

RESERVATIONS TO TREATIES

[Agenda item 6]

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

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Multilateral instruments cited in the present report

	Source
Covenant of the League of Nations (Versailles, 28 June 1919)	League of Nations, <i>Official Journal</i> , No. 1 (February 1920), p. 3.
General Act (Pacific Settlement of International Disputes) (Geneva, 26 September 1928)	<i>Ibid.</i> , <i>Treaty Series</i> , vol. XCIII, No. 2123, p. 343.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 6 to the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty (Strasbourg, 28 April 1983)	<i>Ibid.</i> , vol. 1496, No. 2889, p. 281.
Protocol No. 7 to the above-mentioned Convention (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, No. 2889, p. 7.
Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (Vilnius, 3 May 2002)	<i>Ibid.</i> , vol. 2246, No. 2889, p. 110.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Political Rights of Women (New York, 31 March 1953)	<i>Ibid.</i> , vol. 193, No. 2613, p. 135.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, No. 3992, p. 230.
Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and materials (New York, 4 June 1954)	<i>Ibid.</i> , and vol. 596, p. 266.
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	<i>Ibid.</i> , vol. 282, No. 4101, p. 249.
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956)	<i>Ibid.</i> , vol. 266, No. 3822, p. 3.
European Convention on Extradition (Paris, 13 December 1957)	<i>Ibid.</i> , vol. 359, No. 5146, p. 273.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Convention on the High Seas (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 450, No. 6465, p. 11.
Convention against discrimination in education (Paris, 14 December 1960)	<i>Ibid.</i> , vol. 429, No. 6193, p. 93.
Single Convention on Narcotic Drugs, 1961 (New York, 30 March 1961)	<i>Ibid.</i> , vol. 520, No. 7515, p. 151.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
Final Act of the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration (Geneva, 21 April 1961)	<i>Ibid.</i> , vol. 484, No. 7041, p. 349.
Convention on the reduction of statelessness (New York, 30 August 1961)	<i>Ibid.</i> , vol. 989, No. 14458, p. 175.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (New York, 10 December 1962)	<i>Ibid.</i> , vol. 521, No. 7525, p. 231.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the above-mentioned Covenant (New York, 16 December 1966)	<i>Ibid.</i>
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
European Convention on the adoption of children (Strasbourg, 24 April 1967)	<i>Ibid.</i> , vol. 634, No. 9067, p. 255.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, No. 18232, p. 331.

American Convention on Human Rights: "Pact of San José, Costa Rica" (San José, 22 November 1969)	<i>Ibid.</i> , vol. 1144, No. 17955, pp. 123.
European Agreement concerning the work of crews of vehicles engaged in international road transport (Geneva, 1 July 1970)	<i>Ibid.</i> , vol. 993, No. 14533, p. 143.
Convention on psychotropic substances (Vienna, 21 February 1971)	<i>Ibid.</i> , vol. 1019, No. 14956, p. 175.
International Convention for Safe Containers (CSC) (Geneva, 2 December 1972)	<i>Ibid.</i> , vol. 1064, No. 16198, p. 3.
International Sugar Agreement, 1977 (Geneva, 7 October 1977)	<i>Ibid.</i> , vol. 1064, No. 16200, p. 219.
European Convention on the service abroad of documents relating to administrative matters (Strasbourg, 24 November 1977)	<i>Ibid.</i> , vol. 1299, No. 21537, p. 3.
International Convention against the Taking of Hostages (New York, 17 December 1979)	<i>Ibid.</i> , vol. 1316, No. 21931, p. 205.
Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979)	<i>Ibid.</i> , vol. 1249, No. 20378, p. 13.
African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981)	<i>Ibid.</i> , vol. 1520, No. 26363, p. 217.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
European Convention on the compensation of victims of violent crimes (Strasbourg, 24 November 1983)	<i>Ibid.</i> , vol. 1525, No. 26456, p. 37.
Convention against torture and other cruel, inhuman or degrading treatment or punishment (New York, 10 December 1984)	<i>Ibid.</i> , vol. 1465, No. 24841, p. 113.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
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, No. 27161, p. 363.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	<i>Ibid.</i> , vol. 1582, No. 27627, p. 165.
Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel, 22 March 1989)	<i>Ibid.</i> , vol. 1673, No. 28911, p. 57.
Convention on the rights of the child (New York, 20 November 1989)	<i>Ibid.</i> , vol. 1577, No. 27531, p. 3.
Convention on environmental impact assessment in a transboundary context (Espoo, 25 February 1991)	<i>Ibid.</i> , vol. 1989, No. 34028, p. 309.
International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997)	<i>Ibid.</i> , vol. 2149, No. 37517, p. 256.
Rome Statute of the International Criminal Court (Rome, 17 July 1998)	<i>Ibid.</i> , vol. 2187, No. 38544, p. 3.
International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999)	<i>Ibid.</i> , vol. 2178, No. 38349, p. 197.

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VALIDITY OF RESERVATIONS

Introduction

1. The purpose of this report is to examine the conditions for validity of reservations to treaties and to propose a series of guidelines which will form the third part of the Guide to Practice, following the first part, devoted to definitions, and the second, which is concerned with the

procedure for formulation of reservations and interpretative declarations. In 2006 this part will be supplemented by several draft guidelines regarding the validity of interpretative declarations—which actually pose few problems in this regard.

2. A first problem arises with the very title of this part of the report: after much hesitation, the Special Rapporteur has decided to revert to the phrase “validity of reservations” to describe the intellectual operation consisting in determining whether a unilateral statement made¹ by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty² in their application to that State or organization is capable of producing the effects attached in principle to the formulation of a reservation.

3. Faithful to the definition found in article 2, paragraph 1 (*d*), of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention), reproduced in draft guideline 1.1 of the Guide to Practice, the Commission has accepted that all unilateral statements meeting this definition constitute reservations. But, as the Commission stated very clearly in its commentary on draft guideline 1.6, “[d]efining is not the same as regulating ... a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established”.³

Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime, in the first place, for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation ... that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined.⁴

4. This language poses a problem. At the outset, the Special Rapporteur had indeed preferred the words “validity” and “invalidity” or “non-validity” to “permissibility” and “impermissibility”.⁵ This terminology was disputed by Mr. Bowett, who believed that this concept gave rise to confusion between two different questions, the *permissibility* of a reservation and the *opposability* of a reservation (meaning whether it may be invoked against another party).⁶ The Commission having used this expression in its report on the work of its forty-fifth session,⁷ the representative of the United Kingdom of Great Britain and Northern Ireland to the Sixth Committee stated, in 1993:

¹ Given that the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word “formulated” would have been more appropriate (see paragraphs 13–14 below); but the 1969 and 1986 Vienna Conventions use the word “made” and as a matter of principle the Commission does not wish to revisit the Vienna text.

² Or of the treaty as a whole with respect to certain specific aspects (see *Yearbook ... 1999*, vol. II (Part Two), p. 91, draft guideline 1.1.1 [1.1.4]).

³ *Ibid.*, para. (2) of the commentary.

⁴ *Ibid.*, p. 126, para. (3). See also the commentary on draft guideline 1.1.1 in *Yearbook ... 1998*, vol. II (Part Two), p. 101, para. (3), and *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 250, paras. 154 and 175.

⁵ In the preliminary outline he prepared on the subject in 1993, the future Special Rapporteur on the topic had used the expression “validity of reservations” (see *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/454, p. 231, paras. 21 *et seq.*).

⁶ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 142, para. 97.

⁷ *Yearbook ... 1993*, vol. II (Part Two), p. 96, para. 428: the Commission specified that the question of “the validity of reservations” “encompasses that of the conditions for the lawfulness of reservations and that of their applicability to another State”.

His delegation experienced some unease over the Commission’s use of the term “validity of reservations” in paragraph 428 of its report. While the context indicated what the Commission had in mind, the wording used could be interpreted as presupposing the possibility that a statement conditioning the consent of an adhering State to be bound by a treaty might by some means be held to be a nullity. In fact, article 2 (*d*) of the Vienna Convention, by referring to a reservation not only as a “unilateral” statement which “purported” to achieve an exclusion or modification of treaty terms, but even more so articles 19 *et seq.*, in their careful references to “formulation” of reservations, made it plain that any such statement was *ipso facto* a “reservation”, but that its legal effect remained to be determined by the rules which followed. That emerged with great clarity from the Commission’s commentary on articles 17 to 19 of the 1962 draft and explained why, in the usage of the Vienna Convention, even the cases expressly prohibited, or those incompatible with the object and purpose of a treaty, were referred to in article 19 as “reservations”, and why article 21 referred to a reservation “established” with regard to another party.⁸

5. As the Special Rapporteur indicated in his first report on the law and practice relating to reservations to treaties, in his mind,

the word “validity” was fairly neutral and did indeed encompass the question of the opposability of the reservation which, in his view, was closely linked to the question of the legal regime of objections, even though it did not necessarily depend exclusively on that regime. Moreover, if the word “permissibility” seemed more appropriate, there was no problem in using it. It is in fact more accurate.⁹

However, he noted¹⁰ that the objections of both Mr. Bowett and the British Government assumed the solution of the doctrinal controversy, central to the question of reservations, between the proponents of “opposability” and those of “permissibility”¹¹ in favour of this second thesis, of which Bowett is one of the most eminent representatives.¹² Subsequent to these observations, the Commission (and its Special Rapporteur) used the words “permissible” (*licite*) to describe a reservation likely to produce the effects envisaged by the 1969 and 1986 Vienna Conventions, and “impermissible” (*illicite*) to designate a reservation that could not produce them.

6. However, a new problem arose when:

some members pointed out that this word [impermissible] was not appropriate in that case: in international law, an internationally wrongful act entails its author’s responsibility, and this is plainly not the case of the formulation of reservations which are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose.¹³

Consequently, in 2002, the Commission decided to leave the matter open pending the examination of the effect of such reservations.¹⁴

7. On reflection, however, it is not appropriate for the Commission to wait until it has studied the effects of reservations before deciding on this question of terminology:

⁸ *Official Records of the General Assembly, Forty-eighth Session, Sixth Committee*, 24th meeting, para. 42.

⁹ *Yearbook ... 1995* (see footnote 6 above), p. 142, para. 99.

¹⁰ *Ibid.*, para. 100.

¹¹ *Ibid.*, paras. 101–104.

¹² See Bowett, “Reservations to non-restricted multilateral treaties”.

¹³ Commentary on draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), *Yearbook ... 2002*, vol. II (Part Two), p. 46, para. (7).

¹⁴ *Ibid.*

(a) In the first place, the term “permissible” used in the text of the draft guidelines adopted to date and their commentaries implies that it is exclusively a question of permissibility and not of opposability;

(b) In the second place, the word “admissible”, for its part, implies that the formulation of reservations while ignoring the provisions of article 19 of the 1969 and 1986 Vienna Conventions engages the responsibility of the reserving State or international organization, which is certainly not the case.¹⁵

8. In any event, and this is the only point that matters at this stage, the word “validity” has the advantage of being neutral and of not prejudging either the response the Commission will make to the dispute between opposability and permissibility, or the question of the effects of formulating a reservation contrary to the provisions of article 19. Hence, on the one hand, there is no reason not to consider the question of the validity of reservations and, on the other, the Commission should, as a result, replace the words “permissible” (*licite*) and “impermissible” (*illicite*) by the words “valid” and “invalid” in draft guidelines 1.6 (Scope of definitions) and 2.1.8 (Procedure in case of manifestly [impermissible] reservations).¹⁶

9. With the benefit of this preliminary remark, this report will proceed to study in as much depth as possible the validity of reservations in the light of article 19 of the 1969 and 1986 Conventions, which undoubtedly constitutes the cornerstone of the Vienna regime,¹⁷ following the general outline:

(a) Starting from the principle that there exists a presumption of validity of reservations (sect. A);

(b) This provision spells out the cases in which a reservation is prohibited either expressly or implicitly (sect. B), before stating

(c) The general requirement of the compatibility of reservations with the object and purpose of the treaty (sect. C);

(d) Lastly, a general study will need to be made of the modalities for the application of these principles (sect. D).

A. Presumption of validity of reservations

10. By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, “[a] State or an international organization may* ... formulate a reservation”, albeit under certain conditions, article 19 of the 1986 Vienna Convention sets out, as did the same provision of the 1969 Vienna Convention before

it, “the general principle that the formulation of reservations is permitted”.¹⁸ This is an essential element of the “flexible system” stemming from the 1951 ICJ advisory opinion,¹⁹ and it is no exaggeration to say that, in this respect, it reverses the traditional presumption resulting from the system of unanimity,²⁰ the stated aim being to facilitate the widest possible participation and, ultimately, the universality of treaties.

11. In this regard, the text of article 19, which resulted directly from Sir Humphrey Waldock’s proposals, takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of which started from the opposite assumption, expressing in negative or restrictive terms the principle that a reservation may *only* be formulated (or “made”²¹) *if* certain conditions are met.²²

Sir Humphrey, for his part,²³ presents the principle as the “power to formulate, that is, to *propose*, a reservation”, which a State has “in virtue of its sovereignty”.²⁴

12. However, this power is not unlimited:

(a) In the first place, it is limited in time, since a reservation may only be formulated “when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty”;²⁵

¹⁸ Commentary to draft article 18 adopted on first reading in 1962, *Yearbook ... 1962*, vol. II, document A/5209, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 207, para. (17). For the 1986 Convention, see the commentaries to draft articles 19 (case of treaties between international organizations) adopted in 1977, *Yearbook ... 1977*, vol. II (Part Two), p. 106, para. (1), and 19 *bis* (case of treaties between States and one or more international organizations or between international organizations and one or more States), *ibid.*, p. 108, para. (3).

¹⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15. See also the first report on the law and practice relating to reservations to treaties (*Yearbook ... 1995* (footnote 6 above)), pp. 130–132, paras. 36–46.

²⁰ This concept, which had undoubtedly become the customary norm in the period between the wars (see the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo appended to the aforementioned advisory opinion (footnote 19 above), *I.C.J. Reports 1951*, pp. 34–35), significantly restricted the freedom to make reservations: this was possible only if all the other parties to the treaty accepted the reservation, otherwise the author remained outside the treaty. In its comments on draft article 18, adopted by the Commission in 1962, Japan proposed reverting to the opposite presumption (see the fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 46).

²¹ On this issue, see paragraphs 13–14 below.

²² See, for example, article 10, paragraph (1), of the 1950 draft by Mr. J. L. Brierly (*Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 238), article 9 of the drafts by Mr. H. Lauterpacht (first report, *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 91; second report, *Yearbook ... 1954*, vol. II, document A/CN.4/87, p. 131) and article 39, paragraph 1, of the draft by Mr. G. G. Fitzmaurice (*Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 118). See also the comments by Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, p. 88–89.

²³ “A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation ... unless: ...” (*Yearbook ... 1962*, vol. II, document A/CN.4/144 and Add.1, p. 60, art. 17, para. 1 (a)).

²⁴ *Ibid.*, commentary on article 17, p. 65, para. (9).

²⁵ 1986 Vienna Convention, art. 19. See also paragraph 19 below.

¹⁵ On this point, see paragraphs 190–191 below.

¹⁶ Guideline 1.6 should read as follows: “The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the *validity* [not: ‘the permissibility’] and effects of such statements under the rules applicable to them”; and guideline 2.1.8 should be entitled “Procedure in case of manifestly *invalid* reservations” [not “*impermissible*”]. During the final “clean-up” of the Guide to Practice, the commentaries should also be modified in the same way.

¹⁷ See Ruda, “Reservations to treaties”, p. 180.

(b) In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States—a situation that is taken into account in article 20, paragraph 2, of the 1969 Vienna Convention, which reverts to the system of unanimity where such instruments are concerned²⁶—or, in the case of global instruments, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the Vienna Convention is only intended to be residuary in nature and there is nothing to prevent the negotiators from inserting in the treaty “reservations clauses” that limit or modify the freedom set out as a principle in article 19.²⁷

Thus, it is probably excessive to speak of a “right to reservations”, even though the Convention undoubtedly proceeds from the principle that there is a presumption to that effect.

13. This is the meaning of the very title of article 19 (*Formulation of reservations*), which is confirmed by the *chapeau* of this provision: “A State may ... *formulate** a reservation *unless** ...”. Certainly, by using the verb “may”, the introductory clause of article 19 recognizes that States have a right; but it is only the right to “formulate” reservations.²⁸

14. The words “formulate” and “formulation” were carefully chosen. They signify that, while it is up to the State

intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,²⁹ this formulation is not sufficient of itself: the reservation is not “made”, it does not take effect, merely by virtue of such a statement. For this reason, an amendment by China seeking to replace the words “formulate a reservation” with the words “make reservations”³⁰ was rejected by the Drafting Committee of the United Nations Conference on the Law of Treaties.³¹ As Sir Humphrey Waldock noted, “there is an inherent ambiguity in saying ... that a State may ‘make’ a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively ‘made’ unless and until it has been assented to by the other interested States”.³² Now, not only is a reservation only “established”³³ if certain procedural conditions—admittedly, not very restrictive ones³⁴—are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word “unless” clearly demonstrates.³⁵

15. According to some authors, the terminology used in this provision is not consistent in this regard since if the treaty permits certain reservations (art. 19 (b)), they do not need to be accepted by the other States ... they are thus “made” from the moment of their formulation by the reserving State.³⁶ That being the case, while subparagraph (b) correctly states that such reservations “may be *made**”, the *chapeau* of article 19 is misleading, for it implies that they, too, are merely “formulated” by their author.³⁷ Yet this is a quarrel over nothing:³⁸ subparagraph (b) does not refer to those reservations that are established (or made)

²⁶ “When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.”

²⁷ With regard to the residuary, voluntary nature of the Vienna regime, see the first report on the law and practice relating to reservations to treaties (*Yearbook ... 1995* (footnote 6 above, p. 146, para. 123); the second report on reservations to treaties (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, pp. 46, 61, 63 and 67, paras. 26, 123, 133 and 163 respectively); the third report (*Yearbook ... 1998* (footnote 4 above), p. 247, para. 136); and the fifth report (*Yearbook ... 2000*, vol. II (Part One), document A/CN.4/508 and Add.1–4), p. 194, para. 290); see also Aust, *Modern Treaty Law and Practice*, pp. 124–126; Gamble Jr., “Reservations to multilateral treaties: a macroscopic view of State practice”, pp. 383–391; Imbert, *op. cit.*, pp. 162–230; McNair, *The Law of Treaties*, pp. 169–173; Polakiewicz, *Treaty-making in the Council of Europe*, pp. 85–90 and 101–104; and Riquelme Cortado, *Las reservas a los tratados: lagunas y ambigüedades del Régimen de Viena*, pp. 89–136.

²⁸ Imbert, *op. cit.*, p. 83; see also Reuter, *Introduction to the Law of Treaties*, p. 82; and Riquelme Cortado, *op. cit.*, p. 84. It may also be noted that a proposal by Mr. Briggs to replace the word “free” in Sir Humphrey Waldock’s draft (see footnote 23 above) with the words “legally entitled” (*Yearbook ... 1962*, vol. I, 651st meeting, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, p. 133, para. 175 (a)). The current wording (“A State ... may formulate a reservation unless ...”) was adopted by the Commission’s Drafting Committee (*Yearbook ... 1962*, vol. I, 663rd meeting, p. 221, para. 3), then by the Commission in plenary (*ibid.*, vol. II (see footnote 18 above), pp. 175–176, art. 18, para. 1) in 1962. No amendments were made in 1966, other than the replacement of the words “*Tout État*” [in the French text] with the words “*Un État*” (see *Yearbook ... 1965*, vol. I, 813th meeting, pp. 263–264, para. 1 (text adopted by the Drafting Committee), and *Yearbook ... 1966* (see footnote 18 above), p. 202 (art. 16 adopted on second reading)).

²⁹ See Greig, “Reservations: equity as a balancing factor?”, p. 22.

³⁰ A/CONF.39/C.1/L.161 (see A/CONF.39/14 (footnote 28 above), p. 134, para. 177 (ii)).

³¹ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 23rd meeting, p. 121, para. 2 (explanations by China), and 24th meeting, p. 126, para. 13 (statement by the Expert Consultant Sir Humphrey Waldock).

³² *Yearbook ... 1962* (see footnote 23 above), p. 62, para. (1) of the commentary on draft articles 17–19.

³³ *Chapeau* of article 21 of the 1969 Vienna Convention: “A reservation established with regard to another party in accordance with articles 19, 20 and 23”.

³⁴ See articles 20, paragraphs 3–5, 21, para. 1, and 23 of the 1969 Vienna Convention, and draft guidelines 2.1 to 2.2.3 (*Yearbook ... 2004*, vol. II (Part Two)). See also Coccia, “Reservations to multilateral treaties on human rights”, p. 28.

³⁵ “This article states the general principle that the formulation of reservations is permitted except in three cases” (*Yearbook ... 1966* (see footnote 18 above); the use of the word “*faire*” in the French text of the commentary is open to criticism, but it is probably a translation error, rather than a deliberate choice—*contra*: Imbert, *op. cit.*, p. 90. Moreover, the English text of the commentary is correct.

³⁶ Imbert, *op. cit.*, pp. 83–84.

³⁷ See Ruda, *loc. cit.*, pp. 179–180, and the far more restrained criticism by Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 111–112.

³⁸ One may, however, question the use of the verbs “formulate” and “make” in article 23, paragraph 2; it is not consistent to state, at the end of this provision, that, if a reservation formulated when signing [a treaty] is confirmed at the time of the expression of consent to be bound, “the reservation shall be considered as having been *made** on the date of its confirmation”. In elaborating the Guide to Practice on reservations, the Commission has endeavoured to adopt consistent vocabulary in this regard (the criticisms directed at it by Riquelme Cortado—*op. cit.*, p. 85—appear to be based on a translation error in the Spanish text).

simply by virtue of being formulated, but rather to those that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations cannot be formulated: in one case (subpara. (a)), the prohibition is explicit; in the other (subpara. (b)), it is implied.

16. The principle of freedom to formulate reservations undoubtedly constitutes a key element of the Vienna regime and the question arises as to whether it should be the subject of a separate draft guideline, which could read as follows:

“3.1 [Freedom to formulate a reservation] [Presumption of validity of reservations]

“A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation.”

17. However, not without some hesitation, the Special Rapporteur does not propose that the Commission should proceed in this manner. Such a guideline would no doubt have the merit of highlighting this key principle of the Vienna regime while not departing from the language of the 1969 and 1986 Vienna Conventions, since the wording used above is precisely that of the *chapeau* of article 19. Nevertheless, as a general rule, the Commission has avoided splitting up provisions from individual articles of the Conventions and reproducing them in separate draft guidelines.³⁹ More fundamentally, the principle of freedom to formulate reservations (and, by extension, the presumption of their validity) cannot be separated from the exceptions to this principle.

18. In conformity with the Commission's practice to date, and in the absence of any strong reason for doing otherwise, it seems preferable to include the entire text of article 19 at the beginning of the third part of the Guide to Practice, devoted to validity of reservations, and to give further information and clarifications, such as to provide useful guidance for the practice of States, in the commentary and in additional draft guidelines.

19. The only question that arises in this regard concerns the repetition in the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions of the different moments (or “instances” to reproduce the terminology used in draft guideline 1.1.2⁴⁰) “in which a reservation may be formulated”. Indeed, as is emphasized above,⁴¹ article 19 reproduces the temporal limitations included in the very definition of reservations given in article 2, paragraph 1 (d),

³⁹ See draft guidelines 1.1 (Definition of reservations), 2.2.1 (Formal confirmation of reservations formulated when signing a treaty) or 2.5.1 (Withdrawal of reservations), which reproduce the text of articles 2, paragraph 1 (d), 23, paragraph 2, and 22, paragraph 1, respectively, of the 1986 Vienna Convention. Nevertheless, the Commission has not followed this general rule when the structure of the Guide to Practice has necessitated the division of the various elements of individual provisions of the Convention among several guidelines (for example, the rules set forth in article 23 concerning the procedure regarding reservations, acceptance of and objection to a reservation are divided among several draft guidelines), but there is no reason for doing so in this instance. Note: the Commission prefers to base itself on the 1986 text, which is more complete than the 1969 one.

⁴⁰ *Yearbook ... 1998*, vol. II (Part Two), p. 99.

⁴¹ Para. 12.

of the Conventions.⁴² There is no doubt that this repetition is superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.⁴³ However, the Commission did not think it necessary to correct this anomaly when the final draft was adopted in 1966, and this repetition is not a sufficiently serious drawback to merit rewriting the 1969 Vienna Convention, which, moreover, has managed this drawback very well notwithstanding.

20. This being the case, it seems reasonable to reproduce in a draft guideline 3.1, which could be entitled “Freedom to formulate reservations”, the text of article 19 of the 1986 Vienna Convention.

“3.1 *Freedom to formulate reservations*

“A State or an international organization may, at the time of signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, formulate a reservation unless:

“(a) The reservation is prohibited by the treaty;

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

“(c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

21. As the wording of subparagraph (c) of this provision implies, the three conditions for the validity of reservations stipulated in article 19 are not all of the same order. Subparagraphs (a)–(b) envisage the⁴⁴ situations in which a reservation is prohibited by the treaty, either expressly or impliedly, whereas subparagraph (c) concerns the cases in which a reservation is precluded despite the silence of the treaty. It will be helpful to consider the two situations separately.

B. Reservations prohibited by the treaty

22. According to Reuter, the situations envisaged in article 19 (a)–(b) constitute very simple cases.⁴⁵ Nothing could be less certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered, delicate problems can arise regarding the exact scope of a clause prohibiting reservations (sect. 1) and the effects of a reservation formulated despite that prohibition (sect. 2).

⁴² See draft guidelines 1.1 (Definition of reservations) and 1.1.2 (Instances in which reservations may be formulated) and the commentaries thereto, *Yearbook ... 1998* (footnote 40 above), pp. 99–100 and 103–104.

⁴³ See the fourth report of Sir Humphrey Waldock, *Yearbook ... 1965* (footnote 20 above).

⁴⁴ Or, more precisely, “some situations” because they are not all covered (see paragraphs 31–32 below).

⁴⁵ Reuter, “Solidarité et divisibilité des engagements conventionnels”, p. 625 (also reproduced in Reuter, *Le développement de l'ordre juridique international: écrits de droit international*, p. 363).

1. THE SCOPE OF CLAUSES PROHIBITING RESERVATIONS

23. In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Sir Humphrey Waldock distinguished three possibilities:

(a) Reservations expressly “prohibited by the terms of the treaty or excluded by the nature of the treaty or by the established usage of an international organization”;

(b) Those not falling under a clause restricting the making of reservations or

(c) [A clause] authorizing certain reservations.⁴⁶

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,⁴⁷ “when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself”.⁴⁸

24. Even though it was taken up again, in a slightly different form, by the Commission,⁴⁹ this wording was unnecessarily complicated and, at the rather general level at which the authors of the 1969 Vienna Convention intended to operate, there was no point in drawing a distinction between the first two possibilities identified by the Special Rapporteur.⁵⁰ In draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he restricted himself to distinguishing reservations expressly prohibited by the treaty (or “by the established rules of an international organization”)⁵¹ from

⁴⁶ First report, *Yearbook ... 1962* (see footnote 23 above).

⁴⁷ Situation envisaged in draft article 17, paragraph 2, but in a rather different form than in the current text (see section C below).

⁴⁸ *Yearbook ... 1962* (see footnote 23 above), p. 65, para. (9) of the commentary on article 17.

⁴⁹ *Ibid.* (see footnote 18 above), p. 176, draft art. 18, para. 1 (b)–(d), (see the commentary on this paragraph, p. 180, para. (15)).

⁵⁰ On the contrary, during the discussion of the draft, Mr. Briggs considered that “the distinction was between the case set out in sub-paragraph (a), where all reservations were prohibited, and the case set out in sub-paragraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded” (*ibid.*, vol. I, 663rd meeting, p. 222, para. 12; against: Sir Humphrey Waldock, *ibid.*, p. 223, para. 32; as the example of article 12 of the Convention on the Continental Shelf (paras. 39–40 below) indicates, this comment is highly relevant).

⁵¹ *Ibid.*, p. 221, para. 3, draft art. 17, para. 1 (a). Although the principle had not been disputed at the time of the discussion in plenary meeting in 1965 (but had been disputed by Mr. Lachs in 1962 (*ibid.*, 651st meeting, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, document A/6009, p. 161), this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the “final clean-up” by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part II), 887th meeting, p. 295, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning “treaties constituting international organizations and treaties adopted within an international organization” appearing in article 5 of the 1969 Vienna Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constitution of an international organization (see Mendelson, “Reservations to the constitutions of international organizations”). As for treaties

those implicitly prohibited as a result of the authorization of specified reservations by the treaty.⁵² This dual distinction is found in a more refined form⁵³ in article 19 (a)–(b) of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.⁵⁴

(a) *Express prohibition of reservations*

25. According to Tomuschat, the prohibition in subparagraph (a), as it is drafted, should be understood as covering both express prohibitions and implicit prohibitions of reservations.⁵⁵ Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

(a) In the original wording, proposed by Sir Humphrey Waldock in 1962,⁵⁶ it was specified that the provision concerned reservations that were “expressly prohibited”, a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter.⁵⁷

(b) In the commentary on draft article 16 adopted on second reading in 1966, the Commission in effect seems

concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of ILO, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied with reservations (see the memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, League of Nations, *Official Journal*, 8th Year, No. 7 (July 1927), p. 882; the memorandum submitted by ILO to ICJ in 1951 in *I.C.J. Pleadings, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, pp. 217 and 227–228; and the statement by Wilfred Jenks, ILO Legal Adviser, *Official Records of the United Nations Conference on the Law of Treaties* (footnote 31 above), 7th meeting, p. 37, para. 11); for a discussion and critique of this position, see the commentary on draft guideline 1.1.8 (Reservations made under exclusionary clauses) of the Guide to Practice, *Yearbook ... 2000*, vol. II (Part Two), pp. 108–112.

⁵² See *Yearbook ... 1965* (footnote 20 above).

⁵³ On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, pp. 148–157) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, p. 264, para. 1) and its discussion (*ibid.*, pp. 264–265). The final text of article 16 (a)–(b) adopted on second reading by the Commission read as follows: “A State may ... formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty authorizes specified reservations which do not include the reservation in question” (*Yearbook ... 1966*, vol. II, p. 202). See also footnote 83 below.

⁵⁴ The “alternative drafts” proposed *de lege ferenda* in 1953 in the first report submitted by Mr. H. Lauterpacht all referred to treaties that “[do] not expressly prohibit or restrict the faculty of making reservations” (*Yearbook ... 1953* (see footnote 22 above), pp. 91–92).

⁵⁵ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties: comments on arts. 16 and 17 of the ILC’s 1966 draft articles on the law of treaties”, p. 469.

⁵⁶ See paragraph 23 above.

⁵⁷ See, however, the statement by Mr. Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, p. 149, para. 19: “the words ‘the terms of’ (*expressément*) could be deleted and it could read simply: ‘[unless] the making of reservations is prohibited by the treaty ...’ For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly”—but he was referring to the 1962 text.

to place on the same footing “[r]eservations expressly or impliedly prohibited by the terms of the treaty”.⁵⁸

26. This interpretation, however, is open to discussion. The idea that certain treaties could, “by their nature”, exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Sir Humphrey Waldock.⁵⁹ It is therefore hard to see what prohibitions could derive “impliedly” from a treaty, except in the cases covered by subparagraphs (a)–(b)⁶⁰ of article 19⁶¹ and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation is the only one compatible with the great liberalism that pervades all the provisions of the 1969 Vienna Convention that deal with reservations.

27. There is no problem—other than determining whether or not the declaration in question constitutes a reservation⁶²—if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples⁶³ even if some are famous, such as that in article I of the Covenant of the League of Nations:

⁵⁸ *Yearbook ... 1966* (see footnote 18 above), p. 205, para. (10). Like, moreover, “those expressly or impliedly authorized”, *ibid.*; see also page 207, paragraph (17). In the same spirit, article 19, paragraph 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between international organizations adopted by the Commission in 1981 placed on equal footing cases where reservations are prohibited by treaties and those where “it is otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited” (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

⁵⁹ See paragraph 24 above. The Special Rapporteur indicated that in drafting this clause, “what he had had in mind ... was the Charter of the United Nations which, by its nature, was not open to reservations” (*Yearbook ... 1962*, vol. I, 651st meeting, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the 1969 Vienna Convention (see footnote 60 below). The words “the nature of the treaty” drew little attention during the discussion (Mr. Castrén, however, found the expression imprecise—*ibid.*, 652nd meeting, p. 148, para. 28; see also Mr. Verdross, *ibid.*, p. 149, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, p. 221, para. 3).

⁶⁰ The amendments of Spain (*Official Records of the United Nations Conference on the Law of Treaties* (see footnote 28 above) (A/CONF.39/C.1/L.147) and of Colombia and the United States of America, *ibid.* (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the “nature” of the treaty in subparagraph (c), were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *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), eleventh plenary meeting, p. 35, paras. 2–3).

⁶¹ This is also the final conclusion arrived at by Tomuschat (*loc. cit.*, p. 471).

⁶² See draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations) and its commentary, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–109.

⁶³ Even in the area of human rights (see Imbert, “Reservations and human rights conventions”, p. 28, and Schabas, “Reservations to human rights treaties: time for innovation and reform”, p. 46; see, however, for example, 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 of 4 November 1950 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) which all prohibit any reservations to their provisions.

The original Members of the League of Nations shall be those of the Signatories ... as shall accede without reservation to this Covenant.⁶⁴

Likewise, article 120 of the Rome Statute of the International Criminal Court states:

No reservations may be made to this Statute.⁶⁵

And similarly, article 26, paragraph 1, of the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal states:

No reservation or exception may be made to this Convention.⁶⁶

28. Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the Special Meeting of Plenipotentiaries for the purpose of negotiating and signing a European Convention on International Commercial Arbitration, “the delegations taking part in the negotiation of the European Convention ... declare that their respective countries do not intend to make any reservations to the Convention”:⁶⁷ not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other parties must, logically, object to it.

Reservation clauses in human rights treaties sometimes refer to the provisions of the 1969 Vienna Convention concerning reservations (see article 75 of the American Convention on Human Rights: “Pact of San José, Costa Rica”)—which conventions containing no reservation clauses do implicitly—or reproduce its provisions (see article 28, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women and article 51, paragraph 2, of the Convention on the rights of the child).

⁶⁴ It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see Mendelson, *loc. cit.*, pp. 140–141).

⁶⁵ However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Rome Statute which authorizes “a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court” with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see Pellet, “Entry into force and amendment of the statute”, p. 157; see also the European Convention on the service abroad of documents relating to administrative matters, whose article 21 prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Spiliopoulou Åkermærk, “Reservation clauses in treaties concluded within the Council of Europe”, pp. 493–494; Daillier and Pellet, *Droit international public*, p. 181; Imbert, *op. cit.*, pp. 165–166; Horn, *op. cit.*, p. 113; Riquelme Cortado, *op. cit.*, pp. 105–108; and Schabas, “Reservations to human rights treaties ...”, p. 46).

⁶⁶ For a very detailed commentary, see Fodella, “The declarations of States parties to the Basel Convention”, article 26, paragraph 2, authorizes States parties to make “declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State”. The distinction between the reservations of paragraph 1 and the declarations of paragraph 2 can prove sensitive, but this is a problem of definition that does not in any way restrict the prohibition stated in paragraph 1: if a declaration made under paragraph 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the United Nations Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, Pellet, “Les réserves aux conventions sur le droit de la mer”, pp. 505–517; see also footnote 87 below).

⁶⁷ Example given by Imbert, *op. cit.*, pp. 166–167.

29. More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.⁶⁸ This is the case in article 42 of the Convention relating to the Status of Refugees⁶⁹ and article 14 of the International Convention for Safe Containers.

30. The situation where the treaty does not prohibit reservations to specified provisions but excludes certain categories of reservations is more complicated. An example of this type of clause is provided by article 78, paragraph 3, of the International Sugar Agreement, 1977:

Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement.

31. The distinction between reservation clauses of this type and those excluding specific reservations, was made in Sir Humphrey Waldock's draft in 1962.⁷⁰ For their part, the 1969 and 1986 Vienna Conventions do not make such distinctions and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that article 19 (a) covers all three situations that a more precise analysis can discern:

(a) Reservation clauses prohibiting all reservations;

(b) Reservation clauses prohibiting reservations to specified provisions;

(c) Finally, reservation clauses prohibiting certain categories of reservations.

32. While these distinctions could seem self-evident, it is undoubtedly useful to specify them expressly in draft guideline 3.1.1, which could read as follows:

“3.1.1. *Reservations expressly prohibited by the treaty*

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

“(a) Prohibiting all reservations;

“(b) Prohibiting reservations to specified provisions;

“(c) Prohibiting certain categories of reservations.”

33. This clarification seems all the more useful in that situation (c) poses problems (of interpretation)⁷¹ of the

same nature as those arising from the criterion of compatibility with the object and purpose of the treaty,⁷² which certain clauses actually reproduce expressly.⁷³ By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still come under article 19 (a) of the 1969 and 1986 Vienna Conventions, the Commission could from the outset usefully emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

(b) *Implicit prohibition of reservations*

34. A cursory reading of article 19 (b) of the 1969 and 1986 Vienna Conventions could suggest that it represents one side of the coin and subparagraph (a) represents the other. However, the symmetry is far from total. To create such symmetry, it would have been necessary to stipulate that reservations other than those expressly provided for in the treaty were prohibited. But that is not the case: subparagraph (b) contains two additional details which prevent oversimplification; the implicit prohibition of certain reservations arising from this provision, which is considerably more complex than it seems, relies on the fulfilment of three conditions:

(a) The treaty's reservation clause must permit the formulation of reservations;

(b) The reservations permitted must be “specified”;

(c) It must be specified that “only” those reservations “may be made”.⁷⁴

35. The origin of article 19 (b) of the 1969 and 1986 Vienna Conventions can be traced back to draft article 37, paragraph 3, submitted to the Commission in 1956 by Mr. Fitzmaurice:

In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.⁷⁵

Sir Humphrey Waldock took up that concept again in draft article 17, paragraph 1 (a), which he proposed in 1962 and which the Commission used in draft article 18, paragraph 1 (c). That draft article was adopted the same year⁷⁶ and, following a number of minor drafting changes, was incorporated into article 16 (b) of the 1966 draft⁷⁷ and then into article 19 of the Convention.

36. That course of action did not go unchallenged, however, as during the United Nations Conference on the Law of Treaties a number of amendments were submitted with

⁶⁸ This situation is extremely close to the one in which the treaty specifies the provisions to which reservations are permitted—see paragraph 39 below and the comments by Mr. Briggs (cited above in footnote 50).

⁶⁹ With regard to this provision, Imbert noted that the influence of the opinion (of ICJ on the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide adopted two months earlier) is very clear since such a clause effectively protects the provisions which cannot be the object of reservations (*op. cit.*, p. 167); see the other examples given (*ibid.*), and paragraphs 39–41 below.

⁷⁰ *Yearbook ... 1962* (see footnote 23 above).

⁷¹ “Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty” (Aust, *op. cit.*, p. 110).

⁷² See paragraph 91 below.

⁷³ See the examples given above in footnote 63. That is a particular example of “prohibited categories of reservations”—in a particularly vague way, it is true.

⁷⁴ See paragraph 15 above.

⁷⁵ *Yearbook ... 1956* (see footnote 22 above), p. 115; see also page 127, paragraph 95.

⁷⁶ See paragraphs 23–24 above.

⁷⁷ See footnote 53 above.

a view to deleting that provision⁷⁸ on the pretext that it was “unduly rigid”⁷⁹ or redundant because it duplicated subparagraph (a),⁸⁰ or that it had not been confirmed by practice;⁸¹ all those amendments were, however, withdrawn or rejected.⁸²

37. The only change to subparagraph (b) was made by means of a Polish amendment inserting the word “only” after the word “authorizes”, which was accepted by the Drafting Committee of the United Nations Conference on the Law of Treaties “[i]n the interest of greater clarity”.⁸³ This innocuous appearance must not obscure the vast practical implications of this amendment, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries’ persistent desire to facilitate as much as possible the formulation of reservations, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.⁸⁴ However, this amendment does not exempt a reservation which is neither expressly permitted nor

implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.⁸⁵

38. In practice, permissible reservation clauses are similar in nature to those containing prohibitive provisions and they pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated.⁸⁶

(a) Some of them authorize reservations to particular provisions, expressly and restrictively listed either affirmatively or negatively;

(b) Others authorize specified categories of reservations;

(c) Lastly, others (few in number) authorize reservations in general.

39. Article 12, paragraph 1, of the Convention on the Continental Shelf appears to illustrate the first of those categories:

At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.⁸⁷

As Sinclair has noted, “Article 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might be made”⁸⁸ and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the ICJ judgment in the *North Sea Continental Shelf* cases⁸⁹ and, above all, by the arbitral ruling given in 1977 in the *English Channel* case.⁹⁰

40. In that case, the Arbitral Tribunal emphasized that:

Article 12 [of the Convention on the Continental Shelf], by its clear terms, authorised any contracting State, including the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive.⁹¹

However,

Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly

⁷⁸ Amendments by Colombia and the United States (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (see footnote 28 above), France (A/CONF.39/C.1/L.169 and Corr.1), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions to article 16 (or to articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Official Records of the United Nations Conference on the Law of Treaties*, (footnote 28 above), pp. 133–134, paras. 174–177). During the Commission’s discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, Mr. Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, p. 151, para. 33; or Mr. Ruda, *ibid.*, p. 154, para. 70).

⁷⁹ According to the United States and Poland at the 21st and 22nd meetings of the Committee of the Whole (*Official Records of the United Nations Conference on the Law of Treaties* (footnote 31 above), p. 108, para. 8, and p. 118, para. 42); see also the statement made by the Federal Republic of Germany (*ibid.*, 21st meeting, p. 109, para. 23).

⁸⁰ Colombia, *ibid.*, p. 113, para. 68.

⁸¹ Sweden, *ibid.*, 22nd meeting, p. 117, para. 29.

⁸² *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 28 above), pp. 136–138, paras. 181–188. See the explanations of the Expert Consultant, Sir Humphrey Waldock, *ibid.* (see footnote 31 above), 24th meeting, p. 126, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, p. 135, paras. 23–25.

⁸³ *Ibid.* (see footnote 28 above), p. 134, para. iv (c) (A/CONF.39/C.1/L.136); and A/CONF.39/11, *ibid.* (footnote 31 above), 70th meeting, p. 415, para. 16. Already in 1965, during the Commission’s discussion of draft article 18 (b) as reviewed by the Drafting Committee, Mr. Castrén proposed inserting “only” after “authorizes” in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, p. 149, para. 14, and 813th meeting, p. 264, para. 13; see also the similar proposal made by Mr. Yasseen, *ibid.*, para. 11), which, in the end, was not accepted following a further review by the Drafting Committee (*ibid.*, 816th meeting, p. 283, para. 41).

⁸⁴ See Horn, *op. cit.*, p. 114, Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, p. 39; Ruda, *loc. cit.*, p. 181; and Szafarz, “Reservations to multilateral treaties”, pp. 299–300. Such restrictive formulas are not unusual—see, for example, article 17 of the Convention on the reduction of statelessness:

“1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15.

“2. No other reservations to this Convention shall be admissible.”

and the other examples given by Riquelme Cortado, *op. cit.*, pp. 128–129. On the significance of the reversal of the presumption, see also Mr. Robinson, *Yearbook ... 1995*, vol. I, 2402nd meeting, p. 158, para. 17.

⁸⁵ See paragraphs 59–70 below.

⁸⁶ See paragraphs 25–33 above.

⁸⁷ Article 309 of the United Nations Convention on the Law of the Sea provides: “No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention” (on this provision, see Pellet, “Les réserves ...”, pp. 505–511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the European Convention on the adoption of children). These provisions may be compared with those authorizing parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *sensu stricto* (see draft guidelines 1.4.6–1.4.7 of the Commission and the related commentary, *Yearbook ... 2000*, vol. II (Part Two), pp. 112–116).

⁸⁸ Sinclair, *The Vienna Convention on the Law of Treaties*, p. 73. On the distinction between specified and non-specified reservations, see also paragraph 47 below.

⁸⁹ See *North Sea Continental Shelf, Judgment*, I.C.J. Reports 1969, pp. 38–41.

⁹⁰ *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, UNRIIAA, vol. XVIII (Sales No. E/F.80.V.7), pp. 32–35, paras. 39–44.

⁹¹ *Ibid.*, p. 32, para. 39.

correct. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12 which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms.⁹²

41. The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act (Pacific Settlement of International Disputes) provides an example of this:

1. In addition to the power given in the preceding article⁹³, a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.

2. These reservations may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;

(c) Disputes concerning particular cases or clearly specified subject-matters, such as territorial status, or disputes falling within clearly defined categories.

As ICJ pointed out in its judgment of 1978 in the *Aegean Sea Continental Shelf* case:

When a multilateral treaty thus provides in advance for the making only of particular, designated categories of reservations, there is clearly a high probability, if not an actual presumption, that reservations made in terms used in the treaty are intended to relate to the corresponding categories in the treaty

when even States do not “meticulously” follow the “pattern” set out in the reservation clause.⁹⁴

42. Another particularly famous and widely discussed example⁹⁵ of a clause authorizing reservations (and which, for its part, falls under the second category mentioned above⁹⁶) is found in article 57 (ex 64) of the European Convention on Human Rights:

⁹² *Ibid.*, pp. 32–33, para. 39.

⁹³ Article 38 provides that parties may accede to only parts of the General Act.

⁹⁴ *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 23, para. 55.

⁹⁵ See Bonifazi, “La disciplina delle riserve alla Convenzione europea dei diritti dell’uomo”; Cohen-Jonathan, *La Convention européenne des droits de l’homme*, pp. 85–93; Frowein, “Reservations to the European Convention on Human Rights”; Imbert, “Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case”; Kühner, “Reservations and interpretative declarations to the European Convention on Human Rights (ECHR): article 64 ECHR and the Swiss ‘interpretative declaration’ to article 6 (3) (e) ECHR”; Marcus-Helmons, “L’article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l’homme”; Pires, *As reservas a Convenção europeia dos direitos do homem*; Sapienza, “Sull’ammissibilità di riserve all’accettazione della competenza della Commissione europea dei diritti dell’uomo”; and Schabas, “Article 64”.

⁹⁶ Para. 38. For other examples, see Aust, *op. cit.*, pp. 109–110; Spiliopoulou Åkermærk, *loc. cit.*, pp. 495–496; Bishop Jr., “Reservations to treaties”, pp. 323–324; and Daillier and Pellet, *op. cit.*, p. 181. See also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in paragraph 38 above, in Riquelme Cortado, *op. cit.*, p. 125, and the other examples of partial authorizations given by this author, pp. 126–129.

(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.

In this instance, the authority to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,⁹⁷ a reservation to the Convention must:

(a) Refer to a particular provision of the Convention;

(b) Be justified by the status of legislation [in the reserving State] at the time that the reservation is formulated;

(c) Not be “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope”,⁹⁸ and

(d) Be accompanied by a brief statement explaining “the scope of the Convention provision whose application a State intends to prevent by means of a reservation”.⁹⁹

Assessing whether each of these conditions has been met raises problems. However, it can still be considered that the reservations authorized by the Convention are “specified” within the meaning of article 19 (b) of the 1969 and 1986 Vienna Conventions and that only such reservations are valid.

43. It has been noted that this wording is not fundamentally different¹⁰⁰ from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition:

Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention

even though the latter could be interpreted as a general authorization. However, while the type of reservations that can be formulated to the European Convention on Human Rights is “specified”, here the authorization is restricted only by the exclusion of across-the-board reservations.¹⁰¹

44. In fact, a general authorization of reservations¹⁰² itself does not necessarily resolve all the problems. In

⁹⁷ See paragraph 19 above.

⁹⁸ *Belilos* case, European Court of Human Rights, *Series A: Judgments and Decisions*, judgment of 29 April 1988, *Series A:*, vol. 132, p. 26, para. 55.

⁹⁹ European Commission of Human Rights, *Decisions and Reports*, application No. 9116/80, *Temeltasch v. Switzerland*, vol. 31, p. 150, para. 90.

¹⁰⁰ Imbert, *op. cit.*, p. 186; see also Riquelme Cortado, *op. cit.*, p. 122.

¹⁰¹ Regarding this concept, see draft guideline 1.1.1 of the Commission’s Guide to Practice and the commentary in *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

¹⁰² For another even clearer example, see article 18, paragraph 1, of the European Convention on the compensation of victims of violent crimes: “Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations.”

particular, it leaves unanswered the question of whether the other parties may still object to reservations¹⁰³ and whether these expressly authorized reservations¹⁰⁴ are subject to the test of compatibility with the object and purpose of the treaty.¹⁰⁵ This last point will be discussed in section C below.

45. At this stage, the only question that arises is whether it is necessary for a particular guideline of the Guide to Practice to specify the scope of article 19 (b) of the 1969 and 1986 Vienna Conventions. This could be done in two different ways. One way would be to consider a draft guideline which, where authorized reservations are concerned, would be the equivalent of draft guideline 3.1.1, the text of which is proposed above.¹⁰⁶ However, subparagraph (b) expressly states that the authorization of only “specified reservations” by the treaty (to the exclusion of any other possibility) prohibits the formulation of other reservations. The only option therefore would be to say, *a contrario*, that, if the treaty authorizes the formulation of reservations in a general manner or does not “specify” the reservations that can be formulated in a restricted manner, reservations may still be formulated. Such a draft would merely say the same thing as the existing draft of this paragraph¹⁰⁷ but in a different, “negative” way and would not therefore be particularly useful.

46. On the other hand, it is probably not superfluous to include in the Guide to Practice a draft guideline defining what is meant by “specified reservations”. Indeed, such a definition has important consequences for the applicable legal regime, as it can legitimately be argued that reservations which are not “specified” must pass the test of compatibility with the object and purpose of the treaty.

47. Such a definition is not straightforward. It caused particular controversy following the arbitration in the *English Channel* case.¹⁰⁸ For some reserving States, a reservation is “specified” if the treaty sets precise limits within which it can be formulated; these criteria then replace (but only in this instance) the criterion of the object and

purpose of the means.¹⁰⁹ This position can be based on the arbitral award of 1977, even though that award says more about what a specified reservation is not than what it is.¹¹⁰ Indeed, the upshot of all this is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to “specify” these reservations within the meaning of article 19 (b).¹¹¹ However, the Court confines itself to requiring reservations to be “specific”,¹¹² without indicating what the test of this specificity is to be.

48. It has been noted,¹¹³ however, and not without justification, that it is unrealistic to require the content of authorized reservations to be established with precision by the treaty and that this occurs very exceptionally, other than in the rare cases, of “negotiated reservations”.¹¹⁴ In addition, during the United Nations Conference on the Law of Treaties, Mr. Yasseen, Chairman of the Drafting Committee, included specified reservations among reservations which are expressly authorized by the treaty,¹¹⁵ with no further clarification. On the other hand, however, the Commission did not retain Mr. Rosenne’s proposal that the expression “specified reservations”, which he considered “unduly narrow”, should be replaced by “reservations to specific provisions”.¹¹⁶

49. None of these considerations are decisive. However, a compromise must be found between the undoubtedly excessive (because it largely deprives article 19 (b) of the 1969 and 1986 Vienna Conventions of any real effect) theory which requires the content of authorized reservations to be precisely stated in the reservation clause and the theory which equates a specified reservation with a reservation expressly authorized by the treaty,¹¹⁷ even though articles 19 (b), and 20, paragraph 1, use different expressions. To this end, it must of course be recognized that reservations that are specified within the meaning of guideline 3.1 (b) must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined. Such a definition could read as follows:

¹⁰³ This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women and the related comments by Riquelme Cortado, *op. cit.*, p. 121). Article 20, paragraph 1, of the 1969 Vienna Convention does not resolve the problem: it allows the reservation to be “established” (or “made”) without requiring acceptance, but says nothing about objections. It can, however, be argued that paragraph 4 of the same article seems to exclude the possibility of objecting to a “reservation expressly authorized by a treaty” (para. 1) owing to the fact that paragraph 4 apparently does not apply to cases not falling under paragraph 1.

¹⁰⁴ It cannot be reasonably argued that subparagraph (b) could include “implicitly authorized” reservations—other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c). In this case, the expression “specified reservation” in article 19 (b) is similar to the expression “reservation expressly authorized by a treaty” found in article 20, paragraph 1.

¹⁰⁵ See the questions raised by Spiliopoulou Åkermark, *loc. cit.*, pp. 496–497, and Riquelme Cortado, *op. cit.*, p. 124.

¹⁰⁶ Para. 32.

¹⁰⁷ Such a guideline should probably be worded as follows: “Guideline 3.1 (b) does not exclude the formulation of reservations not expressly provided for by the treaty if the treaty authorizes reservations in a general manner or provides for the freedom to formulate reservations without specifying which reservations can be formulated in a restricted manner.”

¹⁰⁸ See footnote 90 above.

¹⁰⁹ Bowett, “Reservations ...”, pp. 71–72.

¹¹⁰ See paragraph 40 above.

¹¹¹ See paragraphs 39–40 above.

¹¹² In reality, it is the authorization that must apply to specific or specified reservations—terms which the Court considers to be synonymous (see footnote 90 above).

¹¹³ See, in particular, Imbert, “La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d’Irlande du Nord”, pp. 50–53.

¹¹⁴ Regarding this concept, see the Special Rapporteur’s fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 27 above), pp. 174–175, paras. 164–171. The main example given by Bowett to illustrate his theory relates precisely to a “specified reservation” (“Reservations ...”, p. 71).

¹¹⁵ *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 31 above), 70th meeting, p. 416, para. 23.

¹¹⁶ *Yearbook ... 1965*, vol. I, 813th meeting, p. 264, para. 7. However, Imbert (“La question des réserves ...”, p. 52) points out, not without reason, that even though Mr. Rosenne’s proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*Yearbook ... 1965, ibid.*, p. 265, para. 27).

¹¹⁷ In this connection, see Imbert, “La question des réserves ...”, p. 53.

“3.1.2 Definition of specified reservations

“For the purposes of guideline 3.1, the expression ‘specified reservations’ means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.”

2. THE EFFECT OF FORMULATION OF A RESERVATION PROHIBITED BY THE TREATY (REJECTION)

50. It has always been understood that a reservation cannot be formulated (let alone “made”) where this was expressly or implicitly prohibited by a clause of the treaty. This self-evident truth was stated as long ago as 1950 by Mr. Brierly in his first report on the law of treaties; clauses (1), (2) and (4) of his proposed draft article 10 on reservations to treaties began with the following formula: “Unless the contrary is indicated in a treaty”.¹¹⁸ As he explained in the commentary on this provision:

[I]n relation to particular treaties, it may have been made clear in advance that the intending parties will not accept any reservation whatsoever. Clauses to this effect in texts of treaties are not uncommon.¹¹⁹

51. This logical premise has never been questioned.¹²⁰ It simply serves as a reminder that the provisions of the 1969 Vienna Convention are residuary in nature:¹²¹ “where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty”.¹²² Where such a clause prohibits the reservation envisaged, the

reservation cannot be formulated; conversely, however, where such a clause authorizes the reservation, the question of its validity does not arise.¹²³ The apparent simplicity of these common-sense rules¹²⁴ nevertheless obscures delicate problems. Once the problem of the scope of a conventional prohibition on formulating reservations has been resolved, the question arises as to the possible effect of a reservation formulated in spite of the clause expressly (art. 19 (a)) or implicitly (art. 19 (b)) prohibiting it.

52. No provision of the 1969 Vienna Convention expressly answers this question, of great practical importance, and the *travaux préparatoires* relating to article 19¹²⁵ do not shed any light in this regard.¹²⁶ This response may have seemed obvious where subparagraphs (a)–(b) are concerned.¹²⁷ However, if it is obvious, there is no reason not to transpose it to the situation, generally considered much more uncertain, of subparagraph (c): nothing in the text of the Convention or on the basis of logic justifies different responses.¹²⁸ And yet the question of the effects of a reservation that is incompatible with the object and purpose of the treaty (situation of subpara. (c)) was the subject of long and largely inconclusive discussions during the *travaux préparatoires* on the Convention. It would therefore seem preferable not to separate the consideration of the effects of a reservation formulated in spite of an express or implicit prohibition within the meaning of article 19 (c), from that of the consequences of a reservation that is contrary to the object and purpose of the treaty.

53. Suffice it to say at this stage that many commentators believe that a reservation formulated in spite of a conventional prohibition is null and void¹²⁹ and consider that its formulation invalidates the expression of consent to be bound.¹³⁰ If this is the case, these conclusions should affect the response to the question concerning the effects of a reservation formulated in spite of the provisions of article 19 (c).

¹¹⁸ *Yearbook ... 1950* (see footnote 22 above), p. 239, art. 10 (2). See also pages 238 and 241. The French version includes the variants: “*A moins que le contraire n’y soit stipulé ...*” [“Unless the contrary is therein indicated”] (p. 49), “*A moins que le contraire ne soit stipulé dans le traité ...*” [“Unless the contrary is indicated in a treaty”] (p. 51), “*A moins que le contraire ne soit stipulé dans le texte d’un traité*” [“Unless the contrary is indicated in the text of a treaty”] (p. 54).

¹¹⁹ *Ibid.*, p. 239, para. 88; see also pages 239–240, para. 90.

¹²⁰ See the first and second reports of Mr. Lauterpacht, (footnote 22 above), *Yearbook ... 1953*, p. 136, para. (4), and *Yearbook ... 1954*, p. 131, para. 1; the first report of Sir Humphrey Waldock, *Yearbook ... 1962* (footnote 23 above), p. 60, art. 17, para. 1 (a) (i), and p. 65, para. (9), the explanations he gave during Commission discussions (*ibid.*, vol. I, 653rd meeting, p. 159, para. 57) and the text adopted by the Commission in first reading (*ibid.*, vol. II (footnote 18 above), p. 176, art. 18, para. 1 (a)) and the related commentary (pp. 178 and 180, paras. (10) and (15)); the fourth report of Sir Humphrey (*Yearbook ... 1965* (footnote 20 above), p. 50, art. 18, para. 2 (a)), and the text adopted by the Commission in 1965 (*ibid.*, vol. II, p. 162, art. 18 (a)) and the related commentary (*Yearbook ... 1966* (footnote 18 above). Draft article 16 (a) caused very few problems during the United Nations Conference on the Law of Treaties; only the amendments proposed by Spain (A/CONF.39/14 (see footnote 28 above), p. 134, para. 177 (i) (c) and (iii)), which were subsequently withdrawn (A/CONF.39/11) (footnote 31 above), 25th meeting, p. 135, para. 29, and by the Union of Soviet Socialist Republics, which completely changed draft articles 16–17, would have resulted in its deletion (A/CONF.39/14 (see above), p. 134, para. 177 (iii)); according to the Soviet Union, this paragraph (like subparagraph (b)) “seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the sub-paragraph would have the effect of laying down a rule which formed an exception, thus restricting the power of States to make reservations” (A/CONF.39/11) (see above), 21st meeting, p. 107, para. 5. This amendment was rejected by the Committee of the Whole by 70 votes to 10 with 3 abstentions (*ibid.*, 25th meeting, p. 135, para. 23).

¹²¹ See paragraph 12 and footnote 27 above.

¹²² *Yearbook ... 1962* (see footnote 18 above), p. 178, para. (10) of the commentary on draft articles 18–20. Article 19 (a)–(b) is “little more than an acknowledgment that the parties are free to make provision in their treaty whether or to what extent to allow reservations to its terms” (Greig, *loc. cit.*, p. 51).

¹²³ See the arbitral award of 30 June 1977 in the *English Channel* case (footnote 90 above), p. 32, para. 39: “Under article 12 [of the Convention on the Continental Shelf], the United Kingdom bound itself not to contest the right of the French Republic to be a party to the Convention on the basis of reservations the making of which is authorised by that Article.” However, this does not resolve the earlier question of whether the reservations formulated by France were valid in the first place (see paragraph 39 above).

¹²⁴ To the extent that it has been said that “there is clearly no need for an additional rule in the Vienna Convention” (Lijnzaad, *op. cit.*, p. 39); see also footnote 45 above.

¹²⁵ See footnote 53 above.

¹²⁶ See Greig, *loc. cit.*, pp. 52–53, and Fodella, *loc. cit.*, p. 140. See also Tomuschat, who believes, however, that the preparatory work demonstrates that in the Commission’s view it was impossible to accept a reservation excluded under paragraphs (a)–(b) (*loc. cit.*, p. 477).

¹²⁷ For a critical analysis of this pseudo-evidence, see Greig, *loc. cit.*, pp. 52–53 and 154.

¹²⁸ In this connection, see Aust, *op. cit.*, p. 118, and Bowett, who believes that this conclusion must be reached *a fortiori* in the case envisaged in subparagraph (c), “Reservations ...”, note 109, p. 83.

¹²⁹ See, for example, Bowett, “Reservations ...”, p. 84. For a more nuanced analysis, see Greig, *loc. cit.*, pp. 56–57.

¹³⁰ Bowett, “Reservations ...”, p. 84, and Gaja, “Unruly treaty reservations”, p. 314. See also Tomuschat, *loc. cit.*, p. 467; see further the references to Commission’s discussions, *ibid.*, footnote 12; these discussions are less conclusive in this respect than the author would have one believe.

C. Reservations incompatible with the object and purpose of the treaty

54. “[I]n cases not falling under subparagraphs (a) and (b)”, article 19 (c) of the 1969 and 1986 Vienna Conventions prohibits the formulation of reservations incompatible with “the object and purpose of the treaty”. This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the “radically relativistic position”¹³¹ resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,¹³² while avoiding the rigidity resulting from the system of unanimity.

55. This concept, which first appeared in the area of reservations in the 1951 ICJ advisory opinion,¹³³ has become increasingly accepted. It is now the pivot between the need to preserve the nature of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty, in accordance with the advisory opinion, on the one hand, and article 19 (c) of the 1969 Vienna Convention, on the other.¹³⁴ In the advisory opinion, it applied equally to the formulation of reservations and to objections:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.¹³⁵

In the Convention, it is restricted to reservations: article 20 does not restrict the ability of other contracting States to formulate objections.

56. Within those limits, there is no doubt that this criterion of the validity of the formulation of reservations now reflects a rule of customary law which is unchallenged.¹³⁶ However, its contents remain vague (sect. 2) and there is still some uncertainty as to the consequences of the incompatibility of a reservation with the object and purpose of the treaty (sect. 3). Nonetheless, before examining possible responses by the Commission to these two central issues, one should begin by determining the types

of reservations to which the test of compatibility with the object and purpose of the treaty is applicable (sect. 1).

1. APPLICABILITY OF THE CRITERION OF COMPATIBILITY OF A RESERVATION WITH THE OBJECT AND PURPOSE OF THE TREATY

57. The principle set forth in article 19 (c) of the 1969 and 1986 Vienna Conventions, whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature, since it applies only in cases not covered in article 20, paragraphs 2–3, of the Conventions¹³⁷ and where the treaty itself does not resolve the reservations issue.

58. If it does so, a number of cases must be distinguished. They lead to varying answers to the question of whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

(a) There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty.¹³⁸

(b) The same applies to “specified” reservations. Expressly authorized by the treaty, subject to specific conditions, they are automatically valid without having to be accepted by the other contracting States¹³⁹ and they are not subject to the test of compatibility with the object and purpose of the treaty.¹⁴⁰ These obvious facts are probably not worthy of mention in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19 (c) of the 1969 and 1986 Vienna Conventions, and it is proposed that the latter should be reproduced in draft guideline 3.1.¹⁴¹

59. The same does not apply to two other cases which, *a contrario*, arise out of the provisions of article 19 (a)–(b):

(a) Cases in which a reservation is implicitly authorized because it does not fall under the category of prohibited reservations (subpara. (a));

¹³¹ Reuter, *op. cit.*, p. 79, para. 130. This eminent author applies the expression to the system adopted by ICJ in *I.C.J. Reports 1951* (see footnote 19 above), p. 15; the criticism is probably excessive (see paragraphs 88–90 below; see also paragraphs 93 *et seq.*); however, it applies perfectly well to the pan-American system.

¹³² On the pan-American system, see the bibliography in Imbert, *op. cit.*, pp. 485–486. In addition, aside from the description by Imbert himself (*ibid.*, pp. 33–38), see Whiteman, *Digest of International Law*, pp. 141–144 and Ruda, *loc. cit.*, pp. 115–133.

¹³³ *I.C.J. Reports 1951* (see footnote 19 above), pp. 24–26.

¹³⁴ Coccia, *loc. cit.*, pp. 8–9; Lijnzaad, *op. cit.*, p. 40; Ramamontaldo, “Human rights conventions and reservations to treaties”, pp. 1265–1266; and Sinclair, *op. cit.*, p. 61.

¹³⁵ *I.C.J. Reports 1951* (see footnote 19 above), p. 24.

¹³⁶ See the many arguments to that effect given by Riquelme Cortado, *op. cit.*, pp. 138–143. See also the Commission’s preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, in which it reiterated “its view that articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations” (*Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 1).

¹³⁷ In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances of implicit prohibitions of formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

¹³⁸ In its observations on the draft adopted in first reading by the Commission, Canada had suggested that “consideration should be given to extending the criterion of ‘compatibility with the object and purpose’ equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them.” (Fourth report on the law of treaties by Sir Humphrey Waldock, *Yearbook ... 1965* (see footnote 20 above), p. 46). That proposal, which was not very clear, was not retained by the Commission; see the clearer proposals along the same lines by Mr. Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, p. 222, paras. 13–14, and *Yearbook ... 1965*, vol. I, 813th meeting, p. 264, para. 10; *contra*: Mr. Ago, *ibid.*, para. 16.

¹³⁹ See article 20, paragraph 1.

¹⁴⁰ See paragraph 39 above.

¹⁴¹ See paragraph 20 above.

(b) Cases in which a reservation is expressly authorized without being “specified”.

60. In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations is equivalent to a blank cheque given to States or international organizations to formulate any reservation they wish even if to do so would leave the treaty as an empty shell.

61. On the subject of implicitly authorized reservations, Sir Humphrey Waldock recognized, in his fourth report on the law of treaties, that “[a] conceivable exception [to the principle of automatic validity of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations”. However, he excluded that eventuality not because this was untrue but because “this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the 1969 Vienna Convention] as simple as possible”.¹⁴² These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

62. It should therefore certainly be specified in the Guide to Practice that reservations which are “implicitly authorized” because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would certainly be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be allowed more liberally than in the case of treaties which contain no such clauses.¹⁴³

63. Draft guideline 3.1.3, which envisages that case, could read as follows:

“3.1.3 *Reservations implicitly permitted by the treaty*

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

64. The problem arises in the same way if the prohibition of reservations is implicit (case of subpara. (b)).

65. As stated above,¹⁴⁴ the Polish amendment to subparagraph (b), adopted by the United Nations Conference on the Law of Treaties in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided “that *only specified** reservations, which do not include the reservation in question, may be made”.¹⁴⁵ It follows that if authorized reservations are not specified,

they must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

66. Indeed, the modification made to subparagraph (c) itself following the Polish amendment goes in that direction. In the Commission’s text, subparagraph (c) was drafted as follows:

In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.*¹⁴⁶

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;¹⁴⁷ it was therefore changed to the current wording by the Drafting Committee of the United Nations Conference on the Law of Treaties.¹⁴⁸ The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because it is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

67. That was, indeed, the argument adopted by the arbitral tribunal which settled the *English Channel* dispute in deciding that the mere fact that article 12 of the Convention on the Continental Shelf authorizes certain reservations without specifying them¹⁴⁹ did not necessarily mean that such reservations were automatically valid.¹⁵⁰

68. In such cases, the validity of the reservation “cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted”.¹⁵¹ Its validity should be assessed in the light of its compatibility with the object and purpose of the treaty.¹⁵²

¹⁴⁶ *Yearbook ... 1966* (see footnote 18 above), p. 202.

¹⁴⁷ Poland had not, however, put forward any amendment to subparagraph (c), taking into account the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase “in cases where the treaty contains no provisions regarding reservations” (A/CONF.39/14 (see footnote 28 above), p. 134; para. 177 (v) (a), was rejected by the Commission in plenary (*ibid.*, p. 136, para. 182 (d)).

¹⁴⁸ Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). Mr. Yasseen merely stated that “[s]ome members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in paragraphs (a) and (b)” (A/CONF.39/11 (see footnote 31 above), 70th meeting, p. 415, para. 17). See also a remark by Mr. Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook ... 1965*, vol. I, 796th meeting, p. 146, para. 37).

¹⁴⁹ See paragraph 39 above.

¹⁵⁰ UNRIIAA (see footnote 90 above), p. 32, para. 39. See also paragraph 40 above.

¹⁵¹ Bowett, “Reservations ...”, p. 72. In the same vein, see Ruda, *loc. cit.*, p. 182, and Teboul, “Remarques sur les réserves aux conventions de codification”, pp. 691–692. *Contra* Imbert, “La question des réserves ...”, pp. 50–53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the United Nations Conference on the Law of Treaties (see paragraph 66 above).

¹⁵² Tomuschat gives a pertinent example: “If, for example, a convention on the protection of human rights prohibits in a ‘colonial clause’ the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of

¹⁴² *Yearbook ... 1965* (see footnote 20 above), p. 50, para. 4.

¹⁴³ In that vein, see Mr. Rosenne in *Yearbook ... 1965*, vol. I, pp. 148–149, 797th meeting, para. 10.

¹⁴⁴ Para. 37.

¹⁴⁵ Art. 19 (b) of the 1969 Vienna Convention.

69. This observation could be the subject of a draft guideline 3.1.4, worded as follows:

“3.1.4 *Non-specified reservations authorized by the treaty*

“Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.”

70. Another possibility might be to specify, in a single draft guideline combining the aforementioned wordings for 3.1.3 and 3.1.4, the cases in which the formulation of a reservation is subject to compliance with the condition of compatibility with the object and purpose of the treaty, despite the existence in the text of the treaty of a reservations clause:

“3.1.3/3.1.4 *Compatibility of reservations authorized by the treaty with its object and purpose*

“Where the treaty expressly or implicitly authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.”

71. This compact wording no doubt has the disadvantage of combining two distinct cases, one related to article 19 (a) of the 1969 and 1986 Vienna Conventions, the other to article 19 (b), making it somewhat esoteric for an uninformed reader who does not have access to the commentaries. The Special Rapporteur, however, defers to the wisdom of the Commission in the choice of a single draft guideline or two separate guidelines.

2. CONCEPT OF THE OBJECT AND PURPOSE OF THE TREATY

72. Two authors conclude a minutely detailed study devoted to the concept of “the object and purpose of a treaty” by noting “[w]ith regret ... that the object and purpose of a treaty are indeed something of an enigma”.¹⁵³ Certainly, the attempt made in article 19 (c), to introduce an element of objectivity into a largely subjective system is not entirely convincing.¹⁵⁴ “The claim that a particular reservation is contrary to object and purpose is easier made than substantiated.”¹⁵⁵ In their joint dissenting opinion, the judges in 1951 had criticized the solution retained by the majority in the case concerning *Reservations to the*

Convention on Genocide, emphasizing that it could not “produce final and consistent results”,¹⁵⁶ and this had been one of the main reasons for the Commission’s resistance to the flexible system adopted by ICJ in 1951:

Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively.¹⁵⁷

73. Sir Humphrey Waldock himself still had hesitations in his all important first report on the law of treaties in 1962:¹⁵⁸

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

Nevertheless, the Court’s criterion of “compatibility with the object and purpose of the convention” does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State ... The Special Rapporteur, although also of the opinion that there is value in the Court’s principle as a general concept, feels that there is a certain difficulty in using it as a criterion of a reserving State’s status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States.¹⁵⁹

No doubt this was a case of tactical caution, for the “conversion” of the self-same Special Rapporteur to compatibility with the object and purpose of the treaty, not only as a test of the validity of reservations, but also as a key element to be taken into account in interpretation,¹⁶⁰ was swift.¹⁶¹

¹⁵⁶ *I.C.J. Reports 1951* (see footnote 19 above), p. 44.

¹⁵⁷ *Yearbook ... 1951*, vol. II, document A/1858, p. 128, para. 24.

¹⁵⁸ It was this report that introduced the “flexible system” to the Commission and vigorously defended it (*Yearbook ... 1962* (see footnote 23 above), pp. 63–65).

¹⁵⁹ *Ibid.*, pp. 65–66, para. (10); on the same lines, see Sir Humphrey’s oral statement, *ibid.*, vol. I, 651st meeting, p. 139, paras. 4–6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a “test” (*ibid.*, p. 145, para. 85—this paragraph also shows that, from the outset, in Sir Humphrey’s mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a), which was proposed by the Special Rapporteur, reflects this uncertainty: “When formulating a reservation under the provisions of paragraph 1 (a) of this article [with respect to this provision, see paragraph 23 above], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty” (*ibid.*, vol. II (see footnote 23 above), p. 60). This principle met with general approval during the Commission’s debates in 1962 (see in particular Messrs Briggs (*ibid.*, vol. I, 651st meeting, p. 140, para. 23); Lachs (p. 142, para. 54); Rosenne (pp. 144–145, para. 79), who has no hesitation in speaking of a “test” (*ibid.*, p. 145, para. 82, and 653rd meeting, p. 156, para. 27); Castrén (*ibid.*, 652nd meeting, p. 148, para. 25)) and in 1965 (Messrs Yasseen (*Yearbook ... 1965*, vol. I, 797th meeting, pp. 149–150, para. 20); and Tunkin (*ibid.*, p. 150, para. 25); see, however, the objections by Messrs de Luna (*Yearbook ... 1962*, vol. I, 652nd meeting, p. 148, para. 18, and 653rd meeting, p. 160, para. 67); Gros (*ibid.*, 652nd meeting, p. 150, paras. 47–51); Ago (*ibid.*, 653rd meeting, p. 157, para. 34); and, during the debate in 1965, those of Messrs Ruda (*Yearbook ... 1965*, vol. I, 796th meeting, p. 147, para. 55, and 797th meeting, p. 154, para. 69); and Ago (*ibid.*, 798th meeting, p. 161, para. 71)). To the end, Mr. Tsuruoka, the Japanese member of the Commission, opposed subparagraph (c) and, for that reason, he abstained in the voting on draft article 18 as a whole (adopted by 16 votes to none with 1 abstention on 2 July 1965—*ibid.*, 816th meeting, p. 283, para. 42).

¹⁶⁰ See article 31, paragraph 1, of the 1969 Vienna Convention.

¹⁶¹ See Buffard and Zemanek, *loc. cit.*, pp. 320–321.

any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance” (*loc. cit.*, p. 474).

¹⁵³ Buffard and Zemanek, “The ‘object and purpose’ of a treaty: an enigma?”, p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, Aust, *op. cit.*, p. 111; Dupuy, *Droit international public*, p. 273; Fitzmaurice, “Reservations to multilateral conventions”, p. 12; Rama-Montaldo, *loc. cit.*, p. 1265; Rousseau, *Droit international public*, p. 126; Teboul, *loc. cit.*, pp. 695–696; and the first report of the Special Rapporteur, *Yearbook ... 1995* (footnote 6 above), p. 143, para. 109.

¹⁵⁴ According to Koh, “[t]he International Court thereby introduced purposive words into the vocabulary of reservations, which had previously been dominated by the term ‘consent’” (“Reservations to multilateral treaties: how international legal doctrine reflects world vision”, p. 85).

¹⁵⁵ Lijnzaad, *op. cit.*, pp. 82–83.

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

(a) *Meaning of the expression “object and purpose of the treaty”*

75. The preparatory work on this provision is of little assistance in determining the meaning of the expression.¹⁶² As has been noted,¹⁶³ the commentary to draft article 16, adopted by the—usually more prolix—Commission in 1966, is confined to a single paragraph and does not even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly through a careful (or careless?¹⁶⁴) reference to draft article 17:¹⁶⁵ “The admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States.”¹⁶⁶

76. The discussion of subparagraph (c) in the Commission¹⁶⁷ and subsequently at the United Nations Conference on the Law of Treaties¹⁶⁸ does not shed any more light on the meaning of the expression “object and purpose of the treaty” for the purposes of this provision, nor do the other provisions of the 1969 Vienna Convention that use it.

77. There are seven such provisions,¹⁶⁹ including one—article 20, paragraph 2—concerning reservations. However, none of them defines the concept of the object and purpose of the treaty or provides any particular “clues” for this purpose.¹⁷⁰ At most, one can infer that a fairly general approach is required: it is not a question of “dissecting” the treaty in minute detail and examining its provisions one by one, but of extracting the “essence”, the overall “mission” of the treaty:

(a) It is unanimously accepted that article 18 (a) of the 1969 Vienna Convention does not oblige a signatory State to *respect* the treaty, but merely to refrain from rendering

the treaty inoperative prior to its expression of consent to be bound;¹⁷¹

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

(c) Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding “the effective execution ... of the treaty *as a whole*”¹⁷² in the event that it is modified between certain of the Contracting Parties only;

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

(e) According to articles 31, paragraph 1, and 33, paragraph 4, the object and purpose of the treaty are supposed to clarify its overall meaning thereby facilitating its interpretation.¹⁷³

78. There is little doubt that the expression “object and purpose of the treaty” has the same meaning in all of these provisions: one indication of this is that Sir Humphrey Waldock, who without exaggeration can be considered to have invented or, at any rate, overseen the advent of the law of reservations to treaties in the 1969 Vienna Convention, referred to them¹⁷⁴ explicitly in order to justify the inclusion of this criterion in subparagraph (c) through a kind of *a fortiori* reasoning: since “[t]he objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty” and since “the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, be required to refrain from acts calculated to frustrate its objects”, it “would seem somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized”.¹⁷⁵ However, this does not solve the problem: there is a criterion, a unique and versatile criterion, but no definition of this criterion.

79. Nor does international jurisprudence enable us to define it, even though it is in common use.¹⁷⁶ There are, however, some helpful hints, particularly in the ICJ advisory opinion of 1951 on *Reservations to the Convention on Genocide*.¹⁷⁷

¹⁶² *Ibid.*, pp. 319–321.

¹⁶³ Redgwell, “The law of reservations in respect of multilateral conventions”, p. 7.

¹⁶⁴ Article 20 in no way resolves the issue, which is left pending.

¹⁶⁵ Future article 20 of the 1969 Vienna Convention.

¹⁶⁶ *Yearbook ... 1966* (see footnote 18 above). The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)), is no more forthcoming (see *Yearbook ... 1962* (footnote 18 above)).

¹⁶⁷ See footnote 158 above.

¹⁶⁸ It is significant that none of the amendments proposed to the Commission’s draft article 16—including the most radical ones—called this principle into question. At most, the amendments by Colombia, Spain and the United States proposed adding the concept of the “nature” of the treaty or substituting it for that of the object (see footnote 60 above).

¹⁶⁹ See articles 18, 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii) and 60, paragraph 3 (b). A connection can be made with the provisions relating to the “essential bases” or “conditions of the consent to be bound” (Reuter, “Solidarité ...”, p. 627 (and “Le développement ...”, p. 366)).

¹⁷⁰ As Buffard and Zemanek noted (*loc. cit.*, p. 322), the Commission’s commentaries to the draft article in 1966 are virtually silent on the matter.

¹⁷¹ See, for example, Reuter, *op. cit.*, p. 67, who defines the obligation arising from article 18 as an obligation of conduct; and Cahier, “L’obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur”, p. 31.

¹⁷² In this provision, the words “of the object and purpose”, which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

¹⁷³ See Pajzs, Csáky, Esterházy, *Judgment, 1936, P.C.I.J., Series A/B, No. 68*, p. 60; see also Bastid, *Les traités dans la vie internationale: conclusion et effets*, p. 131, and Sur, *L’interprétation en droit international public*, pp. 227–230.

¹⁷⁴ More precisely, to (the current) articles 18 and 31.

¹⁷⁵ Fourth report, *Yearbook ... 1965* (see footnote 20 above), p. 51, para. 6.

¹⁷⁶ Once again, see Buffard and Zemanek, *loc. cit.*, pp. 312–319, and footnote 181 below.

¹⁷⁷ See footnote 19 above.

80. The expression seems to have been used for the first time in its current form¹⁷⁸ in the PCIJ advisory opinion of 31 July 1930 on the *Greco-Bulgarian "Communities"*.¹⁷⁹ However, it was not until 1986 in the *Military and Paramilitary Activities in and against Nicaragua* case,¹⁸⁰ that ICJ put an end to what has been described as "terminological chaos"¹⁸¹ no doubt influenced by the 1969 Vienna Convention.¹⁸²

81. It is difficult, however, to infer a great deal from this relatively abundant case law regarding the method to be followed for determining the object and purpose of a given treaty: ICJ often proceeds by simple affirmations¹⁸³ and, when it seeks to justify its position, it does so empirically. At most, it may be observed that the Court has deduced the object and purpose of a treaty:

(a) From its title;¹⁸⁴

(b) From its preamble;¹⁸⁵

¹⁷⁸ Buffard and Zemanek note (*loc. cit.*, p. 315) that the expression "the aim and the scope" had already been used in *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer, Advisory Opinion*, 1926, P.C.I.J., Series B, No. 13 (p. 18), in reference to part XIII of the Treaty of Versailles. The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court's case law (*ibid.*, pp. 315–316).

¹⁷⁹ *Greco-Bulgarian "Communities"*, Advisory Opinion, 1930, P.C.I.J., Series B, No. 17, p. 21. The terms are inverted, however: the Court bases itself on "the aim and object" of the Greco-Bulgarian Convention of 27 November 1919.

¹⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 136–137, paras. 271–273, p. 138, para. 275, and p. 140, para. 280.

¹⁸¹ Buffard and Zemanek, *loc. cit.*, p. 316.

¹⁸² Henceforth, the terminology used by the Court seems to have been firmly established, see *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, I.C.J. Reports 1993, pp. 49–50, paras. 25 and 27; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 25, para. 52; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 1996, p. 813–814, paras. 27–28; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 64, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 318, para. 98; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, pp. 1072–1073, para. 43; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, pp. 502–503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 652, para. 51; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 48, para. 85; *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, *ibid.*, p. 319, para. 102; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ibid.*, p. 179, para. 109.

¹⁸³ See, for example, *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, 1927, P.C.I.J., Series B, No. 14, p. 64: "It is obvious that the object of the Treaty of Paris [of 1856] ... has been to assure freedom of navigation"; *International Status of South West Africa*, Advisory Opinion, I.C.J. Reports 1950, pp. 136–137, and the judgments of 1993, 1997, 1998, 2001 and 2004 cited above (footnote 182).

¹⁸⁴ See *Certain Norwegian Loans*, Judgment, I.C.J. Reports 1957, p. 24; but also the judgment of 1986 cited in footnote 180 above, and that of 1996 cited in footnote 181 above.

¹⁸⁵ See *Greco-Bulgarian "Communities"* (footnote 179 above), p. 19; *Rights of Nationals of the United States of America in Morocco*, Judgment, I.C.J. Reports 1952, p. 196; I.C.J. Reports 1986

(c) From an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";¹⁸⁶

(d) From an article of the treaty that demonstrates "the major concern of each contracting party"¹⁸⁷ when it concluded the treaty;

(e) From the preparatory work on the treaty;¹⁸⁸ and

(f) From its overall framework.¹⁸⁹

It is difficult, however, to regard this as a "method" properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a "general impression", in which intuition and subjectivity inevitably play a large part.¹⁹⁰

82. It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to delink the concept of the "object and purpose of the treaty" by looking first for the object and then for the purpose. For example, during the discussion of draft article 55 concerning the rule of *pacta sunt servanda*, Mr. Reuter emphasized that "the object of an obligation was one thing and its purpose was another".¹⁹¹ As has been noted, the distinction is common in French (or francophone) doctrine,¹⁹² while it provokes scepticism among authors trained in the English or German systems.¹⁹³

83. However, one (French) author has shown convincingly that "the question cannot be settled by reference to international jurisprudence",¹⁹⁴ particularly since neither the object—defined as the actual content of the treaty¹⁹⁵—still less the purpose—the outcome sought¹⁹⁶—remains immutable over time, as the theory of emergent purpose

(footnote 180 above), p. 138, para. 275; I.C.J. Reports 1994 and; I.C.J. Reports 2002 (footnote 182 above); see also the dissenting opinion of Judge Anzilotti appended to *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 50, p. 385.

¹⁸⁶ I.C.J. Reports 1996 (see footnote 182 above), p. 814, para. 28.

¹⁸⁷ I.C.J. Reports 1999 (see footnote 182 above), p. 1073, para. 43.

¹⁸⁸ Often, as a way of confirming an interpretation based on the text itself; see I.C.J. Reports 1994, pp. 27–28, paras. 55–56, I.C.J. Reports 1999, p. 1074, para. 46, and I.C.J. Reports 2004, p. 179, para. 109 (footnote 182 above); see also the dissenting opinion of Judge Anzilotti cited above in footnote 185, pp. 388–389. In its advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*, ICJ gives some weight to the "origins" of the Convention (I.C.J. Reports 1951 (footnote 19 above), p. 23).

¹⁸⁹ See *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* (footnote 178 above), *Greco-Bulgarian "Communities"* (footnote 179 above), p. 20; I.C.J. Reports 1996, p. 813, para. 27, and I.C.J. Reports 2002, p. 652, para. 51 (footnote 182 above).

¹⁹⁰ "One could just as well believe that it was simply by intuition" (Buffard and Zemanek, *loc. cit.*, p. 319).

¹⁹¹ *Yearbook ... 1964*, vol. I, 726th meeting, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see "Solidarité ...", p. 628, and *Le développement ...*, pp. 366–367).

¹⁹² See Buffard and Zemanek, *loc. cit.*, pp. 325–327.

¹⁹³ *Ibid.*, pp. 322–325 and 327–328.

¹⁹⁴ Teboul, *loc. cit.*, p. 696.

¹⁹⁵ See, for example, Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public*, p. 142: "The object of an act resides in the rights and obligations to which it gives rise."

¹⁹⁶ *Ibid.*

advanced by Fitzmaurice clearly demonstrates: “[T]he notion of object or [and?] purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention.”¹⁹⁷

84. Thus, it is hardly surprising that the attempts made in scholarly writing to define a general method for determining the object and purpose of the treaty have proved to be disappointing. The most convincing method, devised by Buffard and Zemanek, would involve a two-stage process: in the first stage, one would have “recourse to the title, preamble and, if available, programmatic articles of the treaty”;¹⁹⁸ in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty.¹⁹⁹ However, the application of this apparently logical method²⁰⁰ to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method²⁰¹ and conclude that the concept indeed remains an “enigma”.²⁰²

85. Other scholarly attempts are scarcely more convincing, despite the fact that their authors are less modest and are often categorical in defining the object and purpose of the treaty studied. Admittedly, they are often dealing with human rights conventions, which lend themselves easily to conclusions influenced by ideologically oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extreme, is tantamount to precluding any reservation from being valid).²⁰³

86. Given the great variety of situations and their susceptibility to change over time,²⁰⁴ it would appear to be impossible to devise a single set of methods for determin-

ing the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable—however, that is not uncommon in law in general and international law in particular. The basic problem is one of interpretation: *mutatis mutandis*, the “[g]eneral rule of interpretation” set forth in article 31 of the 1969 Vienna Convention and the “supplementary means of interpretation” set forth in article 32 are applicable when seeking to determine the object and purpose of a treaty.²⁰⁵

87. That conclusion, of course, is to some extent tautological,²⁰⁶ since article 31, paragraph 1, of the 1969 Vienna Convention reads:

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

However, the above provision actually relates to the interpretation of a specific clause of the treaty,²⁰⁷ and just as “[t]he objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty”,²⁰⁸ so, when it is a question of determining the object and purpose of a treaty as a whole, the treaty must be interpreted in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account practice²⁰⁹ and, when appropriate, the preparatory work of the treaty and the “circumstances of its conclusion”.²¹⁰

88. As Mr. Ago argued during the debate in the Commission on draft article 17 (article 19 of the 1969 Vienna Convention):

The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.²¹¹

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;²¹² and, on that basis, reservations

¹⁹⁷ “The law and procedure of the International Court of Justice 1951–4: treaty interpretation and other treaty points”, p. 208. See also Teboul, *loc. cit.*, p. 697, and Schabas, “Reservations to the Convention on the Rights of the Child”.

¹⁹⁸ *Loc. cit.*, p. 333.

¹⁹⁹ *Ibid.*

²⁰⁰ Although it does reverse the order stipulated in article 31 of the 1969 Vienna Convention, under which the “terms of the treaty” are the starting point for any interpretation. See also Inter-American Court of Human Rights, *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, p. 77, para. 50.

²⁰¹ The five treaties considered are the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the 1969 Vienna Convention, the general human rights conventions and the Convention on the Elimination of All Forms of Discrimination against Women and the other human rights conventions dealing with specific rights; the method proposed proves convincing only in the latter instance (Buffard and Zemanek, *loc. cit.*, pp. 334–342).

²⁰² See paragraph 72 above.

²⁰³ For a critique of this extreme view, see Schabas, “Reservations to the Convention ...”, pp. 476–477, and “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?”, pp. 291–293. On the position of the Human Rights Committee, see paragraph 100 below.

²⁰⁴ See paragraph 83 above. The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, p. 314; and Cook, “Reservations to the Convention on the Elimination of All Forms of Discrimination against Women”, pp. 706–707).

²⁰⁵ See the advisory opinion of the Inter-American Court of Human Rights concerning restrictions to the death penalty (footnote 200 above), pp. 84–85, para. 63; see also Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, p. 76. While showing that it was aware that the rules on interpretation of treaties could be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the Commission recognized that those rules constituted useful guidelines in that regard (see draft guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations), and the commentary to it, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–109). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose of the treaty itself.

²⁰⁶ See Schabas, “Reservations to human rights treaties ...”, p. 48.

²⁰⁷ As paragraph 2 of the article makes clear, by defining context as the text “including its preamble and annexes”.

²⁰⁸ Sir Humphrey Waldock in his fourth report on the law of treaties, *Yearbook ... 1965* (see footnote 20 above), p. 51, para. 6; see also paragraph 78 above.

²⁰⁹ See article 31, paragraph 3.

²¹⁰ Art. 32.

²¹¹ *Yearbook ... 1962*, vol. I, 651st meeting, p. 141, para. 35.

²¹² What is involved is to examine whether the reservation is compatible “with the general tenor” of the treaty (Mr. Bartoš, *ibid.*, p. 142, para. 40).

to the “essential”²¹³ clauses, and only to such clauses, are rejected.

89. In other words, it is the “effectiveness”,²¹⁴ the “*raison d’être*”²¹⁵ of the treaty, its “substance”²¹⁶ that is to be preserved. “It implies a distinction between all obligations in the treaty and the core obligations that are the treaty’s *raison d’être*.”²¹⁷ This should be reflected in a draft guideline 3.1.5, worded as follows:

“3.1.5 *Definition of the object and purpose of the treaty*

“For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d’être*.”

90. As to the method to be followed in each specific case to determine the object and purpose of the treaty, it is by no means easy to put together in a single formula all the elements to be taken into account. Such a process undoubtedly requires more “*esprit de finesse*” than “*esprit de géométrie*”,²¹⁸ like any act of interpretation, for that matter, in which category the process falls.²¹⁹

91. However, while the very general guidelines indicated above will, to be sure, not resolve all problems, they can certainly contribute to a solution if they are applied in good faith and with a little common sense, and it would appear to be legitimate to transpose the principles in articles 31–32 of the 1969 and 1986 Vienna Conventions applicable to the interpretation of treaties and adapt them to the determination of the object and purpose of a treaty. For that purpose, a draft guideline 3.1.6 might be worded as follows:

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

“1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

“2. For that purpose, the context includes the preamble and annexes. Recourse may also be had in particular, to the preparatory work of the treaty and the circumstances

of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties].”

92. The phrase in square brackets echoes the discussion referred to in paragraph 83 above concerning the possibility that the object and purpose of the treaty will evolve over time. But it remains to be decided whether it is preferable to include the phrase in the wording of the draft guideline itself or merely to raise the point in the commentary.

(b) *Application of the criterion*

93. In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide by which a State sought to reserve the right to commit some of the prohibited acts in its territory or in certain parts thereof would be incompatible with the object and purpose of the Convention.²²⁰ Thus, for example, Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

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

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

The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention.²²¹

²²⁰ The question is particularly relevant with regard to the scope of the infamous “colonial clause” in article XII of the Convention, a clause contested with some justification by the Soviet bloc countries, which had made reservations to it (United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2004* (United Nations publication, Sales No. E.05.V.3), vol. I, pp. 126–134); although the focus here is on the validity of that quasi-reservation clause, it does raise the question of the validity of objections to such reservations.

²²¹ United Nations, *Multilateral Treaties* ... (see footnote 220 above), p. 448; in the same vein see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom and the less explicitly justified objections of Austria and France, *ibid.*, pp. 448–450. See also the objection of Norway and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the Convention on the reduction of statelessness, *ibid.*, pp. 382–383. Another significant example is provided by the declaration of Pakistan concerning the International Convention for the Suppression of Terrorist Bombings, which excluded from the application of the Convention “struggles, including armed struggle, for the realization of the right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law”, *ibid.*, vol. II, p. 132. A number of States considered that “declaration” to be contrary to the object and purpose of the Convention, which is “the suppression of terrorist bombings, irrespective of where they take place and of who carries them out” (*ibid.*, p. 134); see the objections of Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Italy, Japan (with a particular clear statement of reasons), the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States, *ibid.*, pp. 134–139. Similarly, Finland justified its objection to the reservation made by Yemen to article 5 of the International Convention

²¹³ And not those that “related to detail only” (Mr. Paredes, *ibid.*, p. 146, para. 90).

²¹⁴ See European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 310, case of *Loizidou v. Turkey* (Preliminary Objections), judgment of 23 March 1995, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights “would ... diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)”.

²¹⁵ *I.C.J. Reports 1951* (see footnote 19 above), p. 21: “none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d’être* of the convention”.

²¹⁶ Statement by France, *Official Records of the General Assembly, Eleventh Session, Third Committee, 703rd meeting*, quoted in Kiss, *Répertoire de la pratique française en matière de droit international public*, p. 277, No. 552.

²¹⁷ Lijnzaad, *op. cit.*, p. 83; see also page 59, and Sucharipa-Behrmann, *loc. cit.*, p. 76.

²¹⁸ Pascal, *Pensées*, p. 1091.

²¹⁹ See paragraphs 89–90 above.

94. It can also happen that the prohibited reservation relates to less central provisions, but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the 1969 Vienna Convention displays towards reservations to constituent instruments of international organizations.²²² For example, the German Democratic Republic, when ratifying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.²²³ Luxembourg objected to that “declaration” (which was actually a reservation), arguing, correctly, that the effect “would be to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention”.²²⁴

95. It is clearly impossible to draw up an exhaustive list of the potential problems that may arise concerning the compatibility of a reservation with the object and purpose of the treaty. However, it is also clear that reservations to certain categories of treaties or treaty provisions or reservations having certain specific characteristics raise particular problems that should be examined, one by one, in an attempt to develop guidelines that would be helpful to States in formulating reservations of that kind or in responding to them knowledgeably. In that regard, it will be useful to examine:

- Reservations to dispute settlement clauses and clauses concerning the monitoring of the implementation of the treaty
- Reservations to general human rights treaties
- Reservations concerning the application of domestic law
- Reservations that are vague and general
- Reservations to provisions that express customary norms
- Reservations to provisions that express *jus cogens* rules or non-derogable rights.

(i) *Reservations to clauses concerning dispute settlement and the monitoring of the implementation of the treaty*

96. In his first report on the law of treaties, Fitzmaurice categorically stated: “It is considered inadmissible

that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties.”²²⁵ This position, obviously inspired by the cold-war debate on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, is too sweeping; moreover, it was rejected by ICJ, which, in its orders of 2 June 1999 in response to Yugoslavia’s requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Convention, which gives the Court jurisdiction to hear all disputes relating to the Convention,²²⁶ even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.²²⁷ In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo*, the Court came to the same conclusion with regard to the reservation of Rwanda to the same provision, stating that “that reservation does not bear on the substance of the law, but only on the Court’s jurisdiction” and that “it therefore does not appear contrary to the object and purpose of the Convention”.²²⁸ This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.²²⁹ On the other hand, it is self-evident that, if the commitment to obligatory dispute settlement is precisely the purpose of the treaty, a reservation excluding such settlement would, of course, be contrary to the object and purpose of the treaty.

²²⁵ *Yearbook ... 1956* (see footnote 22 above), p. 127, para. 96; that was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (*ibid.*, p. 115).

²²⁶ *Legality of Use of Force (Yugoslavia v. Spain) and (Yugoslavia v. United States of America), Provisional Measures, Orders of 2 June 1999, I.C.J. Reports 1999*, p. 772, paras. 29–33, and pp. 923–924, paras. 21–25, respectively.

²²⁷ See United Nations, *Multilateral Treaties ...* (footnote 220 above), pp. 129–130 (see in particular the clear objections to that effect of Brazil, China, Mexico and the Netherlands).

²²⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of 10 July 2002, I.C.J. Reports 2002*, p. 246, para. 72.

²²⁹ On this point see Riquelme Cortado, *op. cit.*, pp. 192–202. As it happens, objections to reservations to dispute settlement clauses are rare. Apart from the objections raised to reservations to article IX of the Convention on Genocide, however, see the objections formulated by several States to the reservations to article 66 of the 1969 Vienna Convention, in particular the objections of Canada, Egypt, Germany, Japan, the Netherlands (“provisions regarding the settlement of disputes, as laid down in Article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected” (United Nations, *Multilateral Treaties ...* (footnote 220 above), vol. II, p. 358)), New Zealand, Sweden (espousing essentially the same position as the United Kingdom (*ibid.*, p. 359)), the United Kingdom (“These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference” (*ibid.*, p. 360)) and the United States (which argued that the reservation of the Syrian Arab Republic “is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference” (*ibid.*, p. 361); see also paragraph 126 below).

on the Elimination of All Forms of Racial Discrimination by the argument that “provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination” (*ibid.*, vol. I, p. 145).

²²² See article 20, paragraph 3: “When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.”

²²³ See United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 297, note 7; see also Edwards Jr., “Reservations to treaties”, pp. 391–393 and 400–401.

²²⁴ United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 297. Fifteen other States raised objections on the same grounds.

97. According to the Human Rights Committee, the same holds for reservations to the International Covenant on Civil and Political Rights relating to guarantees of its implementation:

These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.²³⁰

With respect to the Optional Protocol to the above-mentioned Covenant, the Committee adds:

A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.²³¹

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.²³²

98. The European Court of Human Rights took a position that was just as extreme. In the *Loizidou* case, the Court concluded from an analysis of the object and purpose of the European Convention on Human Rights "that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions"²³³ and that any restriction

of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.²³⁴

99. Some general lessons can be drawn from the foregoing analysis and embodied in a draft guideline 3.1.13:

"3.1.13 *Reservations to treaty clauses concerning dispute settlement or the monitoring of the implementation of the treaty*

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

"(a) The provision to which the reservation relates constitutes the *raison d'être* of the treaty; or

"(b) The reservation has the effect of excluding its author from a dispute settlement or treaty implementation monitoring mechanism with respect to a treaty provision that the author has previously accepted, if the very purpose of the treaty is to put such a mechanism into effect."

(ii) *Reservations to general human rights treaties*

100. It is also in the area of human rights that the liveliest debates have taken place, particularly over reservations made to general treaties such as the European Convention on Human Rights, the American Convention on Human Rights: "Pact of San José, Costa Rica" and the African Charter on Human and Peoples' Rights or the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. In the case of the latter, the Human Rights Committee stated in its famous (and debatable) general comment No. 24 that:

In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.²³⁵

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.²³⁶ That is not, however, the position of States parties which have not systematically for-

²³⁰ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, general comment No. 24, para. 11; see also Reservations to human rights treaties: final working paper submitted by Françoise Hampson (E/CN.4/Sub.2/2004/42), para. 55.

²³¹ A/50/40 (see footnote 229 above), para. 3. In the following paragraph, the Committee "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

²³² *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex XI A, communication No. 845/1999, *Kennedy v. Trinidad and Tobago*, para. 6.7. To justify its reservation Trinidad and Tobago argued that it accepted "the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, [but it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant" (United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 227). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole.

²³³ European Court of Human Rights (see footnote 214 above), p. 28, para. 77.

²³⁴ *Ibid.*, pp. 26–30, paras. 70–89; see in particular paragraph 79. See also application No. 48787/99, *Ilie Ilaşcu and Others v. Moldova and the Russian Federation*, European Court of Human Rights, Grand Chamber decision of 4 July 2001 (unreported).

²³⁵ General comment No. 24 (see footnote 230 above), para. 7. See also E/CN.4/Sub.2/2004/42, para. 50.

²³⁶ Some authors have maintained that the reservations regime is completely incompatible with human rights. See Imbert, "Reservations and human rights ...", p. 28, who does not share this radical view; Coccia, *loc. cit.*, p. 16; Anand, "Reservations to multilateral conventions", p. 88; Imbert, *op. cit.*, p. 249; and Schabas, "Reservations to human rights treaties ...", p. 41. See also the commentaries on Human Rights Committee general comment No. 24, by Baylis, "General comment 24: confronting the problem of reservations to human rights treaties"; Redgwell, "Reservations to treaties and Human Rights Committee general comment No. 24 (52)"; Higgins, "Introduction", pp. xvii–xxix; and Korkelia, "New challenges to the regime of reservations under the International Covenant on Civil and Political Rights".

mulated objections to reservations of this type,²³⁷ and the Committee itself does not go that far because, in the paragraphs following the statement of its position of principle, it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant:²³⁸ it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be invalid as such.²³⁹

101. Likewise, in the case of the Convention on the rights of the child, a great many reservations have been made to the provisions concerning adoption.²⁴⁰ As has been noted by an author hardly to be suspected of “anti-human-rightism”: “It would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose.”²⁴¹

102. Given the wide range of practice in the matter, the Special Rapporteur believes that draft guideline 3.1.12 on this delicate issue should be drafted in a flexible way to allow sufficient leeway for interpretation. It could read as follows:

“3.1.12 *Reservations to general human rights treaties*

“To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it.”

(iii) *Reservations relating to the application of domestic law*

103. Another question frequently arises, and does so not only in the area of human rights: can a State formulate a reservation in order to safeguard the application of its domestic law?²⁴² Here again, a nuanced response is essential and it is certainly not possible to respond categorically in the negative, as would seem to be suggested by certain objections to reservations of this type. For instance, sev-

eral States have objected to the reservation made by Canada to the Convention on environmental impact assessment in a transboundary context, on the grounds that the reservation “render[s] compliance with the provisions of the Convention dependent on certain norms of Canada’s internal legislation”.²⁴³ Similarly, Finland objected to reservations made by several States to the Convention on the rights of the child on the “general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty”.²⁴⁴

104. This ground for objection is unconvincing. Doubtless, in accordance with article 27 of the 1969 Vienna Convention,²⁴⁵ no party may invoke the provisions of its domestic law as justification for failure to apply a treaty.²⁴⁶ The assumption, however, is that the problem is settled, in the sense that the provisions in question are applicable to the reserving State; but that is precisely the issue. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its domestic law, which it is not in a position to amend,²⁴⁷ at least initially.²⁴⁸ Moreover,

²⁴³ United Nations, *Multilateral Treaties* ... (see footnote 220 above), vol. II, p. 467, objection by Spain. See also those by France, Ireland, Luxembourg, Norway and Sweden, *ibid.*, pp. 468–469.

²⁴⁴ *Ibid.*, vol. I, p. 318. See also objections to the reservations of Indonesia, Malaysia, Oman, Qatar and Singapore, *ibid.*, pp. 318–319. See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, *ibid.*, pp. 129–131; for the text of the reservation itself, see paragraph 112 below. See also paragraph 110 below.

²⁴⁵ Expressly invoked, for instance, by Estonia and the Netherlands to support their objections to this same reservation by the United States, *ibid.*, p. 130.

²⁴⁶ In the words of article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46” (which has to do with imperfect ratifications). The rule set out in article 26 of the Convention concerns treaties in force; whereas, by definition, a reservation purports to exclude or to modify the legal effect of the provision in question in its application to the author of the reservation.

²⁴⁷ See Schabas, “Reservations to the Convention ...”, pp. 479–480, and “Reservations to human rights treaties”, p. 59.

²⁴⁸ Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of Estonia’s reservation to the application of article 6 (United Nations, *Treaty Series*, vol. 1967, No. A-2889, p. 280), or Lithuania’s to article 5, paragraph 3 (*ibid.*, p. 275), of the European Convention on Human Rights, which gave one-year time limits), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, commitments which were in fact kept—see United Nations, *Multilateral Treaties* ... (footnote 220 above), p. 270, note 25 and p. 272, note 40; see also Indonesia’s statement upon accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, *ibid.*, vol. II, p. 457). It is also not unusual for a State to withdraw a reservation made without any time indication after it has amended the provisions of its national law that had prompted the reservation: as in the case of the withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, vol. I, pp. 270–271, note 28, p. 271, note 32 and pp. 277–278, note 56); see further the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservation to article 6, paragraph 1, of the European Convention on Human Rights (<http://conventions.coe.int/>). Such practices are laudable and should definitely be encouraged (see guideline 2.5.3 in the Guide to Practice and the commentary to it, *Yearbook* ... 2003, vol. II (Part Two), p. 76); yet they cannot be used as an argument for the invalidity of the principle of reservations on the grounds of domestic law.

²³⁷ See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (United Nations, *Multilateral Treaties* ... (footnote 220 above), p. 180).

²³⁸ See general comment No. 24 (footnote 230 above), paras. 8–10: these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see also paragraphs 116–144 below.

²³⁹ See, however, footnote 242 below.

²⁴⁰ Arts. 20–21. See United Nations, *Multilateral Treaties* ... (footnote 220 above), pp. 308–309 and 312–317.

²⁴¹ Schabas, “Reservations to the Convention ...”, p. 480.

²⁴² In its concluding comments in 1995 on the initial report of the United States, the Human Rights Committee “regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant” (A/50/40 (see footnote 230 above), chap. VI, sect. J, para. 279). See the analysis by Schabas, “Invalid reservations ...”, and McBride, “Reservations and the capacity to implement human rights treaties”, p. 172.

article 64 of the European Convention on Human Rights does not simply authorize a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts even that authority exclusively to instances where “any law ... in force in its territory is not in conformity with the provision”.²⁴⁹ On the other hand, this same article expressly prohibits “[r]eservations of a general character”.

105. What matters here is that the State or international organization formulating the reservation should not use its domestic law²⁵⁰ as a cover for not actually accepting any new international obligation, even though a treaty would have it change its practice. While article 27 of the 1969 Vienna Convention cannot rightly be said to apply to the case in point,²⁵¹ it should nevertheless be borne in mind that national laws are “merely facts”²⁵² from the standpoint of international law and that the very aim of a treaty can be to lead States to modify them.

106. Although it might seem self-evident, it would no doubt be appropriate to establish this clearly in a draft guideline, 3.1.11:

“3.1.11 *Reservations relating to the application of domestic law*

“A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty.”

(iv) *Vague and general reservations*

107. Article 19 (c) of the 1969 Vienna Convention does not expressly refer to such reservations. Yet a general reservation must be deemed to be incompatible with the object and purpose of the Convention. The object of reservations, by their very definition, is to exclude or to modify “the legal effect of *certain provisions*” of the treaty in their application” (art. 2, para. 1 (d), of the Convention) to their authors.²⁵³

²⁴⁹ See paragraph 42 above.

²⁵⁰ The Special Rapporteur considers it a given that there is a “proper law” of international organizations which, at least as regards the point at issue here, must, *mutatis mutandis*, be considered in the same light as the domestic law of States.

²⁵¹ See paragraph 104 above.

²⁵² *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19; see also Conference on Yugoslavia: Arbitration Committee, opinion No. 1 of 29 November 1991, ILM, vol. XXXI, No. 6 (November 1992), p. 1494. The principle is confirmed in article 4 of the Commission’s draft articles on responsibility of States for internationally wrongful acts (*Yearbook ... 2001*, vol. II (Part Two), p. 26).

²⁵³ See the comments of Israel on the Commission’s first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word “some” to “certain” (fourth report by Sir Humphrey Waldock, *Yearbook ... 1965* (footnote 20 above), p. 15). See also Chile’s statement at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 31 above), 4th meeting, p. 21, para. 5: “[T]he words ‘to vary the legal effect of certain provisions of the treaty’ (sub-paragraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided.”

108. Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although “across-the-board reservations” are common practice, they are, as specified in draft guideline 1.1.1 of the Guide to Practice, valid only if they purport “to exclude or modify the legal effect ... of the treaty as a whole *with respect to certain specific aspects*”.²⁵⁴ Furthermore, it follows from the inherently consensual nature of the law of treaties in general,²⁵⁵ and the law of reservations in particular,²⁵⁶ that although States are free to *formulate* (not to *make*)²⁵⁷ reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its scope to be assessed.

109. Consequently, a reference to the domestic law of the reserving State is not *per se* the problem—there are indeed reservations of this kind that give rise to no objections and have in fact not met with objections;²⁵⁸ the problem lies in the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the United Nations Conference on the Law of Treaties seeking to add the following subparagraph (d) to future article 19 of the 1969 Vienna Convention:

²⁵⁴ *Yearbook ... 1999*, vol. II (Part Two), p. 93. See also the comments of Riquelme Cortado, *op. cit.*, p. 172.

²⁵⁵ See Reuter, *Introduction to the Law of Treaties*, pp. 23–24; and Tomuschat, *loc. cit.*, p. 466. See also, for example, S.S. “Wimbledon”, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25, and *I.C.J. Reports 1950* (footnote 183 above), p. 139.

²⁵⁶ ICJ specified in this connection in its advisory opinion of 1951 on *Reservations to the Convention on Genocide* that: “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” (*I.C.J. Reports 1951* (see footnote 19 above), p. 21). The authors of the joint dissenting opinion accompanying the advisory 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 proposal of the reservation or at the same time or later” (pp. 31–32). See also the decision of 30 June 1977 in the *English Channel* case (footnote 90 above), pp. 41–42, paras. 60–61; and Bishop Jr., *loc. cit.*, p. 255.

²⁵⁷ See paragraph 14 above.

²⁵⁸ See, for example, Mozambique’s reservation to the International Convention against the Taking of Hostages, United Nations, *Multilateral Treaties ...* (footnote 220 above), vol. II, p. 112 (a reservation regarding the extradition of Mozambican nationals that reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism, *ibid.*, p. 163); the reservations by Guatemala and the Philippines to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *ibid.*, p. 93; or the reservations by Colombia (made upon signature), the Islamic Republic of Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *ibid.*, vol. I, pp. 444–446. France’s reservation to article 15, paragraph 1, of the European Convention on Human Rights has given rise to more discussion: see Questiaux, “La Convention européenne des droits de l’homme et l’article 16 de la Constitution du 4 octobre 1958”; Pellet, “La ratification par la France de la Convention européenne des droits de l’homme”, pp. 1358–1365; and Coussirat-Coustère, “La réserve française à l’article 15 de la Convention européenne des droits de l’homme”.

The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law.²⁵⁹

110. Finland's objections to the reservations of several States parties to the Convention on the rights of the child are certainly more solidly reasoned on that ground than by a reference to article 27 of the 1969 Vienna Convention;²⁶⁰ for instance, in response to the reservation by Malaysia, which had accepted a number of the provisions of the Convention on the rights of the child "only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia",²⁶¹ Finland considered that the "broad nature" of that reservation left "open to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention".²⁶² Thailand's interpretative declaration to the effect that it "does not interpret and apply the provisions of this Convention [International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws"²⁶³ also prompted an objection on the part of Sweden that, in so doing, Thailand was making "the application of the Convention ... subject to a general reservation referring to the confines of national legislation, without specifying its contents".²⁶⁴

111. The so-called "sharia reservation"²⁶⁵ gives rise to the same objection, a case in point being the reserva-

tion by which Mauritania approved the Convention on the Elimination of All Forms of Discrimination against Women "in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with our Constitution".²⁶⁶ Here again, the problem lies not in the very fact that Mauritania is invoking a law of religious origin which it applies,²⁶⁷ but, rather that as Denmark noted, "the general reservations with reference to the provisions of Islamic law and the Constitution are of unlimited scope and undefined character".²⁶⁸ Thus, as the United Kingdom put it, such "a reservation which consists of a general reference to national law without specifying its contents does not clearly define for other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention".²⁶⁹

112. The same applies when a State reserves the general right to have its constitution prevail over a treaty;²⁷⁰ as for instance in the reservation by the United States to the Convention on the Prevention and Punishment of the Crime of Genocide:

[N]othing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.²⁷¹

113. Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they are

²⁵⁹ A/CONF.39/14 (see footnote 28 above), p. 134, para. 177 (vi); see the explanations of the representative of Peru, *Official Records of the United Nations Conference on the Law of Treaties*, 21st meeting (footnote 31 above), p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (*ibid.*, 25th meeting, p. 135, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number of delegations, like Italy, "considered it unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty" (*ibid.*, 22nd meeting, p. 120, para. 75); along these same lines, see Szafarz, *loc. cit.*, p. 302.

²⁶⁰ See paragraph 103 above. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second United States reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created "uncertainty as to the extent of the obligations the Government of the United States of America is prepared to assume with regard to the Convention" (United Nations, *Multilateral Treaties ...* (footnote 220 above), pp. 130–131) is more convincing than the argument based on an invocation of domestic law (see footnotes 245–246 above).

²⁶¹ *Ibid.*, p. 313.

²⁶² *Ibid.*, p. 318. See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*, pp. 318–322.

²⁶³ *Ibid.*, p. 142.

²⁶⁴ *Ibid.*, p. 148. See the Norwegian and Swedish objections of 15 March and 14 December 1999, which follow the same line of thinking with regard to Bangladesh's reservation to the Convention on the Political Rights of Women, in *ibid.*, vol. II, pp. 85–86, or the objections by Finland to a reservation by Guatemala to the 1969 Vienna Convention (*ibid.*, p. 357) and by Austria, the Netherlands and Sweden to a comparable reservation by Peru to the same Convention, *ibid.*, pp. 356, 358 and 360.

²⁶⁵ For a discussion of the various schools of thought, see especially Sassi, "General reservations to multilateral treaties", pp. 96–99. With regard specifically to the application of the reservation to the Convention on the Elimination of All Forms of Discrimination against Women, see Clark, *loc. cit.*, pp. 299–302 and 310–311; Connors, "The women's convention in the Muslim world"; Cook, *loc. cit.*, pp. 690–692; McBride, *loc. cit.*, pp. 149–156 (with a great many examples); and Tyagi, "The conflict of law and policy on reservations to human rights treaties", pp. 198–201, and, more specifically, Jenefsky, "Permissibility of Egypt's reservations to the Convention on the Elimination of All Forms of Discrimination against Women".

²⁶⁶ United Nations, *Multilateral Treaties ...* (see footnote 220 above), p. 244. See also the reservations by Saudi Arabia (citing "the norms of Islamic law"), *ibid.*, p. 246, and by Malaysia (*ibid.*, p. 243), or again the initial reservation by Maldives: "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded" (*ibid.*, p. 273, note 43); the latter reservation having elicited several objections, the Maldivian Government modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (*ibid.*). Likewise, several States formulated objections (*ibid.*, pp. 144–148) to the reservation by Saudi Arabia to the International Convention on the Elimination of All Forms of Racial Discrimination, which made the application of its provisions subject to the condition that "these do not conflict with the precepts of the Islamic Shariah" (*ibid.*, p. 141).

²⁶⁷ The Holy See ratified the Convention on the rights of the child provided that "the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law" (*ibid.*, p. 311). As has been pointed out (Schabas, "Reservations to the Convention ...", pp. 478–479), this text raises, *mutatis mutandis*, the same problems as the "sharia" reservation.

²⁶⁸ *Ibid.*, p. 251.

²⁶⁹ *Ibid.*, pp. 266–267. See also the objections by Austria, Finland, Germany, the Netherlands, Norway, Portugal and Sweden (*ibid.*, pp. 250, 254–255, 257, 260, 262–263 and 265–266). The reservations of many Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less uncontested on that basis, although a number of them also drew objections from some States parties. (For example, whereas Clark, *loc. cit.*, p. 300, observes that Iraq's reservation to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden (*ibid.*, pp. 259 and 265).)

²⁷⁰ See Pakistan's declaration to the Convention on the Elimination of All Forms of Discrimination against Women, *ibid.*, p. 246, and the objections made by Austria, Finland, Germany, Netherlands and Norway, *ibid.*, pp. 249, 254, 256, 260 and 262 and by Portugal, *ibid.*, p. 275, note 51.

²⁷¹ *Ibid.*, p. 128.

incompatible, which makes them fall within the purview of article 19 (c) of the 1969 Vienna Convention. As the Human Rights Committee pointed out:

Reservations must be specific and transparent, so that the Committee, those living in the territory of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.²⁷²

114. The European Court of Human Rights as well, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention on Human Rights because it was “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope”.²⁷³ But it is unquestionably the European Commission of Human Rights that most clearly formulated the principle applicable here when it judged that “[a] reservation is of a general character ... if it is worded in such a way that its scope cannot be defined”.²⁷⁴

115. Draft guideline 3.1.7 could be worded along these lines:

“3.1.7 *Vague, general reservations*

“A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.”

(v) *Reservations relating to provisions embodying customary norms*

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

of the view that the Guatemalan reservations [to the 1969 Vienna Convention] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention].²⁷⁵

²⁷² General comment No. 24 (see footnote 230 above), para. 19; see also paragraph 12, which links the issue of the invocation of domestic law to that of widely formulated reservations.

²⁷³ *Belilos* case (see footnote 98 above)—see also paragraph 42 above. For an in-depth analysis of the condition of generality raised by article 57 of the Convention, see especially Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”, pp. 97–109, and MacDonald, “Reservations under the European Convention on Human Rights”, pp. 433–438 and 443–448.

²⁷⁴ European Commission of Human Rights (see footnote 99 above), p. 149, para. 84. See also Imbert, “Reservations to the European Convention ...”, pp. 574–581.

²⁷⁵ United Nations, *Multilateral Treaties* ... (see footnote 220 above), vol. II, p. 356; see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (*ibid.*, pp. 356–357, 359 and 363). In the *English Channel* case, the United Kingdom maintained that France’s reservation to article 6 of the Convention on the Continental Shelf was aimed at “the rules of customary international law” and was “inadmissible as a reservation to Article 6” (UNRIAA (see footnote 90 above), p. 38, para. 50).

Similarly, the Netherlands objected to the reservations formulated by several States in respect of various provisions of the Vienna Convention on Diplomatic Relations and took “the view that this provision remains in force in relations between it and the said States in accordance with international customary law”.²⁷⁶

117. It has often been thought that this inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the ICJ judgment in the *North Sea Continental Shelf* cases.²⁷⁷

[S]peaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.²⁷⁸

While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context.

118. ICJ goes on to exercise caution with respect to the deductions called for by the exclusion of certain reservations. Noting that the faculty of reservation to article 6 of the Convention on the Continental Shelf (delimitation) was not excluded by article 12 on reservations,²⁷⁹ as it was in the case of articles 1–3, the Court considered it normal and

a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law.²⁸⁰

Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;²⁸¹ it simply stated that, in the case under consideration, the different treatment which the authors of the Convention

²⁷⁶ United Nations, *Multilateral Treaties* ... (see footnote 220 above), p. 96; in reality, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see paragraph 120 below). See also Poland’s objections to Bahrain’s and the Libyan Arab Jamahiriya’s reservations (*ibid.*) and Greig, *loc. cit.*, p. 88.

²⁷⁷ See the dissenting opinion of Judge Morelli, appended to the 1969 judgment (*I.C.J. Reports 1969* (footnote 89 above), pp. 198–199) and the many commentaries cited by Imbert, *op. cit.*, p. 244, footnote (20); see also Teboul, *loc. cit.*, p. 685.

²⁷⁸ *I.C.J. Reports 1969* (see footnote 89 above), pp. 38–39, para. 63.

²⁷⁹ See paragraph 39 above.

²⁸⁰ *I.C.J. Reports 1969* (see footnote 89 above), p. 40, para. 66. See also page 39, paragraph 63. In support of this position, see the separate opinion of Judge Padilla Nervo, *ibid.*, p. 89; against it, see the dissenting opinion of Vice-President Koretsky, p. 163.

²⁸¹ Imbert, *op. cit.*, p. 244; and, in the same vein, Pellet, “La CIJ et les réserves aux traités: remarques cursives sur une révolution jurisprudentielle”, pp. 507–508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to “the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty” (*I.C.J. Reports 1969* (see footnote 89 above), p. 182); this confuses the question of the faculty to make a reservation with that of the reservation’s effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature. (Strangely, Judge Tanaka considers that the equidistance principle “must be recognized as *jus cogens*”—*ibid.*)

accorded to articles 1–3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court's own conclusion.

119. Furthermore, the judgement itself states, in an often-neglected *dictum*, that “no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf]”.²⁸² Judge Morelli, dissenting, does not contradict this when he writes: “Naturally the power to make reservations affects only the contractual obligation flowing from the convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified.”²⁸³ This clearly implies that the customary nature of the norm reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: “[T]he faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law”.²⁸⁴

120. Moreover, although this principle is sometimes challenged,²⁸⁵ it is recognized in the preponderance of doctrine,²⁸⁶ and rightly so:

(a) Customary norms are binding on States, independently of their expression of consent to a conventional rule²⁸⁷ but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation²⁸⁸—providing that the latter is valid—but this is precisely the question raised;

(b) A reservation concerns only the expression of the norm in the context of the treaty, not its existence as a customary norm, even if, in some cases, it may cast doubt on the norm's general acceptance “as law”,²⁸⁹ as the United

Kingdom remarked in its observations on general comment No. 24 by the Human Rights Committee: “[T]here is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law.”²⁹⁰

(c) If this nature is clear, States remain bound by the customary norm, independently of the treaty;²⁹¹ and

(d) Appearances to the contrary, there may be an interest (and not necessarily a laudable one) involved—for example, that of avoiding application to the relevant obligations of the monitoring or dispute settlement mechanisms envisaged in the treaty or of limiting the role of domestic judges, who may have different competences with respect to conventional rules, on the one hand, and customary rules, on the other;²⁹²

(e) Furthermore, as noted by France in its observations on general comment No. 24: “[T]he State's duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves.”²⁹³

(f) And, lastly, a reservation may be the means by which a “persistent objector”²⁹⁴ manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a norm which cannot be invoked against it under general international law.

121. Here again, however, the question is whether this solution can be transposed to the field of human rights.²⁹⁵ The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.²⁹⁶

122. First, it should be noted that the Human Rights Committee confirmed that reservations to customary norms are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the

²⁸² *Ibid.*, p. 40, para. 65.

²⁸³ *Ibid.*, p. 198.

²⁸⁴ Dissenting opinion of Judge Sørensen, *ibid.*, p. 248.

²⁸⁵ See the position taken by Mr. Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the *English Channel* case (footnote 90 above), pp. 123–124.

²⁸⁶ See Coccia, *loc. cit.*, pp. 31–32; Gaja, “Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario”, pp. 451–452; Imbert, “La question des réserves ...”, p. 48; Riquelme Cortado, *op. cit.*, pp. 159–171; and Sucharipa-Behrmann, *loc. cit.*, pp. 76–77.

²⁸⁷ See Finland's objection to Yemen's reservations to article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination: “By making a reservation a State cannot contract out from universally binding human rights standards” (United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 145). But this is true as a general rule (objection cited in footnote 221 above), p. 145.

²⁸⁸ In that regard, see the dissenting opinion of Judge Sørensen in the *North Sea Continental Shelf* cases (footnote 284 above), and Coccia, *loc. cit.*, p. 32; see, however, paragraph 132 below.

²⁸⁹ Art. 38, para. 1 (b), of the ICJ Statute. In that regard, see Baxter, “Treaties and custom”, p. 50; Coccia, *loc. cit.*, p. 31; Gaja, *loc. cit.*, p. 451; and Teboul, *loc. cit.*, pp. 711–714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (see Imbert, *op. cit.*, p. 246, and Reuter, “Solidarité et divisibilité...”, p. 631 (or *Le développement de l'ordre juridique ...*, pp. 370–371), footnote 16).

²⁹⁰ A/50/40 (see footnote 230 above), vol. I, annex VI, sect. B, p. 132, para. 7.

²⁹¹ See paragraphs 126–127 below.

²⁹² Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *Recueil des décisions du Conseil d'État*, 1989 (Paris, Sirey, 1989), Frydman's conclusions, p. 190, and the 6 June 1997 decision in the *Aquarone* case, *ibid.*, 1997, Bachelier's conclusions, p. 206.

²⁹³ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, annex VI, p. 104, para. 5; in the same vein, see the comment by the United States ((A/50/40) (footnote 230 above), annex VI, sect. A, p. 127). See also Cohen-Jonathan, “Les réserves dans les traités institutionnels relatifs aux droits de l'homme: nouveaux aspects européens et internationaux”, pp. 932–933.

²⁹⁴ E/CN.4/Sub.2/2002/42 (see footnote 230 above), p. 23, note 45.

²⁹⁵ Second report of the Special Rapporteur on reservations to treaties, *Yearbook ... 1996* (see footnote 27 above), pp. 64–65, paras. 143–147.

²⁹⁶ General comment No. 24 (see footnote 230 above), p. 120, para. 8.

rights of individuals. But this premise does not have the consequences that the Committee attributes to it²⁹⁷ since, on the one hand, a reservation to a human rights treaty provision which reflects a customary norm in no way absolves the reserving State of its obligation to respect the norm as such²⁹⁸ and, on the other, in practice, it is quite likely that a reservation to such a norm (especially if the latter is peremptory) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules,²⁹⁹ but that is another problem.

123. On the more general issue of codification conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that the desire to codify is normally accompanied by a concern to preserve the rule being affirmed;³⁰⁰ if it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would fail in its objectives,³⁰¹ to the point that reservations and, at all events, multiple reservations, have been viewed as the very negation of the work of codification.³⁰²

²⁹⁷ For an opposing view, see Giegerich, "Reservations to human rights agreements admissibility, validity and review powers of treaty bodies: a constitutional approach", p. 744.

²⁹⁸ See paragraph 120 above. According to the Committee:

"[A] State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language."

(General comment No. 24 (see footnote 230 above), p. 120, para. 8).

This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the International Covenant on Civil and Political Rights are prohibited; if these rights must be respected, it is because of their customary and, in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see Gaja, "Le riserve al Patto ...", p. 452. Furthermore, the Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that "[t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*" (Meron, "The Geneva Conventions as customary law", p. 361; see also Schabas' well-argued critique concerning articles 6–7 of the Covenant, "Reservations to the Convention ...", pp. 296–310).

²⁹⁹ In that regard, see the working paper on reservations to human rights treaties submitted by Ms. Françoise Hampson (E/CN.4/Sub.2/1999/28 and Corr.1), para. 17, and her final working paper on that topic, E/CN.4/Sub.2/2004/42 (footnote 230 above), para. 51: "In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion."

³⁰⁰ Imbert, *op. cit.*; see also Teboul, *loc. cit.*, p. 680, who notes that while both are useful, the concept of a reservation is incompatible with that of a codification convention; this study gives a clear overview of the whole question of reservations to codification conventions (pp. 679–717, *passim*).

³⁰¹ Reuter, "Solidarité et divisibilité ...", p. 632 (or *Le développement de l'ordre juridique ...*, p. 371). The author adds that, for this reason, the treaty would also give rise to a situation farther from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (*ibid.*). This second statement is more debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see footnote 310 below).

³⁰² Mr. Ago, *Yearbook ... 1965*, vol. I, 797th meeting, p. 153, para. 58.

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

(a) It is certain that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty;³⁰³

(b) The very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *sensu stricto* of international law and the progressive development thereof.³⁰⁴ How many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?³⁰⁵

(c) The status of the rules included in a treaty changes over time: a rule which falls under the heading of "progressive development" may become pure codification and a "codification convention" often crystallizes into a rule of general international law a norm which was not of this nature at the time of its adoption.³⁰⁶

125. Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same restrictions) as any other treaty and the arguments that can be put forward, in general terms, in support of the ability to formulate reservations to a treaty provision that sets forth a customary norm³⁰⁷ are also fully transposable thereto. Furthermore, there is well-established practice in this area: there are more reservations to human rights treaties (which are, moreover, to a great extent codifiers of existing law) and codification treaties than to any other type of treaty.³⁰⁸ And while some objections may have been based on the customary nature of the rules concerned,³⁰⁹ the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

³⁰³ Teboul, *loc. cit.*, p. 700.

³⁰⁴ See, for example, the Commission's reports on its eighth (1956) and forty-seventh (1996) sessions, *Yearbook ... 1956*, vol. II, document A/3159, pp. 255–256, para. 26, and *Yearbook ... 1996*, vol. II (Part Two) p. 86, paras. 156–157.

³⁰⁵ Reuter, "Solidarité et divisibilité ...", p. 632 (or *Le développement de l'ordre juridique ...*, p. 371).

³⁰⁶ See paragraph 83 above; on the issue of the death penalty from the point of view of articles 6–7 of the International Covenant on Civil and Political Rights (taking a negative position), see Schabas, "Invalid reservations ...", pp. 308–310.

³⁰⁷ See paragraph 116 above.

³⁰⁸ For example, on 31 December 2004, the Vienna Convention on Diplomatic Relations was the object of 57 reservations or declarations (of which 50 are still in force) by 34 States parties (currently, 31 States have reservations still in force) (United Nations, *Multilateral Treaties ...* (footnote 220 above), pp. 90–92 and 98–100; and the 1969 Vienna Convention was the subject of 71 reservations or declarations (of which 61 are still in force) by 35 States (33 at present) (*ibid.*, vol. II, pp. 352–356). For its part, the International Covenant on Civil and Political Rights, which (now, at least) seems primarily to codify the general international law currently in force, was the object of 219 reservations or declarations (of which 197 are still in force) by 59 States (*ibid.*, pp. 174–185 and 219–223).

³⁰⁹ See paragraphs 116 and 122 above.

126. Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once established, it prevents application of the *conventional* rule which is the object of the reservation in the reserving State's relations with the other parties to the treaty, but it does not eliminate that State's obligation to respect the customary norm (the content of which may be identical).³¹⁰ The reason for this is simple and appears quite clearly in the famous ICJ *dictum* in the *Military and Paramilitary Activities in and against Nicaragua* case:

The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.³¹¹

127. Thus, the United States rightly considered, in its objection to the Syrian Arab Republic's reservation to the 1969 Vienna Convention, that

the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties.³¹²

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

[T]he faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is "generally declaratory of established principles of international law". Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.³¹³

³¹⁰ In support of this position, see Jennings and Watts, *Oppenheim's International Law*, p. 1244; Teboul, *loc. cit.*, p. 711; and Weil, "Vers une normativité relative en droit international?", pp. 43–44. See also the authors cited above in footnote 286, and Schabas, "Reservations to human rights treaties ...", p. 56. Reuter takes the opposing view, arguing that the customary norm no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a conventional mechanism subsequent to the establishment of the customary rule, its application has been suspended ("Solidarité et divisibilité ...", p. 631 (or *Le développement de l'ordre juridique ...*), p. 370); for a similar argument, see Teboul, *loc. cit.*, pp. 690 and 708. There are serious objections to this view; see paragraph 132 below.

³¹¹ *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1984, p. 424, para. 73; see also Judge Morelli's dissenting opinion (footnote 277 above), p. 198.

³¹² United Nations, *Multilateral Treaties ...* (footnote 220 above), vol. II, p. 361; see also footnotes 226–228 above, and the objections of the Netherlands and Poland (para. 116 above).

³¹³ I.C.J. Reports 1969 (see footnote 89 above), p. 248.

129. This means that the (customary) nature of the rule set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation, but that such a reservation can in no way call into question the binding nature of that particular rule in relations between the reserving State or international organization and other States or international organizations, whether or not they are parties to the treaty. These two fundamental principles should be set forth in a draft guideline 3.1.8:

"3.1.8. *Reservations to a provision that sets forth a customary norm*

"1. The customary nature of a norm set forth in a treaty provision does not in itself constitute an obstacle to the formulation of a reservation to that provision.

"2. A reservation to a treaty provision which sets forth a customary norm does not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm."

130. The somewhat complicated wording of the last part of draft guideline 3.1.8, paragraph 2, may be explained by the diversity *ratione loci* of customary norms: some may be universal in application while others have only a regional scope³¹⁴ and may even be applicable only at the purely bilateral level.³¹⁵

(vi) *Reservations to provisions setting forth rules of jus cogens or non-derogable rules*

131. According to Reuter, since a reservation, through acceptances by other parties, establishes a "contractual relationship" among the parties, a reservation to a treaty provision that sets forth a peremptory norm of general international law is inconceivable: the resulting agreement would automatically be null and void as a consequence of the principle established in article 53 of the 1969 Vienna Convention.³¹⁶

132. There are serious objections to this reasoning. It is based on one of the postulates of the "opposability" school, according to which the issue of the validity of reservations is left entirely to the subjective judgement of the Contracting Parties and depends only on the provisions of article 20 of the 1969 and 1986 Vienna Conventions.³¹⁷ This reasoning, however, is far from

³¹⁴ See the 20 November 1950 ICJ judgment in *Asylum, Judgment*, I.C.J. Reports 1950, pp. 276–277; the 18 December 1951 judgment of the Court in *Fisheries, Judgment*, I.C.J. Reports 1951, pp. 136–139; and the 27 August 1952 judgment of the Court in *Rights of Nationals of the United States of America in Morocco, Judgment*, I.C.J. Reports 1952, p. 200.

³¹⁵ See the 12 April 1960 ICJ decision in *Right of Passage over Indian Territory, Merits, Judgment*, I.C.J. Reports 1960, p. 39.

³¹⁶ "Solidarité et divisibilité ...", pp. 630–631 (or *Le développement de l'ordre juridique ...*, p. 370). See also Teboul, *loc. cit.*, pp. 690 and 707.

³¹⁷ "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty" (Ruda, *loc. cit.*, p. 190).

clear;³¹⁸ above all, it regards the reservations mechanism as a purely treaty-based process, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it “purports to exclude or to modify the legal effect of *certain provisions of the treaty** in their application”³¹⁹ to the reserving State and, if it is accepted, those are indeed its consequences;³²⁰ however, whether or not it is accepted, “neighbouring” international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.³²¹

133. Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects a peremptory norm of general international law, either without giving any explanation,³²² or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.³²³

134. This is also the position of the Human Rights Committee in its general comment No. 24:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.³²⁴

This formulation is debatable³²⁵ and, in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

135. It has, however, been asserted that the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts.³²⁶ This is certainly true and, in fact, constitutes the only intellectually convincing argument for not transposing to reservations to peremptory provisions the reasoning that would not exclude, in principle, the ability

to formulate reservations to treaty provisions embodying customary rules.³²⁷

136. When formulating a reservation a State may indeed seek to exempt itself from the rule to which the reservation itself relates and, in the case of a peremptory norm of general international law, this is out of the question³²⁸—all the more so because it is inconceivable that a persistent objector could thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,³²⁹ and on this point, there is no reason why the reasoning followed in respect of customary rules which are merely binding should not be transposed to peremptory norms. However, as regrettable as this may seem, reservations do not have to be justified, and in fact, they seldom are. In the absence of clear justification, therefore, it is impossible for the other Contracting Parties or for monitoring bodies to verify the validity of the reservation, and it is best to adopt the principle that any reservation to a provision which formulates a rule of *jus cogens* is null and void *ipso jure*.

137. This conclusion, however, must be accompanied by two major caveats. First, this prohibition does not result from article 19 (c) of the 1969 Vienna Convention but, *mutatis mutandis*, from the principle set out in article 53. Secondly, there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to “secondary” articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision.³³⁰

138. In appearance, the question of reservations to non-derogable clauses contained in human rights treaties is very similar.³³¹ States frequently justify their objections to such provisions on grounds of the treaty-based

³¹⁸ Its validity will be discussed in greater detail when the effects of reservations are discussed, probably in the eleventh report of the Special Rapporteur. In any case, it would certainly be politic for the Commission to avoid, insofar as possible, prejudging its own response to this very important and difficult issue.

³¹⁹ Art. 2, para. 1 (d) of the 1969 Vienna Convention.

³²⁰ See article 21 of the 1969 Vienna Convention.

³²¹ See paragraph 126 above.

³²² See, for example, Riquelme Cortado, *op. cit.*, p. 147. See also the second report on reservations to treaties by the Special Rapporteur, *Yearbook ... 1996* (footnote 27 above), p. 64, paras. 141–142.

³²³ See the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969* (footnote 89 above), p. 182.

³²⁴ General comment No. 24 (see footnote 230 above), para. 8. In its comments, France (A/51/40 (see footnote 293 above), p. 104, para. 3) argued with some justification that “[p]aragraph 8 ... is drafted in such a way as to link the two distinct legal concepts of ‘peremptory norms’ and rules of ‘customary international law’ to the point of confusing them”.

³²⁵ See the doubts expressed on this subject by the United States which, in its commentary on general comment No. 24, transposes to provisions which set forth peremptory norms the solution which is essential for those norms which formulate rules of customary law:

“It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations”.

(A/50/40 (see footnote 230 above), p. 127).

³²⁶ Teboul, *loc. cit.*, p. 707, footnote (52), referring to Sicault, “Du caractère obligatoire des engagements unilatéraux en droit international public”, p. 663, and the legal writings quoted.

³²⁷ This is true *a fortiori* if the reservation/acceptance “pair” is considered as an agreement amending the treaty in the relations between the two States concerned. See Coccia, *loc. cit.*, pp. 30–31; this analysis, however, is unconvincing.

³²⁸ There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*. See, however, the reservation formulated by Myanmar when it acceded, in 1991, to the Convention on the rights of the child. Myanmar reserved the right not to apply article 37 of the Convention and to exercise “powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation” in respect of children, for “the protection of the supreme national interest” (United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 326, note 29). This reservation, to which four States expressed objections (on the basis of referral to domestic legislation, not the conflict of the reservation with a peremptory norm), was withdrawn in 1993 (*ibid.*).

³²⁹ See paragraph 120 above.

³³⁰ In this regard, see, for example, the reservations of Malawi and Mexico to the International Convention against the Taking of Hostages, subjecting the application of article 16 (dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to Article 36, paragraph 2, of the ICJ Statute (United Nations, *Multilateral Treaties ...* (footnote 220 above), vol. II, p. 112. There can be no doubt that such reservations are not prohibited in principle; see paragraph 96 above.

³³¹ On this issue, see in particular Riquelme Cortado, *op. cit.*, pp. 152–159.

prohibition on suspending their application whatever the circumstances.³³²

139. Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.³³³ However, the two are not necessarily identical.³³⁴ According to the Human Rights Committee:

While there is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.³³⁵

This last point is purely a *petitio principii*, which is undoubtedly motivated by legitimate reasons of convenience but is not based on any legal principle. The Commission could endorse this position, but it should bear in mind that it would then be involved in progressive development of international law, rather than codification *sensu stricto*.

140. Incidentally, it follows *a contrario* that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation. The Inter-American Court of Human Rights declared in its advisory opinion of 8 September 1983 on the *Restrictions to the Death Penalty*:

Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.³³⁶

141. In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question

is excluded by the treaty, "with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are ... without any *caveat*, incompatible with the object and purpose of those treaties".³³⁷ This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.³³⁸ It is this second problem that needs to be resolved.

142. It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out—either because they would hold in check a peremptory norm, or because they would be contrary to the object and purpose of the treaty—this is not necessarily always the case.³³⁹ The non-derogable nature of a right protected by a human rights treaty does not in itself prevent a reservation from being formulated, provided that it applies only to certain limited aspects relating to the implementation of the right in question; but it draws attention to its importance and constitutes a useful guide for assessing the criterion of the object and purpose of the treaty.

143. This balanced solution is well illustrated by Denmark's objection to the United States reservations to articles 6–7 of the International Covenant on Civil and Political Rights:

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

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

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.³⁴⁰

³³² See article 4, paragraph 2, of the International Covenant on Civil and Political Rights, article 15, paragraph (2), of the European Convention on Human Rights (see also article 3 of Protocol No. 6, article 4, paragraph 3, of Protocol No. 7 and article 2 of Protocol No. 13), and article 27, paragraph 2, of the American Convention on Human Rights. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter of Human and Peoples' Rights contain clauses of this type (see Ouguergouz, "L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: les réponses du droit international général").

³³³ See the Human Rights Committee's general comment No. 24: "[S]ome non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms ...—the prohibition of torture and arbitrary deprivation of life are examples" (footnote 230 above), p. 121, para. 10.

³³⁴ See the Human Rights Committee's general comment No. 29, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40 (A/56/40)*, vol. I, annex VI, p. 205, para. 11. See also Riquelme Cortado, *op. cit.*, pp. 153–155, and Teraya, "Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights".

³³⁵ General comment No. 24 (see footnote 230 above), para. 10.

³³⁶ Inter-American Court of Human Rights (see footnote 200 above), pp. 83–84, para. 61.

³³⁷ *Ibid.*, Blake case, *Reparations (art. 63(1) of the American Convention on Human Rights)*, Judgment of 22 January 1999, Series C No. 48, separate opinion of Judge A. A. Cançado Trindade, p. 101, para. 11; see also the favourable comment by Riquelme Cortado, *op. cit.*, p. 155. To the same effect, see further the objection by the Netherlands (footnote 340 below).

³³⁸ See the comment by the United Kingdom on general comment No. 24 of the Human Rights Committee: "Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing" (footnote 230 above), p. 131, para. 6).

³³⁹ See the final working paper submitted by Françoise Hampson (footnote 230 above), para. 52; Higgins, "Human rights: some questions of integrity", p. 15; McBride, *loc. cit.*, pp. 163–164; Polakiewicz, *op. cit.*, p. 113, and Redgwell, "Reservations to treaties ...", p. 402; *contra*: Lijnzaad, *op. cit.*, p. 91.

³⁴⁰ United Nations, *Multilateral Treaties ...* (see footnote 220 above), p. 186; see also, although they are less clearly based on the non-derogable nature of articles 6–7, the objections of Belgium, Finland, Germany, Italy, the Netherlands (which mentions *ibid.*, p. 189) that the United States reservation to article 7 "has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted"), Norway, Portugal and Sweden (*ibid.*, pp. 186–191).

Denmark objected not because the United States reservations related to non-derogable rights, but because their wording was such that they left the essential provisions in question empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.³⁴¹

144. Naturally, the fact that a provision may in principle be the object of a derogation does not mean that all reservations relating to it will be valid.³⁴² The criterion of compatibility with the object and purpose of the treaty also applies to them.

145. This leads to several observations:

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

(b) In the first case, all reservations are prohibited because they might threaten the integrity of the peremptory norm, the application of which (unlike that of customary rules, which permit derogations) must be uniform;

(c) In the second case, however, reservations remain possible provided they do not call into question the principle set forth in the treaty provision; in that situation, the methodological guidance contained in draft guideline 3.1.6³⁴³ is fully applicable.

146. Given the fundamental distinction which must be made between these two cases, they should probably be dealt with in two separate draft guidelines:

“3.1.9 *Reservations to provisions setting forth a rule of jus cogens*

“A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

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

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

³⁴¹ See the many examples given by Schabas relating to the International Covenant on Civil and Political Rights and the European and American human rights treaties, “Reservations to human rights treaties”, pp. 51–52, footnote 51.

³⁴² See Redgwell, “Reservations to treaties ...”, p. 402.

³⁴³ “Determination of the object and purpose of the treaty” (see paragraph 91 above).

D. Determination of the validity of reservations and consequences thereof

147. It must be recognized that the notion of the object and purpose of a treaty, while less of an “enigma” than the writers would have it,³⁴⁴ does not lend itself to neat theoretical definition and inevitably leaves room for the subjectivity of the interpreter,³⁴⁵ who must, in each individual instance, make a specific assessment that takes into account, in particular, the elements referred to in draft guideline 3.1.6,³⁴⁶ bearing in mind the nature (customary, non-derogable, peremptory) of the norm to which the reservation relates (even if in actual fact such a determination is not directly linked to determination of the object and purpose³⁴⁷).

148. The resulting disadvantages, should not, however, be exaggerated. After all, the draft guidelines, which offer guidance of a general nature by which an interpreter must allow himself to be directed in good faith, are no more vague than the guiding principles derived from the rules of interpretation set out in articles 31–32 of the 1969 Vienna Convention, which are, for that matter, very similar,³⁴⁸ and have quite rightly been described as one of the crowning achievements of the Convention.³⁴⁹ And while in practice it may not be a simple matter to apply these guidelines, they do not pose insurmountable problems and are clearly quite workable in practice.

149. Consequently, even though it is perfectly true that the 1969 and 1986 Vienna Conventions do not establish any method for settling possible disputes over whether a reservation is compatible with the object and purpose of the treaty to which it relates,³⁵⁰ it is unwarranted for the commentators to focus unduly on the issue of establishing who is competent to determine the compatibility (or incompatibility) of a reservation with the object and purpose of a treaty. Furthermore, as indicated above, the very same issue arises when it comes to assessing whether a reservation is compatible with a treaty clause prohibiting the formulation of reservations or restricting the possibility of formulating them.³⁵¹

150. Keeping this in mind could help to calm down the heated debate over competence to assess the validity of reservations, and in reviewing that issue there will also be an opportunity to reconsider some of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties adopted by the Commission in 1997.³⁵² On the other hand, since it has not been

³⁴⁴ See paragraphs 72 and 84 above.

³⁴⁵ See paragraph 72 above.

³⁴⁶ See paragraph 91 above.

³⁴⁷ See above, especially paragraphs 120–125, 134–136 and 140–143.

³⁴⁸ See paragraph 86 above.

³⁴⁹ Reuter, *op. cit.*, p. 96.

³⁵⁰ See, for example, Combacau, “Logique de la validité contre logique de l’opposabilité dans la Convention de Vienne sur le droit des traités”, pp. 197–198 and 201–202; and Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, p. 331.

³⁵¹ See paragraphs 52–53 above.

³⁵² See *Yearbook ... 1997*, vol. II (Part Two), p. 56, para. 157. See also footnote 136 above.

determined which institutions are empowered to assess the validity of reservations, the result is an intertwining of powers, actual or potential, which further complicates the possible response to the crucial question of the consequences of the incompatibility of a reservation with the object and purpose of the treaty or with the treaty provisions explicitly or implicitly prohibiting certain reservations or categories of reservations.

1. COMPETENCE TO ASSESS THE VALIDITY OF RESERVATIONS

151. It goes without saying that any treaty can include a special provision establishing particular procedures for assessing the validity of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses³⁵³ of this kind is article 20, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination:

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 or inhibitive if at least two-thirds of the States Parties to this Convention object to it.*³⁵⁴

152. This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the 1969 Vienna Convention itself a mechanism enabling a majority to assess the validity of reservations.³⁵⁵

(a) Two of the four proposals submitted as rules *de lege ferenda* in 1953 by Mr. Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned.³⁵⁶

(b) Mr. Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,³⁵⁷ yet on several occasions he let it be

known that he believed that a collective assessment of the admissibility of reservations was the “ideal system”;³⁵⁸

(c) Although Sir Humphrey Waldock had also not proposed such a mechanism in his first report in 1962,³⁵⁹ several members of the Commission took up its defence;³⁶⁰

(d) During the United Nations Conference on the Law of Treaties, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea³⁶¹ was rejected by a large majority³⁶² despite the support of several delegations;³⁶³ the Expert Consultant, Sir Humphrey Waldock,³⁶⁴ and some other delegations³⁶⁵ were very doubtful about this kind of collective monitoring system.

³⁵⁸ Fitzmaurice, “Reservations ...”, p. 23.

³⁵⁹ *Yearbook ... 1962* (see footnote 23 above).

³⁶⁰ See especially Mr. Briggs, *Yearbook ... 1962*, vol. I, 651st meeting, para. 28, and 652nd meeting, paras. 73–74; Mr. Gros, 654th meeting, para. 43; Mr. Bartoš, *ibid.*, para. 56; *contra*: Mr. Rosenne, 651st meeting, para. 83; Mr. Tunkin, 653rd meeting, paras. 24–25, and 654th meeting, para. 31; Mr. Jiménez de Aréchaga, 653rd meeting, para. 47; and Mr. Amado, 654th meeting, para. 34. Sir Humphrey proposed an alternative reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the commentary on draft articles 18–20 (*Yearbook ... 1962* (see footnote 18 above), p. 179, para. (11)) and in the commentaries to draft articles 16–17 (*Yearbook ... 1966* (see footnote 18 above), p. 205, para. (11)). See also Sir Humphrey’s fourth report, *Yearbook ... 1965* (footnote 20 above), p. 49, para. 3.

³⁶¹ The amendment to article 16, paragraph 2, stipulated that, if “objections have been raised ... by a majority of the contracting States as of the time of expiry of the twelve month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect” (A/CONF.39/C.1/L.133/Rev.1), *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 28 above), para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of three months instead of 12 months. See also Japan’s statement at the Conference, *ibid.* (footnote 31 above), 21st meeting, p. 110, para. 29, and 24th meeting, p. 113, paras. 62–63; and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166, *ibid.* (footnote 28 above), p. 136, para. 179 (v) (f) and (vii)), which subsequently withdrew it (*ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that “[t]here was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty” (*ibid.* (footnote 31 above), 21st meeting, p. 114, para. 76).

³⁶² By 48 votes to 14, with 25 abstentions (*ibid.* (see footnote 28 above), p. 136, para. 182 (c)).

³⁶³ Viet Nam (*ibid.* (see footnote 31 above), 21st meeting, para. 22), Italy (22nd meeting, para. 79), China (23rd meeting, para. 3), Singapore (*ibid.*, para. 16), New Zealand (24th meeting, para. 18), India (*ibid.*, paras. 32 and 38), Zambia (*ibid.*, para. 41), Ghana (22nd meeting, paras. 71–72). Sweden, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was “no more than an attempt at solving the problem” (*ibid.*, para. 32). See also the reservations expressed by the United States (24th meeting, para. 49) and by Switzerland (25th meeting, para. 9).

³⁶⁴ With regard to the amendment proposed by Japan and other delegations (see footnote 361 above), the view of the Expert Consultant was that “proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations” (*ibid.*, 24th meeting, para. 9).

³⁶⁵ Thailand (*ibid.*, 21st meeting, para. 47), Argentina (24th meeting, para. 45), Czechoslovakia (*ibid.*, para. 69), Ethiopia (25th meeting, para. 17).

³⁵³ See, for example, Cassese, “A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)”; Redgwell, “The law of reservations ...”, pp. 13–14; and Riquelme Cortado, *op. cit.*, pp. 317–322.

³⁵⁴ Other examples are article 20 of the Convention concerning Customs Facilities for Touring, which authorizes reservations if they have been “accepted by a majority of the members of the Conference and recorded in the Final Act” (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras. 2–3); the similar clauses in article 14 of the Additional Protocol to this Convention and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles; and article 50, paragraph 3, of the Single Convention on Narcotic Drugs, 1961, and article 32, paragraph 3, of the Convention on psychotropic substances, which make the admissibility of the reservation subject to the absence of objections by one third of the contracting States.

³⁵⁵ For a summary of the discussions on the matter by the Commission and during the United Nations Conference on the Law of Treaties, see Riquelme Cortado, *op. cit.*, pp. 314–315.

³⁵⁶ Alternative drafts A and B, in the first report on the law of treaties (*Yearbook ... 1953* (footnote 22 above), pp. 91–92). Alternative drafts C and D, respectively, assigned the task of assessing the admissibility of reservations to a commission set up by the States parties and to an ICJ Chamber of Summary Procedure (*ibid.*, p. 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Mr. Lauterpacht’s second report (*Yearbook ... 1954* (footnote 22 above), p. 132).

³⁵⁷ First report (*Yearbook ... 1956* (see footnote 22 above), pp. 115–116 and 126–127).

153. One is, however, compelled to recognize that such clauses—however attractive they may seem intellectually,³⁶⁶—at all events fall short of resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them³⁶⁷ and they leave important questions unanswered:

(a) Do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4–5, of the 1969 Vienna Convention? Given the very broad latitude that States have in this regard, the answer must unquestionably be in the negative; indeed, States objecting to reservations formulated under article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination have maintained their objections³⁶⁸ even though their position did not receive the support of two thirds of the States parties, which is needed for an “objective” determination of incompatibility under article 20;

(b) On the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the validity of reservations,³⁶⁹ which raises the issue of whether the Committee’s attitude is the result of a discretionary judgement or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms take precedence over the procedures provided for in the treaty for determining the validity of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,³⁷⁰ they can do so in every instance, just as States can.

154. In reality, the controversy raging on this issue among the commentators can be ascribed to the conjunction of several factors:

³⁶⁶ It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely “to cover the position of a state which regarded as essential a point on which a two-thirds majority had not been obtained” (Mr. Jiménez de Aréchaga, *Yearbook ... 1962*, vol. I, 654th meeting, para. 37). See also the sharp criticisms by Cassese, *loc. cit.*, *passim* and, in particular, pp. 301–304.

³⁶⁷ On the question of State inertia in this regard, see the comments of the Expert Consultant during the United Nations Conference on the Law of Treaties (footnote 364 above), and Imbert, *op. cit.*, pp. 146–147, and Riquelme Cortado, *op. cit.*, pp. 316–321; see also paragraph 186 below.

³⁶⁸ See United Nations, *Multilateral Treaties ...* (footnote 220 above), pp. 144–149.

³⁶⁹ “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” (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18* (A/33/18), para. 374 (a)). On this subject, see the comments of Imbert, “Reservations and human rights ...”, pp. 41–42; and Shelton, “State practice on reservations to human rights treaties”, pp. 229–230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that “[t]he broad and imprecise nature of the State party’s general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it” (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 209).

³⁷⁰ See paragraph 157 below.

(a) The issue really arises only in connection with the human rights treaties;

(b) This is the case because, to begin with, it is in this area and only in this area that modern treaties almost invariably create mechanisms to monitor the implementation of the norms that they enact; however, while it has never been contested that a judge or an arbitrator is competent to assess the validity of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,³⁷¹ the human rights treaties endow the bodies which they establish with distinct powers (some—at the regional level—can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);

(c) This is a relatively new phenomenon which was not taken into account by the drafters of the 1969 Vienna Convention;

(d) Furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they recognized their own competence to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they have also seemed to consider that they had a decision-making power to that end, even when they are not otherwise so empowered³⁷² and, applying the “severability” theory, they have declared that the States making the reservations they have judged to be invalid are bound by the treaty, including by the provision or provisions of the treaty to which the reservations applied;³⁷³

(e) In so doing, they have aroused the opposition of States, which have no interest in being bound by a treaty beyond the limits which they accept, which they expect to be able to interpret as freely as possible; some States have reacted particularly violently and gone so far as to deny that the bodies in question have any jurisdiction in the matter;³⁷⁴

(f) This is compounded by the hypersensitivity of human rights activists and human-rights doctrine in this area, which has done nothing to calm a contentious debate that is nevertheless largely artificial.

155. In reality, the issue is unquestionably less complicated than is generally presented by commentators—which

³⁷¹ See footnote 383 below.

³⁷² See, in this connection, the comments of Aust, *op. cit.*, pp. 122–123.

³⁷³ See general comment No. 24 (footnote 230 above), para. 18; communication No. 845/1999 (footnote 232 above). This decision led the State party in question to denounce the Optional Protocol to the International Covenant on Civil and Political Rights (see United Nations, *Multilateral Treaties ...* (footnote 220 above), p. 227), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

³⁷⁴ See especially the very sharp criticisms expressed by France (A/51/40 (footnote 293 above)), pp. 104–106, by the United States (*ibid.*), p. 127, and by the United Kingdom (A/50/40 (footnote 230 above)), p. 132.

does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to rule on the validity of a reservation, when the issue comes before them in the exercise of their functions, including of course the compatibility of the reservation with the object and purpose of the treaty.³⁷⁵ Indeed, it must be acknowledged that the treaty bodies cannot carry out their mandated functions if they cannot be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the validity of reservations made by the States parties to the treaties establishing them.³⁷⁶ Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.³⁷⁷ Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the validity of a contested reservation, they may not substitute their own judgement for the State's consent to be bound by the treaty.³⁷⁸

156. It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the 1969 Vienna Convention.³⁷⁹

³⁷⁵ See paragraph 5 of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "[W]here these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them" (*Yearbook ... 1997*, vol. II (Part Two), p. 57).

³⁷⁶ For an exhaustive presentation of the position of the human rights treaty bodies, see *Yearbook ... 1996* (footnote 27 above), pp. 72–76, paras. 193–210; and Greig, *loc. cit.*, pp. 90–107; see also Riquelme Cortado, *op. cit.*, pp. 345–353, and, with particular reference to the bodies established by the European Convention on Human Rights, Cameron and Horn, *loc. cit.*, pp. 87–92.

³⁷⁷ See paragraph 8 of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role" (*Yearbook ... 1997*, vol. II (Part Two), p. 57).

³⁷⁸ The Commission has stated in that connection, in paragraphs 6 and 10 of its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, that the competence of the monitoring bodies to assess the validity of reservations "does not exclude or otherwise affect the traditional modalities of control by the contracting parties" and "that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty" (*ibid.*).

³⁷⁹ See, however, Human Rights Committee general comment No. 24 (footnote 230 above), p. 124, para. 18: "[I]t is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the International Covenant on Civil and Political Rights] for States parties in relation to human rights treaties." This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".

Similarly, nothing prevents national courts, when necessary, from assessing the validity of reservations made by a State on the occasion of a dispute brought before them,³⁸⁰ including their compatibility with the object and purpose of a treaty, since they are authorized to apply the rules of international treaty law—in the case of States parties to the Convention—or of international customary law, because the principle set out in article 19 (c) has the value of customary law.³⁸¹

157. It follows that this competence to assess the validity of a reservation can also belong to international jurisdictions or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the validity of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.³⁸² Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect. What is more, that was the position of ICJ in its advisory opinion of 1951 on *Reservations to the Convention on Genocide*:

[I]t may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention.³⁸³

158. It must therefore be concluded that the competence to assess the validity of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, their domestic courts and,

³⁸⁰ See the decision of the Swiss Federal Supreme Court of 17 December 1992 in the case of *F. v. R. and the Council of State of Thurgau Canton* (*Journal des tribunaux* (1995), pp. 523–537), and the commentary 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".

³⁸¹ See paragraph 56 above.

³⁸² In this respect, see Bourguignon, "The Belilos case: new light on reservations to multilateral treaties", p. 369, and Bowett, "Reservations ...", p. 81.

³⁸³ *I.C.J. Reports 1951* (see footnote 19 above), p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the *English Channel* case was implicitly recognized as competent to rule on the validity of the French reservations "on the basis that the three reservations to Article 6 [of the Convention on the Continental Shelf] are true reservations and admissible" (UNRIAA (footnote 90 above), p. 40, para. 56). See the position of ICJ concerning the validity of reservations (of a specific nature, it is true, and different from those covered in the Guide to Practice—see draft guideline 1.4.6 (Unilateral statements made under an optional clause) and its commentary (*Yearbook ... 2000*, vol. II (Part Two), pp. 112–114) included in optional declarations of acceptance of its obligatory jurisdiction (see in particular the judgment of 26 November 1957, *Right of Passage over Indian Territory, Preliminary Objections, Judgment*, *I.C.J. Reports 1957*, pp. 141–144; the opinions of Sir Hersch Lauterpacht, separate in the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957* (footnote 184 above) pp. 43–45) and dissenting in the case of *Interhandel, Preliminary Objections, Judgment*, *I.C.J. Reports 1959*, pp. 103–106—see also the dissenting opinions of President Klaedstad and Judge Armand-Hugon, *ibid.*, pp. 75 and 93). See further the jurisprudence cited in paragraph 96 above.

within the limits of their competence, bodies for the settlement of disputes and monitoring of the application of the treaty.

159. On the other hand, in accordance with the widely dominant principle of the “letter box” depositary³⁸⁴ endorsed by article 77 of the 1969 Vienna Convention,³⁸⁵ in principle the depositary can only take note of reservations of which it has been notified and transmit them to the contracting States³⁸⁶ without ruling on their validity.

160. In adopting draft guideline 2.1.8, however, the Commission took the view that, from the perspective of the progressive development of international law, in case of reservations that were in the depositary’s opinion manifestly [impermissible],³⁸⁷ the depositary should “draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such [impermissibility]”.³⁸⁸ It is worth noting that at that time, “[t]he Commission considered that it was not justifiable to make a distinction between the different types of ‘impermissibility’ listed in article 19”³⁸⁹ of the 1969 and 1986 Vienna Conventions.

161. The present situation regarding verification of the validity of reservations to treaties, more particularly human rights treaties, is therefore one in which there is concurrence, or at least coexistence of several mechanisms for determining the validity of reservations.³⁹⁰

(a) One of these, which constitutes ordinary law, is the purely inter-State mechanism provided for in article 20 of the 1969 and 1986 Vienna Conventions which 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 that this body can also rule on the validity of reservations;

(c) But this still leaves open the possibility for the States and international organization parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation.³⁹¹

³⁸⁴ *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3, p. 163, para. 165. See also page 161, paragraphs 158–160; see further Combacau, “Logique de la validité ...”, p. 199.

³⁸⁵ Which corresponds to article 78 of the 1986 Vienna Convention.

³⁸⁶ See *Yearbook ... 2001* (footnote 384 above), pp. 161–163, paras. 160–167, and draft guideline 2.1.7 (Functions of depositaries) of the Guide to Practice and its commentary (*Yearbook ... 2002*, vol. II (Part Two), pp. 42–45).

³⁸⁷ On the significance of the brackets, see paragraph 6 above.

³⁸⁸ Guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations), para. 1, *Yearbook ... 2002*, vol. II (Part Two), p. 45. See also paragraph 183 below.

³⁸⁹ *Yearbook ... 2002*, vol. II (Part Two), p. 45, para. (5) of the commentary to draft guideline 2.1.8.

³⁹⁰ See *Yearbook ... 1996* (footnote 27 above), pp. 76–77, paras. 211–215, on which the discussion that follows is largely based. For a very clear position in favour of the complementarity of monitoring systems, see Lijnzaad, *op. cit.*, pp. 97–98; see also Cohen-Jonathan, *loc. cit.*, p. 944.

³⁹¹ Subject, however, to the existence of “self-contained regimes”, among which those instituted by the European and American

(d) It may well be, moreover, that national courts themselves, like those in Switzerland,³⁹² also consider themselves entitled to determine the validity of a reservation in the light of international law.

162. It is clear that the multiplicity of possibilities for verification 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).³⁹³ But in fact, this risk is 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.

163. 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 Vienna Convention sets a time limit of 12 months following the date of receipt of notification of the reservation (or the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.³⁹⁴ A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional verification, which are unpredictable and depend on referral 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.³⁹⁵ Apart from the fact that none of the relevant texts currently in force provides 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 object and purpose 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,³⁹⁶ the same problem is liable to arise *a fortiori* in the monitoring bodies, as a result of which the latter may find themselves paralysed.

164. It could be concluded that the possibilities of cross-verification in fact strengthen the opportunity for the reservations regime, and in particular the principle of

conventions on human rights and the African Charter of Human and Peoples’ Rights should undoubtedly be included (see Simma, “Self-contained regimes”, pp. 129 *et seq.*, and Meron, *Human Rights and Humanitarian Norms as Customary Law*, pp. 230 *et seq.*

³⁹² See footnote 380 above.

³⁹³ See, in particular, Imbert, who refers to the risks of incompatibility within the European Convention system, in particular between the positions of the Court and the Committee of Ministers (“Reservations to the European Convention ...”, pp. 590–591).

³⁹⁴ Note, however, that the problem nevertheless arises because ratifications and accessions are spread over time.

³⁹⁵ See Imbert, *op. cit.*, p. 146, footnote (25), and “Reservations and human rights conventions”, pp. 36 and 44); *contra* Council of Europe, *Proceedings of the Fourth International Colloquy about the European Convention on Human Rights, Rome, 5–8 November 1975*, pp. 271–272; Golsong, “Les réserves aux instruments internationaux pour la protection des droits de l’homme”, p. 27; and Edwards Jr., *loc. cit.*, pp. 387–388.

³⁹⁶ See Clark, *loc. cit.*, pp. 312–314.

compatibility with the object and purpose of the treaty, to play its real role. The problem is not one of setting up one possibility against another, or of affirming the monopoly of one mechanism,³⁹⁷ but of combining them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States which wish to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

165. This situation does not exclude—in fact it implies—a degree of complementarity among the various methods of verification, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the validity of a reservation, the monitoring bodies (as well as the dispute settlement bodies) should take fully into account the positions taken by the Contracting Parties through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-thought-out and reasoned positions of those bodies, even though the bodies cannot take legally binding decisions.³⁹⁸

166. The examination of competence to assess the validity of reservations both from the viewpoint of the object and purpose of a treaty and from that of treaty clauses excluding or limiting the ability to formulate reservations provided an opportunity to “revisit” some of the preliminary conclusions adopted by the Commission in 1997,

³⁹⁷ Meanwhile it is the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee (“it is an inappropriate task for States parties in relation to human rights treaties”—general comment No. 24 (footnote 230 above), para. 18) and France (“it is [for 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”—A/51/40 (see footnote 290 above), para. 14).

³⁹⁸ See, however, the extremely strong reaction to general comment No. 24 found in the Foreign Relations Revitalization Act submitted to the United States Senate by Senator Helms on 9 June 1995 in terms of which “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 ratification of the International Covenant on Civil and Political Rights.”

(104th Congress, 1st session, S.908 (report No. 104–95, title III, chap. 2, sect. 314))

in particular paragraphs 5, 6 and 8,³⁹⁹ without taking any decisive action that would lead to a change in their meaning. It thus appears that the time has come to reformulate them in order to include them in the form of draft guidelines in the Guide to Practice, without specifically mentioning human rights treaties, even though, in practice, it is mainly in reference to them that the intertwining of powers to assess the validity of reservations poses a problem.

167. The relevant set of draft guidelines should no doubt begin with a general provision recalling that the various modalities of verification are not mutually exclusive but mutually reinforcing—in particular and including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the preliminary conclusions.⁴⁰⁰ Consequently, draft guideline 3.2 could be worded as follows:

“3.2 Competence to assess the validity of reservations

“The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

“(a) The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;

“(b) Dispute settlement bodies that may be competent to interpret or apply the treaty; and

“(c) Treaty implementation monitoring bodies that may be established by the treaty.”

168. The phrase contained in square brackets may not be necessary since domestic courts are, from the viewpoint of international law, an integral part of the “State”, and they may, if need be, engage its responsibility.⁴⁰¹ That clarification could, however, be useful to the extent that their intervention, even if it could have effects at the international level, takes place in the domestic sphere, while subparagraph (a) of the proposed draft guideline refers above all to State bodies which have the capacity to commit the State at the international level.⁴⁰² On the other hand, it would seem unnecessary to mention the (limited) role of the depositary in this area: it is the subject of draft guidelines 2.1.7 and 2.1.8 (see paragraphs 159–160 above).

169. Draft guideline 3.2 implies that the monitoring bodies established by the treaty are competent to rule

³⁹⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 57. See, in particular, paragraph 155 above.

⁴⁰⁰ “The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties” (*Yearbook ... 1997*, vol. II (Part Two), p. 57).

⁴⁰¹ See article 4 of the Commission’s draft articles on responsibility of States for internationally wrongful acts (Conduct of organs of a State), *Yearbook ... 2001*, vol. II (Part Two), p. 26, and General Assembly resolution 56/83 of 12 December 2001, annex.

⁴⁰² See article 7 of the 1969 and 1986 Vienna Conventions.

on the validity of reservations formulated by the Contracting Parties, but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties “are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them”.⁴⁰³

170. The meaning of the last phrase is illuminated by paragraph 8 of the preliminary conclusions:

The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role.⁴⁰⁴

171. A single draft guideline could establish the competence of the monitoring bodies to rule both on the validity of reservations, as seems imperative in view of the discussions on the subject, and on the limits of that power:

“3.2.1 *Competence of the monitoring bodies established by the treaty*

“1. When a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State or an international organization.

“2. The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role.”

172. It should be noted in addition that the wording of draft guideline 3.2 as proposed in paragraph 167 above takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997.⁴⁰⁵ It lists the persons or institutions competent to rule on the validity of reservations but does not specify that such powers are cumulative and not exclusive of each other. It is clearly essential that this be spelled out in a separate draft guideline:

“3.2.4 *Plurality of bodies competent to assess the validity of reservations*

“When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty.”

173. It does not seem appropriate, however, for the Commission to adopt at this stage one or more draft guidelines bearing on the consequences of the assessment of the validity of a reservation. Those consequences cannot be

determined without a thorough study of the effects of the acceptance of, and the objections to, reservations. Such a study will not be able to be carried out until next year.

174. However, the question arises as to whether the Commission intends to incorporate in the Guide to Practice, in the form of draft guidelines, the recommendations set out in paragraphs 7 and 9 of the 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties. These are formulated as follows:

7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

...

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future.⁴⁰⁶

175. It would certainly be inappropriate to include clauses of this type in draft articles intended for adoption in the form of an international convention. But such is not the case of the Guide to Practice currently being drawn up, which is understood to constitute a code of recommended practices, designed to guide the practice of States and international organizations with regard to reservations but without being legally binding.⁴⁰⁷ Moreover, the Commission already decided to include in the Guide at least one draft guideline clearly drafted in the form of a recommendation to States and international organizations.⁴⁰⁸

176. In the same spirit, the Commission might wish to recommend that States and international organizations:

(a) Include in multilateral treaties that they conclude in the future and that provide for the establishment of a monitoring body, specific clauses conferring competence on that body to assess the validity of reservations and specifying the legal effect of such assessment (or attach protocols to that end to existing treaties);

(b) Cooperate with such bodies and give due consideration to their findings as to the validity of reservations.

177. Draft guideline 3.2.2, which would meet the first of these concerns (and would reflect paragraph 7 of the Commission’s preliminary conclusions⁴⁰⁹) could be worded as follows:

“3.2.2 *Clauses specifying the competence of monitoring bodies to assess the validity of reservations*

“States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate,

⁴⁰⁶ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁴⁰⁷ See, in this connection, the commentary to draft guideline 2.5.3, *Yearbook ... 2003*, vol. II (Part Two), p. 76.

⁴⁰⁸ See draft guideline 2.5.3 (Periodic review of the usefulness of reservations), and paragraphs 2)–(3) of the commentary (*ibid.*)

⁴⁰⁹ See paragraph 174 above.

⁴⁰³ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ See footnote 400 above.

the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.”

178. The call to States and international organizations to cooperate with monitoring bodies, in paragraph 9 of the Commission’s preliminary conclusions,⁴¹⁰ could be carried over into a draft guideline 3.2.3, which should however be worded differently so as to remove the ambiguity in the wording adopted in 1997: the phrase “if such bodies were to be granted competence to that effect *in the future*” seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the validity of reservations to treaties whose observance they are required to monitor.⁴¹¹ On the other hand, they may not:

(a) Compel reserving States and international organizations to accept their findings, since they do not have general decision-making power;⁴¹² or

(b) In any case, take the place of the author of the reservation in determining the consequences of the non-validity of a reservation.⁴¹³

179. In the light of these remarks, draft guideline 3.2.3 could be worded as follows:

“3.2.3 *Cooperation of States and international organizations with monitoring bodies*

“States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body’s assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence].”

180. Although paragraph 9 of the preliminary conclusions is drafted as a recommendation (“The Commission calls upon States ...”),⁴¹⁴ it seemed possible to adopt firmer wording for draft guideline 3.2.3: there is no doubt that Contracting Parties have a general duty to cooperate with the treaty monitoring bodies that they have established and, if those bodies are vested with decision-making power, that they must abide by their decisions. However, so long as the difficult question of the effect of a finding of non-validity of reservations has not been considered, it would be premature to spell out the admissible scope of a decision to that effect. This precautionary wording would no doubt be intensified if the Commission were to retain the words between square brackets, which clearly imply that the question of the limits of the competence of the monitoring bodies in this regard remains open.

⁴¹⁰ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

⁴¹¹ See paragraph 155 above; and also *Yearbook ... 1996* (footnote 27 above), p. 75, paras. 206–209.

⁴¹² See draft guideline 3.2.1, paragraph 2 (para. 171 above), and *Yearbook ... 1996* (footnote 27 above), pp. 79–80, paras. 234–240.

⁴¹³ See paragraph 10 of the preliminary conclusions (*Yearbook ... 1997*, vol. II (Part Two), p. 57) and *Yearbook ... 1996* (footnote 27 above), pp. 77–79, paras. 218–230.

⁴¹⁴ *Yearbook ... 1997*, vol. II (Part Two), p. 57.

2. CONSEQUENCES OF THE NON-VALIDITY OF A RESERVATION

181. Just as it does not specify the consequences of the formulation of a reservation prohibited, expressly (subpara. (a) or implicitly subpara. (b)), by the treaty to which it refers, so article 19 does not allude to the effects of the formulation of a reservation prohibited by subparagraph (c),⁴¹⁵ and nothing in the text of the 1969 Vienna Convention indicates how these provisions relate to those of article 20 concerning acceptance of reservations and objections. The question has been raised as to whether this “normative gap”⁴¹⁶ may not have been deliberately created by the authors of the Convention.⁴¹⁷

182. It must in any case be acknowledged that the *travaux préparatoires* for article 19 (c) are confused and do not provide any clearer indications of any consequences that the drafters of the 1969 Vienna Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention.⁴¹⁸

(a) In draft article 17 proposed by Sir Humphrey Waldock in 1962, the object and purpose of the treaty appeared only as guidance for the reserving State itself;⁴¹⁹

(b) The debates on that draft were particularly confused during the Commission’s plenary meetings⁴²⁰ and mainly served to bring to light a split between members who advocated an individual determination by States and those who were in favour of a collegial mechanism (see paragraph 152 above), without the consequences of such determination being really discussed;

(c) However, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the validity of the reservation should be assessed.⁴²¹ This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became “The effect of reservations” instead of “The validity of reservations”,⁴²² which shows that their validity is the subject of draft article 17 (which became article 19 of the 1969 Vienna Convention);

⁴¹⁵ See Greig, *loc. cit.*, p. 83.

⁴¹⁶ Horn, *op. cit.*, p. 131; see also Combacau, “Logique de la validité ...”, p. 199.

⁴¹⁷ See Imbert, *op. cit.*, pp. 137–140.

⁴¹⁸ It should be recalled that this criterion was included in the draft belatedly, going back only to Sir Humphrey Waldock’s first report (*Yearbook ... 1962* (footnote 23 above)); see also paragraphs 72–73 above.

⁴¹⁹ Art. 17, para. 2 (a); see paragraph 73 above; see also the remarks by the Special Rapporteur at the fourteenth session (*Yearbook ... 1962*, vol. I, 651st meeting, pp. 145–146, para. 85).

⁴²⁰ See *Yearbook ... 1962*, vol. I, pp. 139–168 and 172–175.

⁴²¹ *Ibid.*, particularly pp. 225–234. During the discussion on new article 18 *bis*, entitled “The validity of reservations”, all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

⁴²² *Ibid.*, pp. 252–253.

(d) The deft wording of the commentary on draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the 1969 Vienna Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion “is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State’s acceptance or rejection of the reservation”, but only “in the absence of a tribunal or organ with standing competence”.⁴²³

(e) In his 1965 report, the Special Rapporteur, Sir Humphrey Waldock, also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, art. 20 of the 1969 Vienna Convention), that “[t]he Commission recognized that the ‘compatibility’ criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State’s acceptance or rejection of the reservation”; it also recognized that “the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication”.⁴²⁴

(f) The Commission’s commentaries on draft articles 16–17 (subsequently, 19–20 respectively) are no longer so clear, however, and confine themselves to indicating that “[t]he admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States”, and that, for that reason, draft article 16 (c) should be “read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations”.⁴²⁵

(g) At the United Nations Conference on the Law of Treaties, some delegations tried to put more content into the criterion of the object and purpose of the treaty. Accordingly, Mexico proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.⁴²⁶ But it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.⁴²⁷

183. Moreover, as noted in paragraph 52 above, nothing, either in the text of article 19 or in the *travaux*

préparatoires, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the *chapeau* of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of article 19 (a)–(b) (see paragraph 53 above), there is no reason to draw different conclusions from subparagraph (c). Three objections of unequal weight have, however, been raised to this conclusion.

184. First, it has been pointed out that whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, *prima facie*, incompatible with its object and purpose.⁴²⁸ Such indeed is the practice followed by the Secretary-General of the United Nations,⁴²⁹ albeit that its significance is only relative. For

only if there is ... no doubt* that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit ...

...

In case of doubt,* the Secretary-General shall request clarification from the State concerned ...

However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*;* rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations.⁴³⁰

In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in article 19 (a)–(b) on the one hand, and article 19 (c) on the other, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited. Furthermore, in draft guideline 2.1.8 of the Guide to Practice, the Commission, in a context of progressive development, considered that “[w]here, in the opinion of the depositary, a reservation is manifestly [impermissible],⁴³¹ the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such [impermissibility].⁴³² To that end, as is noted in paragraph 160 above: “The Commission considered that it was not justifiable to make a distinction between the different types of ‘impermissibility’ listed in article 19.”⁴³³

⁴²³ *Yearbook ... 1962* (see footnote 18 above), p. 181, para. (22).

⁴²⁴ *Yearbook ... 1965* (see footnote 20 above), p. 52, para. 9.

⁴²⁵ *Yearbook ... 1966* (see footnote 18 above).

⁴²⁶ *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 31 above), 21st meeting, p. 113, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed to cease to be in force between the reserving State and the objecting State.

⁴²⁷ See, in particular, the statements of the various delegations cited above (footnotes 361 and 363).

⁴²⁸ See Gaja, “Unruly treaty reservations”, p. 317.

⁴²⁹ See United Nations, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev. 1) (United Nations publication, Sales No. E.94.V.15), p. 57, paras. 191–192.

⁴³⁰ *Ibid.*, pp. 57–58, paras. 193 and 195–196. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he/she may consult (and does consult) the Committee of Ministers (see Polakiewicz, *op. cit.*, pp. 90–93).

⁴³¹ On the significance of these square brackets, see paragraph 193 below.

⁴³² *Yearbook ... 2002*, vol. (Part Two), p. 45.

⁴³³ *Ibid.*, p. 46, para. (5) of the commentary to draft guideline 2.1.8.

185. Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a)–(b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (“severability theory”).⁴³⁴ There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of the treaty than it is when there is a prohibition clause. The remark is certainly relevant, although not decisive. It is less obvious than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).⁴³⁵ Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition while considering that its consent to be bound by the treaty depends on the acceptance of its interpretation thereof.⁴³⁶ And, in reality, while a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, by the same token it must be aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty’s object and purpose.

186. Thirdly and most importantly, it has been argued that article 20, paragraphs 4–5, describe one single case in which the possibility of accepting a reservation is limited: when the treaty contains a contrary provision,⁴³⁷ *a contrario*, this would allow for complete freedom to accept reservations, notwithstanding the provisions of article 19 (c).⁴³⁸ While it is true that, in practice, States infrequently object to reservations which are very possibly contrary to the object and purpose of the treaty to which they relate and that, as a consequence, the rule contained in article 19 (c)⁴³⁹ is deprived of concrete effect, at least in the absence of an organ which is competent to take decisions in that regard,⁴⁴⁰ many arguments, based on the text of the 1969 Vienna Convention itself, conflict with that reasoning:

(a) Articles 19–20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens when it has been formulated;⁴⁴¹

(b) The proposed interpretation would strip article 19 (c) of all useful effect: as a consequence, a

reservation which is incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;

(c) It also renders meaningless article 21, paragraph 1, which stipulates that a reservation is “established” only “in accordance with articles 19, 20 and 23” (see paragraphs 14 above and 187 below); and

(d) It introduces a distinction between the scope of article 19 (a)–(b), on the one hand, and article 19 (c), on the other, which the text in no way authorizes (see paragraphs 52 and 183 above).

187. Consequently, there is nothing in the text of article 19 of the 1969 and 1986 Vienna Conventions, or in its context, or in the *travaux préparatoires* for the Conventions, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences, on the one hand, of the formulation of a reservation in spite of a treaty-based prohibition (art. 19 (a)–(b)) and, on the other, of its incompatibility with the object and purpose of the treaty (art. 19 (c)). This could be the subject of a new draft guideline 3.3:

“3.3 Consequences of the non-validity of a reservation

“A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.”

188. Once it has been accepted that the three subparagraphs of article 19 have the same function and that a State cannot formulate a reservation which is contrary to their provisions, it still remains to be seen what happens when, in spite of these prohibitions, a State formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its establishment “in accordance with articles 19 [in its entirety], 20 and 23”.⁴⁴² This effect, to some extent *a contrario*, of the non-validity of a reservation can be studied only in conjunction with the effects of reservations, of their acceptance and of the objections made to them.

189. But the question still remains: on the one hand, should it be concluded that, by proceeding thus, the reserving State is committing an internationally wrongful act which engages its international responsibility? On the other hand, are other States prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

190. With regard to the first of those two questions, it has been argued that a reservation which is incompatible with the object and purpose of the treaty⁴⁴³ “amounts to

⁴³⁴ Fodella, *loc. cit.*, p. 143.

⁴³⁵ See paragraphs 39–42 above.

⁴³⁶ On the distinction between reservations and simple or conditional interpretative declarations, see draft guidelines 1.3–1.3.3 of the Commission’s Guide to Practice and the commentaries thereto, *Yearbook ... 1999*, vol. II (Part Two), pp. 107–112.

⁴³⁷ The wording used in both provisions is “unless the treaty otherwise provides”.

⁴³⁸ See Greig, *loc. cit.*, pp. 134–137.

⁴³⁹ See, in particular, Carreau, *Droit international*, p. 137; Gaja, “Unruly treaty reservations”, pp. 315–318; Greig, *loc. cit.*, pp. 86–90; and Imbert, *op. cit.*, pp. 134–137.

⁴⁴⁰ See paragraphs 157–158 above; see also Coccia, *loc. cit.*, p. 33, and Szafarz, *loc. cit.*, p. 301.

⁴⁴¹ See Bowett, “Reservations ...”, p. 80, and Redgwell, “Reservations to treaties ...”, pp. 404–406.

⁴⁴² Art. 21 (Legal effects of reservations and of objections to reservations): “A reservation established with regard to another party in accordance with articles 19, 20 and 23”.

⁴⁴³ But this should also hold true *a fortiori* for reservations prohibited by the treaty.

a breach of [the] obligation” arising from article 19 (c). “Therefore, it is a wrongful act, entailing such State’s responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding ‘incompatible’ reservations.”⁴⁴⁴ This reasoning, based expressly on the rules governing the responsibility of States for internationally wrongful acts,⁴⁴⁵ is not entirely convincing.⁴⁴⁶

191. It is clear that “[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”,⁴⁴⁷ and that a breach of an obligation not to act (in this case, not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. But that question has not yet arisen in the sphere of the law of responsibility. As ICJ forcefully recalled in the case concerning the *Gabčíkovo-Nagymaros Project*, that branch of law and the law of treaties “obviously have a scope that is distinct”; while “[a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties”,⁴⁴⁸ it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined in the light of the Vienna rules and that that responsibility is not relevant to the “law of reservations”. Furthermore, even if damage is not a requirement for engaging the responsibility of a State,⁴⁴⁹ it conditions the implementation of the latter and, in particular, reparation,⁴⁵⁰ whereas, for an invalid reservation to have concrete consequences in the sphere of the law of responsibility, the State relying on it must be able to invoke an injury, which is highly unlikely.

192. But there is more. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State:

⁴⁴⁴ Coccia, *loc. cit.*, pp. 25–26.

⁴⁴⁵ See articles 1–2 of the Commission’s draft articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83, and in *Yearbook ... 2001* (footnote 401 above).

⁴⁴⁶ See Gaja, “Unruly treaty reservations”, p. 314, footnote (29).

⁴⁴⁷ Art. 12 (see footnote 445 above).

⁴⁴⁸ *I.C.J. Reports 1997* (footnote 182 above), p. 38, para. 47; see also the decision of 30 April 1990 in the case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* Affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), pp. 251–252, para. 75. On the relationship between the two branches of law, see, in particular, Bowett, “Treaties and State responsibility”; Combacau, “Logique de la validité ...”; Dupuy, “Droit des traités, codification et responsabilité internationale”; Weckel, “Convergence du droit des traités et du droit de la responsabilité internationale à la lumière de l’arrêt du 25 septembre 1997”; Weil, “Droit des traités et droit de la responsabilité”; and Yahî, “La violation d’un traité: l’articulation du droit des traités et du droit de la responsabilité internationale”.

⁴⁴⁹ See article 1 of the Commission’s draft articles (footnote 401 above).

⁴⁵⁰ See articles 31 and 34 of the Commission’s draft articles (*ibid.*), p. 28.

the consequences of the observation that a reservation is not valid may be varied,⁴⁵¹ they never constitute an obligation to make reparation and, if an objecting State were to invite the reserving State to withdraw its reservation or to amend it within the framework of the “reservations dialogue”,⁴⁵² it would not be acting in the sphere of law of responsibility, but in that of the law of treaties alone.

193. That is, moreover, the reason why the Commission, which had, at first, retained the term “*illicite*”, as an equivalent to the English word “impermissible”, to describe reservations formulated in spite of the provisions of article 19, decided, in 2002, to reserve its position on this matter pending an examination of the effect of such reservations (see paragraph 6 above). It seems certain that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of the responsibility of States for internationally wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.⁴⁵³

194. While this seems self-evident, it is nonetheless advisable to spell it out in draft guideline 3.1.1 of the Guide to Practice, in order to remove any remaining ambiguity. That guideline could read as follows:

“3.1.1 *Non-validity of reservations and responsibility*

“The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.”

195. The question still remains as to whether the other parties may, collectively or unilaterally, accept a reservation which does not fulfil the conditions set out in any of the subparagraphs of article 19. This is the central problem which divides the advocates of the opposability school from those who favour the theory of permissibility.⁴⁵⁴

⁴⁵¹ They arise, *a contrario*, from article 20 and, above all, article 21 of the 1969 and 1986 Vienna Conventions.

⁴⁵² After a great deal of thought, the Special Rapporteur has been convinced that this notion cannot be examined exclusively in relation to the procedure for the formulation of acceptances of reservations or objections, but is inextricably linked to the effects produced by the acceptance of a reservation or by objections. In contrast to what he had originally envisaged (see *Yearbook ... 2000* (footnote 27 above), p. 181, para. 222, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1–3, p. 143, para. 31, and *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 20, para. 70), the “reservations dialogue” will therefore form the subject of a subsequent report.

⁴⁵³ Nor, indeed, that of States which implicitly accept a reservation which is prohibited or incompatible with the object and purpose of the treaty (see, however, Lijnzaad, *op. cit.*, p. 56: “The responsibility for incompatible reservations is ... shared by reserving and accepting States”—but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than “responsibility” in the strictly legal sense, it is no doubt necessary to refer here to “accountability” in the sense of having to provide an explanation).

⁴⁵⁴ On these two schools, see the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995* (footnote 6 above), pp. 142–143, paras. 101–105; paragraphs 196–198 below are inspired by paragraphs 101–102 of that report; see also, in particular, Koh, *loc. cit.*, *passim*, in particular, pp. 75–77; see further Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, particularly pp. 263–269; Riquelme Cortado, *op. cit.*, pp. 73–82; and Sinclair, *op. cit.*, p. 81, endnote 78.

196. The central issue, on which the 1969 Vienna Convention hardly sheds any light, is whether the validity of reservations is an objective question or whether it depends on the subjective opinions of the other States parties. Bowett describes that issue as follows:

The issue of “permissibility” is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservations acceptable or not. The consequence of finding a reservation “impermissible” may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.⁴⁵⁵

197. This particularly authoritative opinion represents the quintessence of the “permissibility” (or “objective validity”) school. In contrast, for those authors who claim allegiance to the opposability school, in the Vienna Convention system, “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”. Hence, article 19 (c) is seen “as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.⁴⁵⁶

198. For those who espouse the thesis of opposability, the answers to questions about the validity of reservations, which are wholly subjective, are to be found in the provisions of article 20 of the 1969 and 1986 Vienna Conventions: “[T]he validity of a reservation depends, under the Convention’s system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty.”⁴⁵⁷ The advocates of the permissibility thesis, on the other hand, take it for granted that an invalid reservation cannot be invoked against other States; thus:

The issue of “opposability” is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting State, is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.⁴⁵⁸

199. Most authors, however, regardless of which of these two schools they belong to, believe that a reservation formulated in spite of a treaty-based prohibition is null and void⁴⁵⁹ and those who advocate “permissibility” consider that its formulation invalidates the expression of consent to be bound.⁴⁶⁰ If this is the case, these con-

clusions apply just as much to the question concerning the effects of a reservation formulated in spite of the provisions of article 19 (c) (see paragraph 53 above).

200. It is too early for the Commission to take a position on whether the nullity of the reservation invalidates the consent to be bound itself: this issue divides the commentators and will be settled only when the role of acceptance of, and objections to, reservations has been studied in greater depth. Nonetheless, it seems reasonable to establish as of now the solution on which those who espouse permissibility and those who espouse opposability agree, which also accords with the positions taken by the human rights treaty bodies,⁴⁶¹ namely that failure to respect the conditions for validity of formulation of reservations, laid down in article 19 of the 1969 and 1986 Vienna Conventions and repeated in draft guideline 3.1, nullifies the reservation. In other words, even if the Commission cannot yet decide on the consequences of the nullity of the reservation, it can still establish the principle of the nullity of invalid reservations in a draft guideline 3.3.2.

“3.3.2 Nullity of invalid reservations

“A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.”

201. Consequently, there is no doubt that unilateral acceptance of a reservation formulated in spite of article 19 (a)–(b), is excluded. This was very clearly confirmed during the United Nations Conference on the Law of Treaties by the Expert Consultant, Sir Humphrey Waldock, on the subject of prohibited reservations and no objections were raised.⁴⁶² For, as indicated above in paragraphs 52 and 183–187, there is no reason not to extend this common-sense solution to reservations falling under subparagraph (c). In reality, the lack of validity of reservations formulated in spite of any one of the three subparagraphs of article 19 is based on the same fundamental considerations: a State cannot blow hot and cold; a State cannot formulate a prohibited reservation or divest the treaty of its very purpose by formulating a reservation that is incompatible with the object and purpose of the treaty, without going against the principle of good faith; nor can the other parties accept such a reservation unilaterally.⁴⁶³ For the result would be to modify the treaty in the relations between the reserving State and the accepting State in a way that would be incompatible with article 41, paragraph 1 (b) (ii), of the 1969 Vienna Convention, which specifically excludes any modification of this kind if it relates “to a provision, derogation from which

⁴⁵⁵ Bowett, “Reservations ...”, p. 88.

⁴⁵⁶ Ruda, *loc. cit.*, p. 190. For similar points of view, see Combacau, *Le droit des traités*, p. 60, and *loc. cit.*, p. 200; Gaja, “Unruly treaty reservations”, pp. 313–320; Imbert, *op. cit.*, pp. 134–137; Reuter, *Introduction to the Law of Treaties*, p. 81; and Zemanek, *loc. cit.*, pp. 331–333.

⁴⁵⁷ Ruda, *loc. cit.*, p. 190.

⁴⁵⁸ Bowett, “Reservations ...”, p. 88.

⁴⁵⁹ *Ibid.*, for example, and Gaja, “Unruly treaty reservations”, pp. 318–320; see also paragraph 53 above.

⁴⁶⁰ Bowett, “Reservations ...”, p. 84; see the criticisms of these positions by Greig, *loc. cit.*, pp. 56–57. See also Tomuschat, *loc. cit.*, p. 467; and the references to the Commission’s discussions, *ibid.*, footnote 12; these discussions are less conclusive in this regard than the author would have one believe.

⁴⁶¹ *Yearbook ... 1996* (see footnote 27 above), pp. 73–74, paras. 194–201.

⁴⁶² *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 31 above), 25th meeting, p. 133, para. 2. At the plenary meeting, the representative of Canada said that he would vote for article 16 on the understanding that this interpretation was “correct”, and he was not contradicted (*ibid.* (see footnote 60 above), 10th plenary meeting, p. 30, para. 33). See also paragraphs 50–51 above, Bowett, “Reservations ...”, pp. 82–83, and Tomuschat, who notes that during the Commission’s discussions, members were unanimous on this point, *loc. cit.*, p. 467.

⁴⁶³ Lijnzaad, *op. cit.*, pp. 55–59.

is incompatible with the effective execution of the object and purpose of the treaty as a whole".⁴⁶⁴

202. As a result, acceptance by one or several Contracting Parties of a reservation that is invalid, either because it is prohibited by the treaty or because it is incompatible with its object and purpose, would not change the intrinsic nullity of the reservation: the reservation is null because it is not envisaged by the treaty, of which it destroys the equilibrium sought by all the parties, and because "certain of the parties only"⁴⁶⁵ may not call the treaty into question in their relations *inter se*. This could be stated specifically in a draft guideline 3.3.3:

"3.3.3 Effect of unilateral acceptance of an invalid reservation"

"Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation."

203. The aim of this draft guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is invalid, it remains null even if it is accepted. This observation accords with article 21, which envisages the effects of reservations only if they are "established" in accordance not only with articles 20 and 23 of the 1969 and 1986 Vienna Conventions, but also, explicitly, with article 19. Furthermore, the principle established in draft guideline 3.3.3 is in line with the provisions of article 20; it does not exclude the possibility that acceptance may have other effects, in particular, of allowing the entry into force of the treaty with regard to the reserving State or international organization.

204. This does not necessarily mean that the parties cannot agree to accept a reservation in spite of the prohibition envisaged in the treaty. Draft article 17, paragraph 1 (*b*), proposed by Sir Humphrey Waldock in 1962, envisaged "the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty";⁴⁶⁶ he provided that, in that case, "the prior consent of all the other interested States" would be required.⁴⁶⁷ This provision was not retained in the Commission's draft articles of 1962⁴⁶⁸ or 1966, nor does it appear in the 1969 Vienna Convention.⁴⁶⁹

⁴⁶⁴ In this regard, see Greig, *loc. cit.*, p. 57, and Sucharipa-Behrmann, *loc. cit.*, pp. 78–79; see, however, *contra* the comments made by Mr. Jiménez de Aréchaga and Mr. Amado during the discussions on Sir Humphrey Waldock's proposals of 1962 (*Yearbook ... 1962*, vol. I, 653rd meeting, p. 158, paras. 44–45, and p. 160, para. 63).

⁴⁶⁵ Art. 41 (Agreements to modify multilateral treaties between certain of the parties only) of the 1969 and 1986 Vienna Conventions.

⁴⁶⁶ First report on the law of treaties, *Yearbook ... 1962* (see footnote 23 above), p. 65, para. (9).

⁴⁶⁷ *Ibid.*, p. 60, art. 17, para. 1 (*b*).

⁴⁶⁸ The provision came up against opposition from Mr. Tunkin (*ibid.*, vol. I, 651st meeting, p. 140, para. 19) and Mr. Castrén (*ibid.*, p. 143, para. 68, and 652nd meeting, p. 148, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (*ibid.*, 663rd meeting, p. 221, para. 3).

⁴⁶⁹ This solution was, however, retained in the reservation clause of the European Agreement concerning the work of crews of vehicles engaged in international road transport, of which article 21, paragraph 2, provides as follows:

205. This silence does not solve the problem. Indeed, it can be argued that the parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the 1969 and 1986 Vienna Conventions and that nothing prevents them from adopting a unanimous agreement⁴⁷⁰ to that end on the subject of reservations.⁴⁷¹ This possibility, which accords with the principle of consensus that underpins all treaty law,⁴⁷² nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Conventions seems to answer this in the affirmative.

206. However, after further consideration, this is not necessarily the case: silence on the part of the State party does not mean that it is taking a position *vis-à-vis* the validity of the reservation; at most, it means that the reservation may be invoked against it⁴⁷³ and that the State undertakes not to object to it in the future.⁴⁷⁴ This is proved by the fact that it cannot be argued that monitoring bodies—whether ICJ, an arbitral tribunal or a human rights treaty body—are prevented from assessing the validity of a reservation even if no objection has been raised to it.⁴⁷⁵

"If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication, expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect."

On the basis of this provision and in the absence of an objection from the other States parties to the Agreement, the States members of the European Economic Community formulated a reservation, not authorized by the Agreement, excluding the application of the Agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, United Nations, *Multilateral Treaties ...* (footnote 220 above), pp. 838–839.

⁴⁷⁰ But not an agreement between certain of the parties only (see paragraph 202 above).

⁴⁷¹ In this regard, see Greig, *loc. cit.*, pp. 56–57, and Sucharipa-Behrmann, *loc. cit.*, p. 78. This is also the position of Bowett, but he considers that this possibility does not come under the law of reservations ("Reservations ...", p. 84; see also Redgwell, "Universality or integrity ...", p. 269).

⁴⁷² See footnotes 254–255 above. In addition, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

⁴⁷³ In this regard, Coccia, *loc. cit.* p. 26; Horn, *op. cit.*, pp. 121 and 131, and Zemanek, *loc. cit.*, pp. 331–332; see also Gaja, "Unruly treaty reservations", pp. 319–320. As pointed out quite rightly by Lijnzaad, it is not a question of acceptance *sensu stricto*: "It is the problem of inactive States, whose laxity leads to the acceptance of reservations contrary to object and purpose" (*op. cit.*, p. 56).

⁴⁷⁴ And even this is not evident; the Commission will have to resolve this important point when it discusses the question of the effects of acceptance and objections.

⁴⁷⁵ See Greig, *loc. cit.*, pp. 57–58. Even during the Commission's discussions in 1962, Mr. Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly invalid reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, p. 163, para. 29).

In the absence of practice,⁴⁷⁶ it is difficult to decide on the course to be taken; the Commission may wish to seek inspiration from the solution it chose on the subject of the late formulation of a reservation and determine that a reservation that is prohibited by the treaty or is clearly contrary to its object and purpose cannot be formulated “except if none of the other Contracting Parties objects to the late formulation of the reservation”,⁴⁷⁷ having been duly consulted by the depositary.⁴⁷⁸

⁴⁷⁶ See, however, Switzerland’s “reservation of neutrality” (Mendelson, *loc. cit.*, p. 140) to the Covenant of the League of Nations which was accepted in spite of the prohibition of reservations to the Covenant (footnote 64 above).

⁴⁷⁷ Draft guideline 2.3.1 of the Guide to Practice (*Yearbook ... 2001*, vol. II (Part Two), p. 185). See also draft guidelines 2.3.2–2.3.3 and their commentary, *ibid.*, pp. 185–191. This solution reintroduces “through the back door” the system of unanimity, which some reservation clauses already explicitly retain (see the examples given by Bishop Jr., *loc. cit.*, p. 324).

⁴⁷⁸ See draft guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations) and its commentary, *Yearbook ... 2002*, vol. II (Part Two), pp. 45–46. For more on this issue, see Riquelme Cortado, *op. cit.*, pp. 223–230.

207. In that case, a draft guideline 3.3.4 could provide as follows:

“3.3.4 *Effect of collective acceptance of an invalid reservation*

“1. A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and purpose may be formulated by a State or an international organization if none of the other Contracting Parties objects to it after having been expressly consulted by the depositary.

“2. During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, to the nature of legal problems raised by the reservation.”

208. The wording of paragraph 2 of this draft guideline is modelled on that of draft guideline 2.1.8, paragraph 2, and responds to the same imperatives.⁴⁷⁹

⁴⁷⁹ *Yearbook ... 2002*, vol. II (Part Two), pp. 45.

Annex

TEXT OF THE DRAFT GUIDELINES ON RESERVATIONS TO TREATIES PROPOSED IN THE PRESENT REPORT

3. *Validity of reservations*

3.1 *Freedom to formulate reservations*

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

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

3.1.1 *Reservations expressly prohibited by the treaty*

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

- (a) Prohibiting all reservations;
- (b) Prohibiting reservations to specified provisions;
- (c) Prohibiting certain categories of reservations.

3.1.2 *Definition of specified reservations*

For the purposes of guideline 3.1, the expression “specified reservations” means reservations that are expressly authorized by the treaty to specific provisions and which meet conditions specified by the treaty.

3.1.3 *Reservations implicitly permitted by the treaty*

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

[3.1.3/3.1.4 *Compatibility of reservations authorized by the treaty with its object and purpose*

Where the treaty expressly or implicitly authorizes certain reservations without specifying them, a reservation may be formulated by a State or an international organization only if it is compatible with the object and purpose of the treaty.]

3.1.4 *Non-specified reservations authorized by the treaty*

Where the treaty authorizes certain reservations without specifying them, a reservation may be formulated by a

State or an international organization only if it is compatible with the object and purpose of the treaty.

3.1.5 *Definition of the object and purpose of the treaty*

For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitute its *raison d'être*.

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

1. In determining the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context.

2. For that purpose, the context includes the preamble and annexes. Recourse may also be had, in particular, to the preparatory work of the treaty and the circumstances of its conclusion, and to the title of the treaty and, where appropriate, the articles that determine its basic structure [and the subsequent practice of the parties.]

3.1.7 *Vague, general reservations*

A reservation worded in vague, general language which does not allow its scope to be determined is incompatible with the object and purpose of the treaty.

3.1.8 *Reservations to a provision that sets forth a customary norm*

1. The customary nature of a norm set forth in a treaty provision shall not in itself constitute an obstacle to the formulation of a reservation to that provision.

2. A reservation to a treaty provision which sets forth a customary norm shall not affect the binding nature of the customary norm in question in relations between the reserving State or international organization and other States or international organizations which are bound by that norm.

3.1.9 *Reservations to provisions setting forth a rule of jus cogens*

A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.

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

A State or an international organization may formulate a reservation to a treaty provision relating to non-derogable rights provided that the reservation in question is not incompatible with the essential rights and obligations

arising out of that provision. In assessing the compatibility of the reservation with the object and purpose of the provision in question, account must be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

3.1.11 Reservations relating to the application of domestic law

A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty.

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the basic structure of the treaty, and the seriousness of the impact the reservation has upon it.

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

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

(a) The provision to which the reservation relates constitutes the *raison d'être* of the treaty; or

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

3.2. Competence to assess the validity of reservations

The following are competent to rule on the validity of reservations to a treaty formulated by a State or an international organization:

(a) The other contracting States [including, as applicable, their domestic courts] or other contracting organizations;

(b) Dispute settlement bodies that may be competent to interpret or apply the treaty; and

(c) Treaty implementation monitoring bodies that may be established by the treaty.

3.2.1 Competence of the monitoring bodies established by the treaty

1. Where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to

assess the validity of reservations formulated by a State or an international organization.

2. The findings made by such a body in the exercise of this competence shall have the same legal force as that deriving from the performance of its general monitoring role.

3.2.2 Clauses specifying the competence of monitoring bodies to assess the validity of reservations

States or international organizations should insert, in treaties establishing bodies to monitor their application, clauses specifying the nature and, where appropriate, the limits of the competence of such bodies to assess the validity of reservations. Protocols to existing treaties could be adopted to the same ends.

3.2.3 Cooperation of States and international organizations with monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a body to monitor its application are required to cooperate with that body and take fully into account that body's assessment of the validity of the reservations that they have formulated. When the body in question is vested with decision-making power, the author of the reservation is bound to give effect to the decision of that body [provided that it is acting within the limits of its competence.]

3.2.4 Plurality of bodies competent to assess the validity of reservations

When the treaty establishes a body to monitor its application, the competence of that body neither excludes nor affects in any other way the competence of other contracting States or other contracting international organizations to assess the validity of reservations to a treaty formulated by a State or an international organization, nor that of such dispute settlement bodies as may be competent to interpret or apply the treaty.

3.3. Consequences of the non-validity of a reservation

A reservation formulated in spite of the express or implicit prohibition arising from the provisions of the treaty or from its incompatibility with the object and purpose of the treaty is not valid, without there being any need to distinguish between these two grounds for invalidity.

3.3.1 Non-validity of reservations and responsibility

The formulation of an invalid reservation produces its effects within the framework of the law of treaties. It shall not, in itself, engage the responsibility of the State or international organization which has formulated it.

3.3.2 Nullity of invalid reservations

A reservation that does not fulfil the conditions for validity laid down in guideline 3.1 is null and void.

3.3.3 *Effect of unilateral acceptance of an invalid reservation*

Acceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation.

3.3.4 *Effect of collective acceptance of an invalid reservation*

1. A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its

object and its purpose, may be formulated by a State or an international organization if none of the other Contracting Parties object to it after having been expressly consulted by the depositary.

2. During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and where appropriate, the competent organ of the international organization concerned, to the nature of the legal problems raised by the reservation.