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## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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The reports of the special rapporteurs and other documents considered by the Commission during its fifty-fourth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

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## ABBREVIATIONS

ALADI	Asociación Latinoamericana de Integración
BIS	Bank for International Settlements
CAHDI	Committee of Legal Advisers on Public International Law
ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICAO	International Civil Aviation Organization
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
	International Telecommunication Union
MIGA	Multilateral Investment Guarantee Agency
NATO	North Atlantic Treaty Organization
NAFTA	North American Free Trade Agreement
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WCO	World Customs Organization
WEU	Western European Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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<i>I.C.J. Reports</i>	<i>ICJ, Reports of Judgments, Advisory Opinions and Orders</i>
ILM	<i>International Legal Materials</i> (Washington, D.C.)
ILR	<i>International Law Reports</i>
LGDJ	Librairie générale de droit et de jurisprudence (Paris)
<i>P.C.I.J., Series A</i>	<i>PCIJ, Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	<i>PCIJ, Judgments, Orders and Advisory Opinions</i> (Nos. 40–80: beginning in 1931)
<i>P.C.I.J., Series C</i>	<i>PCIJ, Pleadings, Oral Arguments, Documents</i> (Nos. 52–88: beginning in 1931)
RGDIP	<i>Revue générale de droit international public</i> (Paris)
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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### NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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**The Internet address of the International Law Commission is [www.un.org/law/ilc/index.htm](http://www.un.org/law/ilc/index.htm).**

## **FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

**DOCUMENT A/CN.4/522**

**Note by the Secretariat**

*[Original: English]*  
*[20 February 2002]*

1. Following the death of Mr. Adegoke Ajibola Ige, one seat has become vacant in the International Law Commission.

2. In this case, article 11 of the statute of the Commission is applicable. It prescribes that:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The term of the member to be elected by the Commission will expire at the end of 2006.



# RESERVATIONS TO TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/526 and Add.1–3

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

[Original: English/French]  
[5 and 29 April, 16 May and 14 June 2002]

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Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, <i>Treaty Series</i> , vol. 78, No. 1021, p. 277.
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950)	<i>Ibid.</i> , vol. 213, No. 2889, p. 221.
Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby (Strasbourg, 11 May 1994)	<i>Ibid.</i> , vol. 2061, annex A, No. 2889, p. 7.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	<i>Ibid.</i> , vol. 189, No. 2545, p. 137.
Convention on the Political Rights of Women (New York, 31 March 1953)	<i>Ibid.</i> , vol. 193, No. 2613, p. 135.
Convention concerning Customs Facilities for Touring (New York, 4 June 1954)	<i>Ibid.</i> , vol. 276, No. 3992, p. 191.
Additional Protocol to the above-mentioned Convention, relating to the importation of tourist publicity documents and material (New York, 4 June 1954)	<i>Ibid.</i>
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 relating to the Status of Stateless Persons (New York, 28 September 1954)	<i>Ibid.</i> , vol. 360, No. 5158, p. 117.
European Convention on Establishment (Paris, 13 December 1955)	<i>Ibid.</i> , vol. 529, No. 7660, p. 141.
Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956)	<i>Ibid.</i> , vol. 399, No. 5742, p. 189.
Convention on the Recovery Abroad of Maintenance (New York, 20 June 1956)	<i>Ibid.</i> , vol. 268, No. 3850, p. 3.
Convention on the nationality of married women (New York, 20 February 1957)	<i>Ibid.</i> , vol. 309, No. 4468, p. 65.
European Agreement on Road Markings (Geneva, 13 December 1957)	<i>Ibid.</i> , vol. 372, No. 5296, p. 159.
Convention on the Continental Shelf (Geneva, 29 April 1958)	<i>Ibid.</i> , vol. 499, No. 7302, p. 311.
Agreement establishing the Inter-American Development Bank (Washington, 8 April 1959)	<i>Ibid.</i> , vol. 389, No. 5593, p. 69.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, No. 7310, p. 95.
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961)	<i>Ibid.</i> , vol. 496, No. 7247, p. 43.
Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (New York, 8 August 1975)	<i>Ibid.</i> , vol. 976, No. 14152, p. 105.
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (New York, 10 December 1962)	<i>Ibid.</i> , vol. 521, No. 7525, p. 231.
Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality (Strasbourg, 6 May 1963)	<i>Ibid.</i> , vol. 634, No. 9065, p. 221.
Convention on the unification of certain points of substantive law on patents for invention (Strasbourg, 27 November 1963)	<i>Ibid.</i> , vol. 1249, No. 20401, p. 369.
International Covenant on Civil and Political Rights (New York, 16 December 1966)	<i>Ibid.</i> , vol. 999, No. 14668, p. 171.
Second optional Protocol to the above-mentioned Covenant, aiming at the abolition of the death penalty (New York, 15 December 1989)	<i>Ibid.</i> , vol. 1642, annex A, No. 14668, p. 414.

- European Convention on the adoption of children (Strasbourg, 24 April 1967) *Ibid.*, vol. 634, No. 9067, p. 255.
- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) *Ibid.*, vol. 1155, No. 18232, p. 331.
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European Convention on Nationality (Strasbourg, 6 November 1997)	United Nations, <i>Treaty Series</i> , vol. 2135, No. 37248, p. 213.
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Convention on the Protection of the Environment through Criminal Law (Strasbourg, 4 November 1998)	Council of Europe, <i>European Treaty Series</i> , No. 172.
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Convention on cybercrime (Budapest, 23 November 2001)	<i>Ibid.</i> , vol. 2296, No. 40916, p. 167.

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## Introduction

1. As an introduction to his seventh report, the Special Rapporteur deems it useful to present, as he did in his previous reports,

(a) A brief summary of the lessons which in his view can be drawn from the consideration of his sixth report both by the Commission itself and by the Sixth Committee of the General Assembly (sect. B below);

(b) A concise account of the main developments with regard to reservations that occurred during the past year and were brought to his attention (sect. C below);

(c) A general presentation of this report (sect. D below).

In addition, since the Commission is entering a new five-year period, he thought it necessary to preface these traditional comments with a brief summary of its earlier work on the topic (sect. A below).

### A. The Commission's earlier work on the topic

2. Initially, the Commission considered the topic of reservations to treaties in the broader context of the law of treaties; in 1995, it was included on the Commission's agenda as a separate topic.

#### 1. RESERVATIONS TO TREATIES AND THE LAW OF TREATIES<sup>1</sup>

3. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) defines a reservation as:

a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Reservations are, therefore, collateral instruments and, quite naturally, successive special rapporteurs of the Commission on the law of treaties undertook to study them between 1950 and 1966.

4. However, although the actual concept of reservation did not pose any major problems, the Commission's views regarding the legal regime applicable to these instruments has evolved considerably. This is primarily due to exogenous factors and, in particular, to the extremely innovative advisory opinion adopted by ICJ on 28 May 1951 in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>2</sup>

<sup>1</sup> A much fuller account may be found in the first report on reservations to treaties, *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/470, chap. I (The previous work of the Commission on reservations and the outcome), pp. 126–141, paras. 8–90.

<sup>2</sup> *I.C.J. Reports 1951*, p. 15. Regarding the major contribution of this opinion, see Pellet, "La CIJ et les réserves aux traités: remarques cursives sur une révolution jurisprudentielle"; see also the studies cited in *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/478, annex I: bibliography, p. 85, and *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/478/Rev.1, annex I: bibliography, p. 139, particularly pp. 142–143.

5. Initially, the Commission took the generally accepted conventional approach and subjected the possibility of accepting a treaty, with reservations, to acceptance of the reservations by all parties to the treaty.<sup>3</sup> Although, in its advisory opinion of 1951, ICJ had adopted a more flexible approach, at least with respect to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, in keeping with pan-American practice and based on the criterion of compatibility of the reservation with the object and purpose of the treaty,<sup>4</sup> the Commission, in accordance with the views of successive special rapporteurs,<sup>5</sup> adhered to this position until 1961.<sup>6</sup>

6. It was not until Sir Humphrey Waldock's first report on the law of treaties,<sup>7</sup> in 1962, that the Commission departed from the conventional approach and adopted a more "flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States"<sup>8</sup>, it being understood that the criterion of compatibility of the reservation with the object and purpose of the treaty should guide States in their assessment.<sup>9</sup>

7. Having been favourably received by the General Assembly, this change was confirmed on second reading, even though the draft finally adopted in 1966 differed significantly in certain respects from the 1962 draft, *inter alia* because the Commission came round more clearly to the ICJ view, and seemed to make compatibility with the object and purpose of the treaty a criterion for permissibility of the reservation.<sup>10</sup> The Commission's draft spelled out the rules applicable to the formulation of reservations (art. 16), acceptance of and objection to reservations (art. 17), procedure regarding reservations (art. 18), legal effects (art. 19) and withdrawal of reservations (art. 20).<sup>11</sup>

8. The United Nations Conference on the Law of Treaties preserved the structure<sup>12</sup> and general outlines

<sup>3</sup> See the first report of Mr. James L. Brierly on the law of treaties, *Yearbook ... 1950*, vol. II, p. 240, document A/CN.4/23, and the report of the Commission, *ibid.*, document A/1316, p. 381, para. 164.

<sup>4</sup> *I.C.J. Reports 1951* (see footnote 2 above), pp. 24 and 29–30.

<sup>5</sup> See, in particular, the first report of Sir Hersch Lauterpacht, *Yearbook ... 1953*, vol. II, document A/CN.4/63, pp. 91–92 and 123–136, and the first report of Sir Gerald Fitzmaurice, *Yearbook ... 1956*, vol. II, A/CN.4/101, pp. 115–116 and 126–127.

<sup>6</sup> See, in particular, the Commission's report of 1951, one chapter of which is devoted especially to the issue of reservations, pursuant to a specific request from the General Assembly (*Yearbook ... 1951*, vol. II, document A/1858, p. 128, para. 24).

<sup>7</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, pp. 60–68.

<sup>8</sup> *Ibid.*, document A/5209, p. 180, para. (14) of the commentary to draft article 20.

<sup>9</sup> *Ibid.*, p. 176, draft art. 20, para. 2 (b).

<sup>10</sup> See *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–207, draft art. 16 and the commentary thereon.

<sup>11</sup> *Ibid.*, pp. 202–209.

<sup>12</sup> However, the order of the articles was changed. In the 1969 Vienna Convention, the structure is as follows: art. 19: (Formulation

of the draft, while further broadening the possibility of formulating reservations and lessening the effects of objections. This resulted in articles 19–23 of the 1969 Vienna Convention, which were purely and simply transposed into the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter the 1986 Vienna Convention).

9. In addition, in connection with its work on succession of States in respect of treaties, the Commission wondered about “the position of the successor State in regard to reservations, acceptances and objections”<sup>13</sup> formulated by the predecessor State. This led to the inclusion, in the Vienna Convention on Succession of States in respect of treaties (hereinafter the 1978 Vienna Convention), of an article 20 which merely states concisely the rules relating to succession in respect of reservations, without going into what happens to acceptances and objections formulated by a predecessor State and, for the rest, refers to articles 19–23 of the 1969 Vienna Convention.

## 2. THE TOPIC “RESERVATIONS TO TREATIES”

10. The rules relating to reservations in the three Vienna Conventions of 1969, 1978 and 1986 constituted—and still do constitute—the framework for practice in respect of reservations both for States which have become party to the Conventions and for those which have not acceded thereto. On the whole, at the practical level, this framework is satisfactory.

11. Nonetheless, as Mr. Paul Reuter, Special Rapporteur, pointed out, “the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention have not eliminated all these difficulties”.<sup>14</sup> Serious problems of principle continue to arise, *inter alia*, concerning, on the one hand, the criterion of compatibility with the object and purpose of the treaty and, on the other, the statement by States parties of their position vis-à-vis the reservation through acceptance or objection. These problems have not inconsiderable practical repercussions. Furthermore, the provisions concerning reservations of the three Vienna Conventions contain numerous other ambiguities and gaps that are the source of difficulties for States and international organizations, particularly (but not exclusively) when acting as depositaries.<sup>15</sup>

(Footnote 12 continued.)

of reservations); art. 20 (Acceptance of and objection to reservations); art. 21 (Legal effects of reservations and of objections to reservations); art. 22 (Withdrawal of reservations and of objections to reservations); and art. 23 (Procedure regarding reservations).

<sup>13</sup> Third report of Sir Humphrey Waldock on succession in respect of treaties, *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 47, para. (1) of the commentary to article 9; see pages 46–52; see also the first report of Sir Francis Vallat on succession of States in respect of treaties, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, pp. 50–55.

<sup>14</sup> 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), document A/CN.4/341 and Add.1, p. 56, para. 53.

<sup>15</sup> For a first survey of these ambiguities and gaps, see the first report on reservations to treaties, *Yearbook ... 1995* (footnote 1 above), chap. II (Brief inventory of the problems of the topic), pp. 141–150, paras. 91–149.

12. It was in order to try to remedy this situation that, in 1993, in accordance with suggestions made during discussions in the Sixth Committee of the General Assembly in 1989 and following proposals made by the Working Group regarding the long-term programme of work and by the Planning Group, the Commission decided to include the topic of reservations to treaties in its agenda.<sup>16</sup> The decision was approved by the General Assembly<sup>17</sup> and, the following year, the Commission appointed a special rapporteur; the latter has already submitted six reports.<sup>18</sup>

### (a) *The first two reports on reservations to treaties and the Commission's decisions*

13. The first two reports on reservations to treaties present specific features.

#### (i) *First report and the outcome*

14. The first report, entitled “First report on the law and practice relating to reservations to treaties”,<sup>19</sup> was submitted and discussed in 1995; it sought to present:

a. The Commission's earlier work on reservations;

b. Problems left pending;<sup>20</sup> and

c. The scope and form that the outcome of the Commission's future work on the topic might take.

15. At the end of the discussions, the Special Rapporteur drew the following conclusions:

(b)<sup>21</sup> The Commission should adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

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

(d) There was a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.<sup>22</sup>

<sup>16</sup> See *Yearbook ... 1993*, vol. II (Part Two), p. 96, paras. 428–430. At the request of the Special Rapporteur, the Commission decided in 1996 to simplify the title of the topic, which initially was: “The law and practice relating to reservations to treaties” (see *Yearbook ... 1996*, vol. II (Part Two), p. 79, para. 105 (a)).

<sup>17</sup> General Assembly resolution 48/31 of 9 December 1993, para. 7.

<sup>18</sup> It will be recalled that, in fact, the Commission did not consider the fourth report (*Yearbook ... 1999* (see footnote 2 above), p. 127, document A/CN.4/499) and that its substance was repeated in the fifth report (*Yearbook ... 2000*, vol. II (Part One), p. 139, document A/CN.4/508 and Add.1–4).

<sup>19</sup> *Yearbook ... 1995* (see footnote 1 above).

<sup>20</sup> The first two chapters are very briefly summarized above (paras. 3–12).

<sup>21</sup> The first conclusion (a) concerned the change in the title of the topic (see footnote 16 above).

<sup>22</sup> *Yearbook ... 1996* (see footnote 16 above), para. 105.

16. These conclusions were supported by the Commission (and by the States that spoke on the topic during the debate in the Sixth Committee in 1995)<sup>23</sup> and have formed the basis on which the Commission and its Special Rapporteur have worked ever since. It would be regrettable, to say the least, if they were to be questioned at this stage.

17. At its forty-seventh session, in 1995, the Commission, in accordance with its previous practice, also “authorized the Special Rapporteur to prepare a detailed questionnaire, as regards reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which are depositaries of multilateral conventions”.<sup>24</sup> The secretariat sent the questionnaires to all States Members of the United Nations or members of specialized agencies or that are party to the ICJ Statute and to 65 intergovernmental organizations.<sup>25</sup> Answers were received from 33 States<sup>26</sup> and 24 international organizations.<sup>27</sup> The Special Rapporteur wishes again to draw attention to the fact that the European Community, which has an abundance of practice in respect of reservations and which does not have fewer resources for responding to such surveys than other international organizations, has thus far not answered. He keenly regrets that failure to respond.

(ii) *Second report and the outcome*

18. The second report, submitted in 1996, consisted of two entirely different chapters.<sup>28</sup> In the first, the Special Rapporteur presented an “overview of the study” and in particular, made a number of proposals with regard to the Commission’s future work on the topic of reservations to treaties.<sup>29</sup> That chapter contained a “provisional plan of the study”.<sup>30</sup>

<sup>23</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session (A/CN.4/472/Add.1), para. 174.

<sup>24</sup> *Yearbook ... 1995*, vol. II (Part Two), p. 108, para. 489.

<sup>25</sup> The questionnaires are reproduced in *Yearbook ... 1996* (see footnote 2 above), document A/CN.4/477 and Add.1, annexes II and III, pp. 97 and 107, respectively.

<sup>26</sup> Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, Germany, Holy See, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, New Zealand, Panama, Peru, Republic of Korea, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. The Special Rapporteur wishes again to thank these States but no longer has much hope that other States will join them. He points out that this failure to reply skews the picture regarding practice, particularly since the geographic origin of the replies is very unbalanced.

<sup>27</sup> ALADI, BIS, Council of Europe, FAO, IAEA, ICAO, ILO, IMO, IFAD, IMF, ITU, OSCE, Pacific Islands Forum Secretariat, United Nations, UNESCO, UNIDO, UPU, WCO, World Bank (IBRD, IDA, IFC, MIGA), WHO, WIPO, WMO and WTO. The Special Rapporteur also wishes to thank these organizations and to express the hope that those which have not yet replied to the questionnaires will do so in the next few months.

<sup>28</sup> *Yearbook ... 1996* (see footnote 25 above), p. 37.

<sup>29</sup> *Ibid.*, pp. 44–51, paras. 9–50.

<sup>30</sup> *Ibid.*, pp. 48–49, para. 37; this outline was briefly commented on (*ibid.*, pp. 49–51, paras. 38–50).

19. Chapter II of the second report, entitled “Unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties)”<sup>31</sup> concluded that, although there were many different kinds of multilateral treaties, the regime of reservations to treaties outlined in articles 19–23 of the 1969 and 1986 Vienna Conventions, because of its flexibility was suited to all treaties, including those dealing with the protection of human rights. The Special Rapporteur had added to his report a draft resolution of the Commission concerning reservations to human rights treaties.<sup>32</sup>

20. Due to time constraints the report was not considered in 1996. However, at the forty-ninth session, in 1997, it was the subject of an in-depth debate<sup>33</sup> following which the Commission adopted not a formal resolution, as the Special Rapporteur had proposed, but preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,<sup>34</sup> and it decided to communicate the text to the human rights treaty monitoring bodies. Thus far, few of them have responded; those that have, have reacted in a somewhat negative fashion, giving reasons that are not well founded.<sup>35</sup>

21. Although some members of the Commission were of a different opinion, the Special Rapporteur remains convinced that it is preferable not to formally revise the preliminary conclusions adopted in 1997 before completing in first reading, if not the Guide to Practice as a whole, at least the draft guidelines concerning the effects of reservations. By that time he hopes that there will have been fuller consultation with the human rights bodies.

22. The Special Rapporteur had annexed a bibliography concerning reservations to treaties to his second report; a fuller and updated version is attached to his fourth report.<sup>36</sup>

(b) *The third and fifth reports: elaboration of the Guide to Practice*

23. What the third report<sup>37</sup> and the fifth report on reservations to treaties<sup>38</sup> have in common is that both documents introduce draft guidelines contained in the Guide to Practice in respect of reservations to treaties which

<sup>31</sup> *Ibid.*, pp. 52–83, paras. 55–260.

<sup>32</sup> *Ibid.*, p. 83, para. 260.

<sup>33</sup> See *Yearbook ... 1997*, vol. II (Part Two), pp. 44–57, paras. 44–157.

<sup>34</sup> *Ibid.*, p. 57.

<sup>35</sup> Regarding the reactions of the human rights bodies, see the third report (*Yearbook ... 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6, p. 231, paras. 15–16, and the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), pp. 148–150, paras. 10–15. Independently of the debates held in 1997 within the Sixth Committee (see Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session (A/CN.4/483), paras. 64–89), several States have submitted comments concerning the Commission’s preliminary conclusions (see *Yearbook ... 2000* (mentioned above), pp. 150–151, para. 16).

<sup>36</sup> *Yearbook ... 1996* and *Yearbook ... 1999* (see footnote 2 above).

<sup>37</sup> *Yearbook ... 1998* (see footnote 35 above).

<sup>38</sup> See footnote 18 above.

the Commission has approved for drafting.<sup>39</sup> These draft guidelines, most of which have been adopted by the Commission, are the product of a uniform method of elaboration, whose main elements it might be useful to recall.

(i) *Draft guidelines which have been adopted*

24. As the question of the unity or diversity of the legal regime for reservations to multilateral treaties (particularly human rights treaties) was the topic of the second report, in accordance with the plan of work submitted in 1995,<sup>40</sup> the third report<sup>41</sup> and the first part of the fifth report<sup>42</sup> dealt with the question of the definition of reservations, which has turned out to be infinitely more complex than could have been imagined, since the aim was to distinguish carefully between the reservations of comparable institutions which could not be assimilated. This is the topic of part one of the Guide to Practice<sup>43</sup> (Definitions), which has 30 draft guidelines divided into seven sections:<sup>44</sup>

1.1 Definition of reservations (draft guidelines 1.1 and 1.1.1 to 1.1.8)

1.2 Definition of interpretative declarations (draft guidelines 1.2, 1.2.1 and 1.2.2)

1.3 Distinction between reservations and interpretative declarations (draft guidelines 1.3 and 1.3.1 to 1.3.3)

1.4 Unilateral statements other than reservations and interpretative declarations (draft guidelines 1.4.1 to 1.4.7)

1.5 Unilateral statements in respect of bilateral treaties (draft guidelines 1.5.1 to 1.5.3)

1.6 Scope of definitions (draft guideline 1.6), and

1.7 Alternatives to reservations and interpretative declarations (draft guidelines 1.7.1 and 1.7.2).

25. One of the concepts similar to reservations of particular importance in State practice—although it is neither dealt with nor even evoked in the 1969 and 1986 Vienna Conventions—is that of interpretative declarations, whose legal regime was to be considered at the same time as the legal regime for reservations and which is therefore dealt with in some of the provisions of the Guide to Practice.<sup>45</sup>

<sup>39</sup> See paragraphs 15–16 above.

<sup>40</sup> See paragraph 18 above.

<sup>41</sup> *Yearbook ... 1998* (see footnote 35 above), p. 221.

<sup>42</sup> *Yearbook ... 2000* (see footnote 35 above), pp. 159–180, paras. 66–213, on alternatives to reservations and interpretative declarations, and annex II on definitions, p. 201).

<sup>43</sup> All the draft guidelines adopted by the Commission or proposed by the Special Rapporteur thus far are annexed to the present report.

<sup>44</sup> The commentaries on these drafts are contained in the reports of the Commission on its fiftieth session (*Yearbook ... 1998*, vol. II (Part Two), pp. 99–107, para. 540), fifty-first session (*Yearbook ... 1999*, pp. 93–126, para. 470) and fifty-second session (*Yearbook ... 2000*, vol. II (Part Two), pp. 108–123, para. 663).

<sup>45</sup> See the fifth report, *Yearbook ... 2000* (footnote 18 above),

26. A problem, however, arose in that regard and cropped up again in the report of the Commission on the work of its fifty-third session in 2001.<sup>46</sup> The problem is as follows: the Commission distinguished between two categories of interpretative declarations: on the one hand, those which purport solely to specify or clarify the meaning or scope which the authors, States or international organizations attribute to a treaty or to certain of its provisions<sup>47</sup> and, on the other hand, those whereby the declarant, purporting to achieve the same objective of specifying or clarifying, subjects its consent to be bound to this interpretation. In accordance with much of the doctrine, the Commission called this latter type of declaration “conditional interpretative declarations”.<sup>48</sup> The distinction has not been contested. Nonetheless, as work on the draft progresses, it appears that the legal regime for conditional interpretative declarations is similar, and even identical, to that for reservations. Consequently, certain members of the Commission expressed their strong opposition to the draft dealing separately with conditional interpretative declarations. While the Special Rapporteur does not object to this in principle, he believes, as do other members, that no final decision should be taken on the matter until the effects of reservations and conditional interpretative declarations have been considered. If, *mutatis mutandis*, an identical regime applies to both, there would still be time to delete specific guidelines relating to conditional interpretative declarations and adopt a single guideline assimilating the legal regime applicable to conditional interpretative declarations to that of reservations.

27. The second part of the fifth report<sup>49</sup> and the sixth report<sup>50</sup> addressed seemingly minor problems with regard to the formulation of reservations and interpretative declarations, although some of them were of great practical significance. On the basis of the fifth report, the Commission, at its fifty-third session in 2001, adopted 11 draft guidelines included in part two of the Guide to Practice (Procedure)<sup>51</sup> concerning:

(a) Confirmation of reservations when signing (draft guidelines 2.2, 2.2.1 to 2.2.3);

(b) Late formulation of a reservation (draft guidelines 2.3, 2.3.1 to 2.3.4); and

p. 158, para. 61.

<sup>46</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 18, para. 20, p. 173, para. 123, and p. 176, para. 149. See also paragraphs 39 and 43 below.

<sup>47</sup> See draft guideline 1.2.

<sup>48</sup> See draft guideline 1.2.1.

<sup>49</sup> *Yearbook ... 2000* (footnote 18 above), pp. 183–199, paras. 230–332, on the moment of formulation of reservations and interpretative declarations.

<sup>50</sup> *Yearbook ... 2001*, vol. II (Part One), A/CN.4/518/Add.1 and Add.3, pp. 144–164, paras. 40–173, on the form, notification and publicity of reservations and interpretative declarations (and its annex (Procedure: consolidated text of all draft guidelines dealing with the formulation of reservations and interpretative declarations proposed in the fifth and sixth reports)). See section B below on the consideration of the sixth report.

<sup>51</sup> The text of and commentaries on these draft guidelines are reproduced in *Yearbook ... 2001*, vol. II (Part Two), pp. 180–195.

(c) Various aspects of the procedure relating to interpretative declarations (draft guidelines 2.4.3 to 2.4.7).

(ii) *Method of elaboration and adoption of draft guidelines*

28. For the elaboration and adoption of the draft guidelines adopted thus far, both the Special Rapporteur, in his reports, and the Commission limited themselves to a uniform method which is more fully described in the third report.<sup>52</sup>

29. In substance, in accordance with the indications given in 1998, the reports are based on the following general outline:

(a) Each chapter will begin by recalling the relevant provisions of the three Vienna Conventions on the law of treaties and the *travaux préparatoires* leading to their adoption;

(b) Next, the Special Rapporteur will describe the practice of States and international organizations with regard to those provisions and any difficulties to which their application has given rise; in that context, the replies to questionnaires<sup>53</sup> which he has received will be particularly valuable;

(c) Simultaneously or in a separate section, as appropriate, he will describe the relevant judicial practice and the commentaries of jurists;

(d) On the basis of this information, he proposes a series of draft articles that will form the Guide to Practice which the Commission intends to adopt;

(e) Where appropriate, the draft articles are accompanied by model clauses which States could use when derogating from the Guide to Practice in special circumstances or specific fields or, on the contrary, to give effect to it.<sup>54</sup>

30. It goes without saying that it will be necessary to deviate from this outline on certain points. In particular, this will happen when the Vienna Conventions remain completely silent, for example in the case of interpretative declarations, to which the Conventions make absolutely no allusion. In such cases, the Special Rapporteur will revert to the usual methodology employed in preparing the Commission's draft articles, that is, he will base the work directly on international practice (see subparagraph (b) above).

31. In other instances, however, the Vienna Conventions may provide sufficient guidelines for practice. The

<sup>52</sup> *Yearbook ... 1998* (see footnote 35 above), pp. 233–235, paras. 31–41.

<sup>53</sup> See paragraph 17 above.

<sup>54</sup> Thus far, model clauses have only been proposed in the fifth report on reservations to treaties (*Yearbook ... 2000* (see footnote 18 above), p. 197, para. 312). These drafts concern "Reservations formulated after the expression of consent to be bound"; anxious not to encourage the practice of late reservations (which is in fact highly questionable), the Commission did not refer these draft guidelines to the Drafting Committee.

Special Rapporteur nevertheless feels that there would be no justification for excluding them from the study or even from the Guide to Practice under consideration: silence on this point would make the draft incomplete and difficult to use, whereas its purpose is precisely to make available to "users"—legal services in ministries of foreign affairs and international organizations, ministries of justice, judges, lawyers, specialists in public or private international relations—a reference work that is as complete and comprehensive as possible. Thus, the Guide to Practice reproduces the relevant provisions of the three Vienna Conventions of 1969, 1978 and 1986, combining them where necessary.

32. This method met with the general approval of both the Sixth Committee and the Commission. Nonetheless, misunderstandings sometimes arose in connection with this second aspect of the Special Rapporteur's method, which was to reproduce word for word the provisions of the Vienna Conventions relating to reservations: certain members of the Commission strongly supported proposals to insert amendments in the draft guidelines of the Guide to Practice which, in their view, would improve them. This approach is unwise; not only is it hardly compatible with the basic premise that the Conventions should not be called into question,<sup>55</sup> but it also sows confusion and is unnecessarily ponderous. While the texts of the Conventions may seem obscure or ambiguous, that seems infinitely preferable to attempting to clarify or supplement them by adopting separate draft guidelines. Moreover, this is what the Commission decided in all cases where such problems arose. The Special Rapporteur fervently hopes that this sound approach will not be called into question in future.

33. Otherwise, the Commission is proceeding, in the elaboration of the Guide to Practice, as it does for all draft articles:<sup>56</sup>

(a) The Commission discusses in the plenary meeting the draft guidelines proposed by the Special Rapporteur;

(b) These draft guidelines are (or are not) referred to the Drafting Committee, which makes whatever changes it deems appropriate;

(c) The new version is again discussed in the plenary;

<sup>55</sup> See paragraph 15 above.

<sup>56</sup> The Special Rapporteur wishes to evoke in passing a (relatively minor) question on which he does not share the views of certain members of the Commission: the numbering of draft guidelines. One view holds that the numbering should follow the usual practice: article 1; article 2; article 3 ... The Special Rapporteur has always been against this: he believes that the current practice (1.1; 1.1.1; 1.2.1) has its advantages: first of all, it helps to draw a clear distinction between the Guide to Practice and the draft convention with which the Guide to Practice is not synonymous (moreover, certain draft guidelines which have already been adopted will never find their way into a treaty—see guidelines 1.7.1 or 1.7.2, for example). Secondly, with the numbering adopted, draft guidelines can be conveniently rearranged by, *inter alia*, chapters or sections; also, additions can be made to the Guide to Practice as work progresses without having to continually dismantle the whole structure. Furthermore, the fact is that, in practice, after an adjustment period, the numbering chosen no longer poses any problem and is adopted by both the members of the Commission and the speakers in the Sixth Committee.

(d) Once the final text is adopted, the Special Rapporteur prepares draft commentaries with the assistance of the Secretariat; and

(e) The commentaries are discussed, amended if necessary, and adopted by the Commission prior to their inclusion in the annual report of the Commission for consideration by the Sixth Committee.

34. It should be noted, however, that the debates in the Sixth Committee cannot have an immediate effect: unless it is prepared to turn its work (whether it is on the Guide to Practice in respect of reservations or any other draft) into a kind of Penelope's web and start over and over again, the Commission cannot be constantly revising its drafts to reflect the reactions of the representatives of States in the General Assembly. Such reactions are, and can only be, a means of "fixing a date" for the second reading. Nothing, however, precludes the Commission and special rapporteurs from taking into account the comments made in the Sixth Committee, which may prove useful in their *future* work. On the contrary, there is every reason to do so, and no one is more convinced than the Special Rapporteur on reservations to treaties that this should be done, even if there is no question of turning the Commission, a body of independent experts, into a mere rubber stamp for the unpredictable positions taken in an international political organ such as the General Assembly.

## B. Outcome of the sixth report on reservations to treaties

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

35. Like the question of the definition of reservations, the question of the formulation of reservations, when taken up, proved to be much more complex and delicate than had been expected. Not only did it have obvious concrete importance (it is important to know, among other things, in what form and at what moment a reservation may be made and the other contracting States and international organizations notified), but it also poses certain problems of principle as was shown, for example, in the Commission's rather lively discussions on the subject of late reservations, one of the subjects of the fifth report on reservations to treaties.

36. This is why, despite his efforts, the Special Rapporteur was unable in his fifth report to complete his examination of the problems associated with the formulation of reservations, as he had hoped to do. This he was able to do only in the sixth report.<sup>57</sup> The latter deals only with the form and notification of reservations and interpretative declarations,<sup>58</sup> including the important question of the role of the depositary.

<sup>57</sup> In response to criticisms of the slow progress of the work (criticisms which he recognizes have been less severe during the previous two years, perhaps because of a growing awareness of the scope of the task), the Special Rapporteur wishes to recall that he receives no assistance in the preparation of his reports, apart from whatever limited help the Secretariat of the Commission is able to provide and for which he is extremely grateful.

<sup>58</sup> See footnote 50 above.

37. At its fifty-third session in 2001, the Commission completed its consideration of the fifth report on reservations to treaties<sup>59</sup> and began consideration of the sixth. The discussion focused mainly on quite technical and very specific points, often in the form of useful opinions on which, in the absence of specific guidelines from the Commission,<sup>60</sup> the Drafting Committee will have to decide.

38. The Commission in fact referred to the Drafting Committee the entire set of draft guidelines proposed by the Special Rapporteur in his sixth report<sup>61</sup> on the form, notification and publication of reservations and interpretative declarations. Owing to lack of time, however, the Special Rapporteur was unable to consider them. He will therefore do so at the fifty-fourth session, in 2002.

### 2. CONSIDERATION OF CHAPTER VI OF THE REPORT OF THE COMMISSION BY THE SIXTH COMMITTEE

39. Chapter VI of the report of the Commission on the work of its fifty-third session in 2001 deals with reservations to treaties. A very brief summary is contained in chapter II<sup>62</sup> and specific issues on which comments would be of particular interest to the Commission are dealt with in chapter III. On the topic of reservations to treaties,<sup>63</sup> these issues concern:

(a) Conditional interpretative declarations (the question being whether draft guidelines specifically relating to such declarations should be included in the Guide to Practice);<sup>64</sup>

(b) Late formulation of reservations (two questions were posed to States on this issue: (i) should draft guideline 2.3.1 (Late formulation of a reservation) be retained in the Guide to Practice? (ii) is it advisable to use the term "objection" in the same draft guideline to signify opposition by a Contracting Party to such a formulation?);<sup>65</sup>

(c) Role of the depositary (does it lie with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is

<sup>59</sup> See paragraph 27 above.

<sup>60</sup> See summaries of the debates in the report of the Commission on the work of its fifty-third session, *Yearbook ... 2001* (footnote 46 above), pp. 172–177, paras. 118–154. See also the summary records of the 2677th to 2679th and 2689th to 2693rd meetings (*ibid.*, vol. I, pp. 67–86 and 145–177).

<sup>61</sup> *Yearbook ... 2001* (see footnote 46 above), p. 177, para. 155. Numbered draft guidelines 2.1.1 to 2.1.8 and 2.4.1, 2.4.2 and 2.4.9 appear in the sixth report (*ibid.* (footnote 50 above), annex). The text of these proposals is contained in italics in the annex to the present report.

<sup>62</sup> *Ibid.* (see footnote 46 above), p. 17, para. 13. The Special Rapporteur questions the usefulness of these "summaries", which are not very informative.

<sup>63</sup> *Ibid.*, p. 18, paras. 20–26.

<sup>64</sup> See paragraph 26 above.

<sup>65</sup> The problem lies in the fact that, according to the Special Rapporteur and certain members of the Commission, the use of this word is a source of confusion, since the objection is not to the content of the proposed reservation (as in articles 20–23 of the 1969 and 1986 Vienna Conventions), but to the very principle of its formulation. That is why, during the work of the Drafting Committee, the Special Rapporteur had proposed the use of a different term, such as "opposition" or "rejection".

manifestly inadmissible, particularly when it is prohibited by a provision of the treaty?).

40. This part of the report was the subject of debate in the Sixth Committee from 29 October to 9 November 2001,<sup>66</sup> during which representatives of 28 States or groups of States<sup>67</sup> spoke on the topic of reservations to treaties. Even though the Special Rapporteur has deep reservations about the way in which consultations take place between the Sixth Committee and the Commission,<sup>68</sup> he noted with satisfaction and appreciation that most of the speakers had focused on the issues raised by the Commission.<sup>69</sup>

41. As noted above,<sup>70</sup> many of the views expressed by States in the Sixth Committee can be taken into consideration only when the Commission proceeds to the second reading of the Guide to Practice. This observation evidently applies to the responses to the two questions posed with regard to the late formulation of reservations,<sup>71</sup> which was the subject of draft guidelines 2.3.1–2.3.4 now adopted.

42. Were it to be otherwise, it would no doubt be imprudent to seek clear guidelines in the statements made during the debates of the Sixth Committee on the topic. While certain States did indeed seem to be against the very principle of including in the Guide to Practice guidelines concerning the late formulation of reservations,<sup>72</sup> some of these declarations are in reality ambiguous.<sup>73</sup> Furthermore, other speakers, on the con-

<sup>66</sup> In principle, the Sixth Committee wished the different chapters of the report to be considered separately. Unfortunately, States paid little heed to this prudent recommendation. The relevant summary records are contained in *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee* (A/C.6/56/SR.11–15 and A/C.6/56/SR.17–24). The Special Rapporteur again expresses regret that the vast majority of the summary records sent to him were in English only. See also the very useful Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session (A/CN.4/521).

<sup>67</sup> Sweden spoke on behalf of the Nordic countries (Denmark, Finland, Iceland and Norway), on 2 November 2001, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 17th meeting (A/C.6/56/SR.17), paras. 18–24.

<sup>68</sup> The Special Rapporteur had occasion to give voice publicly to these concerns on 6 November 2001, *ibid.*, 21st meeting (A/C.6/56/SR.21), paras. 27–28 and 34.

<sup>69</sup> This is also true of the useful written observations which the United Kingdom kindly transmitted to him on 27 February 2002 through the secretariat.

<sup>70</sup> Para. 34.

<sup>71</sup> See paragraph 39 above.

<sup>72</sup> See the positions of the United States, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 14th meeting (A/C.6/56/SR.14), para. 84; and of Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 26, which expressed concern that the inclusion in the Guide to Practice of a guideline on the late formulation of a reservation might serve to encourage a practice that is open to criticism. Also expressing concern were Sweden, on behalf of the Nordic countries, *ibid.*, 17th meeting (A/C.6/56/SR.17), para. 24; Kenya, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 85; Haiti, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 39; and India, *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 5.

<sup>73</sup> As is the case of the written proposal of the United Kingdom (see footnote 69 above) which, after reiterating its opposition in principle to the late formulation of reservations, proposes new wording for draft guideline 2.3.1 which, in its view, is different from the one retained by the Commission only by the requirement (contrary to the current

trary, approved the inclusion.<sup>74</sup> States were also divided on the use of the term “objection” in draft guideline 2.3.1.<sup>75</sup>

43. It is less difficult to identify a broad trend in the positions taken by speakers in the Sixth Committee regarding the advisability of including in the Guide to Practice guidelines concerning the juridical regime applicable to conditional interpretative declarations. Indeed, while certain States took a firm position in favour<sup>76</sup> or against<sup>77</sup> such guidelines,<sup>78</sup> the vast majority of delegations that spoke supported the position of the Special Rapporteur<sup>79</sup> that this juridical regime is very likely identical or very similar to the regime of reservations, but it would be prudent to confirm that before taking a final decision on the matter.<sup>80</sup> In the present report, the Special Rapporteur will therefore continue to raise questions about the rules applicable to conditional interpretative declarations and will propose that the Commission take a decision on the matter only after consideration of the report which he will prepare on the

practice) of express acceptance: “If a State or international organization formulates a reservation after it has expressed its consent to be bound, the reservation shall have no effect unless the treaty provides otherwise or all the other Contracting Parties expressly accept the late formulation of the reservation.” See also the comments of Austria, which argues that such declarations formulated after the expression of consent to be bound constitute reservations, but which does not seem to be opposed to its inclusion in the Guide to Practice (*ibid.*, 13th meeting (A/C.6/56/SR.13), para. 10); see further Japan (*ibid.*, 22nd meeting (A/C.6/56/SR.22), paras. 52–54) and the Russian Federation (*ibid.*, paras. 74–75).

<sup>74</sup> See the positions of Singapore, *ibid.*, 12th meeting (A/C.6/56/SR.12), para. 57; Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 41; Bahrain, *ibid.*, 19th meeting (A/C.6/56/SR.19), paras. 18–23; China, *ibid.*, para. 29; Italy, *ibid.*, paras. 40–42; Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 2; Poland, *ibid.*, para. 8; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 4; Greece, *ibid.*, 22nd meeting (A/C.6/56/SR.22), paras. 69–70. See also Romania, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 56, and Guatemala, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 12. In his statement, the Special Rapporteur recalled that no State had objected to the practice of the Secretary-General of the United Nations (and other depositaries) consisting in considering as accepted a reservation that is formulated late, in the absence of any “objection” within a specified period of time (*ibid.*, 21st meeting (A/C.6/56/SR.21), paras. 32–33).

<sup>75</sup> Singapore, *ibid.*, 12th meeting (A/C.6/56/SR.12), para. 58, and Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 41, declared that they had no objection to it. On the contrary, the United States, *ibid.*, 14th meeting (A/C.6/56/SR.14), para. 85, and Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 2, indicated their preference for other terms such as “opposition”, “denial” or “rejection”; see also the position taken by Poland, *ibid.*, para. 8.

<sup>76</sup> See China, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 28.

<sup>77</sup> See Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 40. See also the doubts expressed by Austria, *ibid.*, 13th meeting (A/C.6/56/SR.13), para. 11, and by the United Kingdom, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 16, and the written reactions of this State (footnote 69 above).

<sup>78</sup> Others have made no distinction (mistakenly, according to the Special Rapporteur) between simple interpretative declarations and conditional interpretative declarations (see Bahrain, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 26, or Israel, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 14).

<sup>79</sup> See paragraph 26 above.

<sup>80</sup> See United States, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 14th meeting (A/C.6/56/SR.14), para. 83; Romania, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 56; Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 1; France, *ibid.*, para. 4; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 3; Greece, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 71; Russian Federation, *ibid.*, para. 73; Kenya, *ibid.*, para. 84; and Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 25.

permissibility of reservations and interpretative declarations and their legal effects.

44. The last question posed by the Commission with regard to reservations was more exclusively prospective in nature, namely, whether the depositary may or should “refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty”.<sup>81</sup> The nuanced responses given to this question by the delegations of States to the Sixth Committee could serve as a useful guide to the Commission and its Drafting Committee during the consideration of the draft guidelines proposed by the Special Rapporteur in his sixth report which, as indicated above,<sup>82</sup> have been referred to the Drafting Committee, which had been unable to consider them. They will be particularly useful in the final elaboration of draft guideline 2.1.7 (Functions of depositaries),<sup>83</sup> which could be appropriately modified or complemented by another draft guideline specifically concerned with the question that was posed to States.

45. Generally speaking, States have expressed a preference for the strict alignment of the Guide to Practice with the provisions of the 1969 Vienna Convention concerning the role of the depositary, in particular article 77 thereof.<sup>84</sup> Some of the delegations that spoke stressed that the depositary must demonstrate impartiality and neutrality in the exercise of his functions and that he should therefore limit himself to transmitting to the parties the reservations that were formulated.<sup>85</sup> However, a number of representatives in the Sixth Committee were of the view that, when a reservation is manifestly impermissible, it is incumbent upon the depositary to refuse to communicate it<sup>86</sup> or at least to first inform the author of the reservation of its position and, if the author maintains the reservation,<sup>87</sup> to communicate it and draw the attention of the other parties to the problem. Moreover, the United Kingdom underscored the role which the Guide to Practice could play in harmonizing the practice of depositaries in the matter.<sup>88</sup>

46. In view of the responses of States to the question posed by the Commission, the latter might perhaps wish to consider the possibility of including in the Guide to

Practice a draft guideline complementing draft guideline 2.1.7<sup>89</sup> that specifies the action to be taken by the depositary in cases where he considers the reservation that has been formulated to be manifestly impermissible. This draft guideline could be worded as follows:

**“2.1.7 bis Case of manifestly impermissible reservations**

“1. Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary’s view, constitutes such impermissibility.

“2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation.”

47. In addition, during the debates in the Sixth Committee, a number of States made useful observations on the details of several of the draft guidelines proposed in the sixth report on reservations to treaties. These observations are summarized in the topical summary prepared by the Secretariat.<sup>90</sup> The Drafting Committee will of course keep these observations in mind when considering the draft guidelines.

**C. Recent developments with regard to reservations to treaties**

48. As far as the Special Rapporteur is aware, there have been few developments of any significance during the year just ended with regard to reservations to treaties.

49. Mention should be made, however, of the important report prepared by the Secretariat at the request of the Committee on the Elimination of Discrimination against Women,<sup>91</sup> which was submitted to this Committee at its twenty-fifth session.<sup>92</sup> This report includes a section on practices of human rights treaty bodies on reservations,<sup>93</sup> which examines the practice followed by:

<sup>81</sup> *Yearbook ... 2001* (see footnote 46 above), p. 18, para. 25.

<sup>82</sup> Para. 38.

<sup>83</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 161, para. 169; the text of this draft is reproduced in footnote 89 below.

<sup>84</sup> See Spain, *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 12th meeting (A/C.6/56/SR.12), para. 42.

<sup>85</sup> See Venezuela, *ibid.*, 15th meeting (A/C.6/56/SR.15), para. 42; China, *ibid.*, 19th meeting (A/C.6/56/SR.19), para. 30; Hungary, *ibid.*, 21st meeting (A/C.6/56/SR.21), para. 5; Israel, *ibid.*, para. 15; Russian Federation, *ibid.*, 22nd meeting (A/C.6/56/SR.22), para. 76; and Kenya, *ibid.*, para. 86.

<sup>86</sup> See Mali, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 3.

<sup>87</sup> See the United States, *ibid.*, 14th meeting (A/C.6/56/SR.14), paras. 86–87; France, *ibid.*, 20th meeting (A/C.6/56/SR.20), para. 6; Poland, *ibid.*, para. 9; Mexico, *ibid.*, 23rd meeting (A/C.6/56/SR.23), para. 27; and India, *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 5; and the written reactions of the United Kingdom (footnote 69 above).

<sup>88</sup> See the United Kingdom, *ibid.*, 18th meeting (A/C.6/56/SR.18), para. 18, and the written reactions of that State (footnote 69 above).

<sup>89</sup> The draft reads as follows (see footnote 83 above):

“*Functions of depositaries*

“1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

“(b) Where appropriate, the competent organ of the international organization concerned.”

<sup>90</sup> A/CN.4/521 (see footnote 66 above), paras. 46–50.

<sup>91</sup> See *Yearbook ... 2001* (footnote 50 above), p. 141, para. 28.

<sup>92</sup> Held on 2–20 July 2001 (CEDAW/C/2001/II/4).

<sup>93</sup> *Ibid.*, paras. 20–56.

- (a) The Human Rights Committee;
- (b) The Committee against Torture;
- (c) The Committee on the Elimination of Racial Discrimination;
- (d) The Committee on Economic, Social and Cultural Rights; and
- (e) The Committee on the Rights of the Child.

50. The present report is not the appropriate place in which to summarize much less to comment on this document, which contains useful information. The document conveys, however, a general impression that is worthy of note: human rights treaty bodies have an attitude towards reservations that is no doubt less dogmatic than the text of general comment No. 24 of the Human Rights Committee suggests.<sup>94</sup> Indeed, it shows that the bodies reviewed are more anxious to engage in a dialogue with the States authors of the reservations to encourage them to withdraw the reservations when these appear to be abusive rather than to rule on their impermissibility. This, for example, is the practice of the Committee on the Elimination of Discrimination against Women.<sup>95</sup> Annex VI of the Secretariat's report contains a legal opinion of the Office of Legal Affairs,<sup>96</sup> the date of which is not indicated but which appears to have been overtaken by events on certain points.

51. At its twenty-fifth session, the Committee on the Elimination of Discrimination against Women took no decision on the report of the Secretariat nor did it take up the question of reservations at its following session (14 January–1 February 2002).

52. For its part, the Sub-Commission on the Promotion and Protection of Human Rights, despite the concerns that had been expressed by the Commission on Human Rights,<sup>97</sup> renewed in its resolution 2001/17 of 16 August 2001, entitled "Reservations to human rights treaties", its earlier decisions of 1999 and 2000 and decided (para. 1):

to entrust Ms. Françoise Hampson with the task of preparing an expanded working paper on reservations to human rights treaties based on her working paper [E/CN.4/Sub.2/1999/28 and Corr.1], as well as

<sup>94</sup> Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V. For a critical commentary on this general comment, see the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 52–53, paras. 59–62, and pp. 77–82, paras. 218–252.

<sup>95</sup> See CEDAW/C/2001/II/4, paras. 4, 7 (c) and 10; see also the report of the Committee on its thirteenth session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 38 (A/49/38)*; chap. 1, sect. C, para. 10).

<sup>96</sup> See CEDAW/C/2001/II/4. This opinion was annexed to the report of the Committee on its third session (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 45 (A/39/45)*, vol. II, annex III); see also the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 72–73, para. 194.

<sup>97</sup> See decision 2001/113 of 25 April 2001 (*Official Records of the Economic and Social Council, Fifty-seventh Session, Supplement No. 3 (E/2001/23–E/CN.4/2001/167)*, p. 348). For previous episodes of this ongoing debate, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 142–143, paras. 21–27.

the comments made and discussions that took place at the fifty-first and fifty-second sessions of the Sub-Commission, which study will not duplicate the work of the International Law Commission, which concerns the legal regime applicable to reservations and interpretative declarations in general, whereas the proposed study involves the examination of the actual reservations and interpretative declarations made to human rights treaties in the light of the legal regime applicable to reservations and interpretative declarations, as set out in the working paper, and of submitting the extended working paper to the Sub-Commission at its fifty-fourth session.<sup>98</sup>

The Sub-Commission further decided (para. 2):

to continue its consideration of the question of reservations to human rights treaties at its fifty-fourth session under the same agenda item.<sup>99</sup>

53. In the light of the concerns that had been expressed on the question at the fifty-third session of the Commission in 2001, the Special Rapporteur did not follow up on his intention to contact Ms. Hampson<sup>100</sup> and the latter did not take the initiative to do so. He is of the view, however, that coordination, if done in a spirit of openness and mutual understanding, would be useful and even necessary and he hoped that the debate on this subject would be renewed this year in the Commission. Generally speaking, it seemed a useful idea for the Commission to take the initiative in promoting closer consultations with the human rights bodies with a view to the re-examination in one or two years' time of the preliminary conclusions adopted in 1997.<sup>101</sup>

54. With regard to the Committee of Legal Advisers on Public International Law (CAHDI), there does not seem to be any important new development to report. In accordance with the decision taken at its meeting in Paris in 1998, CAHDI continued to act as a European unit for monitoring reservations to international treaties.<sup>102</sup> In this capacity, it prepares and updates a list of reservations and declarations to conventions, concluded both outside the Council of Europe and within the Council, which are likely to give rise to objections.<sup>103</sup>

55. The Special Rapporteur has no knowledge of other important recent developments in the matter of reservations. He would be grateful to the other members of the Commission and to any reader of this report for any additional information that might be provided on the question.

## D. General presentation of the seventh report

56. Learning from experience, the Special Rapporteur is making no firm commitment with regard to the content of the present report. Nevertheless, such objec-

<sup>98</sup> Report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session (E/CN.4/2002/2–E/CN.4/Sub.2/2001/40).

<sup>99</sup> *Ibid.*

<sup>100</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 143, para. 28.

<sup>101</sup> See paragraphs 20–21 above.

<sup>102</sup> See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), p. 157, para. 56.

<sup>103</sup> For the latest situation on this issue, see the note prepared by the secretariat for the twenty-second meeting of CAHDI (Strasbourg, 11–12 September 2001), CAHDI (2001) 6 and Add.

tives as he might have set himself may be described as follows.

57. The present report will consist of the continuation and end of the study on the formulation, modification and withdrawal of reservations to treaties and interpretative declarations. Since the second part of the fifth report was concerned with the time at which these instruments should be formulated<sup>104</sup> and the sixth report dealt with the modalities of this formulation,<sup>105</sup> it now remains to study the delicate questions of their withdrawal and, above all, their modification.

58. In accordance with the provisional plan of the study proposed in 1996 in the second report,<sup>106</sup> the

<sup>104</sup> *Yearbook ... 2000* (see footnote 18 above), pp. 182–199, paras. 223–332. See also paragraphs 27 and 35–37 above.

<sup>105</sup> *Yearbook ... 2001* (see footnote 50 above), pp. 144–164, paras. 36–173. See also paragraphs 27 and 35–38 above.

<sup>106</sup> See paragraph 18 above.

## Withdrawal and modification of reservations and interpretative declarations

61. Although the 1969 and 1986 Vienna Conventions devote several provisions to the withdrawal of reservations, they are silent regarding modifications that may be made to an earlier reservation. It is true that there are objections to such a procedure that seem, at first sight, difficult to surmount: unless the treaty provides otherwise, the times at which a reservation may be formulated are fixed in a precise manner by the provisions of the two Vienna Conventions defining reservations,<sup>108</sup> and no modification can be accepted, at least if it amounts to a new reservation. The case is different, however, if the modification can be seen as a partial withdrawal of the reservation. It would therefore be desirable first to clarify the rules applicable to the withdrawal of reservations before considering the rules which might apply to modifications of reservations, and which come under the heading of the progressive development of international law rather than its codification in the strict sense.

62. The same is true *a fortiori* with regard to withdrawal and modification of interpretative declarations, on which the Vienna Conventions are completely silent.<sup>109</sup> In line with the method followed in the preparation of earlier reports, the rules applicable, *de lege lata* or *de lege ferenda*, to withdrawal or modification of these legal instruments will be studied in the light of the rules relating to reservations and of practice, where it exists.

<sup>108</sup> See article 2, paragraph 1 (*d*), in the 1969 and 1986 Vienna Conventions and draft guideline 1.1 of the Guide to Practice. See also draft guidelines 1.1.2, 1.1.4 and 2.3.1 to 2.3.4; regarding interpretative declarations, see draft guidelines 2.4.3, 2.4.6 and 2.4.7. All the draft guidelines already adopted by the Commission or proposed by the Special Rapporteur are reproduced in the annex to this report, which also refers, as applicable, to the Commission's commentaries or to the Special Rapporteur's reports introducing the draft guidelines.

<sup>109</sup> See the first and third reports on reservations to treaties (*Yearbook ... 1995* (footnote 1 above), p. 147, paras. 128–129, and *Yearbook ... 1998* (footnote 35 above), pp. 261–305, paras. 231–305).

present report will deal with the formulation and withdrawal of acceptances to reservations and objections thereto.

59. Moreover, a final part will present an overview of the problems related to the permissibility of reservations (and interpretative declarations), their effects and the effects of their acceptance and of objections thereto. Unlike the preceding parts, this part will not contain draft guidelines. It will take the form of a summary so as to permit the Commission (and, if necessary, a working group) to carry out a broad review of the more thorny issues posed by the subject and, if possible, provide guidance for the future work of the Special Rapporteur.

60. Lastly, as indicated above,<sup>107</sup> an annex will reproduce the entire set of draft guidelines adopted thus far by the Commission or proposed by the Special Rapporteur.

<sup>107</sup> See footnotes 43 and 61 above.

### A. Withdrawal of reservations

#### 1. THE FORM AND PROCEDURE FOR WITHDRAWAL OF RESERVATIONS

63. Withdrawal of reservations, formerly unusual,<sup>110</sup> is today more frequent.<sup>111</sup> The increased recourse made to this possibility is largely due, first, to the accession of many States to independence, which has resulted in their reviewing reservations formulated by the predecessor States,<sup>112</sup> and, secondly and above all, to the change in political regime in the Eastern European countries, which have withdrawn quite a large number of reservations made at the time of the communist regimes, notably with regard to human rights or the submission of disputes to ICJ.<sup>113</sup>

64. Provisions of the 1969 and 1986 Vienna Conventions<sup>114</sup> directly concern the withdrawal of reservations. According to article 22:

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

...

<sup>110</sup> See in this regard Imbert, *Les réserves aux traités multilatéraux*, pp. 291–293, and Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, p. 226.

<sup>111</sup> See Migliorino, “La revoca di riserve e di obiezioni a riserve”, p. 315.

<sup>112</sup> See footnote 160 below.

<sup>113</sup> See, for example, Migliorino, *loc. cit.*, and Bretton, “L'URSS et la compétence de la Cour internationale de Justice en matière de protection des droits de l'homme”.

<sup>114</sup> As a general rule, as with earlier reports, it is best to use the text of the 1986 Vienna Convention, which reproduces the 1969 text but extends it to treaties concluded by international organizations.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

According to article 23, paragraph 4:

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

65. These provisions give precise indications with regard to:

- The form of the withdrawal;
- The time at which it may be made;
- The lack of acceptance on the part of the other parties; and the time at which it takes effect.

By contrast, they make no reference to:

- The procedure to be followed, by the notifying State or others; and
- The effect of the withdrawal.

66. For the sake of simplicity: (a) the form of a withdrawal and the procedure governing it will be considered separately from (b) the effects of the withdrawal. The *travaux préparatoires* of the provisions cited above will be discussed at the same time.

(a) *Form of withdrawal of reservations*

(i) *A written unilateral act: articles 22, paragraph 1, and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions*

67. It follows from the provisions of article 22, paragraph 1, of the 1969 and 1986 Vienna Conventions<sup>115</sup> that the withdrawal of a reservation is a unilateral act. This conclusion settled a controversy that was long a subject of heated debate among legal theorists as to the legal nature of a withdrawal: is it a unilateral decision or an act under a treaty?<sup>116</sup> This divergence of views played a perceptible if understated role in the *travaux préparatoires* for this provision.

68. The question of the withdrawal of reservations did not attract the attention of special rapporteurs on the law of treaties until fairly recently and even then to a limited degree. Mr. James Brierly and Sir Hersch Lauterpacht did not devote a single draft article to the question of the criterion for the admissibility of reservations. The furthest the latter went was to draw attention to some proposals made in April 1954 to the Commission on Human Rights on the subject of reservations to the “Covenant of Human

Rights”, expressly providing for the possibility of withdrawing a reservation simply by notifying the Secretary-General of the United Nations to that effect.<sup>117</sup> Sir Gerald Fitzmaurice may have had that precedent in mind when, in his first report on the law of treaties, in 1956, he proposed the following wording for draft article 40, paragraph 3:

A reservation, though admitted, may be withdrawn by formal notice at any time. If this occurs, the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties.<sup>118</sup>

69. The draft was not discussed by the Commission, but, in his first report on the law of treaties, Sir Humphrey Waldock returned to the concept in a draft article 17, entitled “Power to formulate and withdraw reservations”, which posited the principle of “the absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States”.<sup>119</sup> Paragraph 6 of this draft article states:

A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.<sup>120</sup>

70. This proposal was not discussed in plenary, but the Drafting Committee, while retaining the spirit of the provision, made extensive changes not only to the wording, but even to the substance: the new draft article 19, which dealt exclusively with the withdrawal of reservations, no longer mentioned the notification procedure, but included a paragraph 2 relating to the effect of the withdrawal.<sup>121</sup> This draft was adopted with the addition of a provision in the first paragraph, at the request of Mr. Bartoš,<sup>122</sup> specifying when a withdrawal took legal effect.<sup>123</sup> According to draft article 22 at first reading:

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.<sup>124</sup>

<sup>117</sup> *Yearbook ... 1954*, vol. II, document A/CN.4/87, second report on the law of treaties, pp. 131–132, para. 5 of the commentary to article 9.

<sup>118</sup> *Yearbook ... 1956*, vol. II, document A/CN.4/101, p. 116. In his commentary on this provision, Sir Gerald restricted himself to saying that it did not require any explanation (*ibid.*, vol. II, document A/CN.4/101, p. 116). In his commentary on this provision, Sir Gerald restricted himself to saying that it did not require any explanation (*ibid.*, p. 127, para. 101).

<sup>119</sup> *Yearbook ... 1962*, vol. II, document A/CN.4/144, p. 66, para. (12) of the commentary to draft article 17.

<sup>120</sup> *Ibid.*, p. 61.

<sup>121</sup> *Ibid.*, vol. I, 664th meeting, p. 234, para. 67.

<sup>122</sup> *Ibid.*, paras. 68–71.

<sup>123</sup> *Ibid.*, 667th meeting, p. 253, paras. 73–75.

<sup>124</sup> *Ibid.*, vol. II, document A/5209, p. 181; article 21 related to the application of reservations.

<sup>115</sup> See paragraph 64 above.

<sup>116</sup> On this disagreement on the theory, see particularly Imbert, *op. cit.*, p. 288, and Horn, *op. cit.*, pp. 223–224, and the accompanying references. It would not appear to be useful to quote verbatim from the parties to a disagreement that no longer exists.

71. Paragraph (1) of the commentary on these provisions, which focuses on the unilateral nature of the withdrawal, probably reflects the discussions in the Drafting Committee. It states:

It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.<sup>125</sup>

72. Only three States reacted to draft article 22,<sup>126</sup> which was consequently revised by the Special Rapporteur. He proposed that<sup>127</sup>

(a) The provision should take the form of a residuary rule;

(b) It should be specified that notification of a withdrawal should be made by the depositary, if there was one;

(c) A period of grace should be allowed before the withdrawal became operative.<sup>128</sup>

73. During consideration of these proposals, two members of the Commission maintained that, where a reservation formulated by a State was accepted by another State, an agreement existed between those two States.<sup>129</sup> This proposition received little support and the majority favoured the notion, expressed by Mr. Bartoš, that “normally, a treaty was concluded in order to be applied in full; reservations constituted an exception which was merely tolerated”.<sup>130</sup>

74. Following this discussion, the Drafting Committee effectively reverted, in a different formulation, to the two concepts in paragraph 1 of the 1962 text.<sup>131</sup> The new text was the one eventually adopted<sup>132</sup> and it became the final version of draft article 20 (Withdrawal of reservations):

<sup>125</sup> *Ibid.*, pp. 181–182.

<sup>126</sup> See the fourth report of Sir Humphrey Waldock on the law of treaties, *Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.I and 2, pp. 55–56. Israel considered that notification should be through the channel of the depositary, while the United States welcomed the “provision that the withdrawal of the reservation ‘takes effect when notice of it has been received by the other States concerned’”; the comment by the United Kingdom related to the effective date of the withdrawal; see paragraphs 116 and 157 below. For the text of the comments by the three States, see *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 351 (United States), 295, para. 14 (Israel), and 344 (United Kingdom).

<sup>127</sup> For the text of the draft article proposed by Sir Humphrey Waldock, see *Yearbook ... 1965* (footnote 126 above), p. 56, or *ibid.*, vol. I, 800th meeting, p. 174, para. 43.

<sup>128</sup> On this point, see paragraph 157 below.

<sup>129</sup> See the comments by Mr. Verdross and (less clearly) Mr. Amado, *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 49, and p. 176, para. 60.

<sup>130</sup> *Ibid.*, p. 175, para. 50.

<sup>131</sup> See paragraph 70 above; for the first text adopted by the Drafting Committee in 1965, see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22.

<sup>132</sup> See *Yearbook ... 1965*, vol. I, 816th meeting, p. 284, paras. 56–60, and *Yearbook ... 1966*, vol. I (Part Two), p. 327, para. 106.

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

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only when notice of it has been received by the other contracting States.<sup>133</sup>

75. The commentary on the provision was, apart from a few clarifications, a repetition of that of 1962.<sup>134</sup> The Commission expressed the view that the parties to the treaty “ought to be presumed to wish a reserving State to abandon its reservation, unless a restriction on the withdrawal of reservations has been inserted in the treaty”.<sup>135</sup>

76. At the United Nations Conference on the Law of Treaties, the text of this draft article (which had by now become article 22 of the 1969 Vienna Convention) was incorporated unchanged in article 20 of the Convention, although several amendments of detail had been proposed.<sup>136</sup> However, on the proposal of Hungary, two important additions were adopted:

(a) First, it was decided to bring the procedure relating to the withdrawal of objections to reservations into line with that relating to the withdrawal of reservations themselves;<sup>137</sup> and,

(b) Secondly, a paragraph 4 was added to article 23 specifying that the withdrawal of reservations (and of objections) should be made in writing.

<sup>133</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209; drafted along the same lines, the corresponding text was article 22 of the 1965 draft (*Yearbook ... 1965*, vol. II, document A/6009, p. 162).

<sup>134</sup> See paragraph 70 above.

<sup>135</sup> *Yearbook ... 1966* (see footnote 133 above).

<sup>136</sup> See the list and the text of these amendments and sub-amendments 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* (United Nations publication, Sales No. E.70.V.5), *Documents of the Conference*, report of the Committee of the Whole on its work at the first session of the Conference, document A/CONF.39/14, pp. 141–142, paras. 205–211. In its written commentary, Belgium expressed the opinion that “the consent of a State which has accepted the reservation would appear to be called for” for “withdrawal of reservations for which provision is not made in the treaty and which can take effect only with the express or tacit consent of the other signatory States” (“Analytical compilation of comments and observations made in 1966 and 1967 with respect to the final draft articles on the law of treaties” (A/CONF.39/5 (Vol. I)), p. 166). Belgium does not seem, however, to have subsequently reverted to this suggestion.

<sup>137</sup> For the text of the Hungarian amendment, see A/CONF.39/L.18, which was reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 267; for the discussion of it, see the debates at the eleventh plenary meeting of the Conference (30 April 1969), *ibid.*, *Second session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), pp. 36–38, paras. 14–41.

77. Several States made proposals to this effect,<sup>138</sup> with a view to bringing the provision “into line with article 18 [23 in the definitive text of the Convention], where it was stated that a reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing”.<sup>139</sup> Although Mr. Yasseen (Iraq) considered that “an unnecessary additional condition [was thereby introduced] into a procedure which should be facilitated as much as possible”,<sup>140</sup> the principle was unanimously adopted by 98 votes to none.<sup>141</sup> It had, however, ultimately seemed more logical to include this provision not in article 20 itself but in article 23, which dealt with “Procedure regarding reservations” in general and was, as a result of the inclusion of this new paragraph 4, placed at the end of the section.<sup>142</sup>

78. Basing himself on the principle that “there is no reason to put international organizations in a situation different from that of States in the matter of reservations”, Mr. Paul Reuter, in his fourth report on the question of treaties concluded between States and international organizations or between two or more international organizations, restricted himself to submitting “draft articles which extend the rules embodied in articles 19 to 23 of the 1969 Convention”, subject only to “minor drafting changes”.<sup>143</sup> So it proved with article 22, in which the Special Rapporteur restricted himself to adding a reference to international organizations, and article 23, paragraph 4, which he reproduced in its entirety.<sup>144</sup> These proposals were adopted by the Commission without amendment<sup>145</sup> and retained on second reading.<sup>146</sup> The 1986 United Nations Conference on the Law of Treaties did not bring about any fundamental change.<sup>147</sup>

<sup>138</sup> See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17) and the United States (A/CONF.39/C.1/L.171), reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), pp. 141 and 267.

<sup>139</sup> *Ibid.*, Second session (see footnote 137 above), statement by Mrs. Bokor-Szegó (Hungary), p. 36, para. 13.

<sup>140</sup> *Ibid.*, p. 38, para. 39.

<sup>141</sup> *Ibid.*, para. 41.

<sup>142</sup> *Ibid.*, twenty-ninth plenary meeting, pp. 159–160, paras. 10–13. See Ruda, “Reservations to treaties”, p. 194. For a brief general presentation of the *travaux préparatoires* relating to articles 20 and 23, paragraph 4, see Migliorino, *loc. cit.*, pp. 319–320.

<sup>143</sup> *Yearbook ... 1975*, vol. II, document A/CN.4/285, pp. 36–37, paras. (2) and (5) of the general commentary on section 2.

<sup>144</sup> *Ibid.*, p. 38, and his fifth report, *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/290 and Add.1, p. 146.

<sup>145</sup> See the Commission’s discussions in 1977: *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–34; 1435th meeting, p. 103, paras. 1–2; 1451st meeting, pp. 194–195, paras. 12–16; and the report of the Commission to the General Assembly on the work of its forty-ninth session, *ibid.*, vol. II (Part Two), pp. 114–115.

<sup>146</sup> States and international organizations made no comment on these provisions. See the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, pp. 63–64; the Commission’s discussions: *ibid.*, vol. I, 1652nd meeting, p. 54, paras. 27–29; 1692nd meeting, pp. 264–265, paras. 38–41; the reports of the Commission to the General Assembly on the work of its thirty-third and thirty-fourth sessions, *ibid.*, vol. II (Part Two), p. 140; and *Yearbook ... 1982*, vol. II (Part Two), p. 37.

<sup>147</sup> See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5, vol. I), fifth plenary meeting, 18 March 1986, p. 14, paras. 62–63. For the final text, see paragraph 64 above.

79. It appears from the *travaux préparatoires* of articles 22, paragraphs 1 and 3 (a), and 23, paragraph 4, of the 1969 and 1986 Vienna Conventions that these provisions were hardly questioned. Even the once deeply debated theoretical question<sup>148</sup> of the purely unilateral nature of the act of withdrawal gave rise to little debate, both in the Commission<sup>149</sup> and at the Vienna Conferences.<sup>150</sup> This would appear quite correct: by definition, a reservation is a unilateral<sup>151</sup> act, even though States or international organizations may, by agreement, reach results comparable to those produced by reservations;<sup>152</sup> but the decision to opt for a reservation, by contrast, rightly implies a resort to unilateral action. It would therefore be illogical to require agreement from the other Contracting Parties to undo what the unilateral expression of the will of a State has done.

80. It could, perhaps, be argued that, in accordance with article 20 of the 1969 and 1986 Vienna Conventions, a reservation which is made by a State or an international organization and is not expressly provided for by the treaty is effective only for the parties which have accepted it, if only implicitly. On the one hand, however, such acceptance does not alter the nature of the reservation—it gives effect to it, but the reservation is still a distinct unilateral act—and, on the other hand and above all, such an argument involves extremely formalistic reasoning that takes no account of the benefit of limiting the number and the scope of reservations in order to preserve the integrity of the treaty. As has been rightly observed,<sup>153</sup> the signatories to a multilateral treaty expect, in principle, that it will be accepted as a whole and there is at least a presumption that, if a necessary evil, reservations are regretted by the other parties. It is worth pointing out, moreover, that the withdrawal of reservations, while sometimes regulated,<sup>154</sup> is never forbidden under a treaty.<sup>155</sup>

81. Furthermore, to the best of the Special Rapporteur’s knowledge, the unilateral withdrawal of reservations has never given rise to any particular difficulty and none of the States or international organizations which replied to the Commission’s questionnaire on reservations<sup>156</sup> has noted any problem in that regard. The recognition of such a right of withdrawal is also in accordance with the letter or the spirit of treaty clauses expressly relating to the withdrawal of reservations, which are either worded in terms similar to those in article 22, paragraph 1,<sup>157</sup> or aim

<sup>148</sup> See paragraph 67 above.

<sup>149</sup> See footnotes 129–130 above.

<sup>150</sup> See the comments by Belgium (footnote 136 above).

<sup>151</sup> See article 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1 of the Guide to Practice.

<sup>152</sup> See draft guideline 1.7.1.

<sup>153</sup> See paragraph 73 above.

<sup>154</sup> See especially paragraphs 147 and 163 below.

<sup>155</sup> See Migliorino, *loc. cit.*, p. 319.

<sup>156</sup> See footnotes 25–26 above. See particularly, in the questionnaire addressed to States, questions 1.6, 1.6.1, 1.6.2 and 1.6.2.1 relating to withdrawal of reservations.

<sup>157</sup> See the examples given by Imbert, *op. cit.*, p. 287, footnote (19), and by Horn, *op. cit.*, p. 437, note 1. See also, for example, the Convention relating to the Status of Refugees, art. 42, para. 2; the Convention on the Continental Shelf, art. 12, para. 2; the European Convention on Establishment, art. 26, para. 3; and the text of the model

to encourage withdrawal by urging States to withdraw them “as soon as circumstances permit”.<sup>158</sup> In the same spirit, international organizations and the human rights treaty monitoring bodies constantly issue recommendations urging States to withdraw reservations that they made when ratifying or acceding to treaties.<sup>159</sup>

82. Such exhortations also confirm that the withdrawal of a reservation may take place “at any time”,<sup>160</sup> which could even mean before the entry into a treaty by a State which withdraws a previous reservation,<sup>161</sup> although the Special Rapporteur knows of no case in which this has occurred.<sup>162</sup>

83. Otherwise, the now customary nature of the rules contained in articles 22, paragraph 1, and 23, paragraph

4, of the 1969 and 1986 Vienna Conventions seems not to be in question<sup>163</sup> and is in line with current practice.<sup>164</sup>

84. In these circumstances, there seems no reason not to incorporate in the Guide to Practice the provisions under consideration, in accordance with the Commission’s decision in principle that there would have to be decisive reasons to depart, in the Guide to Practice, from the provisions of the Vienna Conventions with regard to reservations.<sup>165</sup>

85. Draft guideline 2.5.1 (which would be the first to appear in section 2.5 relating to the withdrawal and modification of reservations and interpretative declarations) could therefore adopt without change the wording of the 1986 Vienna Convention, article 22, paragraph 1:

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

“2.5.1 *Withdrawal of reservations*

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

86. This wording does not call for any particular criticism, although some fault could be found with the first phrase (“Unless the treaty otherwise provides ...”). It goes without saying that most of the provisions of the 1986 Vienna Convention, and all the rules of a procedural nature contained in it, are of a residuary, voluntary nature and must be understood to apply “unless the treaty otherwise provides”. The same must therefore be true, *a fortiori*, of the Guide to Practice.

87. The phrase, which appeared in the Commission’s final draft but not in that of 1962,<sup>166</sup> was added by the Special Rapporteur, Sir Humphrey Waldock, following comments by Governments,<sup>167</sup> and endorsed by the Drafting Committee at the seventeenth session in 1965.<sup>168</sup> The reference to treaty provisions seems to suggest that model clauses should be included in the Guide to Practice. The issue is, however, less to do with procedure as such so much as with the effect of a withdrawal; the allusion to any conflict with treaty provisions is really just a muted echo of the concerns raised by some members of

(Footnote 157 continued.)

adopted in 1962 by the Council of Europe, which appears in “Model final clauses”, Secretariat memorandum prepared by the Directorate of Legal Affairs (CM (77) 222 of 16 November 1977, annex I, pp. 9–14).

<sup>158</sup> Convention on the Grant of European Patents, art. 167, para. (4); see also other examples cited by Imbert, *op. cit.*, p. 287, footnote (20), and by Horn, *op. cit.*, p. 437, note 2.

<sup>159</sup> For recent examples, see, amongst others, the following General Assembly resolutions: 55/79 of 4 December 2000 on the rights of the child (sect. I, para. 3); 54/157 of 17 December 1999 on the International Covenants on Human Rights (para. 7); 54/137 of 17 December 1999 (para. 5) and 55/70 of 4 December 2000 on the Convention on the Elimination of All Forms of Discrimination against Women (para. 6); and 47/112 of 16 December 1992 on the implementation of the Convention on the Rights of the Child (para. 7). See also resolution 2000/26 of the Sub-Commission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Council of Europe Committee of Ministers adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe recommendation 1223 (1993) of 1 October 1993 (para. 7).

<sup>160</sup> One favoured occasion for the withdrawal of reservations is at the time of the succession of States, for on that date the newly independent State can express its intention of not maintaining the reservations of the predecessor State (see the 1978 Vienna Convention, art. 20, para. 1). However, in accordance with the general plan followed in drafting the Guide to Practice (see paragraph 18 above), this situation will be examined during the general consideration of the fate of reservations in the case of succession of States.

<sup>161</sup> This eventuality is expressly provided for by the final clauses of the Convention concerning Customs Facilities for Touring, its Additional Protocol, relating to the importation of tourist publicity documents and material, and the Customs Convention on the Temporary Importation of Private Road Vehicles (see *Yearbook ... 1965*, vol. II, document A/5687, annex II, p. 105, para. 2). On the other hand, there is a considerable number of cases in which a State has made a reservation on signing a treaty, but subsequently renounced it because of representations made either by other signatories or by the depositary (see the examples given by Horn, *op. cit.*, pp. 345–346); but these are not strictly speaking withdrawals (see paragraphs 94–95 below).

<sup>162</sup> On the other hand, several cases of withdrawal of a reservation fairly soon after it had been made can be cited. See, for example, Estonia’s reply to question 1.6.2.1 of the Commission’s questionnaire: the restrictions on its acceptance of annexes III–V of the Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973 (MARPOL Convention), to which it had acceded on 16 December 1991, had been lifted on 18 August 1992, when Estonia was considered to be in a position to observe the conditions laid down in these instruments. The United Kingdom states that it withdrew, retrospectively from the date of ratification and three months after formulating it, a reservation to the Agreement establishing the Inter-American Development Bank. See also Migliorino, *loc. cit.*, p. 322, although in the examples he gives several years had elapsed between the making and the withdrawing of the reservation.

<sup>163</sup> See Migliorino, *loc. cit.*, pp. 320–321, and Szafarz, “Reservations to multilateral treaties”, p. 313.

<sup>164</sup> See *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, prepared by the Treaty Section of the Office of Legal Affairs (United Nations publication, Sales No. E.94.V.15), p. 64, para. 216. The few States which made any comment on this subject in their replies to the questionnaire on reservations (question 1.6.2.1) said that any withdrawals of reservations had followed a change in their domestic law (Colombia, Denmark, Israel, Sweden, Switzerland, United Kingdom, United States) or a reassessment of their interests (Israel). On reasons for withdrawal, see Flauss, “Note sur le retrait par la France des réserves aux traités internationaux”, pp. 860–861.

<sup>165</sup> See paragraphs 16 and 31–32 above.

<sup>166</sup> See paragraphs 70 and 74 above.

<sup>167</sup> Fourth report on the law of treaties, *Yearbook ... 1965* (see footnote 126 above), pp. 55–56; see also *Yearbook ... 1965*, vol. I, 800th meeting, p. 174, para. 45.

<sup>168</sup> *Ibid.*, vol. I, 814th meeting, p. 272, para. 22.

the Commission and some governments about difficulties that might arise from the sudden withdrawal of a reservation.<sup>169</sup> Model clauses to meet these concerns are presented below, in the section relating to the effective date of a withdrawal.<sup>170</sup>

88. Similarly, there seems no reason not to include in the Guide to Practice a draft guideline reproducing the wording of article 23, paragraph 4, which is worded identically in both the 1969 and the 1986 Vienna Conventions.

89. Yasseen was doubtless correct, at the 1969 Conference, to emphasize that the withdrawal procedure “should be facilitated as much as possible”.<sup>171</sup> The burden imposed on a State by the requirement of a written withdrawal should not, however, be exaggerated. Moreover, although the rule of parallelism of forms is not an absolute principle in international law,<sup>172</sup> it would be incongruous if a reservation,<sup>173</sup> about which there can surely be no doubt that it should be in writing, could be withdrawn simply through an oral statement. It would result in considerable uncertainty for the other Contracting Parties, which would have received the written text of the reservation but would not necessarily have been made aware of its withdrawal.<sup>174</sup>

90. Draft guideline 2.5.2 can, therefore, safely follow the text of article 23, paragraph 4, of both the 1969 and 1986 Vienna Conventions, at least insofar as the withdrawal of reservations is concerned; according to the plan for this part of the Guide to Practice, objections to reservations will form the subject of a separate section:

#### “2.5.2 Form of withdrawal

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

#### (ii) The question of implicit withdrawals

91. It remains open to question whether the withdrawal of a reservation may not be implicit, arising from circumstances other than formal withdrawal.

92. Certainly, as Ruda points out, “[t]he withdrawal of a reservation ... is not to be presumed”.<sup>175</sup> Yet the question still arises as to whether certain acts or conduct on the part of a State or an international organization should not be characterized as the withdrawal of a reservation.

93. It is, for example, certainly the case that the conclusion between the same parties of a subsequent treaty containing provisions identical to those to which one of the parties had made a reservation, whereas it did not do so

in connection with the second treaty, has, in practice, the same effect as a withdrawal of the initial reservation.<sup>176</sup> The fact remains that it is a separate instrument and that a State which made a reservation to the first treaty is bound by the second and not the first. If, for example, a third State, by acceding to the second treaty, accedes also to the first, the impact of the reservation would be fully felt in that State’s relations with the reserving State.

94. Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound,<sup>177</sup> cannot be interpreted as being a withdrawal of the reservation, which may well have been “formulated” but, for lack of formal confirmation, has not been “made” or “established”.<sup>178</sup> The reserving State has simply renounced it after the time for reflection has elapsed between the date of signing and the date of ratification, act of formal confirmation, acceptance or approval.

95. Imbert argues against this reasoning, basically on the grounds that the reservation exists even before it has been confirmed: it has to be taken into account when assessing the extent of the obligations incumbent on the signatory State (or international organization) under article 18 of the 1969 and 1986 Vienna Conventions; and, under article 23, paragraph 3, “an express acceptance, or an objection does not need to be renewed if made before confirmation of the reservation”.<sup>179</sup> The distinguished writer goes on to say that:

Where a reservation is not renewed [confirmed], whether expressly or not, no change occurs, either for the reserving State itself or in its relations with the other parties, since until that time the State was not bound by the treaty. Conversely, if the reservation is withdrawn after the deposit of the instrument of ratification or accession, the obligations of the reserving State are increased by virtue of the reservation and it may be bound for the first time by the treaty with parties which had objected to its reservation. A withdrawal thus affects the application of the treaty, whereas non-confirmation has no effect at all, from this point of view.<sup>180</sup>

The effects of non-confirmation and of withdrawal are thus too different for it to be possible to class the two institutions together.

96. It would even seem impossible to consider that an expired reservation has been withdrawn.

97. It sometimes happens that a clause in a treaty places a limit on the period of validity of reservations. Thus, for example, the Convention on the unification of certain

<sup>176</sup> In this connection, see Flauss, “Note sur le retrait ...”, pp. 857–858; but see also Tiberghien, *La protection des réfugiés en France*, pp. 34–35 (quoted by Flauss, p. 858, footnote (8)).

<sup>177</sup> See the 1969 and 1986 Vienna Conventions, art. 23, para. 2, draft guideline 2.2.1 and the commentary to it in the report of the Commission on the work of its fifty-third session, *Yearbook ... 2001* (footnote 46 above), pp. 180–183.

<sup>178</sup> Non-confirmation is, however, sometimes (wrongly) called “withdrawal”; see United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2001* (United Nations publication, Sales No. E.02.V.4), vol. I, p. 396, note 19, relating to the non-confirmation by the Government of Indonesia of reservations formulated when it signed the Single Convention on Narcotic Drugs, 1961.

<sup>179</sup> Imbert, *op. cit.*, p. 286.

<sup>180</sup> *Ibid.*

<sup>169</sup> See paragraph 157 below.

<sup>170</sup> See paragraphs 164 and 166 below.

<sup>171</sup> See paragraph 77 above.

<sup>172</sup> See paragraph 119 below.

<sup>173</sup> See draft guideline 2.1.2 proposed by the Special Rapporteur and the explanations contained in the sixth report on reservations to treaties (*Yearbook ... 2001* (footnote 50 above), pp. 144–146, paras. 40–52).

<sup>174</sup> In this connection, see Ruda, *loc. cit.*, pp. 195–196.

<sup>175</sup> *Ibid.*, p. 196.

points of substantive law on patents for invention provides for the possibility of non-renewable reservations to some of its provisions for maximum periods of 5 or 10 years, while an annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles allows Belgium to make a (“negotiated”<sup>181</sup>) reservation for a three-year period starting from the date of entry into force of the Convention.<sup>182</sup> Other Council of Europe conventions authorize only temporary, but renewable reservations; examples include the European Conventions on the adoption of children (art. 25), and on the legal status of children born out of wedlock (art. 14):

A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.

Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraphs by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.<sup>183</sup>

98. This provision makes a very clear distinction between the withdrawal of a reservation, mentioned in the second paragraph, and its expiration in cases of non-renewal, which is the subject of the first paragraph. This distinction is current: whereas withdrawal is a unilateral act expressing the will of the reserving State, expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time.

99. The same applies when, as sometimes occurs, the reservation itself sets a time limit to its validity. Thus, in its reply to the question on reservations,<sup>184</sup> Estonia stated that it had limited its reservation to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) to one year, since one year was considered to be a sufficient period to amend the laws in question.<sup>185</sup> In this case, the reservation ceases to be in force not because it has been withdrawn, but because of the time limit set by the text of the reservation itself.

<sup>181</sup> *Yearbook ... 2000* (footnote 18 above), pp. 174–175, paras. 164–170.

<sup>182</sup> See also the examples given by Spiliopoulou Åkermark, “Reservation clauses in treaties concluded within the Council of Europe”, pp. 499–500, and Imbert, *op. cit.*, p. 287, footnote (21); also article 124 of the Rome Statute of the International Criminal Court, which sets a seven-year time limit on the possibility of non-acceptance of the Court’s competence in respect of war crimes.

<sup>183</sup> The implementation of these provisions has caused great difficulties, owing to the insistence by certain States which had omitted to renew their reservations within the time limit on reformulating them. Eventually, the procedure applicable to the late formulation of reservations (see draft guideline 2.3.1) was implemented without opposition; see Polakiewicz, *Treaty-Making in the Council of Europe*, pp. 101–102. To avoid such problems, the Criminal Law Convention on Corruption (art. 38, para. 2), states that failure to renew a reservation would cause it to lapse.

<sup>184</sup> Replies to questions 1.6 and 1.6.1.

<sup>185</sup> Polakiewicz, *op. cit.*, pp. 102–104, gives many similar examples. It can also happen that a State, when formulating a reservation, indicates that it will withdraw it as soon as possible (see the reservation by Malta to articles 13, 15 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties ...* (footnote 178), p. 246); see also the reservation by Barbados to the International Covenant on Civil and Political Rights, *ibid.*, p. 183).

100. A more awkward situation arises in connection with what have been termed “forgotten reservations”.<sup>186</sup> A reservation is “forgotten”, in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. Flauss, who gives several examples of this in relation to France,<sup>187</sup> considers, no doubt correctly, although a full assessment is impossible, that “the number of ‘forgotten’ reservations ... is undoubtedly by no means negligible”.<sup>188</sup>

101. This situation, which is doubtless generally the product of negligence by the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to total legal chaos, particularly in States with a tradition of legal monism:<sup>189</sup> judges are expected to apply duly ratified treaties (although not reservations) and these generally take precedence over domestic laws, even if the latter are adopted later.<sup>190</sup> The paradoxical situation can thus arise that, in a State that has aligned its internal legislation with a treaty, it is nonetheless the treaty as ratified (and thus stripped of the provision or provisions to which reservations were made) which prevails, unless the reservation is formally withdrawn. Moreover, since “municipal laws are merely facts” from the standpoint of international law,<sup>191</sup> whether the legal system of the State in question is monist or dualist, an unwithdrawn reservation, having been made at international level, will continue, in principle, to be fully effective and the reserving State will continue to have an advantage over the other parties, although such an attitude could be questionable in terms of the principle of good faith,<sup>192</sup> the scope of which, however, is still uncertain.

102. In these circumstances, it is worth considering whether it would not be appropriate to include in the Guide to Practice a draft guideline encouraging States to withdraw reservations that have become obsolete or superfluous.

103. The Special Rapporteur confesses that he is uncertain on this point. Such a provision would probably not belong in a draft convention, for it could have only a very slight normative value. The Guide to Practice, however, does not aim to be a convention; it is, rather, “a code of recommended practices”.<sup>193</sup> It would therefore not be out of place to draw its users’ attention to the drawbacks of these “forgotten reservations” and to the benefits of withdrawing them. To that end, the following draft guideline could be adopted:

<sup>186</sup> Flauss, “Note sur le retrait ...”, p. 861, and Horn, *op. cit.*, p. 223.

<sup>187</sup> Flauss, “Note sur le retrait ...”, pp. 861–862.

<sup>188</sup> *Ibid.*, p. 861.

<sup>189</sup> The problem is less acute in States with a dualist system: international treaties are not applied as such, although, in all cases, national judges will apply the most recent *domestic* law.

<sup>190</sup> See article 55 of the French Constitution of 1958 and the many constitutional provisions which either use the same wording or are inspired by it in French-speaking African countries.

<sup>191</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

<sup>192</sup> In that context, see Flauss, “Note sur le retrait ...”, pp. 862–863.

<sup>193</sup> For this phrase, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 146, para. 51.

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

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

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

104. Apart from the obvious practical benefit offered by such a provision in dealing with “forgotten reservations”, it would also have the merit of responding to the urgent appeals issued by the bodies responsible for the implementation and monitoring of treaties, especially—but not solely—in the field of human rights.<sup>194</sup>

105. It goes without saying that it should be regarded as no more than a recommendation (which is why the conditional tense is used) and that, after such a review, States would remain absolutely free to withdraw their reservations or not.

106. A final problem, which is quite as thorny, arises when the lawfulness of a reservation has been contested by a body, whether judicial or not, which is responsible for monitoring the application of a treaty.

107. The present report is not the place to reconsider the much debated question of reservations to normative treaties and, more particularly, to human rights treaties.<sup>195</sup> It seems difficult, however, to pass over completely in silence the question of whether a reservation declared impermissible is automatically “withdrawn from duty” as a result or whether it should or could be withdrawn by the reserving State.

108. The facts of the question were set out fairly clearly in the second report on reservations to treaties.<sup>196</sup> It will suffice to recall the basic features of the question:

(a) The human rights bodies recognize their right (and even their duty) to pronounce on the permissibility of reservations made with regard to treaties the implementation of which they are mandated to monitor; and

(b) Generally, they consider themselves entitled to act on their findings and to disregard any reservation that they have deemed inadmissible.

109. In the Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, adopted in

<sup>194</sup> See paragraph 81 and footnote 159 above.

<sup>195</sup> See paragraph 21 above.

<sup>196</sup> *Yearbook ... 1996* (see footnote 25 above), particularly pp. 67–82, paras. 164–252.

1997,<sup>197</sup> the Commission expressed its agreement with the first of those positions,<sup>198</sup> but considered that,

in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State’s either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.<sup>199</sup>

110. While hoping that his proposal will not lead the Commission to repeat the whole discussion that led it to adopt this position, the Special Rapporteur believes that it would be illogical not to reflect it in a draft guideline on the withdrawal of reservations. In his view, it follows necessarily that:

(a) The finding that a reservation is inadmissible should not be deemed either an abrogation or, still less, a withdrawal of that reservation;

(b) The reserving State (or international organization) cannot, nonetheless, ignore the finding and has the duty to take action;

(c) It must eliminate the causes of the inadmissibility; and

(d) One of the ways of doing so—the most radical but the most satisfactory—is obviously to withdraw the disputed reservation or reservations.<sup>200</sup>

111. That was the course followed by Switzerland following the judgement in the *Belilos* case, in which the European Court of Human Rights ruled that the disputed declaration (which could in practice be considered a reservation) should be “held to be invalid”.<sup>201</sup> Not without some reluctance, Switzerland withdrew the reservation, at least partially.<sup>202</sup>

112. It is, all the same, open to question whether a draft guideline should be devoted exclusively to a situation in which a reservation is declared inadmissible by a body monitoring or overseeing the implementation of the treaty to which the reservation relates. Regularization is, after all, called for in all cases where a reservation is inadmissible, including cases in which the reserving State or international organization itself recognizes the inadmissibility, whether of its own accord or in response to objections by the other parties.

<sup>197</sup> *Yearbook ... 1997* (see footnote 33 above), p. 57, para. 157; see also paragraphs 19–20 above.

<sup>198</sup> *Ibid.*, para. 5 of the preliminary conclusions (although the Commission confines itself to recognizing the competence of these bodies to “comment upon [the admissibility of reservations] and express recommendations”).

<sup>199</sup> *Ibid.*, para. 10.

<sup>200</sup> On the problems resulting from the amendment of reservations, see section (b) below.

<sup>201</sup> *European Court of Human Rights, Series A: Judgments and Decisions*, vol. 132 (Registry of the Court, Council of Europe, Strasbourg, 1988), judgment of 29 April 1988, p. 28, para. 60.

<sup>202</sup> See section (b) below. On this point, see Flauss, “Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: requiem pour la déclaration interprétative relative à l’article 6 § 1”, p. 298.

113. Upon reflection, however, it seems preferable that the Commission should confine itself to cases in which inadmissibility is found by the body established under a treaty or dispute settlement. While it would be premature to rule on the purely procedural consequences of an inadmissible reservation without considering the more general question of its effect (or absence of effect), it would seem legitimate to give a ruling, in the section of the Guide to Practice relating to the withdrawal of reservations, on what should happen with reservations considered inadmissible by a monitoring body, in order to establish both that the mere finding of inadmissibility by such a body cannot be deemed a withdrawal of the reservation and that the withdrawal of that reservation by the reserving State or international organization is one of the possible responses—and probably the most satisfactory—to dealing with the problem.

114. Draft guideline 2.5.4 could therefore read as follows:

“2.5.4 *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty.*

“1. The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

“2. Following such a finding, the reserving State or international organization must act accordingly. It may fulfil its obligations in that respect by withdrawing the reservation.”<sup>203</sup>

(b) *Omissions from the 1969 and 1986 Vienna Conventions: procedure for withdrawal of reservations*

(i) *Silence of the 1969 and 1986 Vienna Conventions on the procedure for the withdrawal of reservations*

115. The two Vienna Conventions of 1969 and 1986, while reticent on the procedure for the formulation of reservations,<sup>204</sup> are entirely silent as to the procedure for their withdrawal. The question has not, however, been completely overlooked by several of the Commission’s special rapporteurs on the law of treaties. Thus, in 1956, Sir Gerald Fitzmaurice proposed a provision under which the withdrawal of a reservation would be the subject of “formal notice”,<sup>205</sup> but did not specify who should notify whom, or how notice should be given. Later, in 1962, Sir Humphrey Waldock, in his first report, went into more detail in draft article 17, paragraph 6, the adoption of which he recommended:

Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.<sup>206</sup>

<sup>203</sup> In the opinion of the Special Rapporteur, the detailed justification for this draft guideline is provided by the statement contained in his second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), particularly pp. 72–76, paras. 194–210, and pp. 77–82, paras. 216–252.

<sup>204</sup> See paragraph 120 below.

<sup>205</sup> See paragraph 68 above.

<sup>206</sup> *Yearbook ... 1962* (see footnote 119 above), p. 61; see also

The distinguished jurist did not accompany this part of his draft with any commentary.<sup>207</sup>

116. Although the proposal was not discussed in plenary, the Drafting Committee simply deleted it<sup>208</sup> and it was not restored by the Commission. During the brief discussion of the Drafting Committee’s draft, however, Sir Humphrey Waldock pointed out that “[n]otification of the withdrawal of a reservation would normally be made through a depositary”.<sup>209</sup> This approach was approved by Israel, the only State to provide comments on the draft adopted on first reading on that topic,<sup>210</sup> and the Special Rapporteur proposed an amendment to the draft whereby the withdrawal “becomes operative when notice of it has been received by the other States concerned from the depositary\*.”<sup>211</sup>

117. During the discussion in the Commission, Sir Humphrey Waldock explained that the omission of a reference to the depositary on first reading had been due solely to “inadvertence”<sup>212</sup> and his suggestion for remedying it was not disputed in principle. Mr. Rosenne, however, believed that it “was not as clear as it appeared”<sup>213</sup> and suggested the adoption of a single text, grouping together all notifications made by the depositary.<sup>214</sup> Although the Drafting Committee did not immediately adopt this idea, this probably explains why its draft again omitted any reference to the depositary,<sup>215</sup> who is not mentioned in the Commission’s final draft<sup>216</sup> either, nor in the text of the 1986 Vienna Convention itself.<sup>217</sup>

118. The silence of the 1969 and 1986 Vienna Conventions regarding the procedure for the withdrawal of reservations should be rectified by the Guide to Practice. To do this, the Commission might contemplate transposing the rules relating to the formulation of reservations. That calls for further consideration, however.

119. On the one hand, it is by no means clear that the rule of parallelism of forms has been accepted in international law. In its commentary, in 1966, on draft article 51 on the law of treaties, relating to the termination of or withdrawal from a treaty by consent of the parties, the Commission concluded that “this theory reflects the constitutional practice of particular States and not a

paragraph 69 above.

<sup>207</sup> *Ibid.*, p. 66.

<sup>208</sup> See paragraph 70 above.

<sup>209</sup> *Yearbook ... 1962* (see footnote 121 above), 664th meeting, p. 234, para. 71.

<sup>210</sup> *Yearbook... 1965* (see footnote 126 above), p. 55.

<sup>211</sup> *Ibid.*, p. 56. See also paragraph 72 above.

<sup>212</sup> *Yearbook... 1965* (see footnote 129 above), 800th meeting, p. 174, para. 45.

<sup>213</sup> *Ibid.*, p. 176, para. 65.

<sup>214</sup> *Ibid.*, 803rd meeting, pp. 197–199, paras. 30–56; for the text of the proposal, see *Yearbook ... 1965*, vol. II, document A/CN.4/L.108, p. 73.

<sup>215</sup> *Ibid.*, vol. I, 814th meeting, p. 272, para. 22; see also the comments by Mr. Rosenne and Sir Humphrey, *ibid.*, p. 273, paras. 26–28.

<sup>216</sup> Art. 20, para. 2; see the text of this provision in paragraph 74 above.

<sup>217</sup> See the text of the provisions relating to the withdrawal of reservations in the 1986 Vienna Convention (arts. 22–23).

rule of international law. In its opinion, international law does not accept the theory of the ‘*acte contraire*’.”<sup>218</sup> As Reuter pointed out, however, the “Commission stated that any form could in general be resorted to. A treaty may be modified by another written treaty emanating from lower-ranking organs or by an agreement in a less solemn form. According to the Commission, a written treaty may even be modified by a treaty based on oral or tacit consent.”<sup>219</sup> This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.

120. On the other hand, it has to be said that the 1969 and 1986 Vienna Conventions contain few rules specifically relating to the procedure for making reservations, apart from article 23, paragraph 1, which merely states that they must be “communicated to the contracting States [and contracting organizations] and other States [and other international organizations] entitled to become parties to the treaty”.<sup>220</sup>

121. Since there is no treaty provision directly concerning the procedure for withdrawing reservations, and in view of the inadequacy even of those relating to the formulation of reservations, the Commission should thus consider the draft guidelines on these topics contained in the sixth report on reservations to treaties, examine them in the light of the current practice and the (rare) discussions of theory and consider the possibility and the appropriateness of transposing them, with modifications, to the withdrawal of reservations. This is the approach which will be followed below with regard to:

- (a) Competence to withdraw a reservation;
- (b) Communication of the withdrawal.<sup>221</sup>

<sup>218</sup> *Yearbook ... 1966* (footnote 126 above), p. 249, para. (3) of the commentary to draft article 51; see also the commentary to article 35, *ibid.*, pp. 232–233.

<sup>219</sup> Reuter, *Introduction to the Law of Treaties*, p. 137, para. 211; see also Sinclair, *The Vienna Convention on the Law of Treaties*, p. 183. For a flexible position on the denunciation of a treaty, see the ICJ judgment of 21 June 2000 (*Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction*, *I.C.J. Reports 2000*, p. 25, para. 28).

<sup>220</sup> The Special Rapporteur has proposed that this text should be reproduced in draft guideline 2.1.5, paragraph 1, while a second paragraph would detail the procedure to be followed when the reservation relates to the constituent instrument of an international organization; see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 154, para. 113, and p. 157, para. 133.

<sup>221</sup> These problems, relating to the formulation of reservations, correspond to those dealt with in draft guidelines 2.1.3, 2.1.3 *bis* and 2.1.4, on the one hand, and 2.1.5 to 2.1.7, on the other, as proposed by the Special Rapporteur in his sixth report on reservations to treaties (*Yearbook ... 2001* (footnote 50 above)). There would appear to be no need to consider the possibility of using draft guideline 2.1.7 *bis* (Case of manifestly impermissible reservations) (see paragraph 46 above).

(ii) *Competence to withdraw a reservation*

122. The Special Rapporteur has proposed two alternative draft guidelines 2.1.3 (Competence to formulate a reservation at the international level). These draft guidelines, which are based on article 7 of the 1969 and 1986 Vienna Conventions (Full powers), have been sent to the Drafting Committee, which, however, has not yet considered them.<sup>222</sup> They read as follows:<sup>223</sup>

“[2.1.3 *Competence to formulate a reservation at the international level*

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

“[2.1.3 *Competence to formulate a reservation at the international level*

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

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

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

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

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

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

“(c) Representatives accredited by States to an international organization or one of its organs, for the purpose

As for the question of the effective date of communications relating to the withdrawal of reservations (see draft guideline 2.1.8 (Effective date of communications relating to reservations)), this will be considered below, in the general context of the effect of a withdrawal.

<sup>222</sup> See paragraph 38 above.

<sup>223</sup> For the presentation of the two alternative versions of the draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 146–148, paras. 53–71.

of formulating a reservation to a treaty adopted by that organization or body;

“[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization]”

123. Whichever version is adopted,<sup>224</sup> there seems no reason why these rules should not also apply to the withdrawal of reservations. The grounds on which they are justified in relation to the formulation of reservations<sup>225</sup> apply also to withdrawal: the reservation has altered the respective obligations of the reserving State and the other Contracting Parties and should therefore be issued by the same individuals or bodies with the competence to bind the State or international organization at the international level. This must, therefore, apply *a fortiori* to its withdrawal, which puts the seal on the reserving State's commitment.

124. The United Nations Secretariat firmly adopted that position in a letter dated 11 July 1974 to the Legal Adviser of the Permanent Mission of a Member State who had enquired about the “form in which the notifications of withdrawal”<sup>226</sup> of some reservations made in respect of the Convention on the Political Rights of Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages should be made. After noting that the 1969 Vienna Convention makes no reference to the subject and recalling the definition of “full powers” given in article 2, paragraph 1 (c),<sup>227</sup> the author of the letter adds:

Clearly the withdrawal of a reservation constitutes an important treaty action and one of those for which the production of full powers should certainly be contemplated. It would appear only logical to apply to a notification of withdrawal of reservations the same standard as to the formulation of reservations since the withdrawal would entail as much change in the application of the treaty concerned as the original reservations.

And in conclusion:

Our views, therefore, are that the withdrawal of reservations should *in principle* be notified to the Secretary-General either by the Head of State or Government or the Minister for Foreign Affairs, or by an official authorized by one of those authorities. While such a high level of procedure may prove somewhat burdensome, the fundamental safeguard which it provides to all concerned in regard to the validity of the notification more than make up for the resulting inconvenience.<sup>228</sup>

<sup>224</sup> *Ibid.*, p. 146, para. 68, on their respective advantages and disadvantages.

<sup>225</sup> *Ibid.*, p. 144, para. 56.

<sup>226</sup> *United Nations Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.1), p. 190.

<sup>227</sup> The Convention defines “full powers” as “a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty”.

<sup>228</sup> *United Nations Juridical Yearbook, 1974* (see footnote 226 above), p. 191. A memorandum by the Secretariat dated 1 July 1976 confirms this conclusion: “A reservation must be formulated in writing (article 23, paragraph 1, of the [Vienna] Convention), and both reservations and withdrawals\* of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister for Foreign Affairs) competent to bind the State internationally (article 7 of the Convention)” (*ibid.*, 1976 (United Nations publication, Sales No. E.78.V.5), p. 211).

125. Firm though this conclusion is, the words “in principle”, which appear in italics in the text of the Secretariat's legal advice, testify to a certain unease. This is explained by the fact that, as the writer of the letter acknowledges,

on several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.<sup>229</sup>

126. This raises a question that the Special Rapporteur has already mentioned in relation to the formulation of reservations:<sup>230</sup> would it not be legitimate to assume that the representative of a State to an international organization that is the depositary of a treaty (or the ambassador of a State accredited to a depositary State) has been recognized as being competent to give notice of reservations? And the question arises with all the more force in relation to the withdrawal of reservations, since there may be a hope of facilitating such a step, which would have the effect of making the treaty more fully applicable and thus be instrumental in preserving, or re-establishing, its integrity.

127. After thorough consideration, however, the Special Rapporteur, although considering this progressive development “limited but welcome”,<sup>231</sup> has not proposed to adopt it, since he is anxious to depart as little as possible from the provisions of article 7 of the 1969 and 1986 Vienna Conventions. He will also forbear from including a provision on withdrawal. On the one hand, it would be strange to depart, without a compelling reason, from the principle of the *acte contraire*<sup>232</sup> so long as it is understood that a non-formalist conception<sup>233</sup> of it is advisable. That means, in this case, that any of the authorities competent to formulate a reservation on behalf of a State may also withdraw it and the withdrawal need not necessarily be issued by the same body as the one which formulated the reservation. On the other hand, while it is true that there may well be a desire to facilitate the withdrawal of reservations, it is also the case that withdrawal resembles more closely than the formulation of reservations the expression of consent to be bound by a treaty. This constitutes a further argument for not departing from the rules contained in article 7 of the Conventions.

128. Moreover, it seems that the Secretary-General of the United Nations has since adopted a harder line and no longer accepts notification or withdrawal of reservations from permanent representatives accredited to the

<sup>229</sup> *Ibid.*, 1974 (see footnote 226 above), pp. 190–191. This is confirmed by the memorandum of 1 July 1976: “On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations” (*ibid.*, 1976 (see footnote 228 above), footnote 121).

<sup>230</sup> Sixth report on reservations to treaties, *Yearbook ... 2001* (see footnote 50 above), p. 147, paras. 63–64.

<sup>231</sup> *Ibid.*, pp. 147–148, para. 66.

<sup>232</sup> See paragraph 119 above.

<sup>233</sup> *Ibid.*, Reuter's phrase.

Organization.<sup>234</sup> And, in the latest edition of the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the Treaty Section of the Office of Legal Affairs states: “Withdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty.”<sup>235</sup> There is no mention of any possible exceptions.

129. The Secretary-General of the United Nations is not, however, the only depositary of multilateral treaties and the practice followed by other depositaries in this regard could usefully be considered. Unfortunately, the replies by States to the questionnaire on reservations give no information of any practical benefit in that direction. On the other hand, publications of the Council of Europe indicate that it accepts the formulation<sup>236</sup> and withdrawal<sup>237</sup> of reservations by letters from the permanent representatives of the Council.

130. It would be regrettable if such practices, which are perfectly acceptable and do not seem to give rise to any particular difficulties, were to be called into question by the inclusion of over-rigid rules in the Guide to Practice. That would not be the case, however, if guideline 2.1.3 were transposed to the withdrawal of reservations, since both the two proposed versions<sup>238</sup> take care to maintain the “customary practices in international organizations which are depositaries of treaties”.

131. The competent authority to formulate the withdrawal of a reservation at the international level is not necessarily the same as the one with competence to decide the issue at the internal level. Here, too, the problem is the same as that relating the formulation of reservations. It is addressed by draft guidelines 2.1.3 *bis* and 2.1.4 proposed by the Special Rapporteur:

“**2.1.3 bis** *Competence to formulate a reservation at the internal level*<sup>239</sup>

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

“**2.1.4** *Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations*<sup>240</sup>

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

132. The replies by States and international organizations to the questionnaire on reservations do not give any utilizable information regarding competence to decide on the withdrawal of a reservation at the internal level. Legal theory, however, provides certain indications in that respect.

133. Thus, in Italy, problems arose in connection with the withdrawal, in 1989, of the “geographic limitation”<sup>241</sup> formulated by it in 1954 to the Convention relating to the Status of Refugees.<sup>242</sup> Although this reservation, which limited the application of the Convention to persons who had become refugees following the “events occurring in Europe”, had been formulated by the Executive, without any request from Parliament, its withdrawal was decided by a decree-law of 1989 and converted into law in 1990. Theoretically, this was unnecessary,<sup>243</sup> whereas reservations introduced at the request of the legislature require it to be consulted, those decided by the Executive alone do not, in accordance with the principle of parallelism of forms.

134. In France, “like the denunciation of treaties, which is the exclusive prerogative of the Government [244], the withdrawal of reservations lies within the competence of the Executive. No distinction is made between cases in which the treaty is submitted for parliamentary authorization through ratification or approval and those in which it is not”<sup>245</sup>.

135. A more exhaustive study would very probably reveal the same diversity in relation to internal competence to withdraw reservations as has been noted with regard to their formulation.<sup>246</sup> There seems no reason, therefore, why the wording of draft guideline 2.1.3 *bis* should not be transposed to the withdrawal of reservations, if, that is, the former is retained by the Drafting Committee.<sup>247</sup>

136. The same applies to draft guideline 2.1.4,<sup>248</sup> which should, however, be retained in any case, whatever

<sup>234</sup> Flauss (“Note sur le retrait ...”, p. 860), however, mentions a case in which a reservation by France (to article 7 of the Convention on the Elimination of All Forms of Discrimination against Women), was withdrawn on 22 March 1984 by the Permanent Mission of France to the United Nations.

<sup>235</sup> See footnote 164 above.

<sup>236</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 147, para. 64.

<sup>237</sup> See European Committee on Legal Cooperation, *CDCJ Conventions and reservations to the said Conventions*, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (99) 36 of 30 March 1999).

<sup>238</sup> See paragraph 122 above.

<sup>239</sup> For the presentation of the draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 148–149, paras. 72–77.

<sup>240</sup> *Ibid.*, pp. 149–150, paras. 78–82.

<sup>241</sup> Gaja, “Modalità singolari per la revoca di una riserva”, p. 905.

<sup>242</sup> *Ibid.*, pp. 905–907, for a detailed exposition.

<sup>243</sup> *Ibid.*, and Migliorino, *loc. cit.*, pp. 332–333.

<sup>244</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above) p. 149, para. 75.

<sup>245</sup> Flauss, “Note sur le retrait ...”, p. 863.

<sup>246</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 148–149, para. 73.

<sup>247</sup> *Ibid.*, p. 149, para. 77, on the Special Rapporteur’s uncertainty in that regard.

<sup>248</sup> See paragraph 131 above.

happens to guideline 2.1.3 *bis*, since it would seem essential to indicate in the Guide to Practice whether and to what extent a State can claim that a reservation is not valid because it violates the rules of its domestic law; this situation could very well arise in practice, although the Special Rapporteur does not know of any specific example.

137. There might be a case for applying to reservations the “defective ratification” rule of article 46 of the 1969 and 1986 Vienna Conventions, and still more to the withdrawal of reservations, given that the process of ratification or accession is thereby completed. As the Special Rapporteur indicated in his sixth report on reservations to treaties,<sup>249</sup> however, he does not think that the principle stated in article 46 can be transposed to the question of formulating reservations, since the relevant rules are seldom spelled out in formal texts of a constitutional or even a legislative nature. This applies still more to the withdrawal of reservations, as is abundantly shown by the confusion felt by legal theorists concerning the procedure to be followed in situations where the problem might arise:<sup>250</sup> if specialists in such matters are in disagreement amongst themselves or criticize the practices of their own governments, other States or international organizations cannot be asked to delve into the mysteries and subtleties of internal law.

138. Since it appears that a modified version of draft guidelines 2.1.3, 2.1.3 *bis* and 2.1.4 could be applied to the withdrawal of reservations, the question arises as to the form in which that version should appear in chapter 2, section 5, of the Guide to Practice, which deals with the withdrawal and modification of reservations and interpretative declarations. In the view of the Special Rapporteur, two courses of action may be considered:

(a) Either the text could be reproduced in its entirety, only with the word “formulate” replacing the word “withdraw” (and with a few other adjustments);

(b) Or the guideline could be more of a synthesis, establishing the principle of parallelism of forms.

139. If the Commission opts for the first of these courses of action, the corresponding guidelines could read as follows:

“**2.5.5** *Competence to withdraw a reservation at the international level*<sup>251</sup>

“Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State of an international organization to be bound by a treaty is competent to withdraw a reservation on behalf of such State or international organization.]

<sup>249</sup> *Yearbook ... 2001* (footnote 50 above), p. 150, paras. 80–81.

<sup>250</sup> For Italy, in particular, see the articles cited in footnotes 241–243 above and the examples of legal theory given therein.

<sup>251</sup> This guideline is closely modelled on the short version of draft guideline 2.1.3.

“**2.5.5** *Competence to withdraw a reservation at the international level*<sup>252</sup>

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

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

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

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

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

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

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

“**2.5.5 bis** *Competence to withdraw a reservation at the internal level*

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

“**2.5.5 ter** *Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations*

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

140. Even apart from the replacement of the word “formulate” by the word “withdraw”, the transposition is not entirely word for word, at least as far as the long version of draft guideline 2.1.3 (for which the Special Rapporteur, and, it seems, the majority of the Commission, have a preference) is concerned:

<sup>252</sup> This guideline is closely modelled on the long version of draft guideline 2.1.3.

(a) Since the withdrawal procedure is, by definition, distinct both from that used in adopting or authenticating the text of a treaty and from the expression of consent to be bound, and may take place many years later, it is necessary that the person applying the procedure should produce specific full powers (para. 1 (a));

(b) For the same reason, paragraph 2 (b) of draft guideline 2.1.3 cannot apply to the withdrawal of reservations: when a State or an international organization comes to withdraw a reservation, the international conference which adopted the text is obviously no longer in session.

141. Another way of proceeding would be to model the draft guidelines closely on those relating to the competence to formulate reservations. It could not be a straight transposition, however; for the reasons given above, some adaptation is needed. Draft guideline 2.5.5 could thus be worded as follows:

“[2.5.5 *Competence to withdraw a reservation*

“The determination of the competent body and the procedure to be followed for withdrawing a reservation are governed, *mutatis mutandis*, by the rules applying to the formulation of reservations given in guidelines 2.1.3, 2.1.3 *bis* and 2.1.4.]”

142. This second formulation certainly has the merit of conciseness. The Special Rapporteur is not, however, convinced that it is preferable to the first: the Guide to Practice is not a treaty; it is a “code of recommended practices” on reservations and it would seem preferable that the user should find them there directly, without having to refer to other provisions or to commentaries. Above all, the expression “*mutatis mutandis*”, the inclusion of which is essential, since a straight transposition is impossible, at least if the long version of draft guideline 2.1.3 is used,<sup>253</sup> would inevitably give rise to confusion. Despite the risk of seeming repetitive and slightly ponderous, the long versions of draft guidelines 2.5.5, 2.5.5 *bis* and 2.5.5 *ter* (which would, in that case, need to be renumbered) would thus seem more appropriate.

(iii) *Communication of withdrawal of reservations*

143. As shown above,<sup>254</sup> the 1969 and 1986 Vienna Conventions are completely silent as to the procedure for the communication of withdrawal of reservations. Article 22, paragraph 3 (a), undoubtedly implies that the contracting States and international organizations should be notified of a withdrawal but it does not specify either who should make this notification or the procedure to be followed. Here too, therefore, it might be best to follow the method adopted in respect of competence to withdraw and to consider whether it might not be possible and appropriate to use a modified form of the draft guidelines proposed by the Special Rapporteur in relation to the communication of reservations themselves.

144. The relevant draft guidelines are numbered 2.1.5 to 2.1.7 and read as follows:

2.1.5 *Communication of reservations*<sup>255</sup>

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

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

2.1.6 *Procedure for communication of reservations*<sup>256</sup>

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

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

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

2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 *Functions of depositaries*<sup>257</sup>

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

145. The first remark that must be made is that, although the 1969 and 1986 Vienna Conventions do not specify the procedure to be followed for withdrawing a reservation, the *travaux préparatoires* of the 1969 Convention show that those who drafted the law of treaties were in no doubt about the fact that:

(a) Notification of withdrawal must be made by the depositary, if there is one; and

(b) The recipients of the notification must be “every State which is or is entitled to become a party to the treaty” and “interested States”.<sup>258</sup>

146. It is only because, at least partly at the instigation of Mr. Rosenne, it was decided to group together all the

<sup>253</sup> See paragraph 140 above.

<sup>254</sup> Paras. 115–121.

<sup>255</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 152–157, paras. 99–129.

<sup>256</sup> *Ibid.*, pp. 157–161, paras. 135–154, for the presentation of this draft guideline.

<sup>257</sup> *Ibid.*, pp. 161–163, paras. 156–170, for the presentation of this draft guideline.

<sup>258</sup> See paragraphs 115–116 above.

rules relating to depositaries and notification, which constitute articles 76–78 of the 1969 Vienna Convention,<sup>259</sup> that these proposals were abandoned.<sup>260</sup> They are, however, entirely consistent with draft guidelines 2.1.5 and 2.1.6, given above.<sup>261</sup>

147. This approach is endorsed by the legal theory on the topic,<sup>262</sup> meagre though it is, and is also in line with current practice. Thus,

(a) Both the Secretary-General of the United Nations<sup>263</sup> and the Secretary General of the Council of Europe<sup>264</sup> observe the same procedure on withdrawal as on the communication of reservations: they are the recipients of withdrawals of reservations made by States or international organizations to treaties of which they are depositaries and they communicate them to all the Contracting Parties and the States and international organizations entitled to become parties;

(b) Moreover, where treaty provisions expressly relate to the procedure to be followed in respect of withdrawal of reservations, they generally follow the model used for the formulation for reservations, in line with the rules given in draft guidelines 2.1.5 and 2.1.6, in that they specify that the depositary must be notified of a withdrawal<sup>265</sup> and even that he should communicate it to the Contracting Parties<sup>266</sup> or, more broadly, to “every State” entitled to become party or to “every State”, without specifying further.<sup>267</sup>

<sup>259</sup> And articles 77–79 of the 1986 Vienna Convention.

<sup>260</sup> See paragraph 117 above; see also the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), p. 157–158, para. 136.

<sup>261</sup> Para. 144.

<sup>262</sup> See Migliorino, *loc. cit.*, p. 323, and Maresca, *Il diritto dei trattati: la Convenzione codificatrice di Vienna del 23 Maggio 1969*, p. 302.

<sup>263</sup> See United Nations, *Multilateral Treaties ...* (footnote 178), vols. I and II, *passim* (see, among many other examples, the withdrawal of reservations to the Vienna Convention on Diplomatic Relations by China, Egypt and Mongolia, vol. I, p. 111, notes 15, 17 and 19; and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances by Colombia, Jamaica and the Philippines, *ibid.*, p. 427, notes 10, 11 and 13).

<sup>264</sup> See European Committee on Legal Cooperation, *CDCJ Conventions and reservations ...* (footnote 237 above) (withdrawal of reservations by Germany and Italy to the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, pp. 11–12).

<sup>265</sup> See, for example, the Convention on the Contract for the International Carriage of Goods by Road, art. 48, para. 2; the Convention on the limitation period in the international sale of goods, as amended by the Protocol amending the Convention on the limitation period in the international sale of goods, art. 40, para. 2; the Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European communities or officials of member States of the European Union, art. 15, para. 2; and the Convention on cybercrime, art. 43, para. 1.

<sup>266</sup> See, for example, the European Agreement on Road Markings, arts. 15, para. 2, and 17 (f); and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, arts. 18 and 34 (c).

<sup>267</sup> See, for example, the Convention on psychotropic substances, arts. 32, para. 5, and 33 (d); the Customs Convention on containers, arts. 26, para. 3, and 27; the International Convention on the harmonization of frontier control of goods, arts. 21, para. 2, and 25, para. (e); and the Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children (notification “to States Members of the Hague Conference on Private International Law”), arts. 60, para. 2, and 63 (f).

148. As for the depositary, there is no reason to give him a role different from the extremely limited one assigned to him for the formulation of reservations in draft guidelines 2.1.6 and 2.1.7,<sup>268</sup> which are a combination of article 77, paragraph 1, and article 78, paragraphs 1 (d) and 2, of the 1986 Vienna Convention<sup>269</sup> and are in conformity with the principles on which the relevant Vienna rules are based:<sup>270</sup>

(a) Under article 78, paragraph 1 (e), the depositary is given the function of “informing the parties and the States and international organizations entitled to become parties to the treaty of acts, notifications and communications relating to the treaty”; notifications relating to reservations and their withdrawal are covered by this provision, which appears in modified form in draft guideline 2.1.6, paragraph 1 (b);

(b) Draft guideline 2.1.7, paragraph 1, is based on the provision contained in article 78, paragraph 1 (d), under which the depositary should examine whether “notification or communication relating to the treaty is in due and proper form and, if need be, bring [...] the matter to the attention of the State or international organization in question”; this, too, applies equally well to the formulation of reservations and to their withdrawal (which could cause a problem with regard to, for example, the person making the communication);<sup>271</sup>

(c) Paragraph 2 of the same draft guideline carries through the logic of the “letter-box depositary” theory endorsed by the 1969 and 1986 Vienna Conventions in cases where a difference arises. It reproduces word for word the text of article 78, paragraph 2, of the 1986 Convention and, again, there seems no need to make a distinction between formulation and withdrawal.

149. The same problem therefore arises as arose in connection with competence to withdraw a reservation:<sup>272</sup> since the rules contained in draft guidelines 2.1.5–2.1.7 are in every respect transposable to the withdrawal of reservations, should they be merely referred to or reproduced in their entirety? In relation to competence to withdraw a reservation, the Special Rapporteur indicated his preference for the fuller version, an adaptation of draft guidelines 2.1.3, 2.1.3. *bis* and 2.1.4.<sup>273</sup> That position was, however, primarily dictated by the consideration that simply transposing the rules governing competence to formulate a reservation to competence to withdraw it was impossible. The same does not apply to the communication of withdrawal of reservations or the role of the depositary in that regard: the text of draft guidelines 2.1.5, 2.1.6 and 2.1.7 fits perfectly, with the simple replacement of the word “formulation” by the word “withdrawal”.

<sup>268</sup> See the text in paragraph 144 above.

<sup>269</sup> These correspond to articles 77–78 of the 1969 Vienna Convention.

<sup>270</sup> See the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 50 above), pp. 157–161, paras. 135–154, and pp. 161–163, paras. 156–170.

<sup>271</sup> See paragraphs 124–125 above.

<sup>272</sup> See paragraph 138 above.

<sup>273</sup> See paragraph 142 above.

150. A reference to earlier guidelines thus seems less open to objection. In that spirit, the following draft guideline could, perhaps, be adopted:

“**2.5.6** *Communication of withdrawal of a reservation*

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

151. If, however, the Commission considers that it would be preferable to avoid referring to these draft guidelines, it is possible to opt for transposition, as follows:

“**2.5.6** *Communication of withdrawal of reservations*

“1. The withdrawal of a reservation must be communicated [in writing<sup>274</sup>] to the contracting States and contracting organizations and other States and other international organizations entitled to become parties to the treaty.

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

“**2.5.6 bis** *Procedure for communication of withdrawal of reservations*

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

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

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

“**2.5.6 ter** *Functions of depositaries*

“1. The depositary shall examine whether the withdrawal by a State or an international organization of a reservation to a treaty is in due and proper form.

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

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

<sup>274</sup> If this approach is adopted, the words “in writing” should probably be omitted from the text of draft guideline 2.5.6, since this requirement is the subject of draft guideline 2.5.2 (para. 90 above), which reproduces the text of article 23, paragraph 4, of the 1969 and 1986 Vienna Conventions and which it would therefore not be appropriate to combine with draft guideline 2.5.6.

“(b) Where appropriate, the competent organ of the international organization concerned.]”

2. EFFECT OF THE WITHDRAWAL OF A RESERVATION

152. In the abstract, it is not very logical to insert draft guidelines relating to the effect of the withdrawal of a reservation in a chapter of the Guide to Practice dealing with the procedure for reservations, particularly since it is scarcely possible to dissociate the effect of the withdrawal from that of the reservation itself: the one cancels out the other. After some hesitation, however, the Special Rapporteur has decided to do so, for two reasons:

(a) In the first place, article 22 of the 1969 and 1986 Vienna Conventions links the rules governing the form and procedure<sup>275</sup> of a withdrawal closely with the question of its effect; and

(b) In the second place, the effect of a withdrawal may be viewed simply as a matter of form, thus precluding the need to go into the infinitely more complex effect of the reservation itself; this is, in any case, the only reasonable way of apprehending the effect at this stage.

153. Article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is concerned with the effect of the withdrawal of a reservation only in relation to the particular question of the time at which the withdrawal “becomes operative”. During the *travaux préparatoires* of the 1969 Convention, however, the Commission occasionally considered the more substantial question of how it would be operative.

(a) *Time at which the withdrawal of a reservation becomes operative*

154. Under article 22, paragraph 3, of the 1986 Vienna Convention,

Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to a contracting State or a contracting organization only when notice of it has been received by that State or that organization.

155. This provision, which reproduces the 1969 text with the sole addition of the reference to international organizations, was not specifically discussed during the *travaux préparatoires* of the 1986 Vienna Convention<sup>276</sup>

<sup>275</sup> Admittedly, only to the extent that paragraph 3 (a) refers to the “notice” of a withdrawal.

<sup>276</sup> See the fourth (*Yearbook ... 1975* (footnote 143 above), p. 38) and fifth (*Yearbook ... 1976* (footnote 144 above), p. 146) reports of Mr. Reuter on the question of treaties concluded between States and international organizations, or between two or more international organizations; for the (lack of) discussion by the Commission at its twenty-ninth session, see *Yearbook ... 1977*, vol. I, 1434th meeting, pp. 100–101, paras. 30–35, and 1435th meeting, p. 103, paras. 1–2; also 1451st meeting, pp. 194–195, paras. 12–16, and the Commission’s report to the General Assembly of the same year, *ibid.*, vol. II (Part Two), pp. 114–116; and, for the second reading, see the tenth report of Mr. Reuter, *Yearbook ... 1981*, vol. II (Part One), p. 63, para. 84; the (lack of) discussion at the thirtieth session of the Commission, *ibid.*, vol. I, 1652nd and 1692nd meetings, p. 54, paras. 27–28, and p. 265, para. 38, and the final text, *ibid.*, vol. II (Part Two), p. 140, and *Yearbook ... 1982*, vol. II (Part Two), pp. 36–37.

or at the United Nations Conference of on the Law of Treaties, which did no more than clarify<sup>277</sup> the text adopted on second reading by the Commission.<sup>278</sup> Its adoption had, however, given rise to some discussion in the Commission in 1962 and 1965.

156. Whereas Sir Gerald Fitzmaurice had, in his first report, in 1956, planned to spell out the effects of the withdrawal of a reservation,<sup>279</sup> Sir Humphrey Waldock expressed no such intention in his first report, in 1962.<sup>280</sup> It was, however, during the Commission's discussions in that year that, for the first time, a provision was included, at the request of Mr. Bartoš, in draft article 22 on the withdrawal of reservations, that such withdrawal "takes effect when notice of it has been received by the other States concerned".<sup>281</sup>

157. Following the adoption of this provision on first reading, three States reacted:<sup>282</sup> the United States, which welcomed it; and Israel and the United Kingdom, which were concerned about the difficulties that might be encountered by other States parties as a result of the suddenness of the effect of a withdrawal. Their arguments led the Special Rapporteur to propose the addition to draft article 22 of a subparagraph (c) involving a complicated formula whereby the withdrawal became operative as soon as the other States had received notice of it, but they were given three months' grace to make any necessary changes.<sup>283</sup> In this way, Sir Humphrey Waldock intended to give the other parties the opportunity to take "the requisite legislative or administrative action ..., where necessary", so that their internal law could be brought into line with the situation arising out of the withdrawal of the reservation.<sup>284</sup>

158. As well as criticizing the overcomplicated formulation of the admittedly rather strange solution proposed by the Special Rapporteur, the members of the Commission were divided on the principle of the provision. Mr. Ruda, supported by Mr. Briggs, said that there was no reason to allow a period of grace in the case of withdrawal of reservations when no such provision existed in the case

of the entry into force of a treaty as a result of the consent given by a State to be bound.<sup>285</sup> Other members, however, including Mr. Tunkin and Sir Humphrey Waldock himself, pointed out, with some reason, that the two situations were different: where ratification was concerned, "a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law"; in the case of the withdrawal of a reservation, by contrast, "the change in the situation did not depend on the will of the other States concerned, but on the will of the reserving State which decided to withdraw" it.<sup>286</sup>

159. When the text returned from the Drafting Committee, however, the period of grace had gone,<sup>287</sup> since the Commission "considered that such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage".<sup>288</sup> The Commission thus reverted to the principle that a withdrawal became operative once the other Contracting Parties had been notified, although not, it seems, without some hesitation: in its final commentary, after explaining that it had concluded that to formulate as a general rule the granting of a short period of time within which States could "adapt their internal law to the new situation resulting from [the withdrawal of the reservation] ... would be going too far", the Commission

felt that the matter should be left to be regulated by a specific provision in the treaty. It also considered that, even in the absence of such a provision, if a State required a short interval of time in which to bring its internal law into conformity with the situation resulting from the withdrawal of the reservation, good faith would debar the reserving State from complaining of the difficulty which its own reservation had occasioned.<sup>289</sup>

160. This raises another problem: the Commission had surreptitiously reintroduced, in the commentary, the exception that Sir Humphrey Waldock had, if clumsily, tried to incorporate in the text itself of what became article 22 of the 1969 Vienna Convention. And this was undoubtedly not a good course of action. True, the Commission linked the exception with the general principle of good faith, but, although it can constitute the basis for some rules, "the principle of good faith" is, as ICJ has observed, "[o]ne of the basic principles governing the creation and performance of legal obligations",<sup>290</sup> but "it is not in itself a source of obligation where none would otherwise exist".<sup>291</sup>

<sup>277</sup> See *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 142, para. 211 (text of the Drafting Committee).

<sup>278</sup> The plural ("when notice of it has been received by the other contracting States", *Yearbook ... 1966* (footnote 126 above), p. 209) was changed to the singular, which had the advantage of underlining that the time of becoming operative was specific to each of the parties (see the exposition by Mr. Yasseen, Chairman of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties* (footnote 137 above), p. 36, para. 11); see also paragraph 172 below. On the final adoption of draft article 22 by the Commission, see *Yearbook ... 1965*, vol. I, 816th meeting, p. 285, and *Yearbook ... 1966*, vol. I, part II, 892nd meeting, p. 327.

<sup>279</sup> See paragraph 68 above and paragraph 177 below.

<sup>280</sup> See paragraph 69 above.

<sup>281</sup> See paragraph 70 above.

<sup>282</sup> See the fourth report by Sir Humphrey Waldock, *Yearbook ... 1965* (footnote 126 above), pp. 55–56.

<sup>283</sup> *Ibid.*, p. 56, para. 5: "(c) on the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice."

<sup>284</sup> *Yearbook ... 1965*, vol. I, 800th meeting, p. 175, para. 47.

<sup>285</sup> *Ibid.*, p. 176, para. 59 (Mr. Ruda), and p. 177, para. 76 (Mr. Briggs).

<sup>286</sup> *Ibid.*, p. 176, paras. 68–69 (Mr. Tunkin); see also pages 175, para. 54 (Mr. Tsuruoka), and 177, paras. 78–80 (Sir Humphrey Waldock).

<sup>287</sup> *Ibid.*, 814th meeting, p. 272, para. 22.

<sup>288</sup> *Ibid.*, para. 24, explanation given by Sir Humphrey Waldock.

<sup>289</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209, para. (2) of the commentary to draft article 20.

<sup>290</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; and (*New Zealand v. France*), *ibid.*, p. 473, para. 49.

<sup>291</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.

161. The question thus arises as to whether the Guide to Practice should include the clarification contained in the Commission's commentary of 1965: it makes sense to be more specific in this code of recommended practices than in the general conventions on the law of treaties. In this case, however, it would seem most inadvisable: the "rule" set out in the commentary manifestly contradicts that appearing in the 1969 Vienna Convention and its inclusion in the Guide would therefore depart from that rule. This would be acceptable only if it was felt to meet a clear need, which is probably not the case here. Sir Humphrey Waldock had, in 1965, "heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation";<sup>292</sup> this would still seem to be the case 37 years later. The Special Rapporteur is therefore not in favour of this solution, nor of including in the commentary the Commission's questionable attempt, in its 1965 commentary, to soften the force of the provision.

162. It is nonetheless true that, in certain cases, the effect of the withdrawal of a reservation immediately after notification is given might give rise to difficulty. The 1966 commentary itself, however, gives the correct answer to the problem: in such a case, "the matter should ... be regulated by a specific provision in the treaty".<sup>293</sup> In other words, whenever a treaty relates to an issue, such as personal status or certain aspects of private international law, with regard to which it might be thought that the unexpected withdrawal of a reservation could cause the other parties difficulty because they had not adjusted their internal legislation, a clause should be included in the treaty specifying the period of time required to deal with the situation created by the withdrawal.

163. This is, moreover, what happens in practice. A considerable number of treaties set a time limit longer than that given, in accordance with general law, in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, for the withdrawal of a reservation to take effect. This time limit generally ranges from one to three months, starting, in most cases, from the notification of the withdrawal to the depositary rather than to the other contracting States.<sup>294</sup> Conversely, the treaty may set a shorter period than that contained in the Vienna Conventions. Thus, under the European Convention on Transfrontier Television, article 32, paragraph 3,

Any Contracting State which has made a reservation under paragraph 1 may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General\*

<sup>292</sup> See footnote 288 above.

<sup>293</sup> *Yearbook ... 1966* (see footnote 126 above), p. 209, para. (2) of the commentary to article 20.

<sup>294</sup> See the examples given by Imbert, *op. cit.*, p. 290, footnote (36), and by Horn, *op. cit.*, p. 438, note 19. See also, for example, the United Nations Convention on contracts for the international sale of goods, art. 97, para. (4) (six months); the Convention on the conservation of migratory species of wild animals, art. XIV, para. 2 (90 days from the transmission of the withdrawal to the parties by the depositary); and the Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 24, para. (3) (three months after notification of the withdrawal).

and not on the date of receipt by the other Contracting Parties of the notification by the depositary.<sup>295</sup> And sometimes a treaty provides that it is for the State which withdraws its reservation to specify the effective date of the withdrawal.<sup>296</sup>

164. In view of the foregoing, the right course of action would seem to be, first, to reproduce in the Guide to Practice the text of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, without the toning down suggested by the Commission's commentary in 1965, and, secondly, to accompany the text of the relevant guideline (2.5.9<sup>297</sup>) with a model clause A that would reflect the concerns expressed when the provision was drafted, and repeated by the Commission in 1965:

**"Model clause A: Deferment of the effective date of the withdrawal of a reservation**

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

165. Although negotiators are obviously free to modify as they wish the length of time needed for the withdrawal of the reservation to take effect, it would seem desirable that, in the model clause proposed by the Commission, the period should be calculated as dating from receipt of notification of the withdrawal by the depositary, rather than by the other Contracting Parties, as article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions provides. In the first place, the effective date established in that paragraph, which should certainly be retained in draft guideline 2.5.9, is deficient in several respects.<sup>298</sup> In the second place, in cases such as this, the parties are in possession of all the information indicating the probable timescale of communication of the withdrawal to the other States or international organizations concerned; they can thus set the effective date accordingly.

166. Conversely, situations may arise in which States agree that they prefer a shorter timescale. There is no reason against this, so long as the treaty in question contains a provision derogating from the general principle contained in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, whether by shortening the period required for the withdrawal to take effect or by giving the reserving State the power to determine the date on which

<sup>295</sup> Council of Europe conventions containing clauses on the withdrawal of reservations generally follow this formula: see the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, art. 8, para. 2; the European Agreement on the transmission of applications for legal aid, art. 13, para. 2; and the European Convention on Nationality, art. 29, para. 3.

<sup>296</sup> See the Protocol of Amendment to the International Convention on the simplification and harmonization of customs procedures, annex I, appendix I, art. 12, para. 2: "Any Contracting Party which has entered reservations may withdraw them, in whole or in part, at any time by notification to the depositary specifying the date on which such withdrawal takes effect."

<sup>297</sup> See paragraph 175 below.

<sup>298</sup> See paragraph 172 below.

the withdrawal should take effect. Model clauses B and C correspond to each of these situations:

**“Model clause B: Earlier effective date of withdrawal of a reservation**

“A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date of receipt of such notification by [the depositary].”<sup>299</sup>

**“Model clause C: Freedom to set the effective date of withdrawal of a reservation**

“A Contracting Party which has made a reservation to this treaty may withdraw it by means of a notification addressed to [the depositary]. The withdrawal shall take effect on the date set by that State in the notification addressed to [the depositary].”<sup>300</sup>

167. The question arises whether, in the absence of such a clause, a State is free to set the effective date of the withdrawal of a reservation that it has made. The answer must undoubtedly be in the affirmative, if that date is later than that resulting from the application of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions: the period provided for therein is intended to enable the other parties not to be caught unawares and to be fully informed of the scope of their commitments in relation to the State (or international organization) renouncing its reservation. From such time as that information is effective and available, therefore, there is no reason why the reserving party should not set the effective date of the withdrawal of its reservation as it wishes.

168. That is not the case, however, if the date is prior to the receipt of notification by the other Contracting Parties: in that situation, only the withdrawing State or international organization (and, where relevant, the depositary) knows that the reservation has been withdrawn. This applies all the more where the withdrawal is assumed to be retroactive, as sometimes occurs.<sup>301</sup> In such situations, in the absence of a specific treaty provision, an intention expressed unilaterally by the reserving State cannot, in theory, prevail over the clear provisions of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions, if the other Contracting Parties object. It is, however, worth considering whether the category of treaties establishing “integral obligations” should not be retained, especially in the field of human rights; in such a situation, there can be no objection—quite the contrary—to the fact that the withdrawal of the reservation takes immediate, even retroactive, effect, if the State making the original reservation

so wishes, since the legislation of other States is, by definition, not affected.<sup>302</sup>

169. It would probably be useful if the Guide to Practice were to specify the cases in which article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions does not apply, not because of a derogation,<sup>303</sup> but because it was never intended to apply. This could be the subject of a draft guideline 2.5.10:

**“2.5.10 Cases in which a reserving State may unilaterally set the effective date of withdrawal of a reservation**

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

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

“(b) The withdrawal does not alter the situation of the withdrawing State in relation to the other contracting States or international organizations.”

170. Subparagraph (a) of this draft guideline deliberately uses the plural (“the other contracting States or international organizations”) where article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions uses the singular (“that State or that organization”). For the withdrawal to take effect on the date specified by the withdrawing State, it is essential that *all* the other Contracting Parties should have received notification, otherwise neither the spirit nor the *raison d’être* of article 22, paragraph 3 (a), would have been respected. As for subparagraph (b), it addresses situations in which reservations have, in effect, been retroactively withdrawn.<sup>304</sup>

171. The principle remains that contained in article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions which should definitely be reproduced in the Guide to Practice.

172. This principle is, of course, not above criticism. Apart from the problems—considered above<sup>305</sup>—arising, in some cases, from the fact that a withdrawal takes effect on receipt of its notification by the other parties, it has been pointed out that the paragraph “does not really resolve the question of the time factor”,<sup>306</sup> although, thanks to the specific provision introduced at the United Nations Conference on the Law of Treaties in 1969,<sup>307</sup> the partners of a State or international organization which withdraws a reservation know exactly on what date the withdrawal has taken effect, the withdrawing State or international organization itself remains in uncertainty, for the notification may be received at completely different times by the other parties. This has the unfortunate

<sup>299</sup> This wording is closely based on that of the European Convention on Transfrontier Television, art. 32, para. 3, given in paragraph 163 above.

<sup>300</sup> See footnote 296 above.

<sup>301</sup> See the example given by Imbert, *op. cit.*, p. 291, footnote (38) (withdrawal of reservations by Denmark, Norway and Sweden to the Convention relating to the Status of Refugees and the Convention relating to the Status of Stateless Persons). See also United Nations, *Multilateral Treaties ...* (footnote 178), p. 353, notes 9 and 13. See further the example given in footnote 162 above.

<sup>302</sup> In this connection, see Imbert, *op. cit.*, pp. 290–291.

<sup>303</sup> As would be the case in the situation discussed in paragraphs 159–161 above.

<sup>304</sup> See footnote 301 above.

<sup>305</sup> Paragraphs 157–162.

<sup>306</sup> Imbert, *op. cit.*, p. 290.

<sup>307</sup> See footnote 278 above.

effect of leaving the author of the withdrawal uncertain as to the date on which its new obligations will become operational.<sup>308</sup> Short of amending the text of article 22, paragraph 3 (a), itself, however, there is no way of overcoming this difficulty, which seems too insignificant in practice<sup>309</sup> to justify “revising” the Vienna text.

173. It should be noted in this connection that the Vienna text departs from ordinary law: normally, an action under a treaty takes effect from the date of its notification to the depositary. That is what articles 16 (b), 24, paragraph 3, and 78 (b)<sup>310</sup> of the 1969 Vienna Convention provide. And that is how ICJ ruled concerning optional declarations of acceptance of its compulsory jurisdiction, following a line of reasoning that may, by analogy, be applied to the law of treaties.<sup>311</sup>

[By] the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36 ... For it is on that very day that the consensual bond, which is the basis of the Optional Clause, comes into being between the States concerned.<sup>312</sup>

174. The exception established by the provisions of article 22, paragraph 3 (a), of the 1969 and 1986 Vienna Conventions is explained by the concern to avoid a situation in which the other Contracting Parties to a treaty to which a State withdraws its reservation find themselves held responsible for not having observed the treaty provisions with regard to that State, even though they were unaware of the withdrawal.<sup>313</sup> This concern must be commended.

175. It would therefore be appropriate to reproduce, in the Guide to Practice, the provisions of article 22, paragraph 3 (a), of the 1986 Vienna Convention, which includes international organizations.

### “2.5.9 Effective date of withdrawal of a reservation

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

176. It may be noted in passing that the wording of this provision is open to the same objection as that of draft guideline 2.5.1,<sup>314</sup> in that it states that it applies only if the treaty does not otherwise provide; this is true of all the provisions of the 1969 and 1986 Vienna Conventions

<sup>308</sup> In this connection, see the comments by Mr. Briggs, *Yearbook ... 1965*, vol. I, 800th meeting, p. 177, para. 75, and 814th meeting, p. 273, para. 25.

<sup>309</sup> See paragraph 161 above.

<sup>310</sup> Art. 79 (b) of the 1986 Vienna Convention.

<sup>311</sup> See *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)*, Judgment, *I.C.J. Reports 1998*, p. 293, para. 30.

<sup>312</sup> *Right of Passage over Indian Territory*, Preliminary Objections, Judgment, *I.C.J. Reports 1957*, p. 146; see also *I.C.J. Reports 1998* (footnote 311 above), p. 291, para. 25.

<sup>313</sup> See the Commission’s commentary to draft article 22, adopted on first reading, *Yearbook ... 1962* (footnote 124 above), pp. 181–182, and to that adopted on second reading, *Yearbook ... 1966* (footnote 126 above), p. 210.

<sup>314</sup> See paragraph 85 above.

and, therefore, of the guidelines in the Guide to Practice. Nevertheless, for the same reasons given with regard to draft guideline 2.5.1,<sup>315</sup> it seems preferable to make do with this questionable form of words.

### (b) Consequences of withdrawal of a reservation

177. During the *travaux préparatoires* of the 1969 Vienna Convention, consideration was given to devoting a provision to the effect of the withdrawal of a reservation:

(a) In his first report on the law of treaties, Sir Gerald Fitzmaurice proposed a provision that, where a reservation is withdrawn,

the previously reserving State becomes automatically bound to comply fully with the provision of the treaty to which the reservation related, and is equally entitled to claim compliance with that provision by the other parties;<sup>316</sup>

(b) Draft article 22, paragraph 2, adopted by the Commission on first reading in 1962, provided that “[u]pon withdrawal of a reservation the provisions of article 21 [relating to the application of reservations] cease to apply”;<sup>317</sup> this sentence disappeared from the Commission’s final draft,<sup>318</sup> although;

(c) In plenary, Sir Humphrey Waldock suggested that the Drafting Committee could discuss a further question, namely “the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force”;<sup>319</sup> and,

(d) During the United Nations Conference on the Law of Treaties, several amendments aimed to re-establish a provision to that effect in the text of the 1969 Vienna Convention.<sup>320</sup>

178. The Conference Drafting Committee rejected the proposed amendments, on the grounds that they were superfluous and that the effect of the withdrawal of a reservation was self-evident.<sup>321</sup> This is only partially true.

179. There can be no doubt that “[t]he effect of withdrawal of a reservation is obviously to restore the original

<sup>315</sup> See paragraph 86 above.

<sup>316</sup> *Yearbook ... 1956* (see footnote 118 above), p. 116, art. 40, para. 3.

<sup>317</sup> *Yearbook ... 1962* (see footnote 124 above), p. 181; see also paragraph 70 above.

<sup>318</sup> It was discarded on second reading following consideration by the Drafting Committee of the new draft article proposed by Sir Humphrey Waldock, who retained it in part (see footnote 283 above), without offering any comment (see *Yearbook ... 1965*, vol. I, 814th meeting, p. 272, para. 22).

<sup>319</sup> *Ibid.*, 800th meeting, p. 178, para. 86; in that context, see the statement by Mr. Rosenne, *ibid.*, para. 87.

<sup>320</sup> Amendment by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1) (see footnote 138 above), with a sub-amendment by the USSR (A/CONF.39/C.1/L.167), *Official Records of the United Nations Conference on the Law of Treaties* (footnote 136 above), p. 141, para. 207 (iii).

<sup>321</sup> *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 70th meeting, statement by Mr. Yasseen, Chairman of the Drafting Committee, p. 417, para. 37.

text of the treaty”.<sup>322</sup> A distinction should, however, be made between three possible situations.

180. In the relations between the reserving and the accepting State (or international organization) (art. 20, para. 4, of the 1969 and 1986 Vienna Conventions), the reservation ceases to be operational (art. 21, para. 1): “In a situation of this kind, the withdrawal of a reservation will have the effect of re-establishing the original content of the treaty in the relations between the reserving and the accepting State. The withdrawal of the reservation produces the situation that would have existed if the reservation had not been made.”<sup>323</sup> Migliorino gives the example of the withdrawal by Hungary, in 1989, of its reservation to the Single Convention on Narcotic Drugs, 1961, article 48, paragraph 2, of which provides for the competence of ICJ;<sup>324</sup> there had been no objection to this reservation and, as a result of the withdrawal, the Court’s competence to interpret and apply the Convention was established from the effective date of the withdrawal.<sup>325</sup>

181. The same applies to the relations between the State (or international organization) which withdraws a reservation and a State (or international organization) which has objected to, but not opposed the entry into force of the treaty between itself and the reserving State. In this situation, under article 31, paragraph 3, of the 1969 and 1986 Vienna Conventions, the provisions to which the reservation related did not apply in the relations between the two parties: “In a situation of this kind, the withdrawal of a reservation has the effect of extending, in the relations between the reserving and the objecting State, the application of the treaty to the provisions covered by the reservation.”<sup>326</sup>

182. The most radical effect of the withdrawal of a reservation occurs where the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or organization. In that situation, the treaty enters into force<sup>327</sup> on the date on which the withdrawal takes effect. “For a state ... which had previously expressed a maximum-effect objection, the withdrawal of the reservation will mean the establishment of full treaty relations with the reserving state.”<sup>328</sup>

<sup>322</sup> Bowett, “Reservations to non-restricted multilateral treaties”, p. 87. See also Szafarz, *loc. cit.*, p. 313.

<sup>323</sup> Migliorino, *loc. cit.*, p. 325; in that connection, see Szafarz, *loc. cit.*, p. 314.

<sup>324</sup> See United Nations, *Multilateral Treaties ...*, (footnote 178 above), p. 400, note 18.

<sup>325</sup> Migliorino, *loc. cit.*, pp. 325–326.

<sup>326</sup> *Ibid.*, pp. 326–327; the author gives the example of the withdrawal by Portugal, in 1972, of its reservation to the Vienna Convention on Diplomatic Relations, art. 37, para. 2, which gave rise to several objections by States which did not, nevertheless, oppose the entry into force of the Convention between themselves and Portugal (see United Nations, *Multilateral Treaties ...* (footnote 178 above), p. 111, note 20).

<sup>327</sup> See article 24 of the 1969 and 1986 Vienna Conventions, especially paragraph 3.

<sup>328</sup> Szafarz, *loc. cit.*, pp. 313–314; in that connection, see Ruda, *loc. cit.*, p. 202, Bowett, *loc. cit.*, p. 87; and Migliorino, *loc. cit.*, pp. 328–329. The latter gives the example of the withdrawal by Hungary, in 1989, of its reservation to article 66 of the 1969 Vienna Convention (see *Multilateral Treaties ...* (footnote 178 above), vol. II, p. 290, note 15); this example is not really convincing, since the objecting States had not formally rejected the application of the Convention in the relations between themselves and Hungary.

183. In other words, the withdrawal of a reservation entails the application of the treaty in its entirety (so long as there are no other reservations, of course) in the relations between the State or international organization which withdraws the reservation and all the other Contracting Parties, whether they had accepted or objected to the reservation, although, in the second case, if the objecting State or international organization had opposed the entry into force of the treaty between itself and the reserving State or international organization, the treaty enters into force from the effective date of the withdrawal.

184. For the sake of clarity, it would probably be appropriate to reflect these distinct effects in two separate draft guidelines:

#### “2.5.7 *Effect of withdrawal of a reservation*

“The withdrawal of a reservation entails the application of the treaty as a whole in the relations between the State or international organization which withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation.

#### “2.5.8 *Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization*

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

### B. Modification of reservations

185. The question of the modification of reservations should be posed in connection with the questions of withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the “initial reservation”,<sup>329</sup> which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above. If, on the other hand, the effect of the modification is to strengthen an existing reservation, it would seem logical to start from the notion that what is being dealt with is the late formulation of a reservation, and to apply to it the rules applicable in this regard (see below).

186. While these two postulates appear to be virtually self-evident, it is appropriate to ascertain briefly their relevance in the light of practice.

<sup>329</sup> While the expression “initial reservation” is used for convenience, it is improper: it would be more accurate to speak of a reservation “as it was initially formulated”; as its name indicates, a “partial withdrawal” does not substitute one reservation for another, but rather one formulation for another.

### Reduction of the scope of reservations (partial withdrawal)

187. In accordance with the prevailing doctrine, “[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect”.<sup>330</sup> While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal.

188. Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect.<sup>331</sup> Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) provides that:

The declaration provided for in paragraph 1 of this article may be made, withdrawn or modified at any later date; in such case, the declaration, withdrawal or modification shall take effect as from the ninetieth day after receipt of the notice by the Secretary-General of the United Nations.

189. In addition, reservation clauses expressly contemplating the total *or partial* withdrawal of reservations are to be found more frequently. For example, article 8, paragraph 3, of the Convention on the nationality of married women, provides that:

Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received.<sup>332</sup>

The same applies to article 17, paragraph 2, of the Convention on the Protection of the Environment through Criminal Law, which reads as follows:

Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.<sup>333</sup>

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union:

<sup>330</sup> Aust, *Modern Treaty Law and Practice*, p. 128. See also Imbert, *op. cit.*, p. 293, and Polakiewicz, *op. cit.*, p. 96.

<sup>331</sup> This is also the case, of course, where the treaty authorizes the formulation of new reservations after its entry into force.

<sup>332</sup> See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961: “A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations.”

<sup>333</sup> See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism: “Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.” For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see paragraph 97 above.

Any Member State which has entered a reservation may withdraw it at any time in whole or in part by notifying the depositary. Withdrawal shall take effect on the date on which the depositary receives the notification.

190. The fact that they are mentioned simultaneously in numerous treaty clauses highlights the close relationship between total and partial withdrawal of reservations. This similarity, confirmed in practice, is, however, sometimes contested in the literature.

191. During the preparation of the draft articles on the law of treaties by the Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.<sup>334</sup> Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation “in part”,<sup>335</sup> although no reason for this modification can be inferred from the summaries of the discussions.

192. The most plausible explanation is that this seemed to be self-evident—“he who can do more can do less”—and the word “withdrawal” should very likely be interpreted, given the somewhat surprising silence of the commentary, as meaning “total or partial withdrawal”.

193. The fact remains that this is not entirely self-evident and that the literature appears to be somewhat undecided. Thus, in his masterwork on reservations, published in 1979, Imbert regrets that modifications aimed at diminishing the scope of the reservations with which he was familiar were possible only because of the “lack of objections on the part of the other Contracting Parties”, even as he stressed that “it would, however, be desirable to encourage this procedure, which enables States to gradually adapt their participation in the treaty to the evolution of their national law, and which may constitute a transition to the total withdrawal of reservations”.<sup>336</sup>

194. In practice, he seems to have been heard, at least in the European context. Polakiewicz cites a number of reservations concluded within the framework of the Council of Europe which were modified without arousing opposition.<sup>337</sup> For its part, the European Commission of Human Rights showed a certain flexibility as to the time requirement set out in article 64 of the Convention for the Protection of Human Rights and

<sup>334</sup> See draft article 17, paragraph 6, in Sir Humphrey’s first report on the law of treaties, *Yearbook ... 1962* (footnote 119 above), p. 61.

<sup>335</sup> *Ibid.*, pp. 71–72, art. 22; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see paragraph 70 above.

<sup>336</sup> *Op. cit.*, p. 293. Curiously, Flauss refers to this work (but to page 163—which says nothing of the kind) in stating his belief that “it is, it seems, accepted that a State party to a treaty can limit the scope of a reservation” (“Le contentieux de la validité ...”, p. 301).

<sup>337</sup> *Op. cit.*, p. 96; it is true that it seems to be more a matter of “[s]tatements concerning modalities of implementation of a treaty at the internal level” within the meaning of draft guideline 1.4.5 (*Yearbook ... 1999* (see footnote 44 above), p. 118) than of reservations as such.

## Fundamental Freedoms (European Convention on Human Rights):<sup>338</sup>

As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64 ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958–59) (2 *Yearbook* 88–91) covers ... the law of 5 July 1962, which did not have the result of enlarging, *a posteriori*, the area removed from the control of the Commission.<sup>339</sup>

195. This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *limits* the scope of the reservation that the Commission of Human Rights considered that it was covered by the law.<sup>340</sup> Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other Contracting Parties.<sup>341</sup>

196. The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification, it proceeds differently if, following ratification, the law “goes no further than a law in force at the time when the reservation was made”.<sup>342</sup>

197. The outcome of the *Belilos* case<sup>343</sup> is, however, likely to raise doubts in this regard.

<sup>338</sup> Article 57 since the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, restructuring the control machinery established thereby:

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

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

<sup>339</sup> Schabas, “Article 64”, p. 932. See the reports of the European Commission of Human Rights in the cases of *X v. Austria*, application No. 473/59, *Yearbook of the European Convention on Human Rights, 1958–1959*, p. 400, and *ibid.*, application No. 8180/78, Council of Europe, *Decisions and Reports*, vol. 20 (December 1980), pp. 26–28.

<sup>340</sup> See the partly dissenting opinion of Judge Valticos in the *Chorherr v. Austria* case: “Where the law in question is amended, the discrepancy to which the reservation relates could no doubt, if a strict view is not taken, be retained in the new text, but it could not of course be widened” (European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 266 B, judgment of 25 August 1993, p. 40).

<sup>341</sup> See the successive partial withdrawals by Finland of its reservation to article 6 in 1996, 1998, 1999 and 2001 (<http://conventions.coe.int>).

<sup>342</sup> European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 48, case of *Campbell and Cosans*, judgment of 25 February 1982, p. 17, para. 37 (b).

<sup>343</sup> *Ibid.*, vol. 132, *Belilos* case, judgment of 29 April 1988, p. 28, para. 60.

198. Following the highly disputable<sup>344</sup> position taken by the European Court of Human Rights concerning the follow-up to its finding that the Swiss “declaration” made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,<sup>345</sup> Switzerland, after much hesitation, first modified its “declaration”—equated by the Court with a reservation, at least insofar as the applicable rules were concerned—so as to render it compatible with the judgment of 29 April 1988.<sup>346</sup> The “interpretative declaration” thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers “acting as a monitoring body for the enforcement of judgements of the Court”.<sup>347</sup> These notifications do not seem to have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.<sup>348</sup>

199. However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *F. v. R. and the Council of State of Thurgau Canton*, the Swiss Federal Tribunal decided, with regard to the grounds for the *Belilos* decision, that it was the entire “interpretative declaration” of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the European Convention on Human Rights<sup>349</sup> and in article 19 of the 1969 Vienna Convention.<sup>350</sup> On 29 August 2000, Switzerland

<sup>344</sup> See the second report on reservations to treaties, *Yearbook ... 1996* (see footnote 25 above), pp. 77–79, paras. 218–230. Paragraphs 198–201 of the present report largely restate the ideas expressed in the second report (*ibid.*, pp. 77–82, paras. 216–252).

<sup>345</sup> The Court held (see footnote 343 above) that “the declaration in question does not satisfy two of the requirements of Article 64 of the Convention [see footnote 338 above], with the result that it must be held to be invalid” and that, since “it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration” (which, frankly speaking, was no less disputable), the Convention should be applied to Switzerland irrespective of the declaration).

<sup>346</sup> Believing (correctly) that the Court’s rebuke dealt only with the “criminal aspect”, Switzerland had limited its “declaration” to civil proceedings.

<sup>347</sup> Flauss, “Le contentieux de la validité ...”, p. 298, note 9; see also Schabas, “Reservations to human rights treaties: time for innovation and reform”, p. 49. For references to these notifications, see United Nations, *Treaty Series*, vol. 1496, No. 2889, annex A, pp. 234–235; vol. 1525, p. 213; vol. 1561, pp. 386–387; and resolution DH (89) 24 concerning the judgment of the European Court of Human Rights of 29 April 1988 in the *Belilos* case, *Yearbook of the European Convention on Human Rights*, vol. 32 (1989), p. 245.

<sup>348</sup> Some authors have, however, contested their validity; see Cohen-Jonathan, “Les réserves à la Convention européenne des droits de l’homme (à propos de l’arrêt *Belilos* du 29 avril 1988)”, p. 314, and the works cited in *F. v. R. and the Council of State of Thurgau Canton* (footnote 350 below), judgement of the Swiss Federal Tribunal (para. 6 (b)), and by Flauss, “Le contentieux de la validité ...”, p. 300, as well as the position of that author himself; nonetheless, these objections dealt more with the background than with the very possibility of modifying a (quasi?)-reservation.

<sup>349</sup> See footnote 338 above.

<sup>350</sup> Extensive portions of the Swiss Federal Tribunal’s decision are cited in French translation in the *Journal des tribunaux* (1995), pp. 533–537. The relevant passages are to be found in paragraph 7 of the decision in the French text.

officially withdrew its “interpretative declaration” concerning article 6 of the European Convention.<sup>351</sup>

200. Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

(a) The Swiss Federal Tribunal’s position is based on the idea that, in this case, the 1974 “declaration” was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights),<sup>352</sup> and, above all,

(b) In that same decision, the Tribunal stated that:

While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that, as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant State’s commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.<sup>353</sup>

201. This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty’s integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.<sup>354</sup> Furthermore, as has been pointed out, without this option the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): “States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, *a fortiori*, with future Contracting Parties”<sup>355</sup> that would have the advantage of knowing the treaty body’s position regarding the validity of

reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

202. Moreover, it was such considerations<sup>356</sup> which led the Commission to state in 1997 in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties that, in taking action on the inadmissibility of a reservation,<sup>357</sup> the State may, for example, modify its reservation so as to eliminate the inadmissibility,<sup>358</sup> obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

203. In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Horn noted that, of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations was the depositary, “47 have been withdrawn completely or partly.”<sup>359</sup> In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete withdrawal.<sup>360</sup> This trend, while not precipitous, has continued in subsequent years, as demonstrated by the following examples:

(a) On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance,<sup>361</sup>

(b) On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection

<sup>356</sup> See *Yearbook ... 1997* (footnote 33 above), p. 45, paras. 55–56; p. 49, para. 86; and p. 55, paras. 141–144; and the second report on reservations to treaties, *Yearbook ... 1996* (footnote 25 above), pp. 80–81, paras. 241–251.

<sup>357</sup> See footnote 356 above.

<sup>358</sup> See the preliminary conclusions, *Yearbook ... 1997* (footnote 33 above), p. 57, para. 10.

<sup>359</sup> Of these 47 withdrawals, 11 occurred during a succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (see article 20 of the 1978 Vienna Convention); however, as the Commission has decided, all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice (see *Yearbook ... 1995*, vol. II (Part Two), p. 107, para. 477, and *Yearbook ... 1997* (footnote 33 above), p. 68, para. 221).

<sup>360</sup> *Op. cit.*, p. 226; however, these statistics must be viewed with caution. For example, the author actually mentions only one case in which successive partial withdrawals culminated in the total withdrawal of a reservation (*ibid.*, p. 438): that of Denmark and the Convention relating to the Status of Refugees. In reality, (a) with one exception, the statistics are primarily for the total withdrawal of various reservations; and (b) one of the original Danish reservations was reformulated but retained (*Multilateral Treaties ...* (see footnote 178 above), pp. 334 and 345, note 18).

<sup>361</sup> *Multilateral Treaties ...* (see footnote 178 above), vol. II, p. 199, note 10; see also Sweden’s 1966 “reformulation” of one of its reservations to the Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (*ibid.*, vol. I, p. 345, note 25) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a reservation by Switzerland to that Convention (*ibid.*, note 26).

<sup>351</sup> See United Nations, *Treaty Series*, vol. 2123, No. 2889, p. 141.

<sup>352</sup> The Special Rapporteur is of the view, however, that this does not affect the reserving State’s right to modify its reservation in a manner that makes it permissible; moreover, in its 1997 preliminary conclusions on normative multilateral treaties including human rights treaties, the Commission concluded that it was the reserving State which had the responsibility for taking action in the event of inadmissibility of a reservation (*Yearbook ... 1997* (footnote 33 above), p. 57, para. 10 of the conclusions). It does not seem necessary to reopen (or to settle) the issue at this stage.

<sup>353</sup> *F. v. R. and the Council of State of Thurgau Canton* (see footnote 350 above), p. 535. Surprisingly, Flauss, who does not cite this passage in his otherwise noteworthy commentary on the above-mentioned decision, maintains that “initially, in the context of current Convention law and international treaty law, it is difficult to agree that “at-fault” States have a right to modify their reservations, even if this right is limited to cases of partial impermissibility” (“Le contentieux de la validité ...”, p. 298).

<sup>354</sup> See Horn, *op. cit.*, p. 223; however, the author states that he does not know of any actual cases where an objection was withdrawn under such circumstances. The Special Rapporteur is also unaware of such behaviour, although it would be very appropriate.

<sup>355</sup> Flauss, “Le contentieux de la validité ...”, p. 299; the author’s position here is (wrongly, in the Special Rapporteur’s view) *de lege ferenda*.

of Performers, Producers of Phonograms and Broadcasting Organisations;<sup>362</sup> and

(c) On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women, making it more specific.<sup>363</sup>

204. In all these cases (which provide only a few examples) the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

205. The Secretary-General's practice is not absolutely consistent, however, and in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations<sup>364</sup> and confines himself, "[i]n keeping with the ... practice followed in similar cases", to receiving "the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged".<sup>365</sup> This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "[W]hen States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations."<sup>366</sup> This position seems to be confirmed by a note verbale dated 4 April 2000 from the Legal Counsel of the United Nations, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so"<sup>367</sup> and extends the length of time during which parties may object from 90 days to 12 months.

206. Not only is this position counter to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note verbale

<sup>362</sup> *Ibid.*, vol. II, p. 64, note 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (*ibid.*, note 6) and Norway's replacement of a reservation in 1989 (*ibid.*, note 7); in that case, however, it is not clear that the withdrawal was a partial one.

<sup>363</sup> *Ibid.*, vol. I, p. 264, note 35.

<sup>364</sup> See the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), pp. 191–198, paras. 279–325.

<sup>365</sup> See, for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties ...* (footnote 178 above), p. 324, note 6).

<sup>366</sup> *Summary of Practice of the Secretary-General ...* (see footnote 164 above), p. 62, para. 206.

<sup>367</sup> Note verbale from the Legal Counsel (modification of reservations), 2000 (LA41/TR/221 (23–1)), *Treaty Handbook* (United Nations publication, Sales No. E.02.V.2), annex 2, p. 42. For further information on this time period, see the fifth report on reservations to treaties, *Yearbook ... 2000* (footnote 18 above), p. 198, paras. 320–324.

of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between a modification of an existing reservation and a partial withdrawal thereof. In the case of the second type of communication, the Legal Counsel shared the concerns expressed by Portugal that it was highly desirable that, as far as possible, communications which were no more than partial withdrawals of reservations should not be subjected to the procedure that was appropriate for modifications of reservations.

207. The question is thus merely one of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.<sup>368</sup> To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

208. Since this is not a new reservation but a limitation of an existing one, reformulated to bring the obligations of the reserving State more fully into line with those stipulated by the treaty, it is unlikely that the other Contracting Parties will object to the new formulation.<sup>369</sup> If they have adapted to the initial reservation, it is difficult to see how they could object to the new one, the effects of which, in theory, have been reduced. Just as a State cannot object to a pure and simple withdrawal, it cannot object to a partial withdrawal.

209. Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same legal regime as a total withdrawal. In order to avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,<sup>370</sup> it is better to refer here to a "partial withdrawal".

210. A single draft guideline should be able to take into account the alignment of the rules applicable to the partial withdrawal of reservations with those governing total withdrawal; to avoid any confusion, however, it would seem useful to specify what is meant by a partial withdrawal. This guideline could be worded as follows:

<sup>368</sup> See draft guidelines 2.3.1–2.3.3 and the commentary thereon, *Yearbook ... 2001* (footnote 46 above), pp. 185–191).

<sup>369</sup> Nonetheless, they may certainly withdraw their initial objections which, like the reservations themselves, may be withdrawn at any time (see article 22, paragraph 2, of the 1969 and 1986 Vienna Conventions); see also paragraph 201 above.

<sup>370</sup> See paragraphs 205–207 above.

**“2.5.11** *Partial withdrawal of a reservation*

“1. The partial withdrawal of a reservation is subject to respect for the same formal and procedural rules as a total withdrawal and takes effect in the same conditions.

“2. The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.”

211. This definition is modelled as closely as possible on the definition of reservations resulting from article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and draft guidelines 1.1 and 1.1.1.

212. On the one hand, while the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal and may, without any problem, implicitly (or explicitly if the Commission deems that to be clearer) refer to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5 *bis*, 2.5.5 *ter*], 2.5.6 [2.5.6 *bis*, 2.5.6 *ter*], 2.5.9, 2.5.10 and, perhaps, 2.5.3, on the other hand the difficulty lies in knowing whether the provisions of draft guidelines 2.5.4 (Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty), 2.5.7 (Effect of withdrawal of a reservation) and 2.5.8 (Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization) may be transposed to cases of partial withdrawals.

213. The trickiest case is probably one where a treaty monitoring body has found that the initially formulated reservation was not valid.<sup>371</sup> The *Belilos* case of the European Court of Human Rights and the action taken on that basis by the Swiss Federal Tribunal in the *F. v. R. and the Council of State of Thurgau Canton* case<sup>372</sup> may imply that if the monitoring body invalidated the reservation (or if its irregularity may be deduced from the reasoning it followed), the only possible solution is the withdrawal pure and simple of the reservation (for no modification may be made to a reservation said to be null and void *ab initio*); in this case, the provisions of draft guideline 2.5.4 may not be extended, *mutatis mutandis*, to a partial withdrawal; the latter may not be envisaged, and the only way for the reserving State or international organization to fulfil its obligations in that respect is by totally withdrawing the reservation.

214. But this reasoning is far from self-evident. It rests on the assumption that a monitoring body itself may take action as a result of finding a reservation impermissible. This is not the position taken by the Commission in the preliminary conclusions it adopted in 1997.<sup>373</sup> All that matters is that the author of the reservation respects the conditions of validity of the reservation; if it may do

so by making a partial withdrawal, there is no reason it should be prevented from doing so—all the more so in that there is a risk of encouraging the pure and simple denunciation of the treaty, which is contrary to the often invoked principle of universality—while the modification of the reservation achieves the desired balance between the integrity of the treaty and the universality of participation (where the latter is a desired goal).

215. Thus, whereas the partial withdrawal is one of the means by which the State or international organization may fulfil its obligations if one of its reservations is found to be impermissible, the question arises as to whether it is useful to so specify in the Guide to Practice, and in what form. The Special Rapporteur sees three possibilities in this regard:

(a) It may suffice to specify it in the commentaries on draft guidelines 2.5.4 and/or 2.5.11; but the referral of clarifications to the commentary is often an easy option that is particularly questionable when it comes to drafting a guide to practice that must, as far as possible, provide users with answers to any legitimate questions they might have;

(b) A draft guideline could be modelled on draft guideline 2.5.4, paragraph 2, worded as follows:

**“2.5.11 *bis*** *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

“Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding.”

(c) Mention could be made, in draft guideline 2.5.4, paragraph 2, of the possibility of a partial withdrawal; but to proceed thus for this guideline alone, without doing the same for all the others which apply to both partial and total withdrawals, does not seem, *a priori*, very logical; and yet it does seem essential to individualize draft guideline 2.5.11.

216. The Special Rapporteur nevertheless prefers a solution of this type, provided that it does not lead to the elimination of draft guideline 2.5.11. This objective may be attained by combining draft guidelines 2.5.4 and 2.5.11 *bis* and by moving this single draft guideline to the end of section 2.5 of the Guide to Practice. This guideline might read as follows:

**“2.5.X** *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*

“1. The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.

<sup>371</sup> See draft guideline 2.5.4 (para. 114 above).

<sup>372</sup> See paragraphs 199–201 above.

<sup>373</sup> See footnote 356 and paragraph 202 above.

“2. Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.”

217. There should be little hesitation with regard to the effect of the partial withdrawal of a reservation, for it cannot be compared to that of a total withdrawal, nor can it be held that the *partial* “withdrawal of a reservation entails the application of a treaty *as a whole*\* of the provisions on which the reservation had been made in the relations between the State or international organization which” *partially* “withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it”.<sup>374</sup> Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other Contracting Parties; but not “as a whole” since, hypothetically, the reservation (in a more limited form, admittedly) remains.

218. Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,<sup>375</sup> even if those objections had been accompanied by the opposition of the entry into force of the treaty with the reserving State or international organization.<sup>376</sup> There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them, and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them;<sup>377</sup> they cannot be required to do so, however, and they may perfectly well maintain their objections if they deem it appropriate.<sup>378</sup>

<sup>374</sup> See draft guideline 2.5.7 (para. 184 above).

<sup>375</sup> *Ibid.* (“whether they had accepted or objected to the reservation”).

<sup>376</sup> See draft guideline 2.5.8 (para. 184 above): “The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization.”

<sup>377</sup> See paragraph 201 and footnote 369 above.

<sup>378</sup> Even though they may not take the opportunity offered by the partial withdrawal of a reservation to formulate new objections (see paragraph 208 above).

219. The only real question in this regard is to know whether they must formally confirm their objections or whether the latter must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, for, as indicated above,<sup>379</sup> there seems to be no case where the partial withdrawal of a reservation has led to a withdrawal of objections, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.<sup>380</sup> This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; *a priori*, the objections that were made to it rightly continue to apply as long as their authors do not withdraw them.

220. It seems essential, then, to devote a specific draft guideline to the effect of a partial withdrawal of a reservation. Such a guideline could be presented as follows:

“**2.5.12** *Effect of a partial withdrawal of a reservation*

“The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them.”

221. Although the wording of the second sentence of this guideline does not seem to call for any particular explanation, it may be useful to indicate that the wording of the first sentence is based on the terminology used in article 21 of the 1969 and 1986 Vienna Conventions,<sup>381</sup> without entering into substantive discussion of the effects of reservations and objections made to them.

<sup>379</sup> Footnote 354.

<sup>380</sup> See footnote 366 above. The objections of Denmark, Finland, Mexico, the Netherlands, Norway and Sweden to the reservation formulated by the Libyan Arab Jamahiriya were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties ...* (see footnote 178 above), pp. 251–259.

<sup>381</sup> See article 21, paragraph 1:

“A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation.”

**CONSOLIDATED TEXT OF ALL DRAFT GUIDELINES ADOPTED BY THE COMMISSION  
OR PROPOSED BY THE SPECIAL RAPPORTEUR\***

**Guide to practice**

1. DEFINITIONS

**1.1** *Definition of reservations*<sup>1</sup>

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

**1.1.1** *Object of reservations*<sup>2</sup>

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

**1.1.2** *Instances in which reservations may be formulated*<sup>3</sup>

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

**1.1.3 [1.1.8]** *Reservations having territorial scope*<sup>4</sup>

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

**1.1.4** *Reservations formulated when notifying territorial application*<sup>5</sup>

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

**1.1.5** *Statements purporting to limit the obligations of their author*<sup>6</sup>

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

**1.1.6** *Statements purporting to discharge an obligation by equivalent means*<sup>7</sup>

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

**1.1.7** *Reservations formulated jointly*<sup>8</sup>

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

**1.1.8** *Reservations made under exclusionary clauses*<sup>9</sup>

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or

\*The draft guidelines proposed by the Special Rapporteur but not adopted by the Commission are in italics.

<sup>1</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 99–100.

<sup>2</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 93–95.

<sup>3</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 103–104.

<sup>4</sup> *Ibid.*, pp. 104–105.

<sup>5</sup> *Ibid.*, p. 105–106.

<sup>6</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 95–97.

<sup>7</sup> *Ibid.*, p. 97.

<sup>8</sup> For the commentary to this draft guideline, see *Yearbook ... 1998*, vol. II (Part Two), pp. 106–107.

<sup>9</sup> For the commentary to this draft guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 108–112.

some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

## 1.2 *Definition of interpretative declarations*<sup>10</sup>

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

### 1.2.1 *Conditional interpretative declarations*<sup>11</sup>

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

### 1.2.2 *Interpretative declarations formulated jointly*<sup>12</sup>

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

## 1.3 *Distinction between reservations and interpretative declarations*<sup>13</sup>

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

### 1.3.1 *Method of implementation of the distinction between reservations and interpretative declarations*<sup>14</sup>

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

<sup>10</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 91–103.

<sup>11</sup> *Ibid.*, pp. 103–106.

<sup>12</sup> *Ibid.*, pp. 106–107.

<sup>13</sup> *Ibid.*, p. 107.

<sup>14</sup> *Ibid.*, pp. 107–109.

### 1.3.2 *Phrasing and name*<sup>15</sup>

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

### 1.3.3 *Formulation of a unilateral statement when a reservation is prohibited*<sup>16</sup>

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

## 1.4 *Unilateral statements other than reservations and interpretative declarations*<sup>17</sup>

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

### 1.4.1 *Statements purporting to undertake unilateral commitments*<sup>18</sup>

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

### 1.4.2 *Unilateral statements purporting to add further elements to a treaty*<sup>19</sup>

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

### 1.4.3 *Statements of non-recognition*<sup>20</sup>

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

<sup>15</sup> *Ibid.*, pp. 109–111.

<sup>16</sup> *Ibid.*, pp. 111–112.

<sup>17</sup> *Ibid.*, pp. 112–113.

<sup>18</sup> *Ibid.*, pp. 113–114.

<sup>19</sup> *Ibid.*, p. 114.

<sup>20</sup> *Ibid.*, pp. 114–116.

#### 1.4.4 *General statements of policy*<sup>21</sup>

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

#### 1.4.5 *Statements concerning modalities of implementation of a treaty at the internal level*<sup>22</sup>

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

#### 1.4.6 *Unilateral statements made under an optional clause*<sup>23</sup>

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

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

#### 1.4.7 *Unilateral statements providing for a choice between the provisions of a treaty*<sup>24</sup>

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

### 1.5 *Unilateral statements in respect of bilateral treaties*<sup>25</sup>

#### 1.5.1 *“Reservations” to bilateral treaties*<sup>26</sup>

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does

not constitute a reservation within the meaning of the present Guide to Practice.

#### 1.5.2 *Interpretative declarations in respect of bilateral treaties*<sup>27</sup>

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

#### 1.5.3 *Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party*<sup>28</sup>

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

#### 1.6 *Scope of definitions*<sup>29</sup>

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

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

##### 1.7.1 *Alternatives to reservations*<sup>30</sup>

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

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

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

##### 1.7.2 *Alternatives to interpretative declarations*<sup>31</sup>

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

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

<sup>21</sup> *Ibid.*, pp. 116–118.

<sup>22</sup> *Ibid.*, pp. 118–119.

<sup>23</sup> For the commentary to this guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 112–114.

<sup>24</sup> *Ibid.*, pp. 114–116.

<sup>25</sup> For the commentary to this draft guideline, see *Yearbook ... 1999*, vol. II (Part Two), pp. 119–120.

<sup>26</sup> *Ibid.*, pp. 120–124.

<sup>27</sup> *Ibid.*, pp. 124–125.

<sup>28</sup> *Ibid.*, pp. 125–126.

<sup>29</sup> *Ibid.*, p. 126.

<sup>30</sup> For the commentary to this draft guideline, see *Yearbook ... 2000*, vol. II (Part Two), pp. 117–122.

<sup>31</sup> *Ibid.*, pp. 122–123.

## 2. PROCEDURE

## 2.1 Form and notification of reservations

2.1.1 Written form<sup>32</sup>

*A reservation must be formulated in writing.*

2.1.2 Form of formal confirmation<sup>33</sup>

*When formal confirmation of a reservation is necessary, it must be made in writing.*

[2.1.3 Competence to formulate a reservation at the international level<sup>34</sup>

*Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]*

## [2.1.3 Competence to formulate a reservation at the international level

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

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

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

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

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

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

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

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

[2.1.3 bis Competence to formulate a reservation at the internal level<sup>35</sup>

*The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.]*

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations<sup>36</sup>

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

2.1.5 Communication of reservations<sup>37</sup>

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

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

2.1.6 Procedure for communication of reservations<sup>38</sup>

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

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

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

<sup>32</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/518 and Add.1-3, p. 146, para. 49.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, pp. 146-148, paras. 53-71, for the presentation of the two alternative versions of this draft guideline.

<sup>35</sup> *Ibid.*, pp. 148-149, paras. 72-77, for the presentation of this draft guideline.

<sup>36</sup> *Ibid.*, pp. 149-150, paras. 78-82, for the presentation of this draft guideline.

<sup>37</sup> *Ibid.*, pp. 152-157, paras. 99-129, for the presentation of this draft guideline.

<sup>38</sup> *Ibid.*, pp. 157-161, paras. 135-154, for the presentation of this draft guideline.

2. Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

### 2.1.7 Functions of depositaries<sup>39</sup>

1. The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

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

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

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

### 2.1.7 bis Case of manifestly impermissible reservations<sup>40</sup>

1. Where, in the opinion of the depositary, a reservation is manifestly impermissible, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes such impermissibility.

2. If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations, attaching the text of the exchange of views which he has had with the author of the reservation.

### 2.1.8 Effective date of communications relating to reservations<sup>41</sup>

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

## 2.2 Confirmation of reservations when signing

### 2.2.1 Formal confirmation of reservations formulated when signing a treaty<sup>42</sup>

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

reservation shall be considered as having been made on the date of its confirmation.

### 2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty<sup>43</sup>

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

### 2.2.3 Reservations formulated upon signature when a treaty expressly so provides<sup>44</sup>

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

## 2.3 Late formulation of a reservation<sup>45</sup>

### 2.3.1 Late formulation of a reservation<sup>46</sup>

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

### 2.3.2 Acceptance of late formulation of a reservation<sup>47</sup>

Unless the treaty provides otherwise, or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a Contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

### 2.3.3 Objection to late formulation of a reservation<sup>48</sup>

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

### 2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations<sup>49</sup>

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

<sup>39</sup> *Ibid.*, pp. 161–163, paras. 156–170, for the presentation of this draft guideline.

<sup>40</sup> For the presentation of this draft guideline, see paragraphs 44–46 of the present report above.

<sup>41</sup> For the presentation of this draft guideline, see *Yearbook ... 2001* (footnote 32 above), p. 161, para. 155.

<sup>42</sup> For the commentary to this draft guideline, see *Yearbook ... 2001*, vol. II (Part Two), pp. 180–183.

<sup>43</sup> *Ibid.*, p. 183.

<sup>44</sup> *Ibid.*, pp. 183–184.

<sup>45</sup> *Ibid.*, p. 184, for the commentary to this heading.

<sup>46</sup> *Ibid.*, pp. 185–189, for the commentary to this draft guideline.

<sup>47</sup> *Ibid.*, pp. 189–190.

<sup>48</sup> *Ibid.*, pp. 190–191.

<sup>49</sup> *Ibid.*, pp. 191–192.

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

## 2.4 Procedure regarding interpretative declarations

### 2.4.1 Formulation of interpretative declarations<sup>50</sup>

*An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.*

#### [2.4.1 bis Competence to formulate an interpretative declaration at the internal level<sup>51</sup>

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

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

### 2.4.2 Formulation of conditional interpretative declarations<sup>52</sup>

1. *A conditional interpretative declaration must be formulated in writing. Where necessary, formal confirmation of a conditional interpretative declaration must be effected in the same manner.*

2. *A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.*

### 2.4.3 Time at which an interpretative declaration may be formulated<sup>53</sup>

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

### 2.4.4 Non-requirement of confirmation of interpretative declarations made when signing a treaty<sup>54</sup>

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

### 2.4.5 Formal confirmation of conditional interpretative declarations formulated when signing a treaty<sup>55</sup>

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

### 2.4.6 Late formulation of an interpretative declaration<sup>56</sup>

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

### 2.4.7 Late formulation of a conditional interpretative declaration<sup>57</sup>

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

### 2.4.9 Communication of conditional interpretative declarations<sup>58</sup>

1. *A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.*

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

<sup>50</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 32 above), pp. 150–151, paras. 88–90.

<sup>51</sup> *Ibid.*, p. 151, paras. 91–95.

<sup>52</sup> *Ibid.*, p. 150, paras. 83–87.

<sup>53</sup> For the commentary to this draft guideline, see *Yearbook ... 2001* (footnote 42 above), pp. 192–193.

<sup>54</sup> *Ibid.*, pp. 193–194.

<sup>55</sup> *Ibid.*, p. 194.

<sup>56</sup> *Ibid.*, pp. 194–195.

<sup>57</sup> *Ibid.*, p. 195.

<sup>58</sup> For the presentation of this draft guideline, see the sixth report on reservations to treaties, *Yearbook ... 2001* (footnote 32 above), pp. 163–164, paras. 171–173.

# DIPLOMATIC PROTECTION

[Agenda item 4]

DOCUMENT A/CN.4/523 and Add.1

## Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur

[Original: English/French]  
[7 March and 16 April 2002]

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## Introduction<sup>1</sup>

### A. Present state of the study on diplomatic protection

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of “Diplomatic protection” as one of three topics appropriate for codification and progressive development.<sup>2</sup> In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.<sup>3</sup> At the same session the Working Group submitted a report which was endorsed by the Commission.<sup>4</sup> The Working Group attempted to (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.<sup>5</sup>

2. At its 2510th meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.<sup>6</sup> The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic “Diplomatic protection”.

3. The Commission considered the preliminary report on diplomatic protection<sup>7</sup> at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.<sup>8</sup>

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended working group, chaired by Mr. Bennouna, Special Rapporteur for the topic, to consider conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission, in 1999. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following, *inter alia*:

(a) The customary-law approach to diplomatic protection should form the basis for the work of the Commission on the topic;

(b) The topic would deal with secondary rules of international law relating to diplomatic protection; primary rules would only be considered when their clarification was essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and providing them with more direct and indirect access to international forums to enforce their rights.

5. At its 2544th meeting, on 9 June 1998, the Commission considered and endorsed the report of the Working Group.<sup>9</sup>

6. In 1999, Mr. Bennouna resigned from the Commission. On 14 July 1999, the Commission, at its 2602nd meeting, elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.<sup>10</sup>

7. At its fifty-second session, in 2000, the Commission considered the present Special Rapporteur’s first report.<sup>11</sup> The Commission deferred its consideration of the report to the fifty-third session, in 2001, owing to lack of time. At the same session, the Commission established open-ended informal consultations, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.<sup>12</sup> The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5–8 to the Drafting Committee together with the report of the informal consultations.

8. At its fifty-third session, in 2001, the Commission considered the remainder of the Special Rapporteur’s first report as well as his second report.<sup>13</sup> The Commission discussed the first report at its 2680th and 2685th to 2687th meetings, held on 25 May and from 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, from 12 to 17 July 2001. Owing to lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10–11, and deferred consideration of the remainder of the report, concerning draft articles 12–13, to the fifty-fourth session, in 2002.

9. At its 2688th meeting, on 12 July 2001, the Commission decided to refer draft article 9 to the Drafting

<sup>1</sup> The Special Rapporteur wishes to acknowledge with gratitude the assistance of Ms. Zsuzsanna Deen-Racsmany in the preparation of this report.

<sup>2</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 248, and p. 137, annex II, addendum I.

<sup>3</sup> *Yearbook ... 1997*, vol. II (Part Two), p. 60, para. 169.

<sup>4</sup> *Ibid.*, para. 171.

<sup>5</sup> *Ibid.*, pp. 62–63, paras. 189–190.

<sup>6</sup> *Ibid.*, p. 63, para. 190.

<sup>7</sup> *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/484, p. 309.

<sup>8</sup> *Ibid.*, vol. I, pp. 4–31.

<sup>9</sup> *Ibid.*, pp. 181–182, paras. 31–44.

<sup>10</sup> *Yearbook ... 1999*, vol. I, 2602nd meeting, p. 260, para. 49, and *ibid.*, vol. II (Part Two), p. 17, para. 19.

<sup>11</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/506 and Add.1, p. 205.

<sup>12</sup> The report of the informal consultations appears in *Yearbook ... 2000*, vol. II (Part Two), pp. 85–86, para. 495.

<sup>13</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/514, p. 97.

Committee. At its 2690th meeting, on 17 July 2001, it decided to do likewise with draft articles 10–11.

10. The Drafting Committee has not yet had the opportunity to examine any of the draft articles referred to it. The Committee is expected to begin work on these draft articles at the fifty-fourth session of the Commission, in 2002.

### B. Approach of the Special Rapporteur

11. Diplomatic protection is a subject on which there is a wealth of authority in the form of codification, conventions, State practice, jurisprudence and doctrine. Indeed, it is probably true to say that no other branch of international law is so rich in authority. This does not, however, mean that there is necessarily clarity or certainty regarding the rules governing diplomatic protection in general or the exhaustion of local remedies in particular. On the contrary, the authorities are frequently inconsistent and contradictory and point in several directions. In these circumstances the task of the Commission is to choose between competing rules. In exercising this choice it should be guided both by the weight of the authorities in support of a rule and the fairness of the rule in contemporary international society. While the Commission's task is largely that of codification, it does nevertheless progressively develop the law in exercising its choice between rival rule claims.

12. The function of the Special Rapporteur is not to dictate a particular rule to the Commission, but rather to lay all the authorities and options before the Commission so that it can choose the appropriate rule. The Commission, not the Special Rapporteur, is the decision maker. On occasion the Special Rapporteur presents several options to the Commission. In most instances, however, the Special Rapporteur proposes a particular rule which he believes to be most suitable in all circumstances. Competing rules or formulations of the rule are included in the explanatory part of this report together with the authorities in support of such a rule so that the Commission may make an informed choice if it prefers an option not proposed by the Special Rapporteur.

### C. Future direction of the draft articles

13. The first report on diplomatic protection dealt principally with the nationality of claims, while the second report introduced the exhaustion of local remedies rule. The present report is confined to two draft articles: article 14, which examines the circumstances in which local remedies need not be exhausted; and article 15, which considers the burden of proof in the application of the local remedies rule. The Special Rapporteur aims to produce a chapter on two controversial topics which have featured prominently in the history and development of the local remedies rule: the Calvo clause<sup>14</sup> and the denial of justice. The Special Rapporteur is aware of the opposition in certain quarters to the inclusion of a provision on denial of justice in the draft articles on diplomatic protection on the ground that this concept belongs largely

(but certainly not exclusively) to the realm of primary rules.<sup>15</sup> Despite this, the Special Rapporteur believes that the Commission must properly decide whether to include such a provision, as it is as central to the study of the local remedies rule as is the Prince of Denmark to *Hamlet*. Diplomatic protection is a topic with deep roots in the history and jurisprudence of Latin America. Much of this history has been concerned with the scope and content of the concept of denial of justice and the legal consequences of the Calvo clause. No proper study on diplomatic protection can therefore avoid consideration of these topics.

14. A key component of the nationality of claims has yet to be considered in the draft articles: the nationality of corporations. Several articles will be introduced on this subject in the fourth report. Time permitting, the Special Rapporteur proposes that a working group consider tentative suggestions on this subject in the second part of the current session.

15. When the draft articles referred to in paragraph 14 above have been considered, this will complete the study of the secondary rules of diplomatic protection in their traditional context. The Special Rapporteur proposes that the Commission should not seek to extend the scope of the draft articles beyond matters normally and traditionally viewed as belonging to the nationality of claims and the exhaustion of local remedies. If this proposal is accepted, it should be possible to complete the present study, both at first and second reading, by the end of the present quinquennium.

16. Suggestions have been made that the present draft articles should be expanded to include a number of matters linked to the nationality of claims that do not traditionally fall within this field.<sup>16</sup> These include: (a) functional protection by international organizations of their officials;<sup>17</sup> (b) the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;<sup>18</sup> (c) the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right; and (d) the case where a State or an international organization administers or controls a territory.

17. The Special Rapporteur is opposed to the expansion of the draft articles to include such matters. He is particularly opposed to the inclusion of functional protection in the present study. That is a complex topic that would take the Commission beyond diplomatic protection as it is traditionally understood and ensure that the completion of the present draft articles within the present quinquennium would become impossible. This is not to say that functional protection is not an important subject. It certainly is. However, it is suggested that if the Commission

<sup>15</sup> *Yearbook ... 2001* (see footnote 13 above), pp. 101–102, para. 10.

<sup>16</sup> *Ibid.*, vol. II (Part Two), p. 199, para. 183.

<sup>17</sup> See *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

<sup>18</sup> See the *M/V "Saiga" case (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, para. 172, reprinted in *ILM*, vol. 38 (July 1999), p. 1357.

<sup>14</sup> See *Yearbook ... 1956*, vol. II, document A/CN.4/96, pp. 206–208.

believes it should consider this topic, it should do so as a separate study. The Special Rapporteur would welcome such a decision, as such a study would draw on and complement the present articles. During the previous quin-

quennium this issue was frequently raised, with a clear majority of members opposed to the inclusion of functional protection in the present study. The time has come for an immediate and final resolution of the matter.

## CHAPTER I

### Exceptions to the general principle that local remedies must be exhausted

#### “Article 14

“Local remedies do not need to be exhausted where:

“(a) The local remedies:

“(i) Are obviously futile (option 1)

“(ii) Offer no reasonable prospect of success (option 2)

“(iii) Provide no reasonable possibility of an effective remedy (option 3);

“(b) The respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

“(c) There is no voluntary link between the injured individual and the respondent State;

“(d) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

“(e) The respondent State is responsible for undue delay in providing a local remedy;

“(f) The respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.”

#### A. Futility (art. 14 (a))

#### “Article 14

“Local remedies do not need to be exhausted where:

“(a) The local remedies:

“(i) Are obviously futile (option 1)

“(ii) Offer no reasonable prospect of success (option 2)

“(iii) Provide no reasonable possibility of an effective remedy (option 3) ...”

#### 1. PRELIMINARY REMARKS

18. The second report on diplomatic protection proposed that a State might not bring an international claim arising out of an injury to a national before the injured individual

had exhausted “all available local legal remedies” (art. 10, para. 1).<sup>19</sup> In debates in the Commission and in the Sixth Committee of the General Assembly, it was suggested that this provision should be amended to require the exhaustion of “all available *adequate and effective*\* local legal remedies”.<sup>20</sup> This suggestion was understandable as the second report had made no reference to the requirement that remedies should be “effective” (or that they not be “ineffective”) other than in the paragraph dealing with future work,<sup>21</sup> which served notice that the matter would be dealt with in the third report.

19. There is no objection to including a reference to the need for adequate and effective available remedies in article 10, provided a separate provision deals with the subject of ineffective or futile remedies. As shown in article 15, the burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective or futile. Ineffectiveness therefore belongs to the category of exceptions to the local remedies rule and is treated as such in this provision.

20. A local remedy is ineffective when it is “obviously futile”, “offers no reasonable prospect of success” or “provides no reasonable possibility of an effective remedy” (art. 14 (a) above). These phrases are more precise than the generic term “ineffective” and are therefore preferred by courts and writers in describing the phenomenon of the ineffective local remedy. The test of “obvious futility” is higher than that of “no reasonable prospect of success”, while the test of “no reasonable possibility of an effective remedy” occupies an intermediate position. All three options are presented for the consideration of the Commission. All enjoy some support among the authorities.

21. Denial of justice is a concept that belongs largely to the realm of the primary rule. It is, however, inextricably linked with many features of the local remedies rule, including that of ineffectiveness, and as such may be said to have a secondary character. As suggested in the second report on diplomatic protection,<sup>22</sup> it may be seen as a secondary rule when it excuses recourse to further local remedies and as a primary rule when it gives rise to international responsibility. The two faces of denial of justice are well illustrated by the articles adopted on first reading

<sup>19</sup> *Yearbook ... 2001* (see footnote 13 above), sect. B, p. 100.

<sup>20</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 56, para. 177.

<sup>21</sup> *Yearbook ... 2001* (see footnote 13 above), p. 114, para. 67.

<sup>22</sup> *Ibid.*, pp. 101–102, para 10.

by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), which in article 9 defined denial of justice as a primary rule when a foreigner “has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice”<sup>23</sup> and then gave it a secondary character in exempting an injured foreigner from exhausting local remedies when the person had been subjected to such a denial of justice (art. 4, para. 2).

22. Every effort will be made to avoid the language of denial of justice in this comment. This will not, however, always be possible, as the local remedies rule and denial of justice are historically intertwined. As the introduction to this report indicates, the place of denial of justice in the present draft articles will be considered in due course.

## 2. INTRODUCTION

23. There is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile. The reason for this is that a claimant is not required to exhaust justice in a foreign State “when there is no justice to exhaust”.<sup>24</sup> This principle is endorsed by judicial decisions,<sup>25</sup> legal doctrine,<sup>26</sup> State practice<sup>27</sup> and codifications of the local remedies rule.<sup>28</sup> Article 22 of the draft articles on State responsibility adopted on first reading required the exhaustion only of those remedies which are “effective”.<sup>29</sup> Although this principle is accepted, its precise formulation is subject to dispute, as will be shown below.

24. The futility of local remedies must be determined at the time at which they are to be used.<sup>30</sup> Moreover, the decision on the futility of such remedies must be made on the assumption that the claim is meritorious.<sup>31</sup>

<sup>23</sup> *Yearbook ... 1956* (see footnote 14 above), report on international responsibility by Mr. F.V. García Amador, p. 226.

<sup>24</sup> *Robert E. Brown (United States) v. Great Britain* (1923), UNRIAA, vol. VI (Sales No. 1955.V.3), p. 129; see also Mr. Fish, United States Secretary of State, to Mr. Pile (29 May 1873), in Moore, *A Digest of International Law*, vol. VI, p. 677; and *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (1934), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1497.

<sup>25</sup> See the cases referred to above in footnote 24 and *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19; the *Ambatielos Claim* (1956), UNRIAA, vol. XII (Sales No. 63.V.3), pp. 122–123; and *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, pp. 27–29.

<sup>26</sup> See below, particularly footnotes 64–65, 70–71, 75 and 77.

<sup>27</sup> For statements on American and British State practice respectively, see *Restatement of the Law Second: Foreign Relations Law of the United States* (St. Paul, Minn., American Law Institute, 1965), para. 207 (b), pp. 615–616; *ibid. Third*, vol. 2 (St. Paul, Minn., American Law Institute, 1987), chap. II, para. 713. (f), p. 219; and Warbrick, “Protection of nationals abroad”, p. 1008.

<sup>28</sup> See footnotes 37–38 and 41–42 below. The exception to this is the Guerrero report of 1926, which excused compliance from local remedies only where access to domestic courts was denied to foreigners (*Yearbook ... 1956* (see footnote 14 above), annex 1, pp. 221–222). See also the *Supplement to the American Journal of International Law*, vol. 20, July and October 1926, pp. 202–203.

<sup>29</sup> *Yearbook ... 1996*, vol. II (Part Two), p. 60.

<sup>30</sup> Amerasinghe, “The exhaustion of procedural remedies in the same court”, p. 1312.

<sup>31</sup> *Finnish Ships Arbitration* (see footnote 24 above), p. 1504; and the *Ambatielos Claim* (footnote 25 above), pp. 119–120. See

25. It would seem obvious that the competent international tribunal should decide on the issue of the effectiveness *vel non* of local remedies. As Amerasinghe states:

Broadly speaking, there are three possible alternatives. The tribunal may accept the word of the claimant State as to the effect of the remedy or it may accept the word of the respondent State or it may investigate the matter on the evidence presented to it and come to its own conclusion. Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be made and there is no reason why a tribunal should not be competent to make such an estimate.<sup>32</sup>

This obvious truth may appear to be contradicted by the following PCIJ dictum in the *Panevezys-Saldutiskis Railway* case:

The question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government.<sup>33</sup>

That the Court did not intend to leave the final determination of such matters to domestic courts is, however, clear from its comment in the same judgment that “[t]here can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief”.<sup>34</sup> The view that an international tribunal is the appropriate body to pronounce on questions of futility is confirmed by Lauterpacht<sup>35</sup> and García Amador.<sup>36</sup>

## 3. FORMULATING THE EXCEPTION

26. While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement as to how this exception is to be formulated. Some choose to formulate it in terms of a denial of justice: local remedies need not be exhausted when there is a denial of justice. Others prefer to require that the remedies be effective, not obviously futile; offer a reasonable prospect of success; or provide a reasonable possibility of an effective remedy. These tests will be expounded, after which the principal examples of futility or ineffectiveness recognized by judicial decisions will be considered. Once this has been done, a proposal will be made for the most appropriate formulation of the exception.

27. Early codifications excused compliance with the local remedies rule when there was a denial of justice. As shown above, the articles adopted on first reading by the Third Committee of the Conference for the Codifica-

also Schwarzenberger, *International Law*, p. 609; Fitzmaurice, “Hersch Lauterpacht—the scholar as judge: part I”, p. 60; O’Connell, *International Law*, p. 1057; and Borchard, “The local remedy rule”, p. 730.

<sup>32</sup> “The exhaustion of procedural remedies ...”, p. 1307.

<sup>33</sup> *Panevezys-Saldutiskis Railway* (see footnote 25 above).

<sup>34</sup> *Ibid.*, p. 18.

<sup>35</sup> *The Development of International Law by the International Court*, p. 101. See also Law, *The Local Remedies Rule in International Law*, pp. 66–67.

<sup>36</sup> *Yearbook ... 1956* (see footnote 14 above), p. 205, para. 169.

tion of International Law provided that the claimant was excused from exhausting local remedies when he was “hindered by the judicial authorities in the exercise of his right to pursue judicial remedies” or had “encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice”.<sup>37</sup> The Seventh International Conference of American States held in Montevideo in 1933 likewise excepted “those cases of manifest denial or unreasonable delay of justice” from the local remedies rule.<sup>38</sup> García Amador adopted a similar approach.<sup>39</sup>

28. The simple test of “effectiveness” enjoys some support in codifications. The Institute of International Law stated in its resolution adopted at the Granada session in 1956 that the local remedies rule applied only “if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be *effective*\* and *sufficient*.\*”<sup>40</sup> Article 22 of the draft articles on State responsibility adopted by the Commission on first reading requires “effective local remedies” to be exhausted.<sup>41</sup> In a similar vein, Kokott proposed in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association that the claimant was exempt from the local remedies rule where, “for whatever reason, no remedy is available to him, which would effectively redress the violation incurred”.<sup>42</sup>

29. The stringent test of “obvious futility” for release from the local remedies rule has its origin in the following statement by Arbitrator Bagge in the *Finnish Ships Arbitration* case:

As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in the prize cases. Borchard says (a.a. § 383): “In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.”<sup>43</sup>

This formulation of the test for exemption from the local remedies rule was subsequently accepted by the majority of the commissioners in the *Ambatielos*<sup>44</sup> arbitration and accords substantially with the strict test expounded in the

<sup>37</sup> *Ibid.*, p. 226, annex 3. See also Law, *op. cit.*, p. 71.

<sup>38</sup> *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 6, para. 3.

<sup>39</sup> *Yearbook ... 1961*, vol. II, document A/CN.4/134 and Addendum, sixth report on international responsibility, pp. 46–48, arts. 3, para. 2, and 18, para. 2. See also García Amador, “State responsibility: some new problems”, p. 452; see further the separate opinion of Judge Tanaka in *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 145.

<sup>40</sup> *Annuaire de l’Institut de Droit International*, vol. 46 (Granada session, 1956), p. 364.

<sup>41</sup> See footnote 29 above.

<sup>42</sup> “The exhaustion of local remedies”, p. 630.

<sup>43</sup> UNRIAA (see footnote 24 above), p. 1504. According to Judge Tanaka in his separate opinion in the *Barcelona Traction* case, the local remedies “rule does not seem to require from those concerned a clearly futile and pointless activity” (see footnote 39 above).

<sup>44</sup> UNRIAA (see footnote 25 above), p. 119.

*Panevezys-Saldutiskis Railway* case—that the ineffectiveness of the remedy be “clearly shown”.<sup>45</sup>

30. The “obvious futility” test has been strongly criticized by some writers and was not followed in the *ELSI* case<sup>46</sup> in which an ICJ chamber was ready to assume the ineffectiveness of local remedies. Amerasinghe has argued that it was wrong for Arbitrator Bagge to import the strict test expounded in prize cases, arising in the context of war and in respect of which States have special powers of jurisdiction, to the law of diplomatic protection,<sup>47</sup> while Mummery has submitted that the test of obvious futility “contributes very little to precision and objectivity of thought”.<sup>48</sup> Amerasinghe adds that:

The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a strict criterion to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably rather than highly probable that they are not likely to succeed. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local level while invoking an international remedy which could result in adequate redress.<sup>49</sup>

31. Exemption from the local remedies rule on the ground of ineffectiveness may be better achieved by a formulation which renders the exhaustion of local remedies unnecessary when the remedies offer no reasonable prospect of success to the claimant. Support for this formulation is to be found in tests which stress the reasonableness of the claimant pursuing domestic remedies. This test is less demanding than that of “obvious futility”, which requires evidence not only that there was no reasonable prospect of the local remedy succeeding, but that it was obviously and manifestly clear that the local remedy would fail.

32. The clearest support for this test comes from the jurisprudence of the European Commission on Human Rights, which on several occasions has applied the

<sup>45</sup> See footnote 25 above. This test seems to reflect British practice, which requires that the ineffectiveness of the remedy must be “clearly established” (Warbrick, *loc. cit.*, p. 1008). The United States of America, in an opinion of 1930 by the Solicitor for the Department of State, also required that it be “shown” that local remedies were ineffective (Hackworth, *Digest of International Law*, p. 511).

<sup>46</sup> The Chamber stated:

“With such a deal of litigation [lasting from 1968 to 1975 before various Italian courts] in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted.”

(*Elettromica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 46, para. 59)

“In the present case ... it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.”

(*Ibid.*, p. 47, para. 62)

<sup>47</sup> Amerasinghe, “The local remedies rule in an appropriate perspective”, p. 752; and Borchard’s approval of Arbitrator Bagge’s approach in Borchard, “The local remedy rule”, pp. 732–733.

<sup>48</sup> “The content of the duty to exhaust local judicial remedies”, p. 401.

<sup>49</sup> “The local remedies rule ...”, p. 752.

standard of “real” or “reasonable prospect of success”.<sup>50</sup> Commentators are divided as to whether the Commission intended to substitute this test for that of “obvious futility” and have raised doubts about the application of this test to the general law of diplomatic protection.<sup>51</sup> The American Law Institute’s *Restatement of the Law Second: Foreign Relations Law of the United States*, provides some support for this test:

Exhaustion of a remedy does not require the taking of every step that might conceivably result in a favorable determination, but the alien must take all steps that offer a *reasonable possibility, even if not a likelihood*,\* of success... The expense or delay involved, if substantial in relation to the amount or nature of the reparation sought, may be relevant in determining what steps should reasonably be taken to exhaust the available remedies. The alien is not required to incur substantial expense and delay in trying to invoke a remedy where there is no *reasonable possibility*\* that the remedy would be available.<sup>52</sup>

33. As shown above,<sup>53</sup> article 22 of the draft articles on State responsibility adopted by the Commission on first reading simply requires local remedies to be effective. The commentary to the provision does, however, support the “reasonable prospect of success” formulation:

From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a *real prospect* of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored.<sup>54</sup>

34. While the “obvious futility” test is too strict, that of “reasonable prospect of success” is probably too generous to the claimant. It seems wiser, therefore, to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule. A possible solution is to be found in option 3, that there is an exemption from the local remedies rule where there is “no reasonable

possibility of an effective remedy” before courts of the respondent State. This formulation avoids the stringent language of “obvious futility” but nevertheless imposes a heavy burden on the claimant by requiring that he prove that, in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective remedy. This is a stricter test than that of “no reasonable prospect of success”, the test employed in some legal systems for refusing leave to appeal to a higher court.

35. This test is adopted from the separate opinion of Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case, in which he stated, after considering the grounds on which it might be doubted that the Norwegian courts could afford any effective remedy:

However, these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out, as a matter of reasonable possibility, an effective remedy before Norwegian courts.<sup>55</sup>

A number of writers have endorsed this view.<sup>56</sup> Perhaps the best exposition of the test is given by Fitzmaurice:

Lauterpacht propounded the criterion of there being a “reasonable possibility” that a remedy would be afforded, as being the test of effectiveness—or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule.<sup>57</sup>

36. The text proposed arguably accords more with the reasoning of Arbitrator Bagge in the *Finnish Ships Arbitration* than that of “obvious futility”. This is made clear by Simpson and Fox:

The use of such terms as “obviously futile” and “obviously insufficient” in relation to rights of appeal is, however, misleading. In the *Finnish Ships* case the arbitrator heard lengthy argument about the ship-owners’ right of appeal from the decision of the Arbitration Board to the Court of Appeal and their failure to exercise it, and in his award entered into most detailed reasoning before arriving at the conclusion that the appealable points of law were “obviously” insufficient to secure a reversal of the decision of the Arbitration Board. “*Obvious*” is therefore not to be understood in the sense of *immediately apparent*.\* To judge from the *Finnish Ships* case, the test is whether the *insufficiency of the grounds of appeal has been conclusively, or at least convincingly, demonstrated*.\*<sup>58</sup>

This interpretation is consistent with Bagge’s own views, expressed in another context, where he argued, referring to the *Finnish Ships Arbitration* decision, that

it would not be reasonable to require that the private party should spend time and money on a recourse which *in all probability*\* would be futile.

...

<sup>50</sup> *Retimag S.A. v. Federal Republic of Germany*, application No. 712/60, decision of 16 December 1961, *Yearbook of the European Convention on Human Rights*, 1961, p. 400; *X, Y and Z v. the United Kingdom*, application Nos. 8022/77, 8025/77 and 8027/77, decision of 8 December 1979, *European Commission of Human Rights, Decisions and Reports*, vol. 18, p. 76.

<sup>51</sup> Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: its Rationale in the International Protection of Individual Rights*, p. 97; and Amerasinghe, *Local Remedies in International Law*, p. 202.

<sup>52</sup> *Restatement of the Law Second* ... (see footnote 27 above). It should, however, be noted that in paragraph 208 the terms “apparent” and “clearly ineffective” are used (*ibid.*, p. 618). See also *Restatement of the Law Third* ... (footnote 27 above), which requires United States nationals to exhaust local remedies “unless such remedies are clearly sham or inadequate”. Earlier statements of United States officials demonstrate a stricter requirement, namely that “there appears to be no adequate ground for believing that sufficient remedy is afforded”, that “[t]he Department ... can not assume that the regularly established courts of a country will not administer justice until *it has been shown*\* that such is the case” (Hackworth, *op. cit.*, p. 511), or that “[t]he policy of the Department has always been, and is, not to intervene when the claimant has his day in court, unless the courts are of such a character as to preclude hope of a possibility\* of justice” (letter of 27 February 1907 by the Department, quoting an opinion of the Solicitor concerning a claim against Canada, *ibid.*, p. 520.)

<sup>53</sup> Para. 28.

<sup>54</sup> *Yearbook* ... 1977, vol. II (Part Two), p. 47, para. (48). See also Law, *op. cit.*, pp. 78–79, who formulates the test as “reasonable expectation of success”.

<sup>55</sup> *Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 39.

<sup>56</sup> Brownlie, *Principles of Public International Law*, p. 499. Mummery prefers to ask whether the local remedy in question “may reasonably be regarded as incapable of producing satisfactory reparation” (*loc. cit.*, p. 401).

<sup>57</sup> *Loc. cit.*, pp. 60–61. See also Herdegen, “Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen”, p. 70.

<sup>58</sup> *International Arbitration: Law and Practice*, p. 114.

Even if the facts alleged by the intervening State in the diplomatic correspondence as to damage caused by an act for which the defendant State is responsible may seem to the international tribunal firmly established, there may be other bases required by the municipal law, which are decisive for the acceptance or dismissal on the national plane of the private claim, and whose existence may be a subject for different opinions. *Only where such a difference of opinion seems reasonably not possible [i.e. where there is no reasonable prospect of success], ... ought an application of the local remedies rule to be held unnecessary by reference to the merits of the claim.*<sup>59</sup>

37. The objection to the “obvious futility” test that it suggests that the ineffectiveness of the local remedy must be *ex facie* “immediately apparent”<sup>60</sup> is overcome by introducing the element of “reasonableness” into the test. This allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. The necessity to do this was stressed by Mr. Manley O. Hudson in his dissenting opinion in the *Panevezys-Saldutiskis Railway* case<sup>61</sup> and by Sir Hersch Lauterpacht in his separate opinion in the *Certain Norwegian Loans* case.<sup>62</sup> The correct approach is admirably put by Mummery:

The international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the state’s activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule. This flexibility of approach is consonant with the social function of the rule ...—to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy. Thus the result in any particular case will depend on a balancing of factors. For example, in a situation in which the best local legal advice suggests that it is “highly unlikely” that further resort to local remedies will result in a disposition favorable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further.<sup>63</sup>

#### 4. CIRCUMSTANCES IN WHICH LOCAL REMEDIES HAVE BEEN FOUND TO BE INEFFECTIVE OR FUTILE

38. *The local court has no jurisdiction over the dispute in question.*<sup>64</sup> This principle has been widely accepted both in jurisprudence and in the literature.<sup>65</sup> The *Panevezys-*

<sup>59</sup> “Intervention on the ground of damage caused to nationals, with particular reference to exhaustion of local remedies and the rights of shareholders”, pp. 166–167.

<sup>60</sup> Simpson and Fox, *op. cit.*, p. 114.

<sup>61</sup> *P.C.I.J.* (see footnote 25 above), p. 48.

<sup>62</sup> *I.C.J. Reports 1957* (see footnote 55 above), p. 39.

<sup>63</sup> Mummery, *loc. cit.*, pp. 400–401. See also Herdegen, *loc. cit.*, p. 71.

<sup>64</sup> See Kokott, *loc. cit.*, p. 622; Amerasinghe, *Local Remedies ...*, pp. 197–198; Jennings and Watts, eds., *Oppenheim’s International Law*, p. 525; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis*, p. 884; and Mummery, *loc. cit.*, pp. 396–397.

<sup>65</sup> See “International arbitral awards of Östen Undén: arbitration under article 181 of the Treaty of Neuilly”, *American Journal of International Law*, vol. 28 (1934), p. 789 (“the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the government or by a member of the government performing his official duties. There rarely exist local remedies against the acts of the authorized organs of the state”); *Claims of Rosa Gelbrunk and the “Salvador Commercial Company”* et al. (1902), UNRIAA, vol. XV (Sales No. 66.V.3), pp. 467–477; *The Lottie May Incident* (1899), *ibid.*, p. 31; Sir Hersch Lauterpacht’s separate opinion in *Certain Norwegian Loans* (footnote 55 above), pp. 39–40; Borchard, *The Diplomatic Protection of Citizens Abroad or the Law*

*Saldutiskis Railway* case does not negate this principle. There PCIJ held that it was not satisfied that the courts of Lithuania had no jurisdiction over an act of State, as argued by Estonia, in the absence of a Lithuanian court decision.<sup>66</sup> On the facts this was an extremely cautious,<sup>67</sup> possibly timid approach, but the Court made it clear that it accepted the principle that there was “no need to resort to the municipal courts if those courts have no jurisdiction to afford relief”.<sup>68</sup>

39. A necessary corollary of this principle is that it is not necessary to exhaust appellate procedures when the appeal court has limited jurisdiction. Thus in the *Finnish Ships Arbitration* Arbitrator Bagge held that local remedies had been exhausted where the disputed issue was a question of fact and the Court of Appeal had competence to decide questions of law only.<sup>69</sup>

40. *The national legislation justifying the acts of which the alien complains will not be reviewed by the courts.* Where, for instance, legislation has been adopted to confiscate the property of an alien and it is clear that the courts are obliged to enforce this legislation, there will be no need to exhaust local remedies. Thus in the *Arbitration under article 181 of the Treaty of Neuilly*, concerning the confiscation of forests by Bulgaria under a Bulgarian law passed in 1904, Arbitrator Undén held that:

The Ministry of Agriculture, in proceeding definitely to confiscate the forests, relied upon the ... Bulgarian law of 1904 according to which all the *yailaks* were to be considered as domains of the state. Considering that this law was not modified so as to admit of the application of a special régime in the annexed territories, the claimants had reasons for considering as useless any action before the Bulgarian courts against the Bulgarian Treasury.<sup>70</sup>

41. *The local courts are notoriously lacking in independence.*<sup>71</sup> The leading authority in support of this principle

*of International Claims*, p. 823; Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; Amerasinghe, *Local Remedies ...*, p. 198, and “Whither the local remedies rule?”, p. 306; Jiménez de Aréchaga, “International responsibility”, pp. 587–588; Verzijl, “La règle de l’épuisement des recours internes”, p. 266; *Affaire des Forêts du Rhodope Central (fond)*, decision of 29 March 1933, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1420; *Interhandel* case (footnote 25 above), p. 27; Verdross and Simma, *op. cit.*, p. 883; Law, *op. cit.*, p. 69; and Schwarzenberger, *op. cit.*, p. 608.

<sup>66</sup> See footnote 25 above.

<sup>67</sup> See Lauterpacht, *op. cit.*, p. 101.

<sup>68</sup> *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18.

<sup>69</sup> UNRIAA (see footnote 24 above), p. 1535. See also Schwarzenberger, *op. cit.*, p. 609; Jiménez de Aréchaga, “International responsibility”, p. 588; Brownlie, *op. cit.*, p. 499; Mummery, *loc. cit.*, p. 398; and Law, *op. cit.*, p. 68.

<sup>70</sup> “International arbitral awards of Östen Undén ...” (footnote 65 above). See also *Affaire des Forêts du Rhodope Central* (footnote 65 above), p. 1405; the *Ambatielos Claim* (footnote 25 above), p. 119; the *Interhandel* case (footnote 25 above), p. 28; Amerasinghe, *Local Remedies ...*, p. 198; Jennings and Watts, *op. cit.*, p. 525; Jiménez de Aréchaga, “International responsibility”, p. 589; Law, *op. cit.*, pp. 66 and 70; Doehring, “Local remedies, exhaustion of”, p. 240; Schwarzenberger, *op. cit.*, p. 608; and *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (50).

<sup>71</sup> Jiménez de Aréchaga, “International responsibility”, p. 589; Amerasinghe, *Local Remedies ...*, p. 198; Borchard, *The Diplomatic Protection ...*, p. 823 (referring to courts controlled by a hostile mob); Jennings and Watts, *op. cit.*, p. 525; Brownlie, *op. cit.*, p. 500; *Velásquez Rodríguez* case, ILM, vol. 28 (1989), pp. 304–309; Whiteman, *Digest of International Law*, p. 784; separate opinion by Judge Tanaka in the *Barcelona Traction* case (see footnote 39 above), p. 147; dissenting

is the *Robert E. Brown* claim.<sup>72</sup> Here the President of the South African Republic, Paul Kruger, had dismissed the Chief Justice for finding in favour of Brown's claims to certain mining rights, and both the President and the legislature of the Republic had denounced the decision of the Chief Justice. In these circumstances Brown was advised by his counsel that it was pointless to proceed with his claim for damages as the reconstituted High Court was clearly hostile to him.<sup>73</sup> The tribunal that heard the international claim rejected the argument that Brown had failed to exhaust local remedies, holding that "the futility of further proceedings has been fully demonstrated, and that the advice of his counsel was amply justified". It was not necessary, said the tribunal, "to exhaust justice ... when there is no justice to exhaust".<sup>74</sup>

42. *There is a consistent and well-established line of precedents adverse to the alien.* It is not "necessary again to resort to those [municipal] courts if the result must be a repetition of a decision already given".<sup>75</sup> The mere likelihood of an adverse decision is insufficient: there must be "something more than probability of defeat but less than certainty".<sup>76</sup>

43. *The courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the alien.*<sup>77</sup>

opinion of Judge Levi Carneiro in *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 165; Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, pp. 1655 and 1657, vol. III, pp. 3076 *et seq.*, vol. V, p. 4902; and *A Digest of International Law*, p. 287; Mummery, *loc. cit.*, p. 403; Law, *op. cit.*, p. 68; Cançado Trindade, *op. cit.*, p. 78; Fitzmaurice, *loc. cit.*, p. 59; *Yearbook ... 1977* (see footnote 70 above); Daillier and Pellet, *Droit International Public*, p. 776.

<sup>72</sup> UNRIAA (see footnote 24 above), p. 120.

<sup>73</sup> For a history of this case, see Dugard, "Chief Justice versus President: does the ghost of *Brown v Leyds* NO still haunt our judges?", p. 421.

<sup>74</sup> UNRIAA (see footnote 24 above).

<sup>75</sup> *Panevezys-Saldutiskis Railway* case (see footnote 25 above), p. 18. See also Borchard, *The Diplomatic Protection ...*, pp. 823–824; S.S. "*Lisman*" (1937), UNRIAA, vol. III (Sales No. 1949.V.2), p. 1773; S.S. "*Seguranca*" (1939), *ibid.*, p. 1868; *Finnish Ships Arbitration* (footnote 24 above), p. 1495; *X v. Federal Republic of Germany* (1955), European Commission of Human Rights, *Documents and Decisions: 1955–1956–1957*, p. 138; *ibid.* (1958), *Yearbook of the European Convention on Human Rights: 1958–1959*, p. 344; *X* against *Austria* (1959), *ibid.*: 1960, p. 202; Jiménez de Aréchaga, "International responsibility", p. 589; Amerasinghe, *Local Remedies ...*, pp. 196–197; Brownlie, *op. cit.*, p. 499; Kokott, *loc. cit.*, p. 622; Mummery, *loc. cit.*, p. 402; Law, *op. cit.*, p. 66; Cançado Trindade, *op. cit.*; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, p. 240; Schwarzenberger, *op. cit.*, p. 609; *Yearbook ... 1977* (footnote 70 above).

<sup>76</sup> Amerasinghe, *Local Remedies ...*, p. 196.

<sup>77</sup> *Finnish Ships Arbitration* (see footnote 24 above), pp. 1496–1497; *Velásquez Rodríguez* case (see footnote 71 above), pp. 304–309; Borchard, *The Diplomatic Protection ...*, p. 332; Jennings and Watts, *op. cit.*, p. 525; Kokott, *loc. cit.*, p. 622; *Yağci and Sargin v. Turkey* case, application No. 16426/90 (1995) European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 319, p. 17, para. 42; *Hornsby v. Greece* case, application No. 18357/91, European Court of Human Rights, *Reports of Judgments and Decisions*, No. 33 (1997–II), p. 509, para. 37; Mummery, *loc. cit.*, pp. 401–402; Cançado Trindade, *op. cit.*, pp. 76–78; Verdross and Simma, *op. cit.*, p. 884; art. 19, para. 2 (a) of the 1960 draft convention on the international responsibility of States for injuries to aliens prepared by the Harvard Law School, reproduced in Sohn and Baxter, "Responsibility of States for injuries to the economic interests of aliens", p. 577; Amerasinghe, *Local Remedies ...*, pp. 198–199.

44. *The respondent State does not have an adequate system of judicial protection.* In *Mushikiwabo and Others v. Barayagwiza* a United States District Court held that the local remedies rule could be dispensed with in the case as "the Rwandan judicial system is virtually inoperative and will be unable to deal with civil claims in the near future".<sup>78</sup> During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal proceedings under military justice obviated the need to exhaust local remedies.<sup>79</sup> Notions of a fair trial and due process of law carry greater weight in contemporary international law, as a result of the influence of international human rights jurisprudence, than they did in the first 60 years of the twentieth century when many of the seminal decisions on the exhaustion of local remedies were given. This exception to the local remedies must therefore be accorded greater weight today.

## 5. CONCLUSION

45. The above examples of circumstances in which recourse to local remedies has been excused suggest that the claimant is required to prove more than that the local remedies offer no reasonable prospect of success (option 2). On the contrary, they suggest that the claimant must prove their futility. They do not, however, lend support to the test of "obvious futility" (option 1), which suggests that the futility of local remedies must be "immediately apparent".<sup>80</sup> Instead they require a tribunal to examine circumstances pertaining to a particular claim which may not be immediately apparent, such as the independence of the judiciary, the ability of local courts to conduct a fair trial, the presence of a line of precedents adverse to the claimant and the conduct of the respondent State. The reasonableness of pursuing local remedies must therefore be considered in each case.<sup>81</sup> This all points in the direction of option 3: a claimant is not obliged to exhaust local remedies where the courts of the respondent State provide "no reasonable possibility of an effective remedy" (art. 14 (a) above).

<sup>78</sup> Decision of 9 April 1996, ILR, vol. 107, p. 460.

<sup>79</sup> Resolution 01a/88, case 9755 (12 September 1988), *Annual Report of the Inter-American Commission on Human Rights 1987–1988*, p. 137. See also Amerasinghe, *Local Remedies ...*, p. 200, and "Whither the local remedies rule?", p. 308; Borchard, *The Diplomatic Protection ...*, p. 822; Mummery, *loc. cit.*, p. 404; *Restatement of the Law Second ...* (footnote 27 above), p. 618, para. 208; Doehring, *loc. cit.*, p. 239; and Schwarzenberger, *op. cit.*, p. 609.

<sup>80</sup> Simpson and Fox, *op. cit.*, p. 114.

<sup>81</sup> Mummery states in this connection:

"As international jurisprudence develops on this subject, the analysis of cases will call for the best skills of the discipline of comparative law; for the various jurisdictions of the common and civil law have developed differing concepts of what is essential to an effective municipal remedy, and from these concepts criteria may be extracted for the purposes of the international standard involved in the local remedies rule. Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness." (*Loc. cit.*, p. 404)

## B. Waiver and estoppel (art. 14 (b))

### “Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(b) The respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement.”

46. Sometimes States are prepared to waive the requirement that local remedies be exhausted.<sup>82</sup> As the purpose of the rule is to protect the interests of the State accused of mistreating an alien, it follows that a State may waive this protection itself. The Inter-American Court of Human Rights has stated:

In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defense and, as such, waivable, even tacitly.<sup>83</sup>

47. In practice there would seem to be no prohibition on waiver of local remedies. From a doctrinal perspective it is, however, difficult to reconcile waiver with the substantive approach to the exhaustion of local remedies.<sup>84</sup> The reason for this is clearly spelled out by Amerasinghe:

If the rule of local remedies is one of procedure, then such a waiver is truly possible and comprehensible. Since the rule is only a means of establishing the orderly conduct of international litigation, an exception may be made to the rule and steps in the order excluded. The character of the alleged wrong will in no way be affected. It is only the method of settlement that undergoes a change. The wrong which remains the same is conclusively determined and redressed by an international court directly rather than by the usual preliminary court or courts.

If the rule is one of substance, it would follow that a waiver of the requirement that local remedies should be exhausted would not be possible. The resort to local remedies becomes a material part of the wrong being alleged before the international tribunal. Without that resort there would be no cause of action. If a waiver of the requirement were allowed, no cause of action involving international responsibility could be shown before an international tribunal. Either remedies will have to be exhausted with a *denial of justice* or absence of adequate remedies will have to be proved. To speak of a true waiver is incongruous in such a case.

The same arguments apply to forfeiture of the benefits of the rule by estoppel or for any other reasons. The rule is dispensed with in this manner before an international tribunal, if after it is forfeited there is still an international wrong which an international tribunal can redress. This can only be so, if the rule is of a procedural character and not if it is substantive. In the same way true exceptions to the rule [e.g. if the

<sup>82</sup> There are many reasons why a State may decide on such a course. A State may, for instance, believe that such a course would save time and money. See Amerasinghe, *State Responsibility for Injuries to Aliens*, p. 207.

<sup>83</sup> Case of the *Government of Costa Rica (in the matter of Viviana Gallardo et al.)*, Inter-American Court of Human Rights (1981), ILR, vol. 67, p. 587, para. 26. See also the *ELSI* case (footnote 46 above), p. 42, para. 50; and the *De Wilde, Ooms and Versyp* cases (“Belgian Vagrancy Cases”), European Court of Human Rights (1971), ILR, vol. 56, p. 370, para. 55. See further Cançado Trindade, *op. cit.*, p. 133.

<sup>84</sup> See the second report on diplomatic protection, *Yearbook ... 2001* (footnote 13 above), p. 107, para. 33.

remedies are futile] can only be allowed if the international tribunal which is seized of the case has a dispute grounded in international law on which to adjudicate. This is so, only if the rule of local remedies which is not applied in a given case is of a procedural nature.<sup>85</sup>

48. Waiver presents problems for those who advocate a substantive position on the local remedies rule. Probably for this reason there is little discussion of waiver on the part of substantivists,<sup>86</sup> although none deny it. On the contrary, Borchard, a prominent substantivist, admits the possibility of waiver.<sup>87</sup> Writers with leanings in favour of the procedural position have little difficulty in supporting the right of waiver on the part of the respondent State,<sup>88</sup> even in the case of human rights conventions.<sup>89</sup>

49. Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

### 1. EXPRESS WAIVER

50. An express waiver may be included in an *ad hoc* arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies rule is valid,<sup>90</sup> and it has been suggested that this principle is ripe for codification by the Institute of International Law<sup>91</sup> and by the Commission’s Special Rapporteur, Mr. García Amador.<sup>92</sup>

<sup>85</sup> *State Responsibility ...*, pp. 207–208.

<sup>86</sup> Mr. Roberto Ago does not consider waivers in his examination of the local remedies rule (sixth report on State responsibility, *Yearbook ... 1977*, vol. II (Part One), p. 3, document A/CN.4/302 and Add.1–3); see also *Yearbook ... 1977*, vol. II (Part Two), p. 30. See further O’Connell, *op. cit.*, p. 1059.

<sup>87</sup> See, for instance, Borchard, *The Diplomatic Protection ...*, pp. 819 and 825.

<sup>88</sup> Amerasinghe, “The local remedies rule ...”, pp. 735–736; Law, *op. cit.*, p. 59; García Amador, third report on international responsibility, *Yearbook ... 1958*, vol. II, document A/CN.4/111, p. 99; and *The Changing Law of International Claims*, p. 466; Witenberg, “La recevabilité des réclamations devant les juridictions internationales” p. 55; Ipsen, *Völkerrecht*, p. 313; Borchard, “Theoretical aspects of the international responsibility of States”, p. 240. See also *Restatement of the Law Second ...* (footnote 27 above), p. 620–622, para. 209; and Kokott, *loc. cit.*, p. 613.

<sup>89</sup> Cançado Trindade, *op. cit.*, pp. 128–133.

<sup>90</sup> See the writings referred to in footnote 88 above. See also Doehring, *loc. cit.*, p. 239; Briggs, “The local remedies rule: a drafting suggestion”, p. 925; Amerasinghe, “Whither the local remedies rule?”, pp. 293–294, and *Local Remedies ...*, p. 251; Jennings and Watts, *op. cit.*, pp. 525–526; Schwarzenberger, *op. cit.*, p. 610; Verdross and Simma, *op. cit.*, p. 883; and Herdegen, *loc. cit.*, p. 69.

<sup>91</sup> The resolution adopted at its Granada session states that:

“This rule does not apply:

“... ”

“(b) if the application of the rule has been set on one side by agreement between the States concerned.”

(See footnote 40 above.)

See also the comments of Mr. Maurice Bourquin, *Annuaire de l’Institut de Droit International*, vol. 1 (Aix-en-Provence session, 1954), pp. 57–58.

<sup>92</sup> *Yearbook ... 1958* (see footnote 88 above), p. 55. Article 17

51. Waivers are a common feature of contemporary State practice, and many arbitration agreements contain waiver clauses.<sup>93</sup> Probably the best-known example is to be found in article 26 of the Convention on the settlement of investment disputes between States and nationals of other States, which provides:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

52. It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien, are irrevocable, even if the contract is governed by the law of the host State.<sup>94</sup>

## 2. IMPLIED WAIVER

53. Waiver of local remedies must not be readily implied. In the *ELSI* case an ICJ Chamber stated in this connection that it was “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, *in the absence of any words making clear an intention to do so.*”<sup>95</sup> Indeed, Schwarzenberger has suggested that there is a presumption against implying a waiver:

In such a situation of uncertainty it is necessary to give due weight to three relevant presumptions: the presumption against any implicit waiver of rights, and those in favour of the minimum restriction of sovereignty and the interpretation of treaties against the background of international customary law. All three weigh the scales against any implied waiver of the local remedies rule.<sup>96</sup>

54. Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions<sup>97</sup> and the writ-

states that the rule of the exhaustion of local remedies “shall not apply if the State has expressly agreed with the alien ... to dispense with local remedies”. See also *Yearbook ... 1961* (footnote 39 above), p. 48, art. 18, para. 4.

<sup>93</sup> For instance, the 1923 Convention establishing the United States–Mexican Claims Commission (art. V) and the 1910 Agreement between the United States and Great Britain, quoted in Borchard, “Theoretical aspects ...”, p. 240. See also the Agreement between the United States and Canada concerning the establishment of an International Arbitral Tribunal to dispose of United States Claims relating to Gut Dam (Ottawa, 25 March 1965), art. II, para. 2 (c) (United Nations, *Treaty Series*, vol. 607, No. 8802, p. 146; also reproduced in *ILM*, vol. 4 (1965), p. 469).

<sup>94</sup> *Government of Costa Rica ...*, p. 587, para. 26, and *De Wilde, Ooms and Versyp* cases (see footnote 83 above), p. 370, para. 55; Amerasinghe, “Whither the local remedies rule?”, pp. 294–295, *Local Remedies ...*, pp. 252–253, and “The local remedies rule ...”, p. 737; *I.C.J. Pleadings, Anglo-Iranian Oil Co.* (United Kingdom v. Iran), pp. 118–119. *Sed contra* Iran’s pleadings, *ibid.*, p. 501.

<sup>95</sup> *I.C.J. Reports 1989* (see footnote 46 above), p. 42, para. 50. See also Kokott, *loc. cit.*, p. 626.

<sup>96</sup> *Op. cit.*, pp. 610–611. See also García Amador, *The Changing Law ...*, p. 467, and *Yearbook ... 1958* (footnote 88 above), p. 60, para. 23; the *Salem* case (1932), UNRIIAA, vol. II (Sales No. 1949.V.1), p. 1189; Law, *op. cit.*, p. 98; Jiménez de Aréchaga, “International law in the past third of a century”, p. 292; and Cançado Trindade, *op. cit.*, p. 131.

<sup>97</sup> See, for example, *Steiner and Gross v. Polish State* (1928), in McNair and Lauterpacht, eds., *Annual Digest of Public International Law Cases*, p. 472; and *American International Group, Inc. v. Iran*, award No. 93–2–3 (1983), *Iran–United States Claims Tribunal Reports*, vol. 4 (Cambridge, Grotius, 1985), p. 96.

ings<sup>98</sup> of jurists support such a conclusion. Mr. García Amador, Special Rapporteur, was equivocal on this subject: in his sixth and final report to the Commission in 1961 he contemplated only an express waiver of local remedies,<sup>99</sup> but later, in *The Changing Law of International Claims*, he accepted that a waiver might be implied provided it was clear and unequivocal.<sup>100</sup>

55. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption.<sup>101</sup> It is, however, helpful to look at different types of arbitration agreements, as special considerations may apply to different agreements.

## 3. GENERAL ARBITRATION AGREEMENT ENTERED INTO BEFORE DISPUTE

56. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement “does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the contracting States espouses the claim of its national”.<sup>102</sup> Indeed, in several cases involving a general agreement of this kind, the applicant State has declined to raise waiver implied from the fact of submission to arbitration as a counter-argument to a preliminary objection based on the non-exhaustion of local remedies.<sup>103</sup> That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the ICJ Chamber in the *ELSI* case.<sup>104</sup>

<sup>98</sup> Law, *op. cit.*, p. 93; Jennings and Watts, *op. cit.*, pp. 525–526; Amerasinghe, “The local remedies rule ...”, pp. 735–736; Borchard, *The Diplomatic Protection ...*, pp. 819 and 825.

<sup>99</sup> In this report he adopted the view that the exhaustion of local remedies rule “shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary” (*Yearbook ... 1961* (see footnote 39 above), p. 48, art. 18, para. 4). See also *Affaire relative à la concession des phares de l’Empire ottoman* (Greece v. France) (1956), UNRIIAA, vol. XII (Sales No. 63.V.3), pp. 186–187.

<sup>100</sup> *Op. cit.*, p. 467.

<sup>101</sup> In his first report Mr. García Amador stated that it was necessary to look at the *travaux préparatoires* of the agreement “to determine whether the particular dispute is included among those covered by the arbitration agreement and, if so, whether that agreement meant, explicitly or implicitly, to waive the application of the local remedies rule in those disputes. In other words, the application of the local remedies rule will necessarily depend not only on the purpose and scope of the agreement, but also on the circumstances of each particular case” (*Yearbook ... 1956* (see footnote 14 above), p. 204, para. 164). See also Law, *op. cit.*, pp. 93–98; Jiménez de Aréchaga, “International law ...”, p. 292; Amerasinghe, *Local Remedies ...*, pp. 256–257; and *Restatement of the Law Second ...* (footnote 27 above), pp. 620–621, para. 209 (b). See further *Steiner and Gross v. Polish State* (footnote 97 above).

<sup>102</sup> Mann, “State contracts and international arbitration”, p. 32; see also Freeman, *The International Responsibility of States for Denial of Justice*, p. 414; Verzijl, *loc. cit.*, pp. 3–4; Jennings and Watts, *op. cit.*, p. 526, footnote 16; Jiménez de Aréchaga, “International law ...”, p. 292; Amerasinghe, *Local Remedies ...*, pp. 253 and 257–258, and “Whither the local remedies rule?”, pp. 295–296; and Law, *op. cit.*, p. 98.

<sup>103</sup> See, for example, the *Interhandel* (footnote 25 above), and *ELSI* cases (footnote 46 above). See also Amerasinghe, *Local Remedies ...*, p. 253, and “Whither the local remedies rule?”, p. 295.

<sup>104</sup> *I.C.J. Reports 1989* (see footnote 46 above), p. 42, para. 50.

57. In the *Panevezys-Saldutiskis Railway* case PCIJ held that acceptance of the Optional Clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule,<sup>105</sup> as argued by Judge van Eysinga in a dissenting opinion.<sup>106</sup> That the majority opinion is accepted is confirmed by the failure of the applicant State to raise waiver in response to a preliminary objection of non-exhaustion of local remedies in either the *Certain Norwegian Loans* case<sup>107</sup> or the *Interhandel* case,<sup>108</sup> in which the jurisdiction ICJ was asserted on the basis of a declaration under the Optional Clause. As there is an analogy between submission to the jurisdiction of ICJ under the Optional Clause and a general arbitration agreement, it is possible to invoke this jurisprudence on the Optional Clause in support of a presumption against tacit waiver by means of a general arbitration agreement. Although such a presumption is strong, it is not irrebuttable.<sup>109</sup>

#### 4. AD HOC ARBITRATION AGREEMENT ENTERED INTO AFTER DISPUTE

58. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals after the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.<sup>110</sup> Support for this position is to be found in the decisions of claims commissions.<sup>111</sup> Some see confirmation of the possibility of

waiver being implied from arbitration agreements entered into after the dispute has arisen in the fact that some such agreements expressly require the exhaustion of local remedies.<sup>112</sup> Neither PCIJ nor ICJ has addressed waiver in the case of agreements falling into this category.

#### 5. CONTRACT BETWEEN ALIEN AND RESPONDENT STATE

59. A contract to arbitrate between an alien and the host State which expressly or impliedly waives local remedies is not directly relevant here, as dispute settlement in such a case does not involve the espousal of the alien's claim by the State of nationality. Such a contract may, however, become relevant for present purposes if the host refuses to arbitrate and the State of nationality intercedes to protect its national. The question will then arise whether the contractual stipulation, express or implied, to exclude domestic remedies is to prevail. While there is support for the view that an express waiver<sup>113</sup> is to be given effect to, it is less clear whether a contract between a State and an alien agreeing to settle disputes by arbitration, without explicit mention of recourse to local remedies as a precondition to arbitration, is to be interpreted as implying a waiver of local remedies. There is strong support among writers for the view that such an agreement is intended to exclude local remedies.<sup>114</sup> Some arbitral tribunal decisions expressly favour this approach,<sup>115</sup> while in many cases of this kind no objection based on non-exhaustion of local remedies has been raised by the respondent State.<sup>116</sup> While an argument for implied waiver in such cases has been raised before PCIJ and ICJ,<sup>117</sup> neither Court has pronounced on the matter.

case (see footnote 96 above).

<sup>105</sup> See footnote 25 above. Support for this position comes from Verzijl, *loc. cit.*, p. 4; Schwarzenberger, *op. cit.*, p. 610; Jiménez de Aréchaga, "International law ...", p. 292; and Amerasinghe, *Local Remedies* ..., pp. 256–257.

<sup>106</sup> Judge van Eysinga stated:

"It would seem that Lithuania cannot rely upon this rule [the local remedies rule] as against Estonia for the very reason that the acceptance by the two States of the Court's compulsory jurisdiction under Article 36 of the Court's Statute, which acceptance is unreserved ..., implies the setting aside of the rule in question in relations between the two States."

(*Panevezys-Saldutiskis Railway* case (footnote 25 above), pp. 35–36)

<sup>107</sup> See footnote 55 above.

<sup>108</sup> See footnote 25 above.

<sup>109</sup> See *Steiner and Gross v. Polish State* (footnote 97 above). Here the Upper Silesian tribunal held that Poland had impliedly waived the local remedies rule in article 5 of the Convention relating to Upper Silesia (Geneva, 15 May 1922) (League of Nations, *Treaty Series*, vol. IX, No. 271, p. 465), which provided that:

"The question as to whether or to what extent an indemnity for the abolition or diminution of vested rights must be paid by the State, will be settled directly by the Arbitral Tribunal on the complaint of the person enjoying the right."

(Kaeckenbeeck, *The International Experiment of Upper Silesia*, p. 581) The Tribunal held that the expression "directly" was to be interpreted as conferring upon the claimants the right to have recourse to the international tribunal without first exhausting local remedies.

<sup>110</sup> Law, *op. cit.*, pp. 93–94; Borchard, "Theoretical aspects ...", p. 240, and *The Diplomatic Protection* ..., pp. 819 and 825; García Amador, *The Changing Law* ..., p. 550.

<sup>111</sup> See the cases confirming this position in Borchard, "Theoretical aspects ...", p. 240, and *The Diplomatic Protection* ..., p. 819; and Hackworth, *op. cit.*, p. 525. See also *American International Group, Inc. v. Iran* (footnote 97 above), p. 102; and the *Giorgio Uzielli* case, Italian-United States Conciliation Commission (1963), UNRIAA, vol. XVI (Sales No. E/F.69.V.I), pp. 270–271. *Sed contra* the *Salem*

<sup>112</sup> See, for instance, Borchard, *The Diplomatic Protection* ..., p. 819. See also Judge van Eysinga's dissenting opinion in the *Panevezys-Saldutiskis Railway* case (footnote 25 above), pp. 37–38.

<sup>113</sup> Law, *op. cit.*, p. 94; Herdegen, *loc. cit.*, p. 69; Mr. García Amador's third report, *Yearbook ... 1958* (footnote 88 above), p. 55. Article 17 of Mr. García Amador's draft states that the rule of the exhaustion of local remedies (art. 15) "shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies".

<sup>114</sup> Mann, *loc. cit.*, p. 32; Jennings and Watts, *op. cit.*, p. 523, footnote 3; *Yearbook ... 1961* (footnote 39 above), p. 48, art. 18, para. 5; García Amador, *The Changing Law* ..., pp. 539–550; Schwebel, *International Arbitration: Three Salient Problems*, pp. 117–121; Schwebel and Wetter, "Arbitration and the exhaustion of local remedies", p. 499; report of the IBRD Executive Directors on the Convention on the settlement of investment disputes, quoted in Whiteman, *op. cit.*, p. 806; *Restatement of the Law Third ...* (footnote 27 above), p. 226, para. 713, reporters' note 5. See also *Restatement of the Law Second ...* (footnote 27 above), p. 621, para. 209 (c); and O'Connell, *op. cit.*, p. 1059. *Sed contra* Adede, "A survey of treaty provisions on the rule of exhaustion of local remedies", p. 8, footnote 19, who claims that statements made by States upon ratifying the General Treaty of Inter-American Arbitration, which does not explicitly require the exhaustion of local remedies, indicate their conviction that the rule is nevertheless not waived.

<sup>115</sup> See *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* (1977), ILR, vol. 62, pp. 179–180; and *Elf Aquitaine Iran v. National Iranian Oil Company* (1982), *ibid.*, vol. 96, pp. 278–279, para. 44.

<sup>116</sup> Amerasinghe, *Local Remedies* ..., p. 262.

<sup>117</sup> See the memorial by Switzerland in *Losinger, P.C.I.J., Series C, No. 78*, p. 40; United Kingdom contentions in the *Anglo-Iranian Oil Co.* case (footnote 94 above), pp. 81–82; arguments of France in *I.C.J. Pleadings, Electricité de Beyrouth Company* (France v. Lebanon) (1953), p. 14; submissions of France in *I.C.J. Pleadings, Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient* (France v. Lebanon) (1959), pp. 39 and 91–93. *Sed contra* pleadings by Yugoslavia in *Losinger* (see above), p. 132; submission by Iran in the

## 6. ESTOPPEL

60. The conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted.<sup>118</sup> This was acknowledged by an ICJ Chamber in the *ELSI* case when it stated that “it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said”.<sup>119</sup> Support for this principle is also to be found in the 1992 *United States–United Kingdom arbitration concerning Heathrow Airport user charges*.<sup>120</sup>

61. In the *Aerial Incident of 27 July 1955* (United States v. Bulgaria) case the United States submitted that:

If there were any local remedies available in Bulgaria to the next of kin of Americans killed in the shooting down of the El Al Airlines Constellation on July 27, 1955, the Bulgarian Government never adverted to them nor to the desirability or necessity of their being exhausted when the United States presented its diplomatic claim to the Government of Bulgaria in 1955 and 1957. Instead, the Bulgarian Government entertained the diplomatic claim and undertook to discharge it ... In view of these facts, Bulgaria is not entitled now to raise, for the first time, the assertion of a requirement that local remedies be exhausted.<sup>121</sup>

ICJ did not, however, have the opportunity to pronounce on this matter.

62. Both the European Court of Human Rights<sup>122</sup> and the Inter-American Court of Human Rights<sup>123</sup> have indicated that a respondent State may be estopped from raising an objection based on non-exhaustion of local remedies when it has failed to raise this objection at the appropriate time.

*Anglo-Iranian Oil Co.* case (see above), p. 288; arguments by Lebanon in *I.C.J. Pleadings* (see above), pp. 67–70.

<sup>118</sup> Kokott, *loc. cit.*, p. 626; Jennings and Watts, *op. cit.*, pp. 525–526; Amerasinghe, *Local Remedies ...*, pp. 268–270 and 272–275.

<sup>119</sup> *I.C.J. Reports 1989* (see footnote 46 above), p. 44, para. 54.

<sup>120</sup> ILR, vol. 102, p. 285, para. 6.33.

<sup>121</sup> *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, p. 326.

<sup>122</sup> In *Foti and Others*, the Court stated:

“The Court will take cognizance of preliminary objections of this kind [concerning the non-exhaustion of local remedies] in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; *if this condition is not fulfilled, the Government are estopped from raising the objection before the Court\**”

((1982), ILR, vol. 71, p. 380, para. 46)

See also *Artico* (1980), *ibid.*, vol. 60, pp. 192–194, paras. 24–27; *Guzzardi, ibid.*, vol. 61, pp. 301–302, para. 67; and *Corigliano* (1982), *ibid.*, vol. 71, p. 403.

<sup>123</sup> In *Castillo Petruzzi v. Peru*, the Court stated:

“The Court also indicates that the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived a means of defense that the Convention established in its favor and made a tacit admission of the non-existence of such remedies or their timely exhaustion, as has been stated in proceedings before organs of international jurisdiction (such as the European Court which has maintained that objections to inadmissibility should be raised at the initial stage of the proceedings before the Commission, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the Government).”

(*Human Rights Law Journal*, vol. 20, Nos. 4–6 (29 October 1999), p. 181, para. 56)

63. The exhaustion of local remedies rule is a rule of customary international law. A respondent State should not therefore be estopped from asserting this rule unless its conduct has clearly led the applicant State to act in a manner detrimental to its interests. This was made clear by an ICJ Chamber in the *ELSI* case when it stated: “[T]here are obvious difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges.”<sup>124</sup> ICJ likewise adopted a cautionary approach in the *Interhandel* case, in which it stated that it did

not consider it necessary to dwell upon the assertion of the Swiss Government that “the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts”. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State ... This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were then in progress.<sup>125</sup>

Amerasinghe states the position accurately in declaring:

There must be cogent evidence that the conduct was not only intended to lead the alien or individual to believe that local remedies need not be further exhausted, for whatever reason, but also that the latter could reasonably be expected to rely on that conduct, did rely on it and for that reason did not resort to the local remedies which were available.<sup>126</sup>

## 7. CONCLUSION

64. While there is support both for implied waiver of local remedies and for estoppel as a rebuttal of an objection based on non-exhaustion of local remedies, it is clear that neither of these obstacles in the way of the application of a customary rule is to be easily accepted. Despite this, it is necessary to acknowledge their possible existence, depending on the language of the relevant instruments and the circumstances and context of the particular case. Hence the proposed exception to the local remedies rule.

<sup>124</sup> *I.C.J. Reports 1989* (see footnote 46 above), p. 44, para. 54.

<sup>125</sup> *I.C.J. Reports 1959* (see footnote 25 above), p. 27. See also the separate opinion of Judge Córdova, *ibid.*, pp. 46–47. Cf. the dissenting opinion of Judge Erich in the *Panevezys-Salutiskis* case:

“It may happen that the State to which a claim is presented may be quite prepared to discuss its merits or even prepared to submit the claim to an international tribunal, although no final decision has been rendered by the competent judicial or administrative authority of the country. If in a particular case it appears from the attitude of the government that it waives this condition and that it is so to speak prepared to transfer the claim directly to the international plane, it cannot subsequently retreat from that position”.

(*P.C.I.J.* (see footnote 25 above), p. 52)

<sup>126</sup> *Local Remedies ...*, p. 273.

### C. Voluntary link and territorial connection (art. 14 (c)–(d))

#### “Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(c) There is no voluntary link between the injured individual and the respondent State;

“(d) The internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State.”

65. The exceptions to the rule that local remedies must be exhausted contained in subparagraphs (c)–(d) will be considered together, as they are closely related. Although there is support for these rules, the Special Rapporteur doubts whether they are justified, on the ground that other exceptions to the local remedies rule, or general principles of international law, will normally ensure that the local remedies rule is excluded in the circumstances covered in subparagraphs (c)–(d). For this and other reasons the Commission declined to adopt such a rule in 1977 when it considered article 22 in the draft articles on State responsibility (first reading).<sup>127</sup> The issue does, however, require careful consideration, and for this reason the exceptions in subparagraphs (c)–(d) are presented as possible rules in the event that the Commission elects to adopt provisions on this subject. The arguments for and against these rules are presented in order to provide the Commission with a full picture.

66. Some writers argue that the exhaustion of local remedies rule does not apply where the injured alien has no voluntary link with the respondent State because there is no territorial connection between the individual and the respondent State.<sup>128</sup>

67. In support of this view, it is argued that in all the cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. Thus Meron has stated:

While it is possible to find the broadest formulations of the rule of local remedies, an examination of the precedents reveals the following common basis of facts: In all of them the injured alien has voluntarily established, or may be deemed to have established, either expressly or impliedly, a link with the State whose actions are impugned. Such a link could be established in a variety of ways which it is not necessary to enumerate here exhaustively. It will suffice to refer to the more com-

mon examples. These include cases in which an alien resides, either permanently or temporarily, in the territory of the respondent State, engages there in business, owns there property or enters into contractual relations with the Government of that State. It appears that in all the reported cases which are relevant to the rule of local remedies and in which it was considered necessary that the allegedly wrong-doing State should in the first place be given an opportunity to redress the alleged wrong by means furnished by its own courts, a link of this character did in fact exist.<sup>129</sup>

68. Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that “the national going abroad should normally be deemed to take the local law as he finds it, including the means afforded for the redress of wrong”,<sup>130</sup> an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the former Soviet Union, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of aircraft that have accidentally strayed into a State’s airspace (as illustrated by the *Aerial Incident of 27 July 1955* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). According to Meron:

This broadening of the law of State responsibility is an important reason for the re-examination of both the basis and the scope of the rule of local remedies. Surely it would be unreasonable to refer individuals injured by a foreign State outside its territory to its courts as a condition precedent to the institution of international proceedings by the State of which the victim was a national; and this, despite the absence of a genuine link between the injured individual and the respondent State.<sup>131</sup>

69. Those who support the adoption of a voluntary link/territorial connection rule emphasize the assumption of risk undertaken by the alien in a foreign State as the basis for the local remedies rule.<sup>132</sup> It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

70. There is no clear authority either for or against the requirement of a voluntary link.

#### 1. JUDICIAL DECISIONS

71. Judicial decisions afford little guidance on the subject. In the *Interhandel* case ICJ stated:

<sup>129</sup> *Loc. cit.*, p. 94.

<sup>130</sup> Borchard, “Theoretical aspects ...”, p. 240. See also Borchard, *The Diplomatic Protection ...*, p. 817; and Eagleton, *The Responsibility of States in International Law*, p. 96.

<sup>131</sup> *Loc. cit.*, p. 98.

<sup>132</sup> Brownlie, *op. cit.*, p. 501. Brownlie does, however, indicate that there is an opposing philosophy: “If the major objective is to provide an alternative, relatively more convenient, recourse to that of proceeding on the international plane then no condition as to a link will apply.”

<sup>127</sup> *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. 38–42.

<sup>128</sup> See O’Connell, *op. cit.*, p. 951; Meron, “The incidence of the rule of exhaustion of local remedies”, p. 83; Parry, “Some considerations upon the protection of individuals in international law”, p. 688; Amerasinghe, *Local Remedies ...*, p. 138; Doehring, *loc. cit.*, p. 239; Ipsen, *op. cit.*, p. 312; Herdegen, *loc. cit.*, p. 66; Mummery, *loc. cit.*, p. 394; Head, “A fresh look at the local remedies rule”, p. 153; and Jiménez de Aréchaga, “International responsibility”, p. 583. *Sed contra*, see Geck, “Diplomatic protection”, p. 1056; and Gaja, *L’Esaurimento dei ricorsi interni nel diritto internazionale*, p. 87.

[I]t has been considered necessary that the *State where the violation occurred*\* should have an opportunity to redress it by its own means.<sup>133</sup>

72. This dictum which *permits* the territorial State to require local remedies to be exhausted seems to be too small a peg on which to hang a doctrine, as Amerasinghe has sought to do in arguing that it lends support to the view that the wrong must be located in the territory of the delinquent State, from which it would follow “that the person or property must also be located in the delinquent State”.<sup>134</sup> In the *Salem* case, an arbitral tribunal declared that: “As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence.”<sup>135</sup> Again, this trite reformulation of the local remedies rule hardly provides evidence of a rule requiring a voluntary link as a precondition for the local remedies rule.

73. The issue was raised in the *Certain Norwegian Loans* case,<sup>136</sup> in which France, in arguing that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway, stated:

[T]he only explanation of this rule lies in the requirement that a foreigner in dispute with the State *under whose sovereignty he has chosen to live*\* may not have his case transferred to the international level without having first exhausted all local means of settlement.<sup>137</sup>

In reply, Norway argued that practice did not support the French thesis, relying on the arbitral awards in the *Finnish Ships Arbitration*<sup>138</sup> and *Ambatielos*<sup>139</sup> cases, in which the rule of local remedies was held to be applicable despite the fact that the individual claimants did not reside in the respondent State. ICJ did not find it necessary to go into the question of the exhaustion of local remedies, since the case was decided on other grounds. The only reference to the argument of the parties regarding this issue was made by Judge Read in a dissenting opinion when he stated that “France has not been able to put forward any persuasive authority ... and, indeed, the weight of authority is the other way”.<sup>140</sup>

74. The requirement of a voluntary link featured prominently in the argument by Israel in the *Aerial Incident of 27 July 1955* case, in which Israel made a claim for damages from Bulgaria arising from the shooting down of an Israeli civil aircraft that had entered Bulgarian airspace by mistake. Here Mr. Shabtai Rosenne, for Israel, argued:

[I]t is essential, before the rule [of local remedies] can be applied, that a link should exist between the injured individual and the State whose actions are impugned. I submit that all the precedents show that the rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a *voluntary, conscious and deliberate connection*\* between himself and the foreign State whose actions are

impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there—I believe that that covers the majority of the cases—or by virtue of his having made some contract with the government of that State, such as the cases involving foreign bondholders; and there may be other instances.<sup>141</sup>

Bulgaria contested the argument by Israel.<sup>142</sup> Again, ICJ did not decide on the matter.<sup>143</sup>

75. In the 1935 *Trail Smelter* case,<sup>144</sup> involving trans-boundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others<sup>145</sup> in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule.<sup>146</sup> The failure to insist on the application of the local remedies rule in these cases can, however, be explained on other grounds. The *Trail Smelter* case may, for instance, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

76. Opponents of the voluntary link/territorial connection requirement argue that tribunals have accepted the need for the exhaustion of local remedies in cases such as the *Finnish Ships Arbitration*,<sup>147</sup> *Ambatielos*<sup>148</sup> and *ELSI*,<sup>149</sup> where there was no close connection between the injured national and the respondent State. This is a misleading argument, as in all three cases there was some connection with the respondent State in the form of either a contractual relationship (*Ambatielos* and *ELSI*) or physical presence (*Finnish Ships Arbitration*). Proponents of the voluntary link requirement do not equate such a link with residence and have therefore conceded that in the above cases there was sufficient connection between the injured national and the respondent State to make the local remedies rule applicable.<sup>150</sup> If residence were to be a requirement, this would exclude the application of the local remedies rule in cases involving the expropriation of foreign-owned property and contractual transactions where the alien is a non-resident. Today no serious writer supports such a position.

<sup>141</sup> Oral pleadings of Israel in the *Aerial Incident of 27 July 1955* case (Israel v. Bulgaria) (see footnote 121 above), pp. 531–532. See also page 590 (*ibid.*).

<sup>142</sup> *Ibid.*, p. 565.

<sup>143</sup> *Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Judgment, I.C.J. Reports 1959*, p. 127.

<sup>144</sup> UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905.

<sup>145</sup> Case of the “*Virginus*”, reported in Moore, *A Digest of International Law*, vol. II, p. 903; and of the Schooners *Jessie, Thomas F. Bayard and Pescawha*, *American Journal of International Law*, vol. 16 (1922), pp. 114–116.

<sup>146</sup> Law, *op. cit.*, p. 104; Meron, *loc. cit.*, p. 98, footnote 2.

<sup>147</sup> See footnote 24 above.

<sup>148</sup> See footnote 25 above.

<sup>149</sup> *I.C.J. Reports 1959* (footnote 46 above), p. 42, para. 50.

<sup>150</sup> See Meron, *loc. cit.*, pp. 99–100; and Amerasinghe, *Local Remedies* ..., p. 144.

<sup>133</sup> *I.C.J. Reports 1959* (see footnote 25 above), p. 27.

<sup>134</sup> *Local Remedies* ..., p. 145.

<sup>135</sup> UNRIAA (see footnote 96 above), p. 1202.

<sup>136</sup> See footnote 55 above.

<sup>137</sup> *I.C.J. Pleadings, Certain Norwegian Loans*, Vol. I (France v. Norway) (1955), p. 409 (quoted in Mr. Ago’s sixth report, *Yearbook ... 1977* (see footnote 86), p. 38, para. 98).

<sup>138</sup> See footnote 24 above.

<sup>139</sup> See footnote 25 above.

<sup>140</sup> *I.C.J. Reports 1957* (see footnote 55 above), p. 97.

## 2. STATE PRACTICE

77. State practice is likewise unclear. In early British practice it was asserted that where an alien suffered injury on the high seas, as a result of the seizure or capture of a vessel, it was necessary for local remedies to be exhausted in the seizing or capturing State.<sup>151</sup> Amerasinghe rightly doubts whether this practice would be recognized today.<sup>152</sup> Certainly there is no mention of this practice, or indeed of any requirement for a voluntary link, in the most recent British practice rules.<sup>153</sup>

78. United States practice was initially very different. In 1834, the Secretary of State, Mr. McLane, stated that local remedies had to be exhausted by United States citizens in the State “in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide”.<sup>154</sup> Whether this remains the position of the United States is unclear. *Restatement of the Law Third of the Foreign Relations Law of the United States* is silent on the need for a voluntary link as a precondition for the local remedies rule.<sup>155</sup>

79. Recent State practice suggests that a State responsible for accidentally shooting down a foreign aircraft will not require the exhaustion of local remedies as a precondition for claims brought against it by the families of victims. China did not require local remedies to be exhausted before paying compensation to those who had suffered when it shot down a British Cathay Pacific airliner in 1954.<sup>156</sup> Nor did the United States when it offered *ex gratia* payments to nationals of Iran following the shooting down by United States missiles of an Iranian passenger aircraft over Iran.<sup>157</sup> Most recently, India did not raise the non-exhaustion of local remedies as a preliminary objection to a claim by Pakistan for damages resulting from the destruction by India of a Pakistani aircraft.<sup>158</sup>

80. The same practice seems to apply in the case of transboundary environmental damage. Thus Canada waived the requirement of exhaustion of local remedies when it agreed to compensate United States citizens who had suffered loss as a result of the construction of the Gut Dam.<sup>159</sup> Article XI of the Convention on international lia-

<sup>151</sup> See McNair, *International Law Opinions*, p. 302.

<sup>152</sup> *Local Remedies ...*, p. 143.

<sup>153</sup> See Warbrick, *loc. cit.*

<sup>154</sup> Moore, *A Digest of International Law*, vol. VI, p. 658.

<sup>155</sup> *Restatement of the Law Third ...* (see footnote 27 above), p. 348, para. 902 (k); p. 219, para. 713 (f); and pp. 225–226, para. 713, reporters' note 5.

<sup>156</sup> This incident is described in Law, *op. cit.*, p. 104.

<sup>157</sup> See *I.C.J. Pleadings, Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Vol. II, preliminary objections submitted by the United States, part I, chap. III, sect. I, pp. 46–50.

<sup>158</sup> *Aerial Incident of 10 August 1999 (Pakistan v. India)*, *Jurisdiction, Judgment*, *I.C.J. Reports 2000*, p. 12; see also ILM, vol. 39 (2000), p. 1116.

<sup>159</sup> See the Agreement between the United States and Canada (footnote 93 above), p. 141; and the report of the agent of the United States before the Lake Ontario Claims Tribunal, reproduced in ILM, vol. VIII, No. 1 (January 1969), p. 118. The attitude of Canada may also be explained by the fact that the Canadian courts declared that they did not have jurisdiction over the relevant cases (*ibid.*, vol. 4 (1965), p. 475).

bility for damage caused by space objects provides further support for this view:

1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.<sup>160</sup>

Writers have convincingly argued that the extension of the law of State responsibility to transboundary environmental harm requires a reconsideration of the applicability of the local remedies rule.<sup>161</sup>

## 3. CODIFICATION PROPOSALS

81. Early codification proposals were concerned with expounding the principles of State responsibility for damage done in its territory to the person or property of foreigners.<sup>162</sup> Hence no attention was paid to the question of responsibility where the alien was outside the territory of the respondent State. The draft convention on the international responsibility of States for injuries to aliens, prepared by the Harvard Law School, 1961 not only does not include the territorial voluntary link requirement in the relevant article (art. 19), but in its commentary explicitly states that the draft convention

has not adopted the view that the exhaustion of local remedies should be dispensed with when the requirement would cause hardship to the claimant ... Recourse to local remedies may be burdensome when the injured alien has no real connection with the State which is responsible for the injury, as in the case in which the alien is merely passing through

<sup>160</sup> This Convention was invoked by Canada in 1979 when a Soviet satellite powered by a small nuclear reactor broke up over Canada and crashed in its North-West Territories. The Soviet Union agreed to pay compensation of Can\$ 3 million to Canada (ILM, vol. 18 (1979), p. 899; and vol. 20 (1981), p. 689). In this case Canada made a direct claim as there was no injury to Canadian nationals or to private property.

<sup>161</sup> According to Hoffman:

“While not yet recognised as a principle of international law, the ‘link theory’ appears to be gaining currency and would seem an important development in the law of State responsibility as the application of law broadens to include environmental matters”. (“State responsibility in international law and transboundary pollution injuries”, pp. 540–541)

See also Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, pp. 123–124 and 154; Okowa, *State Responsibility for Transboundary Air Pollution in International Law*, p. 219; Jiménez de Aréchaga, “International law ...”, p. 296; and Schachter, “International law in theory and practice”, p. 203. See further Mr. Julio Barboza’s sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/428 and Add.1, p. 109 (art. 28). See also the report of the Working Group of the Commission on this issue in *Yearbook ... 1978*, vol. II (Part Two), p. 151, para. 15.

<sup>162</sup> See the bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law (The Hague, 1930), *Yearbook ... 1956* (footnote 14 above), annex 2, p. 223; the draft convention on “responsibility of States for damage done in their territory to the person or property of foreigners” prepared by Harvard Law School (1929), *ibid.*, annex 9, p. 229; and Mr. García Amador’s second report on international responsibility, *Yearbook ... 1957*, vol. II, p. 104, document A/CN.4/106.

the territory of the State concerned. If he is to make effective use of local remedies, he may have to travel a great distance from his place of residence to the State in which the injury took place. *Although such an exception to the usual rule might be desirable, it finds no support in the decided cases*.\*<sup>163</sup>

82. The Commission considered this issue when it adopted article 22 of the draft articles on State responsibility on first reading.<sup>164</sup> In so doing it rejected a proposal that the local remedies rule should be excluded in the absence of a territorial connection or voluntary link<sup>165</sup> and decided that as neither State practice nor judicial decisions provided “any explicit statements of position concerning the applicability or non-applicability of the condition of the exhaustion of local remedies to cases in which injury to foreign individuals or to their property has been caused *outside the territory of the State*”,<sup>166</sup> it was therefore best “to leave the problem of the applicability of the principle of the exhaustion of local remedies to cases of injury caused by a State to aliens outside its territory, and to similar cases, to be solved by State practice according to the best criteria available”.<sup>167</sup>

#### 4. CONCLUSION

83. Judicial decisions and State practice have not yet adequately addressed the question of the applicability of the local remedies rule in the absence of a voluntary link or territorial connection. There is clearly substance in the arguments raised by the advocates of such an exception to the local remedies rule. It is unreasonable, impractical and unfair that an injured alien should be required to exhaust local remedies in hardship cases of the following kind:

(a) Transboundary environment law harm caused by pollution, radioactive fallout or man-made space objects;

(b) The shooting down of aircraft outside the territory of the respondent State or of aircraft that have accidentally entered its airspace;

(c) The killing of a national of State A by a soldier of State B stationed on the territory of State A;

(d) The transboundary abduction of a foreign national from either the national’s home State or a third state by agents of the respondent State.

The question that must be addressed is whether instances of this kind require a special rule exempting them from the reach of the local remedies rule or whether such cases are covered by existing rules or general principles of international law.

<sup>163</sup> Sohn and Baxter’s commentary cited in Whiteman, *op. cit.*, pp. 793–794.

<sup>164</sup> *Yearbook ... 1977*, vol. II (Part Two), pp. 43–45, paras. (38)–(42) of the commentary to article 22.

<sup>165</sup> *Ibid.*, p. 44, para. (40).

<sup>166</sup> *Ibid.*, p. 43, para. (38).

<sup>167</sup> *Ibid.*, p. 44, para. (40).

84. Before this question is addressed, it must be emphasized that in many of these cases there will be a direct injury to the national State of the injured individual in addition to the injury to the individual. If the preponderance rule proposed in draft article 11 is followed, the exhaustion of local remedies will be inapplicable in many such cases. Transboundary environmental harm will in most cases be characterized as direct injury, as illustrated by the *Trail Smelter* case.<sup>168</sup> So too will the shooting down of a foreign aircraft; as Israel persuasively argued in the *Aerial Incident of 27 July 1955* between Israel and Bulgaria.<sup>169</sup> Abductions, too, constitute a direct injury to the State in which the abduction originated and whose territorial sovereignty has been violated.

85. Where the claimant State prefers not to bring a direct claim or where the injury to the national outweighs the injury to the State, it seems that in most instances the local remedies rule will not apply because there will be no available or effective remedy in the respondent State, or any such remedy would be futile. It was largely for this reason that the Commission declined to adopt a special rule on the voluntary link.<sup>170</sup> A similar view is advanced by Kokott in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association.<sup>171</sup>

86. The suggestion that the requirement of an effective remedy may overcome hardship or injustice in such a case was repudiated by Jiménez de Aréchaga:

It is possible, however, that a person hurt in his own territory by a soldier from another State or by a space object may find effective remedies in the other State: yet it would be unequitable and impose an undue hardship to require him to attempt those remedies in the foreign State. This shows that the effectiveness of a remedy is not a sufficient reason to make it obligatory or to dispense with it. The preferable solution in

<sup>168</sup> See footnote 144 above.

<sup>169</sup> See footnote 143 above. Israel’s argument is clearly expounded by Meron, *loc. cit.*, pp. 92–94.

<sup>170</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 44, para. (39). In his sixth report on State responsibility, *ibid.*, (Part One) (see footnote 86 above), p. 39, para. 100, Mr. Ago elaborated on this theme:

“[I]t would seem to us more consistent with the reason for the existence of the principle of exhaustion of local remedies, and with the logic of that principle, to provide, in a form to be worked out, that the collaboration of individuals should not always be required in order to set in motion machinery enabling the State to redress, by a new course of conduct, a situation which is contrary to the result internationally required of it and which has been brought about by its original conduct. Such a provision would apply, for example, in the case of injury caused to a foreigner brought into the territory of a State, or conveyed in transit by air or over land, against his will. *It might be found in fact that the burdens that would otherwise devolve upon such an individual would be too heavy to be justified.*\* However, even without expressly providing for an exception which might compromise the soundness of the principle, would it not be possible to regard these few extreme cases as covered by the general requirement that local remedies should be *effective*, that requirement being understood to include the further requirement that such remedies should also be effectively usable, in the cases submitted, by the individuals concerned?”

<sup>171</sup> *Loc. cit.*, pp. 614–615. See also Geck, *loc. cit.*, p. 1056.

those cases may be to make the use of local remedies optional instead of obligatory, at the choice of the injured person.<sup>172</sup>

87. A general principle of law that would make the local remedies rule inapplicable in such cases is that of *ex injuria jus non oritur*. As Meron observes: “[A]ccording to general principles of law, it would be very strange indeed if a State which interfered illegally with an alien, who did not—except for that interference—have any connexion with it, should be allowed to derive any advantage from its illegal acts.”<sup>173</sup>

88. Jurisdictional rules may also preclude the application of the local remedies rule in the hardship cases mentioned above. Although a State has wide extraterritorial jurisdiction, there are circumstances in which the exercise of jurisdiction will constitute an abuse or excess of jurisdiction rendering the rule inapplicable. This is emphasized by O’Connell:

The point is better put by emphasising that the issue for trial when the injury occurs extraterritorially is whether or not the State is guilty of excess jurisdiction, and this is a question of international law best left to an international tribunal, whereas the issue for trial when the injury occurs intraterritorially is the nature of the injury done and whether any wrong has in fact been occasioned which international law requires municipal law to remedy. In other words, in the case of extraterritorial injury the question before an international tribunal is whether the State, by its actions, has breached international law, but in the case of intraterritorial injury it is whether the State has done so by its failure to remedy the injury. The difference between the two cases is that in the one the event has occurred outside the jurisdiction of the municipal courts, which are thus incompetent to compel evidence and proceed to adjudication.<sup>174</sup>

89. It is clearly necessary to give special consideration to the applicability of the local remedies rules in cases where there is no voluntary link or territorial connection between the injured alien and the respondent State. Whether there is a need for a special exception in the present draft articles is uncertain. The existing exceptions to the local remedies rule *may* cover most of the “hardship cases” described in paragraph 83 above, but the Commission may decide that stronger and more explicit protection

<sup>172</sup> “International law ...”, pp. 296–297. See also Schachter, *loc. cit.*, p. 203; Law, *op. cit.*, p. 104; and Lefeber, *op. cit.*, pp. 123 and 154. This approach was supported, among others, by the Commission’s Working Group on international liability for injurious consequences arising out of acts not prohibited by international law in 1978 in the following terms:

“It may be noted that obligations of the kind now being considered are different from those that a State owes in respect of aliens who have chosen to place themselves or their property within that State’s territory. In the situations that fall within the present topic, there is no presumption of willingness to accept risks or harmful consequences because they are tolerated within the territory or control of the State in which those risks or harmful consequences arise. There is also no requirement to seek an effective remedy offered by municipal law—unless, indeed, there is an applicable régime, accepted by the States concerned, that does impose such a requirement.”

(*Yearbook ... 1978*, vol. II (Part Two), p. 151, para. 15)

See also ECE, Guidelines on responsibility and liability regarding transboundary water pollution (ENVWA/R.45), annex, para. 22.

<sup>173</sup> *Loc. cit.*, p. 96. To the same effect, see Jiménez de Aréchaga, “International law ...”, p. 296; Head, *loc. cit.*, p. 153; and Amerasinghe, *Local Remedies ...*, p. 146.

<sup>174</sup> O’Connell, *op. cit.*, p. 951. See also Herdegen, *loc. cit.*, pp. 66–67; the *Interhandel* case (footnote 25 above), p. 27; and Amerasinghe, *Local Remedies ...*, pp. 144–145. *Sed contra* Jennings, “General course on principles of international law”, p. 485.

is needed. The Special Rapporteur’s tentative conclusion is that such a provision is unnecessary, but he would certainly not oppose such a provision if the Commission so decided.

#### D. Undue delay (art. 14 (e))

##### “Article 14

“Local remedies do not need to be exhausted where:

“... ”

“(e) The respondent State is responsible for undue delay in providing a local remedy.”

90. That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in providing a local remedy is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion.

##### 1. CODIFICATION

91. The bases of discussion drawn up in 1929 by the Preparatory Committee of the Conference for the Codification of International Law contained a rule in basis of discussion No. 27 on the exhaustion of local remedies. According to that proposal, the local remedies rule could not preclude the application of basis of discussion No. 5, which provided, *inter alia*, that:

A State is responsible for damage suffered by a foreigner as the result of the fact that:

...

3. There has been *unconscionable delay*\* on the part of the courts.<sup>175</sup>

92. A similar provision was adopted by the Third Committee of the Conference for the Codification of International Law. This rule excused compliance with the exhaustion of local remedies rule in cases of denial of justice, and cited “unjustifiable ... delays implying a refusal to do justice” as an example.<sup>176</sup> The text of the draft convention prepared by Harvard Law School established the responsibility of a State, without the requirement of exhausting local remedies, for denial of justice, including “unwarranted delay”.<sup>177</sup>

93. In 1933, the Seventh International Conference of American States, held in Montevideo, considered “unreasonable delay” as an exception to the local remedies rule, but stated that this should be “interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have arisen”.<sup>178</sup>

<sup>175</sup> *Yearbook ... 1956* (see footnote 14 above), p. 223, annex 2.

<sup>176</sup> *Ibid.*, p. 226, annex 3 (art. 9, para. (2)).

<sup>177</sup> *Ibid.*, p. 229, annex 9 (art. 9). To be compared to articles 7–8 and 10–12, all of which require the exhaustion of local remedies, as a precondition to the establishment of State responsibility.

<sup>178</sup> *Ibid.*, p. 226, annex 6, para. 3 of the resolution on international

94. The 1961 draft convention on the international responsibility of States for injuries to aliens prepared by Harvard Law School contained the following proposal:

Local remedies shall be considered as not available for the purposes of this Convention:

...

(c) if only excessively slow remedies are available or justice is unreasonably delayed.<sup>179</sup>

95. Mr. García Amador did not include undue delay as an exception to the local remedies rule, even in the context of denial of justice.<sup>180</sup> Mr. Ago acknowledged that undue delay might lead to the conclusion that local remedies were ineffective,<sup>181</sup> but failed to propose this as a special exception in the local remedies rule in article 22. In her report on the exhaustion of local remedies to the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Kokott likewise considered “unreasonably prolonged proceedings”<sup>182</sup> as an exception to the local remedies rule but did not suggest a separate provision on this exception in her proposed draft articles.

## 2. HUMAN RIGHTS INSTRUMENTS AND PRACTICE

96. Several human rights conventions expressly exclude the need for the exhaustion of local remedies where their application has been “unreasonably prolonged”.<sup>183</sup> The jurisprudence of the monitoring bodies of these conventions endorses this exception.<sup>184</sup>

## 3. JUDICIAL DECISIONS

97. Judicial decisions give some support to “undue delay” as an exception to the local remedies rule. In the *El Oro Mining* case the British-Mexican Claims Commission held that “nine years by far exceeds the limit of the most liberal allowance that may be made”.<sup>185</sup> It therefore considered the remedies to be ineffective and their exhaustion excused. ICJ did not, however, consider 10 years of litigation sufficient to dispense with the need to exhaust

responsibility of the State.

<sup>179</sup> Art. 19, para. 2. Reproduced in Sohn and Baxter, *loc. cit.*, p. 577.

<sup>180</sup> *Yearbook ... 1961* (footnote 39 above), pp. 46–448, arts. 3 and 18, para. 2.

<sup>181</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. (50), footnote 204.

<sup>182</sup> *Loc. cit.*, p. 623.

<sup>183</sup> International Covenant on Civil and Political Rights (art. 41, para. 1 (c)); see also the American Convention on Human Rights: “Pact of San José, Costa Rica” (art. 46, para. 2 (c)).

<sup>184</sup> *Weinberger v. Uruguay*, communication 28/1978, Human Rights Committee, *Selected Decisions under the Optional Protocol* (United Nations publication, Sales No. E.84.XIV.2), p. 59, para. 11; *Las Palmeras* case, Preliminary Objections, Judgment of 4 February 2000, Inter-American Court of Human Rights, *Series C: Decisions and Judgments*, No. 67, p. 64, para. 38; *Erdoğan v. Turkey*, application No. 19807/92, decision of 16 January 1996, European Commission of Human Rights, *Decisions and Reports*, vol. 84–A, pp. 15–16; Amerasinghe, *Local Remedies ...*, pp. 203–206; Kokott, *loc. cit.*, p. 623.

<sup>185</sup> *El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States* (1931), UNRIAA, vol. V (Sales No. 1952.V.3), p. 198. See also *Prince von Pless Administration, Order of 4 February 1933*, P.C.I.J., *Series A/B*, No. 52, p. 16.

local remedies in the *Interhandel* case.<sup>186</sup> This aspect of the decision was criticized by Judge Armond-Ugon, who, in a dissenting opinion, held that, as a final decision was not in sight after 10 years of litigation, the available remedies were too slow and hence ineffective.<sup>187</sup> In this case the Court did not reject the possibility that undue delay might lead to the relaxation of the local remedies rule. It simply did not consider 10 years as sufficient time to dispense with the rule *in this specific case*, particularly as *Interhandel*’s failure to produce some of the necessary documentation had contributed to the delay.<sup>188</sup>

## 4. ACADEMIC OPINION

98. While academic opinion is generally supportive of such an exception,<sup>189</sup> there is an awareness of the difficulty attached to giving an objective content or meaning to “undue delay”. Each case must be judged on its own facts. As Amerasinghe states:

The circumstances of each case would certainly be a determining factor. Much would depend on the judicial assessment of the situation in each case... Clearly such matters as the nature of the wrong would be relevant, it being easier, for instance, to prescribe shorter time-limits for violations of personal and civil rights than for injuries to property. The nature of the claimant may also be a pertinent factor, injuries to large corporations, which may give rise to more complicated cases than injuries to individuals, being subject to longer time-limits than injuries to individuals. In the ultimate analysis such considerations can only provide guidelines, there being no hard and fast rules defining undue delays.<sup>190</sup>

99. This exception to the exhaustion of local remedies rule might be accommodated in the exception contained in article 14 (a), as a component of futility. There are, however, good reasons for recognizing this as a separate exception. Court proceedings are notoriously slow. Such an exception would serve notice on States that they stand to lose the advantages of the local remedies rule if they unduly prolong domestic proceedings in the hope that the day of reckoning before an international tribunal will be delayed.

## E. Denial of access (art. 14 (f))

### “Article 14

“Local remedies do not need to be exhausted where:

“...  
 ...

<sup>186</sup> *I.C.J. Reports 1959* (see footnote 25 above), p. 6.

<sup>187</sup> *Ibid.*, p. 87.

<sup>188</sup> *Local Remedies ...*, p. 203.

<sup>189</sup> See, for example, Brownlie, *op. cit.*, pp. 505–506; Doehring, *loc. cit.*, p. 239; Schwarzenberger, *op. cit.*, pp. 620 and 622 (mentioned in the context of denial of justice); Cançado Trindade, *op. cit.*, p. 79; Jiménez de Aréchaga, “International law ...”, p. 294, and “International responsibility”, p. 589; and Mummery, *loc. cit.*, p. 403.

<sup>190</sup> Amerasinghe, *Local Remedies ...*, pp. 205–206. In the *El Oro Mining* case, the British-Mexican Claims Commission stated:

“The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter.”

(UNRIAA (see footnote 185 above), p. 198)

“(f) The respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.”

100. A State may prevent an injured alien from gaining factual access to its tribunals by, for instance, denying the alien entry to its territory or by exposing the alien to dangers that make it unsafe for the latter to seek entry to its territory. Foreigners determined to assert their rights against a State are seldom welcome visitors. It is not uncommon, therefore, for such a State to exercise its undoubted right to deny entry to foreigners or to make it clear to them that if they enter the State’s territory their safety cannot be guaranteed. Factual denial of access to local remedies may possibly be covered by article 14 (a), but it is probably better to recognize this type of case as a special exception to the local remedies rule, as the remedy may in theory be both available and effective, but will in practice be inaccessible.

101. There is no clear support in State practice, jurisprudence or doctrine for treating this type of situation as a separate exception to the local remedies rule. In her report to the Committee on Diplomatic Protection of Persons and Property of the International Law Association,

Kokott had, however, proposed an exception to the local remedies rule where “the claimant is factually prevented from access to existing remedies”.<sup>191</sup> In support of this proposal she states:

Futility for factual reasons particularly includes the case of danger for life or limb to the applicant in the country where he would have to pursue the remedy. This can be due to a “general atmosphere of hostility” towards the nationals of other countries or it can be based on dangers regarding the alien in particular or a group of persons, provided those dangers are satisfactorily established. Other examples of factual futility are cases of obstructions and hindrances, denials of justice to the effect that the alien is denied access to courts, due to a practice or policy ordered or tolerated by the state.<sup>192</sup>

Kokott’s proposal has its source in human rights jurisprudence,<sup>193</sup> but there is no good reason why it should not be extended, by way of progressive development, to the general principles of law governing the exhaustion of local remedies.

<sup>191</sup> *Loc. cit.*, p. 630.

<sup>192</sup> *Ibid.*, pp. 624–625. See also Doehring, *loc. cit.*, pp. 239–240.

<sup>193</sup> *Loc. cit.*, pp. 624–625, footnotes 86–91; *Akdivar and Others v. Turkey*, judgment of 16 September 1996, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-IV, p. 1213, para. 73.

## CHAPTER II

### Burden of proof

#### “Article 15

“1. The claimant and respondent States share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

“2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

“(a) The burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;

“(b) The burden of proof is on the claimant State to prove any of the exceptions referred to in article 14 or to prove that the claim concerns direct injury to the State itself.”

102. The burden of proof in international litigation relates to what must be proved and which party must prove it. There are no clear and detailed rules on the burden of proof in international law of the kind found in many national legal systems.<sup>194</sup> It is, however, generally accepted that the burden of proof is on the party which makes an assertion: *onus probandi incumbit ei qui dicit*. This may be either the plaintiff (*onus probandi actori incumbit*) or the defendant (*reus in exceptione fit actor*),

as the burden of proof may shift during the course of the proceedings, depending on how parties formulate their assertions or propositions of law.<sup>195</sup> This practical,<sup>196</sup> rather than technical or formalistic, approach to the burden of proof applies to litigation involving the exhaustion of local remedies.

103. Previous attempts at codification of the local remedies rule have not sought to formulate a rule on this subject. However, in her report to the Committee on Diplomatic Protection of Persons and Property of the International Law Association, Kokott had suggested the following rule on burden of proof:

<sup>195</sup> Ripert, “Les règles du droit civil applicables aux rapports internationaux”, p. 646. See also Guggenheim, *Traité de droit international public*, p. 81; Cheng, “Burden of proof before the I.C.J.”, p. 596; Law, *op. cit.*, p. 55; Fawcett, *The Application of the European Convention on Human Rights*, p. 289; Sereni, *Principi generali di diritto e processo internazionale*, pp. 30, 40, 76 and 90; Chappetz, *La règle de l’épuisement des voies de recours internes*, pp. 234–237; Amerasinghe, *Local Remedies ...*, pp. 277–283; Cançado Trindade, *op. cit.*, pp. 134–136 and 169; *Yearbook ... 1958*, vol. II, p. 1, document A/CN.4/113, draft on arbitral procedure adopted by the Commission at its fifth session: report by Georges Scelle, Special Rapporteur (see especially article 21, pp. 9 and 14); *I.C.J. Pleadings, Interhandel* (Switzerland v. United States of America), submission by Switzerland (1958), pp. 562–563. *Sed contra* Robertson, “Exhaustion of local remedies in international human rights litigation: the burden of proof reconsidered”, pp. 191–193 and 196, who distinguishes between legal burden of proof and evidential burden of proof and claims that, with regard to the first, the burden remains with one party (i.e. the claimant).

<sup>196</sup> Gaja, *op. cit.*, pp. 227–231.

<sup>194</sup> See *William A. Parker (U.S.A.) v. United Mexican States* (1926), UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 39–40.

1. The claimant has to prove that he exhausted the local remedies, or
2. that he was exempted from doing so.
3. The host state has to prove that (further) remedies existed which were not exhausted.<sup>197</sup>

104. There is a substantial body of jurisprudence on burden of proof to be found in the practice of human rights monitoring bodies.<sup>198</sup> Decisions of the European Court of Human Rights indicate that the initial burden is on the applicant to demonstrate in his application with a reasonable degree of certainty that he has exhausted the local remedies provided by the host State. If the respondent State then claims that local remedies have not been exhausted, the burden of proof shifts to the respondent to satisfy the Court that there was an effective remedy available to the applicant which was capable of providing redress. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or that there were exceptional circumstances that absolved him from exhausting such remedies.<sup>199</sup>

105. The applicability of these principles to general international law is limited, as the sequence in which the allegations need to be proved is influenced by the fact that “human rights conventions normally stipulate that an application is considered in substance by the relevant supervisory organ only if the latter is satisfied that the local remedies have been exhausted the way the convention requires”.<sup>200</sup> Moreover, human rights bodies may examine compliance with the rule of exhaustion of local remedies *ex officio/proprío motu*, even in the absence of any objection by the respondent.<sup>201</sup>

106. Arbitral and judicial decisions do not offer much clarity on the issue. While some arbitral tribunals have held that the burden should be on the claimant to prove that it has exhausted local remedies or that one of the exceptions to the rule applies,<sup>202</sup> others, assuming the ineffectiveness of the remedies from the circumstances of the case, have placed the burden on the respondent to prove the existence of local remedies which have not been exhausted.<sup>203</sup> The issue was addressed in the *Panevezys-*

*Saldutiskis Railway* case, the *Finnish Ships Arbitration*, the *Ambatielos* claim and the *ELSI* case and was raised in the pleadings in the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria) case and the *Certain Norwegian Loans* case (in which Sir Hersch Lauterpacht delivered an important separate opinion on the subject).

107. In the *Panevezys-Saldutiskis Railway* case, the applicant, Estonia, claimed that the rule of exhaustion of local remedies did not apply on the ground that the Lithuanian courts could not entertain the suit because the highest court of Lithuania had already given a decision on the subject unfavourable to the applicant. Referring to these issues, PCIJ stated:

If either of these points could be substantiated, the Court would be bound to overrule the second Lithuanian objection [concerning non-exhaustion of local remedies].

...

Until it has been clearly shown that the Lithuanian courts have no jurisdiction to entertain a suit by the Esimene Company as to its title to the Panevezys-Saldutiskis railway, the Court cannot accept the contention of the Estonian Agent that the rule as to the exhaustion of local remedies does not apply in this case because Lithuanian law affords no means of redress.<sup>204</sup>

These passages suggest that once the respondent has raised the objection that local remedies have not been exhausted, the burden lies on the applicant to prove that an exception to the local remedies rule is applicable.

108. In the *Finnish Ships Arbitration*, Arbitrator Bagge held that the local remedies rule “can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of ‘doing justice in its own way’ ought to refer only to a claim based upon these contentions”.<sup>205</sup> This unclear reasoning has been liberally interpreted by Law as placing “the burden of proof on the state bringing the case to the tribunal, for it refers to the exclusive reliance on the contentions brought by that state, which, if justified, would mean that local remedies are either non-existent or already exhausted”.<sup>206</sup>

109. The *Ambatielos* case takes a different approach in suggesting that the initial burden of proof is on the respondent State to prove that there were effective remedies that were available which had not been exhausted.<sup>207</sup>

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule.<sup>208</sup>

<sup>197</sup> Kokott, *loc. cit.*, p. 630.

<sup>198</sup> Kokott, *The Burden of Proof in Comparative and International Human Rights Law*; Amerasinghe, *Local Remedies ...*, pp. 291–297; Cançado Trindade, *op. cit.*, pp. 143–171; Robertson, *loc. cit.*; *Velásquez Rodríguez* case (see footnote 71 above), p. 305, paras. 59–60; *Akdivar and Others v. Turkey* (see footnote 193 above), p. 1211, para. 68.

<sup>199</sup> See *Foti and Others* (footnote 122 above), pp. 380–382; and *Selmouni v. France*, application No. 25803/94, judgment of 28 July 1999 (the Netherlands intervening), European Court of Human Rights, *Reports of Judgments and Decisions* 1999–V pp. 175–176, para. 76.

<sup>200</sup> Kokott, *loc. cit.*, p. 628.

<sup>201</sup> Cançado Trindade, *op. cit.*, pp. 153–157.

<sup>202</sup> *Adolph G. Studer (United States) v. Great Britain* (1925), UNRIAA, vol. VI (Sales No. 1955.V.3), p. 153; *La Guaira Electric Light and Power Co. case* (1903–1905), *ibid.*, vol. IX (Sales No. 1959.V.5), p. 243; *Napier* case, Moore, *History and Digest ...*, vol. III, p. 3154.

<sup>203</sup> See *John Gill (Great Britain) v. United Mexican States* (1931), UNRIAA, vol. V (Sales No. 1952.V.3), p. 157; also in Lauterpacht, ed., *Annual Digest ...*, pp. 203–204; *Affaire des Forêts du Rhodope* (footnote 65 above); *Arbitration under article 181 of the Treaty of*

*Neuilly* in Lauterpacht, ed., *Annual Digest ...*, p. 94, and *American Journal of International Law* (footnote 65 above); and the *Brown* claim (footnote 24 above). See also Judge Tanaka’s separate opinion in *Barcelona Traction* (footnote 39 above), pp. 145–147.

<sup>204</sup> *P.C.I.J.* (see footnote 25 above), pp. 18–19.

<sup>205</sup> UNRIAA (see footnote 24 above), p. 1502.

<sup>206</sup> Law, *op. cit.*, p. 56.

<sup>207</sup> *Ibid.*, pp. 56–57.

<sup>208</sup> UNRIAA (see footnote 25 above), p. 119.

110. The *ELSI* case likewise provides authority for the proposition that the burden of proof is on the respondent State to prove the existence of an available remedy that had not been exhausted:

With such a deal of litigation in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny.

...

In the present case, however, it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.

It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”. But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of *ELSI*, and of *ELSI*’s trustee in bankruptcy, ought to have pursued and exhausted.<sup>209</sup>

111. In the *Aerial Incident of 27 July 1955* case, counsel for the respondent, Bulgaria, argued that once the respondent had shown that its courts were open and available to foreigners, it was incumbent on the applicant, Israel, to prove that these remedies were non-existent or ineffective.<sup>210</sup>

112. The burden of proof featured prominently in the pleadings of the *Certain Norwegian Loans* case, but ICJ was not required to decide on this subject. France argued that it was not incumbent on the French Government, as applicant/claimant, to prove the futility of Norwegian local remedies. On the contrary, it was for Norway to prove “the utility of recourse to its judicial organization”.<sup>211</sup> In reply, Norway argued that there was a rule of international law obliging the claimant to exhaust local remedies before submitting the case to the Court:

If the French Government maintains that the principle is not applicable, it has the onus of establishing the reason why that is the case.<sup>212</sup>

Accordingly, it is not for the Norwegian Government to prove that the means of recourse open to the French title holders under its domestic law offer the latter sufficient possibilities to ensure that the rule of prior exhaustion may not be set aside. The Government of the Republic has the onus of proving the opposite.<sup>213</sup>

Subsequently, Norway conceded that the respondent was required to prove the existence of domestic remedies, but claimed that the ineffectiveness of such remedies was to be proved by the applicant:

Once the *existence* of local remedies has been established, the rule of prior exhaustion comes into play. And if the applicant State wishes to avoid the consequences of that rule, it has the onus of proving that the rule does not apply *by reason of the ineffectiveness of existing remedies*.<sup>214</sup>

<sup>209</sup> *I.C.J. Reports 1989* (see footnote 46 above), pp. 46–48, paras. 59 and 62–63.

<sup>210</sup> *I.C.J. Pleadings* (see footnote 121 above), pp. 559 and 565–566.

<sup>211</sup> *I.C.J. Pleadings, Certain Norwegian Loans* (see footnote 137 above), p. 184.

<sup>212</sup> *Ibid.*, p. 280, para. 110.

<sup>213</sup> *Ibid.*, p. 281, para. 114.

<sup>214</sup> *Ibid.*, Vol. II, p. 162. See also page 161.

In response, France argued that there was an obligation on parties to collaborate in the presentation of evidence and that Norway could not simply allege that its courts were impartial. In addition, it was required to prove, in the light of the legislation that had led to the dispute, and which appeared to exclude the competence of local courts, that there was a reasonable prospect of redress before Norway’s courts.<sup>215</sup>

113. In his separate opinion in the *Certain Norwegian Loans* case, Sir Hersch Lauterpacht proposed the following scheme:

(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed; (4) the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting.<sup>216</sup>

While some authors have given uncritical support to Lauterpacht’s formulation,<sup>217</sup> it must not be forgotten that it was intended to apply to the facts before ICJ—that is, Norwegian legislation that *ex facie* seemed to render recourse to local remedies a futile exercise. Lauterpacht’s exposition therefore “does not seem to be open to generalisation”.<sup>218</sup>

114. The burden of proving the effectiveness or ineffectiveness of local remedies has featured prominently in the literature, but the circumstances giving rise to the claim of ineffectiveness will differ from case to case. In one case, the ineffectiveness of the local remedy may be apparent—as when there is legislation depriving the local courts of competence to hear the matter in question. In another case, the ineffectiveness of the local remedy may be less obvious—where, for instance, it is alleged that the courts are biased or under the control of the executive. In the former case, ineffectiveness may be presumed until rebutted by the respondent State, whereas in the latter it will be incumbent on the claimant State to prove its assertion.<sup>219</sup> This all points in the direction of a need for flexibility in the approach to the burden of proof.

115. Writers on the subject of burden of proof have generally been careful not to expound a detailed set of rules and sub-rules that will cover all situations.<sup>220</sup> While scholars have thoroughly analysed the available author-

<sup>215</sup> *Ibid.*, pp. 187–188.

<sup>216</sup> *I.C.J. Reports 1957* (see footnote 55 above), p. 39.

<sup>217</sup> Head, *loc. cit.*, p. 155; O’Connell, *op. cit.*, p. 1058.

<sup>218</sup> Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals*, p. 57.

<sup>219</sup> Brownlie, *op. cit.*, p. 500; Law, *op. cit.*, pp. 57–58.

<sup>220</sup> Amerasinghe writes:

“The subject is, however, nebulous at present in certain of its aspects, because it has not been considered judicially with any completeness. Since the burden of proof is a matter pertaining to litigation, the importance of judicial precedent relating to it cannot be underestimated. Significantly, therefore, although text writers agree that there is a distribution of the burden of proof, it is neither possible nor desirable to lay down any specific rules for such distribution beyond those already established and referred to above.”

(*Local Remedies ...*, pp. 287–288)

ities, few venture beyond the generalization of Jiménez de Aréchaga that:

The State which objects to a claim by invoking the local remedies rule has to prove the existence of a remedy which has not been used. If the claimant State replies that an existing remedy is ineffectual or inadequate in the circumstances of the case, this State has to prove the correctness of such an allegation.<sup>221</sup>

116. The burden of proof is largely dependent on the division of roles in the litigation (i.e. which party raises what issue), which, in turn, is largely dependent on the circumstances of the case. For instance, if the case is brought to an arbitral tribunal by both parties together, based on a *compromis* which implies a waiver of the rule, the claimant would be unlikely to present proof in its original submission to the effect that it has exhausted all available and effective remedies. In this case, the issue will be raised first by the respondent, and the burden of proof will be on this party to demonstrate the existence of local remedies and the applicability of the rule to the case. In contrast, if, in the same situation, the original injury in the specific case relates to a contract between the alien and the respondent State containing a Calvo clause stipulating that the alien waives his rights to diplomatic protection, the respondent State will arguably be able to shift the burden of proof by merely referring to the clause.<sup>222</sup> Moreover, if the claim is

brought under an instrument which expressly requires the exhaustion of local remedies, the division of the burden of proof will be completely different. The claimant State will be obliged to show in its submission that it has exhausted existing local remedies, or to show why this was not necessary. In response, the respondent Government will be required to point to further remedies and to demonstrate their effectiveness to support its objection concerning the non-exhaustion of local remedies.

117. For the above reasons, the only conclusion that can be drawn from the examination of cases and the literature is that it is difficult—and unwise—to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lies on the party which makes a positive claim to prove it: *onus probandi incumbit ei qui dicit*. Article 15 seeks to give effect to this.

118. The Commission may take the position that article 15, paragraph 1, is a general principle that is not subject to codification. In this case it may prefer simply to codify article 15, paragraph 2. Alternatively, it may prefer to adopt the short, but not inaccurate, proposal made by Kokott to the International Law Association, referred to in paragraph 103 above.

<sup>221</sup> “International law . . .”, p. 295. See also Jiménez de Aréchaga, “International responsibility”, p. 590; and Jennings and Watt, *op. cit.*, p. 526.

<sup>222</sup> See *North American Dredging Company of Texas (U.S.A.) v. United Mexican States* (31 March 1926), UNRIAA, vol. IV (Sales No.

1951.V.1), p. 32, paras. 20–21; also reproduced in *American Journal of International Law*, vol. 20 (1926), p. 807.

### CHAPTER III

## The Calvo clause

### “Article 16

“1. A contractual stipulation between an alien and the State in which he carries on business to the effect that:

“(a) The alien will be satisfied with local remedies; or

“(b) No dispute arising out of the contract will be settled by means of an international claim; or

“(c) The alien will be treated as a national of the contracting State for the purposes of the contract,

shall be construed under international law as a valid waiver of the right of the alien to request diplomatic protection in respect of matters pertaining to the contract. Such a contractual stipulation shall not, however, affect the right of the State of nationality of the alien to exercise diplomatic protection on behalf of such a person when he or she is injured by an internationally wrongful act attributable to the contracting State or when the injury to the alien is of direct concern to the State of nationality of the alien.

“2. A contractual stipulation referred to in paragraph 1 shall be construed as a presumption in favour of the need to exhaust local remedies before recourse to international judicial settlement.”

### A. Introduction

119. The Calvo clause is a contractual undertaking by an alien in which he agrees to waive any right which he may have to diplomatic protection by his State of nationality in matters arising out of the contract and to confine himself exclusively to local judicial remedies for any grievances he may have relating to the contract.<sup>223</sup> Named after a distinguished Argentine jurist, Carlos Calvo (1824–1906), the clause has featured prominently in legal discourse on the local remedies rule and as late as 1955 was described as “one of the most controversial questions of contemporary international diplomacy and jurisprudence”.<sup>224</sup> Although it has largely disappeared from the limelight

<sup>223</sup> Freeman, “Recent aspects of the Calvo doctrine and the challenge to international law”, p. 130. See also García Amador, “Calvo doctrine, Calvo clause”, p. 522; Schwarzenberger, *op. cit.*, p. 150; and Shea, *The Calvo Clause: a Problem of Inter-American and International Law and Diplomacy*, p. 6.

<sup>224</sup> Shea, *op. cit.*, p. 6.

today, no codification of the local remedies rule would be complete without recognition of this clause. Moreover, to ignore it would be to overlook a component of the local remedies rule that has been hailed as a regional custom in Latin America,<sup>225</sup> forming part of the national identity of many States.<sup>226</sup>

### B. History

120. Revolutions, civil wars and internal disturbances were a common feature of Latin American history in the late nineteenth and early twentieth centuries. Nationals of European States and of the United States caught up in these civil disruptions often suffered injury to person and property. When the host State denied responsibility for such injuries, aliens frequently sought the protection of their State of nationality and requested it to claim compensation on their behalf in international proceedings. Inevitably aliens abused their privileged position. As Shea states in *The Calvo Clause: a Problem of Inter-American and International Law and Diplomacy*:

Nationals often felt entitled to complete security of their persons and property, and appealed to their governments on rather flimsy evidence and without any real effort to obtain local redress. The petitioned government, acting on limited, one-sided evidence, and often under domestic political pressure, sponsored claims that frequently were not based upon strict justice. Utilization of armed force to compel the weaker nations to honor these dubious claims was not infrequent, and it sometimes happened that the severity of the measures adopted in seeking compensation for the alleged injuries was far out of proportion to the extent of the initial damages suffered.<sup>227</sup>

Mixed claims commissions established to settle these disputes appeared to Latin American States to be biased in favour of the protecting State.

121. As a consequence Latin American States sought to undermine the institution of diplomatic protection by advancing theories that challenged its very foundation. First, the Drago doctrine, codified in the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Porter Convention), declared forcible intervention to collect public debts to be illegal—a doctrine inspired mainly by the British, German and Italian intervention in Venezuela in 1902–1903. Secondly, the Calvo doctrine sought to outlaw all forms of diplomatic protection by the invocation of two principles: the sovereign equality of States, which prohibited foreign intervention, and the equality of nationals and aliens, which deprived aliens of their claim to privileged treatment.<sup>228</sup> On this latter principle, Calvo declared:

It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended.

...

The responsibility of governments toward foreigners cannot be greater than that which these governments have toward their own citizens.<sup>229</sup>

<sup>225</sup> *Ibid.*, pp. 260–279.

<sup>226</sup> Oschmann, *Calvo-Doktrin und Calvo Klauseln*, p. 381.

<sup>227</sup> *Op. cit.*, p. 12.

<sup>228</sup> See Hershey, “The Calvo and Drago doctrines”, p. 26.

<sup>229</sup> Shea, *op. cit.*, pp. 18–19. Translation from Calvo, *Le droit*

122. Attempts to implement the Calvo doctrine by treaty and constitutional or legislative provisions were largely unsuccessful.<sup>230</sup> It was the Calvo clause, a clause inserted in a contract between an alien and the host State in which the alien agreed to forgo his right to request diplomatic protection in any dispute arising out of the contract, that ensured some measure of success for the Calvo doctrine. It is in this form that the Calvo doctrine is remembered today.

### C. Scope

123. That the Calvo clause may take several forms is evidenced by the diverging formulations presented by writers.<sup>231</sup> The clearest exposition is that given by García Amador:

Sometimes, it merely consists of a stipulation that the foreign individual concerned will be satisfied with the action of the local courts. In other cases, the Clause embodies a more direct and broader waiver of diplomatic protection, as when it provides that disputes which may arise shall in no circumstances lead to an international claim, or else that the foreign individuals or corporate bodies are to be deemed to be nationals of the country for the purposes of the contract or concession.<sup>232</sup>

124. The Calvo clause relates to the contractual relationship between alien and host State and only operates in respect of disputes concerning the interpretation, application or performance of the contract.<sup>233</sup> It does not extend the waiver to a denial of justice that may occur in proceedings relating to the contract before a municipal court.<sup>234</sup>

### D. Codification in the Americas

125. Attempts to codify the Calvo clause among Latin American States have been largely successful.

126. In 1902, the Second International Conference of American States held in Mexico City adopted the Convention relative to the Rights of Aliens, which, after recognizing the equality of nationals and aliens (with no special privileges for the latter), provided that:

Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made, through diplomatic channels, except in the cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law.<sup>235</sup>

*internationale théorique et pratique*, vol. VI, p. 231; and *ibid.*, vol. III, p. 138.

<sup>230</sup> Shea, *op. cit.*, pp. 21–27.

<sup>231</sup> See O’Connell, *op. cit.*, pp. 1059–1060; Eagleton, *op. cit.*, p. 168; Geck, *loc. cit.*, p. 1058; Dunn, *The Protection of Nationals: a Study in the Application of International Law*, p. 169; and Lipstein, “The place of the Calvo clause in international law”, pp. 131–134.

<sup>232</sup> “State responsibility ...”, p. 455; see also *Yearbook ... 1958* (footnote 88 above), p. 58.

<sup>233</sup> See García Amador, “State responsibility ...”, p. 456.

<sup>234</sup> This subject is dealt with more fully in paragraph 149 (d) below. The views of García Amador cited in paragraph 149 (e) below (see footnote 285) seem to contradict this proposition.

<sup>235</sup> *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 5. See also on this Convention, and subsequent attempts to confirm it, Shea, *op. cit.*, pp. 77–79.

The United States was present at the Conference but abstained from voting on the Convention.

127. In 1933, the Seventh International Conference of American States was held in Montevideo. At the outset it adopted a resolution, supported by the United States, which:

Reaffirms equally that diplomatic protection cannot be initiated in favor of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favor of the sovereignty of the State in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.<sup>236</sup>

128. The Seventh International Conference of American States proceeded to adopt the Convention on Rights and Duties of States, which provided that: "Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of nationals."<sup>237</sup>

129. Although the United States became a party to the Convention on Rights and Duties of States, it reserved its rights under international law, which raised doubts about its acceptance of this provision as it did not accord with the United States understanding of the rights of aliens under international law.<sup>238</sup>

130. At the Ninth International Conference of American States in Bogotá in 1948, the following provision was adopted as article VII of the American Treaty on Pacific Settlement (Pact of Bogotá):

The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State.<sup>239</sup>

131. Although the United States ratified the treaty, it added the following reservation:

The Government of the United States can not accept Article VII relating to diplomatic protection and the exhaustion of remedies. For its part, the Government of the United States maintains the rules of diplomatic protection, including the rule of exhaustion of local remedies by aliens, as provided by international law.<sup>240</sup>

### E. Codification: the international perspective

132. Attempts to codify the Calvo clause at the international level have proved less successful.

133. The Conference for the Codification of International Law (The Hague, 1930) was briefed with the Guerrero report,<sup>241</sup> the draft convention prepared by the Har-

vard Law School<sup>242</sup> and the bases of discussion drawn up by the Preparatory Committee of the Conference,<sup>243</sup> all of which contained proposals relating to the Calvo clause. The clause was not, however, considered at the Conference, largely due to disagreement over the issue of denial of justice. The Conference adjourned without agreeing on a convention.<sup>244</sup>

134. In 1961, the Harvard Law School prepared another draft convention, on the international responsibility of States for injuries to aliens, which provided in article 22:

4. No claim may be presented by a claimant if, *after the injury*\* and without duress, the claimant himself or the person through whom he derived his claim waived, compromised, or settled the claim.

5. No claim under this Convention may be presented by a claimant with respect to any injury listed in sub-paragraphs 2 (e), 2 (f), 2 (g), or 2 (h) of Article 14 [destruction of, damage to, or loss of property; deprivation of use or enjoyment of property; deprivation of means of livelihood; and loss or deprivation of enjoyment of rights under a contract or concession]:

<sup>242</sup> Draft convention on responsibility of States for damage done in their territory to the person or property of foreigners (see footnote 162 above). Article 17 of the draft provided:

"A State is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the State of which he is a national." (*Yearbook ... 1956* (footnote 14 above), annex 9, p. 230; see also Supplement to the *American Journal of International Law*, vol. 23 (April 1929), p. 135)

<sup>243</sup> *Yearbook ... 1956* (see footnote 162 above), pp. 223–225. The relevant bases for discussions are Nos. 26–27 and 5–6, which provide:

"Basis of discussion No. 26

"An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

"If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in bases of discussion Nos. 5 and 6.

"Basis of discussion No. 27

"Where the foreigner has a legal remedy open to him in the courts of the State (which term includes administrative courts), the State may require that any question of international responsibility shall remain in suspense until its courts have given their final decision. This rule does not exclude application of the provisions set out in bases of discussion Nos. 5 and 6."

(*Ibid.*, p. 224–225)

"Basis of discussion No. 5

"A State is responsible for damage suffered by a foreigner as the result of the fact that:

"1. He is refused access to the courts to defend his rights;

"2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State;

"3. There has been unconscionable delay on the part of the courts;

"4. The substance of judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State.

"Basis of discussion No. 6

"A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgement vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice."

(*Ibid.*, p. 223)

<sup>244</sup> Borchard, "Responsibility of States", at the Hague Codification Conference", p. 539.

<sup>236</sup> *Yearbook ... 1956* (see footnote 14 above), p. 226, annex 6.

<sup>237</sup> Art. 9.

<sup>238</sup> See Shea, *op. cit.*, pp. 81–83.

<sup>239</sup> *Ibid.*, p. 102.

<sup>240</sup> *Ibid.*, p. 103.

<sup>241</sup> See footnote 28 above.

(a) if prior to his acquisition of property rights or of a right to exercise a profession or occupation in the territory of the State responsible for the injury, or as a condition of obtaining rights under a contract with or a concession granted by that State, the alien to whom such rights were accorded agreed to waive such claims as might arise out of a violation by the respondent State of any of the rights thus acquired,

(b) if the respondent State has not altered the agreement unilaterally through a legislative act or in any other manner, and has otherwise complied with the terms and conditions specified in the agreement, and

(c) if the injury arose out of the violation by the State of the rights thus acquired by the alien.

6. No claim may be presented by a claimant with respect to any of the injuries listed in paragraph 2 of Article 14, if as a condition of being allowed to engage in activities involving an extremely high degree of risk, which privilege would otherwise be denied to him by the State, the alien has agreed to waive any claim with respect to such injuries and if the claim arises out of an act or omission attributable to the State which has a reasonably close relationship to such activities. *Such a waiver is effective, however, only as to injuries resulting from a negligent act or omission or from a failure to exercise due diligence to afford protection to the alien in question and not as to injuries caused by a wilful act or omission attributable to the State.*<sup>245</sup>

Article 24, paragraph 1, furthermore provided:

A State is not entitled to present a claim if the claimant or a person through whom he derives his claim has waived, compromised, or settled the claim under paragraphs 4, 5 or 6 of Article 22.<sup>246</sup>

135. Between 1956 and 1961, the Special Rapporteur on State responsibility, Mr. García Amador, presented a number of reports to the Commission which touched on the Calvo clause. In his first report of 1956, he suggested the following basis for discussion:

*Renunciation of diplomatic protection*, either by the State or by foreign private individuals. Renunciation of diplomatic protection by a private person constitutes an exonerating circumstance in so far as the *Calvo clause* does not refer to rights which, by their nature, are not capable of being renounced, or to questions in which the private person is not the only interested party.<sup>247</sup>

In 1961, in his sixth and final report, he proposed:

2. ... in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his nationality and the circumstances are in conformity with the terms of the waiver.

...

4. The waiver of diplomatic protection ... shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes [of preventing the repetition of the injurious act].<sup>248</sup>

<sup>245</sup> *Yearbook ... 1969*, vol. II, document A/CN.4/217 and Add.1, annex VII, pp. 146–147. Also reproduced in *American Journal of International Law*, vol. 55 (1961), pp. 578–579. According to article 20, paragraph 1, the word “claimant” refers to the injured alien.

<sup>246</sup> *Ibid.*, pp. 147 and 579, respectively.

<sup>247</sup> *Yearbook ... 1956* (see footnote 14 above), p. 220, basis of discussion No. V, paragraph (2) (b).

<sup>248</sup> *Yearbook ... 1961* (see footnote 39 above), revised draft on the responsibility of the State for injuries caused in its territory to the person or property of aliens, p. 48, art. 19. See also on the history of this subject before the Commission, Graham, “The Calvo clause: its current status as a contractual renunciation of diplomatic protection”, pp. 297–300.

## F. State practice

136. Shea’s comprehensive study on the Calvo clause, published in 1955, shows that at that time the Calvo clause was recognized in the practice, laws or constitutions of most Latin American States<sup>249</sup> and could be described as a Latin American regional custom.<sup>250</sup> State practice outside Latin America was very different. The United States has long claimed that the clause did not and could not waive the right of the State of nationality to provide diplomatic protection and that the individual’s waiver did not cover cases of denial of justice.<sup>251</sup> Other Governments were divided on the issue. According to their replies to a questionnaire on the subject circulated to States prior to the Codification Conference for the Codification of International Law (The Hague, 1930), Australia, Austria and South Africa considered such clauses as having no effect. Finland, Germany and the Netherlands recognized the validity of the clause, whereas Belgium, Czechoslovakia, Denmark, Hungary, India, Japan, New Zealand, Norway, Poland, Switzerland and the United Kingdom did so only as far as the rights of the individual were concerned, but not in respect of the waiver of the right of the State to diplomatic interposition in cases of violations of international law. Canada, in turn, took the position that the clause was valid if the State of nationality of the injured individual permitted the individual to enter into such contract.<sup>252</sup> The reply of the United Kingdom<sup>253</sup> was particularly illuminating as it gave full support to the decision in the *North American Dredging Company* case<sup>254</sup> (discussed below) upholding the limited validity of the Calvo clause.

## G. Judicial decisions

137. Jurisprudence on the Calvo clause is commonly divided into two periods: those before the *North American Dredging Company* case<sup>255</sup> of 1926 and those afterwards.

138. Decisions handed down by mixed claims commissions before 1926 were characterized by a lack of clarity and determinacy in their attitude towards the validity of the clause. This is illustrated by the differing interpretations placed on those decisions by Borchard and Shea. While Borchard claimed that in the 19 cases decided only 8 recognized the validity of the clause,<sup>256</sup> Shea maintained that in none of those cases was the validity of the Calvo clause in the contract decisive.<sup>257</sup> Perhaps the main interest of Borchard’s study is his conclusion that in cases

<sup>249</sup> Ironically, perhaps, Calvo’s own State, Argentina, was one of the few not to engage in this practice.

<sup>250</sup> *Op. cit.*, pp. 269–279.

<sup>251</sup> *Ibid.*, pp. 37–45.

<sup>252</sup> *Ibid.*, pp. 46–55. See also *Bases of discussion* (League of Nations publication, Sales No. 1929.V.3) (C.75.M.69.1929.V), vol. III, “Responsibility of States for damage caused in their territory to the person or property of foreigners”, point XI (d), pp. 133–135.

<sup>253</sup> Shea, *op. cit.*, p. 50; *Bases of discussion* (see footnote 252 above), p. 134.

<sup>254</sup> UNRIAA, p. 26, and *American Journal of International Law*, p. 800 (see footnote 222 above).

<sup>255</sup> *Ibid.*

<sup>256</sup> *The Diplomatic Protection ...*, pp. 800–801.

<sup>257</sup> *Op. cit.*, pp. 121–193.

in which the validity of the clause was denied, the decision was based on one of three grounds:

[F]irst, that it is beyond the competence of an individual to contract away the superior right of his government to protect him ...; secondly, in cases where the government had annulled the contract without first appealing to the local courts, that such action relieves the claimant from the stipulation not to make the contract a subject of international claim ...; thirdly, wherever possible, the courts try to find that the claim arises not out of the contract itself, but out of some violation of property rights, thus basing the claim on tort.<sup>258</sup>

139. The nature and scope of the Calvo clause were authoritatively expounded by the Mexico–United States General Claims Commission, presided over by Mr. van Vollenhoven, in 1926 in the *North American Dredging Company* case.<sup>259</sup> In that case the claimant company entered into a contract with Mexico for the dredging of the port of Santa Cruz. In order to secure the award of the contract, the claimant agreed to the inclusion in the contract of article 18, which read:

The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract.<sup>260</sup>

140. When an alleged breach of the contract occurred, the claimant made no attempt to exhaust local remedies but instead, relying on article V of the treaty establishing the Claims Commission, which dispensed with the need to exhaust the local remedies rule, requested the United States to bring a claim on its behalf before the Commission. In upholding the motion of Mexico to dismiss the claim, the Commission embarked upon a thorough examination of the validity and scope of the Calvo clause contained in article 18.

141. First, the Claims Commission rejected arguments in favour of upholding or rejecting the validity of the clause “in so far as these arguments go to extremes”.<sup>261</sup> It then stated:

The Calvo clause in a specific contract is neither a clause which must be sustained to its full length because of its contractual nature, nor can it be discretionarily separated from the rest of the contract as if it were just an accidental postscript. The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business. The present stage of international law imposes upon every international tribunal the solemn duty of seeking for a proper and adequate balance between the sovereign right of national jurisdiction, on the one hand, and the sovereign right of national protection of citizens on the other ...

It is quite possible to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so.<sup>262</sup>

142. Secondly, the Claims Commission dismissed the argument that the clause was repugnant to any recognized rule of international law and held that there was no rule of international law prohibiting all limitations on the right of diplomatic protection.<sup>263</sup> The Calvo clause was permissible as it was simply an undertaking on the part of the individual not to ignore local remedies.

143. Thirdly, the Claims Commission held that although an alien might promise to exhaust local remedies he could not

deprive the Government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such Government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his Government. But while any attempt to so bind his Government is void, the Commission has not found any generally recognized rule of positive international law which would give to his Government the right to intervene to strike down a lawful contract ... entered into by its citizen. The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction.<sup>264</sup>

144. With regard to the Calvo clause in article 18 of the contract, the Claims Commission stated that

its purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws ... But this provision did not, and could not, deprive the claimant of his American citizenship and all that that implies. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice. The basis of his appeal would be not a construction of his contract, save perchance in an incidental way, but rather an internationally illegal act.<sup>265</sup>

The Commission stressed that the alien

did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfilment, execution, or enforcement of this contract as such ... He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations ... He did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law. But he did frankly and unreservedly agree that in consideration of the Government of Mexico awarding him this contract, he did not need and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of his contract and the execution of his work thereunder.<sup>266</sup>

145. Finally, the Claims Commission held that article V of the treaty establishing the Commission, which provided that a claim might not be rejected on the ground that local remedies had not been exhausted, did not “entitle either Government to set aside an express valid contract between

<sup>258</sup> *The Diplomatic Protection* ..., p. 805.

<sup>259</sup> UNRIAA (see footnote 222 above).

<sup>260</sup> *Ibid.*, pp. 26–27.

<sup>261</sup> *Ibid.*, p. 27, para. 4.

<sup>262</sup> *Ibid.*, pp. 27–28, paras. 4–5.

<sup>263</sup> *Ibid.*, pp. 28–29, paras. 8–9.

<sup>264</sup> *Ibid.*, p. 29, para 11.

<sup>265</sup> *Ibid.*, p. 30, para. 14.

<sup>266</sup> *Ibid.*, pp. 30–31, para. 15.

one of its citizens and the other Government".<sup>267</sup> The Commission stated that article V was limited in its application to claims that had been "rightfully presented",<sup>268</sup> and that that claim could not be considered to have been "rightfully presented" because the claimant had made no attempt to comply with a fundamental condition of his contract.

146. In summary, the Claims Commission held the Calvo clause to be a promise by the alien to exhaust local remedies. He thereby waived his right to request diplomatic protection in a claim for damages arising out of the contract, or any matter relating to the contract. This did not, however, deprive him of his right to request diplomatic protection in respect of a denial of justice or other violation of international law experienced in the process of exhausting his local remedies or trying to enforce his contract.

147. The decision in the *North American Dredging Company* case has not gone unchallenged. However, most of the criticism has been directed at the refusal of the Claims Commission to give full effect to article V of the treaty establishing the Commission<sup>269</sup> rather than to the formulation of the scope and effect of the Calvo clause itself. There has been considerable effort expended on a precise formulation of the rule in the *North American Dredging Company* case. Probably the most successful such formulation is that to be found in the headnote to the case in UNRIAA:

<sup>267</sup> *Ibid.*, p. 32, para. 21.

<sup>268</sup> *Ibid.*, para. 20.

<sup>269</sup> See, for instance, Borchard, "Decisions of the Claims Commissions, United States and Mexico", p. 540; Feller, "Some observations on the Calvo clause", pp. 462-463; Lipstein, *loc. cit.*, pp. 144-145; Freeman, *op. cit.*, pp. 481-482; and Shea, *op. cit.*, pp. 226-228.

"The *North American Dredging Company Case* was later reheard by the domestic American Mexican Claims Commission, composed of three American nationals, established pursuant to an Act of Congress approved December 18, 1943 (56 Stat. 1058), which passed upon claims not completed by the international commission or for which rehearing had been requested (Mexico making en bloc settlement and the domestic Commission adjudicating the claims). (Whiteman, *op. cit.*, p. 923)

In making an award of US\$ 128,627.77 in favour of the company, the domestic Commission was particularly critical of the decisions of the Mexican-United States General Claims Commission on article V:

"The effect of the decision of the General Claims Commission is to hold that provision 18 of the contract between the claimant and the Government of Mexico prevails despite Article I and Article V of the Convention. With all due deference to the learned members of said Commission, we are unable to agree with the position thus taken. In our view, Article V of the Convention of September 8, 1923 is controlling as to the right of the United States Government; that pursuant thereto said Government may present this claim on behalf of the claimant, and that this Commission has jurisdiction to decide the claim."

(*Ibid.*)

Shea rightly rejects this decision in the following terms:

"Although, from the purely financial viewpoint of the claimant, this might be considered a reversal of the previous ruling on the claim, it would be erroneous to assume that this action by a purely national commission could, in any manner whatsoever, overrule or even weaken the decision or rule of the *Dredging* case in international jurisprudence. From the viewpoint of this study, the action of the domestic commission is of interest but of no determinative import to our task of determining the rule of law on the Calvo Clause."

(*Op. cit.*, p. 230, footnote 89)

A Calvo clause *held* to bar claimant from presenting to his Government any claim connected with the contract in which it appeared and hence to place any such claim beyond the jurisdiction of the tribunal. The clause will not preclude his Government from espousing, or the tribunal from considering, other claims based on the violation of international law. Article V of the *compromis held* not to prevent the foregoing result.<sup>270</sup>

148. Mixed claims commissions concerning Mexico handed down a number of decisions after the *North American Dredging Company* case which approved the principles expounded in that case,<sup>271</sup> even though in several cases the commissions displayed a remarkable leniency towards Mexico in finding that there had been no denial of justice on the facts.<sup>272</sup> Moreover, in *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States*,<sup>273</sup> the British-Mexican Claims Commission seems to have limited the circumstances in which the Calvo clause did not apply to one species of internationally wrongful act only: denial of justice.

## H. The opinions of scholars

149. There is a wealth of writing on the Calvo clause.<sup>274</sup> Since the decision in the *North American Dredging Company* case, and subsequent decisions endorsing it, it has not been possible to argue seriously that the Calvo clause is contrary to international law. Consequently scholars have sought rather to examine its purpose and scope, largely in the context of the *Dredging* case. To say that there is no consensus on the part of writers as to the scope of the Calvo clause is to state the obvious. A number of common principles seem, however, to emerge from the literature:

(a) The Calvo clause is of limited validity only in the sense that it does not constitute a complete bar to diplomatic intervention. It applies only to disputes relating to the contract between alien and host State containing the clause and not to breaches of international law. This interpretation advanced in the *Dredging* case fails to give effect to the real purpose of the Calvo clause—to exclude diplomatic protection in all cases—and has been criticized by Latin American writers on this ground.<sup>275</sup> The *Dredging* case interpretation has, however, been accepted

<sup>270</sup> See footnote 254 above. See also Shea, *op. cit.*, pp. 215-223.

<sup>271</sup> *International Fisheries Company (U.S.A.) v. United Mexican States*, UNRIAA (Sales No. 1951.V.1), vol. IV, p. 691 (1931); and *Douglas G. Collie MacNeill (Great Britain) v. United Mexican States*, *ibid.*, (Sales No. 1952.V.3), p. 135 (1931). For a discussion of these cases, see Shea, *op. cit.*, pp. 231 *et seq.*; and Freeman, *op. cit.*, pp. 469-490.

<sup>272</sup> *Interoceanic Railway of Mexico Ltd. (Great Britain) v. United Mexican States*, UNRIAA (Sales No. 1952.V.3), vol. V, p. 178 (1931). Cf. *El Oro Mining* case (see footnote 185 above), p. 191.

<sup>273</sup> UNRIAA, vol. V (Sales No. 1952.V.3), p. 115 (1930). Compare paragraphs 13 and 14 (d)-(e) (*ibid.*, p. 123).

<sup>274</sup> See, in particular, Shea, *op. cit.*; Lipstein, *loc. cit.*; Feller, *loc. cit.*; Freeman, *loc. cit.*; García Amador, "Calvo doctrine ..."; Oschmann, *op. cit.*; and Graham, *loc. cit.*

<sup>275</sup> García Robles, *La cláusula Calvo ante el derecho internacional*, p. 176; Sápúlveda Gutiérrez, *La responsabilidad internacional del Estado y la validez de la cláusula Calvo*, pp. 69-71; Beteta and Henríquez, "La protección diplomática de los intereses pecuniarios extranjeros en los Estados de América", pp. 44-45.

in State practice<sup>276</sup> and is widely supported by juristic opinion;<sup>277</sup>

(b) The Calvo clause confirms the importance of the exhaustion of local remedies rule. Although some writers have suggested that the limited validity accorded to the clause in the *Dredging* case makes it nothing more than a reaffirmation of the local remedies rule,<sup>278</sup> and thus a superfluous restatement of the obvious, most writers see it as going beyond such a reaffirmation. Opinions differ, however, as to what this extra dimension is.<sup>279</sup> The best explanation is probably to be found in the ruling in the *Dredging* case that the Calvo clause may trump a provision in a *compromis* waiving the requirement that local remedies should be exhausted. Thus Shea states that this is “the very least” that can be accorded to the clause:

This much effectiveness cannot be denied, for the six recent arbitral rulings can be cited in support of it. Perhaps this is the full effectiveness of the Clause ... Consequently, if future conventions conform to what would appear to be the recent trend in international arbitration [of waiving the local remedies rule in the *compromis*] ... then the Calvo Clause, even if restricted in effectiveness to overcoming a general waiver of the local remedies rule contained in the *compromis*, will continue to have a determinative effect on the admissibility of international claims;<sup>280</sup>

(c) International law places no bar on the right of an alien to waive by contract his own power or right to request his State of nationality to exercise diplomatic protection on his behalf;<sup>281</sup>

(d) An alien cannot by means of a Calvo clause waive rights that under international law belong to his Government. The Vattelien fiction, which provides the foundation for the law of diplomatic protection, is premised on the notion that an injury to a national arising from a breach of international law is an injury to the State of nationality itself. An individual cannot waive this right as it is not in his power to do so;<sup>282</sup>

(e) The waiver in a Calvo clause extends only to disputes arising out of the contract, or to breach of the contract, which does not, in any event, constitute a breach of international law.<sup>283</sup> It does not extend to violations of international law, and, in particular, it does not extend to a denial of justice. While there is widespread support for

this proposition,<sup>284</sup> there is some uncertainty about denial of justice associated with or arising from the contract containing the Calvo clause. This is apparent in the writings of García Amador. On the one hand, he acknowledges that, “whatever form it may take, the ‘Calvo Clause’ invariably relates to a contractual relationship, and only operates with regard to disputes concerning the interpretation, application or performance of the contract or concession”.<sup>285</sup>

On the other hand, in defiance of the decision in the *Dredging* case, he submits that:

[I]n principle, the “Clause” is valid as a bar to the exercise of diplomatic protection even in cases of “denial of justice”. It is not to be overlooked that it operates only with regard to disputes concerning the interpretation, application or performance of contracts or concessions. In this sense, *only a specific case of denial of justice would be involved, not all the cases where some other rights of the alien or interests of another kind could be affected.*\* At first sight, this exception to the principle which governs international responsibility for acts and omissions of this nature might appear unjustified. In reality, however, it is not unjustified. Contractual interests and rights are not, so to speak, in the same class as the other rights enjoyed by the alien in international law. Not only are they of an exclusively monetary character, but the alien acquires them by virtue of a contract or concession, the acceptance of which depends solely on his own volition. With this reasoning one does not seek to minimize the importance of this category of rights and interests, but to stress that, by their very nature, they can form the subject of an infinite variety of operations and transactions which can be effected merely by the consent of the contracting parties. In brief, these are rights and interests in respect of which the alien may waive diplomatic protection in whatever terms he considers most conducive to the acquisition of the benefits which he expects to derive from the contract or concession.<sup>286</sup>

Support for this view, he argues, is to be found in the *Inter-oceanic Railway* case.<sup>287</sup> At least, he submits, drawing on the opinion of Shea,<sup>288</sup> the Calvo clause requires proof of an aggravated (“more patent and flagrant”)<sup>289</sup> form of denial of justice before an international claim may be brought.<sup>290</sup>

## I. Recent developments

150. The Calvo clause was born out of the fear on the part of Latin American States of intervention in their domestic affairs by European States and the United States of America under the guise of diplomatic protection. Resistance to the Calvo clause, on the other hand, stemmed from the fear on the part of European States and the United States that their nationals would not receive fair treatment in countries whose judicial standards fell below the international minimum standard created by the latter States in their own image. Today the situation has changed. European States and the United States respect the sovereign equality of Latin American States and have confidence in their judicial systems, which, as in Europe, are subject to both regional and international monitor-

<sup>276</sup> See footnotes 252–253 above.

<sup>277</sup> Shea, *op. cit.*, pp. 217–218; Freeman, *op. cit.*, pp. 489–490; Brownlie, *op. cit.*, pp. 548–549; Jennings and Watts, *op. cit.*, p. 931.

<sup>278</sup> Lipstein, *loc. cit.*, p. 145; Freeman, *op. cit.*, pp. 489–490; Daillier and Pellet, *op. cit.*, p. 778, para. 492; Feller, *The Mexican Claims Commissions 1923–1934: a Study in the Law and Procedure of International Tribunals*, p. 192.

<sup>279</sup> O’Connell has suggested, but dismissed, the argument that this extra dimension is that an affirmative decision on the contractor’s rights of the alien is a precondition for an international claim (*op. cit.*, p. 1062).

<sup>280</sup> *Op. cit.*, pp. 260–261 (see also pages 215, 217 and 257). This view is supported by Brownlie, *op. cit.*, p. 549. Cf. O’Connell, *op. cit.*, p. 1063; and Lipstein, *loc. cit.*, p. 145.

<sup>281</sup> Jimenez de Aréchaga, “International responsibility”, p. 591; García Amador, “State responsibility ...”, pp. 459–460; Jessup, *A Modern Law of Nations: an Introduction*, pp. 11 and 117; Shea, *op. cit.*, pp. 261–263.

<sup>282</sup> Eagleton, *op. cit.*, p. 170; Borchard, *The Diplomatic Protection ...*, p. 809; García Amador, “State responsibility ...”, p. 460; Daillier and Pellet, *op. cit.*, p. 778.

<sup>283</sup> Brownlie, *op. cit.*, p. 549.

<sup>284</sup> Jimenez de Aréchaga, “International responsibility”, pp. 591–592; Freeman, *op. cit.*, pp. 489–490; O’Connell, *op. cit.*, p. 1064; Shea, *op. cit.*, pp. 217–218.

<sup>285</sup> “State responsibility ...”, p. 456.

<sup>286</sup> *Ibid.*, p. 458.

<sup>287</sup> See footnote 272 above.

<sup>288</sup> *Op. cit.*, p. 265.

<sup>289</sup> *Ibid.*

<sup>290</sup> “State responsibility ...”, p. 459.

ing.<sup>291</sup> Consequently the aggressive assertions of diplomatic protection that once characterized relations between Europe and the United States, on the one hand, and Latin America, on the other, have come to an end. This does not mean that the debate over the Calvo clause has lost its relevance. While international legal opinion in Europe and the United States likes to see the Calvo clause as a relic of a past era of inequality in international relations,<sup>292</sup> Latin American States still cling to the clause as an important feature of their regional approach to international law. While they have demonstrated some flexibility in their attitude to new institutions creating dispute settlement procedures for foreign investors, there is no doubt that many of these institutions are still judged by their adherence to the Calvo clause. Moreover, key resolutions of the General Assembly on international economic law show the strong influence of Calvo.

151. The Charter of Economic Rights and Duties of States, contained in General Assembly resolution 3281 (XXIX) of 12 December 1974, proclaims that disputes over compensation arising from the expropriation of foreign property

shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.<sup>293</sup>

The moderate precursor of that resolution, the resolution on permanent sovereignty over natural resources of 14 December 1962, likewise declares that in the case of a dispute over compensation for expropriated property “the national jurisdiction of the State taking such measures shall be exhausted”.<sup>294</sup> Rogers has rightly described these resolutions as a “classic restatement of Calvo”!<sup>295</sup>

152. The Agreement on Andean Subregional Integration (Andean Pact), establishing a common market between Bolivia, Colombia, Ecuador, Peru and Venezuela, likewise shows respect for the Calvo clause. Article 51 of the codified text of the Andean Foreign Investment Code provides that:

In no instrument relating to investments or the transfer of technology shall there be clauses that remove possible conflicts or controversies from the national jurisdiction and competence of the recipient

<sup>291</sup> By bodies established under the American Convention on Human Rights: “Pact of San José, Costa Rica” and the International Covenant on Civil and Political Rights.

<sup>292</sup> According to Dolzer:

“International practice confirming the Calvo Doctrine is nowhere visible, and the legal opinions of the Western capital-exporting nations definitely refute the argument that all major groups affected have consented to a change in customary law over to the Calvo Doctrine.”

(“New foundations of the law of expropriation of alien property”, p. 571)

That the Calvo clause has not been repudiated by legal opinion in the United States is illustrated by *Reavis v. Exxon Corporation* (28 June 1977), ILR, vol. 66, p. 317 (1984), in which the New York Supreme Court seriously considered, but did not apply the Calvo clause.

<sup>293</sup> Chap. II, art. 2, para. 2 (c).

<sup>294</sup> General Assembly resolution 1803 (XVII), para. 4.

<sup>295</sup> “Of missionaries, fanatics, and lawyers: some thoughts on investment disputes in the Americas”, p. 5.

country or allow the subrogation by States to the rights and actions of their national investors.<sup>296</sup>

Article 34 of decision No. 220, in turn, lays down the rule that: “For the settlement of disputes or conflicts deriving from direct foreign investments or from the transfer of foreign technology, Member Countries shall apply the provisions established in their local legislation.”<sup>297</sup>

153. In 1991, the Andean Pact countries revised and liberalized their foreign investment code in decision No. 291, but left this element of the Calvo clause unchanged.<sup>298</sup>

154. The response of Latin American States towards the Convention on the settlement of investment disputes between States and nationals of other States, establishing ICSID, was initially lukewarm.<sup>299</sup> However, article 27 incorporates an element of the Calvo clause by providing that:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

155. Latin American States initially responded in a similar fashion to the Convention establishing the Multilateral Investment Guarantee Agency (MIGA), which facilitates investment in developing countries by making political risk insurance available to investors wishing to do business in developing countries. But again, as with ICSID, MIGA does not necessarily run counter to the philosophy of the Calvo clause, as it permits arbitration only in cases in which the dispute cannot be resolved through negotiation or conciliation.<sup>300</sup> Today most Latin American States are parties to MIGA.

156. The North American Free Trade Agreement (NAFTA) between Canada, Mexico and the United States has been hailed as evidence of a new flexibility on the part of the major Latin American proponent of the Calvo clause, as it permits a foreign investor in certain circumstances to resort to international arbitration.<sup>301</sup> This view<sup>302</sup> should not, however, be exaggerated as there are powerful voices within Mexico demanding that NAFTA

<sup>296</sup> Decision No. 24 on the common regime of treatment of foreign capital and of trademarks, patents, licenses and royalties (amended 30 November 1976), ILM, vol. XVI, No. 1 (January 1977), p. 153.

<sup>297</sup> Andean Group: Commission decision 220 replacing decision 24, the Common Foreign Investment and Technology Licensing Code (11 May 1987), ILM, vol. 27 (1988), p. 986.

<sup>298</sup> *Ibid.*—Commission decision 291: Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties (21 March 1991), art. 10, ILM, vol. 30 (1991), p. 1291.

<sup>299</sup> Rogers, *loc. cit.*, pp. 3–4; Manning-Cabrol, “The imminent death of the Calvo clause and the rebirth of the Calvo principle: equality of foreign and national investors”, p. 1185. Today most Latin American States are parties to ICSID.

<sup>300</sup> Manning-Cabrol, *loc. cit.*, pp. 1185–1186; Dalrymple, “Politics and foreign direct investment: the Multilateral Investment Guarantee Agency and the Calvo clause”.

<sup>301</sup> Chaps. 11 and 20.

<sup>302</sup> Daly, “Has Mexico crossed the border on State responsibility for economic injury to aliens? Foreign investment and the Calvo clause in Mexico after the NAFTA”.

be implemented in a manner compatible with the Calvo clause.<sup>303</sup>

### J. Conclusion

157. There are two options open to the Commission. The first is to decline to draft any provision on this subject on the ground that a Calvo clause is relevant and valid only insofar as it reaffirms the exhaustion of local remedies rule. To include such a provision would therefore be both unnecessary and superfluous. The second option is to draft a provision which limits the validity of the Calvo

clause to disputes arising out of the contract containing the clause and which recognizes that such a clause may give rise to a rebuttable presumption in favour of the exhaustion of local remedies even where the *compromis* referring disputes between the State of nationality of the injured alien and the host State to judicial settlement contains a clause excluding the need to exhaust local remedies. Such a provision would reflect jurisprudence, doctrine and, possibly, State practice on the Calvo clause.

158. While the Special Rapporteur accepts that there may be some merit in the first proposal, he prefers the second, as it would codify a customary rule of one of the major regions of the world and provide clarity on the limits of a mechanism that has featured prominently in the history of this branch of the law. It is in this spirit that article 16 is laid before the Commission.

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<sup>303</sup> Sepúlveda Amor, "International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction". Cf. Zamora, "Allocating legislative competence in the Americas: the early experience under NAFTA and the challenge of hemispheric integration".



# UNILATERAL ACTS OF STATES

[Agenda item 5]

## DOCUMENT A/CN.4/524

### Replies from Governments to the questionnaire: report of the Secretary-General

[Original: English/French]  
[18 April 2002]

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#### Introduction

1. At its fifty-third session, in 2001, the International Law Commission decided that the Special Rapporteur on the topic "Unilateral acts of States" should develop a questionnaire requesting materials from Governments and inquiring about their practice in the area of unilateral acts.<sup>1</sup> Pursuant to the request of the Commission, the Secretariat, on 31 August 2001, circulated to Governments the text of a questionnaire on unilateral acts of States.

2. As at 14 March 2002, replies to the questionnaire had been received from Estonia, Portugal and the United Kingdom of Great Britain and Northern Ireland. The text of those replies is reproduced below.

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<sup>1</sup> *Yearbook ... 2001*, vol. II (Part Two), p. 19, para. 29, and p. 205, para. 254.

## Replies from Governments to the questionnaire

### General comments

#### Estonia

[Original: English]  
[14 March 2002]

The topic of unilateral acts of States presents many difficulties owing to its complexity and diversity. It is generally preferred to use other conventional and recognized methods of international practice, such as treaties, to produce effects on the legal position of other States in their relations with Estonia. However, unilateral acts of States are not unknown to the practice of Estonia, and the attempt to clarify and organize the general legal principles and customary rules governing such acts in order to promote stability in international relations is welcome. For this purpose some examples of unilateral acts are described below.

#### Portugal

[Original: English]  
[25 February 2002]

1. Portugal recognizes the important role played by unilateral acts in international relations and the need to develop rules to regulate their functioning. Thus, Portugal would like to contribute to the work of the Commission on the issue and therefore submits a reply to the questionnaire circulated among States in August 2001.

2. It is Portugal's intention to refrain from general comments on the issue of unilateral acts and to limit itself to a direct answer to the questionnaire concerning recent State practice with regard to formulating and interpreting unilateral acts. However, Portugal would like to make

clear that, while it concurs with the definition of unilateral acts proposed by the Special Rapporteur as reproduced in the report of the Commission on its fifty-second session, namely, "unilateral act of a State' means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization",<sup>1</sup> it would like to stress that in its view it is international law, and not the State's intention, that provides the legal force of unilateral acts in the international legal order.

<sup>1</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 88, footnote 165.

#### United Kingdom of Great Britain and Northern Ireland

[Original: English]  
[27 February 2002]

The United Kingdom reiterates the views expressed in its note dated 3 March 2000.<sup>1</sup> The United Kingdom continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well founded. The United Kingdom therefore reiterates its suggestion that the Commission might consider whether there are specific problems in relation to specific types of unilateral acts which might usefully be addressed in an expository study.

<sup>1</sup> Reproduced in *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, pp. 268-269.

### QUESTION 1

**Has the State formulated a declaration or other similar expression of the State's will which can be considered to fall, *inter alia*, under one or more of the following categories: a promise, recognition, waiver or protest? If the answer is affirmative, could the State provide elements of such practice?**

#### Estonia

[Original: English]  
[14 March 2002]

1. Under the Estonian legal order, the Riigikogu<sup>1</sup> makes binding unilateral acts, and there are three categories: statements, declarations and appeals; but the distinction between the unilateral acts is not very clear. The texts of the statements, declarations and appeals to other States and international organizations are prepared by the Ministry for Foreign Affairs.

2. In practice, the largest group is statements. Statements are mainly expressions of the will or opinion of Estonia, which are most often political in nature and therefore do not produce legal effects.

3. A number of unilateral declarations were made in the early 1990s, because of the specific and complicated historical and political situation that existed in Estonia at the time and because the current Constitution of Estonia had not yet been adopted.<sup>2</sup> Therefore, the competences of the

<sup>2</sup> The current Estonian Constitution, which entered into force on 3 July 1992, is reproduced in V. Pechota, ed., *Central and Eastern European Legal Materials* (Huntington, N.Y., Juris Publishing, 1997), binder 5D, release 21.

<sup>1</sup> Parliament.

various powers were not always very clear at the time. On 30 March 1990, the Supreme Council<sup>3</sup> adopted a decision<sup>4</sup> declaring that the *de jure* continuity of Estonia had not been interrupted by the Soviet occupation of 1940. Although the Supreme Council was not at that time an organ of Estonia, its unilateral acts with regard to the restoration of independence, concluded in August 1991, can be considered as producing legal effects.

4. The Supreme Council's statement on the coup d'état that occurred in the Soviet Union on 19 August 1991<sup>5</sup> can be considered a protest. The Supreme Council declared the coup d'état illegal and considered the bilateral negotiations with the Soviet Union for restoration of the independence of Estonia to be interrupted, whereby the Supreme Council was authorized to restore independence unilaterally according to the will of the people expressed in the referendum of 3 March 1991.

5. The independence of Estonia was restored on 20 August 1991 with the Supreme Council's decision<sup>6</sup> confirming the national independence of Estonia and implementing the restoration of diplomatic relations.

6. On 19 December 1991, the Supreme Council issued a statement on the property of Latvia and Lithuania,<sup>7</sup> which could be considered a promise. The Supreme Council stated that, considering the restoration of the independence of Estonia, Latvia and Lithuania, Estonia would guarantee the legal protection of property in conformity with the equality of legal protection of forms of property of the said States in Estonian territory in accordance with the property law of Estonia.

7. In the practice of the past decade, there have also been some unilateral declarations corresponding to a State's position on a specific situation or fact.

8. On 20 December 1995, the Riigikogu issued a statement of 24 July 1994 concerning ratification of the agreements on the withdrawal of Russian troops from Estonia and about the social guarantees for former Russian military personnel.<sup>8</sup> The Riigikogu declared that those agreements did not alter the Estonian position on the illegal annexation of Estonia to the Soviet Union, nor could ratification of those agreements be interpreted to alter the principle of the legal continuity of Estonia since 1918. On 22 February 1994 the Riigikogu issued a communication addressed to parliaments of Member States of the United Nations declaring Estonia's position on the occupation of Estonia in 1940.<sup>9</sup> These two examples reflect the Esto-

nian position, which reaffirms the principles prescribed in Estonian legal acts.

9. The recognition of States and Governments is a unilateral act that under the Estonian legal system falls under the scope of the Government—for example, the recognition of Slovenia on 25 September 1991. However, on 3 April 1990, the Supreme Council issued a statement on the restoration of independence of Lithuania, recognizing Lithuania as an independent State. That exception could be explained by political reasons at the time.

10. On 21 October 1991 Estonia issued a declaration recognizing as compulsory the jurisdiction of ICJ.<sup>10</sup>

11. In September 1992, when the new parliament, the Riigikogu, was elected, one of its first acts was the adoption of a declaration on restoration which explicitly stated that the present Republic of Estonia is the same subject of international law as the one which was first declared in 1918.<sup>11</sup>

12. Unilateral declarations have also been formulated by the Ministry for Foreign Affairs. A recent example, in the context of terrorist attacks against the United States of America, is the statement of 13 September 2001 declaring the readiness of Estonia, as a candidate State of NATO, to provide assistance within its capacity to the United States, which could be regarded as a promise.

<sup>9</sup> *Ibid.*, vol. I, No. 13, 1994, p. 235.

<sup>10</sup> United Nations, *Treaty Series*, vol. 1653, No. 28436, p. 59. See also *Riigi Teataja*, vol. II, Nos. 24–25, 1996, p. 95.

<sup>11</sup> Declaration of the Riigikogu on the restoration of constitutional State authority, *Riigi Teataja*, No. 40, 1992, p. 533.

## Portugal

[Original: English]  
[25 February 2002]

1. Portugal would like to make the following remarks concerning, first, a series of protests made by Portugal against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

2. The Timor Gap Treaty<sup>1</sup> was at the origin of a legal dispute between Australia and Portugal. This treaty signed by Australia and Indonesia in 1989 established a zone of cooperation for the exploration and exploitation of the petroleum resources of the continental shelf of the area between East Timor and Northern Australia. Portugal considered the treaty to be in breach of Australia's obligations under international law.<sup>2</sup>

<sup>3</sup> Legislative body at the time.

<sup>4</sup> Decision on the status of the Estonian State, adopted on 30 March 1990, *ENSV Ülemnõukogu ja Valitsuse Teataja* (ESSR Supreme Council and Government Gazette), No. 12, 1990, p. 180. See also *Restoration of the Independence of the Republic of Estonia: Selection of Legal Acts (1988–1991)* (Tallinn, Estonian Institute for Information, 1991), p. 22.

<sup>5</sup> Statement of the Supreme Council of Estonia on the coup d'état in the USSR on 29 August 1991, *Riigi Teataja* (State Gazette), No. 25, 1991, p. 309.

<sup>6</sup> Decision of the Supreme Council of Estonia on Estonian national independence, *ibid.*, p. 312. See also *Restoration of the Independence of the Republic of Estonia ...* (footnote 4 above), p. 101.

<sup>7</sup> *Riigi Teataja*, No. 45, 1991, p. 568. See also *Restoration of the Independence of the Republic of Estonia ...* (footnote 4 above), p. 30.

<sup>8</sup> *Riigi Teataja*, vol. II, No. 46, 1995, p. 203.

<sup>1</sup> Treaty between Australia and Indonesia on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (Zone of cooperation, above the Timor Sea, 11 December 1989) (United Nations, *Treaty Series*, vol. 1654, No. 28462, p. 105). See also H. Krieger, ed., *East Timor and the International Community: Basic Documents* (Cambridge, Cambridge University Press, 1997), pp. 346–355.

<sup>2</sup> East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 90.

3. Between 1985 and 1991, from the negotiation and conclusion of the Timor Gap Treaty to the adoption of domestic legislation in Australia for its implementation, Portugal delivered a series of diplomatic protests<sup>3</sup> to the Australian authorities. In 1985, Portugal made known to Australia that it could not “but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal [was] the administering Power, a fact which [was] internationally recognized ... [T]he Portuguese Government cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law”<sup>4</sup> In 1988, Portugal told Australia that “the ratification of such an agreement ... by the Australian Government, would constitute a blatant and serious breach of international law. The Portuguese Government will consider carefully any developments related to this issue and will act promptly, according to the international law in defence of the legitimate interests in question”,<sup>5</sup> adding later that “the Portuguese Government declares its intention of appealing to the appropriate international authorities at the proper time, with the purpose of ensuring the rights of the people of East Timor, which the Portuguese Government has an obligation to consider and protect”.<sup>6</sup> In 1989, Portugal reiterated: “As the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations and reiterates its determination to approach the appropriate international authorities, in due time, to ensure the defence of the legitimate rights of the East Timorese people.”<sup>7</sup> Two days after the signing of the Treaty, Portugal let Australia know its view on the matter once more:

The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia ...

In those protests the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant breach of international law.

In proceeding with the signing of the above-mentioned agreement Australia is continuing and bringing to its conclusion that violation of the law.

...

In signing the “Provisional Agreement” Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self-determination, the territorial integrity of East Timor and the permanent sovereignty of that people over its natural resources which are, partially, the object of the agreement.

<sup>3</sup> *Reproduced in East Timor (Portugal v. Australia), Application instituting proceedings filed in the Registry of the Court on 22 February 1991*, annex 4, pp. 85–91 (French translation). The English translation is reproduced in Krieger, ed., *op. cit.* (footnote 1 above), pp. 359–364.

<sup>4</sup> *Ibid.*, protest of 19 September 1985, p. 359.

<sup>5</sup> *Ibid.*, protest of 9 September 1988, pp. 359–360.

<sup>6</sup> *Ibid.*, protest of 31 October 1988, p. 360.

<sup>7</sup> *Ibid.*, protest of 30 October 1989.

...

The signing of this agreement interferes with and goes against the mediation efforts ... exercised by the Secretary-General, aiming at reaching a comprehensive settlement for that question...

In the light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and to state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese.<sup>8</sup>

4. In 1991, Portugal decided to bring a case against Australia before ICJ.<sup>9</sup> With these acts of protest, Portugal manifested its intention “not to consider a given state of affairs as legal and ... thereby to safeguard its rights which [had] been violated or threatened”.<sup>10</sup>

5. On the other hand, but on the same topic, Portugal also recognized, after the announcement of the results of the popular consultation held in August 1999—by which the majority of the East Timorese opted for independence—East Timor’s right to independence, in a declaration that, it can be inferred, contains the recognition of a right to independence, after a transitional period during which the Territory is administered by the United Nations.

6. In a statement to the General Assembly of the United Nations at its fifty-fourth session, the President of Portugal<sup>11</sup> said: “[T]he people of East Timor democratically exercised on 30 August [1999] their right to self-determination and chose, by a clear and unequivocal majority, their collective future, thereby acquiring, unconditionally and irrevocably, the right to constitute an independent State at the end of the transitional administration period that the United Nations will soon initiate.”<sup>12</sup>

7. By that act, Portugal took “note of the existence of certain facts or certain legal acts and acknowledge[d] that they [were] available against it”<sup>13</sup> (recognition).

<sup>8</sup> *Ibid.*, protest of 13 December 1989, p. 361.

<sup>9</sup> See footnote 3 above.

<sup>10</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, para. 95, footnote 108, citing E. Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, LGDJ, 1962), p. 48.

<sup>11</sup> In accordance with article 293 of the Constitution of Portugal, the President of the Republic is competent to act at the international level in relation to East Timor.

<sup>12</sup> Statement by Mr. Jorge Fernando Branco de Sampaio, President of Portugal (New York, 20 September 1999), *Official Records of the General Assembly, Fifty-fourth Session*, 5th meeting (A/54/PV.5), p. 13, and corrigendum.

<sup>13</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, p. 115, para. 91.

## QUESTION 2

**Has the State relied on other States' unilateral acts or otherwise considered that other States' unilateral acts produce legal effects? If the answer is affirmative, could the State provide elements of such practice?**

**Estonia**

[Original: English]  
[14 March 2002]

1. Just as the unilateral acts of Estonia can produce legal effects, so can the unilateral acts of other States. Considering other States' unilateral acts as producing legal effects need not always be expressed in specific terms; even silence could probably in certain circumstances suffice. Therefore, such practice is not always clear.

2. Clearly, for example, in response to other States' recognition of Estonia, diplomatic relations have been established between the two countries, with relevant consequences thereof.

3. An example could also be given in connection with the unilateral abolishment of visa requirements. For example, several States (e.g. the Dominican Republic, Ecuador, Nicaragua) have unilaterally abolished visa requirements for Estonian citizens.

4. Another example of a unilateral act, although an illegal one, of another State that has produced legal effects for Estonia is a ukase of the President of the Russian Federation<sup>1</sup> whereby Russia unilaterally began demarcating the land border between Estonia and the Russian Federation. Estonia has considered it illegal because of the fact that all matters that relate to border issues between the two States must be resolved bilaterally. Still, since the border agreement has been fully agreed but not yet signed, the ukase has produced effects. Russia has placed border guards on the unilaterally demarcated border and Estonia has done the same on its side in response.

<sup>1</sup> Ukase of the President of the Russian Federation dated 21 July 1994 on the demarcation of the land border between Estonia and the Russian Federation, *Sobranie zakonodatelstva Rossiiskoi Federatsii*, No. 9, item 930 (1994).

**Portugal**

[Original: English/French]  
[25 February 2002]

1. Also in the context of the East Timor case before ICJ, Portugal took a position on certain unilateral acts of Australia, namely on its *de jure* recognition of Indonesia's sovereignty over East Timor and its legal effects. As is stated in the Special Rapporteur's fourth report on unilateral acts of States, recognition, which may be expressed or tacit, "is the procedure whereby a subject of international law, particularly a State, which was not involved in bringing about a situation ... accepts that such situation ... is available against it, or in other words acknowledges the applicability to itself of the legal consequences of the situation"<sup>1</sup>. Portugal considered that Australia had recognized *de jure* Indonesia's sovereignty over East Timor,<sup>2</sup> and this unilateral act was considered incompatible with the East Timorese right to self-determination and thus in breach of Australia's legal obligations:

Portugal contends that the inevitable consequence of the *de jure* recognition of the incorporation of East Timor in a State is the non-recognition of East Timor as a non-self-governing territory.<sup>3</sup>

The *de jure* recognition of the incorporation of East Timor in Indonesia is, first, incompatible with the correlative maintenance for its territory of the status of a non-self-governing territory. Secondly, it entails a clear disregard of its right over its natural resources; and thirdly, it is utterly irreconcilable with respect for its people's right to self-determination.<sup>4</sup>

<sup>1</sup> *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, p. 115, para. 91.

<sup>2</sup> *I.C.J. Pleadings, East Timor (Portugal v. Australia)* (not yet published).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

## QUESTION 3

**Could the State provide some elements of practice concerning the existence of legal effects or the interpretation of unilateral acts referred to in the questions above?**

**It is of utmost importance for the Commission to receive, to the extent possible, precise references to State practice. In this connection, the Commission invites each State to provide copies or references of official or academic publications or other documents which reflect its practice.**

**Estonia**

[Original: English]  
[14 March 2002]

The legal effects or the interpretation of unilateral acts mentioned in the answers to questions 1 and 2 have mostly been referred to in the respective answers. With some unilateral acts the legal effects are obvious and clear, as is the case with statements guaranteeing

legal protection to property of Latvia and Lithuania, recognition of other States or declarations of readiness to provide help to the United States. Even if a declaration does not give rise directly to legal rights or obligations in relation to third States, it may still be of legal significance for them in other ways—for example, as evidence of conduct. This could be seen in the declaration of the principle of the legal continuity of Estonia since 1918 and Estonia's position on its occupation.



# UNILATERAL ACTS OF STATES

[Agenda item 5]

**DOCUMENT A/CN.4/525 and.1 and 2\***  
**Fifth report on unilateral acts of states,**  
**by Mr. Victor Rodríguez Cedeño, Special Rapporteur**

[Original: English/French/Spanish]  
[4 and 17 April and 10 May 2002]

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\* Incorporating A/CN.4/525/Add.1/Corr.1 and 2.

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## Introduction<sup>1</sup>

### A. Previous consideration of the topic

1. The International Law Commission has been considering the topic of unilateral acts of States since its forty-ninth session, in 1997; at that time, a working group was established which prepared an important report that has provided a basis for the Commission's subsequent work.<sup>2</sup> The Commission has been giving more specific consideration to the topic since its fiftieth session, in 1998, when the Special Rapporteur submitted his first report;<sup>3</sup> in that report, he gave a general overview of the topic and provided the elements of a definition of unilateral acts, since in his view that was a fundamental issue which should be resolved prior to the preparation of draft articles and commentaries thereto, as the Commission had agreed.

2. In previous reports on unilateral acts of States,<sup>4</sup> the Special Rapporteur, taking the Vienna regime as a valid frame of reference, to be viewed in the context of the *sui generis* nature of the unilateral acts with which the Commission is concerned, discussed several aspects of the topic, primarily those relating to the formulation and interpretation of unilateral acts.

3. On the basis of an extensive review of the literature, the Special Rapporteur also submitted some views regarding the classification of unilateral acts, a topic which appears fundamental to the structure of the draft articles which the Commission plans to prepare on the topic. In his opinion, the classification of unilateral acts according to their legal effects is not a mere academic exercise. On the contrary, for the reasons mentioned above, an appropriate classification of these acts—in itself a complex process involving several criteria—should facilitate the organization and progress of work on the topic. The Special Rapporteur believes that while not all rules concerning unilateral acts are necessarily applicable to all of them, some rules may be of general application. While it is not necessary to take a decision at this time on the classification of unilateral acts, an attempt could be made to develop rules applicable to all such acts.

4. A continuing source of concern, however, is the uncertainty which seems to persist regarding the subject matter of the work of codification, that is, the unilateral acts which might fall within its definition. Some of them, as will be seen, can be identified and associated with the conduct and attitudes of the State; others, while unquestionably unilateral acts from a formal standpoint, can be

placed in a different sphere, that of treaties or treaty law, while certain others would seem to fall into the category of acts with which the Commission is concerned. Indeed, as will be seen, when one of the acts commonly referred to as “unilateral” from a material standpoint is being dealt with, it may fall outside the scope of this study. Such is the case with regard to waiver or recognition by means of implicit or conclusive acts. It has been stated that waiver and recognition, *inter alia*, are unilateral acts in the sense with which the Commission is concerned. However, closer examination of their form may lead to the conclusion that not all unilateral acts of waiver or recognition fall into the category of interest to the Commission, and thus not all should be included in the definition sought to be developed.

5. In practice, it can be seen that recognition is effected through acts separate from the formal acts referred to above—in other words, through conclusive or implicit acts; this might be true, for instance, of the act of establishing diplomatic relations, by which a State implicitly recognizes another entity which claims the same status. An example of this would be the United Kingdom of Great Britain and Northern Ireland's implicit recognition of Namibia; the Minister for Foreign Affairs of the United Kingdom stated in this regard that the establishment of diplomatic relations with Namibia in March 1990 constituted implicit rather than formal recognition.<sup>5</sup> It should also be noted that some of these acts are of treaty origin, as is the case of the Mauritania-Saharaoui agreement, signed at Algiers on 10 August 1979,<sup>6</sup> referred to in paragraph 21 below; by their very nature, these acts should also be excluded from the scope of the present study.

### B. Consideration of other aspects of international practice

6. The Special Rapporteur's work thus far has been based on an extensive study of doctrine and jurisprudence. However, while he is convinced that practice is of growing importance in this area, it has not been given the attention that it deserves. There is no doubt that this failure, which is due to the difficulties of gathering information on the matter, may have a negative impact on consideration of the topic. The Special Rapporteur is aware that without information concerning practice, it is impossible to prepare a comprehensive study of the topic, let alone embark on the task of codification and progressive development in that area. While unilateral acts are obviously common, there appear to be few cases in which their binding nature has been recognized. The Ihlen declaration<sup>7</sup> was for many years a classic example of a unilateral declaration. Since then, other unilateral declarations have been considered equally binding, although they were not

<sup>1</sup> The Special Rapporteur wishes to thank Mr. Nicolás Guerrero Peniche, doctoral candidate of the Graduate Institute of International Studies in Geneva, for the assistance provided in the research work relating to the present report.

<sup>2</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 64–65, paras. 195–210.

<sup>3</sup> *Yearbook ... 1998*, vol. II (Part One), p. 319, document A/CN.4/486.

<sup>4</sup> Second report, *Yearbook ... 1999*, vol. II (Part One), p. 195, document A/CN.4/500 and Add.1; third report, *Yearbook ... 2000*, vol. II (Part One), p. 247, document A/CN.4/505; and fourth report, *Yearbook ... 2001*, vol. II (Part One), p. 115, document A/CN.4/519.

<sup>5</sup> Marston, ed., “United Kingdom materials on international law 1992”, p. 642, cited in Torres Cazorla, “Los actos unilaterales de los Estados en el derecho internacional contemporáneo”, p. 57.

<sup>6</sup> *Official Records of the Security Council, Thirty-fourth Year, Supplement for July, August and September 1979*, document S/13503, annex I, pp. 111–112.

<sup>7</sup> See *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 70.

subject to judicial examination; Germany's declarations between 1935 and 1938 regarding the inviolability of the neutrality of certain European countries, which have been viewed in the literature as "guarantees", are one example. Also noteworthy is Austria's declaration of neutrality,<sup>8</sup> which some consider a promise, and the declaration by Egypt of 24 April 1957 (with letter of transmittal to the Secretary-General of the United Nations) on the Suez Canal and the arrangements for its operation,<sup>9</sup> although the latter was registered with the Secretary-General. The declarations made by the French authorities questioned by ICJ in the *Nuclear Tests* cases<sup>10</sup> would also be unilateral declarations of the type with which the Commission is concerned. Certain other unilateral declarations, such as negative security guarantees, which could, depending on their content, reflect a promise made by nuclear-weapon States to non-nuclear-weapon States, are another category of such acts, whose legal nature has not been examined by the courts or determined by the authors or the addressees, but which nonetheless may be considered binding from the legal point of view, as several members of the Commission noted in commenting on the second report of the Special Rapporteur.<sup>11</sup>

7. At the fifty-third session of the Commission, in 2001, a working group was established to consider some aspects of the topic, as reflected in a report of which the Commission took note.<sup>12</sup> On that occasion it was noted that one of the problems posed by a study of the topic was that practice had not yet been given full consideration. The Working Group recommended that the Commission should request the Secretariat to circulate to Governments a questionnaire inviting States to provide additional information on practice with regard to the formulation and interpretation of unilateral acts.<sup>13</sup> Some States, such as Estonia and Portugal, replied to this questionnaire in a highly constructive manner; their comments are mentioned below.

8. Portugal provided valuable information on the formulation of unilateral acts in its international relations, qualifying them in each case. It refers to protests against certain acts of Australia related to East Timor and, secondly, the recognition of East Timor's right to independence.

9. According to its report, Portugal made a series of diplomatic protests to the Australian authorities between 1985 and 1991. In 1985, Portugal made known to Australia that it could not "but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a Territory of which Portugal is the administering Power, a fact which is internationally recognized ... the Portuguese Government cannot but express

to the Australian Government its vehement protest for the manifest lack of respect for international law."<sup>14</sup>

10. In 1989, Portugal reiterated that "as the administering Power for the non-autonomous Territory of East Timor, Portugal protests against the text of the above-mentioned declarations".<sup>15</sup> After the signature of the Timor Gap Treaty,<sup>16</sup> Portugal let Australia know its view on the matter once more:

The Portuguese authorities have consistently lodged diplomatic protests with the Government of Australia ... In those protests the Portuguese Government pointed out that the negotiation and the eventual conclusion of such an agreement with the Republic of Indonesia ... would constitute a serious and blatant violation of international law ... In proceeding with the signing of the above-mentioned agreement Australia is continuing and bringing to its conclusion that violation of the law ... In signing the "Provisional Agreement" Australia acts in contempt, namely, of its duties to respect the right of the East Timorese to self determination ... In the light of the above, Portugal cannot but lodge its most vehement protest with the Government of the Commonwealth of Australia and state that it reserves itself the right to resort to all legal means it will consider as convenient to uphold the legitimate rights of the East Timorese.<sup>17</sup>

11. Portugal considers that those unilateral acts, which it refers to as acts of protest, constitute a manifestation of will and of the intention "not to consider a given state of affairs as legal and ... thereby to safeguard its rights which have been violated or threatened".<sup>18</sup> This statement is extremely important in that it does not merely list and qualify the acts in question; it also notes the legal effects which it believes may result therefrom.

12. Estonia also provided extremely valuable information concerning practice. It states that:

On 19 December 1991, the Supreme Council issued a Statement on the Property of the Republic of Latvia and the Republic of Lithuania, which could be considered a promise. The Supreme Council stated that, considering the restoration of independence of Estonia, Latvia and Lithuania, Estonia would guarantee the legal protection of property in conformity with the equality of legal protection of forms of property of the said States in Estonian territory in accordance with Property Law of Estonia.<sup>19</sup>

13. Estonia mentions and qualifies other unilateral declarations in its reply to the above-mentioned questionnaire, including its statement of 24 July 1994 on the social guarantees of former Russian Federation military personnel; its declarations in recognition of States, such as its recognition of the Republic of Slovenia on 25 September 1991; and the Supreme Council's statement of 3 April 1990 on the restoration of independence of the Republic of Lithuania, recognizing Lithuania as an independent State. In September 1992, the Estonian Parliament adopted a declaration on restoration, which explicitly

<sup>8</sup> *Austrian Federal Constitutional Laws (selection)* (Vienna, Federal Press Service, 2000), p. 199.

<sup>9</sup> United Nations, *Treaty Series*, vol. 265, No. 3821, p. 299.

<sup>10</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253; (*New Zealand v. France*), *ibid.*, p. 457.

<sup>11</sup> See footnote 4 above.

<sup>12</sup> *Yearbook ... 2001*, vol. I, 2701st meeting, p. 238, paras. 58–60.

<sup>13</sup> The questionnaire was transmitted to Member States in note No. LA/COD/39 of 31 August 2001. The questionnaire and the replies received are contained in document A/CN.4/524, reproduced in the present volume.

<sup>14</sup> A/CN.4/524 (reproduced in the present volume), reply by Portugal to question 1, para. 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (signed over the zone of cooperation, above the Timor Sea, on 11 December 1989), United Nations, *Treaty Series*, vol. 1654, No. 28462, p. 105.

<sup>17</sup> A/CN.4/524 (see footnote 14 above).

<sup>18</sup> *Ibid.*, para. 4.

<sup>19</sup> *Ibid.*, reply by Estonia to question 1, para. 6.

stated that the present Republic of Estonia was the same subject of international law as that which had first been declared in 1918.<sup>20</sup> Estonia adds: "With some unilateral acts the legal effects are obvious and clear, as is the case with statements guaranteeing legal protection to property of Latvia and Lithuania, recognition of other States ..."<sup>21</sup>

14. Clearly, there is a wide variety of unilateral acts. As some have stated: "The great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards funding a satisfactory typology."<sup>22</sup> Nevertheless, doctrine, and even the Commission itself, has identified promises, protests, waivers and recognition as unilateral acts. Furthermore, the Commission has noted that the work of codification and progressive development may focus, at least initially, on consideration of promises—in other words, that it may seek to develop rules on the functioning of unilateral acts, which, like promises, imply the assumption of unilateral obligations by one or more author States.

15. In studying such acts, bearing in mind that they may not be the only unilateral acts, it is to be noted that recognition through a formal declaration is common in practice; there are many examples of such acts, particularly in the context of acts of recognition of government, following the political changes that began in 1960 with the decolonization and independence of colonial countries and peoples and, more recently, in the context of the creation of new States following changes in the former Czechoslovakia, the former Soviet Union and the former Yugoslavia.

16. A study of diplomatic correspondence, as reflected in the major international press, suggests that States frequently recognize other States through diplomatic notes. For example, by a declaration of 5 May 1992, Venezuela "recognizes ... the Republic of Slovenia as sovereign and independent" and expresses "its intention to establish ... diplomatic relations".<sup>23</sup> Similarly, by a declaration of 14 August 1992, Venezuela decided "to recognize as a sovereign and independent State the Republic of Bosnia and Herzegovina" and expressed "its intention to establish ... diplomatic relations".<sup>24</sup> Lastly, by a declaration of 5 May 1992, Venezuela decided "to recognize the Republic of Croatia as a sovereign and independent State" and "expressed its intention to establish ... diplomatic relations".<sup>25</sup>

17. Through a study of routine diplomatic procedures, certain useful practices capable of qualification are to be noted. One such case is the recognition of States emerging from the former Czechoslovakia, the former Soviet Union and the former Yugoslavia. Examples include notes reflecting such recognition which clearly constitute unilateral acts, such as those sent by the United Kingdom to the Heads of State of some of those countries; for example, in a letter dated 15 January 1992, the Prime Minister, Mr. John Major, stated:

<sup>20</sup> *Ibid.*, paras. 8, 9 and 11.

<sup>21</sup> *Ibid.*, reply to question 3.

<sup>22</sup> Fiedler, "Unilateral acts in international law", p. 1018.

<sup>23</sup> *Libro Amarillo de la República de Venezuela correspondiente al año 1992* (Caracas, Ministry for Foreign Affairs 1992), p. 505.

<sup>24</sup> *Ibid.*, p. 508.

<sup>25</sup> *Ibid.*

I am writing to place on record that the British Government formally recognises Croatia as an independent sovereign State ... In recognising Croatia, we expect the Government of Croatia to take swift steps to meet the reservation set out in M. Badinter's report with regard to the protection of the rights of minorities ... I look forward to the establishment of diplomatic relations. I can confirm that, as appropriate, we regard Treaties and Agreements in force to which the United Kingdom and the Socialist Federal Republic of Yugoslavia were parties as remaining in force between the United Kingdom and Croatia.<sup>26</sup>

18. Recognition, usually a unilateral act, produces specific legal effects which will now be described, although the question will also be considered in future reports. Recognition does not confer rights on the author, but rather imposes obligations; through recognition, as noted in the literature, "the State declares that it considers a situation to exist, and it cannot subsequently state otherwise; whether or not it exists from an objective point of view, the situation will henceforth be enforceable with respect to that State if it was not already so".<sup>27</sup>

19. Some of the many declarations formulated by States have been recognized as promises, such as the ones, discussed above (para. 6), that were formulated by the French authorities whom ICJ questioned in the *Nuclear Tests* cases. Other examples include the declaration by Spain, reflected in the Agreement of the Spanish Council of Ministers of 13 November 1998<sup>28</sup> and referred to in the third report on unilateral acts of States,<sup>29</sup> in which Spain decided to provide emergency assistance to mitigate the damage caused by Hurricane Mitch in Central America, and the declaration made by Tunisia on the occasion of a visit by the Prime Minister of France, Mr. Raymond Barre, on 26 October 1980, in which Tunisia announced its determination to unfreeze, within a relatively short time, the French funds retained after Tunisia gained its independence in 1956. These measures entered into force on 1 January 1981.<sup>30</sup>

20. A study of practice reveals other unilateral declarations which may be qualified as promises in that they correspond to the known doctrinal definition of that act. One example is the declaration made by the President of France, Mr. Jacques Chirac, in which he undertook to cancel the debt of El Salvador, Guatemala, Honduras and Nicaragua, amounting to FF 739 million, following the damage caused to the region by Hurricane Mitch. President Chirac also undertook to negotiate a reduction of the trade debt during the following meeting of the Paris Club.<sup>31</sup> A similar case is that of the declarations made by the Prime Minister of Spain, Mr. José María Aznar, on 4 April 2000, when he stated publicly: "I also wish to inform you that I have announced the cancellation of the debt owed by sub-Saharan African countries, worth US\$ 200 million in official development assistance credits."<sup>32</sup>

<sup>26</sup> Marston, *loc. cit.*, p. 636.

<sup>27</sup> Combacau and Sur, *Droit international public*, p. 285.

<sup>28</sup> *Revista de actividades, textos y documentos de la política exterior española, año 1998* (Madrid, Ministry for Foreign Affairs and Cooperation), p. 823.

<sup>29</sup> *Yearbook ... 2000* (see footnote 4 above), p. 253, para. 43.

<sup>30</sup> Rousseau, "Chronique des faits internationaux", pp. 395–396, cited in Torres Cazorla, *loc. cit.*, p. 49.

<sup>31</sup> Balmont and Weckel, eds., "Chronique des faits internationaux", p. 195, cited in Torres Cazorla, *loc. cit.*, p. 50.

<sup>32</sup> *Revista de actividades, textos y documentos de la política*

21. Declarations containing a waiver may also be observed in international practice. One example, albeit conventional in origin, is Mauritania's waiver of its claims to Western Sahara. The Mauritano-Sahraoui agreement states that the "Islamic Republic of Mauritania solemnly declares that it does not have and will not have any territorial or other claims on Western Sahara".<sup>33</sup>

22. Other declarations have also been observed in practice, including the declaration of 20 May 1980, in which the State Department announced that the United States of America waived its claim of sovereignty over 25 Pacific islands.<sup>34</sup>

23. There are also declarations that may contain several material unilateral acts, as is the case of the declaration by Colombia, formulated in a note of 22 November 1952, in which a recognition, a waiver and a promise can be seen. In this note, Colombia declares that "it does not contest the sovereignty of the United States of Venezuela over the Archipelago of Los Monjes and, consequently, that it does not contest or have any complaint to make concerning the exercise of the sovereignty itself or of any act of ownership by that country over the said archipelago".<sup>35</sup> This declaration, formulated correctly, for a specific purpose, and notified to the addressees, is a unilateral act producing legal effects that the author State intended to produce when formulating it.

24. As shall be seen below, and as has been said on several occasions, it is clear that unilateral acts exist in international relations and that they are increasingly important and frequent as a means of expression of States in their international relations. But this practice, arising from the ordinary understanding of the evolution of such relations, is indeterminate to the extent that neither the authors nor the addressees of such acts have the common and general conviction that it reflects the formulation of unilateral acts in the sense that is of interest to the Commission, although some States recognize and qualify the practice as involving unilateral acts. It should be emphasized that this perception is very different from the one created when the rules on the law of treaties were drafted; the existence of treaties as a legal instrument was more apparent then, owing to the attitude of States towards their existence, their importance and their legal effects. It was much simpler to identify rules of customary law in this context than in that of unilateral acts.

### C. Viability and difficulties of the topic

25. Most members of the Commission have indicated that the topic could be suitable for codification, despite its complexity and the difficulties that some of its aspects pose, as well as the evident weaknesses in gathering information on the topic, including the inadequate consideration of State practice. In general, the representatives of States to the Sixth Committee were of the same opinion.

*exterior española, año 2000* (Madrid, Ministry for Foreign Affairs and Cooperation), p. 102, cited in Torres Cazorla, *loc. cit.*, p. 50.

<sup>33</sup> See footnote 6 above.

<sup>34</sup> *International Herald Tribune*, 21 May 1980, p. 3.

<sup>35</sup> Vásquez Carrizosa, *Las relaciones de Colombia y Venezuela: la historia atormentada de dos naciones*, p. 339.

26. Indeed, members of the Commission indicated that the issue was important and interesting,<sup>36</sup> and a prime candidate for progressive development and codification,<sup>37</sup> while satisfaction with the draft articles presented<sup>38</sup> and optimism as to the possibility of producing a set of draft articles on the topic were expressed.<sup>39</sup>

27. It is true that some members expressed certain doubts about the feasibility of examining the topic and even about the approach and the grounds for doing so, which, according to some, did not take into account State practice, among other issues. One Government indicated that it "continues to consider that any approach which seeks to subject the very wide range of unilateral acts to a single set of general rules is not well founded".<sup>40</sup>

28. Some Governments have also gone on record about the relevance of the topic and the approach taken by the Commission when examining it. For example, in its observations on the topic when completing the questionnaire distributed by the Secretariat, Portugal indicated that "it recognizes the important role played by unilateral acts ... and the need to develop rules to regulate their functioning".<sup>41</sup>

29. Most States tend to consider that it is possible to carry out this task and that the Commission should continue with its work. China stressed that unilateral acts were becoming increasingly important and that the codification and progressive development of the law relating to them were essential, difficult though the process would be.<sup>42</sup> Some countries considered that the topic should be approached in a more limited way. Spain indicated that it would be desirable to concentrate on certain typical unilateral acts and the legal regime which should apply to each.<sup>43</sup> The Nordic countries stated their preference for limiting the study of the topic to a few general rules and a study of certain particular situations.<sup>44</sup> Japan considered that it would be wise for the Commission to focus on the more highly developed areas of State practice.<sup>45</sup> In the opinion of India, the Commission could consider the possibility of framing a set of conclusions on the topic, instead of proceeding with the preparation of draft articles.<sup>46</sup>

<sup>36</sup> *Yearbook ... 2001*, vol. I, 2695th meeting, statement by Mr. Pellet, p. 187, para. 7.

<sup>37</sup> *Ibid.*, statement by Mr. Illueca, p. 193, para. 58.

<sup>38</sup> *Ibid.*, statement by Mr. Goco, p. 187, para. 10.

<sup>39</sup> *Ibid.*, statement by Mr. Al-Baharna, p. 192, para. 54. See also the statements of Mr. Economides, p. 200, and Mr. Rao, p. 195.

<sup>40</sup> A/CN.4/524 (reproduced in the present volume), general comments by the United Kingdom, para. 1.

<sup>41</sup> *Ibid.*, Portugal, para. 1.

<sup>42</sup> *Official Records of the General Assembly, Fifty-sixth Session, Sixth Committee*, 22nd meeting (A/C.6/56/SR.22), para. 45. See also the statements by the Russian Federation and Poland, *ibid.*, para. 80, and *ibid.*, 24th meeting (A/C.6/56/SR.24), para. 2, respectively.

<sup>43</sup> *Ibid.*, 12th meeting, statement by Spain (A/C.6/56/SR.12), para. 44.

<sup>44</sup> *Ibid.*, 22nd meeting, statement by Norway (A/C.6/56/SR.22), para. 32.

<sup>45</sup> *Ibid.*, para. 56.

<sup>46</sup> *Ibid.*, 24th meeting (A/C.6/56/SR.24), para. 6.

30. It can confidently be said that States are increasingly making use of unilateral acts in their international relations. Evidently, this assertion raises doubts about whether those acts which in some way fall within this context, are unilateral acts in the sense that is of interest to the Commission, acts which formulated unilaterally, individually or collectively, may produce legal effects by themselves without the need for acceptance, assent or any other indication of agreement on the part of the addressee of the act. Even though unilateral acts are not referred to in article 38, paragraph 1, of the ICJ Statute, “both State practice and legal scholars presume the existence of such a category of legal acts”.<sup>47</sup>

31. Of course, if the matter is complicated in the context of the formulation and application of such acts, it is even more complex when examining their legal effects, a matter that will be discussed below. However, it is worth underscoring that, as some have indicated:

The scope of unilateral acts, of certain unilateral attitudes, such as the prolonged non-exercise of a right, silence when it was necessary to say something, tacit acquiescence and estoppel, is characterized by uncertainties about their legal effects. In many circumstances, the International Court of Justice has dispelled such uncertainties by resorting to the principle of good faith and to objective considerations that are inferred from the general interest, particularly from the need for legal security and certainty.<sup>48</sup>

32. In addition to the indeterminacy of the subject matter of the proposed work of codification and progressive development, one of the issues that gives rise to doubts about the viability of the topic is that, although a unilateral act may be formulated unilaterally, its materialization, or the legal effects it produces, is related to the addressee or addressees. This could lead to a rapid but mistaken conclusion that all unilateral acts are basically treaty acts, that unilateral acts would therefore not exist as such and that, consequently, no regime other than the one for treaty acts would be required to regulate their functioning.

33. The elaboration of the act and its legal effects are two aspects of the topic that should be carefully distinguished in order to avoid erroneous interpretations about the nature of such acts and the possibility that they may be the subject of codification and progressive development.

34. An act is unilateral in its elaboration, even though its effects generally take place in a relationship that extends beyond that sphere. A relationship between the author State or States and the addressee or addressees is always posited. The bilateralization of the act, if that term can be used, may not mean that it becomes a treaty act. The act continues to be unilateral and is created in this context, even though its materialization or legal effects belong in another, wider sphere. In other words, the unilateral act produces its legal effects even before the addressee considers that the act is enforceable in respect of the author State or States. Obviously, “most acts are inadequately disassociated from the mechanism of tacit acquiescence that deprives them of their originality; other acts, although considered unilateral, are even more closely associated with a genuine treaty mechanism (accession, waiver,

reservation, etc.), to the point that it is not worth disengaging them”.<sup>49</sup>

35. Evidently, it is very difficult to identify and qualify a unilateral act. In the case of a promise, for example, the matter is not easy. It is necessary to start from the premise that international unilateral acts exist, although they are rare. As has been said, “such rarity is easily explained, since no State would willingly make spontaneous and gratuitous concessions”.<sup>50</sup> Also, the question is whether an act may be qualified as a promise. In this respect, as indicated in the literature, “detecting these purely unilateral promises requires meticulous research in order to determine whether a fundamental bilaterality is hidden behind the formally unilateral facade of a declaration of intent”.<sup>51</sup>

36. When examining the Ihlen declaration (para. 6 above) or the 1952 note from Colombia referred to above (para. 23), it can be affirmed that one is in the presence of a waiver, which is also a recognition or a promise, and that this has a bearing on the legal effects that such declarations produce. Consequently, it is not easy to conclude unequivocally that one is in the presence of a specific category of unilateral acts, although what is most important is the legal effect that they produce.

#### D. Content of the fifth report and recapitulative nature of its chapter I

37. During the fifty-third session of the Commission in 2001, a member underscored the importance of asking the Special Rapporteur to prepare a recapitulative report that would clarify the status of discussions on the topic in general and on the draft articles submitted up to then, while allowing the consideration of the topic to proceed as it had up to that point. That comment, and the start of a new quinquennium, made it necessary to take this concern into account; hence chapter I of the present report, which the Special Rapporteur is submitting to the Commission for its consideration.

38. The Special Rapporteur further considers that the work to be accomplished in the short term must be closely related to a longer-term programme. Accordingly, he has set out at the end of this report a general idea concerning future work, which will in any case have to be considered by the Commission.

39. Chapter I again addresses some questions which, in the view of the Special Rapporteur, should be studied in greater detail and clarified in order to allow the consideration of the topic to proceed in a more structured manner. To begin with, the definition of a unilateral act is considered in the light of the evolution of the discussions in both the Commission and the Sixth Committee. A decision in that regard is essential to the consideration of the topic and progress in that respect, although the Special Rapporteur is fully aware of the complexities and difficulties it poses.

<sup>47</sup> Fiedler, *loc. cit.*, p. 1018.

<sup>48</sup> De Visscher, *Les effectivités du droit international public*, pp. 156–157.

<sup>49</sup> Reuter, *Droit international public*, 3rd ed., p. 94.

<sup>50</sup> Suy, *Les actes juridiques unilatéraux en droit international public*, p. 111.

<sup>51</sup> *Ibid.*

40. A definition should cover the majority of unilateral acts, which doctrine and jurisprudence recognize as acts that produce legal effects in and of themselves, regardless of their content. It is important to adopt a definition that allows the various acts that are regarded as unilateral for the purposes of the Commission's consideration of the topic to be placed in context. The definition will have to be broad in order to avoid the exclusion of some of those acts from the scope of the study; at the same time, however (and this reflects its complexity), it will need to be restrictive so as not to leave the door open too far to the inclusion of acts not compatible with or not falling into the category of the acts in question. A balanced approach is therefore essential in this regard.

41. A second question relates to the conditions of validity and causes of invalidity of unilateral acts, again in accordance with the discussion of the topic in both the Commission and the Sixth Committee. It has been pointed out that consideration of the regime of invalidities, which goes beyond consideration of the factors vitiating consent, or, in this context, vitiating the expression of will, must be preceded by consideration of the factors determining the conditions of validity of the act. All those aspects are addressed in greater detail in this report. Some other questions related to the non-application of unilateral acts are also taken up.

42. A third question that is delved into, again within the same parameters, relates to the rules of interpretation applicable to unilateral acts, a question that was submitted to the Commission by the Special Rapporteur in his fourth report<sup>52</sup> and discussed at the fifty-third session, in 2001. A new version of the draft articles submitted previously is set out at the end of the review.

43. Lastly, another brief comment is made on the possibility of classifying unilateral acts and on their relevance

<sup>52</sup> See footnote 4 above.

and importance to the structure of the work that would be carried out on the topic.

44. Chapter II addresses several questions within the framework of the possibility of elaborating common rules applicable to all unilateral acts, regardless of their name, content and legal effects. The general rule concerning respect for unilateral acts, which is based on article 26 of the Vienna Convention on the Law of Treaties (hereinafter the 1969 Vienna Convention) referring to the basic rule of the law of treaties, *pacta sunt servanda*, is examined. An attempt is made to base the binding character of the act on a rule formulated to that end, a topic that was addressed in the first report on unilateral acts of States.<sup>53</sup> Secondly, two questions are addressed which may be the subject of elaboration of rules common to all acts: the application of the act in time, which raises the issue of retroactivity, and the non-retroactivity of the unilateral act and its application in space.

45. Chapter III discusses an important topic: the determination of the moment when the unilateral act begins to produce its legal effects, which is closely related to the concept of entry into force in the context of the law of treaties, although of course with the specific characteristics of such acts. These are two concepts which cannot be conflated by the very nature of the legal acts in question, but which clearly have important elements in common. In this instance it is not a matter of preparing draft articles, but rather of raising some issues for discussion in the Commission, so as to facilitate the work of codification.

46. Chapter IV sets out the structure of the draft articles in accordance with prior discussions and the future plan of work which the Special Rapporteur is submitting to the Commission for its consideration.

<sup>53</sup> See footnote 3 above.

## CHAPTER I

### Recapitulative consideration of some fundamental issues

47. In order to facilitate consideration of the topic in the Commission, it was deemed important, as indicated above, to re-examine, albeit in summary fashion, four issues that are regarded as basic in order to bring forth new elements and clarifications; these issues are the definition of the unilateral act, the conditions of validity and causes of invalidity and other questions related to the non-application of unilateral acts, the rules of interpretation applicable to such acts, and classification and qualification and their impact on the structure of the draft articles.

#### A. Definition of unilateral acts

48. The definition of unilateral acts is a fundamental issue that must be resolved. The Special Rapporteur has proposed a definition which has evolved in accordance with the views and comments of the members of the Commission and the representatives of Member States, both in

the Sixth Committee and in their replies to the questionnaire sent in 2001.<sup>54</sup>

49. At the fifty-third session of the Commission, in 2001, the view was expressed that progress had been made and that some appropriate terms had been introduced, leaving aside those on which there was no consensus in the Commission as to whether they should be retained.

50. As the discussions on the topic evolved, the draft definition of unilateral acts became more acceptable, and it was therefore submitted to the Drafting Committee in 2000<sup>55</sup> in the terms in which it was formulated in the third report on unilateral acts of States.<sup>56</sup>

<sup>54</sup> See footnote 13 above.

<sup>55</sup> *Yearbook ... 2000*, vol. II (Part Two), p. 99, para. 619.

<sup>56</sup> *Yearbook ... 2000* (see footnote 4 above), p. 256, para. 80.

51. A number of differences can be seen in the version that was transmitted to the Drafting Committee of the Commission. First, it will be noted that the word “declaration” has been replaced by the word “act”, which was considered to be broader and less exclusive than the word “declaration”, as it would cover all unilateral acts, especially those which might not be formulated by means of a declaration, although the Special Rapporteur was of the view that unilateral acts in general, regardless of their name, content and legal effects, are formulated by means of a declaration.

52. The concept of “autonomy” was also excluded from the definition following the long discussion to which it gave rise in the Commission, although the Special Rapporteur was of the view that autonomy was an important characteristic, that it should perhaps be interpreted differently, but that in any case it signified independence from other legal regimes and would mean that such acts could produce effects in and of themselves. It will be recalled that ICJ explained in the *Nuclear Tests* cases that what was involved was the “strictly unilateral nature”<sup>57</sup> of certain legal acts, although it referred to one such act, a promise, which appears to reflect the independent character of such acts.

53. As has been pointed out, legal scholars have had recourse to the independence of unilateral acts in characterizing such manifestations of will; the Special Rapporteur shares that approach. Suy, for example, notes that “as to its effectiveness, the manifestation of will may be *independent from other expressions of will* emanating from other subjects of law”.<sup>58</sup> For some members of the Commission, however, unilateral acts cannot be autonomous because they are always authorized by international law.

54. The matter was also discussed in the Sixth Committee in 2000. On the one hand, it was held that the concept of autonomy, understood as independence from other, pre-existing legal acts, or as the State’s freedom to formulate the act, should be included in the definition.<sup>59</sup>

55. With regard to the phrase “expression of will formulated with the intention of producing legal effects”, it will be noted that during the discussions in the Commission in 2000, some were of the view that it did not need to be included. They even pointed to the possible tautology or redundancy of such terms, but as reflected in the report which the Commission adopted that year, “there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained”.<sup>60</sup>

56. A more explicit reference to the expression of will remains pertinent, as it is a fundamental aspect of a legal

act in general and, clearly, of the unilateral acts which are of concern. The importance attached to the role of will in legal acts is well known. For some, in fact, the act is an expression of will, which is reflected in the proposed definition. This also accounts for the importance attached to the interpretation of will, be it the declared or the actual will of the author of the act, and to the flaws that may affect its validity.

57. Unilateral acts have been defined in nearly all of the literature, without major differences between authors, as the expression of will formulated by a subject of the international legal order with the intention of producing legal effects at the international level.<sup>61</sup> As one author states: “Unilateral legal acts are an expression of will ... envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order.”<sup>62</sup> For others, “unilateral acts emanate from a single expression of will ... and create norms intended to apply to subjects of law who have not participated in the formulation of the act”.<sup>63</sup>

58. The expression of will is closely linked to the legal act and, consequently, the unilateral act. Will is a constituent of consent and is also necessary to the formation of the legal act. Will should, of course, be seen as a psychological element (internal will) and as an element of externalization (declared will), a view that is considered in another context below.

59. The definition of recognition given in the specialized literature is based on the expression of will. For some, recognition is “a general legal institution which authors unanimously regard as a unilateral expression of will emanating from a subject of law, by which that subject first takes note of an existing situation and expresses the intention to regard it as legitimate, as being the law”.<sup>64</sup> A promise would also be based on the expression of will.<sup>65</sup> The same applies to waiver, which would be “the expression of will by which a subject of law gives up a subjective right without there being a manifestation of will by a third party”.<sup>66</sup>

60. In addition, the phrase “the intention to acquire legal obligations” was replaced by the expression “the intention to produce legal effects”, which was considered to be broader and to cover both the assumption of obligations and the acquisition of rights. It should be noted, however, that the Commission remains of the view that a State cannot impose unilateral obligations on another State through an act formulated without its participation and consent. On that point, it reiterated principles firmly established in international law, including the principle of *res inter alios acta* and the principle of Roman law, *pacta tertiis*

<sup>57</sup> I.C.J. Reports 1974 (see footnote 10 above), p. 267, para. 43 (*Australia v. France*); and p. 472, para. 46 (*New Zealand v. France*).

<sup>58</sup> Suy, *op. cit.*, p. 30.

<sup>59</sup> See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 19th meeting, statement by Italy (A/C.6/55/SR.19), para. 19.

<sup>60</sup> *Yearbook ... 2000* (see footnote 55 above), para. 607.

<sup>61</sup> Urios Moliner, “Actos unilaterales y derecho internacional público: delimitación de una figura susceptible de un régimen jurídico común”, p. 59.

<sup>62</sup> Rigaldies, “Contribution à l’étude de l’acte juridique unilatéral en droit international public”, p. 451.

<sup>63</sup> Jacqué, *Éléments pour une théorie de l’acte juridique en droit international public*, p. 329.

<sup>64</sup> Suy, *op. cit.*, p. 191.

<sup>65</sup> Jacqué, “À propos de la promesse unilatérale”, p. 339.

<sup>66</sup> Suy, *op. cit.*, p. 156.

*nec nocent nec prosunt*, i.e. that agreements neither bind nor benefit third parties. As has been stated: "In traditional international law, it is impossible, in principle, for a subject of law to create an obligation for another subject without the latter having given its consent."<sup>67</sup> It should be underscored that the justification for such a rule would be based not solely on that principle, which is applicable in the contractual field, but on the sovereignty and independence of States. International jurisprudence is clear in this regard. The decision of arbitrator Max Huber in the *Island of Palmas* case should be recalled: "It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the 'Philippines' could not be binding upon the Netherlands."<sup>68</sup> That decision also points out that "[it] is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers."<sup>69</sup> One should also recall the decision, cited in previous reports, of PCIJ in the case of the *Free Zones of Upper Savoy and the District of Gex*, in which the Court stated that "even were it otherwise, it is certain that, in any case, Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it."<sup>70</sup> Lastly, mention should be made of the decision in the case concerning the *Aerial Incident of 27 July 1955*, in which ICJ stated that Article 36, paragraph 5, of the PCIJ Statute "was without legal force so far as non-signatory States were concerned".<sup>71</sup>

61. International law is also clear in that, in principle, not even a treaty can confer rights on States that are not party to it, as PCIJ established in the case concerning *Certain German interests in Polish Upper Silesia*, when it indicated that "the instruments in question make no provision for a right on the part of other States to adhere to them ... A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced in favour of third States".<sup>72</sup>

62. Evidently, the law of treaties establishes exceptions to this rule, such as the stipulation in favour of third parties that requires the consent of the third State,<sup>73</sup> and it should be asked whether, in the context of unilateral acts, the possibility might be considered that one State might impose obligations on another without its consent; in other words, whether it is possible to go beyond reaffirming rights and legal claims.

63. When examining the various unilateral acts to which reference has been made, it can be seen that they do not

<sup>67</sup> Jacqué, *op. cit.*, p. 329.

<sup>68</sup> UNRIAA, vol. II (Sales No. 1949.V.1), arbitral award of 4 April 1928, p. 850.

<sup>69</sup> *Ibid.*, p. 842.

<sup>70</sup> *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 141.

<sup>71</sup> *Aerial Incident of 27 July 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 138.

<sup>72</sup> *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 28–29.

<sup>73</sup> PCIJ in the *Free Zones of Upper Savoy and the District of Gex* case indicated that "[t]here is ... nothing to prevent the will of sovereign States from having this object and this effect" (see footnote 70 above), p. 147.

impose obligations on States. Waiver and promises are clear in this respect. Recognition, referring to recognition of States, could perhaps bear closer examination.

64. Indeed, when an entity is recognized as having the condition or status of a State, the author State assumes some obligations that are related to the very nature of the State and that arise from international law. Yet the question might be asked whether the obligations corresponding to the State in accordance with international law may be imposed on the recognized entity. The answer to this depends on the nature of the recognition of States. If the thesis that the act of recognition is merely declarative and not constitutive is accepted (and the Special Rapporteur shares this point of view), it can be said that such obligations do not arise from that act of recognition but from its very existence as a State.

65. Most members of the Commission and representatives in the Sixth Committee considered that the expression should be broader; however, in the opinion of the Special Rapporteur, that could not allow or be interpreted as allowing States to impose obligations on third States without their consent.

66. Lastly, the requirement of "publicity" is replaced by that of "notoriety", since it is considered that the former has been used exclusively in the case of a unilateral act formulated *erga omnes*, as were the declarations formulated by the French authorities and considered by ICJ in the *Nuclear Tests* cases.<sup>74</sup> However, the Commission discussed whether that element was constitutive of the act itself or whether, to the contrary, it was a declarative element that was not essential to the definition of the act.

67. For a Government, the intention to produce legal effects referred to in the definition is not the basis for the binding nature of the unilateral act. Thus, when agreeing with the definition proposed by the Special Rapporteur, Portugal stated that "it is international law, and not the State's intention, that provides for the legal force of unilateral acts in the international legal order".<sup>75</sup>

68. The proposed definition, and there appears to be a general consensus in the Commission on this, refers to acts formulated by the State. However, with regard to the addressee, a broader formulation has been introduced in relation to the first one proposed by the Special Rapporteur; it reflects that, even though it is a question of acts of State, they may be addressed to other subjects of international law. A member of the Commission even indicated that the addressee, in addition to being a State or an international organization, could be other distinct subjects and entities, an opinion that the Commission has not yet considered. The definition initially proposed could, according to an opinion expressed in the Commission, limit the effects of unilateral acts to relations with other States and international organizations, excluding other entities, such as national liberation movements, and others that might be the beneficiaries of such acts if that was the author's intention.

<sup>74</sup> See footnote 10 above.

<sup>75</sup> A/CN.4/524 (reproduced in the present volume), general comments, para. 2.

69. The inclusion of the word “unequivocal” was generally accepted by the Commission. During the discussion, it was considered “acceptable, since ... it was hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions or how it could be easily and quickly revoked”.<sup>76</sup> However, some members opposed the inclusion of the word because they considered

that it should be understood that the expression of will must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation it did not create a legal act ... [T]he ideas of clarity and certainty [that were conveyed] by means of the word ‘unequivocal’ was a question of judgement which was traditionally for the judge to decide and did not belong in the definition of unilateral acts.<sup>77</sup>

70. In this respect, in 2000, the Sixth Committee indicated that the “word ‘unequivocal’ qualifying ‘expression of will’ in the definition need not be construed as equivalent to ‘express’. An implicit or tacit expression of will could be unequivocal”.<sup>78</sup>

71. In any case, the draft definition must be considered by the Drafting Committee during the fifty-fourth session of the Commission in 2002. Evidently, there is a certain tendency towards focusing consideration of unilateral acts mainly on promises, in other words, elaborating rules based primarily on one kind of promise, an international promise, although this is clearly a very important unilateral act that has a certain influence on the evolution of the topic. A balanced approach is needed, considering the different unilateral acts that both doctrine and jurisprudence recognize as such, particularly in the context of the work of codification and progressive development that the Commission has undertaken. In this respect, it is worth recalling that the Commission itself has considered that the work of codification can be focused, at least during the first stage, on promises, understood as they are defined in most of the literature, i.e. as reflecting the unilateral assumption of obligations.

72. Regarding the diversity of acts and the difficulties involved in grouping and classifying them (which to some extent relates to their legal effects), it should be indicated that during its deliberations, the Commission was able to exclude a number of acts and kinds of conduct that, even though they produce legal effects, are distinct from the legal act that it is attempting to regulate.

73. Some unilateral declarations raise doubts about their place in the Vienna regime or in the context of unilateral acts; this is the case, for example, of declarations recognizing as compulsory the jurisdiction of ICJ formulated by States under Article 36, paragraph 2, of the Statute of the Court, which the Commission has examined previously. The Special Rapporteur, concurring with some legal scholars, has affirmed that such declarations belong within treaty relationships. However, as the Court itself has recognized, their specific characteristics can

make them appear different from what are clearly treaty declarations.

74. Other declarations already examined seem to belong more easily in the context of the unilateral acts that are of interest to the Commission. These are the declarations formulated by a State’s representative during a proceeding before an international court. The question that arises is whether such declarations may or may not be considered unilateral and binding on the State on whose behalf the agent acts, provided, of course, that they comply with the conditions for validity of the act.

75. This is the case of the declaration formulated by the agent of Poland before PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia*. With regard to a declaration made by Poland, the Court stated that:

The representative before the Court of the respondent Party, in addition to the declarations above mentioned regarding the intention of his Government not to expropriate certain parts of the estates in respect of which notice had been given, has made other similar declarations which will be dealt with later; the Court can be in no doubt as to the binding character of all these declarations.<sup>79</sup>

76. The Special Rapporteur has proposed to separate some types of conduct and attitudes, such as silence, which, even though they can undoubtedly produce legal effects, do not constitute unilateral acts in the strict sense of the term: a unilateral act is an expression of will, formulated with the intention of producing legal effects in relation to a third State that has not participated in its formulation, which produces legal effects without the need for participation of that third party, in other words, without the latter’s acceptance, assent or any other reaction that would indicate assent.

77. Many have considered silence to be a reactive expression of will, in the face of a situation or claim by another subject of international law. The value placed on it by both doctrine and international courts should not be disregarded. In some important judicial decisions, such as those relating to the *Fisheries* case (United Kingdom v. Norway)<sup>80</sup> and the case concerning the *Temple of Preah Vihear*,<sup>81</sup> silence and its legal effects were considered; this has been elaborated on further in previous reports and was also discussed in the Commission. It is worth asking whether the expression of will in those cases differs from the expression of will whose definition is presently of concern. Should the Commission determine that it is pertinent to include silence in its study of unilateral acts, it would be necessary to determine the meaning and limit of the State obligation that this conduct expresses. The Commission would have to consider the matter and decide whether conduct such as silence should be counted among the expressions of will that it seeks to regulate and, consequently, ensure that it is covered by the definition to be adopted this year, or, on the contrary, as has been argued, whether it should be removed from the scope of the study and excluded from the definition.

<sup>76</sup> *Yearbook ... 2000* (see footnote 55 above), p. 94, para. 553.

<sup>77</sup> *Ibid.*, para. 554.

<sup>78</sup> *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 20th meeting, statement by Guatemala (A/C.6/55/SR.20), para. 28.

<sup>79</sup> *P.C.I.J.* (see footnote 72 above), p. 13.

<sup>80</sup> *Fisheries, Judgment, I.C.J. Reports 1951*, p. 139.

<sup>81</sup> *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 23.

78. Some have stated that the State may even carry out unilateral acts “without knowing it”, independently of its intention. Clearly, this would seem possible, as it can occur in other legal spheres. But it is worth asking ourselves whether that expression of will, which could have different connotations, constitutes a unilateral act in the sense that interests us. This should also be examined carefully so that it may be included or excluded once and for all, and so that an adequate definition can be elaborated.

79. Other acts, even treaty acts, can be confused with the unilateral acts with which the Commission is concerned. This is the case of treaties that grant rights or impose obligations on third parties which have not taken part in their elaboration. Such treaty acts may be considered unilateral acts of a collective or treaty origin in favour of third parties; however, they are really collateral agreements or agreements with stipulations in favour of third parties, as envisaged in the 1969 Vienna Convention and provided for in its articles 35 and 36. In any case, for a third State to be bound by a treaty, it must expressly accept any obligations deriving therefrom, or, in the second case, accept the rights that may derive from that treaty in whose elaboration the State did not take part, as less rigidly envisaged in the Convention.

80. As indicated above, the definition of a unilateral act is fundamental, and its consideration should take into account all unilateral acts in order to arrive at a broad, non-exclusive definition.

81. The text of the article proposed by the Special Rapporteur and transmitted to the Drafting Committee is as follows:

*“Article 1. Definition of unilateral acts*

“For the purposes of the present articles, ‘unilateral act of a State’ means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.”

**B. Conditions of validity and causes of invalidity of unilateral acts**

82. The second question addressed in this chapter concerns the conditions of validity and causes of invalidity of unilateral acts; the latter aspect was partially considered by the Commission at its fifty-second session, in 2000, on the basis of the third report submitted by the Special Rapporteur.<sup>82</sup>

83. This year the Working Group of the Commission will take up the draft article submitted by the Special Rapporteur on invalidity of unilateral acts; in that connection, it will need to take into account the discussions in the Commission and the views expressed by representatives in the Sixth Committee in 2000 and 2001, along with the clarifications and additions provided in the Working Group. Before addressing the matter again, several issues

will be considered in an effort to clarify the status of the discussion, namely, conditions of validity of unilateral acts and the general regime governing the invalidity of unilateral acts, issues that, as has been pointed out, are clearly closely related. Preliminary comments will also be made on two issues related to invalidity: loss of the right to invoke a cause of invalidity or a ground for termination of a unilateral act, or to suspend its application, and the relation between domestic law and competence to formulate an act. Preliminary consideration will also be given to other issues relating to the non-application of the act, namely, termination and suspension.

84. A unilateral act is valid and can therefore produce its legal effects if certain conditions are met, as provided for in the Vienna regime concerning treaties. Articles 42–53 and 69–71 of the 1969 Vienna Convention should be recalled in this context.

85. Following the Vienna regime to some extent, and using it as a guide, the conditions of validity of the unilateral acts which are of concern would be: formulation of the act by a State, by a representative authorized or qualified to act on its behalf and commit it at the international level; lawfulness of the object and purpose, which must not conflict with a peremptory norm of international law; and the manifestation of will, free of defects. Certain other related issues should be considered at the same time as validity and causes of invalidity, such as the relation between unilateral acts and prior obligations assumed by the author State.

86. In order to regulate the functioning of unilateral acts, the conditions of validity of such acts do not need to be set forth in a specific provision of the draft articles, any more than they were in the Vienna Conventions. When the Commission elaborated the draft articles on the law of treaties, it considered a draft article (art. 30), which established a general rule concerning validity of treaties and which was subsequently not adopted.<sup>83</sup> The view at the time was that such a rule was unnecessary and that, accordingly, the draft article submitted by the Special Rapporteur should be deleted.

87. In any case, it should be underlined that the inclusion of draft articles on the causes of invalidity of unilateral acts cannot weaken the principle established in this context to serve as a basis for the binding character of such acts (*acta sunt servanda*) and the stability and mutual confidence that should govern international legal relations, any more than the provisions included in the 1969 Vienna Convention that deal with the *acta sunt servanda* principle.

88. Only the State can formulate unilateral acts, at least in the context in which the Commission has addressed the

<sup>82</sup> See footnote 4 above.

<sup>83</sup> The Special Rapporteur on the law of treaties submitted draft article 30 “in order to underline that any treaty concluded and brought into force in accordance with the draft articles governing the conclusion and entry into force of treaties is to be considered as being in force and in operation unless the contrary is shown to result from the application of the articles dealing with the invalidity, termination and suspension of the operation of treaties” (*Yearbook ... 1965*, vol. II, document A/CN.4/177 and Add.1 and 2, p. 65, para. 1).

topic. The State has legal capacity to formulate unilateral acts, just as it has to conclude treaties, a point that was clearly reflected in the 1969 Vienna Convention. Such capacity is beyond doubt, as reflected in draft article 2, submitted in the third report of the Special Rapporteur, which was referred to the Drafting Committee.<sup>84</sup> Of course, while the draft article is limited to the State, that does not exclude other subjects of international law from also having the capacity to formulate such acts. The limitation results from the mandate given to the Commission to study the topic and from the object and purpose defined in accordance with that mandate.

89. Moreover, only qualified persons can act on behalf of the State and commit it in its international relations, a point addressed in draft article 3, which has already been considered by the Commission and referred to the Drafting Committee. There is no question regarding the representativeness of the Head of State,<sup>85</sup> the Head of Government or the Minister for Foreign Affairs,<sup>86</sup> as set forth in article 7 of the 1969 Vienna Convention, on which the draft concerning unilateral acts is based. The point, as noted in the second report submitted by the Special Rapporteur, is that unilateral acts can be formulated only by a person qualified to act on behalf of the State and commit it at the international level. According to the report: "States can be engaged at the international level only by their representatives, as that term is understood in international law, that is, those persons who by virtue of their office or other circumstances are qualified for that purpose."<sup>87</sup>

90. The determination of the persons capable of formulating unilateral acts on behalf of the State depends on the circumstances and on the internal structure and nature of the act.

91. In addition to the persons referred to in the previous paragraph, the Special Rapporteur suggested that other persons could be qualified to formulate a unilateral act on behalf of the State. The determination of persons qualified for that purpose, it should be specified, depends both on domestic, mainly constitutional, law, and on international law. It will be recalled that when the Special Rapporteur submitted his second report to the Commission, he noted that the "intention of the State that formulated the act and the good faith that should apply in international relations made it possible to assume that other representatives could also engage the State without the need

for special powers, and that was clearly shown in international practice".<sup>88</sup> The conclusion could have been drawn, however, that that could happen only on the basis of a restrictive criterion. When the Commission discussed the topic, it concluded that, while it was possible to add to the persons qualified to act on behalf of the State, it should be approached restrictively; that view was also expressed by some Governments, such as Argentina, which, in replying to the above-mentioned questionnaire from the Commission, pointed out that "any addition of other persons or organs to this established norm of customary law must be approached restrictively, bearing in mind contemporary international realities".<sup>89</sup> As one Government stated in its reply to the 1999 questionnaire: "According to a well-established norm of general international law, acts of the Head of State, Head of Government or Minister for Foreign Affairs are attributable to the State. However, there is a possibility that other ministers or officials ... may also act unilaterally on behalf of the State."<sup>90</sup>

92. Pursuant to the preparatory work of the 1969 Vienna Convention and the Commission's studies and discussions on the subject, State practice, legal doctrine and case law concur that the assumption of obligations is a limitative power; in other words, that the explicit powers of governmental representatives should be taken into account, although the general rule prevents the domestic norms from being invoked in order to challenge the validity of a treaty.<sup>91</sup>

93. The same cannot be said for the current status of international law concerning international responsibility, where, as reflected in the draft articles elaborated by the Commission, of which the General Assembly took note in 2001, particularly articles 7–9 thereof, the international responsibility of a State can arise through the conduct of its representatives, even though they have not been authorized for that purpose, and even through "[t]he conduct of a person or group of persons ... if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct", and through "[t]he conduct of a person or group of persons ... if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority".<sup>92</sup> It should be noted, however, that in such situations reference is made to explicit obligations previously recognized by States or by international law in general.<sup>93</sup> Clearly, the need to guarantee legal relations and mutual confidence justify such an extension of

<sup>84</sup> *Yearbook ... 2000* (see footnote 4 above), p. 257, para. 92.

<sup>85</sup> ICJ affirmed in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that "the power of a Head of State to act on behalf of the State in its international relations is universally recognized" (*Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 13).

<sup>86</sup> PCIJ noted in the *Legal Status of Eastern Greenland* case that: "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government ... is binding upon the country to which the Minister belongs" (see footnote 7 above), p. 71. The ICJ decision in the *Nuclear Tests* cases also establishes the capacity of the Minister for Foreign Affairs to act on behalf of the State and commit it in its international relations, *I.C.J. Reports 1974* (see footnote 10 above), pp. 266–269 (*Australia v. France*), and pp. 471–474 (*New Zealand v. France*).

<sup>87</sup> *Yearbook ... 1999* (see footnote 4 above), p. 204, para. 79.

<sup>88</sup> *Ibid.*, vol. I, 2593rd meeting, p. 187, para. 34.

<sup>89</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, p. 271, para. 2.

<sup>90</sup> *Ibid.*, reply by Argentina, para. 1.

<sup>91</sup> In 1966 the Commission noted that "when the violation of internal law regarding competence to conclude treaties would be objectively evident to any State dealing with the matter normally and in good faith, the consent to the treaty purported to be given on behalf of the State may be repudiated" (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, p. 242, para. (11) of the commentary to article 43).

<sup>92</sup> General Assembly resolution 56/83 of 12 December 2001, annex, arts. 8–9.

<sup>93</sup> See *Yearbook ... 2001*, vol. II (Part Two), p. 26, para. 76.

responsibility, although it is envisaged restrictively. In that connection, it is interesting to note the reply to the above-mentioned questionnaire by another Government, which stated that: "It could be argued that in the realm of unilateral acts, all persons who may be deemed mandated by virtue of their tasks and powers to make pronouncements that may be relied upon by third States can be regarded as having the capacity to commit the State."<sup>94</sup>

94. A second condition of validity of unilateral acts is the lawfulness of their object and purpose. A unilateral act that conflicts with a peremptory norm of international law is absolutely invalid. The invalidity of an act because it is contrary to a peremptory norm or *jus cogens* should be distinguished from the situation that exists when a unilateral act conflicts with a previous act, be it a conventional or a unilateral act. In that regard, as one author rightly points out: "When ... the subsequent act is contrary to previous norms having the character of *jus cogens*, the Court is obliged to dismiss its application, on grounds of absolute invalidity."<sup>95</sup> Thus, the State is free to formulate unilateral acts outside the framework of international law, but such acts cannot be contrary to *jus cogens* norms. This means that a State cannot avail itself of the possibility of going outside the international legal order in order to transgress peremptory legal norms.<sup>96</sup>

95. The question of the effects of a unilateral act that is contrary to a previous act, be it a conventional or a unilateral act, and in fact contrary to a norm of general international law, will be addressed below. It is well known, however, that a unilateral act should not contravene existing treaty norms, as affirmed by legal doctrine and judicial precedents. In the *Legal Status of Eastern Greenland* case, PCIJ considered that the 1931 declaration of occupation of that territory by Norway was "unlawful and invalid",<sup>97</sup> as it constituted a violation of the existing legal situation.

96. ICJ expressed a similar view in the *Continental Shelf* case, involving a dispute between Tunisia and the Libyan Arab Jamahiriya, when it stated that: "The Court would therefore observe at the outset that an attempt by a unilateral act to establish international maritime boundary lines regardless of the legal position of other States is contrary to recognized principles of international law."<sup>98</sup>

97. The final condition of validity of a unilateral act concerns the manifestation of will, which must be free of defects, as set forth in the law of treaties; the Special Rapporteur specifically addresses that issue in his third report.<sup>99</sup>

98. The regime governing invalidity is certainly one of the more complex aspects of the study of legal acts in gen-

eral. In the present context, invalidity logically refers to international legal acts, in other words, acts intended to produce legal effects at the international level in accordance with the author's intention. Prior to Vienna, this regime, of extreme importance in the domestic sphere, had not been examined in greater depth in the context of international law. Previously existing rules of customary law were embodied in the 1969 Vienna Convention. The strong influence of domestic law can also be seen in the elaboration of the rules on invalidity contained in the Vienna Conventions.

99. Consideration of the regime concerning invalidity of legal acts involves a variety of situations which reflect its complexity. It is necessary to distinguish between absolute and relative invalidity, between non-existence of the act and invalidity, between invalid acts and acts that can be made invalid, between partial invalidity and total invalidity; all of this is mentioned in some way in the law of treaties codified in Vienna. Absolute invalidity means that the act cannot be confirmed or validated; this happens when the act conflicts with a peremptory norm of international law or of *jus cogens* or when the act is formulated as a result of coercion of the representative of the State or when similar pressure is brought to bear on the State that is the author of the act, contrary to international law. Where there is relative invalidity, on the other hand, it is possible to confirm or validate the act. Such would be the case, for example, when the author State has erred or when the will has been expressed in violation of a fundamental domestic norm regarding competence to formulate the act. The author State may, of its own free will or through behaviour in relation to the act, confirm or validate it.

100. Invalidity arises in relation to conventional acts and in relation to unilateral acts and in either case can relate to both form and substance. In the former case, the specificities of each one of these acts must be taken into account. While the expression of will is the same, the unilateral nature of the latter affects whatever conception one may seek to have of the defects and causes in general that may affect its validity. The unilateral act may be considered invalid if there are defects in its formulation, essentially related to the expression of will; it may also be regarded as invalid if it conflicts with an earlier norm or a peremptory norm of *jus cogens*. In the former context, it can simply be said that the invalidity is related to the incapacity of the subject formulating the act and the incapacity of the person carrying it out, to the object and its lawfulness, and to the expression of will or defects in the declaration of intent. In the latter context, one would be dealing with the fact that the act conflicts with a peremptory norm of international law.

101. The form of the act, it should be remembered, does not affect its validity, as Judge Anzilotti pointed out in 1933, in his dissenting opinion in the case concerning the *Legal Status of Eastern Greenland*,<sup>100</sup> which view was reaffirmed by ICJ in the case concerning the *Temple of Preah Vihear* and in the *Nuclear Tests* cases.

<sup>94</sup> *Yearbook ... 2000* (see footnote 89 above), reply by the Netherlands, p. 272.

<sup>95</sup> Verzijl, "La validité et la nullité des actes juridiques internationaux", p. 321.

<sup>96</sup> Barberis, "Los actos jurídicos unilaterales como fuente del derecho internacional público", p. 112.

<sup>97</sup> *P.C.I.J.* (see footnote 7 above), p. 75.

<sup>98</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 66, para. 87.

<sup>99</sup> See footnote 4 above.

<sup>100</sup> *P.C.I.J.* (see footnote 7 above), p. 71.

102. In the case concerning the *Temple of Preah Vihear*, ICJ stated:

Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.<sup>101</sup>

103. In the *Nuclear Tests* cases, ICJ stated that:

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.<sup>102</sup>

104. In his third report<sup>103</sup> the Special Rapporteur presented some of the causes of invalidity, which gave rise to comments both in the Commission and by representatives of States in the Sixth Committee; they will all have to be considered again in order to clarify the state of deliberations on this topic and to facilitate progress this year. Implementation of the Vienna rules was mentioned by some representatives in the Sixth Committee. It was pointed out, in this context, that invalidity of unilateral acts was an area in which it was acceptable to apply, *mutatis mutandis*, the norms of the 1969 Vienna Convention; according to another view, it would be dangerous to rigorously apply the Vienna norms to unilateral acts in view of the distinctive nature of such acts.<sup>104</sup>

105. The causes relating to invalidity of unilateral acts were dealt with in draft article 5 which was referred to the Working Group for further consideration. Some of them relate to the expression of will, while others refer to conflict with a peremptory norm or a decision of the Security Council.

106. As regards defects in the expression of will, the issue poses no serious difficulties. The rules set forth in the 1969 Vienna Convention apply to a large extent to the expression of unilateral will.

107. As regards unilateral acts that conflict with a peremptory norm of international law or *jus cogens*, at the fifty-second session of the Commission, in 2000, several views were expressed concerning the importance of this cause of invalidity and it was indicated, *inter alia*, that such acts were invalid *ab initio*.

108. As regards unilateral acts that conflict with a decision of the Security Council, it was pointed out that, under Article 25 of the Charter of the United Nations, Members States were already bound to carry out the decisions of

the Council. It was also suggested that the norm contained in Article 103 of the Charter could also apply to unilateral acts, so that obligations contracted under the Charter should take precedence over all other obligations deriving from a treaty or a unilateral act.<sup>105</sup>

109. The possibility that a State might lose the right to invoke a cause of invalidity or a ground for putting an end to the act by its behaviour, whether implicit or explicit, deserves special comment; these issues have been tackled already both in legal doctrine and in judicial practice in the context of the law of treaties, which must be considered as a guide. In the view of some: "Following the conclusion of a treaty the conduct of the Parties becomes part of the agreement. This creates an obligation that makes it possible to overcome the initial obstacles to implementation of the treaty: defects in the agreement." The author goes on to say that: "There is no defect—or almost no defect—in an agreement which cannot be overcome by the subsequent conduct of the Parties. The law of nations acknowledges that Contracting Parties may, by their subsequent attitude, regularize a treaty that is invalid *ab initio*."<sup>106</sup> There are also judicial precedents dealing with this issue. In the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, ICJ ruled that Nicaragua could not challenge the award because it had applied the treaty that contained the arbitral clause. The Court stated that: "In the judgment of the Court, Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award."<sup>107</sup>

110. The issue that arises in the context of unilateral acts is somewhat different, and in this context a distinction would have to be made according to the legal effects of the act. The situation might be different according to whether a protest, a recognition, a promise or a renunciation is being dealt with. Questions arise as to whether it is possible to include a common clause, applicable to all unilateral acts. In the case of a renunciation, for example, the author State can invoke the invalidity of the act if it considers that the conditions required for the declaration or act to be considered valid have not all been met. In the case of a promise the same comment could apply. A unilateral act whereby a State undertakes to assume a particular conduct in the future may be invalid if the author State invokes a cause of invalidity. In the case of a protest, the issue could be approached from a different angle. While the author State can hardly invoke the invalidity of the act, it might be possible for the State to which the act is directed to do so.

111. In view of all this, it would have to be considered whether the author State or the State that can invoke

<sup>105</sup> *Ibid.*, para. 277.

<sup>106</sup> Cot, "La conduite subséquente des Parties à un traité", p. 658. Cahier also points out that "it is acknowledged that the State can confirm a treaty ... The principle that a party cannot maintain a legal position that is in contradiction with its past conduct, makes up in part for the lack of prescription in international law" ("Les caractéristiques de la nullité en droit international et tout particulièrement dans la Convention de Vienne de 1969 sur le droit des traités", p. 677).

<sup>107</sup> *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 213.

<sup>101</sup> *Temple of Preah Vihear, Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31.

<sup>102</sup> *I.C.J. Reports 1974* (see footnote 10 above), pp. 267–268, para. 45 (*Australia v. France*), and p. 473, para. 48 (*New Zealand v. France*).

<sup>103</sup> See footnote 4 above.

<sup>104</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513), paras. 271–272.

the invalidity of the act can lose the right to do so by its conduct or its attitude, whether implicit or explicit. A State that formulates an act containing a promise and acts expressly or behaves in such a manner as to suggest that it accepts that the act is valid cannot later on invoke the invalidity of the declaration. As in the context of the law of treaties—article 45 of the 1969 Vienna Convention—the possibility might be considered of drafting a rule that would be applicable to unilateral acts, although it would have to be determined whether a rule of this nature could be applicable to all unilateral acts.

112. Furthermore, it is important, also in the context of the non-application of unilateral acts, to refer to two other issues—termination and suspension of the act—which are considered and resolved in relation to treaties in the 1969 Vienna Convention, particularly articles 54–64. In the context of unilateral acts, due to the characteristics of such acts, the situation is far more complex. The question is whether it is possible to transfer this regime to the context of unilateral acts and whether it is possible to speak of the “end” and “suspension” of such acts. Once again, this raises the difficulty of transferring the Vienna rules to the regime that one is trying to elaborate. Also in this context, there is the question of the different kinds of acts, according to their legal effects. A unilateral act containing a promise must be looked at differently from a unilateral act whereby a State renounces or recognizes a particular situation. In chapter II of the present report this issue will be looked at in greater depth.

113. Reference must also briefly be made to another aspect related to invalidity, the treatment of which is also based on the Vienna regime: domestic law concerning competence to formulate unilateral acts and the particular restriction of the power to express will. According to the Vienna regime, an act may be invalid if it is formulated in violation of a provision of domestic law concerning competence to formulate such acts, but this cause may be invoked only if the violation is manifest and if it concerns a norm of fundamental importance to the domestic law of the State.

114. Although the first issue seems applicable to unilateral acts, the second presents difficulties. Constitutions and domestic legal orders in general refer to treaties and international agreements but not to unilateral acts, which are not considered in the same way in that context. This issue will also be tackled at greater length in chapter II of the present report.

115. Lastly, it is noted that, as regards form, criticisms were expressed regarding the presentation of the causes of invalidity in a single draft article in the third report of the Special Rapporteur,<sup>108</sup> as opposed to the formulation in the Vienna regime where articles 46–53 contain separate provisions for each cause. The new presentation of the causes in separate provisions makes it necessary to introduce the requisite changes. The new draft articles may serve as a basis for discussion in the Working Group which will have to be set up during this session.

<sup>108</sup> See footnote 4 above.

116. The new draft articles 5 (a) to 5 (h) present within brackets, as a desirable alternative, a reference to the State [or States] that formulated a unilateral act. This alternative will reflect expressly the invocation of invalidity in the case of unilateral acts having a collective origin. If this alternative is accepted it might also be desirable to reflect just as expressly in the definition in article 1, the possibility of a collective unilateral act referred to in the said draft article as the unequivocal expression of will of “one or more States” or of “one or more other States”. Another possibility would be to explain in the commentaries being prepared on article 1, that it relates to unilateral acts which may have an individual or collective origin and that this, in the context of article 5, may enable one of the author States to invoke the cause of invalidity.

117. The new wording specifies that it is possible to invoke a defect in “the expression of will” and absolute invalidity if the act conflicts with a peremptory norm of international law or *jus cogens* and if it is a result of coercion of the person formulating it on behalf of the State.

118. Lastly, it will be noted that it also specifies who can invoke the invalidity of unilateral acts. One case would be when the invalidity is relative; another would be when the unilateral act is invalid because it is contrary to a peremptory norm of international law or of *jus cogens* or because it was formulated as a result of coercion of the State, contrary to international law. In the first case it is understood that only the State or States that formulated the act could invoke the invalidity of the act, whereas in the latter case any State could invoke its invalidity.

119. The draft article could read as follows:

*“Article 5 (a). Error*

“A State [or States] that formulate[s] a unilateral act may invoke error as a defect in the expression of will if [said] act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its [expression of will] [consent] to be bound by the act. The foregoing shall not apply if the author State [or States] contributed by its [their] own conduct to the error or if the circumstances were such as to put that State [or those States] on notice of a possible error.

*“Article 5 (b). Fraud*

“A State [or States] that formulate[s] a unilateral act may invoke fraud as a defect in the expression of will if it has/they have been induced to formulate an act by the fraudulent conduct of another State.

*“Article 5 (c). Corruption of the representative of the State*

“A State [or States] that formulate[s] a unilateral act may invoke a defect in the expression of will if the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State.

“Article 5 (d). *Coercion of the person formulating the act*

“A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him.

“Article 5 (e). *Coercion by the threat or use of force*

“A State [or States] that formulate[s] a unilateral act may invoke the absolute invalidity of the act if the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

“Article 5 (f). *Unilateral act contrary to a peremptory norm of international law (jus cogens)*

“A State may invoke the absolute invalidity of a unilateral act formulated by one or more States if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.

“Article 5 (g). *Unilateral act contrary to a decision of the Security Council*

“A State may invoke the absolute invalidity of a unilateral act formulated by one or more States if, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council.

“Article 5 (h). *Unilateral act contrary to a fundamental norm of the domestic law of the State formulating it*

“A State [or States] that formulate[s] a unilateral act may invoke the invalidity of the act if it conflicts with a norm of fundamental importance to the domestic law of the State formulating it.”

### C. Interpretation of unilateral acts

120. In the fourth report<sup>109</sup> the Special Rapporteur dealt with the interpretation of unilateral acts, which, while different from the formulation of such acts in that it falls within the context of their application, may be subject to common rules, that is, rules which can be applied to all unilateral acts, irrespective of their classification, content and legal effects.

121. When the topic was taken up at the fifty-third session of the Commission, in 2001, some members felt that consideration of the rules of interpretation was premature and that they should be dealt with at a later stage in the elaboration of the draft. Nonetheless, the Special Rapporteur is of the view that it is useful to consider them in this phase of the Commission’s study of the topic, particularly since, as he has suggested, the rules of interpretation can be elaborated separately from the content and legal effects of unilateral acts.

122. The reference to Vienna is always the subject of commentaries. In the case of interpretation, some members agreed that, in view of the fundamental differences between conventional and unilateral acts, the provisions of the Vienna regime, while important, should be adapted to the specific character of unilateral acts. This view is not shared by all members, some of whom believe that the provisions of the Vienna Conventions on the law of treaties are too vague to be applied to unilateral acts.

123. In this connection, the most recent opinion given by ICJ on declarations of acceptance of its compulsory jurisdiction should be noted. Although it might not be “of a strictly unilateral nature”,<sup>110</sup> it is a unilateral declaration from the formal point of view and hence, as the Court itself indicated, a *sui generis* declaration. This was in connection with the examination by the Court of the declaration of acceptance of jurisdiction in the *Fisheries Jurisdiction* case, which, in its 1998 preliminary decision, indicated that:

A declaration of acceptance of the compulsory jurisdiction of the Court ... is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and “makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance” (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, p. 291, para. 25).<sup>111</sup>

124. ICJ indicated, with regard to the interpretation of such declarations, that:

The régime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties ... Spain has suggested in its pleadings that “[t]his does not mean that the legal rules and the art of interpreting declarations (and reservations) do not coincide with those governing the interpretation of treaties”. The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court’s jurisdiction.<sup>112</sup>

125. In 2001, some delegations in the Sixth Committee expressed support for the Special Rapporteur’s approach of adopting the rules of interpretation contained in the 1969 Vienna Convention. However, doubts were also expressed that this would be feasible, given the specific nature of unilateral acts. Some felt that the starting point should be the interpretative needs of the unilateral act, followed by a finding of whether such needs would be well served by the appropriate rules of the Convention.<sup>113</sup> Others felt that the intention of the author State should be a main criterion, and thus greater emphasis should be given to preparatory work which offered a clear indication of the intent.<sup>114</sup> Members also said that the object and purpose of the unilateral act, which the

<sup>110</sup> See footnote 57 above.

<sup>111</sup> *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 453, para. 46.

<sup>112</sup> *Ibid.*

<sup>113</sup> Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-sixth session (A/CN.4/521), para. 114.

<sup>114</sup> *Ibid.*, para. 115.

<sup>109</sup> *Ibid.*

Rapporteur considered fundamentally treaty-based, should be taken into account for the purposes of interpretation.<sup>115</sup>

126. It should be recalled, and on this there is broad agreement, that the general rule of interpretation of the unilateral act should be based on good faith, and on its conformity with the ordinary meaning attributed to the terms of the declaration, in its context and in the light of the author's intent.

127. In the *Fisheries Jurisdiction* case, ICJ, in analysing the declarations of acceptance of its jurisdiction, clearly indicated that it interpreted the relevant words of a declaration in a natural and reasonable way, having due regard to the intention of the State concerned, which may be deduced not only from the text of the relevant clause, but also from the context in which that clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.<sup>116</sup>

128. Unilateral acts, by their very nature, should be interpreted differently from conventional acts. On the one hand, as indicated in the fourth report submitted by the Special Rapporteur: "The interests of legal certainty require that the main criterion should be the will expressed in the text ... and, furthermore, as ICJ itself pointed out in the *Nuclear Tests* case referred to above, such acts should be interpreted restrictively."<sup>117</sup> Some Governments also indicated that the restrictive criterion should predominate in the interpretation of the unilateral act.<sup>118</sup> In general, legal doctrine supports this view. Thus, for example, Grotius says that: "The measure of correct interpretation is the inference of intent from the most probable indications."<sup>119</sup>

129. The purpose of the interpretation is to determine the intention of the State, which can be deduced from the declaration formulated and other elements considered, such as the preparatory work and the circumstances at the time of the formulation of the act. The term "intention" is fundamental. The display of will is the necessary expression of the formulation of the act, while intention is the meaning which the author intends to give to the act. Intention, however, would not be sufficient in the determination of the act, since the said intention must be known to the addressee or addressees, or at least they must have had an opportunity to become aware of it.

130. Article (a), paragraph 2, proposed in 2001, specified that the context comprised "in addition to the text, its preamble and annexes".<sup>120</sup> On this, it must be specified that there were some doubts as to the preambular part but, in the view of the Special Rapporteur, the elaboration of a legal act, whether it is a conventional act or a unilateral act, can be preceded by a preambular part, as

illustrated by the 1957 Declaration by Egypt on the Suez Canal (para. 6 above) and, less clearly, the declarations by France considered by ICJ in the *Nuclear Tests* cases, referred to in previous reports. The same assessment can be made with regard to the annexes. There is no reason why a unilateral act cannot be followed by or composed of annexes, in addition to its operative part.

131. The phrase "given to the terms of the declaration in their context and in the light of the intention of the author State" (art. (a), para. 1) constitutes an important reference in establishing the general rule of interpretation of these acts. Consideration of the context, far from being contradictory, complements the unilateral act for the purposes of interpretation.

132. Recourse to the preparatory work submitted by the Special Rapporteur in 2001 in the draft he submitted to the Commission at that time<sup>121</sup> was questioned by some members who felt that it was not possible and that, moreover, access to it would be difficult, considering that it might include the internal correspondence of ministries of foreign affairs or other organs of State. While consideration of the preparatory work from a perspective other than that of the Vienna regime is important in this context, the Special Rapporteur believes that, given the observations formulated at the previous session, the Commission could reconsider this case in order to determine whether or not such work, given the difficulties in obtaining or having access to it—which, in fact, depends on the unilateral decision of the requested State—could be considered in the draft articles on supplementary means of interpretation, as set forth in the relevant article of the 1969 Vienna Convention. This reference is therefore left between square brackets in the revised version of the draft submitted in the fourth report on unilateral acts of States.<sup>122</sup>

133. With reference to the "object and purpose" of the act, the Special Rapporteur continues to believe that both terms have a fundamentally treaty-based connotation and, as such, there should be no reference to them in the rules of interpretation of unilateral acts. In this case, as proposed in the draft article submitted in 2001, unilateral acts should be interpreted "in the light of the intention of the author State" (art. (a), para. 1).

134. Finally, although this is not reflected in the draft article on interpretation, it can be said that the restrictive criterion must predominate in the exercise of the interpretation of such acts, as upheld by legal doctrine, affirmed by Governments and indicated by case law. In this latter context, it is to be noted that—although it was in reference to promises only—ICJ in the *Nuclear Tests* cases concluded: "When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."<sup>123</sup>

<sup>115</sup> *Ibid.*, para. 116.

<sup>116</sup> *I.C.J. Reports 1998* (see footnote 111 above), p. 454, paras. 47 and 49.

<sup>117</sup> *Yearbook ... 2001* (see footnote 4 above), p. 132, para. 126.

<sup>118</sup> Commentary by Argentina (see footnote 89 above).

<sup>119</sup> Grotius, *De jure belli ac pacis, libri tres* (book II, chap. XVI), in *The Classics of International Law*, p. 409.

<sup>120</sup> *Yearbook ... 2001* (see footnote 4 above), p. 135–136, para. 154.

<sup>121</sup> *Ibid.*

<sup>122</sup> See footnote 4 above.

<sup>123</sup> *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 44 (*Australia v. France*), and p. 473, para. 47 (*New Zealand v. France*).

135. The following draft article is the version likely to be considered by the Commission at its fifty-fourth session, in 2002:

“INTERPRETATION

“*Article (a). General rule of interpretation*

“1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

“2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

“3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

“*Article (b). Supplementary means of interpretation*

“Recourse may be had to supplementary means of interpretation, including [the preparatory work and] the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

“(a) Leaves the meaning ambiguous or obscure; or

“(b) Leads to a result which is manifestly absurd or unreasonable.”

**D. Classification of unilateral acts and structure of the draft articles**

136. In both the Commission and the Sixth Committee, there has been a significant tendency to consider that it is not possible to apply common rules to all unilateral acts, even though, as the Special Rapporteur has noted, this might be possible with regard to some aspects, such as those relating to their formulation and particularly their elaboration: definition, capacity to formulate acts, qualified persons, conditions of validity and causes of invalidity, which are related to the manifestation of will that is common to all acts, irrespective of their content, and even, as has been seen above in the context of their application, of the rules relating to the interpretation of such acts.

137. The Special Rapporteur considers that the classification of these acts goes beyond a simple academic exercise and appears to be fundamental for structuring the draft articles, since grouping the acts on the basis of their effects or any other criteria would simplify that task. As he has said, this requires valid criteria to be established and that is clearly a complex matter, as can be seen from his fourth report<sup>124</sup> in which he examined the matter at length, in the light of a large body of literature, concluding

<sup>124</sup> See footnote 4 above.

ing that these acts could be grouped into two major categories, around which the draft articles governing their functioning could be structured. Otherwise, in view of the diversity of legal effects of the many kinds of unilateral acts, it would be impossible to structure a set of draft articles without the risk of excluding some acts. As will be recalled, the Special Rapporteur indicated that unilateral acts could be grouped into two principal categories: acts by which the State assumes obligations and unilateral acts by which the State reaffirms its rights. There is fairly broad agreement that these acts cannot impose obligations on third States that have not taken part in their elaboration, without the latter’s consent. However, the fact cannot be overlooked that some authors maintain that this possibility is feasible. According to this point of view, a State can formulate an act in order to establish rights and, consequently, impose obligations on third States, an issue that has been examined in this report and in previous ones.

138. Certainly, opinions regarding this exercise were not unanimously favourable, and they were even less so with regard to the criteria that might be established to group these acts together and, on that basis, structure the draft articles envisaged by the Commission. Several members of the Commission have indicated that classification is neither an easy nor a reliable task, and even that it is too academic, whereas the issue deserves a more practical approach. Moreover, one member considered that, besides lacking in importance, classification created unnecessary confusion. It was indicated, and this is true, that case law has attached greater importance to determining whether an act was binding in nature, than to the type of act in question.

139. During the debate during the fifty-third session, in 2001, some members indicated that certain acts could belong to both categories; these included declarations of neutrality, by which a State not only assumed obligations but also reaffirmed its rights, or a declaration of war. Clearly, it is not easy to qualify some acts and place them in a single classification. With regard to this assertion, it is worth pondering whether declarations of neutrality can constitute autonomous unilateral acts or whether they constitute waivers and promises; in other words, whether their legal effects are similar to those of waivers and promises.

140. Indeed, when a State formulates a declaration by which it waives a right, it may at the same time be recognizing a legal claim of another State and promising to behave in a certain way in the future. A declaration of neutrality, which should not be classified as a simple act but rather as a mixed act by which, as mentioned above, a State could assume obligations while reaffirming rights, clearly illustrates the difficulties posed by the classification and qualification of unilateral acts.

141. Members of the Sixth Committee also expressed divergent opinions about the classification of unilateral acts. Some were of the view that classification is unnecessary or valid only from an academic point of view, while others considered it to be an important step in the elaboration of rules on the topic. It was also suggested that a

classification could be elaborated provisionally based on the criterion of legal effects.

142. A decision must be taken on this matter in order to deal with the topic because, as the Special Rapporteur indicates, there appears to be general agreement within the Commission and the Sixth Committee that it is not possible to elaborate common rules applicable to all acts and that, accordingly, in view of the diversity of the acts and their legal effects, the rules applicable to the different acts or the different categories of acts must be grouped together.

143. For several reasons, it does not seem possible to have recourse to an extreme and excessively broad conception in the sense that groups of rules could be elaborated for each of the material acts to which the literature refers most frequently, for several reasons: first, as indicated, the diversity of these acts and their uncertainties, and secondly, the impossibility of qualifying them easily, which to some extent has implications for their legal effects.

144. The Commission has held (and this can be seen in the questionnaire prepared in 1999) that the most important unilateral acts are promise, recognition, waiver and protest. Thus, the reply from Argentina indicated that: "A clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest."<sup>125</sup> This assumption is useful, but it still does not resolve the problem of the diversity of unilateral acts and

<sup>125</sup> *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/511, p. 275, para. 1.

how they may be determined easily. There are no specific criteria for defining them, nor is there a unanimous opinion on all their aspects—nor even, it appears, on the existence of a determinate number of acts. To accept such an idea would imply considering an excessively broad structure, one even impossible to establish definitively, owing to the uncertainty that apparently exists with regard to material acts.

145. Classification is undoubtedly important, even though it is a complex task, not devoid of difficulties. The Special Rapporteur hopes that the Commission will continue to examine the issue and that a decision will be taken during the current year's session.

146. Although discussions should continue on the question of classification, it is possible to continue on the basis of a conclusion that could be reached for different reasons, including those of a practical nature: some rules, including those relating to the formulation of the act and its interpretation, may be regarded as common to all acts.

147. Acts are a unilateral manifestation of will, an element that appears to be essential, even though a final definition of such acts has not been determined. The manifestation of will, in addition to being common to all such acts, is a single one. All the unilateral acts that are of interest derive from that manifestation, and that characteristic allows them to be the subject of common rules. Thus, draft articles have been submitted on definition, the capacity of States, persons qualified to formulate the act, subsequent confirmation of the act, factors vitiating consent and even a general regime governing conditions of validity and causes of invalidity of the act.

## CHAPTER II

### Consideration of other questions that may give rise to additional draft articles that can be applied to all unilateral acts

148. There are other aspects of the topic that can be the subject of rules applicable to all unilateral acts that meet the definition used thus far, regardless of their content or legal effect: observance of unilateral acts, which leads again to consideration of the well-established rule of the law of treaties, *pacta sunt servanda*, and the need for norms that establish the binding nature of unilateral acts; the application of such acts in time, which raises, among other questions, the issue of the non-retroactivity of an act; and, lastly, the application of unilateral acts in space.

149. As has often been noted, while it would seem possible to formulate rules that are applicable to all unilateral acts regardless of their content or material aspects, and especially in respect of their elaboration or formulation, this does not seem to be the case when dealing with aspects that call for different treatment owing to the diversity of such acts, such as matters relating to an act's legal effects. If one takes as a reference those unilateral acts that are considered most common—protest, renunciation or recognition—it will be seen that, while their

form is the same, their legal effects may differ. It has been suggested that promises might be studied as unilateral acts for which specific rules could be elaborated to regulate their functioning. Part two of the draft articles, on rules applicable to unilateral acts by which States assume obligations, is offered for the Commission's consideration on this basis. This part looks at the revocation, modification, extinction and suspension of unilateral acts. A general reference is also made to conditional unilateral acts, even though they are not included as a separate category in this part.

#### A. General rule concerning observance of all unilateral acts

150. In the law of treaties, as reflected in article 26 of the 1969 Vienna Convention, the *pacta sunt servanda* rule governs or underlies the binding nature of the treaty. This rule needs no further commentary. It has been amply considered in doctrine together with the principle of good faith and has been considered in some cases by

international tribunals,<sup>126</sup> a topic which the Special Rapporteur touched on briefly in his first report.<sup>127</sup>

151. The question of the nature of unilateral acts and the basis for their binding nature has been discussed in doctrine and in the Commission. As noted in the first report on unilateral acts of States, the fundamental rule of the law of treaties, *pacta sunt servanda*, from which their binding nature derives cannot be easily assimilated by or transferred to unilateral acts; yet it ought to be possible to consider the establishment of a similar norm that would provide a basis for unilateral acts if they are considered to be binding and to have legal effects.

152. Consideration of the binding nature of unilateral acts has generated a more important controversy in doctrine, although in recent years the discussion would seem to reflect a tendency to consider such acts as binding on a State when they are formulated in accordance with the requisite criteria. As has been noted: "During the first phase, which occurred during the 1960s, a unilateral undertaking was understood as being either an offer that acquired normative value once it was accepted by the State or States to which it had been addressed, or as a counter-offer by the other State."<sup>128</sup> There are of course those who contend that since such acts are not contemplated in Article 38 of the ICJ Statute such a view is difficult to uphold. In the Special Rapporteur's view, this flexible provision must evolve along with society and international relations and be adapted to conform with reality.

153. Some authors, who tend to be consensualists, reject the binding nature of such acts, concluding that they are acts of a political nature.<sup>129</sup> What is more, some authors consider that a promise, even though unilateral as to form, cannot be binding if it is not accepted by the addressee and cite as grounds for this argument the *Lamu Island* arbitral decision (1889), a dispute involving Germany and the United Kingdom. The declarations by the Sultans of Zanzibar were not binding. The arbitrator in that decision held that "in order to transform this intent into a unilateral promise that is equivalent to a convention, the agreement of wills must have been manifested by the express promise of one of the parties, together with the acceptance of the other".<sup>130</sup> Some consider a unilateral promise to be unnecessary, since the full legal effect can be conferred through incorporation in a conventional context. Indeed, it has been pointed out by some that similar institutions, such as acquiescence or estoppel, may be used to the same effect.

154. The voluntarists, on the other hand, accept the binding nature of a unilateral act and find its basis in the expressed will of the formulating State, an argument that has its basis in the *pollicitatio* of Roman law. Some authors<sup>131</sup> maintain that the basis of unilateral acts is to be found in the sovereign will of States and in the principle of *promissorum implendorum obligatio*, which derives from the *pacta sunt servanda* rule. Generally speaking, the binding nature of unilateral acts would seem to have its basis in good faith.<sup>132</sup> If a unilateral act is undertaken with this intention, then there is no reason why such an act cannot be considered binding from this point of view. Some authors have questioned the binding nature of the unilateral promise,<sup>133</sup> while others consider that "there is no logical reason not to confer [on a promise] a nature identical to that of a unilateral promise".<sup>134</sup> In any event, as many have noted, such acts are binding: "It is in this confidence in the given word that the basis of the promise's validity is to be found."<sup>135</sup>

155. The fact that the different institutions in international law that regulate the behaviour of States in their international relations are so similar sometimes poses serious problems when endeavouring to classify a particular legal act as unilateral. Thus it can be seen that a promise is sometimes confused with estoppel, which in the view of some makes it impossible to modify a previous position. One could say that the effect of estoppel is exactly the same as that of a promise. It will be recalled, however, that there is a fundamental difference between the two. For estoppel to produce effects, a third State must have acted on the basis of that behaviour. In the present instance this means that the author of the declaration has made an undertaking, but also that the third State believes in good faith that that undertaking is genuine. A promise may also be confused with a stipulation according rights to third States, which is referred to in article 36, paragraph 1, of the 1969 Vienna Convention. The unilateral act of interest here, as noted above, is a heteronormative act, that is to say, a manifestation of will by which one or more subjects of international law create norms that are applicable to third parties which can have rights conferred on them even though they did not participate in the elaboration of the act. The difference here, it must be recalled, is that while the act in question may appear to be a unilateral act of conventional origin, its legal effects are produced only when it is accepted by the addressee. One might even say that a stipulation in favour of a third party constitutes an offer that requires an acceptance, a fact that makes it conventional in nature and distinguishes it from a

<sup>126</sup> See, for example, *Rights of Nationals of the United States of America in Morocco, Judgment, I.C.J. Reports 1952*, p. 212, and the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 91 (joint dissenting opinion).

<sup>127</sup> See footnote 3 above.

<sup>128</sup> Weil, "Le droit international en quête de son identité: cours général de droit international public", p. 156.

<sup>129</sup> Garner, "The international binding force of unilateral oral declarations".

<sup>130</sup> Arbitral award of Baron Lambertmont in the *Lamu Island* dispute, in Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. V, p. 4942.

<sup>131</sup> Degan, *Sources of International Law*.

<sup>132</sup> Reuter, *op. cit.*, 7th ed., p. 164; Guggenheim, *Traité de droit international public*, p. 280; Suy, *op. cit.*, p. 151; and Sicault, who noted that: "One may therefore conclude, at the close of this review, that good faith constitutes the basis of the binding nature of unilateral undertakings, provided that this notion is not construed to mean solely a duty of loyalty but also the protection of legitimate confidence, which is indispensable to the security of international relations, where emphasis must ultimately be placed" ("Du caractère obligatoire des engagements unilatéraux en droit international public", p. 686).

<sup>133</sup> Quadri, "General course", p. 364.

<sup>134</sup> Venturini, "The scope and legal effects of the behaviour and unilateral acts of States", pp. 401-402.

<sup>135</sup> Suy, *op. cit.*, p. 151.

unilateral act, which, like a truly unilateral promise, requires no acceptance or any reaction signifying acceptance from the addressee.

156. Once again, the acts that have been viewed as typifying the unilateral acts covered by this project of codification and progressive development are not always unilateral in the sense that is of interest here. Thus, for example, recognition may be conventional in nature, as is the case, among many others, of the recognition of the United States under the Treaty of Peace, signed in Paris on 3 September 1783, which was concluded between Great Britain and the United States.<sup>136</sup>

157. ICJ has also recognized the binding nature of such acts, even though it refers to a particular type, the promise. For the Court, the declarations by the French authorities produced their effect automatically, without the need for any tacit acceptance thereof. In its 1974 decisions in the *Nuclear Tests* cases the Court concluded that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.<sup>137</sup>

158. The source of the obligation in the case of a promise is the promise itself, the unilateral act that has been formulated, and not the explicit or tacit agreement of the addressee. Consequently the basis for this binding nature is to be found, as in the case of treaties, in good faith. Here ICJ clearly states:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.<sup>138</sup>

159. If other unilateral acts are looked at, it can be seen that they are similarly accorded a binding character both in doctrine and in practice. Thus, for example, it will be seen that the recognition of States produces legal effects and imposes specific obligations on the State formulating the act. Attention is drawn here to the declaration made by the representative of France in a case before PCIJ during an open session held on 4 August 1931, in which he affirmed that: "Recognition of [a State's] independence implies, on the one hand, that the acts of its Government

are considered binding under international law on the State being recognized and, on the other hand, that the rules of international law will be applied to that State."<sup>139</sup>

160. Renunciation is another unilateral act—although nothing prevents it from having a conventional character—which has specific legal effects. Just as a State may voluntarily assume unilateral obligations, so can it voluntarily renounce a law or a legal claim. Renunciation, which, as both doctrine and jurisprudence have made clear, is not presumed<sup>140</sup> but must be expressed,<sup>141</sup> is a unilateral act by virtue of which a State voluntarily gives up a subjective right. The legal effect of renunciations has been considered by international tribunals, which ascribe to them a binding character, as was done in the cases related to the Ihlen declaration (para. 6 above), by which Norway promised, recognized and even renounced in favour of Denmark; while this renunciation involved a transfer rather than an abdication, which to some authors might constitute a treaty relationship, such an affirmation is unacceptable, since it undermines the unilateral character of the act. PCIJ considered this question and issued an opinion on it. In its decision of 11 November 1912 in the *Russian Indemnity* case between Russia and Turkey involving debt and the payment of interest, the Court attributed a binding character to Russia's renunciation of interest payments on its debt to Turkey.<sup>142</sup>

161. The unilateral assumption of new obligations without the need for the addressee's acceptance is possible under international law. A State may assume obligations by means of a promise, a recognition or a renunciation independently of their acceptance by the addressee, which distinguishes these, as noted earlier, from other, similar institutions. In the first case, it has been noted that the State making a declaration, and thus a promise in the sense herein understood, assumes the obligation to act in conformity with the terms of that declaration, which could thus be considered to have the same character as a norm incorporated in a treaty.<sup>143</sup> By recognition, the State that accepts a legal modification assumes obligations that are implied by this act—for example, the concrete obligations that arise from recognition of a State. The recognizing State thereafter considers a specific entity to be an entity having legal capacity and legal personality under international law, even though it may already have this status conferred on it by the reasons that make it a subject of international law.

162. It is important for the draft articles under study that a provision be elaborated that reflects the binding nature of unilateral acts. This provision as it stands in the proposed text speaks of any unilateral act "in force", which

<sup>136</sup> Bevans, ed., *Treaties and Other International Agreements of the United States of America 1776–1949*, p. 8.

<sup>137</sup> *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 43 (*Australia v. France*), and p. 472, para. 46 (*New Zealand v. France*).

<sup>138</sup> *Ibid.*, p. 268, para. 46, and p. 473, para. 49.

<sup>139</sup> *Customs Régime between Germany and Austria, P.C.I.J., Series C, No. 53*, p. 569; and Kiss, *Répertoire de la pratique française en matière de droit international public*, p. 4 (quoted by Torres Cazorla, *loc. cit.*, p. 55).

<sup>140</sup> See the arbitral award of 10 June 1931 in the *Campbell case*, UNRIAA (see footnote 68 above), p. 1156; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 22; and "Lotus", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18.

<sup>141</sup> Jacqué, *op. cit.*, p. 342.

<sup>142</sup> UNRIAA, vol. XI (Sales No. 61.V.4), p. 446; English translation in *American Journal of International Law*, vol. 7, No. 1 (1913), p. 200.

<sup>143</sup> Sørensen, "General principles of international law", p. 57.

refers to the time of its formulation, that is, to the time when the legal effects of the act become operative and the act becomes opposable against the author State or States by the addressee or addressees. While the term “in force” has its origin in treaty language and would appear to be limited to that sphere, it can also be applied to unilateral acts. Entry into force must be understood as the time a particular legal act begins to produce its effects. From here on it will be necessary to distinguish between the binding nature of an act, which in turn implies its enforceability and opposability, and the act’s applicability, which may, of course, occur at a different time. In any event, this question will be dealt with in greater detail further on. On the basis of the foregoing, and adhering somewhat closely to the Vienna Conventions on the law of treaties, the following draft article is hereby proposed:

“*Article 7. Acta sunt servanda*

“Any unilateral act in force shall obligate the State or States formulating it and must be implemented in good faith.”

**B. Application of a unilateral act in time**

163. The question of the application of legal acts, particularly treaties and unilateral acts, in time is not limited to non-retroactivity, which has been dealt with in a clearly formulated principle that will be considered later. Application in time presupposes taking into account both the entry into force or the commencement of the effects of the unilateral act, which is in turn related to opposability and enforceability, and its application, which may take place prior to this time or even after the act has ceased to produce its legal effects, so long as the author State has declared or in some way manifested a distinct intention.

164. In the area of treaty law, the principle that governs the application of a treaty is that of non-retroactivity. Indeed, treaties are not applied to prior situations unless the parties so agree, as clearly stipulated in article 28 of the 1969 Vienna Convention. This principle, which is applicable to all legal acts, is widely referred to in doctrine and in jurisprudence. Thus it has been said by some that: “The principle of non-retroactivity is a general principle applicable to all international legal acts.”<sup>144</sup> In the *Ambatielos* case, ICJ pointed out that it was impossible to consider that a treaty had been in force prior to the exchange of ratifications and that, in the absence of a special clause or object necessitating retroactive application, it would be impossible to say that one of its provisions had previously been in force. Specifically, the Court noted that accepting the Greek argument would mean

giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty ... shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.<sup>145</sup>

<sup>144</sup> Daillier and Pellet, *Droit international public*, p. 219, para. 140.

<sup>145</sup> *Ambatielos, Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 40.

165. It would seem possible to apply to unilateral acts the principle of the law of treaties that holds that a treaty can be applied only in relation to events or questions that arise or exist while the treaty is in force unless the parties have a different intention, either explicit or implicit. The will of a State, the intention expressed in its declaration or the intention that can be perceived from an interpretation of the declaration is fundamental to the application of the act in time. A unilateral act cannot be applied to prior situations or events occurring prior to its formulation unless the author State had a different intention in mind. The principle of the non-retroactivity of a legal act is not absolute. A State may derogate from it and voluntarily change the scope of temporal application of its act.

166. There is no need to draw a different conclusion in the case of unilateral acts. In principle, a unilateral act begins to produce its effects at the time it is formulated. Recognition, for example, as is well documented in doctrine, begins to have legal effect the moment the act of recognition is formulated, and it does not, in principle, have a retroactive character, a fact that has been emphasized in jurisprudence, which says that it “is not a principle accepted by the best recognized opinions of authors on international law, as is alleged, that the recognition of a new State relates back to a period prior to such recognition”.<sup>146</sup>

167. As noted above, one must distinguish between the problem of the application of the act in its operative form, which can refer to events or situations occurring prior to its formulation or events and situations occurring after its entry into force, and its entry into force, a term of art in treaty law that may be applied to unilateral acts. The question of entry into force or determination of the moment when an act begins to produce legal effects will be considered in chapter III of this report.

168. An article on application in time in the strict sense meant here might be worded as follows:

“*Article 8. Non-retroactivity of unilateral acts*

“A unilateral act shall be applicable to events or situations occurring after its formulation, unless the State or States authors of the act have manifested in any way a different intention.”

**C. Territorial application of a unilateral act**

169. The question of the territorial application of a unilateral act must also be considered in the light of the solution contemplated in the 1969 Vienna Convention, particularly in article 29 thereof.<sup>147</sup> In the realm of treaties, this question, as the first Special Rapporteur on the law of treaties, Sir Humphrey Waldock, noted in his commentary on draft article 58 (Application of a treaty to the territories of a contracting State), application of a treaty is not limited to a particular territory, but also to

<sup>146</sup> Quoted by Torres Cazorla, *loc. cit.*, p. 58, referring to *Eugene L. Didier, adm. et al. v. Chile*, between Chile and the United States (9 April 1894) (Moore, *op. cit.*, vol. IV, p. 4332).

<sup>147</sup> Article 29 reads: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

territories which the parties have purported to bind by the treaty and which, therefore, are the territories affected by the rights and obligations set up by the treaty. Thus, although the enjoyment of the rights and the performance of the obligations contained in a treaty may be localized in a particular territory or area, as in the case of Antarctica, it is the territories with respect to which each party contracted in entering into the treaty which determine its territorial scope.<sup>148</sup>

170. In codifying the topic in the context of the law of treaties, it is important to note that the Special Rapporteur, in his commentary on the same article, refers to the object of the article and to a rule of general application. With regard to the subject of the article, the Special Rapporteur notes that “the object of [article 58] is to provide a rule to cover cases where the intention of the parties concerning the territorial scope of the treaty is not clear”; a general rule is then proposed: “The rule that a treaty is to be presumed to apply with respect to all territories under the sovereignty of the contracting parties means that each State must make its intention plain, expressly or by implication, in any case where it does not intend to enter into the engagements of the treaty on behalf of and with respect to all its territory.”<sup>149</sup>

<sup>148</sup> Third report on the law of treaties, *Yearbook ... 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 12, para. (1).

<sup>149</sup> *Ibid.*, paras. (3)–(4).

171. This question has been amply considered in doctrine within the framework of the law of treaties, so that any further commentary here would be excessive. The question that arises is whether the principle established in this context can be transferred to the regime of unilateral acts. A review of some of the declarations containing unilateral acts in the sense that is of interest to the Commission, such as those relating to the recognition of States or the renunciation of certain territories, indicates that in no case does the author State specify the space to which the declaration applies, leading to the conclusion that, most often, the general principle cited above is applied.

172. Accordingly, the principle and the exception thereto, although of conventional origin, can be combined in a single provision that would read:

*“Article 9. Territorial application of unilateral acts*

“A unilateral act is binding on the State that formulates it in respect of its entire territory, unless a different intention can be inferred or otherwise determined.”

### CHAPTER III

#### **Entry into force in the context of the law of treaties and determination of the moment when a unilateral act begins to produce legal effects**

173. A treaty produces legal effects once the parties have definitively expressed their intent to be bound by it. Here, of course, one is disregarding the effects a treaty may produce in respect of third parties, which are more likely to involve the extension of rights or the imposition of duties on a third State, subject to its consent in both cases.

174. A unilateral act, however, produces legal effects at the time it is formulated, even though, as noted above, it may be applicable to situations or events occurring prior to its formulation as well as after its entry into force. A unilateral act comes into existence at the time it is formulated if, as noted earlier, it meets the requisite conditions of validity. In the case of the unilateral acts of interest to the Commission, according to the most solid doctrine and international jurisprudence, it is not necessary for the addressee to accept or react in any way for the act to produce its legal effects. ICJ, in its *Nuclear Tests* decisions, which have been amply reviewed from the standpoint of doctrine (although the Court was referring to a specific unilateral act, such as promises, all these forms characterize a category of acts under which States assume obligations), tended to support the existence in international law of such acts that, while unilateral in form, produce legal effects by themselves: “[No] subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.”<sup>150</sup>

175. A unilateral act is thus opposable against the State that formulates it from the moment of formulation. The addressee State may demand that the author State implement the act. This enforceability, which is also often mentioned in doctrine, refers to the capacity of the party to whom an obligation has been addressed to request performance by the author. It may well be asked whether, under the definition of unilateral acts that the Commission has created which reflects their variety, this assessment can now be considered to be valid for all cases. In the case of promises, for example, as can be inferred from the ICJ decision, the declarations by the French authorities produced their legal effects from the moment they were formulated.

176. At the same time, an act by which a State recognizes a *de facto* or *de jure* situation originates at the moment it is formulated, even though its application may have a retroactive character if the declaring State expresses or demonstrates that intention. In general, it can be deduced from a review of practice that acts of recognition produce their effects from the time they are formulated unless they reflect a different intention. From the declarations reviewed it can be inferred that the declaring States did not intend for their declarations to be applicable prior to or at a time other than the time of their formulation, which possibility should not, however, be ruled out.

<sup>150</sup> *I.C.J. Reports 1974* (see footnote 10 above), p. 267, para. 43, and p. 472, para. 46.

## CHAPTER V

**Structure of the draft articles and future work of the Special Rapporteur**

177. Thus far, as can be seen, a series of draft articles has been presented and revised; some of these will be considered by the Drafting Committee, others have been referred back to the Working Group that is to meet during the current session while still others are being submitted to the Commission for consideration for the first time.

178. The draft articles have been organized to contain a part one (arts. 1–4), which covers the general rules applicable to all unilateral acts, regardless of their substantive content and category: definition, capacity of the State, persons authorized to formulate unilateral acts and confirmation of a unilateral act formulated by an unauthorized person. These draft articles have been transmitted to the Drafting Committee.

179. In addition, if the Commission should conclude that the conditions of validity and causes of invalidity are generally applicable, part one will include an article 5, now being submitted in a new form to reflect the observations and comments of members of the Commission and representatives on the Sixth Committee; this text will be considered by the Working Group of the Commission which is to be re-established to consider the topic again this year.

180. Part one will also include article 6, on determination of the moment at which a unilateral act begins to produce its legal effects; this is to some extent, and bearing in mind the differences between the regime applicable to the law of treaties and the regime applicable to unilateral acts, roughly equivalent to entry into force in the former. No text is being submitted on this point, as the Special Rapporteur thought it might be more useful for the Commission to discuss this aspect of the topic and give him appropriate guidance so that he can present specific wording in his sixth report, due in 2003.

181. Articles 7–9 deal with the observance and application of unilateral acts and are to be considered by the Commission at the current session: one draft article concerns observance of unilateral acts (*acta sunt servanda*), one deals with the application of unilateral acts in time (non-retroactivity) and one with the application of unilateral acts in space (territorial application).

182. Part one will conclude with articles 10–11, which concern the interpretation of unilateral acts. It will be recalled that the Special Rapporteur submitted draft articles in his fourth report that were given preliminary consideration at the Commission's fifty-third session, in 2001. The draft articles are now being submitted in a

slightly revised form, taking into account the comments and observations made by members of the Commission and the Sixth Committee in 2001.

183. Lastly, part two of the draft articles will deal with the elaboration of rules applicable to specific types of acts, as the Commission suggested in 2001 at its fifty-third session. These will be rules applicable to unilateral acts by which States assume unilateral obligations, a concept that to a certain extent describes an international promise, which is understood as having a unilateral character. For the time being, the Special Rapporteur will limit himself to setting out three possible rules applicable to this category of act which might differ from the rules applicable to other unilateral acts. They concern the revocability, modification, and suspension and termination of unilateral acts.

184. It is important to look more closely at these aspects, which will be discussed in the Special Rapporteur's sixth report to the Commission. Important questions will be raised, such as the possibility of revoking those unilateral acts which, like promises, involve the assumption of unilateral obligations by the formulating State. In principle, and in a very preliminary way, it might perhaps be concluded that an act of recognition or a promise is irrevocable. In fact, while the act is elaborated or formulated unilaterally, without the participation of the addressee, once the latter acquires the right, that is, when the act produces its effect, the author State may not revoke or even modify the act, much less suspend it, without cause or justification unless the addressee so agrees. The basis for this would seem to lie in the confidence and the expectations that are necessarily created, as previously noted, which constitute the legal security that must exist in international relations.

185. Also to be discussed is the topic of conditional unilateral acts. In principle, a unilateral act would not appear to be subject to any conditions, since making it so would place the act in the context of a conventional relationship or, more precisely, a relationship of offer and acceptance. In the case of recognition, doctrine unanimously holds this to be impossible. The Special Rapporteur would like to invite comments and guidance from members of the Commission in order to facilitate the preparation of his sixth report, which will take up this question among others.

186. The Special Rapporteur offers for the Commission's consideration the following structure for the draft articles:

*Part One. General rules***A. Elaboration of unilateral acts**

- Article 1. Definition of unilateral acts
- Article 2. Capacity of States
- Article 3. Persons authorized to formulate unilateral acts
- Article 4. Confirmation of a unilateral act formulated without authorization
- Article 5. Conditions of validity and causes of invalidity of unilateral acts
- Article 5 (a). Error
- Article 5 (b). Fraud
- Article 5 (c). Corruption of the representative of the State
- Article 5 (d). Coercion of the person formulating the act
- Article 5 (e). Coercion by the threat or use of force
- Article 5 (f). Unilateral act contrary to a peremptory norm of international law (*jus cogens*)
- Article 5 (g). Unilateral act contrary to a decision of the Security Council

- Article 5 (h). Unilateral act contrary to a fundamental norm of the domestic law of the State formulating it

**B. Moment at which a unilateral act begins to produce legal effects**

- Article 6. Moment at which a unilateral act begins to produce legal effects

**C. Observance and application of unilateral acts**

- Article 7. *Acta sunt servanda*
- Article 8. Non-retroactivity of unilateral acts
- Article 9. Territorial application of unilateral acts

**D. Interpretation of unilateral acts**

- Article 10. General rule of interpretation
- Article 11. Supplementary means of interpretation

*Part Two. Rules applicable to unilateral acts by which States assume obligations*

- Article 12. Revocation of unilateral acts
- Article 13. Modification of unilateral acts
- Article 14. Termination and suspension of the application of unilateral acts

## CHECKLIST OF DOCUMENTS OF THE FIFTY-FOURTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/520	Provisional agenda	Mimeographed. For agenda as adopted, see <i>Yearbook ... 2002</i> , vol. II (Part Two), p. 10, para. 13.
A/CN.4/521	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-sixth session of the General Assembly	Mimeographed.
A/CN.4/522 and Add.1	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	A/CN.4/522 reproduced in the present volume. Add.1 mimeographed.
A/CN.4/523 and Add.1	Third report on diplomatic protection, by Mr. John Dugard, Special Rapporteur	Reproduced in the present volume.
A/CN.4/524	Unilateral acts of States: replies from Governments to the questionnaire	<i>Idem.</i>
A/CN.4/525 and Add.1 [and Corr.1 and 2] and Add.2	Fifth report on unilateral acts of States, by Mr. Victor Rodríguez Cedeño, Special Rapporteur	<i>Idem.</i>
A/CN.4/526 and Add.1-3	Seventh report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.613 and Rev.1	Diplomatic protection. Titles and texts of the draft articles adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.614	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee	Reproduced in <i>Yearbook ... 2001</i> , vol. I, summary record of the 2733rd meeting (para. 2).
A/CN.4/L.615 [and Corr.1]	Draft report of the Commission on the work of its fifty-fourth session: chapter I (Organization of the session)	Mimeographed. For the final text, see <i>Yearbook ... 2002</i> , vol. II (Part Two), p. 9.
A/CN.4/L.616	<i>Idem</i> : chapter II (Summary of the work of the Commission at its fifty-fourth session)	<i>Idem</i> , p. 11.
A/CN.4/L.617 and Add.1	<i>Idem</i> : chapter III (Specific issues on which comments would be of particular interest to the Commission)	<i>Idem</i> , p. 13.
A/CN.4/L.618 and Add.1-4	<i>Idem</i> : chapter IV (Reservations to treaties)	<i>Idem</i> , p. 15.
A/CN.4/L.619 and Add.1-6	<i>Idem</i> : chapter V (Diplomatic protection)	<i>Idem</i> , p. 49.
A/CN.4/L.620 and Add.1-2	<i>Idem</i> : chapter VI (Unilateral acts of States)	<i>Idem</i> , p. 77.
A/CN.4/L.621	<i>Idem</i> : chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities))	<i>Idem</i> , p. 89.
A/CN.4/L.622	The responsibility of international organizations: scope and orientation of the study. Report of the Working Group	<i>Idem</i> , p. 93.
A/CN.4/L.623	Reservations to treaties: note by the Special Rapporteur on the first paragraph of draft guideline 2.1.7 adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.624	Draft report of the Commission on the work of its fifty-fourth session: chapter VIII (The responsibility of international organizations)	<i>Idem</i> . For the final text, see <i>Yearbook ... 2002</i> , vol. II (Part Two), p. 93.
A/CN.4/L.625	<i>Idem</i> : chapter IX (The fragmentation of international law: difficulties arising from the diversification and expansion of international law)	<i>Idem</i> , p. 97.

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<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.626 and Add.1	<i>Idem</i> : chapter X (Other decisions and conclusions of the Commission)	<i>Idem</i> , p. 100.
A/CN.4/L.627	International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities). Report of the Working Group	<i>Idem</i> , p. 90.
A/CN.4/L.628 [and Corr.1]	The fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group	<i>Idem</i> , p. 97.
A/CN.4/L.629	Programme, procedures and working methods of the Commission and its documentation. Report of the Planning Group	Mimeographed.
A/CN.4/SR.2711–A/ CN.4/SR.2750	Provisional summary records of the 2711th to 2750th meetings	<i>Idem</i> . The final text appears in <i>Yearbook ... 2002</i> , vol. I.



