Mrs. Higgins pointed out during the preparation of general comment No. 24,³⁹⁴ and one which in fact gave rise to a very lively debate. To this question must be added another, which is closely linked to it, but which it seems preferable to deal with separately for reasons of clarity. This is the question of the obligations (and the rights) of the State whose reservation has been considered inadmissible.

³⁹³ See, however, the extremely strong reaction to general comment No. 24 reflected by the Foreign Relations Revitalization Act of 1995 (104th Congress, 1st session, S. 908 (report No. 104–95), title III, chap. 2, sect. 314.), submitted in the United States Senate by Senator Helms on 9 June 1995, which provided that “no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of:

“(A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights; or

“(B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

“(2) certification. The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has:

“(A) revoked its General Comment No. 24 adopted on November 2, 1994; and

“(B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights.”

³⁹⁴ CCPR/C/SR.1366, para. 54.

(i) *Rights and duties of the monitoring body*

218. The problem of the action to be taken by the monitoring body if it finds that a reservation is impermissible is generally stated in terms of “severability”,³⁹⁵ in the sense that commentators and the monitoring bodies themselves wonder whether the reservation can be separated from the consent to be bound and whether the State making the reservation can and should be regarded as being bound by the treaty as a whole despite the impermissibility of the reservation it has formulated.

219. All the monitoring bodies which have asked themselves this question have so far answered in the affirmative:

(a) In the *Belilos* case, the European Court of Human Rights, indicating the grounds for its judgement, stated, laconically: “... it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration”.³⁹⁶

(b) The Court was more explicit in the case of *Loizidou v. Turkey*, in which, after recalling its judgement of 1988,³⁹⁷ it dismisses the statements made by Turkey during the course of the proceedings but

observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and that might be deemed impermissible by the Convention organs.

...

The subsequent reaction of various Contracting Parties to the Turkish declarations ... lends convincing support to the above observation concerning Turkey’s awareness of the legal position. ... Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government’s basic—albeit qualified—intention to accept the competence of the Commission and Court.

It thus falls to the Court, in the exercise of its responsibilities under Article 19, to decide this issue with reference to the texts of the respective declarations and the special character of the Convention regime. The latter, it must be said, militates in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey’s “jurisdiction” within the meaning of Article 1 of the Convention.

The Court has examined the text of the declarations and the wording of the restrictions with a view to determining whether the impugned restrictions can be severed from the instruments of acceptance or whether they form an integral and inseparable part of them. Even considering the texts of the Article 25 and 46 declarations taken together, it considers that the impugned restrictions can be separated from the remainder of the text leaving intact the acceptance of the optional clauses.³⁹⁸

(c) The Human Rights Committee stated that:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.³⁹⁹

³⁹⁵ See Edwards Jr., loc. cit., p. 376.

³⁹⁶ See footnote 81 above, *judgment of 29 April 1988*, para. 60.

³⁹⁷ *Ibid.*, *judgment of 23 March 1995*, para. 94.

³⁹⁸ *Ibid.*, paras. 95–97.

³⁹⁹ A/50/40 (footnote 87 above), p. 124, para. 18.

220. Although the European Court of Human Rights emphasizes the differences between the context in which it operates and that in which ICJ functions,⁴⁰⁰ the similarities between this reasoning and that of Sir Hersch Lauterpacht in his separate opinion attached to the ICJ judgment in the *Case of Certain Norwegian Loans*⁴⁰¹ are very striking, although the European Court is more circumspect than the ICJ judge in making use of it and, above all, totally ignores the starting point of all his reasoning, which was based on a clear alternative:

If the clause of the Acceptance reserving to the declaring Government the right of unilateral determination is invalid, then there are *only two alternatives* open to the Court: it may either treat as invalid that particular part of the reservation or it may consider the entire Acceptance to be tainted with invalidity. (There is a third possibility—which has *only to be mentioned in order to be dismissed*—namely, that the clause in question invalidates not the Acceptance as a whole but the particular reservation. This would mean that the entire reservation of matters of national jurisdiction would be treated as invalid while the Declaration of Acceptance as such would be treated as fully in force.)⁴⁰²

221. It is precisely this “third possibility” (which Sir Hersch Lauterpacht mentions only immediately to reject it) that the European Court utilizes in the judgements cited above and that the Human Rights Committee contemplates in general comment No. 24.

222. These positions are perhaps due to the confusion of two very different concepts:

(a) First of all there is the concept of “separability” of the provisions of the treaty itself,⁴⁰³ which, in relation to reservations, raises the question whether the provision in respect of which the reservation is made can be separated from the treaty without compromising the latter’s object and purpose. This may probably be deemed a prerequisite for permissibility of the reservation, since otherwise the provisions of articles 20, paragraph 4, and 21, paragraph 1, of the 1969 and 1986 Vienna Conventions would be meaningless.⁴⁰⁴

(b) Then there is the concept of the “severability” of the reservation from the consent of the State making the reservation to be generally bound by the treaty, which is something quite different⁴⁰⁵ and raises the question whether the reservation was or was not a prerequisite for the State’s commitment.

223. It is by no means impossible to foresee what might be the consequences of the “severability” of the provision in respect of which the reservation that is held to be unlawful was made. In its observations on the Human Rights Committee’s general comment No. 24, the United Kingdom, supporting Sir Hersch Lauterpacht’s argument,⁴⁰⁶

agrees that severability⁴⁰⁷ of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice. However, the United Kingdom is absolutely clear that severability would entail excising both the reservation *and* the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules “expressly recognized by” the Contracting States.⁴⁰⁸

224. The “severability” practised by the European Court of Human Rights and contemplated by the Human Rights Committee leads precisely to this “other solution”.⁴⁰⁹

225. During the discussion of general comment No. 24 in the Human Rights Committee, Mrs. Higgins explained that “in the case of the human rights treaties, it is undesirable to exclude States parties; it is preferable, on the contrary, to keep them; hence the formulation employed in the penultimate sentence of paragraph 20”.^{410,411} As far as the Special Rapporteur is aware, this is the only explanation of “severability” to be found in the *travaux préparatoires* for general comment No. 24, and it is also the principal justification given by the commentators who expressed support for it.⁴¹²

226. This explanation presents very serious legal difficulties. In law, it is not a question of determining whether or not reserving States parties should be “kept”, but whether or not they have consented to be bound and, to paraphrase the Human Rights Committee, it is the States themselves—and not external bodies, however well-intentioned and technically above criticism they may be—who are “particularly well placed to perform this task”.⁴¹³ Moreover it is difficult to see how such external bodies could replace the States in carrying out the determination. The opposite solution could give rise to serious political and constitutional difficulties for the reserving State, particularly where the Parliament has attached conditions to the authorization to ratify or accede.⁴¹⁴

227. It would seem odd, moreover, for the monitoring bodies to be able to go further than the States themselves can do in their relations *inter se*. Under the 1969 and 1986 Vienna Conventions and in accordance with practice, only two possibilities are open to them: exclusion of application of the provision that is the subject of the reservation (art. 21, para. 1 (a)) or of the treaty as a whole (art. 20, para. 4 (b)); but the Conventions do “not even contemplate the possibility that the full treaty might come into force for the reserving State”.⁴¹⁵

⁴⁰⁷ The United Kingdom designates here by “severability” what has been defined as “separability” (para. 222 above).

⁴⁰⁸ A/50/40 (footnote 88 above), p. 133, para. 14; this possibility is likely to occur only rarely in practice.

⁴⁰⁹ See paragraph 219 above.

⁴¹⁰ Later para. 18.

⁴¹¹ CCPR/C/SR.1382, para. 11.

⁴¹² See Giegerich, *loc. cit.*, p. 782 (surprisingly, however, this commentator adds that this solution “also prevents legal uncertainty as to the status of the reserving state as a contracting party”).

⁴¹³ See A/50/40 (footnote 87 above), p. 128, para. 18.

⁴¹⁴ See, in this connection, the statement by the United States (*Official Records of the General Assembly, Fiftieth Session, Sixth Committee*, 13th meeting (A/C.6/50/SR.13), para. 53).

⁴¹⁵ A/50/40 (footnote 88 above), observations of the United States, sect. 5, p. 129.

⁴⁰⁰ See footnote 327 above.

⁴⁰¹ *I.C.J. Reports 1957*, pp. 56–59 (see footnote 326 above).

⁴⁰² *Ibid.*, pp. 55–56.

⁴⁰³ See Reuter, *op. cit.*, pp. 37–38.

⁴⁰⁴ It is in accordance with this first meaning that the most authoritative commentators on the question of reservations refer to “separability” (see, for example, Reuter, *op. cit.*, p. 84; Bowett, *loc. cit.*, p. 89; and Sinclair, *op. cit.*, p. 68).

⁴⁰⁵ This appears to have been confused with the preceding concept by the European Court of Human Rights in the *Loizidou* case (see paragraph 219 and footnote 81 above).

⁴⁰⁶ See paragraph 220 above.

228. However, the most serious criticism one might level at “severability” is that it takes no account whatsoever of the consensual character constituting the very essence of any treaty commitment. The three States which have so far reacted to general comment No. 24 are in agreement on this point. Their view was expressed particularly clearly by France, which stated that

agreements, whatever their nature, are governed by the law of treaties, that they are based on States’ consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.⁴¹⁶

229. Subject to the possible consequences of the “severability” of the provision that is the subject of the reservation,⁴¹⁷ this conclusion seems to be the correct one. Irrespective of its object, a treaty remains a juridical act based on the will of States, whose meaning cannot be presumed or invented. Human rights treaties do not escape the general law: their object and purpose do not effect any “transubstantiation” and do not transform them into international “legislation” which would bind States against their will.

230. This is the risk monitoring bodies take if they venture to determine what the *intention* of a State was when it bound itself by a treaty, while it was, *at the same time*, formulating a reservation. Not only may the determination of this intention prove extremely delicate,⁴¹⁸ and not only are the precedents constituted by the *Belilos* and *Loizidou* cases very unconvincing in this regard,⁴¹⁹ but the very principle of such determination gives rise to serious objections.

(ii) *Rights and duties of the reserving State*

231. If the points made above are considered accepted,

(a) The human rights treaty monitoring bodies may determine the permissibility of reservations formulated by States in the light of the applicable reservations regime;

(b) If they consider the reservation to be impermissible, they can only conclude that the reserving State is not currently bound;⁴²⁰

⁴¹⁶ A/51/40 (footnote 88 above), observations of France, p. 106, para. 13; see also the observations of the United States, A/50/40, sect. 5, and of the United Kingdom, p. 122, para. 14 (footnote 88 above).

⁴¹⁷ See paragraph 223 above.

⁴¹⁸ See the opinion of Sir Hersch Lauterpacht in the *Interhandel* case (footnote 326 above), pp. 112–116; see also Edwards Jr., loc. cit., p. 375.

⁴¹⁹ In the *Belilos* case, the European Court of Human Rights very clearly underestimated the importance of the reservation in the eyes of the Swiss authorities, as is shown by Switzerland’s reluctance to remain a party to the European Convention on Human Rights following the handing down of the judgement (see footnote 379 above). Furthermore, the entirely contrary grounds given by the European Court in support of its decision in the *Loizidou* case reflect an offhand attitude, to say the least, on the part of the Court, towards a sovereign State, in simply casting doubt on formal statements made before it in the written proceedings (see paragraph 219 above).

⁴²⁰ Except in the case of “separability”, which is difficult to conceive in practice (see paragraphs 220–223 above).

(c) But they cannot take the place of the reserving State in order to determine whether the latter wishes or does not wish to be bound by the treaty despite the impermissibility of the reservation accompanying the expression of its consent to be bound by the treaty.

232. The attitude of the reserving State is therefore crucial and the question is whether that State is bound by legal rules or enjoys a purely discretionary competence.

233. Here again, it is convenient to divide the problem into two questions that are separate even though linked:

(a) Are the findings of the monitoring body binding on the reserving State?

(b) Irrespective of the answer to the preceding question, has the State a choice between several types of reaction?

a. *Binding force of the findings of the monitoring body*

234. Although it seems controversial,⁴²¹ the answer to this first question does not present any problem. Indeed, it seems almost obvious that the authority of the findings made by the monitoring body on the question of reservations will depend on the powers with which the body is invested: they will have the force of *res judicata* where the body is jurisdictional in character, or is arbitral and adjudicates and will have the status of advisory opinions or recommendations in other cases.

235. Admittedly, things are somewhat more complex in practice. On the one hand, it is not always easy to determine the exact nature of the body required to make a determination, especially as one and the same body may successively exercise different competences. Furthermore, the latter do not necessarily fall into well-defined categories that are clearly identified in law. Finally, the exact scope of certain instruments is the subject of doctrinal controversy and, even where this is not the case, practical problems may also arise.⁴²² Real as they are, these problems are not specific to the area of reservations. It is therefore sufficient to rely on the very general directive set out in paragraph 234 above.

236. It should be noted, however, that, even on this point, the Human Rights Committee’s general comment No. 24 has not escaped criticism. In particular, the United Kingdom criticized it for having used “the verb ‘determine’ in connection with the Committee’s functions towards the status of reservations” and of having done so, “moreover in the context of its *dictum* that the task in question is inappropriate for the States Parties”.⁴²³

237. Although the Human Rights Committee meant by this that it had to take decisions that were binding on the States parties, this objection is very probably well founded: the “comments”, “reports” and “finding” adopted by the Committee under articles 40 and 41 of the International Covenant on Civil and Political Rights or article 5 of the Optional Protocol to it are certainly not legally bind-

⁴²¹ See paragraphs 236 et seq.

⁴²² See, for example, paragraph 241 below.

⁴²³ A/50/40 (footnote 88 above), p. 132, para. 11.

ing.⁴²⁴ “Findings” would have been more accurate, but it is certainly true that “too much is not to be read into the verb ‘determine’”:⁴²⁵ the Committee can take a position regarding the permissibility or impermissibility of reservations formulated by the States parties to the Covenant in the exercise of its general functions of monitoring the implementation of that instrument, but “a competence to do something” should not be confused with “the binding effect of that which is done”.⁴²⁶

238. Furthermore, when it considered the first report of the United States, following the adoption of general comment No. 24, the Human Rights Committee confined itself to “regretting” the extent of the State party’s reservations, declarations and understandings to the International Covenant on Civil and Political Rights, stating that it was “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”.⁴²⁷ Furthermore, at the last meeting devoted to consideration of this report, the Chairman of the Committee, responding to the concerns expressed by the United States, pointed out that: “The Committee’s interpretations as set out in its general comments were not strictly binding, although it hoped that the comments carried a certain weight and authority.”⁴²⁸

239. The formulas used by the chairpersons of the bodies set up under international human rights instruments in their 1992 and 1994 reports⁴²⁹ call for similar comments. They are of different types and in any event cannot imply that the bodies concerned have greater powers in this area than those conferred on them by their statutes.

240. These powers also vary greatly, depending on circumstances and from body to body. It is nevertheless clear that by ratifying the treaties which establish these bodies, the States parties undertake to execute them in good faith, which implies at least that they will examine in good faith the comments and recommendations made to them by the bodies concerned.⁴³⁰

b. *The reactions expected from the reserving State*

241. The juridical value of the findings of the monitoring bodies naturally has some bearing on the nature and scope of the consequential obligations for a reserving State whose reservation is declared inadmissible. Where

⁴²⁴ Higgins, “Introduction”, p. xviii, footnote 7: “The legally binding nature of any ‘determination’ of the Committee, whether on this issue or otherwise, is problematic.”

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*, p. xxii.

⁴²⁷ A/50/40 (footnote 87 above), para. 279.

⁴²⁸ CCPR/C/SR.1406, para. 3.

⁴²⁹ See footnote 84 above. “The treaty bodies should systematically review reservations made when considering a report and include in the list of questions to be addressed to reporting Governments a question as to whether a given reservation was still necessary and whether a State party would consider withdrawing a reservation that might be considered by the treaty body concerned as being incompatible with the object and purpose of the treaty” (A/47/628, para. 36). “They recommend that treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law” (A/49/537, para. 30).

⁴³⁰ See Higgins, “Introduction”, p. xviii; and, more generally, Nguyen Quoc, Dailier and Pellet, *op. cit.*, p. 372.

the body concerned is vested with decision-making powers, the State must conform to the body’s decisions. However, this rule is tempered by two factors:

(a) In the first place, it is not entirely obvious, from the strictly legal standpoint, that a State would be legally bound to withdraw a reservation declared impermissible if this question does not constitute the actual subject of the decision; in the case of the human rights treaty monitoring bodies this is likely to occur only rarely,⁴³¹

(b) Secondly, and again from a strictly legal standpoint, assuming that such a decision were handed down, it would have the *relative* authority of *res judicata* and would therefore impose an obligation on the defending State only in relation to the applicant or applicants.⁴³²

242. Too much importance should not, however, be attached to these strictly technical considerations: it is scarcely conceivable that a State anxious to observe the law—and to preserve its international image—would adopt such a restrictive position. This applies at least to any findings that might be made in such circumstances and to the recommendations made or advisory opinions given. While such instruments have no binding force, they do grant permission⁴³³ and States parties cannot, without breaching the principle of good faith, remain indifferent to findings regarding the scope of their commitments, made, in the exercise of its functions (contentious, consultative or other), by an organ established under a treaty by which they have wished to be bound.

243. In all cases where such a body has found a reservation to be impermissible, the State therefore finds itself confronted with a choice. Except in special cases, it alone must determine whether the impermissible reservation that it attached to the expression of its consent to be bound constituted an essential element of that consent.⁴³⁴

244. The State has two options: (a) simply to withdraw the reservation; or (b) to terminate its participation in the treaty.

245. In both these cases, it must be borne in mind that the State’s decision produces its effects, or in any event certain effects, *ab initio*. By definition, if the reservation is incompatible with the object and purpose of the treaty,⁴³⁵

⁴³¹ This might, however, be the case if a State (the reserving State or the objecting State) were to submit to the European Court of Human Rights a dispute relating to reservations under article 46 of the European Convention on Human Rights or article 62 of the American Convention on Human Rights. On the other hand, it is generally considered that the principle of *res judicata* extends only to the substantive provisions of jurisdictional or arbitral decisions and to the grounds on which they are necessarily based, but not to those decisions as a whole. While a jurisdictional organ may give its views on the permissibility of a reservation when an individual or inter-State application is made to it in relation to the implementation of the convention, it is doubtful that observations made in connection with the matter can be considered *res judicata*.

⁴³² See the position of Sir Humphrey Waldock (para. 205 above).

⁴³³ See, for example: Jacqué, *Eléments pour une théorie de l’acte juridique en droit international public*, p. 238; and Nguyen Quoc, Dailier and Pellet, *op. cit.*, pp. 373–374.

⁴³⁴ See paragraphs 228–231 above.

⁴³⁵ Bowett (*loc. cit.*, p. 77) makes a distinction between a reservation that is “fundamentally inconsistent with the object and purpose of the treaty” and a reservation that is simply “impermissible” and draws

it alters the latter's nature, emptying it of its substance, so that it is difficult to consider that the reserving State was really a party to the treaty.⁴³⁶ Consequently, the Special Rapporteur cannot regard as too absolute the nullity which would result from incompatibility of the reservation with the object and purpose of the treaty; the finding of impermissibility of the reservation may be made a long time after expression by the State of its consent to be bound⁴³⁷ and may, in the meantime, have produced effects in law which it may be difficult or impossible to alter.

246. Certainly, the decision of the reserving State to end its relationships under the treaty following a finding that its reservation is impermissible presents real drawbacks. In particular, as was noted by Macdonald: "To exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation."⁴³⁸ This statement calls for two comments, however:

(a) The author assumes here the case of "separability";⁴³⁹ but what is envisaged here is different: in this case the State renounces the benefits of the treaty as a whole (or withdraws the challenged reservation);

(b) Consequently, a decision of the reserving State to terminate its relationships under the treaty simply has the effect of restoring the *status quo ante*.

247. Yet if this "all or nothing" situation is related to the functions of the reservations regime,⁴⁴⁰ it is unsatisfactory and is liable to compromise the objective of universality by encouraging the reserving State to leave the treaty circle. The question therefore is whether this State cannot move towards an intermediate solution that will preserve the integrity of the treaty and yet allow the State to continue its participation without this causing it insuperable difficulties. In other words, is it conceivable, from a legal standpoint, for the State concerned to modify its reservation in order to make it compatible with the object and purpose of the treaty?⁴⁴¹

248. Prima facie, such an intermediate solution seems scarcely compatible with the Vienna regime since, under the provisions of article 19 of the 1969 and 1986 Vienna Conventions, the formulation of a reservation can take place only "when signing, ratifying, accepting, approving or acceding to a treaty". Furthermore, the possibility of raising an objection to a reservation is restricted by the time limit set in article 20, paragraph 5.

249. However, the objection does not appear to be diriment. In the first place, if it is considered that the State has never in fact expressed a valid consent to be bound by the treaty,⁴⁴² the "regularization" of its reservation would

seem, in fact, to be concomitant with the expression of its consent to be bound. Secondly, and above all, if, as seems inevitable without serious prejudice to the fundamental principle of consent which underlies every treaty commitment,⁴⁴³ the reserving State can give up its participation in the treaty, it is difficult to see why it could not equally well modify the sense of its reservation, so as to make it compatible with the object and purpose of the treaty, and thus permissible. This solution, which is not incompatible with the Vienna rules, has the advantage of reconciling the requirements of integrity and universality that are inherent in any reservations regime.

250. As Mr. Valticos wrote in the partly dissenting opinion which he appended to the *Chorherr v. Austria* judgement of the European Court of Human Rights, rejection of this possibility

would ... be unreasonable, because the government concerned have been informed of the non-validity of their reservation only several years after the ratification. The government in question should therefore have the opportunity to rectify the situation and to submit a valid reservation within a reasonable time and on the basis of their former reservation.⁴⁴⁴

251. There is, moreover, at least one precedent for such action. Although, by the *Belilos* judgement, the European Court of Human Rights considered that Switzerland was bound "irrespective of the validity of the declaration", which it had found not in conformity with article 64 of the European Convention on Human Rights,⁴⁴⁵ that country, in accordance, moreover, with a suggestion it had made to the Court and which the latter had not adopted,⁴⁴⁶ formulated a new declaration,⁴⁴⁷ without, seemingly, giving rise to any objection or protest. More generally, moreover, it probably must be recognized that States, which can at any time withdraw their reservations, may also "tone them down"; here again, the recent practice of the Secretary-General as depositary reflects the same approach.⁴⁴⁸

⁴⁴³ See paragraph 228 above.

⁴⁴⁴ *Judgment of 25 August 1993* (footnote 333 above), p. 42. Mr. Valticos further suggested that any new declaration or reservation should be submitted to the European Court of Human Rights for the latter to determine its validity. There is nothing to prevent this *de lege ferenda*, but a text should expressly provide for this or, alternatively, it would simply be possible to follow the advisory opinion procedure of Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, conferring upon the European Court of Human Rights competence to give advisory opinions.

⁴⁴⁵ See paragraph 219 above.

⁴⁴⁶ See Schabas, "Reservations to human rights treaties ...", pp. 76–77.

⁴⁴⁷ Council of Europe, *Yearbook of the European Convention on Human Rights*, 1988, vol. 31 (Dordrecht, Martinus Nijhoff, 1993), p. 5. Switzerland even modified its declaration again the following year and Liechtenstein—whose own, identical declaration had nevertheless not been declared invalid by the Court—did likewise in 1992 (see Schabas, "Reservations to human rights treaties ...", p. 77).

⁴⁴⁸ Following several objections, the Government of the Libyan Arab Jamahiriya informed the Secretary-General on 5 July 1995 of its intention to "modify by making more specific" the general reservation it had formulated on its accession to the Convention on the Elimination of All Forms of Discrimination against Women. The Secretary-General communicated this modification (see *Multilateral Treaties Deposited with the Secretary-General* (footnote 282 above), chap. IV.8, pp. 172, 177–180 and 182, footnote 21), without this giving rise to any objection or criticism. (See also the Government of Finland's notification to the Secretary-General dated 10 February 1994 to amend, by reducing its scope, a reservation to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961, *ibid.*, chap. XIV.3, pp. 666 and 670, footnote 5.)

the conclusion that only the former "is a nullity and if severable can be struck out (*ibid.*, p. 84). Versus: Redgwell, *loc. cit.*, pp. 267–268.

⁴³⁶ Notwithstanding the point made in footnote 435 above, the situation may be different if a reservation is prohibited by the treaty—because of a reservations clause—but yet cannot be regarded as contrary to the object and purpose of the treaty.

⁴³⁷ See paragraph 213 above.

⁴³⁸ Macdonald, *loc. cit.*, p. 449.

⁴³⁹ See paragraph 222 above.

⁴⁴⁰ See paragraphs 90–98 above.

⁴⁴¹ Or could it rectify whatever was the cause of the impermissibility of its reservation?

⁴⁴² See paragraph 245 above.

Conclusion: coexistence of monitoring mechanisms

252. In conclusion, it would seem that:

(a) While, as far as their content is concerned, the human rights treaties are not of such a special nature as to justify applying to them a different reservations regime, the establishment, by most of these treaties, of monitoring bodies influences the modalities of determination of the permissibility of reservations;

(b) Although no provision is made for this in their statutes, these bodies have undertaken to determine the permissibility of reservations to their constituent instruments. Their competence to do so must be recognized: it is a prerequisite for the exercise of the general monitoring functions with which they are invested;

(c) Like the contracting parties themselves in their relations inter se or any other bodies which may have competence to settle disputes, the monitoring bodies determine the permissibility of reservations to human rights treaties on the basis of the criterion of the treaty's object and purpose, thus confirming the adaptation to these instruments of the flexible reservations regime provided for in the 1969 and 1986 Vienna Conventions;

(d) The legal force of the findings made by these bodies in the exercise of this determination power cannot exceed that resulting from the powers given them for the performance of their general monitoring role; in all cases, however, the States must examine these findings in good faith and, where necessary, rectify the factors found to exist which render the reservation impermissible;

(e) No organ for determining the permissibility of reservations can take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it is prepared to assume. The State alone, therefore, is responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation;

(f) This "action to ensure conformity" may consist simply in withdrawal of the inadmissible reservation or in its modification.

CONCLUSIONS

253. In view of the importance of the problems raised by the recent practice of the human rights treaty monitoring bodies with regard to reservations and the extent of the controversy this practice has generated, the Special Rapporteur has thought it necessary to depart somewhat from his intentions announced at the time of submission of his first report, regarding the order of dealing with the various issues raised by the question of "reservations to treaties". He believes it necessary for the Commission to present in this debate the viewpoint of general international law, of which it is one of the organs, a debate that is sometimes obscured, and in any event distorted, by certain approaches that are sometimes adopted with the best of intentions, but which, being too sectorial, tend to exaggerate the special aspects of particular areas, particular branches of law and particular treaties, to the detriment of the unity of the rules of international law.

254. Unity is not, of course, an end in itself and it is quite conceivable to envisage applying diverse rules to different situations when the situations so justify. Reservations to treaties do not, however, seem to require such a normative diversification: the existing regime is characterized by its flexibility and its adaptability and it achieves satisfactorily the necessary balance between the conflicting requirement of the integrity and the universality of the treaty.

255. Whatever may have been said or written on the subject, this objective of equilibrium is universal. Whatever its object, a treaty remains a treaty and expresses the will of the States (or international organizations) that are parties to it. The purpose of the reservations regime is to enable these wishes of States to be expressed in a balanced fashion and it succeeds in doing so in a generally satisfactory manner. It would be unfortunate to bring the regime into question by attaching undue importance to sectorial considerations that can perfectly well be accommodated within the existing regime.

256. This general conclusion must nevertheless be tempered by two considerations:

(a) First, it is undeniable that the law was not frozen in 1951 nor in 1969;⁴⁴⁹ issues which did not arise (or scarcely arose) at that time have since emerged and call for answers. The Special Rapporteur believes that the answers must be found in the spirit of the "Vienna rules", although these will have to be adapted and extended, as appropriate, whenever this is found to be necessary;

(b) Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances is to adopt appropriate rules by the conclusion of treaties. In the area of reservations, this can easily be done through the adoption of derogating reservations clauses, if the parties see a need for this.

257. More specifically, no determining factor seems to require the adoption of a special reservations regime for normative treaties, nor even for human rights treaties. The special nature of the latter was fully taken into account by the judges in 1951 and the "codifiers" of later years and it did not seem to them to justify an overall derogating regime. This view is shared by the Special Rapporteur.

258. There is reason to believe, however, that the drafters of the 1969 and 1986 Vienna Conventions never envisaged the role which the bodies for monitoring the implementation of certain treaties would later have to play, especially in the area of protection of human rights, in applying the reservations regime which they established. This role can in fact be quite easily circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities vested in those bodies.

259. There are, however, two circumstances—the second one in particular—that may justify the adoption of special reservation clauses, a measure that will in any case help to avoid sterile controversy.

⁴⁴⁹ See the first report of the Special Rapporteur (footnote 2 above), p. 152, paras. 161–162.

260. In the light of the foregoing, it seems to the Special Rapporteur that the Commission would be fully performing its role of promoting the progressive development of international law and its codification,⁴⁵⁰ by adopting a resolution addressed to the General Assembly, which the latter might wish to bring to the attention of States and the various parties concerned, in the hope of clarifying the legal aspects of the matter. It is in this spirit that the Special Rapporteur has prepared the draft resolution reproduced below.

DRAFT RESOLUTION OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES, INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission,

Having considered, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations,

Aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights,

Desiring that the voice of international law be heard in this discussion,

1. *Reaffirms* its attachment to the effective application of the reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the fundamental criterion of the object and purpose of the treaty as the fundamental criterion for determining the permissibility of reservations;

2. *Considers* that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. *Also considers* that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunci-

ated in the above-mentioned Vienna Conventions are fully applicable to reservations to such instruments;

4. *Nevertheless considers* that the establishment of monitoring machinery by many human rights treaties creates special problems that were not envisaged at the time of the drafting of those conventions, connected with determination of the permissibility of reservations formulated by States;

5. *Further considers* that, although these treaties are silent on the subject, the bodies which they establish necessarily have competence to carry out this determination function, which is essential for the performance of the functions vested in them, but that the control they can exercise over the permissibility of reservations does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the 1969 and 1986 Vienna Conventions and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaty;

6. *Is firmly of the view* that it is only the reserving State that has the responsibility of taking appropriate action in the event of incompatibility of the reservation which it formulated with the object and purpose of the treaty. This action may consist in the State either forgoing becoming a party or withdrawing its reservation, or modifying the latter so as to rectify the impermissibility that has been observed;

7. *Calls* on States to cooperate fully and in good faith with the bodies responsible for determining the permissibility of reservations, where such bodies exist;

8. *Suggests* that it would be desirable if, in future, specific clauses were inserted in multilateral normative treaties, including human rights treaties, in order to eliminate any uncertainty regarding the applicable reservations regime, the power to determine the permissibility of reservations enjoyed by the monitoring bodies established by the treaties and the legal effects of such determination;

9. *Expresses the hope* that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights; and

10. *Suggests* to the General Assembly that it bring the present resolution to the attention of States and bodies which might have to determine the permissibility of such reservations.

⁴⁵⁰ See article 1 of the statute of the Commission.