

RESERVATIONS TO TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/624 and Add.1–2

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

[Original: French]
[31 March, 26 May and 31 May 2010]

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Multilateral instruments cited in the present report

	<i>Source</i>
Covenant of the League of Nations (Versailles, 28 June 1919)	<i>British and Foreign State Papers</i> , 1884–1885, vol. LXXVI, p. 4.
General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (Paris, 27 August 1928)	League of Nations, <i>Treaty Series</i> , vol. XCIV, No. 2137, p. 57.
Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930)	<i>Ibid.</i> , vol. CXLIII, No. 3313, p. 257.
Convention providing a Uniform Law for Cheques (Geneva, 19 March 1931)	<i>Ibid.</i> , vol. CXLIII, No. 3316, p. 355.

Source

American Treaty on Pacific Settlement (Pact of Bogota) (Bogota, 30 April 1948)	United Nations, <i>Treaty Series</i> , vol. 30, No. 449, p. 83.
Protocol amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928 (Paris, 9 December 1948)	<i>Ibid.</i> , vol. 20, No. 318, p. 229.
Convention on the prevention and punishment of the crime of genocide (New York, 9 December 1948)	<i>Ibid.</i> , vol. 78, No. 1021, p. 277.
Revised General Act for the Pacific Settlement of International Disputes (New York, 28 April 1949)	<i>Ibid.</i> , vol. 71, No. 912, p. 101.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	<i>Ibid.</i> , vol. 75, Nos. 970–973.
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	<i>Ibid.</i> , p. 31.
Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	<i>Ibid.</i> , p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	<i>Ibid.</i> , p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	<i>Ibid.</i> , p. 287.
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. 7 to the above-mentioned Convention (Strasbourg, 22 November 1984)	<i>Ibid.</i> , vol. 1525, No. 2889, p. 195.
Customs Convention on the Temporary Importation of Private Road Vehicles (New York, 4 June 1954)	<i>Ibid.</i> , vol. 282, No. 4101, p. 249.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	<i>Ibid.</i> , vol. 660, No. 9464, p. 195.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i>
Second Optional Protocol to the International Covenant on Civil and Political Rights (New York, 15 December 1989)	<i>Ibid.</i> , vol. 1642, No. 14668, p. 414.
International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 993, No. 14531, p. 3.
International Sugar Agreement, 1968 (Geneva, 24 October 1968)	<i>Ibid.</i> , vol. 654, No. 9369, p. 3.
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, p. 123.
Convention on special missions (New York, 8 December 1969)	<i>Ibid.</i> , vol. 1400, No. 23431, p. 231.
Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents (New York, 14 December 1973)	<i>Ibid.</i> , vol. 1035, No. 15410, p. 167.
Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (Geneva, 14 November 1975)	<i>Ibid.</i> , vol. 1079, No. 16510, p. 89.
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.
Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with protocols) (Geneva, 10 October 1980)	<i>Ibid.</i> , vol. 1342, No. 22495, p. 137.

Source

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), (Geneva, 10 October 1980)	<i>Ibid.</i> , p. 171.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Ibid.</i> , vol. 1833, No. 31363, p. 3.
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. 85.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988)	United Nations, <i>Treaty Series</i> , vol. 1582, No. 27627, p. 95.
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.
European Charter for Regional or Minority Languages (Strasbourg, 5 November 1992)	<i>Ibid.</i> , vol. 2044, No. 35358, p. 575.
United Nations Convention against Corruption (New York, 31 October 2003)	<i>Ibid.</i> , vol. 2349, No. 42146, p. 41.
Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)	<i>Ibid.</i> , vol. 2515, No. 44910, p. 3.

Works cited in the present report

- ABI-SAAB, Georges
 “‘Interprétation’ et ‘Auto-interprétation’: Quelques réflexions sur leur rôle dans la formation et la résolution du différend international”, *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht. Festschrift für Rudolf Bernhardt*. Berlin, Springer, 1995, pp. 9–19.
- BARATTA, Roberto
Gli effetti delle riserve ai trattati. Milan, Giuffrè, 1999.
 “Should invalid reservations to human rights treaties be disregarded?” *European Journal of International Law*, vol. 11, No. 2, 2000, pp. 413–425.
- BOURGUIGNON, Henry J.
 “The *Belilos* case: new light on reservations to multilateral treaties”, *Virginia Journal of International Law* (Charlottesville), vol. 29, No. 2, 1989, pp. 347–386.
- BOWETT, Derek William
 “Estoppel before international tribunals and its relation to acquiescence”, *BYBIL*, vol. 33, 1957, pp. 176–202.
 “Reservations to non-restricted multilateral treaties”, *BYBIL*, vol. 48, 1976–1977, pp. 67–92.
- CAMERON, Iain and Frank HORN
 “Reservations to the European Convention on Human Rights: the *Belilos* case”, *German Yearbook of International Law*, vol. 33 (1990), pp. 69–129.
- CLARK, Belinda
 “The Vienna Convention reservations regime and the Convention on Discrimination Against Women”, *AJIL*, vol. 85 (1991), pp. 281–321.
- COCCIA, Massimo
 “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, vol. 15, No. 1, 1985, pp. 1–51.
- COHEN-JONATHAN, Gérard
 “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, *RGDIP*, vol. 93, 1989, pp. 273–315.
- CRAWFORD, James and Alain PELLET
 “Aspects des modes continentaux et Anglo-Saxons de plaidoiries devant la C.I.J.”, *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*. Leiden and Boston, Nijhoff, 2008, pp. 831–867.
- DAILLIER, Patrick, Mathias FORTEAU and Alain PELLET
Droit international public (Nguyen Quoc Dinh), 8th ed., Paris, LGDJ, 2010.
- DE VATTEL, Emer
The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, vol. III. English translation of the edition of 1758 in *The Classics of International Law*. Washington, D.C., Carnegie Institution, 1916, Book II.
- EDWARDS, Richard W., Jr.
 “Reservations to treaties”, *Michigan Journal of International Law* (Ann Arbor), vol. 10, No. 2, 1989, pp. 362–405.
- GAJA, Giorgio
 “Unruly treaty reservations”, *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Milan, Giuffrè, 1987, vol. I, pp. 307–330.
 “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, *Studi in onore di Vincenzo Starace*. Naples, Editoriale Scientifica, 2008, vol. I, pp. 349–361.
- GOODMAN, Ryan
 “Human rights treaties, invalid reservations, and State consent”, *AJIL*, vol. 96, No. 3 (July 2002), pp. 531–560.

- GREIG, D. W.
 “Reservations: equity as a balancing factor?”, *Australian Year Book of International Law*, vol. 16, 1995, pp. 21–172.
- GUGGENHEIM, Paul
 “La validité et la nullité des actes juridiques internationaux”, *Collected Courses of The Hague Academy of International Law*, vol. 74, 1949-I, pp. 191–268.
- HERDEGEN, Matthias
 “Interpretation in international law”, *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/home/EPIL>.
- HEYMANN, Monika
Eineseitige Interpretationserklärungen zu multilateralen Verträgen. Berlin, Duncker & Humblot, 2005.
- HORN, Frank
Reservations and Interpretative Declarations to Multilateral Treaties. The Hague, T.M.C. Asser Instituut, 1988.
- IMBERT, Pierre-Henri
 “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”, *AFDI*, vol. XXIV (1978), pp. 29–58.
Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l’avis consultatif donné par la Cour internationale de Justice le 28 mai 1951. Paris, Pedone, 1978.
- JENNINGS, Robert and Arthur WATTS, eds.
Oppenheim’s International Law, vol. I, Peace, parts 2–4, 9th ed., Harlow, Longman, 1992.
- KLABBERS, Jan
 “Accepting the unacceptable? A new Nordic approach to reservations to multilateral treaties”, *Nordic Journal of International Law*, vol. 69, 2000, pp. 179–193.
- KOH, Jean Kyongun
 “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, *Harvard International Law Journal*, vol. 23, 1982–1983, pp. 71–116.
- KOLB, Robert
Interprétation et création du droit international. Brussels, Bruylant, 2006.
- MARKS, Susan
 “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”, *International and Comparative Law Quarterly*, vol. 39, part 2, April 1990, pp. 300–327.
- MCRAE, D. M.
 “The legal effect of interpretative declarations”, *BYBIL*, vol. 49, 1978, pp. 155–173.
- MENDELSON, Maurice H.
 “Reservations to the constitutions of international organizations”, *BYBIL*, vol. 45, 1971, pp. 137–171.
- MÜLLER, Daniel
 “Article 20 (1969)” and “Article 20 (1969)”, in Olivier Corten and Pierre Klein, eds., *Les Conventions de Vienne sur le droit des traités: commentaire article par article*, vol. I, Brussels, Bruylant, 2006, pp. 797–882 and 883–929, respectively.
- PELLET, Alain
 “Article 19 (1969)”, in Olivier Corten and Pierre Klein, eds., *Les Conventions de Vienne sur le droit des traités: commentaire article par article*, vol. I, Brussels, Bruylant, 2006, pp. 641–788.
- REDGWELL, Catherine
 “Universality or integrity? Some reflections on reservations to general multilateral treaties”, *BYBIL*, vol. 64, 1993, pp. 245–282.
- REUTER, Paul
Introduction au droit des traités (2nd ed.). Paris, Presses universitaires de France, 1985.
Introduction au droit des traités (3rd ed.). Paris, Presses universitaires de France, 1995.
- RIQUELME CORTADO, Rosa
Las reservas a los tratados: lagunas y ambigüedades del Régimen de Viena. Murcia, Universidad de Murcia, 2004.
- RUDA, José María
 “Reservations to treaties”, *Collected Courses of The Hague Academy of International Law*, vol. 146, 1975-III, pp. 95–218.
- SALMON, Jean, ed.
Dictionnaire de droit international public. Brussels, Bruylant, 2001.
- SAPIENZA, Rosario
Dichiarazioni interpretative unilaterali e trattati internazionali. Milan, Giuffrè, 1996.
 “Les déclarations interprétatives unilatérales et l’interprétation des traités”, *RGDIP*, vol. CIII (1999), pp. 601–629.
- SCHABAS, William A.
 “Invalid reservations to the International Covenant on Civil and Political Rights: Is the United States still a party?”, *Brooklyn Journal of International Law*, vol. 21, No. 2 (1995), pp. 277–325.
- SCHERMERS, H. G.
 “The suitability of reservations to multilateral treaties”, *Netherlands International Law Review*, vol. VI, 1959, pp. 350–361.
- SIMMA, Bruno
 “Reservations to human rights treaties: some recent developments”, in Gerhard Hafner and others, eds., *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in honour of his 80th Birthday*. The Hague, Kluwer, 1998, pp. 659–682.
- SINCLAIR, Ian
The Vienna Convention on the Law of Treaties, 2nd ed. Manchester, Manchester University Press, 1984.
- SUCHARIPA-BEHRMANN, Lilly
 “The legal effects of reservations to multilateral treaties”, *Austrian Review of International and European Law*, vol. 1, 1996, pp. 67–88.
- SZAFARZ, Renata
 “Reservations to multilateral treaties”, *Polish Yearbook of International Law*, vol. 3, 1970, pp. 293–316.
- TEBOUL, Gérard
 “Remarques sur les réserves aux conventions de codification”, *RGDIP*, vol. 86, 1982, pp. 679–717.
- TOMUSCHAT, Christian
 “Admissibility and legal effects of reservations to multilateral treaties”, *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, vol. 27, 1967, pp. 463–482.
 “International law: ensuring the survival of mankind on the eve of a new century—General course on public international law”, *Collected Courses of The Hague Academy of International Law*, vol. 281, 1999, pp. 9–438.
- VOICU, Ioan
De l’interprétation authentique des traités internationaux. Paris, Pedone, 1968.
- WEIL, Prosper
 “Towards relative normativity in international law?”, *AJIL*, vol. 77, 1983, pp. 413–442.
- ZEMANEK, Karl
 “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, *Essays in International Law in Honour of Judge Manfred Lachs*. The Hague, Nijhoff, 1984, pp. 323–336.

Effects of reservations and interpretative declarations (*continued*)

A. Effects of reservations, acceptances and objections (*continued*)

1. VALID RESERVATIONS (*continued*)

(a) *Effects of an objection to a valid reservation*

1. Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation–objection pair. For example, it may choose—in accordance with article 20, paragraph 4 (*b*), 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”)—to have the treaty not enter into force as between itself and the reserving State by “definitely” expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more accurately, may refrain from expressing a contrary intention. In that case, if the treaty does, in fact, enter into force for the two parties,¹ the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the 1969 and 1986 Vienna Conventions (hereinafter “the Vienna Conventions”). Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with regard to one and the same treaty.

2. The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author’s rejection of the reservation. As ICJ clearly stated in its 1951 advisory opinion, “no State can be bound by a reservation to which it has not consented”.² This is the fundamental effect of the same principle of consent that underlies all treaty law and, in particular, the reservations regime: the treaty is the consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are “consubstantial” with the State’s consent to be bound by the treaty.³

3. Thus, objections may be analysed first and foremost as the objecting State’s refusal to consent to the reservation and, as such, they prevent the establishment of the reservation with respect to the objecting State or international organization within the meaning of article 21, paragraph 1, of the Vienna Conventions and of guideline 4.1.⁴

¹ On the issue of when the treaty enters into force for the author of the reservation, see guideline 4.2.1 (Status of the author of an established reservation) (*Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 250) and paras. 7–29 below.

² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 26.

³ See, for example, *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

⁴ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199–206.

As the Commission stressed in its commentary to guideline 2.6.1 (Definition of objections to reservations): “The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning”.⁵

4. Unlike acceptance, an objection makes the reservation inapplicable as against the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (explicitly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, definitively so, at least insofar as the effects of acceptance are concerned. In that regard, guideline 2.8.12 states: “Acceptance of a reservation cannot be withdrawn or amended”.⁶

5. In order to highlight this function of objections, which is both primary and fundamental, guideline 4.3, which begins the section of the Guide to Practice on the effects of an objection to a valid reservation, might reaffirm, on the one hand, that acceptance of a reservation is irrevocable and, on the other, that an objection makes the reservation inapplicable as against the objecting State:

“4.3 *Effect of an objection to a valid reservation*

“The formulation of an objection to a valid reservation renders the reservation inapplicable as against the objecting State or international organization unless the reservation has been established with regard to that State or international organization.”

6. However, the inapplicability of the reservation as against the objecting State or international organization is far from resolving the entire question of the effect of an objection. Inapplicability can have several different effects, both with respect to the entry into force of the treaty and, once the treaty has entered into force for the author of the reservation and the author of the objection, with respect to the actual content of the treaty relations thus established.

(i) *Entry into force of the treaty*

a. Presumption of entry into force of the treaty as between the reserving State and the objecting State

7. It is clear from article 20, paragraph 4 (*b*), of the 1986 Vienna Convention—which except for its references to a contracting international organization is identical to the corresponding provision of the 1969 Vienna Convention—that, in general, an objection to a reservation results in the entry into force of the treaty as between the objecting State and the reserving State:

An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization.

⁵ *Yearbook ... 2005*, vol. II (Part Two), p. 78, para. (13) of the commentary.

⁶ *Yearbook ... 2009*, vol. II (Part Two), p. 91.

While such a “simple” or “minimum-effect” objection⁷ does not have as its immediate effect the entry into force of the treaty in relations between the two States, as is the case with an acceptance,⁸ it does not preclude it.

8. That is not, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: “... unless a contrary intention is definitely expressed by the objecting State or organization”. Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so “definitely”.

9. The system established by the Vienna Conventions corresponds to the approach taken by ICJ in 1951: “each State objecting to it will or will not ... consider the reserving State to be a party to the Convention”.⁹

10. The nature of the presumption is surprising. Traditionally, in keeping with the principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty;¹⁰ this is what is commonly called the “maximum” effect of an objection. That outcome was necessary under the system of unanimity, in which even a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was so self-evident that the Commission’s first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

11. The “revolution” introduced by the “flexible” system advocated by Sir Humphrey Waldock¹¹ did not, however, lead to a rejection of the traditional principle whereby “the objections shall preclude the entry into force of the treaty”.¹² The Special Rapporteur did, however, allow for one major difference as compared with the traditional system since he considered that objections had only a relative effect; rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in relations between the reserving State and the objecting State.¹³

12. Nonetheless, to align the draft with the solution proposed in the 1951 advisory opinion of ICJ,¹⁴ and in

response to the criticisms and misgivings expressed by many Commission members,¹⁵ the radical solution proposed by Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹⁶

13. However, during the debate on the Commission’s draft in the Sixth Committee of the General Assembly, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would “be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States”.¹⁷ Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,¹⁸ this position was not retained in the Commission’s final draft.

14. The issue arose again, however, during the United Nations Conference on the Law of Treaties. The proposals of Czechoslovakia,¹⁹ the Syrian Arab Republic²⁰ and the Union of Soviet Socialist Republics²¹ were aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations²² as innocuous, reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.²³ That was why the notion of reversing the presumption had been rejected in 1968.²⁴ During the second session of the Conference, the Union

¹⁵ See, for example, Tunkin (*Yearbook ... 1962*, vol. I, 653rd meeting, p. 156, para. 26; and 654th meeting, p. 161, para. 11), Rosenne (*ibid.*, 653rd meeting, para. 30), Jiménez de Aréchaga (*ibid.*, p. 158, para. 48), de Luna (*ibid.*, p. 160, para. 66), Yasseen (*ibid.*, 654th meeting, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (*ibid.*, pp. 162, paras. 17 and 20).

¹⁶ *Yearbook ... 1962*, vol. II, p. 176 and p. 181, para. (23).

¹⁷ See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 48.

¹⁸ See comments by Tunkin (*Yearbook ... 1965*, vol. I, 799th meeting, p. 167, para. 39) and Lachs (*ibid.*, 813th meeting, p. 268, para. 62).

¹⁹ A/CONF.39/C.1/L.85, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference (A/CONF.39/11/Add.2) (United Nations publication, Sales No. E.70.V.5), p. 135.

²⁰ A/CONF.39/C.1/L.94, *ibid.*

²¹ A/CONF.39/C.1/L.115, *ibid.*, p. 133.

²² The United Arab Republic considered, for example, that those amendments were purely drafting amendments (*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) (A/CONF.39/11) (United Nations publication, Sales No. E.68.V.7), 24th meeting, p. 127, para. 24).

²³ See comments of Sweden on this subject, who noted that “the International Law Commission’s formula might have the advantage of dissuading States from formulating reservations” (*ibid.*, 22nd meeting, p. 117, para. 35). Poland supported the amendments precisely because they favoured the acceptance of reservations and the establishment of a contractual relationship (*ibid.*), which for Argentina “would be going too far in applying the principle of flexibility” (*ibid.*, 24th meeting, p. 129, para. 43).

²⁴ *Ibid.*, 25th meeting, p. 135, paras. 35 *et seq.*

⁷ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535 and Add.1, p. 47, para. 95. See also Riquelme Cortado, *Las reservas a los tratados: lagunas y ambigüedades del Régimen de Viena*, pp. 279–280; and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, pp. 170–172.

⁸ Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State (see guidelines 4.2.1 to 4.2.3 and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 239–252).

⁹ See footnote 2 above.

¹⁰ Imbert, *Les réserves aux traités multilatéraux*, pp. 155 and 260.

¹¹ Pellet, “Article 19 (1969)”, pp. 664–668, paras. 44–55.

¹² See draft article 19, para. 4 (c), presented by Sir Humphrey in 1962 in his first report on the law of treaties (*Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, Reuter, *Introduction au droit des traités*, 2nd ed., p. 75, para. 132.

¹³ On this point, see also the Commission’s commentary to draft article 20, para. 2 (b) (*Yearbook ... 1962*, vol. II, p. 181, para. (23)).

¹⁴ See footnote 2 above.

of Soviet Socialist Republics once again submitted a similar amendment,²⁵ debated at length, insisting on the sovereign right of each State to formulate a reservation and relying on the Court's 1951 advisory opinion.²⁶ That amendment was finally adopted²⁷ and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

15. The difficulties that the Conference encountered in adopting the amendment of the Union of Soviet Socialist Republics show clearly that reversal of the presumption was not as innocuous as Sir Humphrey Waldock, then Expert Consultant to the Conference, indicated. The problem is not merely that of “formulating a rule one way or the other”:²⁸ this new formula, in particular, is at the root of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.²⁹

16. Nonetheless, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. It was simply transposed by the Commission during the drafting of the 1986 Vienna Convention. In the *travaux* on reservations to treaties, it seemed neither possible nor truly necessary to undo the last-minute compromise that had been struck at the United Nations Conference on the Law of Treaties—however odd it might be. According to the presumption that is now part of positive international law, the rule remains that an objection does not preclude the entry into force of a treaty except for cases where there is no treaty relationship between the author of the objection and the author of the reservation.

- b. Effect of an objection with maximum effect: exclusion of treaty relations between the author of the objection and the author of the reservation

17. Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in accordance with guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty).³⁰ In this case, the objection produces its “maximum effect”.

²⁵ A/CONF.39/L.3, *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference, A/CONF.39/11/Add.2, p. 135, para. 179 (v) (a).

²⁶ Notably the answer to the second question, in which the Court held that the State that has formulated an objection “can in fact consider that the reserving State is not party to the Convention” (*I.C.J. Reports 1951*, p. 30).

²⁷ By 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.39/11/Add.1 (United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, p. 35, para. 79).

²⁸ *Ibid.*, p. 34, para. 74. See also Imbert, *op. cit.* (footnote 10 above), pp. 156–157.

²⁹ Horn, *op. cit.* (footnote 7 above), pp. 172–173.

³⁰ This guideline reads as follows: “When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them”. (*Yearbook ... 2008*, vol. II (Part Two), para. 123.)

18. This rule is the subject of guideline 4.3.4, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

“4.3.4 *Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect*

“An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].”

19. The purpose of the phrase in square brackets is to refer to a guideline that is closely related to this one. However, this clarification may perhaps be relegated to the commentary.

20. As the Commission has indicated in the commentary to guideline 2.6.8, the Vienna Conventions do not give any indication regarding the time at which the objecting State or international organization must definitely express its intention to oppose the entry into force of the treaty.³¹ The Commission has concluded, however, that according to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of that intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation and, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. The same idea has already been expressed in guideline 2.6.8, which states that the intention to oppose the entry into force of the treaty must have been expressed “before the treaty would otherwise enter into force” between [the author of the objection and the author of the reservation].³² However, the latter guideline concerns the procedure for formulating the required intention and not its effects. It may be useful to reiterate this principle in the part of the Guide to Practice concerning the legal effect of a maximum-effect objection. Nonetheless, guideline 4.3.4 uses the expression “does not preclude the entry into force”, which implies that the treaty is not in force as between the author of the objection and the author of the reservation when the objection is formulated.

21. Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them even if, as is often the case, both parties could be considered contracting parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting party in accordance with guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly

³¹ *Ibid.*, para. (4) of the commentary.

³² See footnote 30 above and *ibid.*, para. (5) of the commentary to guideline 2.6.8.

for the author of the reservation to be considered a contracting party to the treaty. The absence of a treaty relationship between the author of the maximum-effect objection and the author of the reservation does not *a priori* produce any effect except between them.³³

c. Effect of other objections on the entry into force of the treaty

22. In the absence of a definite expression of the contrary intention, an objection—which can be termed “simple”—to a valid reservation does not *ipso facto* result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as is the case for acceptance. This, in fact, is one of the fundamental differences between objection and acceptance, one which, along with other considerations, makes an objection not “tantamount to acceptance”, contrary to what has often been asserted.³⁴ Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in guideline 4.3.4, such an objection “does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization”. But, while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting party to the treaty, and does not necessarily result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

23. This effect—or rather the lack of an effect—of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

Subject to the proviso of article 21, paragraph 3 of the Vienna Convention on the Law of Treaties, these objections do not constitute an *obstacle** to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States.³⁵

³³ ICJ recognized in its advisory opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951 that “such a decision will only affect the relationship between the State making the reservation and the objecting State”. (*I.C.J. Reports 1951*, p. 26) See, however, para. 27 below.

³⁴ See comments by Mr. Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, p. 271, para. 5) and the doubts expressed by Mr. Tsu-ruoka (*ibid.*, 800th meeting, p. 174, para. 40); Koh, “Reservations to multilateral treaties: how international legal doctrine reflects world vision”, p. 102; Coccia, “Reservations to multilateral treaties on human rights”, p. 35; Gaja, “Unruly treaty reservations” pp. 326–329; Klabbers, “Accepting the unacceptable? A new Nordic approach to reservations to multilateral treaties”, p. 181; Ruda, “Reservations to treaties”, pp. 198–199; Sucharipa-Behrmann, “The legal effects of reservations to multilateral treaties”, p. 74; Zemanek, “Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties”, pp. 332–333. See also the first report on the law and practice relating to reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 146, para. 123.

³⁵ *Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009* (United Nations publication, Sales No. E.09.V.3) (ST/LEG/SER.E/26), chap. IV.4, available from <https://treaties.un.org> (Status of Treaties Deposited with the Secretary-General).

The Netherlands deemed it useful to reiterate that its objection did not constitute an “obstacle” to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the 1969 Vienna Convention.

24. This effect—or lack of an effect—of a simple objection on the entry into force of the treaty could be spelled out in guideline 4.3.1 which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

“4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of the reservation*

“An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.”

25. For the treaty effectively to enter into force as between the author of the objection and the author of the reservation, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting parties thereto. In other words, the reservation must be established by the acceptance of another State or international organization, within the meaning of guideline 4.2.1. Hence, apart from the scenario envisaged in guideline 4.3.2, the effective entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation, which is completely beyond the control of the author of the objection.

26. In concrete terms, a treaty that is subject to the general regime of consent as established in article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting party (in accordance with article 20, paragraph 4 (c) of the Vienna Conventions). Only if the reservation is thus established may treaty relations be established between the author of the reservation and the author of a simple objection. Their treaty relations are, however, restricted in accordance with article 21, paragraph 3, of the Vienna Conventions.³⁶ Guideline 4.3.2 seeks to clarify the point at which the treaty effectively enters into force between the author of the objection and the author of the reservation:

“4.3.2 *Entry into force of the treaty as between the author of the reservation and the author of the objection*

“The treaty enters into force as between the author of the reservation and the objecting contracting State or contracting organization as soon as the treaty has entered into force and the author of the reservation has become a contracting party in accordance with guideline 4.2.1.”

³⁶ See paragraphs 31–64 below.

27. The situation is, however, different in cases where, for one reason or another, unanimous acceptance by the contracting parties is required in order to “establish” the reservation, as in the case of treaties with limited participation,³⁷ for example. In that case, any objection—simple or qualified—has a much more significant effect with regard to the entry into force of the treaty as between all the contracting parties, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this specific case—which is far from certain in view of the chapeau of the paragraph³⁸—the reservation could not be established and, consequently, the author of the reservation could never become a contracting party. The objection—whether simple or qualified—in this case constitutes an insurmountable obstacle both for the author of the reservation and for all the contracting parties in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or the objection would resolve the situation.

28. Although such a solution is already implied by guidelines 4.1.2 and 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance:

“4.3.3 *Non-entry into force of the treaty for the author of the reservation when unanimous acceptance is required*

“If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.”

29. The situation can be envisaged where a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. However, such an objection, regardless of its content, would be devoid of legal effects. The Commission has already adopted guideline 2.8.11, according to which:

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.³⁹

(ii) *Content of treaty relations between the author of the reservation and the author of the objection*

30. The potential effects of an objection are quite diverse.⁴⁰ The outright non-application of the treaty

between the author of the reservation and the author of the objection is the most straightforward hypothesis (objection with maximum effect (sect. d below)) but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.⁴¹ The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty *vis-à-vis* the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases are characterized in theory by the partial non-application of the treaty (objection with minimum effect (sect. a below)). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) related to the reservation (objection with intermediate effect (sect. b below)), or by claiming that the treaty applies without any modification (objection with “super-maximum” effect (sect. c below)).

a. Effect of an objection with minimum effect on treaty relations

31. Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation in the treaty:⁴² the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither James Brierly nor Sir Gerald Fitzmaurice discussed the effects of objections to reservations, while Sir Hersch Lauterpacht touched on them only briefly in his proposals *de lege ferenda*.⁴³

32. Nor did Sir Humphrey Waldock find it necessary in his first report to address the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.⁴⁴ Despite the shift away from this categorical approach in favour of a mere presumption, the draft articles adopted on first reading said nothing about the specific effect of an objection that did not preclude the entry into force of the treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that silence.⁴⁵

33. Nevertheless, a comment by the United States⁴⁶ drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where

³⁷ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides ...”; see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 223–233.

³⁸ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides...”

³⁹ For the commentary to this guideline, see *Yearbook ... 2009*, vol. II (Part Two), pp. 105–106. Guideline 2.8.7 reads “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”.

⁴⁰ See paragraph 1 above.

⁴¹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 192, and paragraphs 7–16 above.

⁴² See Greig, “Reservations: equity as a balancing factor?” p. 146; Horn, *op. cit.* (footnote 7 above), p. 170.

⁴³ Alternative drafts C and D of art. 9, in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 92.

⁴⁴ See paragraph 11 above.

⁴⁵ Only two States explicitly raised the issue. See the comments of Denmark (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 46) and the comments of the United States (*ibid.*, p. 47 and p. 55).

⁴⁶ *Ibid.*, p. 55.

treaty relations were established despite an objection was deemed “unusual”,⁴⁷ which was certainly true at the time, the United States still considered it necessary to cover such a situation and suggested the addition of a new paragraph, as follows:

Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.⁴⁸

34. The arguments put forward by the United States convinced Sir Humphrey of the “logical” need to include this situation in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.⁴⁹

ICJ expressed a similar view in its 1951 advisory opinion:

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.⁵⁰

35. The Commission engaged in a very lively debate on the proposed text of paragraph 3. The view of Erik Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),⁵¹ was not shared by the other Commission members. Most members⁵² considered it necessary, if not “indispensable”⁵³ to introduce a provision “in order to forestall ambiguous situations”.⁵⁴ However, members of the Commission had different opinions regarding how to explain the intended effect of the new paragraph proposed by the United States and the Special Rapporteur. Whereas Sir Humphrey’s proposal emphasized the consensual basis of the treaty relationship established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission.⁵⁵

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 55, Observations and proposals of the Special Rapporteur on art. 21, para. 3.

⁵⁰ *I.C.J. Reports 1951*, p. 27.

⁵¹ *Yearbook ... 1965*, vol. I, 800th meeting, p. 172, para. 15.

⁵² Mr. Ruda (*ibid.*, para. 13); Mr. Ago (*ibid.*, 814th meeting, pp. 271 and 272, paras. 7 and 11); Mr. Tunkin (*ibid.*, p. 271, para. 8) and Mr. Briggs (*ibid.*, p. 272, para. 14).

⁵³ See the statement made by Mr. Ago (*ibid.*, p. 271, para. 7).

⁵⁴ *Ibid.*

⁵⁵ Mr. Yasseen (*ibid.*, 800th meeting, p. 171, para. 7; p. 172, paras. 21–23; and p. 173, para. 26), Mr. Tunkin (*ibid.*, p. 172, para. 18) and Mr. Pal (*ibid.*, pp. 172–173, para. 24) expressed the same doubts as the Special Rapporteur (*ibid.*, p. 173, para. 31); in contrast, Mr. Rosenne, supported by Mr. Ruda (*ibid.*, p. 172, para. 13) considered that “the United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission’s provisions on reservations and preferable to the Special Rapporteur’s reciprocal approach” (*ibid.*, para. 10).

36. The text that the Commission finally adopted on a unanimous basis,⁵⁶ however, was very neutral and clearly showed that the issue was left open by the Commission. The Special Rapporteur in fact stated that he was able to “agree with both currents of opinion about the additional paragraph” since “the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions”.⁵⁷

37. During the debate at the United Nations Conference on the Law of Treaties on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

38. The episode is, however, relevant for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Mr. Mustafa Kamil Yasseen—who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations⁵⁸—proposed an amended text for article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment. The amended text stated that:

When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2**.⁵⁹

It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,⁶⁰ a joint amendment was submitted by India, Japan, the Netherlands and the Union of Soviet Socialist Republics⁶¹ a few days before the end of the Conference, with a view to replacing the last part of the sentence by the words originally proposed by the Commission and thereby restoring the distinction between the effects of an objection and an acceptance.

39. The joint amendment was incorporated into the text by the Drafting Committee and adopted by the Conference.⁶² Mr. Yasseen explained that it was “necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted”.⁶³

⁵⁶ *Ibid.*, 816th meeting, p. 284.

⁵⁷ *Ibid.*, 800th meeting, p. 173, para. 31.

⁵⁸ *Ibid.*, 814th meeting, p. 271, para. 5.

⁵⁹ *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 11th plenary session, p. 36.

⁶⁰ *Ibid.*, para. 10 (94 votes to none).

⁶¹ A/CONF.39/L.49, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Session, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, document A/CONF.39/11/Add.1, p. 273.

⁶² *Ibid.*, *Second Session, Vienna, 9 April–22 May 1969*, (A/CONF.39/11/Add.1), 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

⁶³ *Ibid.*, para. 2.

40. The *travaux préparatoires* therefore leave no doubt that:

The view that the institution of objections is in the end void of any special effect is discomfiting as it was intended by the framers of the Vienna Convention to be the means by which the parties to a treaty safeguarded themselves against unwelcome reservations.⁶⁴

The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.⁶⁵

41. Paragraph 3 of article 21 of the 1969 Vienna Convention was not, however, an exercise in codification *stricto sensu* at the time of its adoption by the Commission, then by the United Nations Conference on the Law of Treaties. It had been included by the Commission “for the sake of completeness”,⁶⁶ but not as a rule of customary law.⁶⁷ Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 Vienna Conference, during the *travaux préparatoires* for the draft that became the 1986 Vienna Convention, some members of the Commission nonetheless considered the provision clear⁶⁸ and acceptable.⁶⁹ That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading with only the editorial changes necessary in 1977. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,⁷⁰ which was confirmed by the decision of the Franco-British Court of Arbitration responsible for settling the dispute concerning the delimitation of the continental shelf in the *English Channel* case, which was rendered several days later.⁷¹ The provision is part of the “flexible” system of reservations to treaties.

42. What was henceforth to be considered the “normal” effect of an objection to a valid reservation is therefore set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

43. Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has effectively entered into force in the bilateral relations between the author of the reservation and the author of the

objection—a detail that article 21, paragraph 3, does not specify but which is self-evident—the provision or provisions to which the reservation relates shall be excised from their treaty relations to the extent of the reservation. Article 21, paragraph 3, however, calls for three remarks.

44. First, the intended effect of an objection is, in fact, diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent. Even though in certain specific cases the actual effect on the treaty relationship established despite the objection may be identical to that of an acceptance,⁷² nonetheless the legal regimes of the reservation/acceptance pair and the reservation/objection pair are, in law, distinctly different.

45. Secondly, it is surprising—and regrettable—that paragraph 3 does not in any way limit its scope only to reservations that are “valid”, that is, in accordance with articles 19 and 23, as is the case in paragraph 1.⁷³ It is nonetheless highly unlikely that an objection to an invalid reservation could produce the effect specified in paragraph 3, even though that seems to be allowed in State practice. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

46. A telling example is that of the objection of Germany to the reservation formulated by Myanmar to the Convention on the Rights of the Child:

The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (art. 51, para. 2) and therefore objects to them.

This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.⁷⁴

This example is far from isolated; there are numerous objections with “minimum effect” which, in spite of the conviction expressed by their authors as to the impermissibility of the reservation, do not oppose the entry into force of the treaty and say so clearly.⁷⁵ Simple objections

⁷² On this question, see paragraph 61 below.

⁷³ “1. A reservation established with regard to another party in accordance with articles 19, 20 and 23...”; see *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 205.

⁷⁴ *Multilateral Treaties...* (footnote 35 above) chap. IV.11.

⁷⁵ See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (*ibid.* chap. III.3) or the objections of the Federal Republic of Germany to several reservations to the same Convention (*ibid.*). It is, however, interesting to note with regard to the objection by Germany, which considers certain reservations to be “incompatible with the letter and spirit of the Convention”, that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples

(Continued on next page.)

⁶⁴ Horn, *op. cit.* (footnote 7 above), pp. 173–174.

⁶⁵ See the doctrinal references cited in footnote 34 above.

⁶⁶ *Yearbook ... 1966*, vol. II, p. 209, para. (2) of the commentary to draft article 19.

⁶⁷ Edwards, “Reservations to treaties”, p. 398.

⁶⁸ Mr. Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, p. 98, para. 8.

⁶⁹ Mr. Tabibi, *ibid.*, para. 7.

⁷⁰ Edwards, *op. cit.* (footnote 67 above), p. 398; Gaja, “Unruly treaty reservations”, p. 308.

⁷¹ *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3.

to reservations considered to be impermissible are therefore far from being just a matter of speculation.⁷⁶

47. The 1969 Vienna Convention does not resolve this thorny issue and seems to treat the effects of the objection on the content of treaty relations independently from the issue of the validity of reservations. On this point, it can be said that the Commission went further than necessary in disconnecting the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to raise an objection to any reservation,⁷⁷ whether valid or invalid, and it is quite another to assign identical effects to all these objections. It is highly doubtful whether article 21, paragraph 3, of the Vienna Conventions is applicable to objections to reservations that do not satisfy the conditions of articles 19 and 23.⁷⁸ For the time being, however, it is not necessary to reach a final decision on this issue: at this stage of the analysis, it is sufficient to consider the effects of a valid reservation.⁷⁹

48. Thirdly, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates do not apply *vis-à-vis* the author of the objection, the phrase “to the extent of the reservation” leaves one “rather puzzled”⁸⁰ and needs further clarification.

49. The decision of the Court of Arbitration in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (English Channel case)*⁸¹ clarifies the meaning to be given to this phrase. France had, at the time of ratification, formulated a reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf, the relevant portion of which reads as follows:

(Footnote 75 continued.)

can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (*ibid.*). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation “with the text as well as the object and purpose of article 6” (*ibid.*). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (*ibid.*, chap. VI.19).

⁷⁶ Zemanek, *loc. cit.* (footnote 34 above), p. 331.

⁷⁷ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 96–100.

⁷⁸ See, for example, Gaja, “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, pp. 349–361.

⁷⁹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 196.

⁸⁰ As the representative of the United States of America expressed it at the Vienna Conference, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 33rd plenary meeting, p. 181, para. 9.

⁸¹ UNRIAA, vol. XVIII, p. 3.

The Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

—if such boundary is calculated from baselines established after 29 April 1958;

—if it extends beyond the 200-metre isobath;

—if it lies in areas where, in the Government’s opinion, there are “special circumstances” within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.⁸²

The United Kingdom objected to this part of the French reservation, stating only that:

The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.⁸³

Before the Court of Arbitration, France maintained that on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.⁸⁴ The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Conventions—which had at the time not entered into force and had not even been signed by the French Republic—“the French reservations cannot render Article 6 inapplicable *in toto*, but at the most ‘to the extent of the reservation’”⁸⁵

50. The Court found that:

The answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to Article 6 it made its consent to be bound by the provisions of that Article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom’s observation that its rejection was directed to the reservations alone and not to Article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of Article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of Article 6. The effect of the United Kingdom’s rejection of the reservations is thus limited to the reservations themselves.⁸⁶

The Court went on to say:

However, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of Article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of

⁸² *Multilateral Treaties...* (footnote 35 above), chap. XXI.4.

⁸³ *Ibid.*

⁸⁴ UNRIAA, vol. XVIII, p. 40, para. 57.

⁸⁵ *Ibid.* p. 41, para. 58.

⁸⁶ *Ibid.*, para. 59.

the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.⁸⁷

51. This 1977 decision not only confirms the customary nature of article 21, paragraph 3 of the 1969 Vienna Convention,⁸⁸ but also shows that the objective of this provision—which derives from the same principle of mutuality of consent—is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

52. In the case of France and the United Kingdom, that meant accepting that article 6 of the Convention on the Continental Shelf remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by “to the extent of the reservation”. The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing states.⁸⁹

53. Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by Bowett:

The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the “provisions,” the words, to which the reservation relates.⁹⁰

Moreover, as Horn rightly notes:

A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An “exclusion” of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the “exclusion” or the “modification”.⁹¹

54. Consequently, only an interpretation of the reservation can help in determining the provisions of the treaty, or the parts of these provisions, whose legal effect the reserving State or international organization purports to exclude or modify. Those provisions or parts of provisions are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. All the provisions or parts of provisions not affected by the reservation remain applicable as between the parties.

55. What should be excluded from relations between the two parties can easily be determined by asking what the reservation actually modifies in the treaty relations of its author *vis-à-vis* a contracting party that has accepted it. All this is excluded in relations with a contracting party that has objected to the reservation.

56. Hence, guideline 4.3.5, which determines the content of treaty relations between the author of a simple objection and the author of the reservation, reproduces the language of article 21, paragraph 3, of the 1986 Vienna Convention, which addresses precisely that question, except that the guideline specifies that the rule applies only to objections to a valid reservation. Moreover, in order to clarify that the effect of the objection is not to exclude automatically the application of the entire provision to which the reservation relates—as France had contended in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (English Channel case)*⁹²—it would be useful to point out that exclusion may concern only a part of a provision. The guideline could therefore read as follows:

“4.3.5 Content of treaty relations

“When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty as between itself and the reserving State or organization, the provisions or parts of provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.”

57. In order to clarify the content of treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between “modifying reservations” and “excluding reservations” employed earlier to determine the effects of an established reservation.⁹³

58. In the case of excluding reservations, the situation is particularly straightforward. The above-mentioned Egyptian reservation to the Vienna Convention on Diplomatic Relations is a case in point. That reservation reads: “Paragraph 2 of article 37 shall not apply.”⁹⁴ The provision to which the reservation relates is clearly article 37, paragraph 2, of the Convention on Diplomatic Relations. In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision (or part of a provision) does not apply, to the extent of the reservation; that is, it does not apply at all. Its application is entirely excluded.

59. Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

⁸⁷ *Ibid.*, p. 42, para. 61.

⁸⁸ See paragraph 41 above.

⁸⁹ *Loc. cit.* (footnote 34 above), p. 102.

⁹⁰ Bowett, “Reservations to non-restricted multilateral treaties”, p. 86.

⁹¹ Horn, *op. cit.* (footnote 7 above), p. 178.

⁹² UNRIAA, vol. XVIII, p. 3.

⁹³ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 262.

⁹⁴ *Multilateral Treaties...* (footnote 35 above), chap. III.3. See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 264.

The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.⁹⁵

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. The rest of the provision, however, remains in force as between the two parties.

60. Nevertheless, some types of excluding reservations are much more complex. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.⁹⁶ The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

The Government of Guatemala reserves its right:

(1) To consider that the provisions of the Convention apply only to natural persons, and not to legal persons and bodies corporate as provided in chapter 1, article 1.⁹⁷

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relations established between the author of this reservation and an objecting State excludes the application of article 1—the provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the practical example of the reservation of Guatemala, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

61. In such cases, and only in such cases, an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates “to the extent of the reservation”; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation and the author of the acceptance or of the simple objection. The literature agrees on this point.⁹⁸ The similarity in the effects of an acceptance

and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation “would get what it desired”.⁹⁹ Moreover, this similarity is observed only in the very specific case of excluding reservations, and never in the case of reservations by which an author purports to modify the legal effects of a treaty provision.¹⁰⁰ Furthermore, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a reservation, an objection cannot be considered mere “wishful thinking”;¹⁰¹ it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.¹⁰²

62. In the light of these observations, it would seem useful to clarify the concrete effect of an objection to an excluding reservation. A comparison of the effect of the establishment of such a reservation, on the one hand, and of a simple objection to that reservation, on the other, shows that the same rights and obligations are excluded from the treaty relations between the respective parties. Guideline 4.3.6 clarifies the similarity between the treaty relations established in the two cases. It is in no way intended to replace guideline 4.3.5, but rather to provide clarification in regard to specific categories of reservations.

“4.3.6 Content of treaty relations in the case of a reservation purporting to exclude the legal effect of one or more provisions of the treaty

“A contracting State or a contracting organization that has formulated a valid reservation purporting to exclude the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would not be applicable as between them if the reservation were established.”

“All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.”

63. In the case of modifying reservations, however, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties with regard to which the reservation is established, article 21, paragraph 3 excludes the application of all the provisions that potentially would be modified by the reservation, to the extent of the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially to be replaced by the reservation shall be excised

⁹⁵ United Nations, *Treaty Series*, vol. 1400, No. 23431, p. 231.

⁹⁶ See guideline 1.1.1 (Object of reservations) and the commentary thereon (*Yearbook ... 1999*, vol. II (Part Two), pp. 93–95).

⁹⁷ United Nations, *Treaty Series*, vol. 282, No. 4101, p. 249.

⁹⁸ See for example Clark, “The Vienna Convention reservations regime and the Convention on Discrimination against Women”, p. 308; Coccia, *loc. cit.* (footnote 34 above), p. 36; Gaja, *loc. cit.* (footnote 34 above), p. 327; Imbert, *op. cit.* (footnote 10 above), p. 157; Ruda, *op. cit.*, p. 199; Sinclair, *The Vienna Convention on the Law of Treaties*, p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment, *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna*,

9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), 32nd plenary meeting, p. 179, para. 55; Horn, *op. cit.* (footnote 7 above), p. 173; Klabbers, *loc. cit.* (footnote 34 above), pp. 186–187.

⁹⁹ Klabbers, *loc. cit.* (footnote 34 above), p. 179.

¹⁰⁰ See paragraph 63 below.

¹⁰¹ Imbert, *op. cit.* (footnote 10 above), p. 157, quoting Dehaussy.

¹⁰² Zemanek, *loc. cit.* (footnote 34 above), p. 332.

from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has not agreed to it.

64. It is important to point out this difference between a modifying reservation that is accepted and one to which a simple objection is made. Like guideline 4.3.6, guideline 4.3.7 must be read in conjunction with guideline 4.3.5, which it is intended to clarify.

“4.3.7 Content of treaty relations in the case of a reservation purporting to modify the legal effect of one or more provisions of the treaty

“A contracting State or a contracting organization that has formulated a valid reservation purporting to modify the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would be modified as between them if the reservation were established.”

“All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.”

b. Effect of an objection with intermediate effect on treaty relations

65. There is now a well-established practice of objections the effects of which extend beyond the framework of article 21, paragraph 3, of the Vienna Conventions: objections with “intermediate effect”.¹⁰³ The point here is not whether such objections may or may not be formulated; in 2009, the Special Rapporteur proposed a guideline that directly addresses this point,¹⁰⁴ and it has already been referred to the Drafting Committee.¹⁰⁵ Rather, the question here is to determine what effects such an objection can actually produce, irrespective of its author’s original intent. How far can the author of an objection extend the effect of the objection, between a “simple” effect

¹⁰³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 107.

¹⁰⁴ Guideline 3.4.2 proposed by the Special Rapporteur during the discussion of the fourteenth report, *Yearbook ... 2009*, vol. II (Part Two), footnote 372, reads as follows:

“3.4.2 Substantive validity of an objection to a reservation

“An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:

“(a) The additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated;

“(b) The objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.”

¹⁰⁵ *Ibid.*, para. 60; following an indicative vote, it was decided not to include in guideline 3.4.2 a provision concerning *jus cogens* in relation to the permissibility of objections to reservations (*ibid.*).

(article 21, paragraph 3, of the Vienna Conventions) and a “qualified” or “maximum” effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b), of the Vienna Conventions)?

66. Clearly, the choice cannot be left entirely to the discretion of the author of the objection.¹⁰⁶ As ICJ emphasized in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.¹⁰⁷

Therefore, an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose.¹⁰⁸ This clearly constitutes a limit not to be exceeded, and guideline 3.4.2 even makes it a criterion for the assessment of permissibility.¹⁰⁹

67. On the other hand, it is important not to lose sight of the principle of mutual consent, which is the basis for the law of treaties as a whole and which, as the Court of Arbitration rightly stressed in the *English Channel* case,¹¹⁰ is essential for determining the effects of an objection and of a reservation. As has been recalled many times during the Commission’s work on reservations to treaties: “No State can be bound by contractual obligations it does not consider suitable”.¹¹¹ This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even where the object and purpose of the treaty are not threatened by the reservation.

68. This is the case, for example, when the reservation purports to exclude or to modify a provision of the treaty which, based on the intention of the parties, is necessary to safeguard the balance between the rights and the obligations deriving from their consent to the entry into force of the treaty. This is also the case when the reservation not only undermines the consent of the parties to the

¹⁰⁶ *Ibid.*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 109.

¹⁰⁷ *I.C.J. Reports 1951*, p. 27.

¹⁰⁸ This fundamental observation provides a hint as to the solution to the problem posed by the transposition of article 21, paragraph 3, of the Vienna Conventions, in the case of objections to impermissible reservations.

¹⁰⁹ See footnote 104 above.

¹¹⁰ UNRIAA, vol. XVIII, p. 42, para. 61.

¹¹¹ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties”, p. 466; see also *Yearbook...1996*, vol. II (Part One), document A/CN.4/477 and Add.1, p. 57, paras. 97 and 99; and Müller, “Article 20”, pp. 809–811, paras. 20–24.

provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of other provisions. A contracting party may then legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes a contractual obligation it does not consider suitable.

69. These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of part V of the 1969 Vienna Convention, and this example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

70. Article 66 of the 1969 Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of other provisions of part V.¹¹² The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the “normal” effects of the reservations envisaged by the Vienna Conventions.¹¹³

71. Hence, in order to restore what could be referred to as “consensual balance” between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a specific link with the provisions to which the reservation refers.

72. In the light of these remarks, it would be useful to include in the Guide to Practice a guideline 4.3.8 stating that an objection may, under certain conditions, exclude the application of provisions to which the reservation does not refer.

“4.3.8 Non-application of provisions other than those to which the reservation relates

“In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty.”

73. The Special Rapporteur is aware that this guideline duplicates, to some extent, guideline 3.4.2.¹¹⁴ However, guideline 3.4.2 addresses the issue only from the

standpoint of the permissibility of such an objection, whereas guideline 4.3.8 deals more directly with the possible effect of an objection. Its goal is not to “sanction” a possibly impermissible objection with intermediate effect, but only to note that an objection accompanied by the corresponding intention of its author produces this effect. The effects of an objection with intermediate effect can be determined objectively by combining the effects provided for in guidelines 4.3.5 and 4.3.8, without the need to state that the author of an objection with intermediate effect that goes beyond what is admissible would still benefit from the “normal” effect of the objection.

c. Case of objections with “super-maximum” effect

74. The much more controversial question of objections with “super-maximum” effect whereby the author of the objection affirms that the treaty enters into force in relations between it and author of the reservation without the latter being able to benefit from its reservation,¹¹⁵ can also be resolved logically by applying the principle of mutual consent.

75. It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation made by El Salvador to the Convention on the Rights of Persons with Disabilities:

[T]he Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.

According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.¹¹⁶

76. Regardless of the consequences of such an objection with super-maximum effect in the case of invalid reservation, it is quite clear that such an effect of an objection is not only not provided for in the Vienna Conventions—which is also true of an objection with intermediate effect—but is also clearly incompatible with the principle of mutual consent. Accordingly, a super-maximum effect is excluded

¹¹² *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 117.

¹¹³ Müller, “Article 21”, pp. 927–928, para. 70.

¹¹⁴ See footnote 104 above.

¹¹⁵ See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 106.

¹¹⁶ *Multilateral Treaties...* (footnote 35 above) chap. IV.15.

in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to accept. The objecting State or international organization cannot impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume.

77. It would therefore be appropriate to point out in the Guide to Practice that the author of a validly formulated reservation cannot be bound to comply with the provisions of the treaty without the benefit of its reservation. That is the thrust of guideline 4.3.9:

“4.3.9 Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation

“The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.”

78. This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with objections with intermediate effect that go beyond admissible effects, such objections are, above all, objections through which the author expresses its disagreement with the reservation. The application of guideline 4.3.5 is in no way limited to simple objections. It applies to all objections to a valid reservation, including objections with super-maximum effect.

d. Effect of objections with maximum effect on treaty relations (revisited)

79. In the case where the author of an objection has opposed the entry into force of a treaty in its relations with the author of a reservation—a right recognized by article 20, paragraph 4 (b), of the Vienna Conventions, the treaty is quite simply not in force as between the author of the objection and the author of the reservation.¹¹⁷ No rule deriving from the treaty applies to their mutual relations. In that case, there is no point in discussing the issue of the content of treaty relations, because they are by definition non-existent.

(b) *Effect of a valid reservation on extraconventional norms*

80. The definition of a reservation contained in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice clearly establishes that a reservation “purports to exclude or to modify the legal effect of certain provisions of the treaty”. Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the “provisions of the treaty to which the reservation relates”.¹¹⁸

¹¹⁷ See paragraphs 17–21 above.

¹¹⁸ On the differences between art. 2, para. 1 (d), and art. 21, para. 1, of the Vienna Conventions, see Müller, *loc. cit.* (footnote 113 above), pp. 896–898, paras. 25–26.

Although article 21, paragraph 3, is not as precise on this point, it refers to the “provisions to which the reservation relates”, which, based on the definition of a reservation, can only mean “certain provisions of the treaty”.

81. The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects of the treaty or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports to modify. It does not constitute a unilateral, independent act capable of modifying the obligations, still less the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of norms external to the treaty.

82. Although technically not a reservation to a treaty, the arguments put forward by France on its reservation to its declaration of acceptance of the jurisdiction of the Court under article 36, paragraph 2, of the ICJ Statute in the *Nuclear Tests* cases are quite instructive in this regard.¹¹⁹ In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of Arbitration. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

Thus, in principle, a reservation relates exclusively to a State’s expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.¹²⁰

This opinion is expressed in sufficiently broad terms not to be applicable exclusively to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause, but to any reservation to an international treaty in general. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, where Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the Pact of Bogotá. The Court, however, held that such a reservation:

... cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.¹²¹

83. This relative effect of the reservation and of the reactions to the reservation, in the sense that they can modify

¹¹⁹ *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, pp. 101–102, para. 18; *Nuclear Tests (New Zealand v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, pp. 137–138, para. 16.

¹²⁰ *Nuclear Tests (Australia v. France)*, Joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Waldock, *I.C.J. Reports 1974*, p. 350, para. 83.

¹²¹ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1988*, p. 88, para. 41.

or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the *pacta sunt servanda* principle. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

84. The purpose of guideline 4.4.1 is to highlight the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

“4.4 Effects of a reservation and extraconventional obligations

“4.4.1 Absence of effect on the application of provisions of another treaty

“A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.”

85. Just as a reservation cannot influence pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting¹²² a customary norm.¹²³ Certainly, as between the author of the reservation and the contracting parties with regard to which the reservation is established, the reservation has the “normal” effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary norm concerned in the context of the treaty¹²⁴—for example, by imposing less stringent obligations. Nonetheless, the reservation in no way affects the obligatory nature of the customary norm as such. It cannot release its author from compliance with the customary norm, if it is in effect with regard to the author, outside these specific regulatory systems.¹²⁵ ICJ has clearly stressed in this regard that:

no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention.¹²⁶

The reason for this is simple:

The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or

¹²² On the use of the word “reflect” see *Yearbook ... 2007*, vol. II (Part Two), p. 89, para. (1) of the commentary to guideline 3.1.8.

¹²³ On the question of the admissibility of such reservations, see *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1, paras. 116–130, and guideline 3.1.8, para. 1 (*Yearbook ... 2007*, vol. II (Part Two), para. 153). See also Teboul, “Remarques sur les réserves aux conventions de codification”, pp. 679–717.

¹²⁴ Teboul, *loc. cit.* (footnote 123 above), p. 708, para. 32.

¹²⁵ Weil has stated that “the intention manifested by a [S]tate in regard to a given convention is henceforth of little account ... whether it enters reservations to such and such a clause or not, it will in any case be bound by any provisions of the convention that are recognized to possess the character of rules of customary or general international law” (“Towards relative normativity in international law”, p. 440).

¹²⁶ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 40, para. 65.

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.¹²⁷

86. Modifying or excluding the application of a treaty provision that reflects a customary norm can indeed produce effects in the framework of treaty relations; however, it does not in any way affect the existence or obligatory nature of the customary norm *per se*.

87. Concretely, the effect of the reservation (and of the reactions to it—acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary norm, which means that the author of the reservation is not bound *vis-à-vis* the other contracting parties to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international judge for any matter of interpretation or application of the rule, despite a settlement clause contained in the treaty. Nonetheless, since the customary norm retains its full legal force, the author of the reservation is not, as such, free to violate the customary norm (identical by definition); it must comply with it as such. Compliance or the consequences of non-compliance with the customary norm are not, however, part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

88. This approach, moreover, is shared by States, which do not hesitate to draw the attention of the author of the reservation to the fact that the customary norm remains in force in their mutual relations, their objection notwithstanding. See, for example, the Netherlands in its objection to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

The Kingdom of the Netherlands does not accept the declarations by the People’s Republic of Bulgaria, the German Democratic Republic, the Mongolian People’s Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the People’s Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law.¹²⁸

89. The Commission has already adopted a guideline on this matter in the third part of the Guide to Practice on the validity of reservations. The guideline in question is 3.1.8, which reads as follows:

3.1.8 Reservations to a provision reflecting a customary norm

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

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or

¹²⁷ *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, I.C.J. Reports, 1984*, p. 424, para. 73.

¹²⁸ *Multilateral Treaties...* (footnote 35 above), chap. III.3. In essence, the validity of the remark by the Netherlands is unquestionable. However, the way it is framed is highly debatable; it is not the treaty provision which remains in force between the reserving States and the Netherlands, but the customary norm that the provision reflects.

international organization and other States or international organizations which are bound by that norm.¹²⁹

90. It is the view of the Special Rapporteur that paragraph 2 of this guideline addresses this question satisfactorily. However, one could ask whether the paragraph has been placed in the appropriate section of the Guide. It has more to do with the effects than with the validity of the reservation. Perhaps it would make sense, in that case, to turn paragraph 2 of guideline 3.1.8 into a new guideline 4.4.2:

“4.4.2 Absence of effect of a reservation on the application of customary norms

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

91. The fundamental principle then, is, that a reservation and the reactions to it neither modify nor exclude the application of other treaty rules or customary norms that bind the parties. This principle applies *a fortiori*, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*). On this subject, following intense debate, the Commission adopted guideline 3.1.9, which is based in part upon this issue:

3.1.9 Reservations contrary to a rule of jus cogens

A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.¹³⁰

92. Without reopening a lengthy discussion on the problem (if indeed it is one), the Special Rapporteur is of the view that it would be desirable for a provision on the effects (or absence of effects) of a reservation on a *jus cogens* norm to be included in the fourth part of the Guide to Practice. In 2006, some members of the Commission expressed the view that guideline 3.1.9 had more to do with the effects of a reservation than it did with the question of its validity.¹³¹

93. However, unlike what was suggested above¹³² with regard to reservations to a treaty provision reflecting a customary norm, the Special Rapporteur is not proposing simply to move guideline 3.1.9 to the fourth part of the Guide to Practice; as written, this guideline does not directly address the question of the effects of a reservation to a provision reflecting a peremptory norm of general international law.

94. As noted above,¹³³ there is no reason why the principle applicable to reservations to a provision reflecting a customary norm cannot be transposed to reservations to a provision reflecting a peremptory norm. Guideline 4.4.3 could therefore be worded along the same lines as guideline 4.4.2, to read as follows:

“4.4.3 Absence of effect of a reservation on the application of peremptory norms of general international law (jus cogens)

“A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of the norm in question, which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.”

95. In that case, the Special Rapporteur will leave it to the Commission to decide whether guideline 4.4.3 duplicates guideline 3.1.9 or whether the two guidelines could be retained in their respective parts of the Guide to Practice.

2. INVALID RESERVATIONS

(a) Invalid reservations and the Vienna Conventions

96. Neither the 1969 nor the 1986 Vienna Convention deals explicitly with the question of the legal effects of a reservation that does not meet the conditions of permissibility and validity established in articles 19 and 23, which, taken together, suggest that the reservation is established in respect of another contracting State as soon as that State has accepted it in accordance with the provisions of article 20. The *travaux préparatoires* for the provisions of these two Conventions that concern reservations are equally unrevealing as to the effects—or lack thereof—that result from the invalidity of a reservation.

97. The effects attributed to a non-established reservation by the Commission’s previous Special Rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of the reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not respect certain conditions of validity, since there were no such conditions under the wholly intersubjective system, but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become “part of the bargain between the parties”.¹³⁴

98. From this perspective, the Special Rapporteur, Mr. Brierly, wrote in 1950 that:

the acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto.¹³⁵

Lauterpacht expressed the same idea: “A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty”.¹³⁶ Thus, unless a reservation is established in this

¹²⁹ *Yearbook ... 2007*, vol. II (Part Two), para. 153.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, para. 154, commentary to guideline 3.1.9, para. (12).

¹³² See paragraph 90 above.

¹³³ See paragraph 92 above.

¹³⁴ First report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241, para. 96; see also *ibid.*, vol. I, 53rd meeting, p. 90, para. 3 (Brierly).

¹³⁵ Draft article 10, para. 3, in Brierly’s first report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 241.

¹³⁶ Draft article 9 in Lauterpacht’s report on the law of treaties, *Yearbook ... 1953*, vol. II, document A/CN.4/63, p. 91.

manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a “null and void” reservation had no effect:

In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.¹³⁷

Under this system, the issue is the ineffectiveness, rather than the invalidity, of a reservation; consent alone established its acceptability or unacceptability to all the other contracting parties.

99. However, even Brierly, though a strong supporter of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions:

allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depository or the question of States being consulted in regard to reservations, for *such questions cannot arise as no reservations at that stage are permissible*.¹³⁸

It follows that States were not free to “agree upon any terms in the treaty”,¹³⁹ as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Gerald Fitzmaurice endorsed this idea in paragraph 3 of his draft article 37, which stated: “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”.¹⁴⁰

100. The situation changed with Sir Humphrey Waldock’s first report. The fourth Special Rapporteur on the law of treaties, a supporter of the flexible system, deliberately made the sovereign right of States to formulate reservations subject to certain conditions of validity. Despite the uncertainty concerning his position on the permissibility of reservations that are incompatible with the object and purpose of the treaty,¹⁴¹ draft article 17, paragraph 1 (in his first report) “*accepts the view that, unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations, a State is free, in virtue of its sovereignty, to formulate such reservations as*

it thinks fit”.¹⁴² However, Sir Humphrey did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the validity of reservations without establishing the regime governing reservations which did not meet them.¹⁴³

101. Sir Humphrey’s first report does, however, contain several reflections on the effects of a reservation that it is prohibited by the treaty:

... 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.¹⁴⁴

While this explanation does not reply directly to the question of the effect of prohibited reservations, it has the advantage of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise invalid reservation through the unanimous consent of all the contracting States.¹⁴⁵

102. For a long time, the Commission gave separate—and rather confusing—treatment to the question of reservations that are incompatible with the object and purpose of the treaty, and that of prohibited reservations. Thus, draft article 20, paragraph 2 (b) (“Effects of reservations”), adopted by the Commission on first reading, envisaged the legal effect of a reservation only in the context of an objection to it made on the grounds of its incompatibility with the object and purpose of the treaty:

An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.¹⁴⁶

¹⁴² *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17 (emphasis Sir Humphrey’s). See also *ibid.*, p. 67, para. (15) of the commentary to draft article 18; and *Yearbook ... 1962*, vol. I, 651st meeting, p. 143, para. 64 (Mr. Yasseen) and the conclusions of the Special Rapporteur, *ibid.*, 653rd meeting, p. 159, para. 57 (Sir Humphrey).

¹⁴³ During the debate, Alfred Verdross expressed the view that the case of a “treaty which specifically prohibited reservations ... did not present any difficulties” (*ibid.*, 652nd meeting, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depository (*Yearbook ... 1962*, vol. I, 658th meeting, p. 191, para. 59 (Sir Humphrey); and *ibid.*, 664th meeting, p. 236, paras. 82–95).

¹⁴⁴ *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17. In that connection, see Brierly, report on the law of treaties, *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

¹⁴⁵ Draft article 17, para. 1 (b), in *Yearbook ... 1962*, vol. II, p. 60: “The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of subparagraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained”. See also draft article 18 as proposed by Waldock in his 1965 report on the law of treaties, *Yearbook ... 1962*, vol. II, document A/CN.4/177 and Add.1–2, pp. 61–62. On the question of the unanimous consent of the contracting States and contracting organizations, see paras. 204–209 below.

¹⁴⁶ *Yearbook ... 1962*, vol. II, p. 176.

¹³⁷ League of Nations, *Official Journal*, eighth year, No. 1, annex 967, p. 881.

¹³⁸ Report on reservations to multilateral conventions, *Yearbook ... 1951*, vol. II, document A/CN.4/41, p. 3, para. 11. In annex C to his report, the Special Rapporteur provided examples from the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes (1930), the Convention providing a Uniform Law for Cheques (1931) and the 1948 Protocol amending the International Convention on Economic Statistics, signed at Geneva on 14 December 1928.

¹³⁹ *Yearbook ... 1950*, vol. II, document A/CN.4/23, p. 239, para. 88.

¹⁴⁰ *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 115.

¹⁴¹ *Yearbook ... 1962*, vol. II, pp. 65–66, para. (10) of the commentary to draft article 17. See also paras. (2) and (3) of the commentary to guideline 3.1 (Permissible reservations) in *Yearbook ... 2006*, vol. II (Part Two), p. 145.

It is also clear from this statement that the effect of an objection—which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of ICJ¹⁴⁷—was envisaged only in the case of reservations that were incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, following criticism from several States of this restriction of the right to make objections to reservations, the Special Rapporteur proposed new wording¹⁴⁸ in order to make a clearer distinction between objections and the validity of reservations. But as a result, invalid reservations fell outside of the work of the Commission and the United Nations Conference on the Law of Treaties and would remain so until the adoption of the 1969 Vienna Convention.

103. The fact that the 1969 Vienna Convention contains no rules on invalid reservations is, moreover, a consequence of the wording of article 21, paragraph 1, on the effect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting party in accordance with article 20¹⁴⁹ can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, regardless of whether it is accepted by a contracting party.

104. This explanation is not, however, included in article 21, paragraph 3, on objections to reservations. But that does not mean that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;¹⁵⁰ however, the effects of acceptance of an invalid reservation are not governed by the Convention.

105. The *travaux préparatoires* of the United Nations Conference on the Law of Treaties clearly confirm that

¹⁴⁷ In 1951, the Court stated: “it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court’s 1951 advisory opinion, see Koh, *loc. cit.* (footnote 34 above), pp. 88–95.

¹⁴⁸ *Yearbook ... 1965*, vol. II, p. 52, para. 9, of the commentary to draft article 19. Draft article 19, paragraph 4, as proposed by Sir Humphrey, states:

“4. In other cases, unless the State [*sic*—read ‘the treaty’?] concerned otherwise specifies:

“(a) acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

“(b) objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.”

¹⁴⁹ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199 *et seq.*

¹⁵⁰ See paragraphs 25 and 26 above.

the 1969 Vienna Convention says nothing about the consequences of invalid reservations, let alone their effects. In 1968, during the first session of the Conference, the United States proposed to add, in the introductory sentence of future article 20, paragraph 4, after “In cases not falling under the preceding paragraphs”, the following specification: “and unless the reservation is prohibited by virtue of [future article 19].”¹⁵¹ According to the explanation provided by Herbert W. Briggs, representative of the United States, in support of the amendment:

The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article 17 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in subparagraph (c) of article 16 would then be applicable to such acceptance or objection. It was a shortcoming of subparagraph (c) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.¹⁵²

106. Although it is unclear from Briggs’ explanations, which focus primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, applied only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment,¹⁵³ even though no new rule concerning such reservations was proposed. The representative of Canada, Max H. Wershof, then asked: “[W]as paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?”¹⁵⁴ Sir Humphrey, in his capacity as Expert Consultant, replied: “The answer was ... Yes, since it would in effect restate the rule already laid down in article 16.”¹⁵⁵

107. The “drafting” amendment proposed by the United States was sent to the Drafting Committee.¹⁵⁶ However, neither the language that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,¹⁵⁷ nor the language that was ultimately

¹⁵¹ Document A/CONF.39/C.1/L.127, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2)*, para. 179 (v) (d), p. 136.

¹⁵² *Ibid.*, First Session, Vienna, 26 March–24 May 1968 (A/CONF.39/11), 21st plenary meeting of the Committee of the Whole, para. 11, p. 118.

¹⁵³ It is, however, not entirely clear why the same restriction should not apply to the cases covered by paragraph 2 (treaties that must be applied in their entirety) and paragraph 3 (constituent instruments of international organizations).

¹⁵⁴ *Ibid.*, 24th meeting, p. 144, para. 77.

¹⁵⁵ *Ibid.*, 25th meeting, p. 144, para. 4. Draft article 16 became article 19 of the Convention.

¹⁵⁶ *Ibid.*, pp. 135–136, para. 38.

¹⁵⁷ A/CONF.39/C.1/L.344, in *ibid.*, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference, A/CONF.39/11/Add.2, p. 137, para. 185.

adopted by the Committee of the Whole and referred to the plenary Conference,¹⁵⁸ contained the wording proposed by the United States, although this decision is not explained in the *travaux préparatoires* of the Conference. It is, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of express rules adopted at the conclusion of their *travaux préparatoires* and that the provisions of the Vienna Convention did not apply, as such, to that situation.

108. During the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations and the *travaux préparatoires* of the United Nations Conference on the Law of Treaties, the question of the potential effects of a formulated reservation that does not meet the conditions for permissibility was not addressed. Nevertheless, Paul Reuter, Special Rapporteur of the Commission on the topic, recognized that "[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties".¹⁵⁹ Nonetheless, the Special Rapporteur "thought it wise not to depart from that Convention where the concept of reservations was concerned".¹⁶⁰

109. In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also recognized, at least in principle,¹⁶¹ that the 1969 Vienna Convention did not cover the question of impermissible reservations:

The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (see para. 9 above). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*.¹⁶²

110. Admittedly, neither the 1969 nor the 1986 Vienna Convention—which are quite similar, including in this respect—contains clear, specific rules concerning the

effects of an impermissible reservation.¹⁶³ As the Special Rapporteur stressed in introducing his tenth report on reservations to treaties, the question of the consequences of the "invalidity" of a reservation is:¹⁶⁴

[O]ne of the most serious lacunae in the matter of reservations in the Vienna Conventions, which were silent on that point. It had been referred to as a "normative gap", and the gap was all the more troubling in that the *travaux préparatoires* did not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead gave the impression that they had deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, was not acceptable in a work whose purpose was precisely that of filling the gaps left by the Vienna Conventions in the matter of reservations.¹⁶⁵

111. In this area, it is particularly striking that:

[T]he 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation... the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time.¹⁶⁶

Thus, in accordance with the method of work that has been proposed and followed by the Special Rapporteur and by the Commission in the context of preparation of the Guide to Practice,¹⁶⁷ treaty rules—which are silent on the question of the effects of impermissible reservations—should be taken as established and the Commission should "simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility".¹⁶⁸

112. However, this does not mean that the Commission should enact legislation and create *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for permissibility. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Special Rapporteur considers perfectly capable of guiding the

¹⁵⁸ The language was approved by 60 votes to 15, with 13 abstentions, *ibid.*, *Second Session, Vienna, 9 April–22 May 1969* (A/CONF.39/11/Add.1), 85th meeting of the Committee of the Whole, p. 221, paras. 33–34. For the text of this provision, see *ibid.*, *First and Second Sessions Vienna, 26 March–24 May 1968 and 9 April–22 May 1969*, Documents of the Conference, A/CONF.39/11/Add.2, para. 57.

¹⁵⁹ Reuter, Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook ... 1981*, vol. II (Part One), p. 56, para. 53. The Special Rapporteur referred to Imbert, *Les réserves aux traités multilatéraux*; and, by the same author, "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. 29–58.

¹⁶⁰ *Yearbook ... 1977*, vol. I, 1434th meeting, p. 98, para. 4.

¹⁶¹ See footnote 209 below. While the United Kingdom considered that impermissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply article 21, paragraph 3, of the Conventions to them.

¹⁶² Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V.

¹⁶³ In that regard, see Gaja, "Il regime della Convenzione di Vienna concernente le riserve inammissibili", pp. 349–361; Simma, "Reservations to human rights treaties: some recent developments", pp. 667–668; and Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century", p. 321.

¹⁶⁴ *Yearbook ... 2005*, vol. II (Part One), pp. 183–189, paras. 181–208.

¹⁶⁵ *Yearbook ... 2006*, vol. I, 2888th meeting, p. 132, para. 32.

¹⁶⁶ *Yearbook ... 1995*, vol. II (Part One), p. 152, para. 161.

¹⁶⁷ In 2006, during the Commission's consideration of the tenth report on reservations to treaties, "[i]t was even questioned whether the Commission should take up the matter of the consequences of the invalidity of reservations, which, perhaps wisely, had not been addressed in the 1969 and 1986 Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it" (*Yearbook ... 2006*, vol. II (Part Two), para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (*Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 17th meeting (A/C.6/61/SR.17), para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (A/C.6/61/SR.16, para. 43 (Sweden); *ibid.*, para. 51 (Austria); and A/C.6/61/SR.17, para. 7 (France)); it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (A/C.6/61/SR.16, para. 59 (Canada)). See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 14.

¹⁶⁸ *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, p. 152, para. 163.

Commission's work. It is a question, not of creating, but of systematizing, the applicable principles and rules in a reasonable manner and of preserving the general spirit of the Vienna system.

(b) *Nullity of an impermissible reservation and the consequences thereof*

(i) *Nullity of an impermissible reservation*

113. In his tenth report on reservations to treaties, the Special Rapporteur proposed the following draft guideline:

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.¹⁶⁹

114. This proposal was justified by the following considerations:

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 [*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477/Add.1, pp. 72–74, paras. 194–201], namely that failure to respect the conditions for validity of formulation of reservations laid down in article 19 of the 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 3.3.2.¹⁷⁰

115. Several members of the Commission expressed the view that consideration of guideline 3.3.2 at that stage of the Commission's work on the topic was premature¹⁷¹ and that it should be postponed until the question of the legal effects of reservations was considered. Although the principle of the nullity of an impermissible reservation was not challenged and was deemed convincing and useful,¹⁷² it was stressed that the wording of guideline 3.3.2 seemed to imply that an impermissible reservation would have no effect on the reserving State's participation in the treaty.¹⁷³

116. Following the discussion in the Commission, consideration of guideline 3.3.2 was deferred, to be

¹⁶⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 200.

¹⁷⁰ *Ibid.*

¹⁷¹ *Yearbook ... 2006*, vol. I, 2888th meeting, para. 52 (Mr. Matheson); 2889th meeting, para. 29 (Mr. Gaja); 2890th meeting, para. 10 (Mr. Fomba); *ibid.*, para. 33 (Mr. Yamada); *ibid.*, para. 48 (Mr. Mansfield).

¹⁷² *Yearbook ... 2006*, vol. I, 2890th meeting, para. 10 (Mr. Fomba); *ibid.*, para. 13 (Mr. Kemicha); *ibid.*, para. 16 (Mr. Economides); *ibid.*, para. 23 (Mr. Chee); *ibid.*, para. 33 (Mr. Yamada); *ibid.*, para. 48 (Mr. Mansfield); *ibid.*, para. 51 (Mr. Rodríguez Cedeño). There was one point of view which did not garner support, whereby it was suggested that proposals should not be included in the Guide to Practice if they would purport to undo the legal regime established by the 1969 Vienna Convention, which was deliberately silent on the question of the effects of an impermissible reservation, leaving the assessment of permissibility to the author of the reservation (2889th meeting, para. 12 (Mr. Rao)).

¹⁷³ *Yearbook ... 2006*, vol. I, 2889th meeting, para. 29 (Mr. Gaja). See also *ibid.*, 2890th meeting, para. 56 (Ms. Xue).

considered along with the question of the effects of an impermissible reservation.¹⁷⁴

117. While the nullity of a reservation and the consequences and effects of that nullity are certainly interdependent, they are two different issues. It is not possible first to consider the effects of an impermissible reservation and then to deduce its nullity: the fact that a legal act produces no effect does not necessarily mean that it is null and void. It is the characteristics of the act that influence its effects, not the other way around. In that regard, the nullity of an act is merely one of its characteristics, which, in turn, influences the capacity of the act to produce or modify a legal situation.

118. With regard to acts which are null and void under civil law, the great French jurist Marcel Planiol has explained:

[A] legal act is null and void when it is deprived of effect by law, even if it was in fact carried out and no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so.¹⁷⁵

The *Dictionnaire du droit international public* defines “nullity” as a:

[c]haracteristic of a legal act or of a provision of an act, lacking legal value due to the absence of formal or substantive requirements necessary for its validity.¹⁷⁶

119. This is precisely the situation in the case of a reservation which does not meet the criteria for permissibility under article 19 of the Vienna Conventions: it does not meet the requirements for permissibility and, for this reason, has no legal value. However, had the reservation met the requirements for permissibility, it could have produced legal effects.

120. The very principle of nullity was, moreover, favourably received by several delegations during the Sixth Committee's consideration of the report of the Commission on its fifty-eighth session. Only China expressed the view that it would be difficult to conclude that a reservation was impermissible from the outset since the other contracting parties were free to decide whether to accept it.¹⁷⁷ This position,¹⁷⁸ which accurately reflects the school of “opposability”, nevertheless ignores the very existence of article 19 of the Vienna Conventions. Leaving it to the contracting parties to assess the permissibility of a reservation ultimately amounts to denying any useful effect to this provision, even though it is central to the Vienna regime and is formulated (*a contrario*, at least) not as a set of factors which States and international organizations should take into account, but in prescriptive language.¹⁷⁹

¹⁷⁴ *Yearbook ... 2006*, vol. II (Part Two), paras. 139 and 157.

¹⁷⁵ Cited by Guggenheim, “La validité et la nullité des actes juridiques internationaux”, p. 208.

¹⁷⁶ Salmon, ed., *Dictionnaire de droit international public*, p. 760 (nullity).

¹⁷⁷ *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), para. 65.

¹⁷⁸ See also the position of Portugal (*ibid.*, para. 79).

¹⁷⁹ “A State may ... formulate a reservation, unless ...” which clearly means “a State cannot formulate a reservation if ...”.

Furthermore, this argument assumes that States can, in fact, accept a reservation which does not meet the permissibility criteria established in the 1969 and 1986 Vienna Conventions; this is far from certain. On the contrary, it would seem that express acceptance of an impermissible reservation cannot make the reservation permissible¹⁸⁰ and is also impermissible.¹⁸¹

121. Several other States have expressed the view that an impermissible reservation should be considered null and void,¹⁸² while emphasizing that the specific consequences of this nullity must be spelled out.¹⁸³ The representative of Sweden, speaking on behalf of the Nordic countries, pointed out emphatically:

Article 19 of the Vienna Convention makes clear that reservations incompatible with the object and purpose of a treaty should not be part of treaty relations between States. An invalid reservation should therefore be considered null and void.¹⁸⁴

The same representative, Ms. Hammarskjöld, then continued:

The practice of severing reservations incompatible with the object and purpose of a treaty was fully in conformity with article 19 of the Vienna Convention, which made clear that such reservations were not to form part of the treaty relationship.¹⁸⁵

122. In no way does the nullity of an impermissible reservation fall into the *de lege ferenda* category;¹⁸⁶ it is solidly established in State practice.

123. It is not unusual for States to formulate objections to reservations which are incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be “null and void”. As early as 1982:

...[t]he Government of the Union of Soviet Socialist Republics does not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation is contrary to one of the most important provisions of the Convention, namely, that “the diplomatic bag shall not be opened or detained”.¹⁸⁷

This is also true of Italy, which formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4 paragraph 2 of the

¹⁸⁰ *Yearbook ... 2005*, vol. II (Part One), pp. 187–188, paras. 201 and 202.

¹⁸¹ *Yearbook ... 2009*, vol. II (Part Two), footnote 371. See also paragraphs 204–209 below.

¹⁸² Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixty-first Session, Sixth Committee*, 16th meeting (A/C.6/61/SR.16), paras. 43–45; Austria, *ibid.*, para. 51; and France, *ibid.*, 17th meeting (A/C.6/61/SR.17), paras. 5–7. See also Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *ibid.*, *Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), paras. 22–23.

¹⁸³ Canada, *ibid.*, *Sixty-first Session, Sixth Committee*, 16th meeting, (A/C.6/61/SR.16), para. 59 and France *ibid.*, 17th meeting (A/C.6/61/SR.17), para. 5.

¹⁸⁴ *Ibid.*, 16th meeting, (A/C.6/61/SR.16), para. 44. See, however, Portugal, *ibid.*, 16th meeting (A/C.6/61/SR.16), para. 79.

¹⁸⁵ *Ibid.*, para. 45.

¹⁸⁶ See footnote 184 above.

¹⁸⁷ *Multilateral treaties...* (footnote 35 above), chap. III.3.

Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant.¹⁸⁸

In 1995, Finland, the Netherlands and Sweden made objections that were comparable to the declarations formulated by Egypt upon it acceding to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. In its objection, the Netherlands stated:

[t]he Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void.¹⁸⁹

Finland and Sweden also stated in their objections that they considered these declarations to be null and void.¹⁹⁰ The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,¹⁹¹ was formulated late¹⁹² or is incompatible with the object and purpose of the treaty.¹⁹³ In the latter category, Sweden’s reaction to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic¹⁹⁴ is particularly explicit:

The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties.¹⁹⁵

124. This objection makes it clear that the nullity of the reservation is a consequence, not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not meet the requirements for the permissibility of

¹⁸⁸ *Ibid.*, chap. IV.4.

¹⁸⁹ *Ibid.*, chap. XXVII.3. Art. 26, para. 1, of the Basel Convention stipulates that “No reservation or exception may be made to this Convention.”

¹⁹⁰ *Ibid.*, chap. XXVII.3.

¹⁹¹ *Ibid.*

¹⁹² The objection of Sweden to the late declaration of Egypt to the Basel Convention was, however, justified by both the Convention’s prohibition of reservations and the fact that “these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention” (*ibid.*, footnote 8). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*, chap. XVII.3). Italy also considered that the declarations formulated by Egypt were late and that “[f]or these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content” (*ibid.*).

¹⁹³ See the objections of Sweden to the reservations to the International Covenant on Civil and Political Rights formulated by Maldives and Mauritania (*ibid.*, chap. IV.4); its objections to the reservations to the Convention on the Elimination of All Forms of Discrimination against Women formulated by Bahrain, Brunei Darussalam, the Democratic People’s Republic of Korea, the Federated States of Micronesia, Oman and the United Arab Emirates (*ibid.*, chap. IV.8) and its objections to the reservation and interpretative declaration to the Convention on the Rights of Persons with Disabilities formulated by El Salvador and Thailand, respectively (*ibid.*, chap. IV.15).

¹⁹⁴ The German Democratic Republic had declared upon signing and ratifying the Convention that it “will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic” (*ibid.*, chap. IV.9). See also *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 259, para. 217.

¹⁹⁵ *Multilateral treaties...* (footnote 35 above), chap. IV.9.

a reservation. This is an objective issue which does not depend on the reactions of the other contracting parties, even if they could help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (permissible reservations).¹⁹⁶

125. It is not a question of granting the parties a competence which is clearly not theirs; individually, the contracting States and contracting organizations are not authorized to annul an impermissible reservation.¹⁹⁷ Moreover, this is not the purpose of these objections and they should not be understood in that manner. However, and this is particularly important in a system that lacks a control and annulment mechanism, these objections express the views of their authors on the question of the permissibility and effects of an impermissible reservation.¹⁹⁸ As the representative of Sweden pointed out in the Sixth Committee:

Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection *per se*; consequently, the time limit of twelve months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such “objections” still served an important purpose.¹⁹⁹

126. Guideline 3.3.2, proposed by the Special Rapporteur in his tenth report, should certainly be included in the Guide to Practice, as confirmed by the views of the majority of States on the problem of the effects (or absence thereof) of an impermissible reservation.

127. It might nevertheless be wondered whether this guideline should remain in part III of the Guide to Practice, which deals with matters relating to the permissibility of reservations and interpretative declarations, or whether it would ultimately make more sense to incorporate it into part IV of the Guide, on effects. From the purely theoretical standpoint, in the light of the meaning of the term “nullity”²⁰⁰—the issue is to determine what characterizes an impermissible act—it seems quite appropriate to leave this guideline where it was originally. “Nullity” is one of the “consequences of the non-permissibility”²⁰¹ of a reservation. This is not, in itself, a legal effect.

128. However, part III, and, in particular, the first three sections thereof, concern only the *permissibility* of reservations. There is no reason to exclude from the conditions for the validity of a reservation—which, if not met, render the reservation null and void—those which concern form. A reservation which was not formulated in writing,²⁰² was

not communicated to the other concerned parties²⁰³ or was formulated late²⁰⁴ is also, in principle, unable to produce legal effects; it is null and void. Thus, the reference only to guideline 3.1—which reflects article 19 of the Vienna Conventions—in guideline 3.3.2, as proposed, seems too limited. Upon reflection, this dual cause of nullity is also an argument for including this guideline in the fourth, rather than the third, part of the Guide.²⁰⁵

129. In principle, then, it is certainly worth mentioning, in the context of part IV of the Guide to Practice, that an impermissible or invalid reservation is null and void. The guideline, which will begin section 4.5 on the effects of an invalid reservation, might read:

“4.5 Effects of an invalid reservation

“4.5.1 Nullity of an invalid reservation

“A reservation that does not meet the conditions of permissibility and validity set out in parts II and III of the Guide to Practice is null and void.”

(ii) Effects of the nullity of an impermissible reservation

130. Simply to state that a reservation is null and void does not, however, resolve the question of the effects—or lack of effects—of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting parties; as seen from the preceding paragraphs, the Vienna Conventions are silent on this matter. We must therefore refer to the basic principles underlying all treaty law (beginning with the rules applicable to reservations) and, above all, to the principle of consent.

131. Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it may seem surprising that it was primarily (but not exclusively) the Western States which, at the United Nations Conference on the Law of Treaties, expressed serious misgivings regarding the reversal of the presumption that was strongly supported by the Eastern countries.²⁰⁶ But the fact that the *treaty* remains in force does not answer the question of the status of the *reservation*.

¹⁹⁶ See also paragraphs 192–223 below.

¹⁹⁷ See also Klabbers, *loc. cit.* (footnote 34 above), p. 184.

¹⁹⁸ See also guideline 3.2 (Assessment of the permissibility of reservations), *Yearbook ... 2009*, vol. II (Part Two), para. 83.

¹⁹⁹ Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting (A/C.6/60/SR.14)*, para. 22.

²⁰⁰ See paragraph 118 above.

²⁰¹ This is the title of guideline 3.3, the section in which it was proposed that guideline 3.3.2 would be inserted.

²⁰² Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.1 (Written form), *Yearbook ... 2002*, vol. II (Part Two), p. 28.

²⁰³ Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations), *ibid.*

²⁰⁴ See guidelines 2.3 (Late reservations) and 2.3.1 (Late formulation of a reservation) to 2.3.5 (Widening the scope of a reservation), *Yearbook ... 2009*, vol. II (Part Two), para. 83, and *Yearbook ... 2004*, vol. II (Part Two), p. 104.

²⁰⁵ Furthermore, guideline 4.5 would be, for invalid reservations, the equivalent of guideline 4.1 for valid reservations (“Established reservations”): both deal with the two categories of conditions (permissibility and validity) for a reserve to be considered “established”, in one case (on the condition that it is also accepted by at least one other contracting State or contracting organization), or “invalid” in the second case.

²⁰⁶ See paragraphs 10–16 above. See also paragraph (1) of the commentary to guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty), *Yearbook ... 2008*, vol. II (Part Two), para. 124.

132. The objection of Belgium to the reservations to the Vienna Convention on Diplomatic Relations made by the United Arab Republic and Cambodia raises this issue. Upon ratifying the Convention in 1968, Belgium stated that it considered “the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention”²⁰⁷ without drawing any particular consequences. But in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt), Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations*.²⁰⁸

In other words, according to Belgium, despite the incompatibility of the reservations with “the letter and spirit” of the Convention, the latter would enter into force between Belgium and the authors of the impermissible reservations. However, the provisions to which the reservations referred would not apply as between the authors of those reservations and Belgium; this amounts to giving impermissible reservations the same effect as permissible reservations.

133. The approach taken in the objection of Belgium, which is somewhat unusual,²⁰⁹ appears to correspond to

²⁰⁷ *Multilateral treaties...* (footnote 35 above), chap. III.3.

²⁰⁸ *Ibid.*

²⁰⁹ See, however, the objection of the Netherlands to the reservation to the International Covenant on Civil and Political Rights formulated by the United States of America:

“The Government of the Kingdom of the Netherlands objects to the reservations with respect to capital punishment for crimes committed by persons below eighteen years of age, since it follows from the text and history of the Covenant that the said reservation is incompatible with the text, the object and purpose of article 6 of the Covenant, which according to article 4 lays down the minimum standard for the protection of the right to life.

“The Government of the Kingdom of the Netherlands objects to the reservation with respect to article 7 of the Covenant, since it follows from the text and the interpretation of this article that the said reservation is incompatible with the object and purpose of the Covenant.

“In the opinion of the Government of the Kingdom of the Netherlands this reservation 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.

“It is the understanding of the Government of the Kingdom of the Netherlands that the understandings and declarations of the United States do not exclude or modify the legal effect of provisions of the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States.

“*Subject to the proviso of article 21, paragraph 3 of the Vienna Convention of the Law of Treaties*”, these objections do not constitute an obstacle to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States” (*ibid.*, chap. IV.4).

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: “[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish

the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.²¹⁰

134. It is, however, highly debatable; it draws no real consequence from the nullity of the reservation, but treats it in the same way as a permissible reservation by letting in “through the back door” what was excluded by the authors of the 1969 and 1986 Vienna Conventions.²¹¹ Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of impermissible reservations, but it is clear from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.²¹²

135. As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee’s discussion of the report of the Commission on the work of its fifty-seventh session,

A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.²¹³

136. Moreover, the irrelevance of the Vienna rules is clearly confirmed by the great majority of reactions by States to reservations that they consider impermissible. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the

rules “expressly recognized by” the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not “expressly recognized” but rather has indicated its express unwillingness to accept” (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, p. 163, para. 14).

In its report to the eighteenth meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that “the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or *as a party to the treaty but the provision to which the reservation has been made would not apply**, or as a party to the treaty without the benefit of the reservation” (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7*). This position was, however, subsequently modified (see footnote 213 below).

²¹⁰ See paragraphs 31–64 above.

²¹¹ See the observations of the United Kingdom on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, pp. 162–163, para. 13). See also the Sub-Commission on the Promotion and Protection of Human Rights expanded working paper by Ms. Françoise Hampson on the question of reservations to human rights treaties, prepared in accordance with Sub-Commission decision 2001/17 (E/CN.4/Sub.2/2003/WP.2), para. 16.

²¹² See paragraphs 100–108 above.

²¹³ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), para. 22. See also Malaysia, *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 86, and Greece, *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 39, as well as the report of the meeting of the working group on reservations to the nineteenth meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (HRI/MC/2007/5, para. 18): “[I]t cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying.”

author of the reservation, they nevertheless state unambiguously that an impermissible reservation has no legal effect.

137. For example, upon ratifying the Geneva Conventions for the protection of war victims, the United Kingdom made an objection to the reservations formulated by several Eastern European States:

Whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.²¹⁴

138. Belarus, Bulgaria, the Russian Federation and Czechoslovakia also made objections to the “interpretative declaration” of the Philippines to the United Nations Convention on the Law of the Sea, stating that this reservation had no value or legal effect.²¹⁵ Norway and Finland made objections to a declaration made by the German Democratic Republic in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²¹⁶ the declaration was broadly criticized by several States, which considered that “any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention”.²¹⁷ And although Portugal had expressed doubt regarding the nullity of an impermissible reservation,²¹⁸ it stressed in its objection to the reservation made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women: “Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto”.²¹⁹

139. State practice is extensive—and essentially homogeneous—and is not limited to a few specific States. Recent objections by Finland,²²⁰ Sweden²²¹ other States—

²¹⁴ United Nations, *Treaty Series*, vol. 278, No. 973, p. 268. See also the identical objections to the four Geneva Conventions made by the United States of America. The objection to the Geneva Convention relative to the treatment of prisoners of war reads: “Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations” (*ibid.*, vol. 213, No. 972, p. 383).

²¹⁵ *Multilateral treaties...* (footnote 35 above), chap. XXI.6.

²¹⁶ See footnote 194 above.

²¹⁷ *Multilateral treaties...* (footnote 35 above), chap. IV.9.

²¹⁸ See footnote 184 above.

²¹⁹ *Multilateral treaties...* (footnote 35 above), chap. IV.8.

²²⁰ See the objections by Finland to the reservation to the International Convention on the Elimination of All Forms of Racial Discrimination made by Yemen (*Multilateral treaties...* (footnote 35 above), chap. IV.2); the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by Kuwait, Lesotho, Malaysia, Pakistan and Singapore (*ibid.*, chap. IV.8); the reservations to the Convention on the Rights of the Child made by Malaysia, Oman, Qatar and Singapore (*ibid.*, chap. IV.11); and the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (*ibid.*, chap. XXVI.2).

²²¹ See the objection by Sweden to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively

such as Belgium,²²² Spain,²²³ the Netherlands,²²⁴ the Czech Republic²²⁵ and Slovakia²²⁶—and even some international organizations²²⁷ quite often include a statement that the impermissible reservation is devoid of legal force.

140. The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation—which, moreover, arises directly from the very concept of nullity²²⁸—was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to

Injurious or to have Indiscriminate Effects (*ibid.*, chap. XXVI.2). Sweden specified, however, that “[t]his objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation”.

²²² See the objection by Belgium to the reservation to the Convention on the Rights of the Child made by Singapore: “The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law” (*ibid.*, chap. IV.11).

²²³ See the objection by Spain to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “The Government of the Kingdom of Spain believes that the aforementioned declarations ... have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention” (*ibid.*, chap. IV.8).

²²⁴ See the objection by the Netherlands to the reservation to the Convention on the Rights of Persons with Disabilities made by El Salvador: “It is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador” (*ibid.*, chap. IV.15).

²²⁵ See the objection by the Czech Republic to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “[t]he Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation” (*ibid.*, chap. IV.8).

²²⁶ See the objection by Slovakia to the reservation to the International Covenant on Economic, Social and Cultural Rights made by Pakistan: “The International Covenant on Economic, Social and Cultural Rights enters into force in its entirety between the Slovak Republic and the Islamic Republic of Pakistan, without ... Pakistan benefiting from its reservation” (*ibid.*, chap. IV.3); and to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by Qatar: “This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination Against Women between the Slovak Republic and the State of Qatar. The Convention (...) enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations” (*ibid.*).

²²⁷ See the objections made jointly by the European Community and its members (Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom) to the objections to the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) made by Bulgaria and the German Democratic Republic. In the two identical objections, the authors noted: “The statement made (...) concerning article 52 (3) has the appearance of a reservation to that provision, although such reservation is expressly prohibited by the Convention. The Community and the Member States therefore consider that under no circumstances can this statement be invoked against them and they regard it as entirely void” (*ibid.*, chap. XI.A.16).

²²⁸ See paragraph 118 above.

declarations under article 41 of the Covenant, which reflects international jurisprudence as at 1994. The Committee considered that one aspect of the “normal consequence” of the impermissibility of a reservation was that its author did not have the benefit of the reservation.²²⁹ It is significant that, despite the active response to general comment No. 24 by the United States, France and the United Kingdom, none of the three States challenged this position.²³⁰

141. The Committee subsequently confirmed this conclusion from its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago* communication. In its decision on the admissibility of the communication,²³¹ the Committee ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon reaccessing to the First Optional Protocol to the International Covenant on Civil and Political Rights, having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee’s jurisdiction in cases involving prisoners under sentence of death.²³² On the basis of the discriminatory nature of the reservation, the Committee considered that the reservation “cannot be deemed compatible with the object and purpose of the Optional Protocol”.²³³ The Committee concluded, “The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol”.²³⁴ In other words, according to the Committee, Trinidad and Tobago’s reservation did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,²³⁵ nor that

of a permissible reservation to which an objection has been made.²³⁶ It produced no effect.

142. The Inter-American Court of Human Rights also stated that an impermissible reservation seeking to limit the Court’s competence could produce no effect. In *Hilaire v. Trinidad and Tobago*, the Court stressed:

Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention.²³⁷

143. The European Court of Human Rights took this approach in the principle invoked in *Weber v. Switzerland*,²³⁸ *Belilos v. Switzerland*²³⁹ and *Loizidou v. Turkey*.²⁴⁰ In all three cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and Turkey, applied the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as if the reservations had not been formulated and, consequently, had produced no legal effect.

144. In the light of this general agreement, it seems essential to include the principle that an impermissible reservation has no legal effect on the treaty in a guideline 4.5.2, which might read:

“4.5.2 Absence of legal effect of an impermissible reservation

“A reservation that is null and void pursuant to guideline 4.5.1 is devoid of legal effects.”

(iii) *Effects of the nullity of a reservation on the consent of its author to be bound by the treaty*

145. Guideline 4.5.2—which is not the logical continuation of guideline 4.5.1 (and which might constitute the second paragraph of that provision)—does not, however, resolve all the issues concerning the effects of the nullity of an impermissible reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into

²²⁹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/40)*, vol. I, pp. 151–152, para. 18. See also Françoise Hampson’s final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 57 (“A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty”) and para. 59 of her expanded working paper on the same topic (see footnote 211 above): “A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty.” The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author’s status as a party (which has been widely debated; see paras. 145–191 below).

²³⁰ See the observations of the United States of America (Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/40)*), vol. I, annex VI, pp. 154–158; the United Kingdom (*ibid.*, pp. 158–164) and France (*ibid.*, *Fifty-first Session, Supplement No. 10 (A/51/40)*), vol. I, annex VI, pp. 104–106.

²³¹ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999).

²³² Also in accordance with its conclusions in general comment No. 24, the Committee maintained that the State party remained bound by the Optional Protocol; this cannot be taken for granted, even if it is agreed that Trinidad and Tobago was able to withdraw from the treaty and immediately reaccessed to it (a point on which the Special Rapporteur will not, at this time, take a position). See paragraphs 165–191 below.

²³³ Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999), para. 6.7.

²³⁴ *Ibid.*

²³⁵ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 262–267.

²³⁶ See paragraphs 1–79 above.

²³⁷ Preliminary objection, judgement of 1 September 2001, *Hilaire v. Trinidad and Tobago, Series C, No. 80*, para. 98. See also the Court’s judgement of 1 September 2001 on the preliminary objection in *Benjamin et al. v. Trinidad and Tobago, Series C, No. 81*, para. 89. In the latter judgement, the Court arrived at the same conclusions without, however, stating that the reservation was incompatible with the object and purpose of the Convention.

²³⁸ *Weber v. Switzerland*, sentence of 22 May 1990, *Series A, No. 177*, paras. 35–38.

²³⁹ *Belilos v. Switzerland*, sentence of 29 April 1988, *Series A, No. 132*, para. 60.

²⁴⁰ *Loizidou v. Turkey*, sentence of 23 March 1995, *Series A, No. 310*, paras. 89–98.

force for the author of the reservation without the latter benefiting from its impermissible reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.²⁴¹ The Special Rapporteur believes that it is both desirable and possible to find a middle ground between these apparently irreconcilable positions (which the partisans of each position have, in the past, presented as irreconcilable).

a. The two alternatives

146. The first alternative, the severability of an impermissible reservation from the reserving State's consent to be bound by the treaty, is currently supported to some extent by State practice. Many objections have clearly been based on the impermissibility of a reservation and even, in many cases, have declared such a reservation to be null and void, and unable to produce effects; nevertheless, in virtually all cases, the objecting States have not opposed the treaty's entry into force and have even favoured the establishment of a treaty relationship with the author of the reservation. Since a reservation that is null and void has no legal effect, such a treaty relationship can only mean that the reserving State is bound by the treaty as a whole without benefit of the reservation.

147. This approach is confirmed by the practice, followed, *inter alia*, by the Nordic States,²⁴² of formulating what have come to be called objections with "super-maximum" effect (or intent),²⁴³ along the lines of the objection by Sweden to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.²⁴⁴

148. Such objections, of which the Nordic States—though not the originators of this practice²⁴⁵—make frequent use, have been appearing for some 15 years and are used more and more often, especially by the European States. Apart from Sweden, Austria,²⁴⁶ the Czech

Republic²⁴⁷ and the Netherlands²⁴⁸ have also sought to give super-maximum effect to their objections to the reservations to the 2006 Convention on the Rights of Persons with Disabilities, made by El Salvador and Thailand.

149. More recently, in early 2010, several European States objected to the reservation formulated by the United States of America upon expressing its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. No fewer than five of these objections contain wording intended to produce so-called "super-maximum" effect.²⁴⁹ Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to the reservation by Qatar to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.²⁵⁰ This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;²⁵¹ the above-mentioned objections closely mirror these clauses.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* The Netherlands specified that "[i]t is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador".

²⁴⁹ *Ibid.* (chap. XXVI.2): Austria ("The Government of Austria objects to the aforementioned reservation made by the United States of America to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol III). This position however does not preclude the entry into force in its entirety of the Convention between the United States of America and Austria."); Cyprus ("The Government of the Republic of Cyprus objects to the aforementioned reservation by the United States of America to Protocol III of the CCW. This position does not preclude the entry into force of the Convention between the United States of America and the Republic of Cyprus in its entirety."); Finland ("The Government of Finland therefore objects to the said reservation and considers that it is without legal effect between the United States of America and Finland. This objection shall not preclude the entry into force of Protocol III between the United States of America and Finland."); Norway ("The Government of the Kingdom of Norway objects to the aforesaid reservation by the Government of the United States of America to the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. However, this objection shall not preclude the entry into force of the Protocol in its entirety between the two States, without the United States of America benefiting from its reservation."); and Sweden ("The Government of Sweden objects to the aforesaid reservation made by the Government of the United States of America to Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects and considers the reservation without legal effect. This objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation.").

²⁵⁰ *Multilateral treaties...* (footnote 35 above), chap. IV.8.

²⁵¹ Council of Europe, Committee of Ministers, recommendation No. Rec(99)13, 18 May 1999.

²⁴¹ See Greig (footnote 42 above), p. 52; Goodman, "Human rights treaties, invalid reservations, and State consent", p. 531.

²⁴² Concerning this practice, see, *inter alia*, Klabbars (footnote 34 above), pp. 183–186.

²⁴³ See Simma (footnote 163 above), pp. 667–668. See also *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/535/Add.1, p. 48, para. 96; and paras. 74–78 above.

²⁴⁴ See footnote 116 above. See also the objection by Sweden to the reservation to the same Convention formulated by Thailand (*Multilateral treaties...* (footnote 35 above), chap. IV.15).

²⁴⁵ One of the earliest objections that, while not explicit in this regard, can be termed an objection with "super-maximum" effect was made by Portugal in response to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by the Maldives (footnote 219 above).

²⁴⁶ *Multilateral Treaties ...*, chap. IV.15. In its objection, the Austrian Government stressed that "[i]his objection, however, does not preclude the entry into force, *in its entirety*", of the Convention between Austria and El Salvador".

150. It is clear that this practice is supported to some extent by the decisions of human rights bodies and regional courts, such as the European and Inter-American Courts of Human Rights.

151. In its landmark judgement in *Belilos v. Switzerland*,²⁵² the European Court of Human Rights, sitting in plenary session, not only reclassified the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly referred to as an interpretative declaration) was valid. Having concluded that Switzerland's reservation was impermissible, particularly in relation to the conditions set out in article 64²⁵³ of the European Convention on Human Rights, the Court added: "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration".²⁵⁴

152. In its judgement in *Weber v. Switzerland*,²⁵⁵ a chamber of the European Court of Human Rights was called upon to decide whether article 6, paragraph 1, of the European Convention on Human Rights was applicable, whether it had been violated by the respondent State and whether the reservation of Switzerland in respect of that provision—which, according to the respondent State, was separate from its interpretative declaration—was applicable. In this connection, Switzerland claimed that:

Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) ... would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public.²⁵⁶

The Court went on to consider the permissibility of the reservation of Switzerland and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation:

...does not fulfil one of them, as the Swiss Government did not append "a brief statement of the law [or laws] concerned" to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, "both constitutes an evidential factor and contributes to legal certainty"; its purpose is to "provide a guarantee—in particular for the other Contracting Parties and the Convention institutions—that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the *Belilos* judgment previously cited, *Series A No. 132*, pp. 27–28, § 59). Disregarding it is a breach not of "a purely formal requirement" but of "a condition of substance" (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid.²⁵⁷

In contrast to its practice in the *Belilos* judgement, the Court did not go on to explore whether the nullity of the reservation had consequences for the consent of Switzerland to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that "[t]here ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)".²⁵⁸ Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its

reservation, and that it could not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

153. In its judgement on preliminary objections in *Loizidou v. Turkey*,²⁵⁹ a chamber of the European Court of Human Rights took the opportunity to develop its jurisprudence considerably. While in this case the issue of permissibility arose in respect not of a reservation to a provision of the European Convention on Human Rights, but of a "reservation" to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgement can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to Turkey's declarations of acceptance of the Court's jurisdiction were "invalid", the Strasbourg judges pursued their line of reasoning by considering "whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question".²⁶⁰ The Court noted:

93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".

94. It also recalls the finding in its *Belilos v. Switzerland* judgment of 29 April 1988, after having struck down an interpretative declaration on the grounds that it did not conform to Article 64 (art. 64), that Switzerland was still bound by the Convention notwithstanding the invalidity of the declaration (*Series A No. 132*, p. 28, para. 60).

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.

It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the Belgian Linguistic (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, *Series A Nos. 5 and 23* respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, *Series B No. 3*, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, *Series B No. 21*, p. 119).

The subsequent reaction of various Contracting Parties to the Turkish declarations... lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic—albeit qualified—intention to accept the competence of the Commission and Court.

²⁵² *Series A, No. 132* (footnote 239 above).

²⁵³ Now article 57.

²⁵⁴ *Ibid.*, para. 60.

²⁵⁵ *Series A, No. 177* (footnote 238 above).

²⁵⁶ *Ibid.*, para. 36.

²⁵⁷ *Ibid.*, para. 38.

²⁵⁸ *Ibid.*, para. 40.

²⁵⁹ *Series A, No. 310* (footnote 240 above).

²⁶⁰ *Ibid.*, para. 89.

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

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

98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.²⁶¹

154. In its judgement on preliminary objections in *Hilaire v. Trinidad and Tobago*,²⁶² the Inter-American Court of Human Rights likewise noted that, in the light of the American Convention on Human Rights and its object and purpose, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.²⁶³

155. With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reaccessing to the First Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted, "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol".²⁶⁴ In other words, Trinidad and Tobago was still bound by the Protocol without benefit of the reservation.

156. This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,²⁶⁵ in which the Committee affirmed that:

The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.²⁶⁶

It should be noted at this stage that the wording adopted by the Committee does not suggest that this "normal" consequence is the only one possible or that other solutions may not exist.

²⁶¹ *Ibid.*, paras. 93–98.

²⁶² *Series C, No. 80* (footnote 237 above).

²⁶³ *Ibid.*, para. 98.

²⁶⁴ Report of the Human Rights Committee (A/55/40) (footnote 231 above), para. 6.7. See also paragraph 141 above.

²⁶⁵ Report of the Human Rights Committee (A/50/40) (footnote 230 above), pp. 119–126.

²⁶⁶ *Ibid.*, p. 124, para. 583.

157. In its observations on general comment No. 24 of the Human Rights Committee, France nonetheless stated categorically

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.²⁶⁷

158. This view, which reflects the second (and the only other) possible answer to the question of whether the author of an impermissible reservation becomes a contracting party is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by the treaty. In a 1951 advisory opinion, ICJ answered, in response to the General Assembly's question I,

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.²⁶⁸

This approach views the reservation as a *sine qua non* for the reserving State's consent to be bound by the treaty and seems to be the only approach that is consistent with the principle of consent. If the condition is not permissible, there is no consent on the part of the reserving State. In these circumstances, only the reserving State can take the necessary decisions to remedy the nullity of its reservation, and it should not be regarded as a party to the treaty until such time as it has withdrawn or amended its reservation.

159. The practice of the Secretary-General as depositary of multilateral treaties also seems to confirm this radical solution. The *Summary of Practice* explains in this respect:

191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned....

192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act, *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty...

193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read "State XXX shall not apply article YYY", when the treaty prohibited all reservations or reservations to article YYY.²⁶⁹

There is, however, no need to distinguish between reservations that are prohibited by the treaty and reservations that are impermissible for other reasons.²⁷⁰

²⁶⁷ Report of the Human Rights Committee (A/51/40), (footnote 230 above), p. 106, para. 13.

²⁶⁸ *I.C.J. Reports 1951*, p. 29.

²⁶⁹ *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. 191–193.

²⁷⁰ See guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto (*Yearbook ... 2009*, vol. II (Part Two), para. 84).

160. State practice, while not completely absent, is still less consistent in this regard. For example, Israel, Italy and the United Kingdom objected to the reservation formulated by Burundi upon acceding to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. But whereas

[t]he Government of the State of Israel regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention and is unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,²⁷¹

the other two States that objected to the reservation of Burundi did not include such a statement in their objections.²⁷²

161. The Government in Taiwan, which ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1951,²⁷³ stated that it

objects to all the identical reservations made at the time of signature or ratification or accession to the Convention by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Chinese Government considers the above-mentioned reservations as incompatible with the object and purpose of the Convention and, therefore, by virtue of the Advisory Opinion of the International Court of Justice of 28 May 1951, would not regard the above-mentioned States as being Parties to the Convention.²⁷⁴

Only the Netherlands formulated a comparable objection, in 1966.²⁷⁵

²⁷¹ *Multilateral treaties...* (footnote 35 above), chap. XVIII.7. The objection of the United Kingdom reads: "The purpose of this Convention was to secure the world-wide repression of crimes against internationally protected persons, including diplomatic agents, and to deny the perpetrators of such crimes a safe haven. Accordingly the Government of the United Kingdom of Great Britain and Northern Ireland regard the reservation entered by the Government of Burundi as incompatible with the object and purpose of the Convention, and are unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn" (*ibid.*). Italy objected that "the purpose of the Convention is to ensure the punishment, world-wide, of crimes against internationally protected persons, including diplomatic agents, and to deny a safe haven to the perpetrators of such crimes. Considering therefore that the reservation expressed by the Government of Burundi is incompatible with the aim and purpose of the Convention, the Italian Government cannot consider Burundi's accession to the Convention as valid as long as it does not withdraw that reservation" (*ibid.*).

²⁷² The Federal Republic of Germany objected: "The Government of the Federal Republic of Germany considers the reservation made by the Government of Burundi concerning article 2, paragraph 2, and article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, to be incompatible with the object and purpose of the Convention" (*ibid.*). France, upon acceding to the Convention, stated that it "objects to the declaration made by Burundi on 17 December 1980 limiting the application of the provisions of article 2, paragraph 2, and article 6, paragraph 1" (*ibid.*).

²⁷³ This notification was made prior to the adoption, on 25 October 1971, of General Assembly resolution 2758 (XXVI), whereby the Assembly decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations"; the Government of the People's Republic of China declared, upon ratifying the 1948 Convention on the prevention and punishment of the crime of genocide on 18 April 1983, that "[t]he ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void" (*ibid.*, chap. IV.1).

²⁷⁴ *Ibid.*

²⁷⁵ The objection by the Netherlands reads: "The Government of the Kingdom of the Netherlands declares that it considers the reservations

162. In the vast majority of cases, States that formulate objections to a reservation that they consider impermissible expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State, while seeing no need to elaborate further on the content of any such treaty relationship. Struck by this practice, which may seem inconsistent, the Commission in 2005 sought comments from the Member States of the United Nations on the following question:

States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.²⁷⁶

163. The views expressed by several delegations in the Sixth Committee clearly show that there is no agreement on the approach to the thorny question of the validity of consent to be bound by the treaty in the case of an impermissible reservation. Several States²⁷⁷ have maintained that this practice was "paradoxical" and that, in any event, the author of the objection "could not simply ignore the reservation and act as if it had never been formulated".²⁷⁸ The French delegation stressed that

such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.²⁷⁹

Others, however, noted that it would be better to have the author of the reservation become a contracting State or contracting organization than to exclude it from the circle of parties. In that regard, the representative of Sweden, speaking on behalf of the Nordic countries, said:

The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.²⁸⁰

164. However, it should be noted that those who share this point of view have made the entry into force of the treaty conditional on the will of the author of the

made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or which will make such reservation a party to the Convention" (*ibid.*).

²⁷⁶ *Yearbook ... 2005*, vol. II (Part Two), p. 14, para. 29.

²⁷⁷ *Official Records of the General Assembly, Sixtieth Session, Sixth Committee*, 14th meeting (A/C.6/60/SR.14), paras. 3 (United Kingdom) and 72 (France); and *ibid.*, 16th meeting (A/C.6/60/SR.16), paras. 20 (Italy) and 44 (Portugal).

²⁷⁸ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 72 (France).

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*, para. 23 (Sweden). See also *ibid.*, 17th meeting (A/C.6/60/SR.17), para. 24 (Spain); *ibid.*, 18th meeting (A/C.6/60/SR.18), para. 86 (Malaysia); and *ibid.*, 19th meeting (A/C.6/60/SR.19), para. 39 (Greece).

reservation: “However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation”.²⁸¹

b. Presumption of the will of the author of an impermissible reservation

165. Although the two approaches and the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both are consistent with the principle that underlies treaty law: the principle of consent. There is no doubt that the key to the problem is simply the will of the author of the reservation: does it purport to be bound by the treaty even if its reservation is impermissible—without benefit of the reservation—or is its reservation a *sine qua non* for its commitment to be bound by the treaty?

166. In the context of an issue which, while specific, is comparable to reservations to optional declarations accepting the compulsory jurisdiction of ICJ as envisaged in article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court’s judgment on the preliminary objection in the *Interhandel* case, stated:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.²⁸²

Thus, the important issue is the will of the author of the reservation and its intent to be bound by the treaty, with or without benefit of its reservation. This is also true in the case of more classic reservations to treaty provisions.

167. In its judgement in the *Belilos* case, the European Court of Human Rights paid particular attention to Switzerland’s position with regard to the European Convention on Human Rights. It expressly noted: “At the same time, Switzerland was, and regarded itself as, bound by the Convention irrespective of validity of the declaration”.²⁸³ Thus, the Court clearly took into consideration the fact that Switzerland itself—the author of the impermissible “reservation”—considered itself to be bound by the Treaty despite the nullity of this reservation and had behaved accordingly.

168. In the *Loizidou* case, the European Court of Human Rights also based its judgement, if not on the will of the Turkish Government—which had submitted during the proceedings before the European Court of Human Rights that “if the restrictions attached to the Article 25 and 46

(art. 25, art. 46) declarations were not recognised to be valid, as a whole, the declarations were to be considered null and void in their entirety”²⁸⁴—then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared impermissible:

That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.²⁸⁵

169. The “Strasbourg approach”²⁸⁶ thus consists of acting on the reserving State’s will to be bound by the treaty even if its reservation is impermissible.²⁸⁷ In so doing, the European Court of Human Rights did not, however, rely only on the express declarations of the State in question—as, for example, it did in the *Belilos* case²⁸⁸—it also sought to “re-establish” the will of the State. As Schabas wrote:

...[t]he European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the state.²⁸⁹

Only where it is established that the reserving State did not consider its reservation (which has been recognized as impermissible) to be an essential element of its consent to be bound by the treaty is the reservation separable from its treaty obligation.

170. Moreover, the European Court of Human Rights and the Inter-American Court of Human Rights do not limit their consideration to the will of the State that is the author of the impermissible reservation; both Courts take into account the specific nature of the instruments that they are mandated to enforce. In the *Loizidou* case, for example, the European Court noted:

In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), “to ensure the observance of the engagements undertaken by the High Contracting Parties”.²⁹⁰

The Inter-American Court, for its part, stressed in its judgement in the *Hilaire v. Trinidad and Tobago* case:

²⁸⁴ *Series A, No. 310* (footnote 240 above), para. 90.

²⁸⁵ *Ibid.*, para. 95.

²⁸⁶ Simma (footnote 163 above), p. 670.

²⁸⁷ See also footnote 281 above. According to Gaja, “Il regime della Convenzione di Vienna concernente le riserve inammissibili”, p. 358: “An alternative basis for subsequent determination of the will of the reserving State is that the State in question must have purported to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation”, p. 358.

²⁸⁸ On this case and its impact, see Baratta, *Gli effetti delle riserve ai trattati*, pp. 160–163; Bourguignon, “The *Belilos* case: new light on reservations to multilateral treaties”, pp. 347–386; Cameron and Horn, “Reservations to the European Convention on Human Rights: the *Belilos* case”, pp. 69–116; Marks, “Reservations unhinged: the *Belilos* case before the European Court of Human Rights”, pp. 300–327; and Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, pp. 272–314.

²⁸⁹ Schabas, “Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?” p. 322.

²⁹⁰ *Series A, No. 310* (footnote 240 above), para. 93.

²⁸¹ *Ibid.*, 14th meeting (A/C.6/60/SR.14), para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): “On the related issue of the ‘super-maximum effect’ of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect”.

²⁸² *Interhandel Case, Preliminary Objections, Judgment, I.C.J. Reports 1959*, dissenting opinion of Sir Hersch Lauterpacht, p. 117.

²⁸³ *Series A, No. 132* (footnote 239 above).

93. Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centered around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties.²⁹¹

171. The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.²⁹² In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the impermissible reservation, and the author's will in that regard. It simply states that the "normal consequence"²⁹³ is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,²⁹⁴ this "normal" consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, conversely, suggests) the possibility that the impermissible reservation may produce other "abnormal" consequences. But the Committee is silent on both the question of what these other consequences might be, and the question of how and by what the "normal" consequence and the potential "abnormal" consequence are triggered.

172. In any event, the position taken by the human rights bodies has been nuanced to a considerable extent in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the 17th meeting of chairpersons of these bodies, it was noted that

[i]n a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption.²⁹⁵

173. In 2006, the working group on reservations noted that there were several potential consequences of a reservation that had been ruled impermissible. It ultimately proposed the following Recommendation No. 7:

The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation^{*}. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.²⁹⁶

²⁹¹ *Series C, No. 80* (footnote 237 above), paras. 93–94.

²⁹² In her expanded working paper, Hampson states: "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called 'severance' or disguised by the use of some other phrase, such as non-application" (see footnote 211 above, para. 59).

²⁹³ See footnote 266 above.

²⁹⁴ See paragraph 156 above.

²⁹⁵ Report on the practice of the treaty bodies with respect to reservations made to the core international human rights treaties (HRI/MC/2005/5), para. 37.

²⁹⁶ HRI/MC/2006/5, para. 16.

174. The working group's recommendations,²⁹⁷ which the sixth inter-committee meeting of the human rights treaty bodies endorsed²⁹⁸ in 2007, are recalled in the introduction to the fourteenth report.²⁹⁹ According to new Recommendation No. 7:

As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, *unless its contrary intention is incontrovertibly established*^{*}, will remain a party to the treaty without the benefit of the reservation.

175. Thus, it is clear that the deciding factor is still the intention of the State that is the author of the impermissible reservation. Entry into force is no longer simply an automatic consequence of the nullity of a reservation, but rather a presumption. In the Special Rapporteur's opinion, this position merits serious consideration in the Guide to Practice since it offers a reasonable compromise between the underlying principle of treaty law—consent—and the potential to consider that the author of the impermissible reservation is bound by the treaty without benefit of the reservation.

176. There might, however, be doubts as to the nature of the presumption; intellectually, it might be presumed either that the treaty would enter into force or, on the contrary, that the author of the reservation did not purport for it to enter into force.

177. A negative presumption—refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary has been established—may better reflect the principle of consent under which, in the words of ICJ, "in its treaty relations a State cannot be bound without its consent".³⁰⁰ From this point of view, a State or international organization that has formulated a reservation—even though it is impermissible—has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is "hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept".³⁰¹ From that point of view, no agreement to the contrary can be noted or presumed unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

178. The reverse—positive—presumption has, however, several advantages which, regardless of any political consideration, argue strongly for it even though it is clear

²⁹⁷ See HRI/MC/2007/5, pp. 6–8.

²⁹⁸ Report of the sixth inter-committee meeting of human rights treaty bodies (A/62/224), annex, para. 48 (v).

²⁹⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 14, para. 53.

³⁰⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 21.

³⁰¹ Report of the Human Rights Committee (A/50/40) (footnote 162 above), p. 138, para. 14.

that this rule is not established in the Vienna Conventions³⁰² or in international customary law.³⁰³ However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area must not be ignored.

179. First and foremost, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process; for the purposes of establishing the presumption, however, its importance must not be overestimated. As Goodman has stated:

The package of reservation a State submits reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound.³⁰⁴

180. Furthermore, and perhaps most importantly, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of this privileged circle. In that regard, it must not be forgotten that, as the Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,³⁰⁵

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.³⁰⁶

To that end, as stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, “[h]uman rights treaty bodies”—or any other mechanism established by the treaty or the parties to the treaty as a whole—“should be encouraged to continue their current practice of entering a dialogue with reserving States, with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty”.³⁰⁷ This goal may more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

181. Moreover, presumption of the entry into force of the treaty provides legal certainty. This presumption (provided that it is not conclusive) can help fill the inevitable legal vacuum between the formulation of the reservation and the declaration of its nullity; during this entire period (which may last several years), the author of the reservation has conducted itself as a party and been deemed to be so by the other parties.

³⁰² As noted above, the Vienna Conventions do not address the issue of impermissible reservations; see paragraphs 96–112 above.

³⁰³ See, *inter alia*, Baratta, “Should invalid reservations to human rights treaties be disregarded?” pp. 419–420.

³⁰⁴ *Loc. cit.* (footnote 241 above), p. 537.

³⁰⁵ *Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157.

³⁰⁶ *Ibid.*, p. 57 (para. 10 of the preliminary conclusions).

³⁰⁷ HRI/MC/2005/5, para. 42.

182. In the light of these considerations, the Special Rapporteur strongly recommends that the Commission should support the idea of a relative and rebuttable *presumption*, according to which the treaty would apply to a State or international organization that is the author of an impermissible reservation, notwithstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic condition is met (absence of a contrary intention on the part of the author of the reservation), the treaty is presumed to have entered into force for the author—provided that the treaty has, in fact, entered into force in respect of the contracting States and contracting organizations—and the reservation has no legal effect on the content of the treaty,³⁰⁸ which applies in its entirety.

183. In practice, determining the intention of the author of an impermissible reservation is a challenging process. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of consent, on the other, since “in international society at the present stage, the State alone could know the exact role of its reservation to its consent”.³⁰⁹ Since the basic presumption is rebuttable, it is, however, vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so. Several factors come into play.

184. First, the text of the reservation itself may well contain elements that provide information about its author's intention in the event that the reservation is impermissible. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.9 of the Guide to Practice:

2.1.9 Statement of reasons³¹⁰

A reservation should to the extent possible indicate the reasons why it is being made.

The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning the permissibility, and the effects of the impermissibility, of its reservation, should, however, be treated with caution.³¹¹

185. In addition to the actual text of the reservation and the reasons given for its formulation, the content

³⁰⁸ See paragraphs 130–144 above.

³⁰⁹ *Yearbook ... 1997*, vol. II (Part Two), p. 49, para. 83.

³¹⁰ For the commentary to this guideline, see *Yearbook ... 2008*, vol. II (Part Two), pp. 80–82, para. 124.

³¹¹ See *Loizidou v. Turkey, Series A, No. 310*, para. 95; see also paragraph 153 above.

and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, must also be taken into account. As mentioned above, both the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the “special character” of the treaty in question;³¹² there is no reason to limit these considerations to human rights treaties, which do not constitute a specific category of treaty—at least for the purposes of applying rules relating to reservations³¹³—and are not the only treaties to establish “higher common values”.

186. Furthermore, in line with the approach taken by the European Court of Human Rights in its judgement on the *Belilos* case,³¹⁴ it is also advisable to take into consideration the author’s subsequent attitude in respect of the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt as to the fact that Switzerland would regard itself as bound by the European Convention on Human Rights, even in the event that its interpretative declaration was deemed impermissible. Moreover, as Schabas pointed out in relation to the reservations to the International Covenant on Civil and Political Rights made by the United States of America:

Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. ... Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.³¹⁵

Although, owing to the relative effect of any reservation, caution is certainly warranted when making comparisons between different treaties, it is possible to refer to the prior attitude of the reserving State with regard to provisions similar to those to which the reservation relates. If a State consistently and systematically excludes the legal effect of a particular obligation contained in several instruments, such practice could certainly constitute significant proof that the author of the reservation does not wish to be bound by that obligation under any circumstances.

187. Lastly, the reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the author’s intention or, more accurately, the risk that it may intentionally have run in formulating an impermissible reservation. This is particularly well illustrated by the European Court of Human Rights in the *Loizidou* case; the Court, citing case law established before Turkey

formulated its reservation, as well as the objections made by several States parties to the European Convention on Human Rights,³¹⁶ concluded that:

The subsequent reaction of various Contracting Parties to the Turkish declarations (...) lends convincing support to the above observation concerning Turkey’s awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46)—the latter subsequent to the statements by the Contracting Parties referred to above—indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.³¹⁷

188. The combination of these criteria should serve as a guide for the authorities called upon to rule on the consequences of the nullity of an impermissible reservation, it being understood, however, that this list is in no way exhaustive and that all relevant factors for determining the intention of the author of the reservation must be taken into consideration.

189. That said, the establishment of such a presumption must not constitute approval of what are now generally called objections with “super-maximum” effect. Certainly, the result of the presumption may ultimately be the same as the intended result of such objections. But whereas an objection with “super-maximum” effect apparently purports to require that the author of the reservation should be bound by the treaty without benefit of its reservation simply because the reservation is impermissible, the presumption is based on the intention of the author of the reservation. Although this intention may be hypothetical if not expressly indicated by the author, it is understood that nothing prevents the author from making its true intention known to the other contracting parties. Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with “super-maximum” effect, cannot produce such an effect!³¹⁸ “No State can be bound by contractual obligations it does not consider suitable”,³¹⁹ neither the objecting State nor the reserving State, although such considerations clearly do not mean that the practice has no significance.³²⁰

190. In the light of this caveat, it would be advisable to include in the Guide to Practice a guideline 4.5.3 setting out the rebuttable presumption that a treaty is applicable in its entirety for the author of an impermissible reservation.

191. The first paragraph of guideline 4.5.3 as proposed by the Special Rapporteur sets forth the presumption that the treaty is applicable in its entirety, while the second contains an illustrative and non-exhaustive list of factors that should be taken into account in determining the intention of the author of the reservation. The guideline might read:

³¹² See paragraph 170 above.

³¹³ *Yearbook ... 1996*, vol. II (Part One), pp. 52–83, paras. 55–260; and the preliminary conclusions of the Commission on reservations to normative multilateral treaties including human rights treaties (*Yearbook ... 1997*, vol. II (Part Two), pp. 56–57, para. 157).

³¹⁴ See paragraphs 167–169 above.

³¹⁵ Schabas (footnote 289 above), p. 322.

³¹⁶ *Series A, No. 310* (footnote 240 above), paras. 18–24.

³¹⁷ *Ibid.*, para. 95.

³¹⁸ See also paragraphs 76–77 above.

³¹⁹ Tomuschat, “Admissibility and legal effects of reservations to multilateral treaties”, p. 466; see also *Yearbook ... 1996*, vol. II (Part One), p. 57; and Müller, “Article 20”, pp. 809–811, paras. 20–24.

³²⁰ See paragraphs 211–223 below.

“4.5.3 [Application of the treaty in the case of an impermissible reservation] [Effects of the nullity of a reservation on consent to be bound by the treaty]”

“When an invalid reservation has been formulated in respect of one or more provisions of a treaty, or of certain specific aspects of the treaty as a whole, the treaty applies to the reserving State or to the reserving international organization, notwithstanding the reservation, unless a contrary intention of the said State or organization is established.

“The intention of the author of the reservation must be established by taking into consideration all the available information, including, *inter alia*:

“—The wording of the reservation;

“—The provision or provisions to which the reservation relates and the object and purpose of the treaty;

“—The declarations made by the author of the reservation when negotiating, signing or ratifying the treaty;

“—The reactions of other contracting States and contracting organizations; and

“—The subsequent attitude of the author of the reservation.”

192. Guideline 4.5.3 intentionally refrains from establishing the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.³²¹ The specific effects, including the date on which the treaty enters into force for the author of the impermissible reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law.³²²

(c) Reactions to an impermissible reservation

193. It is clear from the above considerations that neither the nullity of the reservation—owing to its impermissibility—nor the effects of this nullity are dependent on the reactions of contracting States or contracting organizations other than the author of the reservation. The nullity of the reservation arises from its impermissibility. In turn, a reservation that is null and void has no effect on the treaty, not because of its acceptance or objection by the other contracting parties, but solely because of its nullity. In other words, in the light of the distinction made in the chapeau of article 21, paragraph 1, of the Vienna Conventions between the permissibility of a reservation, on the one hand, and the consent of the other contracting States and contracting organizations, on the other, an impermissible reservation does not meet the first

³²¹ Article 24, paragraph 1, of the 1969 Vienna Convention states: “A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.”

³²² See article 24, paragraphs 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

“2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

“3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.”

criterion—permissibility—and it is therefore not necessary to apply the second criterion—acceptance.

194. Consequently, neither the acceptance of an impermissible reservation (except in the specific case of unanimous or express acceptance) nor an objection to an impermissible reservation has any particular consequences with regard to the legal effects that the reservation does or does not produce.

(i) Acceptance of an impermissible reservation

195. The question of the acceptance of a reservation that does not meet the criteria for permissibility has been discussed at length in the tenth report on reservations to treaties.³²³

196. In that report, the Special Rapporteur recalled that the unilateral acceptance of a reservation formulated in spite of article 19, subparagraphs (a) and (b), is undoubtedly excluded and, consequently, devoid of any effect. Sir Humphrey Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the United Nations Conference on Succession of States in Respect of Treaties, stating that:

a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.³²⁴

197. The logical consequence of the “impossibility” of accepting a reservation that is impermissible, either under paragraphs (a) or (b) of article 19, or under paragraph (c), of the same article—which follows exactly the same logic and which there is no reason to distinguish from the other two paragraphs of the article³²⁵—is that such an acceptance cannot produce any legal effect.³²⁶ It cannot “permit” the reservation, nor can it cause the reservation to produce any effect whatsoever—and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established. Furthermore, if the acceptance of an impermissible reservation constituted an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in relations between the two parties; that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates “to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole”.³²⁷

³²³ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 141.

³²⁴ *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, 25th meeting, para. 2, p. 133.

³²⁵ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, pp. 183–185, paras. 181–187.

³²⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, pp. 25–26, para. 124.

³²⁷ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 187, para. 201. In that regard, see Greig (footnote 42 above), p. 57, and Sucharipa-Behrmann (footnote 34 above), pp. 78–79; see, however, the comments made by Eduardo Jiménez de Aréchaga and Gilberto Amado during the discussions on Sir Humphrey Waldock’s proposals in 1962 (*Yearbook ... 1962*, vol. I, 653rd meeting, paras. 44–45, p. 158, and para. 63, p. 160).

198. On the basis of these considerations, the Special Rapporteur, in his tenth report, proposed a guideline 3.3.3.³²⁸

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.

199. At its fifty-eighth session, in 2006, the Commission suggested, with the agreement of the Special Rapporteur,³²⁹ that consideration of this guideline should be deferred until such time as it could consider the question of the effects of reservations.³³⁰ Although this was a wise and cautious decision, it should be acknowledged that, despite the slightly misleading title of guideline 3.3.3, it is a question of identifying not the effect of acceptance of an impermissible reservation (which would fall under part IV of the Guide to Practice), but rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises later in the process than the question of the effect of reservations—the subject of part IV of the Guide to Practice—but which falls under part III). Permissibility logically precedes acceptance³³¹ (the Vienna Conventions also follow this logic) and guideline 3.3.3 relates to the permissibility of the reservation—in other words, the fact that acceptance cannot change its impermissibility. As the tenth report on reservations to treaties explains:

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 [it might have been preferable to say “it remains impermissible”] even if it is accepted.³³²

200. Unilateral—even express—acceptance of an impermissible reservation has no effect as such on the effects produced by this nullity, which have been outlined in the preceding paragraphs of this report.³³³ The question of the consequences of acceptance for the effects of the reservation is not and should not be raised; the issue is not explored beyond the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

201. Guideline 3.4.1, which the Special Rapporteur proposed in 2009³³⁴ irrespective of the conclusions in the fourteenth report,³³⁵ reaffirmed this approach very clearly. This guideline is worded as follows:³³⁶

3.4.1 *Substantive validity of the acceptance of a reservation*

The explicit acceptance of a non-valid reservation is not valid either.

202. This guideline shows very clearly that the explicit acceptance of an impermissible reservation cannot have any effect, either; it, too, is impermissible.

³²⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 202.

³²⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 138, para. 157.

³³⁰ *Ibid.*, p. 136, para. 139. See also *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 7, para. 6.

³³¹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205.

³³² *Ibid.*, para. 203.

³³³ See paragraphs 113–191 above.

³³⁴ *Yearbook ... 2009*, vol. II (Part Two), p. 83, footnote 372.

³³⁵ See the conclusions regarding the permissibility of reactions to reservations in *ibid.*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 127.

³³⁶ Draft guideline 3.4.1 was referred to the Drafting Committee in 2009 (*ibid.*, vol. II (Part Two), para. 60), and was adopted that same year.

203. In the light of these comments, the Special Rapporteur suggests that the Commission should retain guideline 3.3.3 as it appears in the tenth report.

204. A major caveat should, however, be raised and, as a result, the categorical wording of guideline 3.3.3 should be nuanced. Although there is little doubt that an individual acceptance by a contracting State or contracting organization cannot have the effect of “permitting” an impermissible reservation or produce any other effect in relation to the reservation or the treaty, the situation is different where all the contracting States and contracting organizations expressly approve a reservation that—without this unanimous acceptance—would be impermissible. It can, in fact, be maintained—and Sir Humphrey Waldock expressly envisaged this possibility in his first report on the law of treaties³³⁷—that, in accordance with the principle of consensus, “the Parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and... nothing prevents them from adopting a unanimous agreement to that end on the subject of reservations”.³³⁸

205. In order to take this situation into account, in 2005³³⁹ the Special Rapporteur proposed a guideline 3.3.4:

“3.3.4 *Effect of collective acceptance of an invalid reservation*

“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 States or contracting organizations³⁴⁰ objects to it after having been expressly consulted by the depositary.

“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.”

206. The idea underlying this guideline is, moreover, to some extent supported by practice. Although it is not,

³³⁷ See *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17. See also the explanations contained in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205.

³³⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 188, para. 205. This position is also maintained by Greig (footnote 42 above), pp. 56–57, and Sucharipa-Behrmann (footnote 34 above), p. 78. Bowett, who shares this position, considers, however, that this possibility does not fall under the law of reservations (“Reservations to non-restricted multilateral treaties” p. 84); see also Redgwell, “Universality or integrity? Some reflections on reservations to general multilateral treaties”, p. 269.

³³⁹ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2, p. 189, para. 207.

³⁴⁰ The draft guideline initially proposed by the Special Rapporteur used the expression “contracting parties”, which is in common use and which, in his view, included contracting States and contracting organizations. Following various comments made within the Commission, the Special Rapporteur reconsidered this convenient term, which he acknowledged to be incompatible with the definitions of “contracting State” and “contracting organization”, on the one hand, and “party”, on the other, contained in article 2, paragraph 1 (f) (i) and (ii), and paragraph 1 (g), respectively, of the 1986 Vienna Convention.

strictly speaking, a case of unanimous acceptance by the parties to a treaty, the reservation of neutrality formulated by Switzerland upon acceding to the Covenant of the League of Nations is an example in which, despite the prohibition of reservations, the reserving State was admitted into the circle of States parties.³⁴¹

207. In the same vein, the Commission has already recognized, in guideline 2.3.1,³⁴² that the invalidity of a reservation owing to its late formulation may be remedied by unanimous acceptance—or at least absence of objection—by all the contracting States and contracting organizations.³⁴³

208. But even then, the issue is different from that of the effects of an impermissible reservation or that of the effects of reactions thereto; it is the separate issue of the permissibility of the reservation itself, which, unless it meets the conditions set out in article 19 of the Vienna Conventions, can become permissible only through unanimous acceptance by the contracting States or the contracting organizations. Only then can the Vienna regime continue to play its role: the now-permissible reservation must be accepted in accordance with the relevant provisions of article 20 of the Conventions, and that acceptance is indispensable for the reservation to produce any legal effect pursuant to article 21.

209. Thus, guideline 3.3.4, which remains relevant, should also be included in part III of the Guide to Practice on the “validity of reservations”. In any event, it would be illogical to place such a guideline in the part that deals with the effects of impermissible reservations. By definition, the reservation in question here has become *permissible* by reason of the unanimous acceptance or the absence of unanimous objection.

210. Guidelines 3.3.3 and 3.4.1 address the question of the acceptance of an impermissible reservation: it can have no effect on either the permissibility of the reservation—apart from the special case envisaged in guideline 3.3.4—or, *a fortiori*, on the legal consequences of the nullity of an impermissible reservation.

(ii) *Objection to an impermissible reservation*

211. In State practice, the vast majority of objections are based on the impermissibility of the reservation to which

the objection is made. But the authors of such objections draw very different conclusions from them: some simply note that the reservation is impermissible while others state that it is null and void and without legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations.³⁴⁴

212. The jurisprudence of ICJ is not a model of consistency on this point.³⁴⁵ In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States, the Court simply noted that:

Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain’s reservation to Article IX; and whereas the said reservation had the effect of excluding that Article from the provisions of the Convention in force between the Parties.³⁴⁶

The Court’s reasoning did not include any review of the permissibility of the reservation, apart from the observation that the Convention did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which had subsequently been superseded by the Vienna Convention, with which it is incompatible:³⁴⁷

The object and purpose [of the treaty] (...) limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.³⁴⁸

213. Nonetheless, in its order concerning the request for provisional measures in the case of *Armed activities on the*

³⁴¹ See Mendelson, “Reservations to the constitutions of international organizations”, pp. 140–141.

³⁴² Guideline 2.3.1, adopted on first reading, reads:

“2.3.1 *Late formulation of a reservation*

“Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty *except if none of the other Contracting Parties objects to the late formulation of the reservation*.”

³⁴³ For a recent example of the formal “validation” of a late reservation, see the reservation to the United Nations Convention against Corruption formulated by Mozambique some seven months after ratifying the Convention (*Multilateral Treaties...* (footnote 35 above), chap. XVIII.14). In his depositary notification of 10 November 2009 (C.N.806.2009.TREATIES-34), the Secretary-General, in his capacity as depositary, wrote: “Within a period of one year from the date of the depositary notification transmitting the reservation (C.N.834.2008.TREATIES-32 of 5 November 2008), none of the Contracting Parties to the said Convention had notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged. Consequently, the reservation in question was accepted for deposit upon the above-stipulated one year period, that is on 4 November 2009.”

³⁴⁴ The reactions to the reservation formulated by Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women illustrate virtually the full range of objections imaginable: while the 18 objections (including late ones made by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is “null and void”, and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while ten (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties...* (footnote 35 above), chap. IV.8.

³⁴⁵ See the joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma annexed to the judgment of 3 February 2006, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, I.C.J. Reports 2006, pp. 65–71.

³⁴⁶ Orders of 2 June 1999, *Legality of Use of Force (Yugoslavia v. Spain)*, *Provisional Measures*, I.C.J. Reports 1999, p. 772, para. 32; and *Legality of Use of Force (Yugoslavia v. United States of America)*, *Provisional Measures*, *ibid.*, p. 924, para. 24.

³⁴⁷ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, p. 21, paras. 98–100.

³⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 24.

territory of the Congo (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), ICJ modified its approach by considering *in limine* the permissibility of Rwanda's reservation: "[T]hat reservation does not bear on the substance of the law, but only on the Court's jurisdiction; (...) it therefore does not appear contrary to the object and purpose of the Convention".³⁴⁹

And in its judgment on the jurisdiction of the Court and the admissibility of the application, the Court confirmed that

Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.³⁵⁰

ICJ thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".³⁵¹ Even though an objection by the Democratic Republic of the Congo was not required in order to assess the permissibility of the reservation, the Court found it necessary to add: "As a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it."³⁵²

214. This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the permissibility of the reservation as such, it is an important element to be considered by all actors involved—the author of the reservation, the contracting States and contracting organizations, and anybody with competence to assess the permissibility of a reservation. Nonetheless, it should be borne in mind that, as ICJ indicated in its 1951 advisory opinion: "[e]ach State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint".³⁵³

215. The judgement of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be considered in assessing the permissibility of Turkey's reservation.³⁵⁴ The Human Rights Committee confirmed this approach in its general comment No. 24:

The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the

Covenant (...). However, 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.³⁵⁵

216. During consideration of the report of the Commission on the work of its fifty-seventh session, in 2005, Sweden, replying to the Commission's question regarding "minimum effect" objections based on the incompatibility of a reservation with the object and purpose of the treaty,³⁵⁶ expressly supported this position:

Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection... However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.³⁵⁷

217. As established above,³⁵⁸ the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or—as a logical consequence thereof—concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations assess the permissibility of a reservation; rather, it renders the reservation inapplicable as against the author of the objection.³⁵⁹ The acceptances and objections mentioned in article 20 concern only permissible reservations. The mere fact that these same instruments are used in State practice to react to impermissible reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to permissible reservations.

218. In the opinion of the Special Rapporteur, however, contrary to what Sweden may have meant to say in the aforementioned statement,³⁶⁰ this is not a sufficient reason to refuse to consider these reactions as true objections. Such a reaction is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude (...) the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.³⁶¹

The mere fact that ultimately, it is not the objection that achieves the desired goal by depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the impermissible

³⁴⁹ Order of 10 July 2002, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures*, I.C.J. Reports 2002, p. 246, para. 72.

³⁵⁰ I.C.J. Reports 2006, p. 32, para. 67.

³⁵¹ *Ibid.*, p. 70, para. 20.

³⁵² *Ibid.*, p. 33, para. 68.

³⁵³ I.C.J. Reports 1951, p. 26. See also the advisory opinion of the Inter-American Court of Human Rights on the effect of reservations on the entry into force of the American Convention on Human Rights, OC-2/82, 24 September 1982, *Series A, No. 2*, para. 38 ("The States Parties have a legitimate interest, of course, in barring reservations incompatible with the object and purpose of the Convention. They are free to assert that interest through the adjudicatory and advisory machinery established by the Convention.").

³⁵⁴ *Series A, No. 310* (footnote 240 above), para. 95.

³⁵⁵ Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, para. 582.

³⁵⁶ See footnote 276 above.

³⁵⁷ Sweden, speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), *Official Records of the General Assembly, Sixtieth Session, Sixth Committee, 14th meeting (A/C.6/60/SR.14)*, para. 22.

³⁵⁸ See paragraphs 96–112 above.

³⁵⁹ See paragraphs 2–5 above.

³⁶⁰ See paragraph 216 above.

³⁶¹ For the full text of guideline 2.6.1 (Definition of objections to reservations) and the commentary thereto, see *Yearbook ... 2005*, vol. II (Part Two), p. 77.

reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of “objection” adopted by the Commission, but is used extensively in State practice and, it would appear, is accepted and understood unanimously.

219. Moreover, although an objection to an impermissible reservation adds nothing to the nullity of the reservation, it is undoubtedly an important instrument both for initiating the reservations dialogue and for alerting treaty bodies and international and domestic courts when they must, where necessary, assess the permissibility of a reservation. Consequently, it would not be advisable—and would, in fact, be misleading—simply to note in the Guide to Practice that an objection to an impermissible reservation is without effect.

220. On the other hand, it is vitally important for States to continue to formulate objections to reservations which they consider impermissible even though such declarations may not seem to add anything to the effects that arise, *ipso jure* and without any other condition, from the impermissibility of the reservation. This is all the more important, as there are, in fact, only a few bodies that are competent to assess the permissibility of a contested reservation. As is usual in international law—in this area as in many others—the absence of an objective assessment mechanism remains the rule, and its existence the exception.³⁶² Hence, pending a very hypothetical intervention by an impartial third party, “each State establishes for itself its legal situation *vis-à-vis* other States”, including, of course, on the issue of reservations.³⁶³

221. States should not be discouraged from formulating objections to reservations that they consider impermissible. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so, provided that they provide reasons for their position.³⁶⁴ This is why, in guideline 4.5.4, which is proposed for inclusion in the Guide to Practice, it would not be sufficient simply to set out the (undoubtedly correct) principle that an objection to an impermissible reservation does not, as such, produce effects; it is also necessary to discourage any hasty inference, from the statement of that principle, that this is a futile exercise. Indeed, it is in every respect very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the impermissibility of the reservation.

222. However, while it may be preferable, it is not indispensable³⁶⁵ for these objections to be formulated

within the time limit of 12 months, or within any other time limit set out in the treaty.³⁶⁶ Although they have, as such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation, which would be alerted to the doubts surrounding its validity, but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the permissibility of the reservation. This was underscored clearly in the commentary to guideline 2.6.15 (Late objections):

This practice [of late objections] should certainly not be condemned. On the contrary, it allows States and international organizations to express—in the form of objections—their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect.³⁶⁷

The same applies *a fortiori* to objections to reservations that the objecting States or objecting organizations deem impermissible.

223. This comment is not, however, to be taken as an encouragement to formulate late objections on the grounds that, even without the objection, the reservation is null and void and produces no effect. It is in the interests of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to impermissible reservations to be made and to be formulated as quickly as possible, so that the legal situation can be appraised rapidly by all the actors and the author of the reservation can potentially remedy the impermissibility within the framework of the reservations dialogue.

224. Given these considerations, the Commission might adopt a guideline 4.5.4 summarizing the rules to be applied to reactions to impermissible reservations and, more specifically, to objections to such reservations. The guideline might read:

“4.5.4 Reactions to an impermissible reservation

“The effects of the nullity of an impermissible reservation do not depend on the reaction of a contracting State or of a contracting international organization.

“A State or international organization which, having examined the permissibility of a reservation in accordance with the present Guide to Practice, considers that the reservation is impermissible, should nonetheless formulate a reasoned objection to that effect as soon as possible.”

³⁶² *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, para. 86: “In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception.”

³⁶³ *Case of Air Service Agreement of 27 March 1946 between the United States of America and France*, decision of 9 December 1978, UNRIAA, vol. XVIII, p. 483, para. 81.

³⁶⁴ See guideline 2.6.10 (Statement of reasons), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made (*Yearbook ... 2008*, vol. II (Part Two), para. 123).

³⁶⁵ Italy, in its late objection to the reservations of Botswana to the International Covenant on Civil and Political Rights, explained: “The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according

to article 19 of the 1969 Vienna Convention on the Law of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected at any time” (*Multilateral Treaties...* (footnote 35 above), chap. IV.4). See also the objection of Italy to the reservation of Qatar to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, formulated by Qatar (*ibid.*, chap. IV.9); and the position expressed by Sweden in paragraph 216 above.

³⁶⁶ For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties...* (footnote 35 above), chap. IV.8). Both objections were made on 10 May 2010 (C.N.260.2010.TREATIES-15 and C.N.264.2010.TREATIES-16); Qatar’s instrument of accession was communicated by the Secretary-General on 8 May 2009.

³⁶⁷ *Yearbook ... 2008*, vol. II (Part Two), p. 95, para. (3) of the commentary.

3. ABSENCE OF EFFECT OF A RESERVATION ON TREATY
RELATIONS BETWEEN THE OTHER CONTRACTING PARTIES

225. Article 21, paragraph 2 of the Vienna Conventions provides that: “The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*”.

226. Pursuant to this provision, treaty relations between the other parties to the treaty are not affected by the reservation. This rule of the relativity of legal relations is designed to preserve the normative system applicable as between the other parties to the treaty. Although this normative system stands, in relation to the author of the reservation and to the reservation itself, as the general regime of the treaty (to which the author of the reservation is bound only partially by reason of its reservation), this is not necessarily the only regime, since the other parties may also make their consent subject to reservations which would then modify their mutual relations as envisaged in article 21, paragraphs 1 and 3.³⁶⁸ The purpose of paragraph 2 is not, however, to limit the number of normative systems that could be established within the same treaty, but only to limit the effects of the reservation to the bilateral relations between the reserving State, on the one hand, and each of the other contracting States, on the other.

227. The scope of paragraph 2 is not limited to “established” reservations—reservations that meet the requirements of articles 19, 20 and 23—but this is not a drafting inconsistency. Indeed, the principle of the relativity of reservations applies, irrespective of the permissibility or validity of the reservation. This is particularly obvious in the case of invalid reservations, which, owing to their nullity, are deprived of any effect, for the benefit of their authors and, of course, for the benefit or to the detriment of the other parties to the treaty.³⁶⁹

228. Furthermore, the acceptance of a reservation and the objections thereto also have no bearing on the effects of the reservation beyond the bilateral relations between the author of the reservation and each of the other contracting parties. They merely identify the parties for whom the reservation is considered to be established—those which have accepted the reservation³⁷⁰—in order to distinguish them from parties for whom the reservation does not produce any effect—those which have made an objection to the reservation. However, in relations between all the contracting States or contracting organizations except the author of the reservation, the reservation cannot modify or exclude the legal effects of one or more provisions of the treaty, or of the treaty as a whole, regardless of whether these States or organizations have accepted the reservation or objected to it.

229. Although paragraph 2 does not contain any limitation or exception, it might be wondered whether the rule of the “relativity of legal relations” is as absolute as the paragraph states.³⁷¹ Moreover, Sir Humphrey Waldock

made this point more cautiously in the appendix to his first report, entitled “Historical summary of the question of reservations to multilateral conventions”: “[*in principle*], a reservation only operates in the relations of States with the reserving State”.³⁷² This then raises the question of whether there are treaties to which the principle of relativity may not apply.

230. The specific treaties referred to in article 20, paragraphs 2 and 3, are definitely not an exception to the relativity rule. It is true that the relativity of legal relations is, to some extent, limited in the case of these treaties, but not with regard to the relations of the other States parties *inter se*, which also remain unchanged.

231. Although, in the case of treaties that must be applied in their entirety, the contracting States and contracting organizations must all give their consent in order for the reservation to produce its effects, this unanimous consent certainly does not, in itself, constitute a modification of the treaty itself as between the parties thereto. Here too, a distinction should therefore be made between two normative systems within the same treaty: the system governing relations between the author of the reservation and each of the other parties which have, by definition, all accepted the reservation, on the one hand, and the system governing relations between these other parties, on the other. The relations of the other parties *inter se* remain unchanged.

232. The same reasoning applies in the case of constituent instruments of international organizations. Although in this case the consent is not necessarily unanimous, it does not in any way modify the treaty relations between parties other than the author of the reservation. The majority system simply imposes on the minority members a position in respect of the author of the reservation, precisely to avoid the establishment of multiple normative systems within the constituent instrument. But in this case, it is the acceptance of the reservation by the organ of the organization which makes the reservation applicable universally, and probably exclusively, in the relations of the other parties with the reserving State or organization.

233. Even in the event of unanimous acceptance of a reservation which is *a priori* invalid,³⁷³ it is not the reservation which has been “validated” by the consent of the parties that modifies the “general” normative system applicable as between the other parties. Granted, this normative system is modified insofar as the prohibition of the reservation is lifted or the object and purpose of the treaty are modified in order to bring the treaty (and its reservation clauses) in line with the reservation. Nonetheless, this modification of the treaty, which has implications for all the parties, arises not from the reservation, but from the unanimous consent of the contracting States and contracting organizations that is the basis of an agreement purporting to modify the treaty in order to authorize the reservation within the meaning of article 39 of the Vienna Conventions.³⁷⁴

³⁶⁸ See Horn (footnote 7 above), p. 142.

³⁶⁹ See paragraphs 130–144 above.

³⁷⁰ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, paras. 199–236.

³⁷¹ Szafarz maintains that “[i]t is obvious, of course, that ‘the reservation does not modify the provisions of the treaty for the other parties

to the treaty *inter se*’” (“Reservations to multilateral treaties”, p. 311).

³⁷² *Yearbook ... 1962*, vol. II, p. 76, appendix, footnote e.

³⁷³ See paragraphs 204–209 above.

³⁷⁴ See paragraph 204 above.

234. It should be noted, however, that the parties are still free to modify their treaty relations if they deem it necessary.³⁷⁵ This possibility may be deduced *a contrario* from the Commission's commentary to draft article 19 of the 1966 draft articles on the law of treaties (which became article 21 of the 1969 Vienna Convention). In the commentary, the Commission stated that a reservation "does not modify the provisions of the treaty for the other parties, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations".³⁷⁶

235. In the light of these comments, the Commission will certainly, following its usual practice, wish to include in the Guide to Practice a draft guideline 4.6, simply repeating the wording of article 21, paragraph 2, of the Vienna Conventions:

"4.6 Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author

"A reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*."

236. Moreover, nothing prevents the parties from accepting the reservation as a real clause of the treaty, or from changing any other provision of the treaty, if they deem it necessary. However, such modification cannot be made *ipso facto* by acceptance of a reservation—as indicated in guideline 4.6—nor can it be presumed. In any event, the procedures set out for this purpose in the treaty or, in the absence thereof, the procedure established by in articles 39 *et seq.* of the Vienna Conventions, must be followed. In fact, it may become necessary, if not indispensable,³⁷⁷ to modify the treaty in its entirety. This depends, however, on the circumstances of each case and remains at the discretion of the parties. Consequently, it does not seem indispensable to provide for an exception to the principle established in article 21, paragraph 2, of the Vienna Conventions. Should the Commission take a different view, guideline 4.6 could still read:

"4.6 Absence of effect of a reservation on relations between contracting States and contracting organizations other than the author of the reservation

"[Without prejudice to any agreement between the parties as to its application,] a reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*."

³⁷⁵ Horn (footnote 7 above), pp. 142–143.

³⁷⁶ *Yearbook ... 1966*, vol. II, p. 209, para. (1) of the commentary.

³⁷⁷ Such a situation may occur, *inter alia*, in commodity treaties in which even the principle of reciprocity cannot "restore" the balance between the parties (Schermers, "The suitability of reservations to multilateral treaties" p. 356). Article 65, paragraph 2 (c) of the 1968 International Sugar Agreement seemed to provide for the possibility of adapting provisions the application of which had been compromised by the reservation: "In any other instance where reservations are made [namely in cases where the reservation concerns the economic operation of the Agreement], the Council shall examine them and decide, by special vote, whether they are to be accepted and, if so, under what conditions". Such reservations shall become effective only after the Council has taken a decision on the matter". See also Imbert (footnote 10 above), p. 250; and Horn (footnote 7 above), pp. 142–143.

B. Effects of interpretative declarations, approvals, oppositions, silence and reclassifications

237. Despite a long-standing and highly developed practice, neither the 1969 nor the 1986 Vienna Convention contains rules concerning interpretative declarations, much less the possible effects of such a declaration.³⁷⁸

238. The *travaux préparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first Special Rapporteurs,³⁷⁹ Sir Humphrey Waldock³⁸⁰ was aware both of the practical difficulties these declarations created, and of the utterly simple solution required. Indeed, several governments returned in their commentary to the draft articles adopted on first reading, not just to the absence of interpretative declarations and the distinction that should be drawn between such declarations and reservations,³⁸¹ but also to the elements to be taken into account when interpreting a treaty.³⁸² In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. As Sir Humphrey continued:

Interpretative declarations, however, remained a problem, and possible also statements of policy made in connexion with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touch the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.³⁸³

Contrary to the positions expressed by some members of the Commission,³⁸⁴ the effect of an interpretative declaration "was governed by the rules on interpretation".³⁸⁵

³⁷⁸ See *Yearbook ... 1999*, vol. II (Part Two), p. 97, para. (1) of the commentary on guideline 1.2.

³⁷⁹ Sir Gerald Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (First report on the law of treaties, *Yearbook ... 1956*, vol. II, art. 13 (I), p. 110).

³⁸⁰ In his definition of the term "reservation", Sir Humphrey explained that "[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation". (First report on the law of treaties, *Yearbook ... 1962*, vol. II, art. 1 (I), pp. 31–32).

³⁸¹ See, in particular, the commentary of Japan summarized in the fourth report on the law of treaties by Sir Humphrey Waldock (*Yearbook ... 1965*, vol. II, p. 49) and the comment of the United Kingdom that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (*ibid.*, p. 47).

³⁸² See the comments of the United States on draft articles 69 and 70 concerning interpretation, summarized in the sixth report on the law of treaties by Sir Humphrey Waldock (*Yearbook ... 1966*, vol. II, p. 93).

³⁸³ *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 13. See also Sir Humphrey Waldock, *ibid.*, vol. II, p. 49, para. 2.

³⁸⁴ See the comments of Mr. Verdross (*Yearbook ... 1965*, vol. I, 797th meeting, p. 151, para. 36 and 799th meeting, p. 166, para. 23) and Mr. Ago (*ibid.*, 798th meeting, p. 161, para. 68). See also Mr. Castren (*ibid.*, 799th meeting, p. 166, para. 30) and Mr. Bartos (*ibid.*, para. 28).

³⁸⁵ *Ibid.*, 799th meeting, p. 165, para. 14. See also *ibid.*, vol. II, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present section for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties³⁸⁷").

Although “[i]n interpretative statements are certainly important, ... it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made”.³⁸⁶

239. At the United Nations Conference on the Law of Treaties, the question of interpretative declarations was debated once again, in particular concerning an amendment by Hungary to the definition of the term “reservation”³⁸⁷ and to article 19 (which became article 21) concerning the effects of a reservation.³⁸⁸ The effect of this amendment was to liken interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such a comparison.³⁸⁹ Sir Humphrey Waldock, in his capacity as expert consultant, had:

issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations.³⁹⁰

Consequently, he appealed:

to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter.³⁹¹

240. In the end, the Drafting Committee had not retained the amendment of Hungary. Although Mr. Sepulveda Amor, on behalf of Mexico, had drawn attention to “the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]”, while “interpretative declarations of that type were common in practice”³⁹² and suggested that “it was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations”,³⁹³ as none of the provisions of the Vienna Convention had been devoted specifically to interpretative declarations. Sir Humphrey’s conclusions regarding the effects of these declarations³⁹⁴ were thus confirmed by the work of the Conference.

³⁸⁶ *Ibid.*, vol. II, p. 49, para. 2.

³⁸⁷ A/CONF.39/C.1/L.23, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2)*, p. 122, para. 35 (vi) (e). Hungary proposed the following text: “‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a multilateral treaty, whereby it purports to exclude, to vary or to interpret the legal effect of certain provisions of the treaty in their application to that State.”

³⁸⁸ A/CONF.39/C.1/L.177, *ibid.*, p. 151, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, *ibid.*, *First and Second Sessions, Vienna, 26 March–24 May 1968, Documents of the Conference (A/CONF.39/11)*, 25th meeting, pp. 148 and 149, paras. 52–53.

³⁸⁹ See, in particular, the position of Australia, (*ibid.*, 5th meeting, p. 33, para. 81), Sweden (*ibid.*, p. 34, para. 102), the United States (*ibid.*, p. 35, para. 116) and the United Kingdom (*ibid.*, 25th meeting, p. 149, para. 60).

³⁹⁰ *Ibid.*, p. 149, para. 56.

³⁹¹ *Ibid.*

³⁹² *Ibid.*, 21st meeting, p. 123, para. 62.

³⁹³ *Ibid.*

³⁹⁴ See footnote 386 above.

241. Neither the work of the Commission nor the 1986 Vienna Convention have further elucidated the question of the concrete effects of an interpretative declaration.

242. The absence of a specific provision in the Vienna Conventions concerning the legal effects an interpretative declaration is likely to produce does not mean, however, that they contain no indications on that subject, as the comments made during their elaboration will show.³⁹⁵

243. As their name clearly indicates, their aim and function consists in proposing an interpretation of the treaty.³⁹⁶ Consequently, in accordance with the definition arrived at by the Commission:

“Interpretative declaration” means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.³⁹⁷

Giving a precise definition of or clarifying the provisions of a treaty is indeed to interpret it and for this reason, the Commission used those terms to define interpretative declarations.³⁹⁸ Although, as the commentary on guideline 1.2 (Definition of interpretative declarations) makes clear, the definition accepted “in no way prejudices the validity or the effect of such declarations”,³⁹⁹ it seems quite evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

244. Before considering the role such a declaration may play in the interpretation process, it is important to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that whereas the latter are intended to modify the treaty or exclude certain of its provisions, the former have no other aim than to specify or clarify its meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Yasseen has clearly explained:

A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.

A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.⁴⁰⁰

If the effect of an interpretative declaration consisted of modifying the treaty, it would actually constitute a

³⁹⁵ See paragraph 238 above.

³⁹⁶ *Yearbook ... 1999*, vol. II (Part Two), p. 100, para. (16) of the commentary on guideline 1.2.

³⁹⁷ Guideline 1.2 (Definition of interpretative declarations) and commentaries thereto, *ibid.*, pp. 97–103.

³⁹⁸ See the commentary on guideline 1.2 (Definition of interpretative declarations), *ibid.*, p. 100, para. (18).

³⁹⁹ *Ibid.*, p. 103, para. (33) of the commentary.

⁴⁰⁰ *Yearbook ... 1965*, vol. I, 799th meeting, p. 166, paras. 25–26.

reservation, not an interpretative declaration. The Commission's commentary on article 2, paragraph 1 (d), of its 1966 draft articles, describes this dialectic unequivocally:

States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.⁴⁰¹

245. ICJ has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "It is the duty of the Court to interpret the Treaties, not to revise them".⁴⁰²

246. It may be deduced from the foregoing that an interpretative declaration may in no way modify the treaty provisions. Whether or not the interpretation is correct, its author remains bound by the treaty. This is certainly the intended meaning of the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration:

may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.⁴⁰³

In other words, a State may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (article 31, para. 1, of the Vienna Conventions), its actions in the course of enforcing the treaty run a serious risk of violating its treaty obligations.⁴⁰⁴

247. If a State or international organization has made its interpretation a condition for its agreement to be bound by the treaty, in the form of a conditional interpretative declaration within the meaning of guideline 1.2.1 (Definition of conditional interpretative declarations),⁴⁰⁵ the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by an authorized

third body⁴⁰⁶ are in agreement, there is no problem; the interpretative declaration remains merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation given by the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by an impartial third body, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which—it is assumed—does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (article 31, para. 1, of the Vienna Conventions). In this case—but in this case only—the conditional interpretative declaration must be equated to a reservation and may produce only the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations. As McRae has pointed out:

Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.⁴⁰⁷

248. In view of the foregoing, guideline 4.7.4 concerns the specific case of conditional interpretative declarations that do not appear to be equatable, purely and simply, to reservations in respect of their definition, but which produce the same effects:

"4.7.4 Effects of a conditional interpretative declaration

"A conditional interpretative declaration produces the same effects as a reservation in conformity with guidelines 4.1 to 4.6."

249. In cases of a simple interpretative declaration, however, the mere fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the declaring State's position with regard to the treaty. The State remains bound by it and must respect it. This position has also been confirmed by McRae:

[T]he State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the

⁴⁰¹ *Yearbook ... 1966*, vol. II, pp. 189–190, para. (11) of the commentary. See also Sir Humphrey Waldock's explanations, *Yearbook ... 1965*, vol. I, 799th meeting, p. 165, para. 14. ("The crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation").

⁴⁰² Second Phase, *I.C.J. Reports 1950*, p. 229. See also the judgments in *Case concerning Rights of Nationals of the United States of America in Morocco*, *I.C.J. Reports 1952*, p. 196, and *South West Africa cases*, Second Phase, *I.C.J. Reports 1966*, p. 48, para. 91.

⁴⁰³ *Belilos v. Switzerland*, Report of 7 May 1986, vol. 1, No. 32, para. 102.

⁴⁰⁴ See also McRae, "The legal effect of interpretative declarations", p. 161; Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, p. 126; or Horn (footnote 7 above), p. 326.

⁴⁰⁵ *Yearbook ... 1999*, vol. II (Part Two), pp. 103–106.

⁴⁰⁶ It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by the parties as a whole) will differ significantly from that given by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves. See Salmon, ed. (footnote 176 above), p. 604: "An interpretation issued by the author or by all the authors of the provision being interpreted—in the case of a treaty, by all the parties—in due form so that its authority may not be questioned"; see also paras. 277–282 below.

⁴⁰⁷ McRae (footnote 404 above), p. 161. See also Heymann (footnote 404 above), pp. 147–148. Heymann shares the view that a conditional interpretative declaration should be treated as a reservation only in the case where the treaty creates a competent body to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (*ibid.*, pp. 148–150).

State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.⁴⁰⁸

250. Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in the interpretation of the treaty. It has already been noted during the consideration of the validity of interpretative declarations⁴⁰⁹ that “on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party”.⁴¹⁰ This corresponds to a need: those to whom a legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.⁴¹¹

251. Interpretative declarations are above all an expression of the parties’ concept of their international obligations under the treaty. Accordingly, they are a means of determining the intention of the contracting States or organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law⁴¹² and doctrine have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.⁴¹³

252. Heymann shares this view. She affirms, on the one hand, that an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; on the other hand, she adds: “That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties.”⁴¹⁴

253. The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the French Government to the interpretation of the treaty alone: “Whereas, moreover, the French Government has accompanied its signature with an interpretative declaration in which it specifies the meaning and scope which it intends to give to the Charter or to some of its provisions with regard to the Constitution, such unilateral declaration shall have normative force only in that it constitutes an instrument in conformity with the treaty and may contribute, in the case of a dispute, to its interpretation”.⁴¹⁵

⁴⁰⁸ McRae (footnote 404 above), p. 160.

⁴⁰⁹ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, para. 142.

⁴¹⁰ Daillier, Forteau and Pellet, *Droit international public (Nguyen Quoc Dinh)*, p. 277.

⁴¹¹ Abi-Saab, “‘Interprétation’ et ‘auto-interprétation’: quelques réflexions sur leur rôle dans la formation et la résolution du différend international”, p. 14.

⁴¹² See footnote 403 above.

⁴¹³ McRae (footnote 404 above), p. 169.

⁴¹⁴ Heymann (footnote 404 above), p. 135.

⁴¹⁵ Constitutional Council, Decision No. 99-412 DC, 15 June 1999, *European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8965, para. 4.

254. Guideline 4.7, which opens the section concerning the legal effects of an interpretative declaration, takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation. It could be worded as follows:

“4.7 Effects of an interpretative declaration

“An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.”

255. In addition, it should be recalled that an interpretative declaration is also a unilateral declaration expressing its author’s intention to accept a certain interpretation of the treaty or of its provisions. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;⁴¹⁶ in any case it is a corollary of the principle of good faith,⁴¹⁷ in the sense that, in its international relations, a State cannot “blow hot and cold”. It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before a judge or international arbitrator.⁴¹⁸

⁴¹⁶ As Judge Alfaro had explained in the important separate opinion in the *Temple of Preah Vihear (Cambodia v. Thailand)* case, “[w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*). ... Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)” (*I.C.J. Reports 1962*, p. 40). See also the Judgments of 12 July 1929, *Serbian loans*, P.C.I.J., Series A, No. 20, pp. 38–39; 20 February 1969 (*North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*), *I.C.J. Reports 1969*, p. 26, para. 30; 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 415, para. 51; or 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene*, *I.C.J. Reports 1990*, p. 118, para. 63.

⁴¹⁷ See the judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *I.C.J. Reports 1984*, p. 305, para. 130. The doctrine is in agreement on this point. Thus, as Bowett explained more than a half-century ago, the *raison d’être* of estoppel lies in the principle of good faith: “The basis of the rule is the general principle of good faith and as such finds a place in many systems of law” (“Estoppel before international tribunals and its relation to acquiescence”, p. 176 (footnotes omitted)). See also Crawford and Pellet, “Aspects des modes continentaux et anglo-saxons de plaidoiries devant la C.I.J.”, pp. 831–867.

⁴¹⁸ See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the Commission, principle 10: “A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: “... (b) The extent to which those to

256. It cannot be deduced from the above that the author of an interpretative declaration is bound by the interpretation it puts forward—which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them.⁴¹⁹

257. Nonetheless, the author of an interpretative declaration, by formulating an interpretation in a given sense, has created an expectation in the other contracting parties, who, acting in good faith, may take cognizance of and place confidence in it.⁴²⁰ The author of an interpretative declaration may not, therefore, change its position at will, as long as its declaration has not been withdrawn or modified. Indeed, under guidelines 2.4.9 (Modification of an interpretative declaration)⁴²¹ and 2.5.12 (Withdrawal of an interpretative declaration),⁴²² the author of an interpretative declaration is free to modify or withdraw it at any time.

258. Like the author of an interpretative declaration, any State or international organization that approves this declaration must also refrain from invoking, in respect of the author of the declaration, a different interpretation.

259. In view of the foregoing, it would be appropriate to insert a guideline 4.7.2 into the Guide to Practice in order to take into account this opposability of an interpretative declaration in respect of its author:

“4.7.2 Validity of an interpretative declaration in respect of its author

“The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration.”

260. Because of the very nature of the operation of interpretation—which is a process,⁴²³ an art rather than an exact science⁴²⁴—it is not possible in a general and abstract

whom the obligations are owed have relied on such obligations...” *Yearbook ... 2006*, vol. II (Part Two), p. 161.

⁴¹⁹ Bowett, “Estoppel before international tribunals and its relation to acquiescence”, p. 189. See also McRae (footnote 404 above), p. 168.

⁴²⁰ See Heymann (footnote 404 above), p. 142.

⁴²¹ This guideline reads as follows: “Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time” (*Yearbook ... 2004*, vol. II (Part Two), p. 108).

⁴²² This guideline reads as follows: “An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose” (*ibid.*, p. 109).

⁴²³ A “logico-intellective” operation, according to Rosario Sapienza, “Les déclarations interprétatives unilatérales et l’interprétation des traités”, p. 623.

⁴²⁴ See *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/614 and Add.1–2, pp. 28–29, paras. 140 and 141.

manner to determine the value of an interpretation other than by referring to the “general rule of interpretation” which is set out in article 31 of the Vienna Conventions and which cannot be called into question or “revisited” in the context of the present exercise. Therefore, in the present study, any research must necessarily be limited to the question of the authority of a proposed interpretation in an interpretative declaration and the question of its probative value for any third party interpreter, that is, its place and role in the process of interpretation.

261. With regard to the first question—the authority of the interpretation proposed by the author of an interpretative declaration—it should be remembered that, according to the definition of interpretative declarations, they are unilateral statements.⁴²⁵ The interpretation which such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot, as such, bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

Neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy.⁴²⁶

During the discussion on draft article 70 (which became article 31) containing the general rule of interpretation, Mr. Rosenne expressed the view

that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties.⁴²⁷

262. The Appellate Body of the Dispute Settlement Body of the World Trade Organization has expressed the same idea:

The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined “expectations” of *one* of the parties to a treaty.⁴²⁸

263. Since the declaration expresses only the unilateral intention of the author—or, if it has been approved by certain parties to the treaty, at best a shared intention⁴²⁹—it certainly cannot be given an objective value that is applicable *erga omnes*, much less the value of an authentic interpretation accepted by all parties.⁴³⁰ Although it does

⁴²⁵ *Yearbook ... 1999*, vol. II (Part Two), p. 97.

⁴²⁶ *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, p. 462, para. 265.

⁴²⁷ *Yearbook ... 1964*, vol. I, 769th meeting, p. 313, para. 52.

⁴²⁸ Decision of 5 June 1998, *European Communities—Customs Classification of Certain Computer Equipment*, WT/DS62-67-68/AB/R, para. 84 (also available on the World Trade Organization website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm, accessed 31 March 2015).

⁴²⁹ Heymann (footnote 404 above), p. 135, has explained in this regard: “If a mere interpretative declaration is accepted by only some of the contracting parties, the shared interpretation does not constitute an autonomous factor in interpretation within the meaning of the Vienna Convention on the Law of Treaties. This is because, when the treaty is interpreted, the intentions of the parties must be taken into account while the shared interpretation expresses only the will of a more or less large group of the contracting parties.”

⁴³⁰ On this case, see paragraphs 277–282 below.

not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

264. However, it is difficult to determine precisely on what basis an interpretative declaration would be considered a factor in interpretation under articles 31 and 32 of the Vienna Conventions. An element of doubt about the question was raised in a particularly careful manner as far back as Sir Humphrey:

Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69–71. These articles provide that the “context of the treaty, for the purposes of its interpretation”, is to be understood as comprising “any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion” (article 69, paragraph 2); that “any agreement between the parties regarding the interpretation of the treaty” and “any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation” are to be taken into account “together with the context” of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as “further means of interpretation” recourse may be had, *inter alia*, to the “preparatory work of the treaty and the circumstances of its conclusion” (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. ... In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69–71 rather than under the present section.⁴³¹

265. Whether interpretative declarations are regarded as one of the elements to be taken into consideration for the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in this “context”, even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

As to the substance of paragraph 2, ... the suggestion of the United States Government that it should be made clear whether the “context” includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. ... But it would seem clear on principle that a unilateral document cannot be regarded as part of the “context” for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State’s acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a “unilateral” or a “group” document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle—the need for express or implied assent.⁴³²

266. Mr. Sapienza also concludes that interpretative declarations which have not been approved by the other

parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

First, it could be asked what meaning should be given to the phrase “accepted by the other parties as an instrument related to the treaty”. Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or, rather, should it also cover the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account “for the purpose of the interpretation”. Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.⁴³³

267. Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

268. In its advisory opinion on the *International status of South-West Africa*, ICJ noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.⁴³⁴

269. The Court thus specified that declarations by States relating to their international obligations have “probative value” for the interpretation of the terms of the legal instruments to which they relate, but that they corroborate or “support” an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective factors listed in articles 31 and 32 of the Vienna Conventions.

270. In *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,⁴³⁵ the Court again had to make a determination as to the value of an interpretative declaration. In signing and ratifying the United Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

Romania states that according to the requirements of equity as it results from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States.⁴³⁶

In its judgment, however, the Court paid little attention to the Romanian declaration, merely noting the following:

⁴³³ Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali*, pp. 239–240. See also Jennings and Watts, eds., *Oppenheim’s International Law*, p. 1268 (“An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration”).

⁴³⁴ *I.C.J. Reports 1950*, pp. 135–136.

⁴³⁵ Judgment, *I.C.J. Reports 2009*, p. 61.

⁴³⁶ *Multilateral Treaties...* (footnote 35 above), chap. XXI.6.

⁴³¹ *Yearbook ... 1965*, vol. II, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18, 19 and 20).

⁴³² *Yearbook ... 1966*, vol. II, p. 98, para. 16.

Finally, regarding Romania's declaration..., the Court observes that under Article 310 of the United Nations Convention on the Law of the Sea, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of the United Nations Convention on the Law of the Sea in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of United Nations Convention on the Law of the Sea as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation.⁴³⁷

271. The wording is radical and seems to call into question whether interpretative declarations are relevant at all. It seems to suggest that the declaration has "no bearing" on the interpretation of the provisions of the United Nations Convention on the Law of the Sea that the Court has been asked to give. Such a radical remark is qualified, however, by the use of the expression "as such": while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the unilateral interpretation from having an effect as a means of proof or a piece of information that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

272. The European Court of Human Rights took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted",⁴³⁸ the Court chose to take the same approach in the case of *Krombach v. France*: interpretative declarations may confirm an interpretation derived on the basis of sound practice. Thus, in order to respond to the question of knowing whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own jurisprudence, in the matter and ultimately cited a French interpretative declaration:

The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), No. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: "... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court".⁴³⁹

273. States also put forward their interpretative declarations on those grounds. Thus, the argument by the Agent for the United States in *Legality of Use of Force (Yugoslavia v. United States of America)* was tangentially based on the interpretative declaration made by the United States in order to demonstrate that the *mens rea specialis* is a *sine qua non* element of the qualification of genocide:

⁴³⁷ *I.C.J. Reports 2009*, p. 78, para. 42.

⁴³⁸ See footnote 403 above.

⁴³⁹ Application No. 29731/9, judgement of 13 February 2001, para. 96.

[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that "acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention". The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it.⁴⁴⁰

274. It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation corroborating a meaning given by the terms of the treaty, considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

275. The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation—the intention of one of the States parties—and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In that same vein, the reactions that may have been expressed with regard to the interpretative declaration by the other parties—all of them potential interpreters of the treaty as well—should also be taken into consideration. An interpretative declaration that was approved by one or more States certainly has greater value as evidence of the intention of the parties than an interpretative declaration to which there has been an opposition.⁴⁴¹

276. This "confirming" effect of the interpretative declarations is the subject of guideline 4.7.1, which reads as follows:

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

"An interpretative declaration may serve to elucidate the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in accordance with the general rule of interpretation of treaties.

"In determining how much weight should be given to an interpretative declaration in the interpretation of the treaty, approval of and opposition to it by the other contracting States and contracting organization shall be duly taken into account."

277. Acquiescence to an interpretative declaration by the other parties to the treaty, however, radically alters the situation. Thus, Sir Humphrey recalled that the Commission:

agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of

⁴⁴⁰ *I.C.J. Pleadings, Legality of Use of Force (Yugoslavia v. United States of America)*, CR 99/35, 12 May 1999 (Mr. Andrews).

⁴⁴¹ McRae (footnote 404 above), pp. 169–170.

common agreement by the parties. Acquiescence by the other parties was essential.⁴⁴²

278. Unanimous agreement by all the parties constitutes a genuine interpretative agreement which represents the will of the “masters of the treaty” and thus an authentic interpretation.⁴⁴³ One example is the unanimous approval by the contracting States to the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) of the interpretative declaration of the United States of America concerning the right to self-defence.⁴⁴⁴

279. In this case, it is still just as difficult to determine whether the interpretative agreement is part of the internal context of the treaty (art. 31, para. 2 of the Vienna Conventions) or the external context (art. 31, para. 3) of the treaty. The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. Indeed, in a case where a declaration is made before the signature of the treaty and approved when (or before) all the parties have expressed their consent to be bound by it, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty” within the meaning of article 31, paragraph 2 (a), or as “any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” within the meaning of article 31, paragraph 2 (b), of that same article. If, however, the interpretative agreement is reached only once the treaty has been concluded, a question might arise as to whether it is merely a “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” within the meaning of article 31, paragraph 3 (b), or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”.⁴⁴⁵

⁴⁴² *Yearbook ... 1966*, vol. I (Part I), 829th meeting, p. 47, para. 53. See also Kolb, *Interpretation et création du droit international*, p. 609.

⁴⁴³ See footnote 406 above. See also Heymann (footnote 404 above), pp. 130–135; Voicu, *De l'interprétation authentique des traités internationaux*, p. 134 or Herdegen, “Interpretation in international law”, para. 34.

⁴⁴⁴ “Notes between the United States and other powers”, *AJIL, Supplement*, vol. 23, 1929, pp. 1–13.

⁴⁴⁵ In this regard, see, in particular, Heymann (footnote 404 above), p. 130.

280. Without really coming to a decision on the matter, the Commission wrote in its commentary to article 27 (which has become article 31), paragraph 3 (a), of its draft articles:

A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: “... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...”. Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.⁴⁴⁶

281. The fact remains, however, that an agreement between the parties as to the interpretation of the treaty must be taken into account together with the text.

282. Guideline 4.7.3 recognizes this practice of interpretative declarations approved by all the parties to the treaty:

“4.7.3 Effects of an interpretative declaration approved by all the contracting States and contracting organizations

“An interpretative declaration that has been approved by all the contracting States and contracting organizations constitutes an agreement regarding the interpretation of the treaty.”

283. Even in instances where unanimous agreement on an interpretative declaration is not certain, the interpretative declaration does not lose all significance. Since it might well constitute the basis for agreement on the interpretation of the treaty, it could also preclude such an agreement from being made.⁴⁴⁷ In this connection, Professor McRae noted:

The “mere interpretative declaration” serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties.⁴⁴⁸

⁴⁴⁶ *Yearbook ... 1966*, vol. II, p. 221, para. (14) of the commentary. For the *Ambatielos* case (Preliminary Objection), see *I.C.J. Reports 1952*, p. 44.

⁴⁴⁷ Heymann, (footnote 404 above), p. 129.

⁴⁴⁸ McRae, (footnote 404 above), pp. 160–161.