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Rapporteur: Mr. Ernest PETRIČ

CHAPTER IV

RESERVATIONS TO TREATIES

Addendum

CONTENTS

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

1. Text of the draft guidelines

1. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to practice

Explanatory note[1]

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

1. Definitions

1.1 Definition of reservations[2]

"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.

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[1] For the commentary see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 189.

[2] For the commentary to this draft guideline, see *ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

1.1.1 [1.1.4][3] Object of reservations[4]

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[5]

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 Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[6]

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

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[7]

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.

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[3] The number between square brackets indicates the number of this draft guideline in the report of the Special Rapporteur or, as the case may be, the original number of a draft guideline in the report of the Special Rapporteur which has been merged with the final draft guideline.

[4] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[5] For the commentary to this draft guideline, see *ibid.*, *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 203-206.

[6] For the commentary to this draft guideline, see *ibid.*, pp. 206-209.

[7] For the commentary to this draft guideline, see *ibid.*, pp. 209-210.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[8]

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[9]

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

1.1.7 [1.1.1] Reservations formulated jointly[10]

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

1.1.8 Reservations made under exclusionary clauses[11]

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

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[8] For the commentary to this draft guideline, see *ibid*., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[9] For the commentary to this draft guideline, see *ibid*., pp. 222-223.

[10] For the commentary to this draft guideline, see *ibid*., *Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[11] For the commentary to this draft guideline, see *ibid*., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 230-241.

1.2 Definition of interpretative declarations[12]

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

1.2.1 [1.2.4] Conditional interpretative declarations[13]

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

1.2.2 [1.2.1] Interpretative declarations formulated jointly[14]

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[15]

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

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[12] For the commentary to this draft guideline, see *ibid*., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[13] For the commentary to this draft guideline, see *ibid*., pp. 240-249.

[14] For the commentary to this draft guideline, see *ibid*., pp. 249-252.

[15] For the commentary to this draft guideline, see *ibid*., pp. 252-253.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[16]

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

1.3.2 [1.2.2] Phrasing and name[17]

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

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[18]

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[19]

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.

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[16] For the commentary to this draft guideline, see *ibid*., pp. 254-260.

[17] For the commentary to this draft guideline, see *ibid*., pp. 260-266.

[18] For the commentary to this draft guideline, see *ibid*., pp. 266-268.

[19] For the commentary to this draft guideline, see *ibid*., pp. 268-270.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[20]

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

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[21]

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

1.4.3 [1.1.7] Statements of non-recognition[22]

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

1.4.4 [1.2.5] General statements of policy[23]

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.

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[20] For the commentary to this draft guideline, see *ibid*., pp. 270-273.

[21] For the commentary to this draft guideline, see *ibid*., pp. 273-274.

[22] For the commentary to this draft guideline, see *ibid*., pp. 275-280.

[23] For the commentary to this draft guideline, see *ibid*., pp. 280-284.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[24]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other Contracting Parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[25]

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.

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

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[26]

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.

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[24] For the commentary to this draft guideline, see *ibid*., pp. 284-289.

[25] For the commentary to this draft guideline, see *ibid*., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-247.

[26] For the commentary to this draft guideline, see *ibid*., pp. 247-252.

1.5 Unilateral statements in respect of bilateral treaties[27]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[28]

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

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[29]

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

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[30]

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.

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[27] For the commentary, see *ibid*., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[28] For the commentary to this draft guideline, see *ibid*., pp. 290-302.

[29] For the commentary to this draft guideline, see *ibid*., pp. 302-306.

[30] For the commentary to this draft guideline, see *ibid*., pp. 306-307.

1.6 Scope of definitions[31]

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

1.7 Alternatives to reservations and interpretative declarations[32]

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[33]

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

– The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

– 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 [1.7.5] Alternatives to interpretative declarations[34]

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:

– The insertion in the treaty of provisions purporting to interpret the same treaty;

– The conclusion of a supplementary agreement to the same end.

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[31] This draft guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see section C.2 below.

[32] For the commentary see *ibid.*, *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 252-253.

[33] For the commentary to this draft guideline, see *ibid.*, pp. 253-269.

[34] For the commentary to this draft guideline, see *ibid.*, pp. 270-272.

2. Procedure

2.1 Form and notification of reservations

2.1.1 Written form[35]

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation[36]

Formal confirmation of a reservation must be made in writing.

2.1.3 Formulation of a reservation at the international level[37]

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

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

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

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

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

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[35] For the commentary to this draft guideline, see *ibid*., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 63-67.

[36] For the commentary to this draft guideline, see *ibid*., pp. 67-69.

[37] For the commentary to this draft guideline, see *ibid*., pp. 69-75.

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

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

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

2.1.4 [2.1.3 *bis*, 2.1.4] Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations[38]

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

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[39]

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.

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

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[38] For the commentary to this draft guideline, see *ibid*., pp. 75-79.

[39] For the commentary to this draft guideline, see *ibid*., pp. 80-93.

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations[40]

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:

(i) 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

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

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

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

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

2.1.7 Functions of depositaries[41]

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

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[40] For the commentary to this draft guideline, see *ibid*., pp. 94-104.

[41] For the commentary to this draft guideline, see *ibid*., pp. 105-112.

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

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

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

2.1.8 [2.1.7 *bis*] Procedure in case of manifestly invalid reservations[42]

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

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

2.2.1 Formal confirmation of reservations formulated when signing a treaty[43]

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.

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[42] This draft guideline was reconsidered and modified during the fifty-eighth session (2006). For the new commentary see section C.2 below.

[43] For the commentary to this draft guideline, see *ibid*., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 465-472.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty[44]

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

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides[45]

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 … .[46]

2.3.1 Late formulation of a reservation[47]

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[48]

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.

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[44] For the commentary to this draft guideline, see *ibid*., pp. 472-474.

[45] For the commentary to this draft guideline, see *ibid*., pp. 474-477.

[46] Section 2.3 proposed by the Special Rapporteur deals with the late formulation of reservations.

[47] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 477-489.

[48] For the commentary to this draft guideline, see *ibid*., pp. 490-493.

2.3.3 Objection to late formulation of a reservation[49]

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[50]

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

(*a*) Interpretation of a reservation made earlier; or

(*b*) A unilateral statement made subsequently under an optional clause.

2.3.5 Widening of the scope of a reservation[51]

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

2.4 Procedure for interpretative declarations[52]

2.4.1 Formulation of interpretative declarations[53]

An interpretative declaration must be formulated by a person who is considered as representing a State or an international organization for the purpose of adopting or

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[49] For the commentary to this draft guideline, see *ibid*., pp. 493-495.

[50] For the commentary to this draft guideline, see *ibid*., pp. 495-499.

[51] For the commentary see *ibid*., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269-274.

[52] For the commentary see *ibid*., *Fifty-seventh Session, Supplement No. 10* (A/57/10), p. 115.

[53] For the commentary to this draft guideline, see *ibid*., pp. 115-116.

authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.2 [2.4.1 *bis*] Formulation of an interpretative declaration at the internal level[54]

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

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

2.4.3 Time at which an interpretative declaration may be formulated[55]

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

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty[56]

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.

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[54] For the commentary to this draft guideline, see *ibid*., pp. 117-118.

[55] For the commentary to this draft guideline, see *ibid*., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 499-501.

[56] For the commentary to this draft guideline, see *ibid*., pp. 501-502.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty[57]

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

2.4.6 [2.4.7] Late formulation of an interpretative declaration[58]

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

[2.4.7 [2.4.2, 2.4.9] Formulation and communication of conditional interpretative declarations[59]

A conditional interpretative declaration must be formulated in writing.

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

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 a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ.]

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[57] For the commentary to this draft guideline, see *ibid*., pp. 502-503.

[58] For the commentary to this draft guideline, see *ibid*., pp. 503-505.

[59] For the commentary to this draft guideline, see *ibid*., *Fifty-seventh Session, Supplement No. 10* (A/57/10), pp. 118-119.

2.4.8 Late formulation of a conditional interpretative declaration[60]

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

2.4.9 Modification of an interpretative declaration[61]

Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time.

2.4.10 Limitation and widening of the scope of a conditional interpretative declaration[62]

The limitation and the widening of the scope of a conditional interpretative declaration are governed by the rules respectively applicable to the partial withdrawal and the widening of the scope of reservations.

2.5 Withdrawal and modification of reservations and interpretative declarations

2.5.1 Withdrawal of reservations[63]

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.

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[60] For the commentary to this draft guideline, see *ibid*., *Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 505-506. This draft guideline (formerly 2.4.7 [2.4.8]) was renumbered as a result of the adoption of new draft guidelines at the fifty-fourth session.

[61] For the commentary see *ibid*., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277.

[62] For the commentary see *ibid*., pp. 277-278.

[63] For the commentary to this draft guideline, see *ibid*., *Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 190-201.

2.5.2 Form of withdrawal[64]

The withdrawal of a reservation must be formulated in writing.

2.5.3 Periodic review of the usefulness of reservations[65]

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

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

2.5.4 [2.5.5] Formulation of the withdrawal of a reservation at the international level[66]

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

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

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

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

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

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64 For the commentary to this draft guideline, see *ibid*., pp. 201-207.

65 For the commentary to this draft guideline, see *ibid*., pp. 207-209.

66 For the commentary to this draft guideline, see *ibid*., pp. 210-218.

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

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

2.5.5 [2.5.5 *bis*, 2.5.5 *ter*] Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations[67]

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

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

2.5.6 Communication of withdrawal of a reservation[68]

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

2.5.7 [2.5.7, 2.5.8] Effect of withdrawal of a reservation[69]

The withdrawal of a reservation entails the application as a whole of the provisions on which the reservation had been made in the relations between the State or international

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[67] For the commentary to this draft guideline, see *ibid*., pp. 219-221.

[68] For the commentary to this draft guideline, see *ibid*., pp. 221-226.

[69] For the commentary to this draft guideline, see *ibid*., pp. 227-231.

organization which withdraws the reservation and all the other parties, whether they had accepted the reservation or objected to it.

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

2.5.8 [2.5.9] Effective date of withdrawal of a reservation[70]

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

Model clauses[71]

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

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

B. Earlier effective date of withdrawal of a reservation[72]

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].

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[70] For the commentary to this draft guideline, see *ibid*., pp. 231-239.

[71] For the commentary to this model clause, see *ibid*., p. 211.

[72] For the commentary to this model clause, see *ibid*., pp. 211 and 212.

C. Freedom to set the effective date of withdrawal of a reservation[73]

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

2.5.9 [2.5.10] Cases in which a reserving State or international organization may unilaterally set the effective date of withdrawal of a reservation[74]

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

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

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

2.5.10 [2.5.11] Partial withdrawal of a reservation[75]

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

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

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[73] For the commentary to this model clause, see *ibid*., p. 212.

[74] For the commentary to this draft guideline, see *ibid*., pp. 213-215.

[75] For the commentary to this draft guideline, see *ibid*., pp. 215-225.

2.5.11 [2.5.12] Effect of a partial withdrawal of a reservation[76]

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

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

2.5.12 Withdrawal of an interpretative declaration[77]

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

2.5.13 Withdrawal of a conditional interpretative declaration[78]

The withdrawal of a conditional interpretative declaration is governed by the rules applying to the withdrawal of reservations.

2.6.1 Definition of objections to reservations[79]

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

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[76] For the commentary to this draft guideline, see *ibid*., pp. 226-228.

[77] For the commentary to this draft guideline, see *ibid*., *Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 281 and 282.

[78] For the commentary to this draft guideline, see *ibid*., pp. 282 and 283.

[79] For the commentary see *ibid*., *Sixtieth Session, Supplement No. 10* (A/60/10), pp. 184-199.

2.6.2 Definition of objections to the late formulation or widening of the scope of a reservation[80]

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

3. Validity of reservations and interpretative declarations

3.1 Permissible reservations[81]

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

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

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

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

3.1.1 Reservations expressly prohibited by the treaty[82]

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

(*a*) Prohibiting all reservations;

(*b*) Prohibiting reservations to specified provisions and a reservation in question is formulated to one of such provisions; or

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[80] For the commentary see *ibid*., pp. 199 and 200.

[81] For the commentary see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 327-333.

[82] For the commentary see *ibid*., pp. 333-340.

(*c*) Prohibiting certain categories of reservations and a reservation in question falls within one of such categories.

3.1.2 Definition of specified reservations[83]

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

3.1.3 Permissibility of reservations not prohibited by the treaty[84]

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

3.1.4 Permissibility of specified reservations[85]

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

3.1.5 Incompatibility of a reservation with the object and purpose of the treaty[86]

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

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[83] For the commentary see *ibid*., pp. 340-350.

[84] For the commentary see *ibid*., pp. 350-354.

[85] For the commentary see *ibid*., pp. 354-356.

[86] For the commentary see section C.2 below.

3.1.6 Determination of the object and purpose of the treaty[87]

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

3.1.7 Vague or general reservations[88]

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

3.1.8 Reservations to a provision reflecting a customary norm[89]

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

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

3.1.9 Reservations contrary to a rule of *jus cogens*[90]

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

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[87] For the commentary see section C.2 below.

[88] For the commentary see section C.2 below.

[89] For the commentary see section C.2 below.

[90] For the commentary see section C.2 below.

3.1.10 Reservations to provisions relating to non-derogable rights[91]

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

3.1.11 Reservations relating to internal law[92]

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

3.1.12 Reservations to general human rights treaties[93]

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

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91 For the commentary see section C.2 below.

92 For the commentary see section C.2 below.

93 For the commentary see section C.2 below.

3.1.13 Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty[94]

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

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

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

2. Text of the draft guidelines and commentaries thereto adopted by the Commission at its fifty-ninth session

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

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

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

Commentary

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

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[94] For the commentary see section C.2 below.

(2) In fact the concept of the object and purpose of the treaty, far from being confined to reservations, occurs in seven other provisions of the Vienna Convention,[95] including one - article 20, paragraph 2 - which concerns reservations. However, none of them defines the concept of the object and purpose of the treaty or provides any particular "clues" for this purpose.[96] At most, one can infer that a fairly general approach is required: it is not a question of "dissecting" the treaty in minute detail and examining its provisions one by one, but of extracting the "essence", the overall "mission" of the treaty:

- It is unanimously accepted that article 18, paragraph (a), of the Convention does not oblige a signatory State to *respect* the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound;[97]

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

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[95] Cf. articles 18, 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b). A connection can be made with the provisions relating to the "essential bas[e]s" or "condition[s] of the consent to be bound" (see Paul Reuter, *Le développement de l'ordre juridique international - Écrits de droit international* (Paris, Économica, 1999), p. 627 (or p. 366)).

[96] As Isabelle Buffard and Karl Zemanek have noted, the Commission's commentaries to the draft article in 1966 are virtually silent on the matter ("The 'object and purpose' of a treaty: an enigma?", *Austrian Review of International and European Law* (ARIEL) 1998, p. 322).

[97] See, for example, P. Reuter, *Introduction au droit des traités*, 3rd ed. revised and expanded by Philippe Cahier (Paris, PUF, 1995), p. 62, who defines the obligation arising from article 18 as an obligation of conduct, or P. Cahier, "L'obligation de ne pas priver un traité de son object et de son but avant son entrée en vigueur", *Mélanges Fernand Dehousse* (Paris, Nathan), vol. I, p. 31.

– Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the "effective execution ... of the treaty *as a whole*"[98] in the event that it is modified between certain of the contracting parties only;

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

– According to articles 31, paragraph 1, and 33, paragraph 4, the object and purpose of the treaty are supposed to "clarify" its overall meaning thereby facilitating its interpretation.[99]

(3) There is little doubt that the expression "object and purpose of the treaty" has the same meaning in all of these provisions: one indication of this is that Waldock, who without exaggeration can be considered to be the father of the law of reservations to treaties in the Vienna Convention, referred to them[100] explicitly in order to justify the inclusion of this criterion in article 19, subparagraph (c), through a kind of *a fortiori* reasoning: since "the objects and purposes of the treaty ... are criteria of fundamental importance for the interpretation ... of a treaty" and since "the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, refrain from acts calculated to frustrate its objects", it would seem "somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized".[101] However, this does not solve the problem: it simply demonstrates that there is a criterion, a unique and versatile criterion, but as yet no definition. As has been noted, "the object and

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[98] In this provision, the words "of the object and purpose", which are replaced by an ellipsis in the above quotation, obscure rather than clarify the meaning.

[99] See *Pajzs, Csáky and Esterházy, Judgment of 16 December 1936, P.C.I.J., Series A/B, No. 68*, p. 60; see also Suzanne Bastid, *Les traités en droit international public - conclusion et effets*, (Paris, Économica, 1985), p. 131, or Serge Sur, *L'interprétation en droit international public*, (Paris, L.G.D.J., 1974), pp. 227-230.

[100] More precisely, to (the current) articles 18 and 31.

[101] Fourth report (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 51, para. 6.

purpose of a treaty are indeed something of an enigma".[102] Certainly, the attempt made in article 19, subparagraph (c), pursuant to the 1951 advisory opinion by the International Court of Justice,[103] to introduce an element of objectivity into a largely subjective system is not entirely convincing:[104] "The claim that a particular reservation is contrary to object and purpose is easier made than substantiated."[105] In their joint opinion, the dissenting judges in 1951 had criticized the solution retained by the majority in the *Reservations to the Genocide Convention* case, emphasizing that it could not "produce final and consistent results",[106] and this had been one of the main reasons for the Commission's resistance to the flexible system adopted by the Court in 1951:

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[102] I. Buffard and K. Zemanek, *op. cit*. in note 96 above, p. 342. The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, for example, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 111; Pierre-Maire Dupuy, *Droit international public*, 8th ed. (Paris, Dalloz), p. 286; Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *International and Comparative Law Quarterly* (*ICLQ*) 1953, p. 12; Manuel Rama-Montaldo, "Human Rights Conventions and Reservations to Treaties", *Héctor Gros Espiell* Amicorum Liber, vol. II (Brussels, Bruylant, 1997), p. 1265; Charles Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Sirey, 1970), p. 126; Gérard Teboul, "Remarques sur les réserves aux traités de codification", *Revue générale de droit international public* (*RGDIP*) 1982, pp. 695-696; or A. Pellet, preliminary report (A/CN.4/470), p. 51, para. 109.

[103] See the advisory opinion of 28 May 1951, "*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*", *I.C.J. Reports 1951*, p. 24: "It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."

[104] According to Jean Kyongun Koh, "[t]he International Court thereby introduced purposive words into the vocabulary of reservations which had previously been dominated by the term 'consent'" ("Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal* 1982, p. 85).

[105] Liesbeth Lijnzaad, *Reservations to United Nations Human Rights Treaties: Ratify and Ruin?* (TMC Asser-Instituut, Dordrecht, Nijhoff, 1994, pp. 82-83).

[106] *I.C.J. Reports 1951*, p. 44.

"Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively."[107]

(4) Sir Humphrey Waldock himself still had hesitations in his all-important first report on the law of treaties in 1962:[108]

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

"Nevertheless, the Court's criterion of 'compatibility with the object and purpose of the convention' does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State. ... The Special Rapporteur, although also of the opinion that there is value in the Court's principle as a general concept, feels that there is a certain difficulty in using it as a *criterion* of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States."[109]

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[107] Report of ILC on its third session, *Official Records of the General Assembly, Sixth Session, Supplement No. 9* (A/1858), p. 128, para. 24.

[108] It was this report (A/CN.4/144) that introduced the "flexible system" to the Commission and vigorously defended it (*Yearbook ... 1962*, vol. II, pp. 72-74).

[109] *Yearbook ... 1962*, vol. II, pp. 65-66, para. 10; along the same lines, see Waldock's oral statement, *ibid.*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4-6; however, during the discussion the Special Rapporteur did not hesitate to characterize the principle of compatibility as a "test" (see p. 145, para. 85 - this paragraph also shows that, from the outset, in Waldock's mind, this test was decisive as far as the formulation of reservations was concerned (in contrast to objections, for which the consensual principle alone appeared practicable to him)). The wording used in draft article 17, paragraph 2 (a), which was proposed by the Special Rapporteur, reflects this uncertainty: "When formulating a reservation under the provisions of paragraph 1 (a)

No doubt, this was a case of tactical caution for the "conversion" of the self-same Special Rapporteur to compatibility with the object and purpose of the treaty, not only as a test of the validity of reservations, but also as a key element to be taken into account in interpretation,[110] was swift.[111]

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

(6) The preparatory work on this provision is of little assistance in determining the meaning of the expression.[112] As has been noted,[113] the commentary to draft article 16, adopted by the - usually more prolix - Commission in 1966, is confined to a single paragraph and does not

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of this article [with respect to this provision, see the commentary to draft guideline 3.1.1, para. 3], a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty" (*ibid.*, vol. II, p. 60). This principle met with general approval during the Commission's debates in 1962 (see in particular Briggs (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 23); Lachs (p. 142, para. 54); Rosenne (pp. 144-145, para. 79), who has no hesitation in speaking of a "test" (see also p. 145, para. 82, and 653rd meeting, 29 May 1962, p. 156, para. 27); Castrén (652nd meeting, p. 148, para. 25)) and in 1965 (Yasseen (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, pp. 149-150, para. 20); Tunkin (p. 150, para. 25); see, however, the objections by De Luna (652nd meeting, 28 May 1962, p. 148, para. 18, and 653rd meeting, p. 160, para. 67); Gros (652nd meeting, p. 150, paras. 47-51); or Ago (653rd meeting, p. 157, para. 34); or, during the debate in 1965, those of Ruda (*ibid.*, 796th meeting, 4 June 1965, p. 147, para. 55, and 797th meeting, 8 June 1965, p. 154, para. 69); and Ago (798th meeting, 9 June 1965, p. 161, para. 71)). To the end, Tsuruoka, the Japanese member of the Commission, opposed subparagraph (c) and, for that reason, abstained in the voting on draft article 18 as a whole (adopted by 16 votes to none with one abstention on 2 July 1965 - *ibid.*, 816th meeting, p. 283, para. 42).

[110] See article 31, paragraph 1, of the Convention.

[111] See I. Buffard and K. Zemanek, *op. cit.*, note 152, pp. 320-321.

[112] See *ibid.*, pp. 319-321.

[113] C. Redgwell, "The law of reservations in respect of multilateral conventions", in J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out - Reservations and Objections to Human Rights Conventions* (London, British Institute of International Comparative Law (BIICL), 1997), p. 7.

even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly, through a simple reference to draft article 17:[114] "The admissibility or otherwise of a reservation under paragraph [*sic*] (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States."[115]

(7) The discussion of subparagraph (c) in the Commission[116] and subsequently at the Vienna Conference[117] does not shed any more light on the meaning of the expression "object and purpose of the treaty" for the purposes of this provision. Nor does international jurisprudence enable us to define it, even though it is in common use.[118] There are, however, some helpful hints, particularly in the 1951 advisory opinion of the International Court of Justice on *Reservations to the Genocide Convention*.

(8) The expression seems to have been used for the first time in its current form[119] in the advisory opinion of the Permanent Court of International Justice of 31 July 1930 on

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[114] Future article 20 of the Convention. The article in no way resolves the issue, which is left pending.

[115] *Yearbook ... 1965*, vol. II, p. 207, para. 17. The commentary to the corresponding provision adopted in 1962 (art. 18, para. 1 (d)), is no more forthcoming (see *Yearbook ... 1962*, vol. II, p. 180, para. 15).

[116] See note 109 above.

[117] It is significant that none of the amendments proposed to the Commission's draft article 16 - including the most radical ones - called this principle into question. At most, the amendments by Spain, the United States of America and Colombia proposed adding the concept of the "nature" of the treaty or substituting it for that of the object (see paragraph 6 of the commentary to draft guideline 3.1.1, *Report of the International Law Commission*, Fifty-eighth Session, 2006, *Official Records of the General Assembly, Sixty-first Session*, p. 336, note 810).

[118] See I. Buffard and K. Zemanek, *op. cit.* in note 96 above, pp. 312-319, and note 123 below.

[119] I. Buffard and K. Zemanek note (*ibid.*, p. 315) that the expression "the aim and the scope" had already been used in the advisory opinion of the Permanent Court of International Justice of 23 July 1926 on *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer* in reference to Part XIII of the Treaty of Versailles (*Series B, No. 13*, p. 18). The same authors, after citing exhaustively the relevant decisions of the Court, describe the difficulty of establishing definitive terminology (especially in English) in the Court's case law (*ibid.*, pp. 315-316).

the *Greco-Bulgarian "Communities"* case.[120] However, it was not until 1986 in the *Nicaragua* case[121] that the Court put an end to what has been described as "terminological chaos",[122] no doubt influenced by the Vienna Convention.[123] It is difficult, however, to infer a great deal from this relatively abundant case law regarding the method to be followed for determining the object and purpose of a given treaty: the Court often proceeds by simple affirmations[124] and,

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[120] The terms are inverted, however: the Court bases itself on "the aim and object" of the Greco-Bulgarian Convention of 27 November 1919 (*Series B, No. 17*, p. 21).

[121] *Military and Paramilitary Activities In and Against Nicaragua, Judgment of 27 June 1986, I.C.J. Reports 1986*, pp. 136-137, paras. 271-273, p. 138, para. 275, or p. 140, para. 280.

[122] I. Buffard and K. Zemanek, *op. cit.* in note 96 above, p. 316.

[123] Henceforth, the terminology used by the Court seems to have been firmly established; cf.: *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment of 20 December 1988, I.C.J. Reports 1988*, p. 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment of 14 June 1993, I.C.J. Reports 1993*, pp. 49-51, paras. 25-27; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, I.C.J. Reports 1994*, pp. 25-26, para. 52; *Oil Platforms, Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 813, para. 27; *Gabčikova-Nagymaros Project, Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 64, para. 104, and p. 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment of 11 June 1998, I.C.J. Reports 1998*, p. 318, para. 98; *Kasikili/Sedudu Island, Judgment of 13 December 1999, I.C.J. Reports 1999*, pp. 1072-1073, para. 43; *LaGrand, Judgment of 27 June 2001, I.C.J. Reports 2001*, pp. 502-503, para. 102; *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits, Judgment of 17 December 2002, I.C.J. Reports 2002*, p. 652, para. 51; *Avena and Other Mexican Nationals, Judgment of 31 March 2004, I.C.J. Reports 2004*, p. 48, para. 85; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 179, para. 109; *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 319, para. 102; *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006*; paras. 66-67 and 77; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, Judgment of 26 February 2007*, paras. 160 and 198.

[124] See, for example, *Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion of 8 December 1927, P.C.I.J., Series B, No. 14*, p. 64: "It is obvious that the object of the Treaty of Paris [of 1856] ... has been to assure freedom of navigation ..."; *International Status of South-West Africa, advisory opinion of 11 July 1950, I.C.J. Reports 1950*, pp. 136-137, and the Judgment of 14 June 1993, cited above, p. 50, para. 27, the Judgment of 25 September 1997, cited above, p. 67, para. 110, the Judgment

when it seeks to justify its position, it does so empirically.[125]

(9) It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to delink the concept of the "object and purpose of the treaty" by looking first for the object and then for the purpose. For example, during the discussion of draft article 55 concerning the rule of *pacta sunt servanda*, Reuter emphasized that "the object of an obligation was one thing and its purpose was another".[126] While the distinction is common in French (or francophone) doctrine,[127] it provokes scepticism among authors trained in the German or English systems.[128]

(10) However, one (French) author has shown convincingly that "the question cannot be settled" by reference to international jurisprudence,[129] particularly since neither the object - defined as the actual content of the treaty[130] - still less the purpose - the outcome sought[131] - remain immutable over time, as the theory of emergent purpose advanced by Sir Gerald Fitzmaurice clearly demonstrates: "The notion of object and purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the

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of 11 June 1998, cited above, p. 318, para. 98, the Judgment of 27 June 2001, cited above, p. 502, para. 102, and the Judgment of 15 December 2004, cited above, para. 102.

[125] See paragraph 3 of the commentary to draft guideline 3.1.6 below.

[126] *Yearbook ... 1964*, vol. I, 19 May 1964, 726th meeting, p. 26, para. 77. Elsewhere, however, the same author manifests a certain scepticism regarding the utility of the distinction (see "Solidarité et divisibilité des engagements conventionnels" in *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1999), p. 625 (also reproduced in P. Reuter, *op. cit.*, p. 363).

[127] See I. Buffard and K. Zemanek, *op. cit.*, in note 96 above, pp. 325-327.

[128] *Ibid.*, pp. 322-325 and 327-328.

[129] G. Teboul, *op. cit.* in note 102 above, p. 696.

[130] See, for example, Jean-Paul Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, LGDJ, 1972), p. 142: The object of an instrument resides in the rights and obligations to which it gives rise.

[131] *Ibid.*

operation and working of the convention."[132] Thus, it is hardly surprising that the attempts made in scholarly writing to define a general method for determining the object and purpose of the treaty have proved to be disappointing.[133]

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

> "The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a

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[132] "The law and procedure of the International Court of Justice: treaty interpretation and other treaty points", *British Yearbook of International Law (BYBIL)* 1957, p. 208. See also G. Teboul, *op. cit.*, note 102, p. 697, or William A. Schabas, "Reservations to the Convention on the Rights of the Child", *European Journal of International Law (EJIL)* 1996, p. 479.

[133] The most successful method, devised by Ms. Buffard and Mr. Zemanek, would involve a two-stage process: in the first stage, one would have "recourse to the title, preamble and, if available, programmatic articles of the treaty"; in the second stage, the conclusion thus reached *prima facie* would have to be tested in the light of the text of the treaty (*op. cit.* in note 96 above, p. 333). However, the application of this apparently logical method (even though it reverses the order stipulated in article 31 of the Vienna Convention, under which the "terms of the treaty" are the starting point for any interpretation; see also the advisory opinion of the Inter-American Court of Human Rights of 8 September 1983 in *Restrictions to the death penalty*, OC-3/83, *Series A*, No. 3, French text in *Revue universelle des droits de l'homme (RUDH)* 1992, para. 50, p. 304) to concrete situations turns out to be rather unconvincing: the authors admit that they are unable to determine objectively and simply the object and purpose of four out of five treaties or groups of treaties used to illustrate their method (the Charter of the United Nations, the Vienna Convention on Diplomatic Relations, the Vienna Convention on the Law of Treaties, the general human rights conventions and the Convention on the Elimination of All Forms of Discrimination against Women as well as the other human rights treaties dealing with specific rights; the method proposed proves convincing only in the latter instance (*ibid.*, pp. 334-342)) and conclude that the concept indeed remains an "enigma" (see above, para. 3). Other scholarly attempts are scarcely more convincing, despite the fact that their authors are often categorical in defining the object and purpose of the treaty studied. Admittedly, they are often dealing with human rights treaties, which lend themselves easily to conclusions influenced by ideologically oriented positions, one symptom of which is the insistence that all the substantive provisions of such treaties reflect their object and purpose (which, taken to its logical extremes, is tantamount to precluding any reservation from being valid) - for a critique of this extreme view, see W.A. Schabas, *op. cit.*, note 138, pp. 476-477, or "Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party?", *Brooklyn Journal of International Law* 1995, pp. 291-293. On the position of the Human Rights Committee, see paragraph (1) of the commentary to draft guideline 3.1.12.

> distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible."[134]

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;[135] and, on that basis, reservations to the "essential"[136] clauses, and only to such clauses, are rejected.

(12) In other words, it is the "effectiveness",[137] the "*raison d'être*"[138] of the treaty, its "fundamental core"[139] that is to be preserved. "It implies a distinction between all obligations in the treaty and the core obligations that are the treaty's *raison d'être*."[140]

(13) Even if the general approach is fairly clear, it is no easy matter to reflect this in a simple formulation. In the view of some members, the "threshold" has been set too high in draft guideline 3.1.5 and may well unduly facilitate the formulation of reservations. Most members of the Commission, however, have taken the view that by definition any reservation "purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with

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[134] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 141, para. 35.

[135] What is involved is to examine whether the reservation is compatible "with the general tenor" of the treaty (Bartoš, *ibid.*, p. 142, para. 40).

[136] And not those that related "to detail only" (Paredes, *ibid.*, p. 163, para. 89).

[137] See European Court of Human Rights, *Loizidou*, Judgment of 23 March 1995 (Preliminary Objections), *Publications of the European Court of Human Rights, Series A*, vol. 310, p. 27, para. 75: acceptance of separate regimes of enforcement of the European Convention on Human Rights "would ... diminish the effectiveness of the convention as a constitutional instrument of European public order (*ordre public*)".

[138] International Court of Justice, advisory opinion of 28 May 1951, *I.C.J. Reports 1951*, p. 21: "none of the contracting parties is entitled to frustrate or impair ... the purpose and *raison d'être* of the convention".

[139] Statement by the representative of France to the Third Committee at the eleventh session of the General Assembly, 703rd meeting on 6 December 1956, quoted in A.C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, Centre national de la recherche scientifique, 1962), vol. I, p. 277, No. 552.

[140] L. Lijnzaad, *op. cit.* in note 105 above, p. 83; see also p. 59 or L. Sucharipa-Behrmann, *op. cit.* note 141, p. 76.

respect to certain specific aspects in their application" to the author of the reservation[141] and that the definition of the object and purpose of the treaty should not be so broad as to impair the capacity to formulate reservations. By limiting the incompatibility of the reservation with the object and purpose of the treaty to cases in which (i) it impairs an essential element, (ii) necessary to the general thrust of the treaty, (iii) thereby compromising the *raison d'être* of the treaty, the formulation in draft guideline 3.1.5 strikes an acceptable balance between the need to preserve the integrity of the treaty and the concern to facilitate the broadest possible participation in multilateral conventions.

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

1. The term "essential element" is to be understood in terms of the object of the reservation as formulated by the author and is not necessarily limited to a specific provision. An "essential element" may be a norm, a right or an obligation which, interpreted in context,[142] is essential to the general thrust of the treaty and whose exclusion or amendment would compromise its *raison d'être*. This would generally be the case if a State sought to exclude or significantly amend a provision of the treaty which embodied the object and purpose of the treaty. Thus a reservation which excluded the application of a provision comparable to article I of the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran of 15 August 1955 would certainly impair an "essential element" within the meaning of guideline 3.1.5, given that this provision "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";[143]

2. This "essential element" must thus be "necessary to the general thrust of the treaty", that is the balance of rights and obligations which constitute its substance or the general concept

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[141] See draft guideline 1.1.1.

[142] See draft guideline 3.1.6.

[143] International Court of Justice Judgment of 12 December 1996, cited in note 123 above, p. 814, para. 28.

underlying the treaty.[144] While the Commission has had no difficulty in adopting, in French, the term "*économie générale du traité*", which seems to it to accurately reflect the concept that the essential nature of the point to which the reservation applies must be assessed in the context of the treaty as a whole, it has been somewhat more hesitant as regards the English expression to be used. After having vacillated between "general framework", "general structure" and "overall structure", it appeared to the Commission that the expression "general thrust" had the merit of placing the emphasis on the global nature of the assessment to be made and of not imposing too rigid an interpretation. Thus the International Court of Justice has determined the object and purpose of a treaty by reference not only to its preamble, but also to its "structure", as represented by the provisions of the treaty taken as a whole;[145]

3. Similarly, in an endeavour to avoid too high a "threshold", the Commission chose the adjective "necessary" in preference to the stronger term "essential", and decided on the verb "impair" (rather than "vitiate") to qualify the "*raison d'être*" of the treaty, it being understood that this can be simple and unambiguous (the "*raison d'être*" of the 1948 Convention on the Suppression and Punishment of the Crime of Genocide is clearly defined by its title) or much more complex (in the case of a general human rights treaty[146] or an environmental protection convention or commitments relating to a broad range of questions) and that the question arises of whether it may change over time.[147]

(15) The fact remains that draft guideline 3.1.5 indicates a direction rather than establishing a clear, directly applicable criterion. Accordingly, it seems appropriate to complement it in two ways: on the one hand, by seeking to specify means of determining the object and purpose of a treaty - as in draft guideline 3.1.6, and, on the other hand, by illustrating the methodology more

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[144] Since not all treaties are necessarily or entirely based on a balance of rights and obligations (see in particular those treaties relating to "integral obligations", including the human rights treaties) (see G.G. Fitzmaurice, Second report on the law of treaties (A/CN.4/107), *Yearbook ... 1957*, vol. II, pp. 54-55, paras. 125-128).

[145] ICJ Judgment of 12 December 1996, cited above in note 123, p. 813, para. 27; Judgment of 17 December 2002, *ibid.*, p. 652, para. 51.

[146] See draft guideline 3.1.12 below.

[147] See paragraph (12) above and paragraph (7) of the commentary to draft guideline 3.1.6 below.

clearly by means of a series of examples chosen from areas in which the question of permissible reservations frequently arises (draft guidelines 3.1.7 to 3.1.13).

3.1.6 Determination of the object and purpose of the treaty

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

Commentary

(1) It is by no means easy to put together in a single formula all the elements to be taken into account, in each specific case, in determining the object and purpose of the treaty. Such a process undoubtedly requires more "*esprit de finesse*" than "*esprit de géométrie*",[148] like any act of interpretation, for that matter, in which category the process falls.

(2) Given the great variety of situations and their susceptibility to change over time,[149] it would appear to be impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable - however, that is not uncommon in law in general and in international law in particular.

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

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[148] Blaise Pascal, *Pensées*, Oeuvres complètes, Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954, p. 1091.

[149] See the commentary above to draft guideline 3.1.5, paragraph (10). The question could also be raised whether the cumulative weight of separate reservations, each of which, taken alone, would be admissible, might not ultimately result in their incompatibility with the object and purpose of the treaty (see Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", *American Journal of International Law* (*AJIL*) 1991, p. 314, and Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 706 and 707).

– From its title;[150]

– From its preamble;[151]

– From an article placed at the beginning of the treaty that "must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied";[152]

– From an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;[153]

– From the preparatory work on the treaty;[154] and

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[150] See Judgment of 6 July 1957, *Certain Norwegian Loans, I.C.J. Reports 1957*, p. 24; but see the Judgments of 27 June 1986, *Military and Paramilitary Activities In and Against Nicaragua, I.C.J. Reports 1986*, p. 137, para. 273, and of 12 December 1996, *Oil Platforms, Preliminary Objection, I.C.J. Reports 1996*, p. 814, para. 28.

[151] See advisory opinion of the Permanent Court of International Justice of 31 July 1930 on the Greco-Bulgarian "Communities", *P.C.I.J.*, *Series B*, No. 17, p. 19, or Judgments of 27 August 1952, *Rights of Nationals of the United States of America in Morocco*, *I.C.J. Reports 1952*, p. 196, of 27 June 1986, cited in note 150 above, p. 138, para. 275, of 3 February 1994, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, pp. 25 and 26, para. 52, and of 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits, I.C.J. Reports 2002*, p. 652, para. 51; see also the dissenting opinion of Judge Anzilotti appended to Interpretation of the 1919 Convention Concerning Employment of Women During the Night, advisory opinion of 15 November 1932, *P.C.I.J.*, *Series A/B*, No. 50, p. 384.

[152] Judgment of 12 December 1996 cited in note 150 above, p. 814, para. 28.

[153] Judgment of 13 December 1999, *Kasikili/Sedudu Island, I.C.J. Reports 1999*, pp. 1072 and 1073, para. 43.

[154] Often, as a way of confirming an interpretation based on the text itself; see the Judgment of 3 February 1994 cited in note 151 above, pp. 27 and 28, paras. 55 and 56, the Judgment of 13 December 1999 cited in note 153 above, p. 1074, para. 46, or the advisory opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 179, para. 109; see also the dissenting opinion of Judge Anzilotti cited in note 151 above, pp. 388 and 389. In its advisory opinion of 28 May 1951 on *Reservations to the Genocide Convention*, the Court gives some weight to the "origins" of the Convention (*I.C.J. Reports 1951*, p. 23).

– From its overall framework.[155]

(4) It is difficult, however, to regard this as a "method" properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a "general impression", in which intuition and subjectivity inevitably play a large part.[156] Since, however, the basic problem is one of interpretation, it would appear to be legitimate, *mutatis mutandis*, to transpose the principles in articles 31 and 32 of the Vienna Conventions applicable to the interpretation of treaties - the "general rule of interpretation" set forth in article 31 and the "supplementary means of interpretation" set forth in article 32[157] - and to adapt them to the determination of the object and purpose of the treaty.

(5) The Committee is fully aware that this position is to some extent tautological,[158] since paragraph 1 of article 31 reads:

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[155] See advisory opinion of the Permanent Court of International Justice of 23 July 1930, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer, P.C.I.J., Series B,* No. 13, p. 18, of 31 July 1930, cited in note 151 above, p. 20, or the Judgments of the International Court of Justice of 12 December 1996, cited in note 150 above, p. 813, para. 27, and of 17 December 2002, cited in note 151 above, p. 652, para. 51.

[156] "One could just as well believe it was simply by intuition" (Isabelle Buffard and Karl Zemanek, (*ARIEL*) 1998 *op. cit.* in note 96 above, p. 319).

[157] See the advisory opinion of 8 September 1983 of the Inter-American Court of Human Rights on *Restrictions to the death penalty*, OC-3/83, *Series A*, No. 3, French text in *Revue universelle des droits de l'homme (RUDH)* 1992, para. 63, p. 306; see also L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", *ARIEL*, 1996, p. 76. While showing that it was aware that the rules on interpretation of treaties could not be directly transposed to unilateral statements formulated by the parties concerning a treaty (reservations and interpretative declarations), the International Law Commission recognized that those rules constituted useful guidelines in that regard (see draft guideline 1.3.1, "Method of implementation of the distinction between reservations and interpretative declarations", and the commentary thereto, *Yearbook ... 1999*, vol. II (Part One), pp. 107-109). This is true *a fortiori* when the aim is to assess the compatibility of a reservation with the object and purpose *of the treaty* itself.

[158] W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law 1955*, p. 48.

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

(6) That said, however, the determination of the object and purpose of a treaty is indeed a question of interpretation, whereby the treaty must be interpreted as a whole, in good faith, in its entirety, in accordance with the ordinary meaning to be given to the terms of the treaty in their context, including the preamble, taking into account practice[159] and, when appropriate, the preparatory work of the treaty and the "circumstances of its conclusion".[160]

(7) These are the parameters underlying draft guideline 3.1.6, which partly reproduces the terms of articles 31 and 32 of the Vienna Conventions, in that it highlights the need for determination in good faith based on the terms of the treaty in their context. As, for the purposes of interpretation,[161] this latter includes the text, including the preamble, it was not deemed useful to reproduce it.[162] On the other hand, mention of the preparatory work and of the circumstances of the conclusion is of indisputably greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions, as is the case with the title of the treaty, which is not mentioned in articles 31 and 32 of the Vienna Conventions but which is of importance in determining the treaty's object and purpose. As for the phrase "the subsequent practice agreed upon by the parties", this reflects paragraphs 2, 3 (a) and 3 (b) of article 31, since most Committee members were of the view that the object and purpose of a treaty was likely to evolve over time.[163] Furthermore, even though it was argued that this mention was redundant in subsequent practice, since objections, if there are any, must be made

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[159] See article 31, paragraph 3.

[160] Article 32.

[161] Article 31, paragraph 2.

[162] Mention of the text also appeared to suffice for the purposes of including the provisions setting out the general objects of the treaty; these objects might, however, be of particular significance in a determination of the "general thrust" of the treaty (see note 152 above).

[163] See paragraph (10) of the commentary to draft guideline 3.1.5, and paragraph (2) above.

during the year following the formulation of the reservation, it was pointed out that the reservation could be assessed by third parties at any time, even years after its formulation.

(8) In some cases, the application of these methodological guidelines raises no problems. It is obvious that a reservation to the Convention on the Prevention and Punishment of the Crime of Genocide by which a State sought to reserve the right to commit some of the prohibited acts in its territory or in certain parts thereof would be incompatible with the object and purpose of the Convention.[164] Thus, for example, Germany and a number of other European countries presented the following arguments in support of their objections to a reservation formulated by Viet Nam to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances:

> "The reservation made in respect of article 6 is contrary to the principle 'aut dedere aut iudicare' which provides that offences are brought before the court or that extradition is granted to the requesting States.
>
> "The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2, paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.
>
> "The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention. ..."[165]

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[164] The question is particularly relevant with regard to the scope of the "colonial clause" in article XII of the Convention, a clause contested by the Soviet bloc countries, which had made reservations to it (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/24), vol. I, pp. 126-134 (chap. IV.1)); although the focus here is on the validity of that quasi-reservation clause, it does raise the question of the validity of objections to such reservations.

[165] *Ibid.*, p. 466 (chap. VI.19); in the same vein see also the objections of Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom and the less explicitly justified objections of Austria and France, *ibid.*, pp. 466-468. See also the objection of Norway and the less explicit objections of Germany and Sweden to the Tunisian

(9) It can also happen that the prohibited reservation relates to less central provisions but is nonetheless contrary to the object and purpose of the treaty because it makes its implementation impossible. That is the rationale behind the wariness the Vienna Convention displays towards reservations to constituent instruments of international organizations.[166] For example, the German Democratic Republic, when ratifying the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, declared that it would only bear its share of the expenses of the Committee against Torture for activities for which it recognized that the Committee had competence.[167] Luxembourg objected to that "declaration" (which was actually a reservation), arguing, correctly, that the effect would be "to inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention".[168]

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

[166] Cf. article 20, paragraph 3: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

[167] See *Multilateral Treaties …* , cited in note 164 above, vol. I, p. 308, note 3 (chap. IV.9); see also Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, Spring 1989, pp. 391-393 and 400.

[168] *Ibid.*, p. 309. Fifteen other States raised objections on the same grounds.

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

3.1.7 Vague or general reservations

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

Commentary

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

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

reservations is to exclude or to modify "the legal effect of certain provisions of the treaty in their application" to their authors.[169] Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although "across-the-board" reservations are common practice, they are, as specified in draft guideline 1.1.1 of the Guide to Practice,[170] valid only if they purport "to exclude or modify the legal effect ... of the treaty as a whole with respect to certain specific aspects ...".

(3) Furthermore, it follows from the inherently consensual nature of the law of treaties in general,[171] and the law of reservations in particular,[172] that, although States are free to formulate

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[169] See the comments of the Israeli Government on the Commission's first draft on the law of treaties, which caused the English text of the definition of reservations to be brought into line with the French text by changing the word "some" to "certain" (in Sir Humphrey Waldock, fourth report (A/CN.4/177, *Yearbook ... 1965*, p. 15); see also Chile's statement at the United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treaties, second session, Vienna, 9 April to 22 May 1969*, summary records of plenary meetings and of meetings of the plenary Committee (A/CONF.39/11), 4th plenary meeting, p. 21, para. 5: "the words 'to vary the legal effect of certain provisions of the treaty' (subparagraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided".

[170] *Yearbook ... 1999*, vol. II, Part Two, pp. 93-95. See also the remarks by Rosa Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Universidad de Murcia, 2004), p. 172.

[171] See Paul Reuter, *op. cit.* in note 97 above, pp. 20-21; Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties. Comments on arts. 16 and 17 of the ILC's draft articles on the law of treaties", *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1967, p. 466. See also, for example, *Case of the S.S. "Wimbledon"*, *Judgment of 17 August 1923, P.C.I.J, Series A*, No. 1, p. 25, or *International Status of South-West Africa, advisory opinion of 11 July 1950, I.C.J. Reports 1950*, p. 139.

[172] The International Court of Justice specified in this connection in its advisory opinion of 1951 on *Reservations to the Genocide Convention* that "it is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto" (*I.C.J. Reports 1951*, p. 21). The authors of the joint dissenting opinion accompanying the advisory opinion express this idea still more strongly: "The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later" (p. 32). See also the arbitral judgement of 30 June 1977 in the *Mer d'Iroise* case, in *Reports of International Arbitral Awards*, vol. XVIII, pp. 41 and 42, paras. 60 and 61; and

(not to make[173]) reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its scope to be assessed.

(4) This is often the case when a reservation invokes the internal law of the State which has formulated it without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code. In these cases, the reference to the domestic law of the reserving State is not per se the problem,[174] but the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. That was the thinking behind an amendment submitted by Peru at the Vienna Conference seeking to add the following subparagraph (d) to future article 19 of the Convention:

> "(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law".[175]

(5) Finland's objections to the reservations of several States parties to the 1989 Convention on the Rights of the Child are certainly more solidly reasoned on that ground than by a reference to

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William Bishop, Jr., "Reservations to Treaties", *Recueil des Cours de l'Académie de Droit International (RCADI)* 1996-II, vol. 103, note 96, p. 255.

[173] See paragraph (6) of the commentary to draft guideline 3.1 (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 330 and 331).

[174] See paragraph (4) of the commentary to draft guideline 3.1.11.

[175] Reports of the Plenary Commission (A/CONF.39/14), *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2), p. 134, para. 177; see the explanations of the representative of Peru at the 21st plenary meeting of the Conference, on 10 April 1968, *Summary records* (A/CONF.39/11), cited in note 169 above, p. 109, para. 25. The amendment was rejected by 44 votes to 16 with 26 abstentions (*ibid.*, 25th plenary meeting of 16 April 1968, p. 135, para. 26); a reading of the debate gives little explanation for the rejection: no doubt a number of delegations, like Italy, considered it "unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty" (*ibid.*, 22nd plenary meeting, 10 April 1968, p. 120, para. 75); along these same lines, see Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law* 1970, p. 302.

article 27 of the 1969 Vienna Convention;[176] for instance, in response to the reservation by Malaysia, which had accepted a number of the provisions of the 1989 Convention "only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia",[177] Finland considered that the "broad nature" of that reservation left open "to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention".[178] Thailand's interpretative declaration to the effect that it "does not interpret and apply the provisions of this Convention [the 1966 International Convention on the Elimination of All Forms of Racial Discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of [its] Constitution and [its] laws"[179] also prompted an objection on the part of Sweden that, in so doing, Thailand was making the application of the Convention subject to a general reservation which made reference to the limits of national legislation the content of which was not specified.[180]

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[176] See paragraph (4) of the commentary to draft guideline 3.1.11. Similarly, the reason given by the Netherlands and the United Kingdom in support of their objections to the second United States reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, namely, that it created "uncertainty as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention" (*Multilateral Treaties …, cited in note 164 above*, vol. I, pp. 130-132 (chap. IV.1)) is more convincing than the argument based on an invocation of domestic law (see paragraph (4) (notes 182 and 183) of the commentary to draft guideline 3.1.11).

[177] *Ibid.*, p. 326 (chap. IV.11).

[178] *Ibid.*, pp. 331 and 332. See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*, pp. 330-335.

[179] *Ibid.*, p. 142 (chap. IV.2).

[180] *Ibid.*, pp. 148 and 149. See the Norwegian and Swedish objections of 15 March 1999, which follow the same line of thinking with regard to Bangladesh's reservation to the Convention on the Political Rights of Women of 31 March 1953, *ibid.*, vol. II, pp. 85 and 86 (chap. XVI.1) or the objections by Finland to a reservation by Guatemala to the Vienna Convention on the Law of Treaties and by the Netherlands, Sweden and Austria to a comparable reservation by Peru to the same Convention, in *ibid.*, pp. 381-384 (chap. XXIII.1).

(6) The same applies when a State reserves the general right to have its constitution prevail over a treaty,[181] as for instance in the reservation by the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide:

> "... Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."[182]

(7) The so-called "Sharia reservation"[183] gives rise to the same objection, a case in point being the reservation by which Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women "in each and every one of its parts which are not contrary to Islamic Sharia".[184] Here again, the problem lies not in the very fact that Mauritania is

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[181] See Pakistan's reservation to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, vol. I, p. 253 (chap. IV.8)), and the objections made by Austria, Finland, Germany, Netherlands and Norway (*ibid.*, pp. 256-272) and by Portugal (*ibid.*, p. 286, note 52).

[182] *Ibid.*, p. 128 (chap. IV.1).

[183] For a discussion of the various schools of thought, see especially Andrea Sassi, "General reservations to multilateral treaties" in Tullio Treves (ed.), "Six studies on reservations", *Comunicazioni e Studi*, vol. XXII, 2002, pp. 96-99. With regard specifically to the application of the reservation to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, see Belinda Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", *American Journal of International Law* (*AJIL*), 1991, pp. 299-302 and pp. 310 and 311; Jane Connors, "The Women's Convention in the Muslim world" *in* J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out - Reservations and Objections to Human Rights Conventions*, British Institute of International Comparative Law (BIICL), London, 1997, pp. 85-103; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 690-692; Jeremy McBride, "Reservations and the capacity of States to implement human rights treaties" in J.P. Gardner ed., *loc. cit*., pp. 149-156 (with a great many examples) or Y. Tyagi, "The conflict of law and policy on reservations to human rights treaties", *British Yearbook of International Law*, 2000, pp. 198-201 and, more specifically: Anna Jenefsky, "Permissibility of Egypt's reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, 1991, pp. 199-233.

[184] *Multilateral Treaties …*, cited in note 164 above, vol. I, p. 251 (chap. IV.8). See also the reservations by Saudi Arabia (citing "the norms of Islamic law" - *ibid.*, p. 253) and by Malaysia (*ibid.*, p. 250), or again the initial reservation by Maldives: "The Government of the Republic of

invoking a law of religious origin which it applies,[185] but, rather that, as Denmark noted, "the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character".[186] Thus, as the United Kingdom put it, such a reservation "which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention".[187]

(8) Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the Convention on the Law of Treaties. As the Human Rights Committee pointed out:

Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded" (*ibid.*, p. 284, note 43); the latter reservation having elicited several objections, the Maldivian Government modified it in a more restrictive sense, but Germany once again objected to it and Finland criticized the new reservation (*ibid.*). Likewise, several States formulated objections to the reservation by Saudi Arabia to the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which made the application of its provisions subject to the condition that "these do not conflict with the precepts of the Islamic *Shariah*" (*ibid.*, pp. 141 and 144-149).

[185] The Holy See ratified the 1989 Convention on the Rights of the Child provided that "the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law ..." (*ibid.*, pp. 324 and 325). As has been pointed out (William A. Schabas, "Reservations to the Convention on the Rights of the Child", *European Journal of International Law (EJIL)* 1996, pp. 478 and 479), this text raises, *mutatis mutandis*, the same problems as the "Sharia reservation".

[186] *Ibid.*, pp. 258 and 259 (chap. IV.8).

[187] *Ibid.*, pp. 277 and 278. See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (*ibid.*, pp. 256-278). The reservations of many Islamic States to specific provisions of the Convention, on the grounds of their incompatibility with the sharia, are certainly less criticizable on that basis, although a number of them also drew objections from some States parties. (For example, whereas Clark, *op. cit.*, note 183, p. 300, observes that Iraq's reservation to article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, based on the sharia, is specific and entails a regime more favourable than that of the Convention, this reservation nonetheless elicited the objections of Mexico, the Netherlands and Sweden, *Multilateral Treaties …*, cited in note 164 above, vol. I, pp. 267, 269 and 275 (chap. IV.8)).

> "Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto."[188]

(9) The European Court of Human Rights as well, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention on Human Rights because it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope".[189] But it is unquestionably the European Commission on Human Rights that most clearly formulated the principle applicable here when it judged that "a reservation is of a general nature ... when it is worded in such a way that it does not allow its scope to be determined".[190]

(10) Draft guideline 3.1.7 reflects this fundamental notion. Its title gives an indication of the (alternative) characteristics which a reservation needs to exhibit to come within its scope: it applies to reservations which are either "vague" or "general". The former might be a reservation which leaves some uncertainty as to the circumstances in which it might be applicable[191] or to

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[188] General comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 19; see also paragraph 12, which links the issue of the invocation of domestic law to that of widely formulated reservations.

[189] Judgment of 29 April 1988, *Belilos*, *ECHR Series A*, vol. 132, p. 25, para. 55 - see paragraph (8) of the commentary to draft guideline 3.1.2 (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 346–347). For a detailed analysis of the condition of generality raised by article 57 of the Convention, see especially Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: the Belilos Case", *German Yearbook of International Law 1990*, pp. 97-109, and R.J. Stuart MacDonald "Reservations Under the European Convention on Human Rights", *Revue Belge de Droit International, 1988*, pp. 433-438 and 443-448.

[190] Report of the Commission, 5 May 1982, *Temeltasch* case, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 588. See Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), pp. 599-607.

[191] See Malta's reservation to the 1996 International Covenant on Civil and Political Rights: "While the Government of Malta accepts the principle of compensation for wrongful imprisonment, it is not possible at this time to implement such a principle in accordance with

the extent of the obligations effectively entered into by its author. The latter corresponds to the examples enumerated above.[192]

(11) Although the present commentary may not be the right place for a discussion of the effects of vague or general reservations, it must still be noted that they raise particular problems: it would seem difficult, at the very outset, to maintain that they are invalid *ipso jure*: the main criticism that can be levelled against them is that they make it impossible to assess whether or not the conditions for their substantive validity have been fulfilled.[193] For that reason, they should lend themselves particularly well to a "reservation dialogue".

3.1.8 Reservations to a provision reflecting a customary norm

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

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

Commentary

(1) Draft guideline 3.1.8 relates to a problem which arises fairly often in practice: that of the validity of a reservation to a provision which is restricted to reflecting a customary norm - the word "reflect" is preferred here to "enunciate" in order to demonstrate that the process of enshrining the norm in question in a treaty has no effect on its continued operation as a customary norm. This principle of the persistence of customary norms (and of the obligations flowing therefrom for the States or international organizations bound by them) is also reflected

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article 14, paragraph 6, of the Covenant" (*Multilateral Treaties Deposited with the Secretary-General*, cited in note 176 above, vol. I, pp. 182 and 183 (chap. IV.4).

[192] Paragraphs (5)-(9).

[193] See paragraphs (1) and (4) above.

in paragraph 2 of the draft guideline, which recalls that the author of a reservation to a provision of this type may not be relieved of his obligations thereunder by formulating a reservation. Paragraph 1, meanwhile, underlines the principle that a reservation to a treaty rule which reflects a customary norm is not *ipso jure* incompatible with the object and purpose of the treaty, even if due account must be taken of that element in assessing such compatibility.

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

> "... of the view that the Guatemalan reservations [to the 1969 Vienna Convention on the Law of Treaties] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention] ...".[194]

For its part, the Netherlands objected to the reservations formulated by several States in respect of various provisions of the 1961 Vienna Convention on Diplomatic Relations and took "the view that this provision remains in force in relations between it and the said States in accordance with international customary law".[195]

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[194] *Multilateral Treaties* …, cited in note 164 above, vol. II, p. 380 (chap. XXIII.1); see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (*ibid.*, pp. 380-385). In the *Mer d'Iroise* case, the United Kingdom maintained that France's reservation to article 6 of the Convention on the Continental Shelf was aimed at "the rules of customary international law" and was "inadmissible as a reservation to article 6", award of 30 June 1977, *Reports of International Arbitral Awards* (*RIAA*) vol. XVIII, p. 38, para. 50.

[195] *Multilateral Treaties* …, cited in note 164 above, vol. I, p. 96 (chap. III.3); in reality, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see below, paragraphs (13)-(16)). See also Poland's objections to the reservations of Bahrain and the Libyan Arab Jamahiriya (*ibid.*, p. 96) and D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, 1995, p. 88.

(3) It has often been thought that this inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases:[196]

> "... speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; - whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour".[197]

(4) While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context. The Court goes on to exercise caution in respect of the deductions called for by the exclusion of certain reservations. Noting that the faculty of reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf (delimitation) was not excluded by article 12 on reservations,[198] as it was in the case of articles 1-3, the Court considered it "normal" and

> "a legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law".[199]

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[196] See the dissenting opinion of Judge Morelli, appended to the 1969 judgment (*I.C.J. Reports 1969*, pp. 198 and 199) and the many commentaries cited by Pierre-Henri Imbert in *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 244, note 20; see also Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public* (*RGDIP*) 1982, p. 685.

[197] Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 38 and 39, para. 63.

[198] See paragraph (5) of the commentary to draft guideline 3.1.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 343 and 344.

[199] *I.C.J. Reports 1969*, p. 40, para. 66; see also p. 39, para. 63. In support of this position, see the individual opinion of Judge Padilla Nervo, *ibid.*, p. 89; against it, see the dissenting opinion of Judge Koretsky, p. 163.

(5) Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;[200] it simply stated that, in the case under consideration, the different treatment which the authors of the Convention accorded to articles 1-3, on the one hand, and article 6, on the other, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court's own conclusion.

(6) Furthermore, the Judgment itself states, in an often-neglected dictum, that "no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf] ...".[201] Judge Morelli, dissenting, does not contradict this when he writes: "Naturally the power to make reservations affects only the contractual obligation flowing from the Convention ... It goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified."[202] This clearly implies that the customary nature of the norm reflected in a treaty provision in respect of which a reservation is formulated does not in itself constitute grounds for invalidating the reservation: "the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law".[203]

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[200] P.-H. Imbert, *op. cit.*, note 22, p. 244; and, in the same vein, Alain Pellet, "La C.I.J. et les réserves aux traités: Remarques cursives sur une révolution inachevée", *Liber Amicorum Judge Shigeru Oda* (The Hague, Kluwer Law International, 2002), pp. 507 and 508. In his dissenting opinion, Judge Tanaka takes the opposing position with respect to "the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that article 12 of the Convention does not expressly exclude article 6, paragraphs 1 and 2, from the exercise of the reservation faculty" (*I.C.J. Reports 1969*, p. 182); this confuses the question of the faculty to make a reservation with that of the reservation's effects, where the provision that the reservation concerns is of a customary, and even a peremptory, nature. (Strangely, Judge Tanaka considers that the equidistance principle "must be recognized as *jus cogens*" - *ibid*.)

[201] *I.C.J. Reports 1969*, p. 40, para. 65.

[202] *Ibid.*, p. 198.

[203] Dissenting opinion of *ad hoc* Judge Sørensen, *ibid.*, p. 248.

(7) Moreover, although this principle is sometimes challenged,[204] it is recognized in the preponderance of doctrine,[205] and rightly so:

– Customary norms are binding on States, independently of their expression of consent to a conventional rule[206] but, unlike the case of peremptory norms, States may opt out by agreement *inter se*; it is not clear why they could not do so through a reservation[207] - providing that the latter is valid - but this is precisely the question raised;

– A reservation concerns only the expression of the norm in the context of the treaty, not its existence as a customary norm, even if, in some cases, it may cast doubt on the norm's general acceptance "as of right";[208] as the United Kingdom remarked in its

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[204] See the position taken by Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the *Mer d'Iroise* case, cited in note 194 above, p. 262.

[205] See Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, 1985, pp. 31 and 32; G. Gaja, "Le reserve al Patto sui diritti civili e politici e il diretto consuetudinario", *Rivista di diritto internazionale*, 1996, pp. 451 and 452; P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord", *Annuaire Français de Droit International*, 1978, p. 48; Rosa Riquelme Cortado, *op. cit.* in note 170 above, pp. 159-171; and L. Sucharipa-Behrmann, *op. cit.* in note 157 above, pp. 76 and 77.

[206] See Finland's objection to Yemen's reservations to article 5 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination: "By making a reservation a State cannot contract out from universally binding human rights standards [but this is true as a general rule]", (*Multilateral Treaties Deposited with the Secretary-General, op. cit.*, note 194, vol. I, p. 147 (chap. IV.2)).

[207] In that regard, see the dissenting opinion of *ad hoc* Judge Sørenson in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 248; see also M. Coccia, *op. cit*. in note 205 above, p. 32; see, however, below, paragraph (3) of the commentary to draft guideline 3.1.9.

[208] See article 38, paragraph 1 (b), of the Statute of the International Court of Justice. In that regard, see R.R. Baxter, "Treaties and Customs", *RCADI* 1970-I, vol. 129, p. 50; M. Coccia, *op. cit*. in note 205 above, p. 31; Giorgio Gaja, "Le reserve al Patto sui diritti civili e politici e il diretto consuetudinario", *Rivista di diritto internazionale*, 1996, p. 451 and G. Teboul, *op. cit*., note 196, pp. 711-714. Under certain (but not all) circumstances, the same may be true of the existence of a reservation clause (see P.-H. Imbert, *op. cit*., cited in note 196 above, p. 246, and Paul Reuter, "Solidarité et divisibilité des engagements conventionnels", *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1999), p. 631

observations on general comment No. 24, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law";[209]

– If this nature is clear, States remain bound by the customary norm, independently of the treaty;[210]

– Appearances to the contrary, there may be an interest (and not necessarily a laudable one) involved - for example, that of avoiding application to the relevant obligations of the monitoring or dispute settlement mechanisms envisaged in the treaty or of limiting the role of domestic judges, who may have different competences with respect to conventional rules, on the one hand, and customary rules, on the other;[211]

– Furthermore, as noted by France in its observations on general comment No. 24 of the Human Rights Committee, "the State's duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves";[212]

(also reproduced in P. Reuter, *Le développement de l'ordre juridique international - Écrits de droit international* (Paris, Économica, 1999), pp. 370 and 371), note 16).

[209] 1996 report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, (A/50/40, vol. I), pp. 131 and 132, para. 7.

[210] See paragraphs (13)-(16) below.

[211] Such is the case in France, where treaties (under article 55 of the Constitution), but not customary norms, take precedence over laws; see the 20 October 1989 decision by the Assembly of the French Council of State in the *Nicolo* case, *recueil Lebon*, p. 748, Frydman's conclusions, and the 6 June 1997 decision in the *Aquarone* case, *recueil Lebon*, p. 206, Bachelier's conclusions.

[212] 1997 report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40*, (A/51/40, vol. I), p. 104, para. 5; in the same vein, see the comment by the United States of America (in the Committees 1996 report, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, (A/50/40, vol. I), p. 130). See also Gérard Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *RGDIP* 1966, pp. 932 and 933.

– And, lastly, a reservation may be the means by which a "persistent objector" manifests the persistence of its objection; the objector may certainly reject the application, through a treaty, of a norm which cannot be invoked against it under general international law.[213]

(8) Here again, however, the question is whether this solution can be transposed to the field of human rights.[214] The Human Rights Committee challenged this view on the basis of the specific characteristics of human rights treaties:

> "Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction."[215]

(9) First, it should be noted that the Committee confirmed that reservations to customary norms are not excluded *a priori*. In arguing to the contrary in the specific case of human rights treaties, it simply notes that these instruments are designed to protect the rights of individuals. But this premise does not have the consequences that the Committee attributes to it[216] since, on the one hand, a reservation to a human rights treaty provision which reflects a customary norm in no way absolves the reserving State of its obligation to respect the norm as such[217] and, on the

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[213] See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), note 45.

[214] See A. Pellet, Second report on reservations to treaties (A/CN.4/477/Add.1), paras. 143-147.

[215] General comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 8.

[216] For an opposing view, see Thomas Giegerich, "Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien - Ein konstitutioneller Ansatz", *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*), 1995, p. 744 (English summary, pp. 779 and 780).

[217] See paragraph (7) above. According to the Human Rights Committee, "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own

other, in practice, it is quite likely that a reservation to such a norm (especially if the latter is peremptory) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules.[218] It is these considerations which led the Commission to indicate, at the outset, that: "[t]he fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation".

(10) On the more general issue of codification conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that the desire to codify is normally accompanied by a concern to preserve the rule being affirmed:[219] if it were possible to formulate a reservation to a provision of customary origin in the context of a codification treaty, the codification treaty would fail in its objectives,[220] to the point that

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religion, or use their own language" (general comment No. 24, cited in note 215 above, para. 8). This is certainly true, but it does not automatically mean that reservations to the relevant provisions of the Covenant are prohibited; if these rights must be respected, it is because of their customary and, in some cases, peremptory nature, not because of their inclusion in the Covenant. For a similar view, see G. Gaja, *op. cit*., note 208, p. 452. Furthermore, the Committee simply makes assertions; it does not justify its identification of customary rules attached to these norms; in another context, it has been said that "[t]he 'ought' merges with the 'is', the *lex ferenda* with the *lex lata*" (T. Meron, "The Geneva Conventions as customary norms", *American Journal of International Law* (*AJIL*), 1987, p. 55; see also W.A. Schabas's well-argued critique concerning articles 6 and 7 of the Covenant, "Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a Party?", *Brooklyn Journal of International Law*, 1995, pp. 296-310).

[218] In that regard, see Françoise Hampson's working paper on reservations to human rights treaties, (E/CN.4/Sub.2/1999/28, para. 17), and her final working paper on that topic (E/CN.4/Sub.2/2004/42); cited in note 213 above, para. 51: "In theory, a State may make a reservation to a treaty provision without necessarily calling into question the customary status of the norm or its willingness to be bound by the customary norm. Nevertheless, in practice, reservations to provisions which reflect customary international law norms are likely to be viewed with considerable suspicion."

[219] P.-H. Imbert, *op. cit*. in note 196 above, p. 246; see also G. Teboul, *op. cit*. in note 196 above, p. 680, who notes that while both are useful, the concept of a reservation is incompatible with that of a codification convention; this study gives a clear overview of the whole question of reservations to codification conventions (pp. 679-717, *passim*).

[220] P. Reuter, *op. cit*. in note 208 above, pp. 630 and 631 (or *Le développement de l'ordre juridique international*, cited *ibid.*, p. 370). The author adds that, for this reason, the treaty would also give rise to a situation further from its object and purpose than if it had not existed, since the scope of application of a general rule would be restricted (*ibid.*). This second statement is more

reservations and, at all events, multiple reservations, have been viewed as the very negation of the work of codification.[221]

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

- It is certain that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, on reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty;[222]

- The very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between the codification *stricto sensu* of international law and the progressive development thereof.[223] How many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?;[224]

- The status of the rules included in a treaty changes over time: a rule which falls under the heading of "progressive development" may become pure codification and a

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debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see below, note 229).

[221] R. Ago in *Yearbook ... 1965*, vol. I (797th meeting, 8 June 1965), p. 168, para. 58.

[222] G. Teboul, *op. cit*., note 150, p. 700.

[223] See, for example, the Commission's reports on its eighth (1956) and forty-seventh (1995) sessions, *Yearbook ... 1956*, vol. II, p. 256, para. 26, and *Yearbook ... 1996*, vol. II, pp. 92 and 93, paras. 156 and 157.

[224] P. Reuter, *op. cit*. in note 208 above, p. 632 (or *Le développement de l'ordre juridique international*, cited *ibid.*, p. 371).

> "codification convention" often crystallizes into a rule of general international law a norm which was not of this nature at the time of its adoption.[225]

(12) Thus, the nature of codification conventions does not, as such, constitute an obstacle to the formulation of reservations to some of their provisions on the same grounds (and with the same restrictions) as any other treaty and the arguments that can be put forward, in general terms, in support of the ability to formulate reservations to a treaty provision that sets forth a customary norm[226] are also fully transposable thereto. Furthermore, there is well-established practice in this area: there are more reservations to human rights treaties (which are, moreover, to a great extent codifiers of existing law) and codification treaties than to any other type of treaty.[227] And while some objections may have been based on the customary nature of the rules concerned,[228] the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

(13) Nevertheless, the customary nature of a provision which is the object of a reservation has important consequences with respect to the effects produced by the reservation; once established, it prevents application of the conventional rule which is the object of the reservation in the reserving State's relations with the other parties to the treaty, but it does not eliminate that

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[225] See below, paragraph (17); on the issue of the death penalty from the point of view of articles 6 and 7 of the 1966 Covenant on Civil and Political Rights (taking a negative position), see W.A. Schabas, *op. cit*. in note 217 above, pp. 308-310.

[226] See paragraph (2) above.

[227] For example, on 31 December 2003, the Vienna Convention on Diplomatic Relations was the object of 57 reservations or declarations (of which 50 are still in force) by 34 States parties (currently, 31 States have reservations still in force) (*Multilateral Treaties …*, cited in note 164 above, vol. I, pp. 90-100) and the 1969 Vienna Convention on the Law of Treaties was the subject of 70 reservations or declarations (of which 60 are still in force) by 35 States (32 at present) (*ibid.*, vol. II, pp. 340-351). For its part, the 1966 Covenant on Civil and Political Rights, which (now, at least) seems primarily to codify the general international law currently in force, was the object of 218 reservations or declarations (of which 196 are still in force) by 58 States (*ibid.*, pp. 173-184).

[228] See paragraph (2) above.

State's obligation to respect the customary norm (the content of which may be identical).[229] The reason for this is simple and appears quite clearly in the famous dictum of the International Court of Justice in the Nicaragua case:

> "The fact that the above-mentioned principles [of general and customary international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions."[230]

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

> "the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties".[231]

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

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[229] In support of this position, see Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., Longman, Harlow, 1992, vol. II, p. 1244; G. Teboul, *op. cit*. in note 196 above, p. 711; and Prosper Weil, "Vers une normativité relative en droit international?", *RGDIP* 1982, pp. 43-44. See also the authors cited in note 208 above or W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law* (1955), p. 56. Paul Reuter takes the opposing view, arguing that the customary norm no longer applies between the State that formulates a reservation and the parties that refrain from objecting to it since, through a conventional mechanism subsequent to the establishment of the customary rule, its application has been suspended (*op. cit*. in note 208 above); for a similar argument, see G. Teboul, *op. cit*. in note 196 above, pp. 690 and 708. There are serious objections to this view; see paragraph (2) of guideline 3.1.9.

[230] Judgment of 26 November 1984, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application), I.C.J. Reports 1984*, para. 73; see also Judge Morelli's dissenting opinion, *ibid.*, p. 198.

[231] See *Multilateral Treaties …*, cited in note 164 above, vol. II, p. 385 (chap. XXIII.1); see also the objections of the Netherlands and Poland, cited in paragraphs (6) and (7) above.

> "... the faculty of making reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognized rule of law. To substantiate this opinion it may be sufficient to point out that a number of reservations have been made to provisions of the Convention on the High Seas, although this Convention, according to its preamble, is 'generally declaratory of established principles of international law'. Some of these reservations have been objected to by other contracting States, while other reservations have been tacitly accepted. The acceptance, whether tacit or express, of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such. Consequently, there is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law".[232]

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

(17) The customary nature of the rule "reflected" in the treaty provision pursuant to which a reservation is formulated must be determined at the moment of such formulation. Nor can it be excluded that the adoption of the treaty might have helped crystallize this nature, particularly if the reservation was formulated long after the conclusion of the treaty.[233]

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[232] *I.C.J. Reports 1969*, p. 248.

[233] In its Judgment of 20 February 1969 in the *North Sea Continental Shelf* case, the International Court of Justice also recognized that "a norm-creating provision [may constitute]

(18) The somewhat complicated wording of the last part of draft guideline 3.1.8, paragraph 2, may be explained by the diversity *ratione loci* of customary norms: some may be universal in application while others have only a regional scope[234] and may even be applicable only at the purely bilateral level.[235]

3.1.9 Reservations contrary to a rule of *jus cogens*

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

Commentary

(1) Draft guideline 3.1.9 is a compromise between two opposing lines of argument which emerged during the Commission's debate. Some members held that the peremptory nature of the norm to which the reservation related made the reservation in question invalid, while others maintained that the logic behind draft guideline 3.1.8, on reservations to a provision reflecting a customary norm, should apply and that it should be accepted that such a reservation was not invalid in itself, provided it concerned only some aspect of a treaty provision setting forth the rule in question and left the norm itself intact. Both groups agreed that a reservation should not have any effect on the content of the binding obligations stemming from the *jus cogens* norm as reflected in the provision to which it referred. This consensus is reflected in draft guideline 3.1.9;

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the foundation of, or [generate] a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed" (*I.C.J. Reports 1969*, p. 41, para. 71).

[234] See the 20 November 1950 Judgment of the International Court of Justice in the *Asylum* case, *I.C.J. Reports 1950*, pp. 276 and 277; the 18 December 1951 Judgment of the Court in the *Anglo-Norwegian Fisheries* case, *I.C.J. Reports 1951*, pp. 136-139; and the 27 August 1952 Judgment of the Court in the *Rights of Nationals of the United States of America in Morocco* case, *I.C.J. Reports 1952*, p. 200.

[235] See the 12 April 1960 Judgment of the International Court of Justice in the *Right of Passage over Indian Territory* case (merits), *I.C.J. Reports 1960*, p. 39.

without adopting a position as to whether these opposing arguments are founded or unfounded, it establishes that a reservation should not permit a breach of a peremptory norm of general international law.

(2) According to Paul Reuter, since a reservation, through acceptances by other parties, establishes a "contractual relationship" among the parties, a reservation to a treaty provision that sets forth a peremptory norm of general international law is inconceivable: the resulting agreement would automatically be null and void as a consequence of the principle established in article 53 of the Vienna Convention.[236]

(3) This reasoning is not, however, axiomatic, but is based on one of the postulates of the "opposability" school, according to which the issue of the validity of reservations is left entirely to the subjective judgement of the contracting parties and depends only on the provisions of article 20 of the 1969 and 1986 Conventions.[237] Yet this reasoning is far from clear;[238] above all, it regards the reservations mechanism as a purely treaty-based process, whereas a reservation is a *unilateral* act; although linked to the treaty, it has no exogenous effects. By definition, it "purports to exclude or to modify the legal effect of *certain provisions of the treaty* in their application" to the reserving State[239] and, if it is accepted, those are indeed its consequences;[240]

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[236] Paul Reuter, "Solidarité et divisibilité des engagements conventionnels" in *International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1999), p. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international - Écrits de droit international* (Paris, Économica, 1999), p. 363). See also Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public* (1982), pp. 691-692.

[237] "The validity of a reservation depends, under the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty" (Jean-Marie Ruda, "Reservations to Treaties", *RCADI*, 1975-III, vol. 146, p. 180).

[238] Alain Pellet, First report on the law and practice relating to reservations to treaties (A/CN.4/470), paras. 100-105.

[239] See article 2 (1) (d) of the Vienna Conventions, reproduced in draft guideline 1.1; see also draft guideline 1.1.1.

[240] See article 21 of the Vienna Conventions.

however, whether or not it is accepted, "neighbouring" international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.[241] Other, more numerous authors assert the incompatibility of any reservation with a provision which reflects a peremptory norm of general international law, either without giving any explanation,[242] or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.[243]

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

> "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant."[244]

This formulation is debatable[245] and, in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

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[241] See paragraph (13) of the commentary to draft guideline 3.1.8.

[242] See, for example, R. Riquelme Cortado, *op. cit.*, p. 147. See also A. Pellet, Second report on reservations to treaties (A/CN.4/477/Add.1), paras. 141-142.

[243] See also the dissenting opinion of Judge Tanaka in the *North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 182.

[244] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 8. In its comments, France argued that "paragraph 8 is drafted in such a way as to link the two distinct legal concepts: of 'peremptory norms' and rules of 'customary international law' to the point of confusing them". (See 1997 report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 104, para. 3.)

[245] See the doubts expressed on this subject by the United States of America which, in its commentary on general comment No. 24, transposes to provisions which set forth peremptory norms the solution which is essential for those norms which formulate rules of customary law: "it is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations" (*ibid., Fiftieth Session* (A/50/40), vol. I, p. 127).

(5) It has, however, been asserted that the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts.[246] This is certainly true and in fact constitutes the only intellectually convincing argument for not transposing to reservations to peremptory provisions the reasoning that would not exclude, in principle, the ability to formulate reservations to treaty provisions embodying customary rules.[247]

(6) Conversely, it should be noted that when formulating a reservation, a State may indeed seek to exempt itself from the rule to which the reservation itself relates, and in the case of a peremptory norm of general international law this is out of the question[248] - all the more so because it is inconceivable that a persistent objector could thwart such a norm. The objectives of the reserving State, however, may be different: while accepting the content of the rule, it may wish to escape the consequences arising out of it, particularly in respect of monitoring,[249] and on this point there is no reason why the reasoning followed in respect of customary rules which are merely binding should not be transposed to peremptory norms.

(7) However, as regrettable as this may seem, reservations do not have to be justified, and in fact they seldom are. In the absence of clear justification, therefore, it is impossible for the other

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[246] G. Teboul, *op. cit.*, note 236, p. 707, note 52 referring to J.-D. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", *Revue générale de droit international public* (1979), p. 663, and the legal writings quoted.

[247] This is true *a fortiori* if we consider the reservation/acceptance "pair" as an agreement amending the treaty in the relations between the two States concerned. (See Massimo Coccia, *op. cit.* in note 205 above, pp. 30-31; see also the position of P. Reuter, above, paragraph (7)); this analysis, however, is unconvincing.

[248] There are, of course, few examples of reservations which are clearly contrary to a norm of *jus cogens*. See, however, the reservation formulated by Myanmar when it acceded, in 1993, to the 1989 Convention on the Rights of the Child. Myanmar reserved the right not to apply article 37 of the Convention and to exercise "powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation" in respect of children, in order to "protect the supreme national interest" (*Multilateral Treaties ...*, cited in note 164 above, vol. I, p. 339, note 29 (chap. IV.11)); this reservation, to which four States expressed objections (on the basis of referral to domestic legislation, not the conflict of the reservation with a peremptory norm), was withdrawn in 1993 (*ibid.*).

[249] See paragraph (7) of the commentary to draft guideline 3.1.8.

contracting parties or for monitoring bodies to verify the validity of the reservation, and it is best to adopt the principle that any reservation to a provision which formulates a rule of *jus cogens* is null and void *ipso jure*.

(8) Yet, even in the eyes of its advocates, this conclusion must be accompanied by two major caveats. Firstly, this prohibition does not result from article 19 (c) of the Vienna Convention but, *mutatis mutandis*, from the principle set out in article 53. Secondly, there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to "secondary" articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision.[250]

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

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

the Court referred

> "to its reasoning when dismissing the DRC's similar argument in regard to Rwanda's reservation to Article IX of the Genocide Convention (see paragraphs 64-69 above [[251]]):

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[250] In this regard, see, for example, the reservations of Malawi and Mexico to the 1979 International Convention against the Taking of Hostages, subjecting the application of article 17 (dispute settlement and jurisdiction of the Court) to the conditions of their optional declarations pursuant to article 36 (2) of the Statute of the International Court of Justice, *Multilateral Treaties* ... cited in note 164 above, vol. II, p. 112 (chap. XVIII.5). There can be no doubt that such reservations are not prohibited in principle; see draft guideline 3.1.13 and the commentary thereto.

[251] On this aspect of the Judgment, see paragraphs (2) and (3) of the commentary to draft guideline 3.1.13.

> the fact that a dispute concerns non-compliance with a peremptory norm of general international law cannot suffice to found the Court's jurisdiction to entertain such a dispute, and there exists no peremptory norm requiring States to consent to such jurisdiction in order to settle disputes relating to the Convention on Racial Discrimination."[252]

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

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

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

3.1.10 Reservations to provisions relating to non-derogable rights

A State or an international organization may not formulate a reservation to a treaty provision relating to non-derogable rights unless the reservation in question is compatible with

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[252] Judgment of 3 February 2006, *Jurisdiction of the Court and Admissibility of the Application*, para. 78.

the essential rights and obligations arising out of that treaty. In assessing that compatibility, account shall be taken of the importance which the parties have conferred upon the rights at issue by making them non-derogable.

Commentary

(1) In appearance, the question of reservations to non-derogable obligations contained in human rights treaties, as well as in certain conventions on the law of armed conflict,[253] environmental protection[254] or diplomatic relations,[255] is very similar to the question - as yet unresolved - of reservations to treaty provisions reflecting peremptory norms of general international law.[256] States frequently justify their objections to such provisions on grounds of the treaty-based prohibition on suspending their application whatever the circumstances.[257]

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[253] The principles set out in common article 3, paragraph 1, of the 1949 Geneva Conventions are non-derogable and must be respected "at any time and in any place".

[254] Although most environmental protection conventions contain rules considered to be non-derogable (see article 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal), they very often prohibit all reservations. See also article 311, paragraph 3, of the United Nations Convention on the Law of the Sea.

[255] See article 45 of the 1961 Vienna Convention on Diplomatic Relations. See also the Judgment of 24 May 1980, *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), I.C.J. Reports 1980*, p. 40, para. 86.

[256] On this issue, see: Rosa Riquelme Cortado, *op. cit.* in note 170 above, pp. 152 to 159.

[257] See article 4 (2) of the 1966 International Covenant on Civil and Political Rights, article 15 (2) of the European Convention on Human Rights (see also article 3 of Protocol No. 6, article 4 (3) of Protocol No. 7 and article 2 of Protocol No. 13), and article 27 of the American Convention on Human Rights. Neither the International Covenant on Economic, Social and Cultural Rights nor the African Charter of Human and Peoples' Rights contain clauses of this type (see Fatsah Ouguergouz, "L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme", RGDIP 1994, pp. 289-335).

(2) Clearly, to the extent that non-derogable provisions relate to rules of *jus cogens*, the reasoning applicable to the latter applies also to the former.[258] However, the two are not necessarily identical.[259] According to the Human Rights Committee:

> "While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation."[260]

This last point is a *petitio principii*, which is undoubtedly motivated by reasons of convenience but is not based on any principle of positive law and could only reflect the progressive development of international law, rather than codification *stricto sensu*.

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

> "Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not

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[258] See the Human Rights Committee's general comment No. 24: "some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms [...] - the prohibition of torture and arbitrary deprivation of life are examples" (CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 10).

[259] See the Human Rights Committee's general comment No. 29 (CCPR/C/21/Rev.1/Add.11), para. 11. See also R. Riquelme Cortado, *op. cit.*, in note 170 above, pp. 153-155, or K. Teraya, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights", *EJIL* 2001, pp. 917-947.

[260] General comment No. 24, cited in note 258 above, para. 10.

permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention."[261]

(4) In opposition to any possibility of formulating reservations to a non-derogable provision, it has been argued that, when any suspension of the obligations in question is excluded by the treaty, "with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are … without any caveat, incompatible with the object and purpose of those treaties".[262] This argument is not persuasive: it is one thing to prevent derogations from a binding provision, but another thing to determine whether a State is bound by the provision at issue.[263] It is this second problem that needs to be resolved.

(5) It must therefore be accepted that, while certain reservations to non-derogable provisions are certainly ruled out - either because they would hold in check a peremptory norm, assuming that such reservations are impermissible,[264] or because they would be contrary to the object and

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[261] OC-3/83, *Series A*, No. 3, para. 61 (French text in *Revue universelle des droits de l'homme (RUDH)* 1992, p. 306).

[262] Separate opinion of Mr. Augusto Cançado Trindade, appended to the decision of the Inter-American Court dated 22 January 1999 in the case of *Blake*, *Series C*, No. 27, para. 11; see the favourable comment by R. Riquelme Cortado, *op. cit.*, in note 170 above, p. 155. To the same effect, see the objection by the Netherlands mentioning that the United States reservation to article 7 of the 1966 International Covenant on Civil and Political Rights "has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogation, not even in times of public emergency, are permitted" (*Multilateral Treaties* …, cited in note 164 above, vol. I, pp. 192-193 (chap. IV.4)).

[263] See the commentary by the United Kingdom on general comment No. 24 of the Human Rights Committee: "Derogation from a formally contracted obligation and reluctance to undertake the obligation in the first place are not the same thing" (1996 report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session* (A/50/40), vol. I, p. 131, para. 6).

[264] Regarding this ambiguity, see draft guideline 3.1.9 and the commentary thereto, above.

purpose of the treaty - this is not necessarily always the case.[265] The non-derogable nature of a right protected by a human rights treaty reveals the importance with which it is viewed by the contracting parties, and it follows that any reservation aimed purely and simply at preventing its implementation is without doubt contrary to the object and purpose of the treaty.[266] It does not follow, however, that this non-derogable nature in itself prevents a reservation from being formulated to the provision setting out the right in question, provided that it applies only to certain limited aspects relating to the implementation of that right.

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

> "Denmark would like to recall article 4, paragraph 2, of the Covenant, according to which no derogations from a number of fundamental articles, inter alia 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.
>
> In the opinion of Denmark, reservation (2) of the United States with regard to capital punishment for crimes committed by persons below 18 years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, paragraph 2, of the Covenant such derogations are not permitted.

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[265] See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 52; Rosalyn Higgins, "Human Rights: Some Questions of Integrity", *Michigan Law Rev.* 1989, p. 15; Jeremy McBride, "Reservations and the Capacity of States to Implement Human Rights Treaties" in J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to Opt Out - Reservations and Objections to Human Rights Conventions*, British Institute of International Comparative Law (BIICL), London, 1997, pp. 163-164; Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe, Strasbourg, 1999, p. 113, or Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)", *International and Comparative Law Quarterly, 1997*, p. 402; *contra*: Liesbeth Lijnzaad, *op. cit.* in note 105 above, p. 91.

[266] See draft guideline 3.1.5: "A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty …".

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations."[267]

Denmark objected not because the United States reservations related to non-derogable rights, but because their wording was such that they left the essential provisions in question empty of any substance. It should be noted that in certain cases, States parties formulated no objection to reservations relating to provisions in respect of which no derogation is permitted.[268]

(7) Naturally, the fact that a provision may in principle be the object of a derogation does not mean that all reservations relating to it will be valid.[269] The criterion of compatibility with the object and purpose of the treaty also applies to them.

(8) This leads to several observations:

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

- In the first case, questions persist as to whether it is possible to formulate a reservation to a treaty provision setting out a peremptory norm, because the reservation might threaten the integrity of the norm, the application of which (unlike that of customary rules, which permit derogations) must be uniform;

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[267] *Multilateral Treaties*, cited in note 164 above, vol. 1, p. 189 (chap. IV.4); see also, although they are less clearly based on the non-derogable nature of articles 6 and 7, the objections of Belgium, Finland, Germany, Italy, the Netherlands (note 262 above), Norway, Portugal or Sweden (*ibid.*, pp. 194-196).

[268] See the many examples given by W.A. Schabas relating to the 1966 International Covenant on Civil and Political Rights and the European and Inter-American human rights treaties, *op. cit.* in note 158 above, pp. 51-52, note 51.

[269] See C.J. Redgwell, *op. cit.* in note 265 above, p. 402.

– In the second case, however, reservations remain possible provided they do not call into question the principle set forth in the treaty provision; in that situation, the methodological guidance contained in draft guideline 3.1.6[270] is fully applicable.

– Nevertheless, it is necessary to proceed with the utmost caution, and this is why the Commission has drafted the first sentence of draft guideline 3.1.10 in the negative ("A State or an international organization *may not* formulate a reservation … *unless* …"), as it has done on several occasions in the past when it wished to draw attention to the exceptional nature of certain behaviour in relation to reservations;[271]

– Moreover, in elaborating this draft guideline the Commission took care not to give the impression that it was introducing an additional criterion of permissibility with regard to reservations: the assessment of compatibility referred to in the second sentence of the provision concerns the reservation's relationship to "the essential rights and obligations arising out of the treaty", the effect on "an essential element of the treaty" being cited as one of the criteria for incompatibility with the object and purpose.[272]

3.1.11 Reservations relating to internal law

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

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[270] "Determination of the compatibility of a reservation with the object and purpose of a treaty".

[271] See draft guidelines 2.3.1 ("Late formulation of a reservation"), 2.4.6 ("Late formulation of an interpretative declaration"), 2.4.8 ("Late formulation of a conditional interpretative declaration"), 2.5.11 ("Effect of a partial withdrawal of a reservation"), 3.1.3 ("Permissibility of reservations not prohibited by the treaty") and 3.1.4 ("Permissibility of specified reservations").

[272] See draft guideline 3.1.5 and, in particular, paragraph (14) of the commentary thereto.

Commentary

(1) A reason frequently put forward by States in support of their formulation of a reservation relates to their desire to preserve the integrity of specific norms of their internal law.

(2) Although similar in certain respects, a distinction must be drawn between such reservations and those arising out of vague or general reservations. The latter are often formulated by reference to internal law in general or to whole sections of such law (such as constitution, criminal law, family law) without any further detail, thus making it impossible to assess the compatibility of the reservation in question with the object and purpose of the treaty. The question which draft guideline 3.1.11 seeks to answer is a different one, namely whether the formulation of a reservation - clearly expressed and sufficiently detailed - could be justified by considerations arising from internal law.[273]

(3) Here again, in the Commission's view, a nuanced response is essential, and it is certainly not possible to respond categorically in the negative, as certain objections to reservations of this type would seem to suggest. For instance, several States have objected to the reservation made by Canada to the Convention on the Environmental Impact Assessment in a Transboundary Context of 25 February 1991, on the grounds that the reservation "renders compliance with the provisions of the Convention dependent on certain norms of Canada's internal legislation". [274] Similarly, Finland objected to reservations made by several States to the 1989 Convention on the Rights of the Child on the "general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty".[275]

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[273] See paragraphs (4) to (6) of the commentary to draft guideline 3.1.7.

[274] See the objection by Spain, as well as those by France, Norway, Ireland, Luxembourg and Sweden in *Multilateral Treaties* …, cited in note 164 above, vol. II pp. 509-510 (chap. XXVI.4).

[275] Objections by Finland to the reservations of Indonesia, Malaysia, Qatar, Singapore and Oman, *ibid*., vol. I, pp. 337-339 (chap. IV.11). See also, for example, the objections of Denmark, Finland, Greece, Ireland, Mexico, Norway and Sweden to the second reservation of the United States to the Convention on the Prevention and Punishment of the Crime of Genocide, *ibid*., pp. 130 and 131 (chap. IV.1); for the text of the reservation itself, see paragraph (6) of the commentary to draft guideline 3.1.7; see also paragraph (4) of the same commentary.

(4) This ground for objection is unconvincing. Doubtless, in accordance with article 27 of the Vienna Convention,[276] no party may invoke the provisions of its domestic law as justification for failure to apply a treaty.[277] The assumption, however, is that the problem is settled, in the sense that the provisions in question are applicable to the reserving States; but that is precisely the issue. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its domestic law, which it is not in a position to amend,[278] at least initially.[279] Moreover, article 57 of the European Convention on Human Rights does not simply authorize a State party to formulate a reservation where its internal law is

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

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

[278] See William A. Schabas, "Reservations to the Convention on the Rights of the Child", *EJIL* 1996, pp. 479-480 and also *op cit.* in note 158 above, p. 59.

[279] Sometimes the reserving State indicates the period of time it will need to bring its domestic law into line with the treaty (as in the case of Estonia's reservation to the application of article 6, or Lithuania's to article 5, paragraph 3, of the European Convention on Human Rights which gave one-year time limits (http://conventions.coe.int/)), or it indicates its intention to do so (as in the case of the reservations Cyprus and Malawi made upon accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, commitments which were in fact kept - see *Multilateral Treaties* …, cited in note 164 above, vol. I, p. 281, note 25, and p. 283, note 40 (chap. IV.8)); see also Indonesia's statement upon accession to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989, *ibid.* vol. II, p. 487 (chap. XXVII.3)). It is also not unusual for a State to withdraw a reservation made without any time indication after it has amended the provisions of its national law that had prompted the reservation: as in the case of withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women (see *ibid.* vol. I, pp. 281 and 282, notes 28 and 32, and pp. 286 and 287, note 58 (chap. IV.8); see also the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservations to article 6, paragraph 1, of the European Convention on Human Rights (http://conventions.coe.int/). Such practices are laudable and should definitely be encouraged (see guideline 2.5.3 in the Guide to Practice and the commentary thereto, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 207-209); yet they cannot be used as an argument for the invalidity of the principle of reservations on the grounds of domestic law.

not in conformity with a provision of the Convention, but restricts even that authority exclusively to instances where "a law … in force in its territory is not in conformity with the provision".[280] Besides the European Convention, there are indeed reservations relating to the implementation of internal law that give rise to no objections and have in fact not met with objections.[281] On the other hand, this same article expressly prohibits "reservations of a general character".

(5) What matters here is that the State formulating the reservation should not use its domestic law[282] as a cover for not actually accepting any new international obligation, even though a treaty would have it change its practice.[283] While article 27 of the Vienna Conventions cannot

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[280] See paragraph (8) of the commentary to draft Guideline 3.1.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 346-347.

[281] See, for example, Mozambique's reservation to the International Convention against the Taking of Hostages of 17 December 1979, *Multilateral Treaties* …, cited in note 164 above, vol. II, p. 112 (chap. XVIII.5) (A reservation regarding the extradition of Mozambican nationals that reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism, *ibid*., p. 167 (chap. XVIII.11)), the reservations by Guatemala and the Philippines to the 1962 Convention on Consent for Marriage, Minimum Age for Marriage and Registration of Marriages, *ibid*., p. 93 (chap. XVI.3); all the reservations by Colombia (made upon signature), Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *ibid*., vol. I, pp. 462-464 (chap. VI.19). France's reservation to article 5, paragraph 1, of the European Convention on Human Rights has given rise to more discussion: see Nicole Questiaux, "La Convention européenne des droits de l'homme et l'article 16 de la Constitution du 4 octobre 1958", *Revue des Droits Humains* 1970, pp. 651-663; Alain Pellet, "La ratification par la France de la Convention européenne des droits de l'homme", *Revue de droit public* 1974, pp. 1358-1365; or Vincent Coussirat-Coustère, "La resérve française à l'article 15 de la Convention européenne des droits de l'homme", *Journal de droit internationale* 1975, pp. 269-293.

[282] Or international organizations their "rules of the organization": the term is taken from articles 27 and 46 of the 1986 Vienna Convention on the Law of Treaties between States and international organizations or between international organizations. It also appears (and is defined) in article 4, paragraph 4, of the Commission's draft articles on responsibility of international organizations (see *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), p. 103.

[283] In its concluding observations of 6 April 1995 on the initial report of the United States of America on its implementation of the 1996 International Covenant on Civil and Political Rights, the Human Rights Committee "regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that

rightly be said to apply to the case in point,[284] it should nevertheless be borne in mind that national laws are "merely facts" from the standpoint of international law[285] and that the very aim of a treaty can be to lead States to modify them.

(6) The Commission preferred the term "particular norms of internal law" to the term "provisions of internal law", which ran the risk of suggesting that only the written rules of a constitutional, legislative or regulatory nature were involved, whereas draft guideline 3.1.11 applied also to customary norms or norms of jurisprudence. Similarly, the term "rules of the organization" means not only the "established practice of the organization" but also the constituent instruments and "decisions, resolutions and other acts taken by the organization in accordance with the constituent instruments".[286]

(7) The Commission is aware that draft guideline 3.1.11 may, on first reading, seem to be merely a repetition of the principle set out in article 19 (c) of the Vienna Conventions and reproduced in draft guideline 3.1. Its function is important, nonetheless: it is to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of particular norms of internal law - it being

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the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant" (CCPR/CE/79/Add.50, para. 14). See the analysis by William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: is the United States still a party?", *Brooklyn Journal of International Law* 1995, pp. 277-238; and Jeremy McBride, "Reservations and the Capacity of States to implement Human Rights Treaties" in J.P. Gardner, ed., *Human Rights as General Norms and a State's Right to opt out - Reservations and Objections to Human Rights Conventions* (London, BIICL, 1997), p. 172.

[284] See paragraph (4) above.

[285] Permanent International Court of Justice Judgment of 25 May 1926, *Polish Upper Silesia* case, *Series A*, No. 7, p. 19; see also Arbitration Commission for Yugoslavia, Opinion No. 1 of 29 November 1991, in *Revue Générale de Droit International Public (RGDIP)*, 1992, p. 264. The principle is confirmed in article 4 of the Commission's 2001 draft articles on responsibility of States for internationally wrongful acts.

[286] Article 4, paragraph 4, of the Commission's draft articles on responsibility of international organizations, cited in note 282 above.

understood that, as in the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate.

(8) A proposal was also made to create an additional draft guideline dealing with reservations to treaty clauses relating to the implementation of the treaty in internal law.[287] Without underestimating the potential significance of this issue, the Commission was of the view that it was premature to devote a separate draft article to it, given that, in practical terms, the problem did not seem to have arisen and that the purpose of draft articles 3.1.7 to 3.1.13 was to illustrate the general guidance given in draft guideline 3.1.5, with examples chosen on the basis of their practical importance for States.[288] The Commission in fact considers that reservations to provisions of this type would not be valid if they had the effect of hindering the effective implementation of the treaty.

3.1.12 Reservations to general human rights treaties

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.

Commentary

(1) It is in the area of human rights that the most reservations have been made and the liveliest debates on their validity have taken place. Whenever necessary, the Commission has drawn attention to specific problems that could arise.[289] It was nonetheless deemed useful to have a

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[287] See, for example, article I of the Convention relating to a uniform law on the formation of contracts for the international sale of goods (The Hague, 1 July 1964); article 1 of the European Convention providing a uniform law on arbitration (Strasbourg, 20 January 1966); or articles 1 and 2 of the International Convention against the Taking of Hostages (New York, 17 December 1979).

[288] See paragraph (15) of the commentary to draft guideline 3.1.5, below.

[289] With regard to guidelines on the permissibility of reservations, see in particular paragraphs (8) and (9) of the commentary to draft guideline 3.1.7 (“Vague or general

specific draft guideline dealing with reservations made to general treaties such as the European, Inter-American and African Conventions or the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.[290]

(2) In the case of the latter, the Human Rights Committee stated in its general comment No. 24 that:

> "In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken."[291]

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.[292] That is not, however, the position of States parties which

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reservations"), paragraphs (8) and (9) of the commentary to draft guideline 3.1.8 ("Reservations to a provision reflecting a customary norm") or paragraph (4) of the commentary to draft guideline 3.1.9 ("Reservations contrary to a rule of *jus cogens*") and the commentary to draft guideline 3.1.10, *passim*.

[290] These treaties are not the only ones covered by this draft guideline: a treaty such as the Convention on the Rights of the Child (20 November 1989) also seeks to protect a very wide range of rights. See also the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (New York, 18 December 1990).

[291] CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 7. See Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 50.

[292] Some authors have maintained that the reservations regime is completely incompatible with human rights. See P.H. Imbert, who does not share this radical view, "La question des réserves et les conventions en matière de droits de l'homme", *Actes du cinquième colloque sur la Convention européenne des droits de l'homme* (Paris, Pedone, 1982), p. 99 (also in English: "Reservations and Human Rights Convention", *Human Rights Review* 1981, p. 28) or *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), p. 249; Massimo Coccia, *op. cit.* in note 205 above, p. 16, or R.P. Anand, "Reservations to Multilateral Treaties", *Indian Journal of International Law, 1960*, p. 88; See also the commentaries on Human Rights Committee general comment No. 24, cited in note 291 above, by Elena A. Baylis, "General Comment 24:

have not systematically formulated objections to reservations of this type,[293] and the Committee itself does not go that far because, in the paragraphs following the statement of its position of principle, it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant:[294] it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be invalid as such.

(3) Likewise, in the case of the 1989 Convention on the Rights of the Child, a great many reservations have been made to the provisions concerning adoption.[295] As has been noted by an author hardly to be suspected of "anti-human-rightsism", "It would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose".[296]

(4) In contrast with treaties relating to a particular human right, such as the conventions on torture or racial discrimination, the object and purpose of general human rights treaties is a

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Confronting the Problem of Reservations to Human Rights Treaties", *Berkeley Journal of International Law*, 1999, pp. 277-329; Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee General Comment No. 24 (52)", *International and Comparative Law Quarterly, 1997*, pp. 390-412; Rosalind Higgins, Introduction to J.P. Gardner, ed., *op. cit.*, note 162, pp. xvii-xxix; or Konstantin Korkelia, "New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights", *European Journal of International Law* (*EIJL*), *2002*, pp. 437-477.

[293] See, for example, the reservation of Malta to article 13 (on the conditions for the expulsion of aliens), to which no objection has been entered (see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2005* (ST/LEG/SER.E/24), vol. I, pp. 182-183 (chap. IV.4)). See also the reservation by Barbados to article 14, paragraph 3, or the reservation by Belize to the same provision (*ibid*., p. 179); or else the reservation by Mauritius to article 22 of the Convention on the Rights of the Child (*ibid*., p. 326 (chap. IV.11)).

[294] See general comment No. 24, paragraphs 8-10: these criteria, beyond that of the compatibility of a reservation with the object and purpose of the Covenant, have to do with the customary, peremptory or non-derogable nature of the norm in question; see draft guidelines 3.1.8-3.1.10.

[295] Articles 20 and 21; see Multilateral Treaties ..., cited in note 164 above, vol. I, pp. 321-336 (chap. IV.11).

[296] W.A. Schabas, "Reservations to the Convention on the Rights of the Child", EJIL 1996, p. 480.

complex matter. These treaties cover a wide range of human rights and are characterized by the global nature of the rights that they are intended to protect. Nevertheless, some of the protected rights may be more essential than others;[297] moreover, even in the case of essential rights, one cannot preclude the validity of a reservation dealing with certain limited aspects of the implementation of the right in question. In this respect reservations to general human rights treaties pose similar problems to reservations to provisions relating to non-derogable rights.[298]

(5) Draft guideline 3.1.12 attempts to strike a particularly delicate balance between these different considerations by combining three elements:

- "The indivisibility, interdependence and interrelatedness of the rights set out in the treaty";

- "The importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty"; and

- "The gravity of the impact the reservation has upon it".

(6) The wording of the first element is taken from paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993. It emphasizes the global nature of the protection afforded by general human rights treaties and is intended to prevent their dismantling.[299]

(7) The second element qualifies the previous one by recognizing - in keeping with practice - that certain rights protected by these instruments are no less important than other rights - and, in particular, non-derogable ones.[300] The wording used signals that the assessment

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[297] See paragraph (3), above.

[298] See draft guideline 3.1.10 above, and in particular paragraphs (4)-(8) of the commentary.

[299] Vienna Declaration and Programme of Action (A/CONF.157/23). This wording has since been regularly adopted - see in particular General Assembly resolutions on human rights, which systematically use the expression.

[300] See draft guideline 3.1.10 above.

must take into account both the rights concerned (substantive approach) and the provision of the treaty in question (formal approach), since it has been noted that one and the same right may be the subject of several provisions. As for the expression "general thrust of the treaty", it is taken up in draft guideline 3.1.5.[301]

(8) Lastly, the reference to "the gravity of the impact the reservation has upon" the right or the provision with respect to which it was made indicates that even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.

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

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

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

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

Commentary

(1) In his first report on the law of treaties, Fitzmaurice categorically stated: "It is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties".[302] His position, obviously inspired by the cold war debate on reservations to the Genocide Convention, is too

[301] See in particular paragraph (14) 2 of the commentary to draft guideline 3.1.5.

[302] A/CN.4/101, *Yearbook … 1956*, vol. II, p. 127, para. 96; this was the purpose of draft article 37, paragraph 4, which the Special Rapporteur was proposing (*ibid*., p. 115).

sweeping; moreover, it was rejected by the International Court of Justice, which, in its orders of 2 June 1999 in response to Yugoslavia's requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to article IX of the Genocide Convention of 1948, which gives the Court jurisdiction to hear all disputes relating to the Convention,[303] even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.[304]

(2) In its order on a request for the indication of provisional measures in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002)*, the Court came to the same conclusion with regard to the reservation of Rwanda to that same provision, stating that "that reservation does not bear on the substance of the law, but only on the Court's jurisdiction" and that "it therefore does not appear contrary to the object and purpose of the Convention".[305] It upheld that position in its Judgment of 3 February 2006, after reaffirming the position it had taken in its advisory opinion of 28 May 1951 on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,[306] according to which a reservation to that Convention would be permitted provided it was not incompatible with the object and purpose of the Convention, the Court concluded:

> "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a

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[303] *I.C.J. Reports 1999*, p. 772, paras. 29-33, and pp. 923-924, paras. 21-25.

[304] See *Multilateral Treaties* ..., cited in note 164 above, vol. I, pp. 129-132 (chap. IV.1) (see in particular the clear objections to that effect of Brazil, China (Taiwan), Mexico and the Netherlands).

[305] *(New Application: 2002)*, Order of 10 July 2002, *I.C.J. Reports 2002*, p. 246, para. 72.

[306] *I.C.J. Reports 1951*, p. 15.

particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention."[307]

The International Court of Justice, confirming its prior case law, thus gave effect to Rwanda's reservation to article IX of the Genocide Convention. This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.[308]

(3) In their joint separate opinion, however, several judges stated the view that the principle applied by the Court in its judgment might not be absolute in scope. They stressed that there might be situations where reservations to clauses concerning dispute settlement could be contrary to the treaty's object and purpose: it depended on the particular case.[309]

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[307] Paragraph 67.

[308] See in this connection Rosa Riquelme Cortado, *op. cit.* in note 170 above, pp. 192-202. As it happens, objections to reservations to dispute settlement clauses are rare. Apart from the objections raised to reservations to article IX of the Genocide Convention, however, see the objections formulated by several States to the reservations to article 66 of the Vienna Convention on the Law of Treaties, in particular the objections of Germany, Canada, Egypt, the United States of America (which argued that the reservation of Syria "is incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference" (*Multilateral Treaties …*, cited in note 164 above, vol. II, p. 385 (chap. XXIII.1)), Japan, New Zealand, the Netherlands ("provisions regarding the settlement of disputes, as laid down in article 66 of the Convention, are an important part of the Convention and ... cannot be separated from the substantive rules with which they are connected" (*ibid.*, p. 382)), the United Kingdom ("These provisions are inextricably linked with the provisions of Part V to which they relate. Their inclusion was the basis on which those parts of Part V which represent progressive development of international law were accepted by the Vienna Conference." (*ibid.*, p. 384)) and Sweden (espousing essentially the same position as the United Kingdom (*ibid.*, p. 383)).

[309] Joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, para. 21.

(4) The Human Rights Committee, meanwhile, felt that reservations to the International Covenant on Civil and Political Rights of 1966 relating to guarantees of its implementation and contained both in the Covenant itself and in the Optional Protocol thereto could be contrary to the object and purpose of those instruments:

> "These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. ... The Covenant ... envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is ... directed to securing the enjoyment of the rights, are ... incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty."[310]

With respect to the Optional Protocol, the Committee adds:

> "A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with the obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for

[310] Human Rights Committee, general comment No. 24 (CCPR/C/21/Rev.1/Add.6), 11 November 1994, para. 11; see also Françoise Hampson, Reservations to human rights treaties: final working paper (E/CN.4/Sub.2/2004/42), para. 55.

> the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case."[311]

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.[312]

(5) The European Court of Human Rights took a position that was just as extreme. In the *Loizidou* case, the Court concluded from an analysis of the object and purpose of the European Convention on Human Rights "that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their 'jurisdiction' from supervision by the Convention institutions"[313] and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.[314]

(6) This body of case law, with all its nuances, led the Commission to:

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[311] *Ibid*., para. 13. In the following paragraph, the Committee "considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose".

[312] Communication No. 845/1999, *Kennedy v. Trinidad and Tobago* (CCPR/C/67/D/845/1999), 2000 report of the Human Rights Committee (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40* (A/55/40), vol. II), annex XI.A, para. 6.7. To justify its reservation Trinidad and Tobago argued that it accepted "the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself, but [it] stresses that its Reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant ..." (*Multilateral Treaties ...*, cited in note 164 above, vol. I, p. 234 (chap. IV.5)). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole (*ibid*., pp. 239-240, note 3).

[313] Judgment of 23 March 1995, *Series A*, vol. 310, p. 27, para. 77.

[314] *Ibid*., paras. 70-89; see in particular paragraph 79. See also the decision of 4 July 2001 of the Grand Chamber on the admissibility of Application No. 48787/99 in the case of *Ilie Ilaşcu et al. v. Moldova and the Russian Federation*, p. 20, or the judgment of the Grand Chamber of 8 April 2004 in the case of *Assanidze v. Georgia* (Application No. 71503/01), para. 140.

1. Recall that the formulation of reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty is not in itself precluded; this is the purpose of the "*chapeau*" of draft guideline 3.1.13;

2. Unless the regulation or monitoring in question is the purpose of the treaty instrument to which a reservation is being made; and

3. Nevertheless indicate that a State or an international organization cannot minimize its substantial prior treaty obligations by formulating a reservation to a treaty provision concerning dispute settlement or the monitoring of the implementation of the treaty at the time it accepts the provision.

(7) Although some members might have disagreed, the Commission felt that there was no reason to draw a distinction between the two types of provision: even if their purposes are somewhat different,[315] the reservations that can be formulated to both types give rise to the same type of problems, and splitting them into two separate draft guidelines would have entailed setting out the same rules twice.

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[315] In part simply because the (non-binding) settlement of disputes could be one of the functions of a treaty monitoring body and could be part of its overall task of monitoring.