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Addendum

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Chapter IV
Reservations to treaties

Addendum

3. Permissibility of reservations and interpretative declarations

General commentary

(1) The purpose of Part 3, which comes after Part 1 devoted to definitions and Part 2 dealing with the procedure for formulating reservations and interpretative declarations, is to determine the conditions for the permissibility of reservations to treaties (and of interpretative declarations).

(2) After extensive debate, the Commission decided to retain the term "validity of reservations" to describe the intellectual operation consisting in determining whether a unilateral statement made[1] by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty[2] in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation.

(3) Adhering to the definition found in article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in guideline 1.1 of the Guide to Practice, the Commission

[1] Since the mere formulation of a reservation does not allow it to produce the effects intended by its author, the word "formulated" would have been more appropriate (see below the commentary to guideline 3.1, paras. (6) and (7)); but the Vienna Conventions use the word "made" and as a matter of principle the Commission does not wish to revisit the Vienna text.

[2] Or of the treaty as a whole with respect to certain specific aspects (see paragaraph 2 of guideline 1.1.1).

accepted that all unilateral statements meeting that definition constituted reservations. But, as the Commission states very clearly in its commentary to guideline 1.8, "[d]efining is not the same as regulating. […] [a] reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established".[3] It goes on to say: "Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and, above all, for the assessment of its validity. It is only once a particular instrument has been defined as a reservation (...) that one can decide whether it is valid, evaluate its legal scope and determine its effect."[4]

(4) At an early stage, the Commission opted for the words "permissibility" ("*licéité*") and "impermissibility" ("*illicéité*") in preference to "validity" ("*validité*") and "invalidity" ("*invalidité*") in order to respond to the concerns expressed by some members of the Commission and some States who considered that the term "validity" cast doubt on the nature of statements that fit the definition of reservations given in article 2, paragraph 1 (d), of the Vienna Conventions but did not fulfil the conditions set forth in article 19.[5] Actually, the word "validity" is quite neutral in that regard. It offers the advantage that it does not prejudge the doctrinal controversy,[6] central to the question of reservations, between the proponents of "permissibility", who hold that "the issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as a matter of policy, other Parties find the reservations acceptable or not",[7] and the proponents of "opposability", who hold that "the validity of a reservation depends solely on the acceptance of the reservation by another contracting State" and who therefore view article 19, subparagraph (c), of the Vienna Convention of 1969 "as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but not more than that".[8]

(5) Moreover, it was thought that the term "*illicite*" was not appropriate in any case to characterize reservations that did not fulfil the conditions of form or substance set by the Vienna Conventions. The Commission considers in this regard that in international law, an internationally wrongful act entails its author's responsibility, and this is plainly not the case with regard to the formulation of reservations that are contrary to the provisions of the treaty to which they relate or incompatible with its object and purpose.[9]

(6) It thus appeared to the Commission:

- First, that the term "*licite*" implied that the formulation of reservations contrary to the provisions of article 19 of the Vienna Conventions would engage the

[3] Paragraph (1) of the commentary.

[4] Paragraph (2) of the commentary. See also paragraph (16) of the commentary to guideline 1.1.

[5] See the statement of the United Kingdom in the Sixth Committee on 2 November 1993, A/C.6/48/SR.24, para. 42.

[6] On this doctrinal dispute, see in particular Jean Kyongun Koh, "Reservations to multilateral treaties: how international legal doctrine reflects world vision", *Harvard International Law Journal*, vol. 23 (1982), pp. 71–116, *passim*, in particular pp. 75–77; see also Catherine Redgwell, "Universality or Integrity? Some reflections on reservations to general multilateral treaties", BYBIL, vol. 64 (1993), pp. 243–282, in particular pp. 263–269; and Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), p. 81, footnote 78.

[7] Derek W. Bowett, "Reservations to non-restricted multilateral treaties", BYBIL, vol. 48 (1976–1977), p. 88.

[8] José Maria Ruda, "Reservations to treaties", *Recueil des cours* …, vol. 146 (1975-III), p. 190.

[9] See above guideline 3.3.2 (Non-permissibility of reservations and international responsibility) and commentary.

responsibility of the reserving State or international organization, which was certainly not the case;[10] and

- Second, that the term "permissible" used in the English text of the guidelines in the Guide to Practice and the commentaries thereto implied that the issue was exclusively one of permissibility and not of opposability, which had the disadvantage of unprofitably prejudging the doctrinal dispute discussed above.[11]

(7) However, the term "permissibility" was retained to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions, since, according to the English speakers, the term did not imply taking a position as to the consequences of non-fulfilment of those conditions. The term was rendered in French by the term "*validité substantielle*".

(8) Part 3 of the Guide to Practice deals successively with the questions relating to:

- Permissibility of reservations;
- Competence to assess the permissibility of reservations; and
- Consequences of the impermissibility of a reservation.

A special section will be devoted to the same questions in relation to interpretative declarations.

3.1 Permissible reservations

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.

Commentary

(1) Guideline 3.1 faithfully reproduces the wording of article 19 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986, which is patterned after the corresponding provision of the 1969 Convention with just two additions, which were needed in order to cover treaties concluded by international organizations.[12]

(2) By providing that, when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, "[a] State or an international organization may (...) formulate a reservation", albeit under certain conditions, that provision sets out "the general principle that the formulation of reservations is permitted …".[13] This is an essential element

[10] See above, paragraph (5).

[11] Paragraph (4).

[12] On the *travaux prėparatoires* of article 19 of the 1986 Vienna Convention, see A. Pellet, "Article 19 (1986)" in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article* (Brussels, Bruylant, 2006), pp. 189–796.

[13] Commentary to draft article 18 adopted on first reading in 1962, *Yearbook … 1962*, vol. II, p. 180, para. (15); see also the commentary to draft article 16 adopted on second reading, *Yearbook … 1966*, vol. II, p. 207, para. (17). For the 1986 Convention, see the commentary to draft articles 19

of the "flexible system" stemming from the advisory opinion of the International Court of Justice of 1951,[14] and it is no exaggeration to say that, on this point, it reverses the traditional presumption resulting from the system of unanimity,[15] the stated aim being to facilitate the widest possible participation in treaties and, ultimately, their universality.

(3) In this regard, the text of article 19 finally adopted in 1969 resulted directly from Waldock's proposals and takes the opposite view from the drafts prepared by the Special Rapporteurs on the law of treaties who preceded him, all of whom started from the inverse assumption, expressing in negative or restrictive terms the principle that a reservation might only be formulated (or "made")[16] if certain conditions were met.[17] Waldock,[18] on the other hand, presents the principle as the "power to formulate, that is, to *propose*, a reservation", which a State has "in virtue of its sovereignty".[19]

(4) However, this power is not unlimited:

- In the first place, it is limited in time, since a reservation may only be formulated "when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty";[20]
- In the second place, the formulation of reservations may be incompatible with the object of some treaties, either because they are limited to a small group of States — a situation that is taken into account in article 20, paragraph 2, of the Convention, which reverts to the system of unanimity where such instruments are concerned[21] — or, in the case of instruments of universal scope, because the parties intend to make the integrity of the treaty take precedence over its universality or, at any rate, to limit the power of States to formulate reservations; on this issue, as on all others, the

(Formulation of reservations in the case of treaties between several international organizations) adopted in 1977, *Yearbook … 1977*, vol. II (Part Two), p. 106, para. (1), and 19 *bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States), *Yearbook … 1977*, vol. II (Part Two), p. 108, para. (3).

[14] R*eservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*, 28 May 1951, *I.C.J. Reports 1951*, p. 15.

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

[16] On this point, see paragraphs (6) and (7) below.

[17] See, for example, draft article 10, para. 1, proposed by J.L. Brierly (A/CN.4/23, *Yearbook ... 1950*, vol. II, p. 238), the drafts of article 9 proposed by Hersch Lauterpacht (first report (A/CN.4/63), *Yearbook … 1953*, vol. II, pp. 91–92; and second report (A/CN.4/87), *Yearbook … 1954*, vol. II, p. 131); or draft article 39, para. 1, proposed by G.G. Fitzmaurice (*Yearbook … 1956*, vol. II, p. 115). See the comments of Pierre-Henri Imbert in *Les réserves aux traités multilatéraux* (Paris, Pedone, 1979), pp. 88–89.

[18] "A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation … unless: …" (first report (A/CN.4/144), *Yearbook … 1962*, vol. II, article 17, para. 1 (a), p. 60).

[19] Commentary to article 17, *ibid*., p. 65, para. (9) – emphasis in the original.

[20] See paragraph (9) below.

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

Vienna Convention is only intended to be residuary in nature, and there is nothing to prevent the negotiators from inserting in the treaty "reservations clauses" that limit or modify the freedom set out as a principle in article 19.[22]

(5) It is probably excessive to speak of a "right to reservations", even though the Convention proceeds from the principle that there is a presumption in favour of their validity. Some members contested the existence of such a presumption. This, moreover, is the significance of the very title of article 19 of the Vienna Conventions ("Formulation of reservations"),[23] which is confirmed by its *chapeau*: "A State may (...) formulate a reservation unless …". Certainly, by using the verb "may", the introductory clause of article 19 recognizes that States have a right; but it is only the right to "formulate" reservations.[24]

(6) The words "formulate" and "formulation" were carefully chosen. They signify that, while it is up to the State intending to attach a reservation to its expression of consent to be bound to indicate how it means to modify its participation in the treaty,[25] that formulation is not sufficient of itself. The reservation is not "made", it does not produce any effect, merely by virtue of such a statement. For that reason an amendment by China seeking to replace the words "formulate a reservation" with the words "make reservations"[26] was rejected by the Drafting Committee of the Vienna Conference.[27] As Waldock noted, "there is an

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[22] With regard to the residual nature of the Vienna regime, see Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, Cambridge University Press, 2007), pp. 151–153; John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", AJIL, vol. 74 (1980), pp. 383–391; P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, pp. 162–230; Lord McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 169–173; Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg: Council of Europe, 1999), pp. 85–90 and 101–104; Rosa Riquelme Cortado, *Las reservas a los tratados – Formulación y ambigüedades del regimen de Viena* (Universidad de Murcia, 2004), pp. 89–136.

[23] Concerning the modification of this title in the context of the Guide to Practice, see paragraph (10) below.

[24] P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, p. 83; see also Paul Reuter, *Introduction au droit des traités*, 3rd ed., Philippe Cahier, ed. (Paris, PUF, 1995), p. 75; or R. Riquelme Cortado, *Las reservas a los tratados* …, footnote XXX above, p. 84. It may also be noted that a proposal by Briggs to replace the word "free" in Waldock's draft (see footnote XXX above) with the words "legally entitled" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 140, para. 22) was not accepted, nor was an amendment along the same lines proposed by the Union of Soviet Socialist Republics at the Vienna Conference (A/CONF.39/C.1/L.115, *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. 133, para. 175). The current wording ("A State may … formulate a reservation unless ...") was adopted by the Commission's Drafting Committee (*Yearbook … 1962*, vol. I, 663rd meeting, 18 June 1962, p. 221, para. 3), then by the Commission in plenary meeting in 1962 (*ibid*., vol. II, pp. 175–176, article 18, para. 1). No amendments were made in 1966, other than the replacement of the words "*Tout État*" [in the French text] with the words "*Un État*" (see *Yearbook … 1965*, vol. I, 813th meeting, 29 June 1965, p. 287, para. 1 (text adopted by the Drafting Committee), and *Yearbook … 1966*, vol. II, p. 202 (article 16 adopted on second reading)).

[25] *Cf.* D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 22; and A. Pellet, "Article 19 (1969)", footnote XXX above, pp. 712–714, paras. 146–149.

[26] A/CONF.39/C.1/L.161 (see *Documents of the Conference* (A/CONF.39/11/Add.2), footnote XXX above, p. 145, para. 177).

[27] See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), Committee of the Whole, 23rd meeting, 11 April 1968, p.

inherent ambiguity in saying (...) that a State may '*make*' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States".[28] Now, not only is a reservation only "established"[29] if certain procedural conditions — admittedly, not very restrictive ones[30] — are met, but it must also comply with the substantive conditions set forth in the three subparagraphs of article 19 itself, as the word "unless" clearly demonstrates.[31]

(7) According to some authors, the terminology used in this provision is not consistent in that regard, since "*[l]orsque le traité autorise certaines réserves (article 19, alinéa b), elles n'ont pas besoin d'être acceptées par les autres États (…). Elles son donc 'faites' dès l'instant de leur formulation par l'État réservataire*" ["if the treaty permits specified reservations (article 19, subparagraph (b)), they do not need to be accepted by the other States … They are thus 'made' from the moment of their formulation by the reserving State"].[32] According to that logic, while subparagraph (b) correctly states that such reservations "may be *made*", the *chapeau* of article 19 could be misleading by implying that they, too, are merely "formulated" by their author.[33] But this is an empty argument:[34] subparagraph (b) is not about reservations that are established (or made) simply by virtue of being formulated, but rather about reservations that are not permitted by the treaty. As in the situation in subparagraph (a), such reservations may not be formulated: in one case (subparagraph (a)), the prohibition is explicit; in the other (subparagraph (b)), it is implied.

(8) Moreover, the principle of freedom to formulate reservations cannot be separated from the exceptions to the principle. For this reason, the Commission, which in general has avoided modifying the wording of the provisions of the Vienna Conventions that it has

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121, para. 2 (explanations by China), and 24th meeting, 16 April 1968, p. 126, para. 13 (statement by the Expert Consultant, Sir Humphrey Waldock).

[28] First report (A/CN.4/144), *Yearbook … 1962*, vol. II, p. 62, para. (1) of the commentary to draft articles 17, 18 and 19.

[29] See the *chapeau* of article 21, "A reservation established with regard to another party in accordance with articles 19, 20 and 23 …", and guidelines 4.1 to 4.1.3.

[30] See article 20, paras. 3–5, article 21, para. 1, and article 23 and guidelines 2.1 to 2.2.4. See also Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, vol. 15 (1985), p. 28; D. Müller, "Article 20 (1969)" and "Article 21 (1969)" in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, footnote XXX above, pp. 797–875 and pp. 883–929.

[31] "This article states the general principle that the *formulation* of reservations is permitted except in three cases" (*Yearbook … 1966*, vol. II, p. 207, commentary to art. 16, para. (17)) – emphasis added; the use of the word "*faire*" in the French text of the commentary (*ibid*., p. 225) is open to criticism, but it is probably a translation error, rather than a deliberate choice – *contra*: P.-H. Imbert, *Les réserves aux traités …*, footnote XXX above, p. 90. In any case, the English text of the commentary is correct.

[32] P.-H. Imbert, *Les réserves aux traités …*, footnote XXX above, pp. 84–85.

[33] See also J.M. Ruda, "Reservations to Treaties", footnote XXX above, pp. 179–180, and the far more restrained criticism by Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, (The Hague, 1988), vol. 5, pp. 111–112.

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

carried over into the Guide to Practice, decided against elaborating a separate guideline dealing only with the principle of the presumption of the validity of reservations.

(9) For the same reason, the Commission chose not to leave out of guideline 3.1 a reference to all the different moments "in which a reservation may be formulated". As discussed above,[35] article 19 reproduces the temporal limitations included in the definition of reservations in article 2, paragraph 1 (d), of the Vienna Conventions,[36] and this repetition is no doubt superfluous, as was stressed by Denmark during the consideration of the draft articles on the law of treaties adopted in 1962.[37] However, the Commission did not think it necessary to correct the anomaly when the final draft was adopted in 1966, and the repetition is not a sufficiently serious drawback to merit rewriting the Vienna Convention, which allowed this drawback to remain.

(10) The repetition also provides a discreet reminder that the validity of reservations does not depend solely on the substantive conditions set forth in article 19 of the Vienna Conventions but is also dependent on conformity with conditions of form and timeliness. However, those formal conditions are dealt with in Part 2 of the Guide to Practice, so that Part 3 places more emphasis on the substantive validity, that is, the permissibility of reservations – hence the title of "Permissible reservations" chosen by the Commission for guideline 3.1, for which it was not possible to retain the title of article 19 of the Vienna Conventions ("Formulation of reservations"), since it was already used for guideline 2.1.3[38] and would, in any case, tend to put the accent, inappropriately, on the formal conditions for the validity of reservations.

3.1.1 Reservations prohibited by the treaty

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

(a) Prohibiting all reservations;

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

(c) Prohibiting certain categories of reservations including the reservation in question.

Commentary

(1) According to Paul Reuter, the situations envisaged in subparagraphs (a) and (b) of article 19 (reproduced in guideline 3.1) constitute very simple cases.[39] However, that is not at all certain. It is true that these provisions refer to cases where the treaty to which a State or an international organization wishes to make a reservation contains a special clause prohibiting or permitting the formulation of reservations. But, aside from the fact that not all possibilities are explicitly covered,[40] delicate problems can arise regarding the exact

[35] Para. (4).
[36] See guidelines 1.1 (Definition of reservations) and commentary.
[37] See the fourth report of Humphrey Waldock (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 46.
[38] "Representation for the purpose of formulating a reservation at the international level".
[39] 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. 625 (also reproduced in P. Reuter, *Le développement de l'ordre juridique international – Écrits de droit international* (Paris, Economica, 1999), p. 363). For the contrary view on the complexity of the issue, see A. Pellet, "Article 19 (1969)" footnote XXX above, pp. 715–725, paras. 151–167.
[40] See footnote XXX and the commentary to guideline 3.1.3, para. (9), below.

scope of a clause prohibiting reservations and the effects of a reservation formulated despite that prohibition.

(2) Guideline 3.1.1 is intended to clarify the scope of subparagraph (a) of guideline 3.1, which does not spell out what is meant by "reservation … prohibited by the treaty", while guidelines 3.1.2 and 3.1.4 undertake to clarify the meaning and the scope of the expression "specified reservations" contained in subparagraph (b).

(3) In draft article 17, paragraph 1 (a), which he submitted to the Commission in 1962, Waldock distinguished three situations:

- Reservations "prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization";
- Reservations not provided for by a clause that restricts the reservations that can be made; or
- Reservations not provided for by a clause that authorizes certain reservations.[41]

What these three cases had in common was that, unlike reservations incompatible with the object and purpose of the treaty,[42] "when a reservation is formulated that is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself".[43]

(4) Even though it was taken up again, in a slightly different form, by the Commission,[44] this categorization was unnecessarily complicated and, at the rather general level at which the authors of the Convention intended to operate, there was no point in drawing a distinction between the first two situations identified by the Special Rapporteur.[45] In the draft article 18, paragraph 2, which he proposed in 1965 in the light of the observations by Governments, he limited himself to distinguishing reservations prohibited by the terms of the treaty (or "by the established rules of an international organization")[46] from those

[41] First report (A/CN.4/144), *Yearbook … 1962*, vol. II, pp. 60–61.

[42] Situation envisaged in para. 2 of draft article 17 but in a rather different form than in the current text.

[43] First report (A/CN.4/144), *Yearbook … 1962*, vol. II, p. 65, para. (9) of the commentary.

[44] Draft article 18, para. 1 (b), (c) and (d), report of the International Law Commission (1962) (A/5209), *Yearbook ... 1962*, vol. II, p. 176 (see the commentary to this para., p. 180, para. (15)).

[45] On the contrary, during the debate on the draft, Briggs considered that "the distinction was between the case set out in subparagraph (a), where all reservations were prohibited, and the case set out in subparagraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded" (*Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, para. 12); *contra*: Waldock, *ibid.*, p. 223, para. 32; as the example of article 12 of the 1958 Convention on the Limits of the Continental Shelf (see the commentary to guideline 3.1.2, para. (6) below) indicates, this comment is highly relevant.

[46] Although the principle had not been disputed at the time of the debate in the plenary Commission in 1965 (but had been disputed by Lachs in 1962 (see *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142, para. 53) and had been retained in the text adopted during the first part of the seventeenth session (see *Yearbook ... 1965*, vol. II, p. 162) this indication disappeared without explanation from draft article 16 as finally adopted by the Commission in 1966 following the "final cleanup" by the Drafting Committee (see *Yearbook ... 1966*, vol. I (Part Two), 887th meeting, 11 July 1966, p. 295, para. 91). The deletion of this phrase should be seen in the context of the general safeguards clause concerning constituent instruments of international organizations or treaties adopted within an international organization appearing in article 5 of the Convention and adopted the same day in its final form by the Commission (*ibid.*, p. 294, para. 79). In practice, it is very unusual to allow reservations to be formulated to the constituent instruments of an international organization (see Maurice H. Mendelson, "Reservations to the constitutions of international organizations", BYBIL,

implicitly prohibited as a result of the authorization of specified reservations by the treaty.[47] This distinction is found in a more refined form[48] in article 19, subparagraphs (a) and (b), of the Convention, without any distinction being made as to whether the treaty prohibits, or fully or partially authorizes reservations.[49]

(5) According to Tomuschat, the prohibition in subparagraph (a), as it is worded, should be understood as covering both express prohibitions and implicit prohibitions of reservations.[50] Some justification for this interpretation can be found in the *travaux préparatoires* for this provision:

- In the original wording, proposed by Waldock in 1962,[51] it was specified that the provision concerned reservations that were "prohibited by the terms of the treaty", a clarification that was abandoned in 1965 without explanation by the Special Rapporteur and with little light being shed by the discussions in the Commission on this matter;[52]
- In the commentary to draft article 16 adopted on second reading in 1965, the Commission in effect seems to place on the same footing "reservations expressly or implicitly prohibited by the provisions of the treaty".[53]

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vol. 45 (1971), pp. 137–71). As for treaties concluded within the context of international organizations, the best example of (purported) exclusion of reservations is that of the International Labour Organization, whose consistent practice is not to accept the deposit of instruments of ratification of international labour conventions when accompanied by reservations (see the Memorandum submitted by the Director of the International Labour Office to the Council of the League of Nations on the admissibility of reservations to general conventions, *Official Journal* of the League of Nations, 1927, p. 882, or the memorandum submitted by the International Labour Organization to the International Court of Justice in 1951 in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in *I.C.J. Reports 1951, Pleadings, Oral Arguments and Documents*, pp. 227–228, or the statement of Wilfred Jenks, Legal Adviser of the International Labour Organization, during the oral pleadings in that case, *ibid.*, p. 234); for a discussion and critique of this position, see the commentary to guideline 1.1.6 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty), paras. (3)–(5).

47 Fourth report (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 50.

48 On the editorial changes made by the Commission, see the debate on draft article 18 (*Yearbook ... 1965*, vol. I, especially the 797th and 798th meetings, 7 and 9 June 1965, pp. 147–163) and the text adopted by the Drafting Committee (*ibid.*, 813th meeting, 29 June 1965, p. 263–264, para. 1) and the debate on it (*ibid.*, pp. 264–265). The final texts of art. 16 (a) and (b) adopted on second reading by the Commission read as follows: "A State may ... formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty authorizes specified reservations which do not include the reservation in question" (*Yearbook ... 1966*, vol. II, p. 202), see also the commentary to guideline 3.1.2, footnote XXX above, below.

49 The "alternative proposals" *de lege ferenda* in 1953 in the first report submitted by Hersch Lauterpacht all refer to treaties that "[do] not prohibit or restrict the faculty of making reservations" (first report (A/CN.4/63) *Yearbook … 1953*, vol. II, pp. 91–92).

50 Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties. Comments on articles 16 and 17 of the International Law Commission's draft articles on the law of treaties", ZaöRV, vol. 27 (1967), p. 469.

51 See paragraph (3) above.

52 See, however, the statement by Yasseen, *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 19: "the words 'the terms of' (*expressément*) could be deleted and it could read simply: '[unless] the making of reservations is prohibited by the treaty ...'. For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly" – but he was referring to the 1962 text.

53 Like, moreover, "those expressly or impliedly authorized", *Yearbook ... 1966*, vol. II, p. 205, para.

(6) This interpretation, however, is open to discussion. The idea that certain treaties could "by their nature", exclude reservations was discarded by the Commission in 1962, when it rejected the proposal along those lines made by Waldock.[54] Thus, apart from the case of reservations to the constituent instruments of international organizations — which is dealt with in guideline 2.8.8 — it is hard to see what prohibitions could derive "implicitly" from a treaty, except in the cases covered by subparagraphs (a) and (b)[55] of article 19,[56] and it must be recognized that subparagraph (a) concerns only reservations expressly prohibited by the treaty. Moreover, this interpretation appears to be compatible with the relative flexibility that pervades all the provisions of the Convention that deal with reservations.

(7) There is no problem — other than determining whether or not the declaration in question constitutes a reservation[57] — if the prohibition is clear and precise, in particular when it is a general prohibition, on the understanding, however, that there are relatively few such examples[58] even if some are famous, such as that in article 1 of the Covenant of the League of Nations:

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(10) of the commentary; see also p. 207, para. (17). In the same vein, article 19, para. 1 (a) of the draft articles on the law of treaties concluded between States and international organizations or between two or more international organizations adopted by the Commission in 1981 places on equal footing cases where reservations are prohibited by treaties and those where it is "otherwise established that the negotiating States and negotiating organizations were agreed that the reservation is prohibited" (*Yearbook ... 1981*, vol. II (Part Two), p. 137).

[54] See paragraph (4) above. The Special Rapporteur indicated that, in drafting this clause, "what he had had in mind was the Charter of the United Nations, which, by its nature, was not open to reservations" (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 60). This exception is covered by the safeguard clause of article 5 of the Convention (see footnote XXX above). The words "nature of the treaty" drew little attention during the discussion (Castrén, however, found the expression imprecise – *ibid.*, 652nd meeting, 28 May 1962, p. 166, para. 28; see also Verdross, *ibid.*, para. 35); it was deleted by the Drafting Committee (*ibid.*, 663rd meeting, 18 June 1962, p. 221, para. 3).

[55] The amendments of Spain (A/CONF.39/C.1/L.147) and of the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) aimed at reintroducing the idea of the "nature" of the treaty in subparagraph (c) were withdrawn by their authors or rejected by the Drafting Committee (see the reaction of the United States, *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 meetings of the plenary Committee* (A/CONF.39/11/Add.1, p. 37). During the Commission's discussion of guideline 3.1.1, some members stated the view that certain treaties, such as the Charter of the United Nations, by their very nature excluded any reservations. The Commission nonetheless concluded that this idea was consistent with the principle enunciated in subparagraph (c) of article 19 of the Vienna Conventions and that, where the Charter was concerned, the requirement of the acceptance of the competent organ of the organization (see article 20, para. 3, of the Vienna Conventions) provided sufficient guarantees.

[56] This is also the final conclusion arrived at by C. Tomuschat, "Admissibility and legal effects of reservations …", footnote XXX above, p. 471.

[57] See guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations) and commentary.

[58] Even in the area of human rights (see P.-H. Imbert, "Reservations and human rights conventions", *Human Rights Review* (1981), p. 28 or W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law* (1955), p. 46; see, however, for example, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (article 9), the Convention against Discrimination in Education of 14 December 1960 (article 9, para. 7), Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (article 4) or the European Convention against Torture of 26 November 1987 (article 21), which all prohibit any reservations to their provisions. Reservation clauses in human rights treaties sometimes refer to the provisions of the Vienna Convention concerning reservations (*cf.* article 75 of the American

> "The original Members of the League shall be those of the Signatories (...) as shall accede without reservation to this Covenant."[59]

Likewise, article 120 of the 1998 Rome Statute of the International Criminal Court states:

> "No reservations may be made to this Statute."[60]

And similarly, article 26, paragraph 1, of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> "No reservation or exception may be made to this Convention."[61]

(8) Sometimes, however, the prohibition is more ambiguous. Thus, in accordance with paragraph 14 of the Final Act of the 1961 Geneva Conference which adopted the European Convention on International Commercial Arbitration, "the delegations taking part in the negotiation of the Convention ... declare that their respective countries do not intend to make any reservations to the Convention":[62] not only is it not a categorical prohibition, but this declaration of intention is even made in an instrument separate from the treaty. In a

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Convention on Human Rights) — which conventions containing no reservation clauses do implicitly — or reproduce its provisions (*cf.* article 28, para. 2, of the 1979 Convention on the Elimination of All Forms of Discrimination against Women or article 51, para. 2, of the 1989 Convention on the Rights of the Child).

[59] It could be maintained that this rule was set aside when the Council of the League recognized the neutrality of Switzerland (in this respect, see M. Mendelson, "Reservations to the constitutions of international organizations", footnote XXX above, pp. 140 and 141).

[60] However straightforward it may seem, this prohibition is not actually totally devoid of ambiguity: the highly regrettable article 124 of the Statute, which authorizes "a State on becoming a party [to] declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court" with respect to war crimes, constitutes an exception to the rule stated in article 120, for such declarations amount to reservations (see A. Pellet, "Entry into force and amendment of the Statute" in Antonio Cassese, Paola Gaeta and John R.W. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), vol. I, p. 157; see also the European Convention on the Service Abroad of Documents relating to Administrative Matters, article 21 of which prohibits reservations, while several other provisions authorize certain reservations. For other examples, see Sia Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", *ICLQ*, vol. 48 (1999), pp. 493 and 494; P. Daillier, M. Forteau and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, *L.G.D.J.*, 8th edition (Paris, 2009), p. 199; P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, pp. 165 and 166; F. Horn, *Reservations and Interpretative Declarations* …, footnote XXX above, p. 113; R. Riquelme Cortado, *Las reservas a los tratados* …, footnote XXX above, pp. 105–108; W.A. Schabas, "Reservations to human rights treaties …", footnote XXX above, p. 46.

[61] For a very detailed commentary, see Alessandro Fodella, "The declarations of States parties to the Basel Convention" in Tullio Treves (ed.), *Six Studies on Reservations*, *Comunicazioni e Studi*, vol. XXII, 2002, pp. 111–148; art. 26, para. 2, authorizes States parties to make "declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State". The distinction between the reservations of para. 1 and the declarations of para. 2 can prove laborious, but this is a problem of definition that does not in any way restrict the prohibition stated in para. 1: if a declaration made under para. 2 proves to be a reservation, it is prohibited. The combination of articles 309 and 310 of the 1982 Convention on the Law of the Sea poses the same problems and calls for the same responses (see, in particular, A. Pellet, "Les réserves aux conventions sur le droit de la mer", *La mer et son droit – Melanges offerts a Laurent Lucchini et Jean-Pierre Quéneudec* (Paris, Pedone, 2003), pp. 505–517; see also the commentary to guideline 3.1.2, footnote XXX below).

[62] Example given by P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, pp. 166 and 167.

case of this type, it could seem that reservations are not strictly speaking prohibited, but that if a State formulates a reservation, the other Parties should, logically, object to it.

(9) More often, the prohibition is partial and relates to one or more specified reservations or one or more categories of reservations. The simplest (but rather rare) situation is that of clauses listing the provisions of the treaty to which reservations are not permitted.[63] Examples are article 42 of the Convention relating to the Status of Refugees of 28 July 1951[64] and article 26 of the 1972 International Convention for Safe Containers of the International Maritime Organization.

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

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

(11) The distinction between reservation clauses of this type and those excluding specified reservations was made in Sir Humphrey Waldock's draft in 1962.[65] The Vienna Conventions themselves do not draw such distinctions, and, despite the uncertainty that prevailed in their *travaux préparatoires*, it should certainly be assumed that subparagraph (a) of article 19 covers all the three situations that a more precise analysis can discern:

- Reservation clauses prohibiting all reservations;
- Reservation clauses prohibiting reservations to specified provisions;
- Lastly, reservation clauses prohibiting certain categories of reservations.

(12) This clarification seems particularly helpful in that the third of these situations poses problems (of interpretation)[66] of the same nature as those arising from the criterion of compatibility with the object and purpose of the treaty, which certain clauses actually reproduce expressly.[67] By indicating that these reservations, prohibited without reference to a specific provision of the treaty, still fall under article 19, subparagraph (a), of the Vienna Conventions, the Commission seeks from the outset to emphasize the unity of the legal regime applicable to the reservations mentioned in the three subparagraphs of article 19.

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[63] This situation is very similar to that in which the treaty specifies the provisions to which reservations are permitted – see paragraph (5) of the commentary to guideline 3.1.2 and the comments by Briggs (*Yearbook … 1962*, vol. I, 663rd meeting, 18 June 1962).

[64] With regard to this provision, P.-H. Imbert notes that "*[l]'influence de l'avis [de la CIJ sur les* Réserves à la Convention sur le genocide *adopté deux mois auparavant] est très nette puisqu'une telle clause revient à preserver les dispositions qui ne pourront faire l'objet de réserves*" [the influence of the opinion [of the International Court of Justice on *Reservations to the Genocide Convention* adopted two months earlier] is very clear, since such a clause effectively protects the provisions which cannot be the object of reservations (*Les réserves aux traités …*, footnote XXX above, p. 167); see the other examples given, *ibid.*, or in the commentary to guideline 3.1.2, paras. (5)–(8), below.

[65] See *Yearbook … 1962*, vol. II, p. 60.

[66] "Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty" (A. Aust, *Modern Treaty Law and Practice*, footnote XXX above, p. 136).

[67] See the examples given in footnote XXX above. This is one specific example of "categories of prohibited reservations" – quite vague in nature, it is true.

3.1.2 Definition of specified reservations

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.

Commentary

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

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

(b) The reservations permitted must be "specified";

(c) It must be specified that "only" those reservations "may be made".[68]

The purpose of guideline 3.1.2 is to clarify the meaning of the expression "specified reservations", which is not defined by the Vienna Conventions, since this clarification could have important consequences for the applicable legal regime; among other things, reservations which are not "specified" must pass the test of compatibility with the object and purpose of the treaty.[69]

(2) The origin of article 19, subparagraph (b), of the Vienna Conventions can be traced back to paragraph 3 of draft article 37 submitted to the Commission in 1956 by Fitzmaurice:

> "In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted."[70]

Waldock took up that concept again in paragraph 1 (a) of draft article 17, which he proposed in 1962 and which the Commission used in paragraph 1 (c) of draft article 18. That draft article was adopted the same year[71] and, following a number of minor drafting changes, was incorporated into article 16, subparagraph (b), of the 1966 draft,[72] then into article 19 of the Convention. That course of action did not go unchallenged, however, as during the Vienna Conference a number of amendments were submitted with a view to deleting the provision[73] on the pretext that it was "too rigid"[74] or redundant because it

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[68] On this word, see the commentary to guideline 3.1, paras. (6)–(7), above.

[69] See guideline 3.1.4 below.

[70] First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, p. 115; see also p. 127, para. 95.

[71] See the commentary to guideline 3.1.1, paras. (3)–(4), above.

[72] See footnote XXX above.

[73] Amendments by the United States of America and Colombia (A/CONF.39/C.1/L.126 and Add.1) and the Federal Republic of Germany (A/CONF.39/C.1/L.128), which were specifically designed to delete subparagraph (b), and by the Union of Soviet Socialist Republics (A/CONF.39/C.1/L.115), France (A/CONF.39/C.1/L.169), Ceylon (A/CONF.39/C.1/L.139) and Spain (A/CONF.39/C.1/L.147), which proposed major revisions of article 16 (or of articles 16 and 17) that would also have led to the disappearance of that provision (for the text of these amendments, see *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May*

duplicated subparagraph (a),[75] or that it had not been confirmed by practice;[76] all those amendments were, however, withdrawn or rejected.[77]

(3) The only change to subparagraph (b) was made by means of a Polish amendment inserting the word "only" after the word "authorizes", which was accepted by the Drafting Committee of the Vienna Conference "in the interest of greater clarity".[78] This bland description should not obscure the vast practical implications of this clarification, which actually reverses the presumption made by the Commission and, in keeping with the Eastern countries' persistent effort to facilitate the formulation of reservations as much as possible, offers the possibility of doing so even when the negotiators have taken the precaution of expressly indicating the provisions in respect of which a reservation is permitted.[79] This amendment does not, however, exempt a reservation which is neither expressly permitted nor implicitly prohibited from the requirement to observe the criterion of compatibility with the object and purpose of the treaty.[80] Such a reservation may also be subject to objections on other grounds. This is why, in the wording of guideline 3.1.2, the Commission favoured the word "envisaged" over the word "authorized" to qualify the reservations in question, in contrast to the expression "reservation expressly authorized", as found in article 20, paragraph 1, of the Vienna Conventions.

1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2), pp. 144 and 145, paras. 174–177). During the Commission's discussion of the draft, certain members had also taken the view that that provision was unnecessary (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, Yasseen, p. 149, para. 18; Tunkin, *ibid.*, p. 150, para. 29; but, for a more nuanced position, see *ibid.*, p. 151, para. 33; or Ruda, p. 154, para. 70).

[74] According to the representatives of the United States of America and Poland at the 21st meeting of the Plenary Committee (10 April 1968, *Summary records of plenary meetings and meetings of the plenary Committee* (A/CONF.39/11), p. 117, para. 8, and p. 128, para. 42); see also the statement made by the representative of the Federal Republic of Germany (*ibid.*, p. 119, para. 23).

[75] Colombia, *ibid.*, p. 123, para. 68.

[76] Sweden, *ibid.*, p. 127, para. 29.

[77] See *ibid.*, pp. 148–149, paras. 181–188 and the explanations of the Expert Consultant, Sir Humphrey Waldock, *Summary records* (A/CONF.39/11), 24th meeting, 16 April 1968, p. 137, para. 6, and the results of the votes on those amendments, *ibid.*, 25th meeting, 16 April 1968, p. 146, paras. 23–25.

[78] A/CONF.39/C.1/L.136; see *Summary records* (A/CONF.39/11), Plenary Committee, 70th meeting, 14 May 1968, p. 453, para. 16. Already in 1965, during the Commission's discussion of draft article 18, subparagraph (b), as reviewed by the Drafting Committee, Castrèn proposed inserting "only" after "authorizes" in subparagraph (b) (*Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 149, para. 14, and 813th meeting, 29 June 1965, p. 264, para. 13); see also the similar proposal made by Yasseen, *ibid.*, para. 11, which, in the end, was not accepted following a further review by the Drafting Committee (see *ibid.*, 816th meeting, p. 308, para. 41).

[79] See F. Horn, *Reservations and Interpretative Declarations …*, footnote XXX above, p. 114; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties*: *Ratify and Ruin?*, T.M.C. Asser Institut (Dordrecht, Nijhoff, 1994), p. 39; Jean-Marie Ruda, "Reservations to treaties …", footnote XXX above, p. 181; or Renata Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law* (1970), pp. 299–300. Such restrictive formulas are not unusual – see, for example, article 17, para. 1, of the Convention on the Reduction of Statelessness of 1954 ("1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15. 2. No other reservations to this Convention shall be admissible") and the other examples given by R. Riquelme Cortado, *Las reservas a los tratados …*, footnote XXX above, pp. 128–129., A. Pellet "Article 19 (1969)", footnote XXX above, pp. 720–721, paras. 159–163. On the significance of the reversal of the presumption, see also M. Robinson, *Yearbook … 1995*, vol. I, 2402nd meeting, p. 158, para. 17.

[80] See guideline 3.1.3 and commentary, in particular paras. (2)–(3), below.

(4) In practice, the types of clauses permitting reservations are comparable to those containing prohibitive provisions and pose the same kind of difficulties with regard to determining *a contrario* those reservations which may not be formulated:[81]

- Some of them authorize reservations to particular provisions, expressly and limitatively listed either affirmatively or negatively;
- Others authorize specified categories of reservations;
- Lastly, others (few in number) authorize reservations in general.

(5) Article 12, paragraph 1, of the 1958 Geneva Convention on the Continental Shelf appears to illustrate the first of those categories:

> "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."[82]

As Ian Sinclair noted, "Article 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might be made",[83] and neither the scope nor the effects of that authorization are self-evident, as demonstrated by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases[84] and, above all, by the arbitral award rendered in 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*.[85]

(6) In that case, the Arbitral Tribunal emphasized that:

> "Article 12 [of the 1958 Geneva Convention on the Continental Shelf], by its clear terms, authorised any contracting State, including the French Republic, to make its consent to be bound by the Convention subject to reservations to articles other than Articles 1 to 3 inclusive.[86]

However,

> "Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 … Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms."[87]

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[81] See guideline 3.1.1 and commentary, above.

[82] Article 309 of the United Nations Convention on the Law of the Sea provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention" (on this provision, see A. Pellet, "Les réserves aux conventions sur le droit de la mer", footnote XXX above, pp. 505–511). A treaty may set a maximum number of reservations or provisions that can be subject to reservations (see, for example, article 25 of the 1967 European Convention on the Adoption of Children). These provisions may be compared with those authorizing parties to accept certain obligations or to choose between the provisions of a treaty, which are not reservation clauses *stricto sensu* (see guideline 1.5.3 and commentary).

[83] Ian Sinclair, *The Vienna Convention* …, footnote XXX above, p. 73. On the distinction between specified and non-specified reservations, see also paras. (11)–(13) below.

[84] See Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 38–41.

[85] Decision of 30 June 1977, UNRIAA, vol. XVIII, pp. 32–35, paras. 39–44.

[86] *Ibid*., pp. 32–33, para. 39.

[87] *Ibid*.

(7) The situation is different when the reservation clause defines the categories of permissible reservations. Article 39 of the General Act of Arbitration of 1928 provides an example of this:

> "1. In addition to the power given in the preceding article[88], a Party, in acceding to the present General Act, may make his acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. These reservations must be indicated at the time of accession.
>
> "2. These reservations may be such as to exclude from the procedure described in the present Act:
>
> "(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said party may have a dispute;
>
> "(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> "(c) Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories."

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

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

even when States do not "meticulously" follow the "pattern" set out in the reservation clause.[89]

(8) Another particularly famous and widely discussed example[90] of a clause authorizing

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[88] Article 38 provides that Parties may accede to only parts of the General Act.

[89] Judgment of 19 December 1978, *I.C.J. Reports 1978*, p. 28, para. 55.

[90] See Angela Bonifazi, "La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo", in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Minutes of the round table organized in Bari on 17 and 18 December 1973 by the Faculty of Law of the University of Bari) (Bari, Levante, 1974), pp. 301–319; Gérard Cohen-Jonathan, *La Convention européenne des droits de l'homme* (Paris: Economica, 1989), pp. 86–93; J.A. Frowein, "Reservations to the European Convention on Human Rights", *Protecting Human Rights: The European Dimension. Studies in Honour of Gerard J. Warda* (Cologne: C. Heymanns Verlag, 1988), pp. 193–200; Pierre-Henri Imbert, "Reservations to the European Convention on Human Rights before the Strasbourg Commission: the *Temeltasch* case", ICLQ, vol. 33 (1984), pp. 558–595; Rolf Kühner, "Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen 'auslegenden Erklärung' zu Art. 6 Abs. 3 lit. e MRK", ZaöRV, vol. 42 (1982), pp. 58–92 (summary in English); S. Marcus-Helmons, "L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme", *Revue de droit international et de droit comparé*, 1968, pp. 7–26; Maria Jose Morais Pires, *As reservas a Convenção europeia dos direitos do homen* (Coimbra, Portugal, Livraria Almedina, 1997), p. 493; Rosario Sapienza, "Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo", *Rivista di Diritto internazionale*, 1987, pp. 641–653; William A. Schabas, "Article 64" in E. Decaux, P.-H. Imbert and L. Pettiti dirs., *La Convention européenne des droits de l'homme: commentaire article par article* (Paris: Economica, 1995), pp. 923–942; Susan Marks, "Reservations to regional human rights treaties" in J.P. Gardner (ed.), *Human Rights as*

reservations (which falls under the second category mentioned above)[91] is found in article 57 (ex 64) of the European Convention on Human Rights:

> "1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
>
> "2. Any reservation made under this article shall contain a brief statement of the law concerned."

In this instance, the right to formulate reservations is limited by conditions relating to both form and content; in addition to the usual limitations *ratione temporis*,[92] a reservation to the Convention must:

- Refer to a particular provision of the Convention;
- Be justified by the state of legislation in the reserving State; at the time that the reservation is formulated;
- Not be "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope";[93] and
- Be accompanied by a brief statement explaining "the scope of the Convention provision whose application a State intends to prevent by means of a reservation".[94]

Assessing whether each of these conditions has been met raises problems. It must surely be considered, however, that the reservations authorized by the Convention are "specified" within the meaning of article 19 (b) of the Vienna Conventions and that only such reservations are permissible.

(9) It has been noted that the wording of article 57 of the European Convention on Human Rights is not fundamentally different[95] from that used, for example, in article 26, paragraph 1, of the European Convention on Extradition of 1957:

General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions (British Institute of International and Comparative Law, 1997), p. 35; and Jean Dhommeaux, "La coordination des réserves et des déclarations à la Convention européenne des droits de l'homme et au Pacte international relatif aux droits civils et politiques" in J.-F. Flauss and M. de Salvia (eds.), *La Convention européenne des droits de l'homme – développements récents et nouveaux défis* (Brussels, Bruylant, 1997), pp. 13–37.

[91] Para. (4). For other examples, see A. Aust, *Modern Treaty Law and Practice*, footnote XXX above, pp. 135–136; S. Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", footnote XXX above, pp. 495–496; William Bishop, Jr., "Reservations to treaties", *Recueil des cours* …, vol. 103, 1996-II, pp. 323 and 324; or P. Daillier and A. Pellet, *Droit international public*, footnote XXX above, p. 181; see also the table of Council of Europe conventions showing clauses falling into each of the first two categories of permissible reservation clauses mentioned in para. (4) above, in C.R. Riquelme Cortado, *Las reservas a los tratados* …, footnote XXX above, p. 125, and the other examples of partial authorizations given by this author, pp. 126–129.

[92] See the commentary to guideline 3.1, footnote XXX.

[93] *Belilos* case, judgement of 29 April 1988, E.C.H.R. *Series A*, vol. 132, p. 25, para. 55.

[94] Report of the European Commission of Human Rights of 5 May 1982, *Temeltasch*, Application No. 9116/80, *European Commission of Human Rights Yearbook*, vol. 25, para. 90.

[95] P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, p. 186; see also R. Riquelme Cortado, *Las reservas a los tratados* ..., footnote XXX above, p. 122.

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

even though the latter could be interpreted as a general authorization. While, however, the type of reservations that can be formulated to the European Convention on Human Rights is "specified", here the authorization is restricted only by the exclusion of across-the-board reservations.[96]

(10) In fact, a general authorization of reservations[97] itself does not necessarily resolve all the problems. It leaves unanswered the question of whether the other Parties may still object to reservations[98] and whether these authorized reservations[99] are subject to the test of compatibility with the object and purpose of the treaty.[100] The latter question is addressed by guideline 3.1.4, which draws a distinction between specified reservations whose reservation clause defines the content and those which leave the content relatively open.

(11) This distinction is not self-evident. It caused particular controversy following the 1977 arbitral award in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* and divided the Commission, whose members advocated different positions. Some reserving States thought that a reservation was "specified" if the treaty set precise limits within which it could be formulated; those criteria then superseded (but only in that instance) the criterion of the object and purpose.[101] Others pointed out that that occurred very exceptionally, perhaps only in the rare case of "negotiated reservations",[102] and, furthermore, that the Commission had not retained Mr. Rosenne's proposal that the

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[96] Regarding this concept, see guideline 1.1, paragraph 2, and paragraphs (16) to (22) of the commentary.

[97] For another even clearer example, see article 18, paragraph 1, of the European Convention on the Compensation of Victims of Violent Crimes of 1983: "Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations."

[98] This is sometimes expressly stated (see, for example, article VII of the Convention on the Political Rights of Women of 1952 and the comments in that regard of R. Riquelme Cortado, *Las reservas a los tratados* …, footnote XXX above, p. 121).

[99] It cannot be reasonably argued that subparagraph (b) could include "implicitly authorized" reservations – other than on the grounds that any reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of subparagraph (c).

[100] See the questions raised by S. Spiliopoulou Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", footnote XXX above, pp. 496–497, or R. Riquelme Cortado, *Las reservas a los tratados* …, footnote XXX above, p. 124.

[101] Derek W. Bowett, "Reservations to non-restricted multilateral treaties", footnote XXX above, pp. 71–72.

[102] On this concept, see the commentary to guideline 1.1.8 (Reservations formulated by virtue of clauses expressly authorizing the exclusion or the modification of certain provisions of a treaty), para. (10). See also W. Paul Gormley, "The modification of multilateral conventions by means of 'negotiated reservations' and other 'alternatives': a comparative study of the ILO and Council of Europe", Part I, *Fordham Law Review*, vol. 39 (1970–1971), p. 59 and pp. 75–76. *Cf.* the annex to the European Convention on Civil Liability for Damage caused by Motor Vehicles, which accords to Belgium the faculty over a period of three years to make a specific reservation, or article 32, paragraph 1 (b), of the European Convention on Transfrontier Television of 1989, which exclusively grants the United Kingdom the ability to formulate a specified reservation; examples provided by Sia Spiliopoulo Åkermark, "Reservations clauses in treaties concluded within the Council of Europe", footnote XXX above, p. 499. The main example given by D. Bowett to illustrate his theory relates precisely to a "negotiated reservation" ("Reservations to non-restricted multilateral treaties", footnote XXX above, p. 71).

expression "specified reservations", which he considered "unduly narrow", should be replaced by "reservations to specific provisions";[103] accordingly, it would be unrealistic to require the content of specified reservations to be established with precision by the treaty, otherwise subparagraph (b) would be rendered meaningless.[104] According to a third view, a compromise was possible between the undoubtedly excessive position that would require the content of the reservations envisaged to be precisely stated in the reservation clause and the position that equated a specified reservation with a "reservation expressly authorized by the treaty",[105] even though articles 19, paragraph (b), and article 20, paragraph 1, use different expressions. Consequently, it was suggested that it should be recognized that reservations that were specified within the meaning of article 19, subparagraph (b) (and of guideline 3.1 (b)), must, on the one hand, relate to specific provisions and, on the other, fulfil certain conditions specified in the treaty, but without going so far as to require their content to be predetermined – that was the position finally taken by the Commission.

(12) The case law is not very helpful in reconciling those opposing views. The arbitral award of 1977, invoked by the proponents of both arguments, says more about what a specified reservation is not than what it is.[106] The conclusion to be drawn is that the mere fact that a reservation clause authorizes reservations to particular provisions of the treaty is not enough to "specify" these reservations within the meaning of article 19, subparagraph (b).[107] The Tribunal, however, confined itself to requiring reservations to be "specific",[108] without indicating what the test of that specificity was to be. In addition, during the Vienna Conference, K. Yasseen, Chairman of the Drafting Committee, assimilated specified reservations to those which were expressly authorized by the treaty[109] with no further clarification.

(13) Accordingly, most members of the Commission held that a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or, to take into account of the across-the-board reservations envisaged in guideline 1.1, paragraph 2,[110] indicated that reservations were possible to the treaty as a whole with respect to certain specific aspects. The divergence between these different points of view should not be overstated, however; while the expression "reservations envisaged", which was preferred to "reservations authorized", undoubtedly gives more weight to the broad-brush approach favoured by the Commission, at the same time, in guideline 3.1.4, the Commission introduced a distinction between specified reservations with defined content and those whose content is not defined, the latter being subject to the test of compatibility with the object and purpose of the treaty.

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[103] *Yearbook ... 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 7. 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. 52, points out, however, that, even though Mr. Rosenne's proposal was not accepted, Sir Humphrey Waldock himself had also drawn this parallel (*Yearbook … 1965*, vol. I, p. 265, para. 27).

[104] P.-H. Imbert, *ibid.*, pp. 50–53.

[105] In this connection, see P.-H. Imbert, *ibid.*, p. 53.

[106] See paragraph (6) above.

[107] See paragraphs (6)–(7) above.

[108] In reality, it is the authorization that must apply to specific or specified reservations – terms which the Tribunal considered to be synonymous, in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic.*

[109] A/CONF.39/C.1/SR.70, para. 23.

[110] See guideline 1.1 and paragraphs (16)–(22) of the commentary.

3.1.3 Permissibility of reservations not prohibited by the treaty

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

Commentary

(1) Guidelines 3.1.3 and 3.1.4 specify the scope of article 19, subparagraphs (a) and (b), of the Vienna Conventions (the 1986 text of which is repeated in guideline 3.1). They make explicit what the Conventions leave implicit, *viz.*, that failing a contrary provision in the treaty — and in particular if the treaty authorizes specified reservations as defined in guideline 3.1.2 — any reservation must satisfy the basic requirement, set forth in article 19, subparagraph (c), of not being incompatible with the object and purpose of the treaty.

(2) This principle is one of the fundamental elements of the flexible system established by the Vienna regime, moderating the "radical relativism"[111] resulting from the pan-American system, which reduces multilateral treaties to a network of bilateral relations,[112] while avoiding the rigidity resulting from the system of unanimity.

(3) Since its first appearance in connection with reservations in the advisory opinion of the International Court of Justice of 1951,[113] the notion of the object and purpose of the treaty[114] has become increasingly accepted. It has become a means of striking a balance between the need to preserve the essence of the treaty and the desire to facilitate accession to multilateral treaties by the greatest possible number of States. There is, however, a major difference between the role of the criterion of compatibility with the object and purpose of the treaty according to the 1951 advisory opinion, on the one hand, and article 19, subparagraph (c), of the Convention, on the other.[115] In the advisory opinion, the criterion was applied equally to the formulation of reservations and to objections:

> "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."[116]

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

(4) While there is no doubt that this requirement that a reservation must be compatible with the object and purpose of the treaty now represents a rule of customary law which is

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[111] P. Reuter, *Introduction au droit des traités*, footnote XXX above, p. 73, para. 130. This author applies the term to the system adopted by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*I.C.J. Reports 1951*, p. 15); the criticism applies perfectly well, however, to the pan-American system.

[112] On the pan-American system, see the bibliography in P.-H. Imbert, *Les réserves aux traités* …, footnote XXX above, pp. 485–486. In addition, aside from the description by P.-H. Imbert himself (*ibid.*, pp. 33–38), see M.M. Whiteman, *Digest of International Law*, Department of State (Washington, D.C., 1970), vol. 14, pp. 141–144 or J.M. Ruda, "Reservations to treaties", footnote XXX above, pp. 115–133.

[113] *I.C.J. Reports 1951*, pp. 24 and 26.

[114] This notion is defined in guideline 3.1.5.

[115] See M. Coccia, "Reservations to multilateral treaties on human rights", footnote XXX above, p. 9; L. Lijnzaad, *Reservations to UN Human Rights Treaties* …, footnote XXX above, p. 40; Manuel Rama-Montaldo, "Human rights conventions and reservations to treaties", *Héctor Gros Espiell* Amicorum Liber, vol. II (Brussels, Bruylant, 1997), pp. 1265–1266; or I. Sinclair, *The Vienna Convention* …, footnote XXX above, p. 61.

[116] *I.C.J. Reports 1951*, p. 24.

unchallenged,[117] its content remains vague[118] and there is some uncertainty as to the consequences of incompatibility.[119] Moreover, article 19 does not dispel the ambiguity as to its scope of application.

(5) The principle set forth in article 19, subparagraph (c), whereby a reservation incompatible with the object and purpose of the treaty may not be formulated, is of a subsidiary nature since it applies only in cases not covered in article 20, paragraphs 2 and 3, of the Convention[120] and where the treaty itself does not resolve the reservations issue.

(6) If the treaty does regulate reservations, a number of cases must be distinguished which offer different answers to the question whether the reservations concerned are subject to the test of compatibility with the object and purpose of the treaty. In two of these cases the answer is clearly negative:

- There is no doubt that a reservation expressly prohibited by the treaty cannot be held to be valid on the pretext that it is compatible with the object and purpose of the treaty;[121]
- The exception also applies to "specified" reservations that are expressly authorized by the treaty, with a defined content: they are automatically valid without having to be accepted by the other contracting States[122] and they are not subject to the test of compatibility with the object and purpose of the treaty.[123]

In the Commission's view, these obvious truths are not worth mentioning in separate provisions of the Guide to Practice; they follow directly and inevitably from article 19, subparagraph (c), of the Vienna Conventions, the text of which is repeated in guideline 3.1.

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[117] See the many arguments to that effect given by C. Riquelme Cortado, *Las reservas a los tratados …*, footnote XXX above, pp. 138–143. See also the Commission's 1997 preliminary conclusions, in which it reiterated its view that "articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations". *Yearbook ... 1997*, vol. II (Part Two), p. 57, para. 1. See also A. Pellet, "Article 19 (1969)" in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, footnote XXX above, pp. 728–740, paras. 172–196. The word "*licéité*" should be understood as corresponding to "*validité*" [in English "permissibility"], the term that the Commission ultimately adopted to refer collectively to the conditions to which reservations, some objections and interpretative declarations are subject (with regard to the choice of this term, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324–327, para. 159, and footnote XXX above.

[118] See guidelines 3.1.5 to 3.1.5.7.

[119] See guidelines 3.3 to 3.3.3.

[120] In the case of treaties with limited participation and the constituent instruments of international organizations. These cases do not constitute instances where there is an implicit prohibition against formulating reservations; they reintroduce the system of unanimity for particular types of treaties.

[121] In its observations on the draft adopted on first reading by the Commission, Canada had suggested that "consideration should be given to extending the criterion of 'compatibility with the object and purpose' equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty was silent on the making of reservations and cases where it permitted them." (Sir Humphrey Waldock, fourth report, A/CN.4/177, *Yearbook … 1965*, vol. II, p. 46). That proposal, which was not very clear, was not retained by the Commission; *cf.* the clearer proposals along the same lines by Briggs in *Yearbook ... 1962*, vol. I, 663rd meeting, 18 June 1962, p. 222, paras. 13 and 14, and *Yearbook … 1965*, vol. I, 813th meeting, 29 June 1965, p. 264, para. 10; *contra*: Ago, *ibid.*, para. 16.

[122] *Cf.* article 20, para. 1.

[123] See guideline 3.1.2 and commentary, above.

(7) The same is not true of two other cases which arise *a contrario* out of the provisions of article 19, subparagraphs (a) and (b):

- Those in which a reservation is authorized because it does not fall under the category of prohibited reservations (subparagraph (a));
- Those in which a reservation is authorized without being "specified" within the meaning of subparagraph (b) as spelled out in guideline 3.1.2.

(8) In both these cases, it cannot be presumed that treaty-based authorization to formulate reservations offers States or international organizations *carte blanche* to formulate any reservation they wish, even if it would leave the treaty bereft of substance.

(9) On the subject of implicitly authorized reservations, Sir Humphrey Waldock recognized, in his fourth report on the law of treaties, that "a conceivable exception [to the principle of the automatic permissibility of reservations permitted by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby implicitly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations". However, he excluded that eventuality not because this was untrue but because "this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 [which became article 19 of the Convention] as simple as possible".[124] These considerations do not apply to the Guide to Practice, the aim of which is precisely to provide States with coherent answers to all questions they may have in the area of reservations.

(10) This is why guideline 3.1.3 stipulates that reservations which are "implicitly authorized" because they are not formally excluded by the treaty must be compatible with the object and purpose of the treaty. It would be paradoxical, to say the least, if reservations to treaties containing reservations clauses should be admitted more freely than in the case of treaties which contain no such clauses.[125] Thus the criterion of compatibility with the object and purpose of the treaty applies.

3.1.4 Permissibility of specified reservations

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.

Commentary

(1) Guideline 3.1.3 explains that reservations not prohibited by the treaty are still subject to the criterion of compatibility with the object and purpose of the treaty. Guideline 3.1.4 makes the same clarification with regard to specified reservations in the sense of guideline 3.1.1 where the treaty does not define the content of the reservation: the same problem arises, and the considerations put forward in support of guideline 3.1.3 apply *mutatis mutandis*.

[124] Report (A/CN.4/177), *Yearbook … 1965*, vol. II, p. 50, para 4.

[125] In that vein, Rosenne in *Yearbook … 1965*, vol. I, 797th meeting, 8 June 1965, pp. 148–149, para. 10. C. Tomuschat gives a pertinent example: "If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance" ("Admissibility and legal effects of reservations to multilateral treaties …", footnote XXX above, p. 474).

(2) The Polish amendment to subparagraph (b), adopted by the Vienna Conference in 1968, restricted the possibility of implicit prohibition of reservations to treaties which provided "that *only* specified reservations, which do not include the reservation in question, may be formulated".[126] But it does not follow that reservations thus authorized may be made at will: the arguments applicable to non-prohibited reservations[127] apply here, and if one accepts the broad definition of specified reservations favoured by the majority of Commission members,[128] a distinction must be drawn between reservations whose content is defined in the treaty itself and those which are permitted in principle but which there is no reason to suppose should be allowed to deprive the treaty of its object or purpose. The latter must be subject to the same general conditions as reservations to treaties which do not contain specific clauses.

(3) The modification made to article 19, subparagraph (c), of the 1969 Vienna Convention following the Polish amendment in fact supports that conclusion. In the Commission's text, subparagraph (c) was drafted as follows:

> "(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty."[129]

This was consistent with subparagraph (b), which prohibited the formulation of reservations other than those authorized by a reservations clause. Once an authorization was no longer interpreted *a contrario* as automatically excluding other reservations, the formula could not be retained;[130] it was therefore changed to the current wording by the Drafting Committee of the Vienna Conference.[131] The result is, *a contrario*, that if a reservation does not fall within the scope of subparagraph (b) (because its content is not specified), it is subject to the test of compatibility with the object and purpose of the treaty.

(4) That was, indeed, the reasoning followed by the arbitral tribunal which settled the dispute concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* in deciding that the mere fact that article 12 of the Geneva Convention on the Continental Shelf authorized certain reservations without specifying their content[132] did not necessarily mean that such reservations were automatically permissible.[133] In such cases, the permissibility of the reservation "cannot be assumed simply on the ground that it is, or purports to be, a

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[126] See commentary to guideline 3.1.2, para. (3).

[127] See commentary to guideline 3.1.3, para. (9).

[128] See commentary to guideline 3.1.2, para. (13).

[129] *Yearbook … 1966*, vol. II, p. 202.

[130] Poland had not, however, put forward any amendment to subparagraph (c) drawing the consequences from the amendment it had successfully proposed for subparagraph (b). An amendment by Viet Nam, however, intended to delete the phrase "in cases where the treaty contains no provisions regarding reservations" (A/CONF.39/C.1/L.125), *Documents of the Conference* (A/CONF.39/11/Add.2), p. 145, para. 177, was rejected by the plenary Commission (*ibid.*, p. 148, para. 181).

[131] Curiously, the reason given by the Chairman of the Drafting Committee makes no connection between the modifications made to subparagraphs (b) and (c). K. Yasseen merely stated that "certain members of the Committee considered that a treaty could conceivably contain provisions on reservations which did not come under any of the categories envisaged in subparagraphs (a) and (b)" (*Summary records* (A/CONF.39/11), plenary Commission, 70th meeting, 14 May 1968, p. 452, para. 17). *Cf.* a remark by Briggs to the same effect during discussions in the Commission in 1965 (*Yearbook … 1965*, vol. I, 796th meeting, 4 June 1965, p. 146, para. 37).

[132] See the commentary to guideline 3.1.2, para. (5).

[133] UNRIAA, vol. XVIII, pp. 32–33, para. 39. See the commentary to guideline 3.1.2, para. (6).

reservation to an article to which reservations are permitted".[134] Its permissibility must be assessed in the light of its compatibility with the object and purpose of the treaty.

(5) *A contrario*, it goes without saying that when the content of a specified reservation is indeed indicated in the reservations clause itself, a reservation consistent with that provision is not subject to the test of compatibility with the object and purpose of the treaty.

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 tenor, 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.

(2) In fact the concept of the object and purpose of the treaty is far from being confined to reservations. In the Vienna Convention, it occurs in eight provisions,[135] only two of which — articles 19, subparagraph (c), and 20, paragraph 2 — concern reservations. However, none of them defines the concept of the object and purpose of the treaty or provides any particular "clues" for this purpose.[136] 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, subparagraph (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;[137]

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[134] D. Bowett, "Reservations to non-restricted multilateral treaties …", footnote XXX above, p. 72. In the same vein, J.M. Ruda, "Reservations to Treaties", footnote XXX above, p. 182; or Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, 1982, pp. 691–692. *Contra:* P.-H. Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 …", footnote XXX above, pp. 50–53; this opinion, very well argued, does not sufficiently take into account the consequences of the modification made to subparagraph (c) at the Vienna Conference (*cf.* above para. (3)).

[135] *Cf.* articles 18, 19 (c), 20, paragraph 2, 31, paragraph 1, 33, paragraph 4, 41, paragraph 1 (b) (ii), 58, paragraph 1 (b) (ii), and 60, paragraph 3 (b). A connection can be made with the provisions relating to the "essential bases" or "conditions of the consent to be bound" (see 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. 627 (also reproduced in Paul Reuter, *Le développement de l'ordre juridique international — Écrits de droit international* (Paris, Économica, 1999), p. 366)).

[136] 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*, vol. 3 (1998), p. 322).

[137] See, for example, Paul 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 Philippe 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, 1982), vol. I, p. 31.

- 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;
- Article 41, paragraph 1 (b) (ii), is also aimed at safeguarding the "effective execution ... of the treaty *as a whole*"[138] 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 provision *essential*" [to the treaty]; 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.[139]

(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[140] 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".[141] 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 purpose of a treaty are indeed something of an enigma".[142] It is certainly true that the attempt made in article 19, subparagraph (c), pursuant to the 1951 advisory opinion by the International Court of Justice,[143] to introduce

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[138] 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.

[139] 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.

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

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

[142] I. Buffard and K. Zemanek, footnote XXX 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, Cambridge University Press, 2000), p. 111; Pierre-Marie Dupuy, *Droit international public*, 8th ed. (Paris, Dalloz, 2006), p. 286; Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *International and Comparative Law Quarterly*, vol. 2 (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*, vol. 86 (1982), pp. 695–696; Alain Pellet, preliminary report (A/CN.4/470), p. 51, para. 109; or Frédérique Coulée, "A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", *Mélanges offerts à Gérard Cohen-Jonathan* (Brussels, Bruylant, 2004), pp. 501–521.

[143] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,

an element of objectivity into a largely subjective system is not entirely convincing:[144] "The claim that a particular reservation is contrary to object and purpose is easier made than substantiated."[145] In their joint opinion, the dissenting judges in 1951 had criticized the solution retained by the majority in the advisory opinion on *Reservations to the Genocide Convention*, emphasizing that it could not "produce final and consistent results",[146] and that had been one of the main reasons for the Commission's resistance to the flexible system adopted by the Court in 1951:

> "Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively."[147]

(4) Sir Humphrey Waldock himself still expressed hesitation in his all-important first report on the law of treaties in 1962:[148]

> "… 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."[149]

Advisory Opinion of 28 May 1951, 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."

144 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*, vol. 23 (1982), p. 85).

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

146 *I.C.J. Reports 1951*, p. 44.

147 *Yearbook ... 1951*, vol. II, p. 128, para. 24.

148 It was this first report (A/CN.4/144) that introduced the "flexible system" to the Commission and vigorously defended it (*Yearbook ... 1962*, vol. II, pp. 63–66).

149 *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) as proposed by the Special Rapporteur reflects this uncertainty: "When formulating a reservation under the provisions of paragraph 1 (*a*) of this article [with respect to this provision, see

No doubt, this was a case of tactical caution, since the self-same Special Rapporteur's "conversion" to compatibility with the object and purpose of the treaty, not only as a test of the permissibility of reservations, but also as a key element to be taken into account in interpretation,[150] was swift.[151]

(5) The 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 in a reasonable manner most problems that arise.

(6) The *travaux préparatoires* on this provision are of little assistance in determining the meaning of the expression.[152] As has been noted,[153] the commentary to draft article 16, adopted in 1966 by the Commission, usually more prolix, is limited to a single paragraph and does not even allude to the difficulties involved in defining the object and purpose of the treaty, other than very indirectly, through a simple reference to draft article 17:[154] "The admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States."[155]

(7) The discussion of subparagraph (c) in the Commission[156] and subsequently at the Vienna Conference[157] does not shed any further 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.[158] There are,

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the commentary to 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 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).

150 See article 31, paragraph 1, of the Vienna Convention.

151 See I. Buffard and K. Zemanek, footnote XXX above, pp. 320–321; see footnote XXX above.

152 See *ibid.*, pp. 319–321.

153 Catherine 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, 1997), p. 7.

154 Future article 20 of the Vienna Convention. The article in no way resolves the issue, which is left pending.

155 *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).

156 See footnote XXX above.

157 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 guideline 3.1.1, footnote XXX).

158 See I. Buffard and K. Zemanek, footnote XXX above, pp. 312–319, and footnote XXX below.

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[159] in the advisory opinion of the Permanent Court of International Justice of 31 July 1930 in the *Greco-Bulgarian "Communities"* case.[160] However, it was not until 1986 in the *Nicaragua* case[161] that the Court put an end to what has been described as "terminological chaos",[162] no doubt influenced by the Vienna Convention.[163] 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[164] and, when it seeks to justify its position, it does so empirically.[165]

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[159] 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, *P.C.I.J. 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).

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

[161] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 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.

[162] I. Buffard and K. Zemanek, footnote XXX above, p. 316.

[163] 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 v. 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; *Gabčíkovo-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; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 79; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, paras. 85, 98, 143 and 281.

[164] 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 following judgments cited in the previous note: Judgment of 14 June 1993, p. 50, para. 27; Judgment of 25 September 1997, p. 67, para. 110; Judgment of 11 June 1998, p. 318, para. 98;

(9) It has been asked whether, in order to get around the difficulties resulting from such uncertainty, there is a need to break down the concept of the "object and purpose of the treaty" by looking first at the object and then at 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".[166] While the distinction is common in French (or francophone) legal literature,[167] it meets with scepticism among authors trained in the German or English systems.[168]

(10) However, one (French) author has shown convincingly that "the question cannot be settled" by reference to international jurisprudence,[169] particularly since neither the object — defined as the actual content of the treaty[170] — still less the purpose — the outcome sought[171] — 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 operation and working of the convention."[172] 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.[173]

Judgment of 27 June 2001, p. 502, para. 102; and Judgment of 15 December 2004, para. 102.

165 See paragraph (3) of the commentary to guideline 3.1.5.1 below.

166 *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 P. Reuter, "Solidarité ...", footnote XXX above, p. 625 (also reproduced in P. Reuter, *Le développement* ..., footnote XXX above, p. 363).

167 See I. Buffard and K. Zemanek, footnote XXX above, pp. 325–327; see footnote XXX above.

168 *Ibid.*, pp. 322–325 and 327–328.

169 G. Teboul, footnote XXX above, p. 696; see footnote XXX above.

170 See, for example, Jean-Paul Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, L.G.D.J., 1972), p. 142: "L'objet d'un acte reside dans les droits et obligations auxquels il donne naissance" [The object of an instrument resides in the rights and obligations to which it gives rise].

171 *Ibid.*

172 Gerald G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Treaty Points", *British Yearbook of International Law*, vol. 33 (1957), p. 208. See also G. Teboul, footnote XXX above, p. 697, or William A. Schabas, "Reservations to the Convention on the Rights of the Child", *Human Rights Quarterly*, vol. 18 (1996), p. 479.

173 The most successful method, devised by I. Buffard and K. 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 (footnote XXX 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, para. 50) 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 (I. Buffard and K. Zemanek, footnote XXX above, pp. 334–342)) and conclude that the concept indeed remains an "enigma" (see paragraph (3) above). 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

(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 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."[174]

These are the two fundamental elements: the object and purpose can only be determined by an examination of the treaty as a whole;[175] and, on that basis, reservations to the "essential"[176] clauses, and only to such clauses, are rejected.

(12) In other words, it is the "*raison d'être*"[177] of the treaty, its "*noyau fundamental*" [fundamental core][178] that is to be preserved in order to avoid undermining the "effectiveness"[179] of the treaty as a whole. "It implies a distinction between all obligations in the treaty and the core obligations that are the treaty's *raison d'être*."[180]

(13) Even if the general approach is fairly clear, it is no easy matter to reflect this in a simple formulation. The "threshold" may seem to have been set too high in guideline 3.1.5 and to facilitate unduly the formulation of reservations. 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 respect to certain specific aspects in their application" to the author of the reservation;[181] therefore, 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

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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, "Reservations to the Convention on the Rights of the Child", footnote XXX above, 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*, vol. 21 (1995), pp. 291–293. On the position of the Human Rights Committee, see paragraph (1) of the commentary to guideline 3.1.5.6. See also Bruno Simma and Gleider I. Hernandéz, "Legal consequences of an impermissible reservation to a human rights treaty, where do we stand?", footnote XXX above, pp. 70–71.

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

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

176 And not those that related "to detail only" (Paredes, *ibid.*, p. 146, para. 90).

177 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 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".

178 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.

179 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*)".

180 L. Lijnzaad, footnote XXX above, p. 83; see also p. 59; or L. Sucharipa-Behrmann, "The legal effects of reservations to multilateral treaties", *Austrian Review of International and European Law*, vol. 1 (1996), p. 76.

181 *Cf.* guideline 1.1, paragraph 1 *in fine*.

(i) it impairs an essential element, (ii) necessary to the general tenor of the treaty, (iii) thereby compromising the *raison d'être* of the treaty, the formulation in 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.[182]

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

(i) The term "essential element" is to be understood in relation to 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,[183] is essential to the general tenor of the treaty and whose exclusion or modification would compromise the treaty's *raison d'être*. That would generally be the case if a State sought to exclude or significantly modify 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";[184]

(ii) This "essential element" must thus be "necessary to the general tenor of the treaty", that is the balance of rights and obligations which constitute its substance or the general concept underlying the treaty.[185] While the Commission has had no difficulty in adopting, in French, the term "*économie générale du traité*", which seems 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 tenor" 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;[186]

(iii) Similarly, in an endeavour to avoid too high a "threshold", the Commission chose the adjective "necessary" in preference to the stronger term "indispensable", and decided on the verb "impair" (rather than "deprive") to apply to the "*raison d'être*" of the treaty, it being understood that it may be simple and unambiguous (the

[182] See A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil" in Ulrich Fastenrat (ed.), *From Bilateralism to Community Interest, Essays in Honour of Bruno Simma* (Oxford University Press, 2011) pp. 524–530.

[183] See guideline 3.1.5.1.

[184] International Court of Justice, *Oil Platforms*, Judgment of 12 December 1996, cited in footnote XXX above, *I.C.J. Reports 1996*, p. 814, para. 28.

[185] 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).

[186] International Court of Justice, *Oil Platforms*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 813, para. 27; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, Judgment of 17 December 2002, *I.C.J. Reports 2002*, p. 652, para. 51.

raison d'être of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is clearly defined by its title) or much more complex (in the case of a convention entailing many interdependent rights and obligations, such as general human rights treaties[187] or a convention on environmental protection or investments covering a broad range of issues) and that the question could even arise of whether the *raison d'être* might change over time.[188]

(15) The fact remains that guideline 3.1.5 indicates a direction rather than establishing a clear criterion that can be directly applied in all cases. 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 guideline 3.1.6, and, on the other hand, by illustrating the methodology more clearly by means of a series of examples chosen from areas in which the question of the permissibility of reservations frequently arises (guidelines 3.1.5.2 to 3.1.5.7).

3.1.5.1 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, in particular the title and the preamble of the treaty. Recourse may also be had in particular to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of 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*",[189] like any act of interpretation, for that matter – and this process is certainly one of interpretation.

(2) Given the great variety of situations and their susceptibility to change over time,[190] 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:

- From its title;[191]

[187] See guideline 3.1.5.6 below. See also A. Pellet, "Article 19 (1969)" in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, footnote XXX above, pp. 745–746, paras. 202–204.

[188] See paragraph (10) above and paragraph (7) of the commentary to guideline 3.1.5.1 below.

[189] Blaise Pascal, *Pensées*, in *Oeuvres complètes* (Paris, Bibliothèque de la Pléiade, N.R.F.-Gallimard, 1954), p. 1091.

[190] See above paragraph (10) of the commentary to guideline 3.1.5. 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*, vol. 85 (1991), p. 314; or 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).

[191] See *Certain Norwegian Loans*, Judgment of 6 July 1957, *I.C.J. Reports 1957*, p. 24; but see *Military and Paramilitary Activities in and against Nicaragua, Merits*, Judgment of 27 June 1986, *I.C.J.*

- From its preamble;[192]
- 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";[193]
- From an article of the treaty that demonstrates "the major concern of each contracting party" when it concluded the treaty;[194]
- From the preparatory work on the treaty;[195] and
- From its overall tenor.[196]

(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 subjectivity inevitably plays a considerable part.[197] 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[198] — and to adapt them to the determination of the object and purpose of the treaty.

Reports 1986, p. 137, para. 273, and *Oil Platforms, Preliminary Objection*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 814, para. 28.

[192] See the advisory opinion of the Permanent Court of International Justice of 31 July 1930 on *Greco-Bulgarian "Communities", P.C.I.J., Series B*, No. 17, p. 19; or *Rights of Nationals of the United States of America in Morocco*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 196; *Military and Paramilitary Activities in and against Nicaragua, Merits*, Judgment of 27 June 1986, cited in footnote XXX above, *C.J. Reports 1986*, p. 138, para. 275; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, *I.C.J. Reports 1994*, pp. 25 and 26, para. 52; and *Sovereignty over Pulau Ligitan and Pulau Sipadan, Merits*, Judgment of 17 December 2002, *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.

[193] *Oil Platforms*, Judgment of 12 December 1996, *I.C.J. Reports 1996*, p. 814, para. 28.

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

[195] Often, as a way of confirming an interpretation based on the text itself; see the judgment of 3 February 1994 cited in footnote XXX above, pp. 27 and 28, paras. 55 and 56, the judgment of 13 December 1999 cited in footnote XXX above, p. 1074, para. 46, or *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, cited in footnote XXX above, *I.C.J. Reports 2004*, p. 179, para. 109; see also the dissenting opinion of Judge Anzilotti cited in footnote XXX above, pp. 388 and 389. In its advisory opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court gives some weight to the "origins" of the Convention (*I.C.J. Reports 1951*, p. 23).

[196] See Permanent Court of International Justice, *Competence ..., Advisory Opinion of 23 July 1930, P.C.I.J., Series B*, No. 13, p. 18, and the P.C.I.J. advisory opinion of 31 July 1930, cited in footnote XXX above, p. 20; or the judgments of the International Court of Justice of 12 December 1996, cited in footnote XXX above, p. 813, para. 27 and of 17 December 2002, cited in footnote XXX above, p. 652, para. 51.

[197] "One could just as well believe it was simply by intuition" (I. Buffard and K. Zemanek, footnote XXX above, p. 319).

[198] 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, para. 63; see also L. Sucharipa-Behrmann, footnote XXX above, 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

(5) The Commission is fully aware that this position is to some extent tautological,[199] since paragraph 1 of article 31 reads:

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

(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[200] and, when appropriate, the preparatory work of the treaty and the "circumstances of its conclusion".[201]

(7) These are the parameters underlying guideline 3.1.5.1, 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. Although the Commission adhered closely to the wording of article 31, paragraph 2, of the Vienna Conventions, which list the elements constituting the context to be taken into consideration for the purpose of interpreting the treaty, it thought that it was worthwhile to stress two specific elements, namely, the preamble, mentioned in article 31, paragraph 2 — and the title of the treaty, which is of particular importance in determining the object and purpose.[202] Reference to the preparatory work and the circumstances of the treaty's conclusion is also certainly of greater importance for the determination of the object and purpose of the treaty than for the interpretation of one of its provisions. The phrase "the subsequent practice agreed upon by the parties" reflects paragraphs 2, 3 (a) and 3 (b) of article 31, since the Commission was of the view that the object and purpose of a treaty was likely to evolve over time.[203] Furthermore, even though the reference to subsequent practice might seem superfluous, since objections, if any, must be made during the year following the formulation of the reservation, it could nonetheless be pertinent, since assessment of the reservation by a third party might come 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.[204]

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parties concerning a treaty (reservations and interpretative declarations), the International Law Commission recognized that those rules constituted useful guidelines in that regard (see guideline 1.3.1, "Method of determining the distinction between reservations and interpretative declarations", and commentary). 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.

199 See W.A. Schabas, "Reservations to human rights treaties: time for innovation and reform", *Canadian Yearbook of International Law*, vol. 32 (1994), p. 48.

200 *Cf.* article 31, paragraph 3.

201 Article 32.

202 The mention of "the terms of the treaty" seemed sufficient in determining the general objectives of the treaty; but they could, however, have a particular importance in assessing the "general tenor" of the treaty (see footnote XXX above).

203 See paragraph (10) of the commentary to guideline 3.1.5 below and paragraph (2) above.

204 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* …, chap. IV.1); but the focus here is on the permissibility of that quasi-reservation clause.

(9) 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."[205]

(10) 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.[206] 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.[207] Luxembourg objected to that "declaration" (which was actually a reservation), arguing,

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[205] *Ibid.*, 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.* See also the objection of Norway, and the less explicit objections of Germany and Sweden to the Tunisian declaration concerning the application of the 1961 Convention relating to the Reduction of Statelessness, *ibid.*, Chap. V.4. 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.*, 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.* 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.*, chap. IV.2.

[206] *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." The text of the provision is reproduced in guideline 2.8.8.

[207] See *Multilateral Treaties* …, chap. IV.9; see also Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10 (1989), pp. 391–393 and 400.

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".[208]

(11) 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 pose particular problems of permissibility 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 guidelines 3.1.5.2 to 3.1.5.7, the preparation of which was prompted by the relative frequency with which problems arise; these guidelines are of a purely illustrative nature.

3.1.5.2 Vague or general reservations

A reservation shall be worded in such a way as to allow its meaning to be understood, 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 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 guideline 3.1.5.2. 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 Commission 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" 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 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.[209] 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

[208] *Multilateral Treaties* …, chap. IV.9. Fifteen other States raised objections on the same grounds.

[209] 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*, vol. II, 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."

in guideline 1.1.1, paragraph 2,[210] 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,[211] and the law of reservations in particular,[212] that, although States are free to formulate (not to *make*[213]) 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 meaning to be understood.

(4) That often happens when a reservation invokes the internal law of the State that 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 such cases, it is not the reference to the domestic law of the reserving State *per se* that is the problem,[214] but rather 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."[215]

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[210] See paragraphs (16) to (22) of the commentary to guideline 1.1. See also the remarks by Rosa Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Murcia, Universidad de Murcia, 2004), p. 172; or A. Pellet, "Article 19 (1969)" in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, footnote XXX above, pp. 747–752, paras. 206–211.

[211] See P. Reuter, *Introduction* ..., footnote XXX 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 für ausländisches öffentliches Recht und Völkerrecht*, vol. 27 (1967), p. 466. See also, for example, the Permanent Court of International Justice, *S.S. "Wimbledon"*, Judgment of 17 August 1923, *P.C.I.J, Series A*, No. 1, p. 25, or the International Court of Justice, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, *I.C.J. Reports 1950*, p. 139.

[212] The International Court of Justice specified in this connection in its advisory opinion of 1951 on *Reservations to the Convention on Genocide* that "it is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto" (*I.C.J. Reports 1951*, 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 award of 30 June 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, in United Nations, *Reports of International Arbitral Awards* (UNRIAA), vol. XVIII, pp. 41 and 42, paras. 60 and 61; and William Bishop, Jr., "Reservations to Treaties", *Recueil des cours* …, (1961-II), vol. 103 p. 255, note 96.

[213] See paragraph (6) of the commentary to guideline 3.1.

[214] See paragraph (4) of the commentary to guideline 3.1.5.5.

[215] 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 footnote XXX 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

(5) Finland's objections to the reservations of several States parties to the 1989 Convention on the Rights of the Child would certainly be on firmer ground with that argument than by a reference to article 27 of the 1969 Vienna Convention;[216] in fact, 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",[217] 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".[218] 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"[219] 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.[220]

(6) The same applies when a State reserves the general right to have its constitution prevail over a treaty,[221] 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."[222]

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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*, vol. 3 (1970), p. 302.

[216] See paragraph (4) of the commentary to guideline 3.1.5.5. 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* … chap. IV.1) is more convincing than the argument based on an invocation of domestic law (see paragraph (4) (footnotes XXX and XXX) of the commentary to guideline 3.1.5.5).

[217] *Multilateral treaties* … chap. IV.11.

[218] *Ibid*. See also the objections by Finland and several other States parties to comparable reservations by several other States, *ibid.*

[219] *Ibid.*, chap. IV.2.

[220] *Ibid.* See along the same lines the Norwegian and Swedish objections of 15 March 1999 with regard to Bangladesh's reservation to the Convention on the Political Rights of Women of 31 March 1953 (*ibid.*, chap. XVI.1) or the objections by Finland to a reservation formulated by Guatemala to the 1969 Vienna Convention on the Law of Treaties and by the Netherlands, Sweden and Austria to a comparable reservation formulated by Peru to the same Convention (*ibid.*, chap. XXIII.1). See also the objection by Poland to the reservation formulated by Pakistan to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment: "The Islamic Republic of Pakistan refers in the above-mentioned reservations to the Sharia laws and to its domestic legislation as possibly affecting the application of the Convention. Nonetheless it does [not] specify the exact content of these laws and legislation. As a result, it is impossible to clearly define the extent to which the reserving State has accepted the obligations of the Convention." (*ibid.*, chap. IV.9).

[221] *Cf.* Pakistan's reservation to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid.*, chap. IV.8), and the objections made by Austria, Finland, Germany, the Netherlands and Norway (*ibid.*) and by Portugal (*ibid.*).

[222] *Ibid.*, chap. IV.1.

(7) Some of the so-called "sharia reservations"[223] give 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".[224] Here again, the problem lies not in the fact that Mauritania is invoking a law of religious origin which it applies,[225] but, rather that, as Denmark noted, "the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character".[226] 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".[227]

(8) Basically, it is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, and not the certainty that they are incompatible, which makes them fall within the purview of article 19 (c) of the Vienna Convention on the Law of Treaties. As the Human Rights Committee pointed out:

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[223] For a discussion of the various schools of thought, see in particular 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 B. Clark, footnote XXX above, pp. 299–302 and pp. 310–311; Jane Connors, "The women's convention in the Muslim world" in J.P. Gardner (ed.), *Human Rights as General Norms ...*, footnote XXX above, pp. 85–103; R.J. Cook, footnote XXX above, 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 Yogesh Tyagi, "The conflict of law and policy on reservations to human rights treaties", BYBIL, vol. 71 (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*, vol. 15 (1991), pp. 199–233.

[224] *Multilateral Treaties* …, chap. IV.8. See also the reservations by Saudi Arabia (citing "the norms of Islamic law" – *ibid.*) and by Malaysia (*ibid.*), or the reservation made by Maldives upon accession: "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic sharia upon which the laws and traditions of the Maldives is founded" (*ibid.*); the latter reservation having elicited several objections, the Maldives 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 International Convention on the Elimination of All Forms of Racial Discrimination of 1966, which made the application of its provisions subject to the condition that "these do not conflict with the precepts of the Islamic sharia" (*ibid.*, chap. IV.2).

[225] 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.*, chap. IV.11). As has been pointed out (W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote XXX above, pp. 478–479), this text raises, *mutatis mutandis*, the same problems as the "sharia reservation".

[226] *Multilateral treaties ...*, chap. IV.8.

[227] *Ibid.* See also the objections by Austria, Finland, Germany, Norway, the Netherlands, Portugal and Sweden (*ibid.*). 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, footnote XXX above, 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* …, 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."[228]

(9) According to article 57 (formerly article 64) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), "[r]eservations of a general character shall not be permitted ...". The European Court of Human Rights, in the *Belilos* case, declared invalid the interpretative declaration (equivalent to a reservation) by Switzerland on article 6, paragraph 1, of the European Convention because it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope".[229] 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".[230]

(10) Guideline 3.1.5.2 reflects this fundamental notion. Its title gives an indication of the (alternative) characteristics which a reservation needs to exhibit to fall within its scope: it applies to reservations which are either "vague" or "general". An example of the former might be a reservation which leaves some uncertainty as to the circumstances in which it might be applicable[231] or to the extent of the obligations effectively entered into by its author. The latter type would correspond to the examples given above.[232]

(11) Although the present commentary may not be the right place for a discussion of the effects of vague or general reservations,[233] 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 they satisfy the conditions for permissibility.[234] For that reason, they should lend themselves particularly well to a "reservations dialogue".

3.1.5.3 Reservations to a provision reflecting a customary rule

The fact that a treaty provision reflects a rule of customary international law does not in itself constitute an obstacle to the formulation of a reservation to that provision.

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[228] 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".

[229] Judgement of 29 April 1988, *Belilos*, *ECHR Series A*, vol. 132, p. 25, para. 55 – see paragraph (8) of the commentary to guideline 3.1.2. For a detailed analysis of the generality condition posed 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*, vol. 33 (1990), pp. 97–109, and R.St.J. MacDonald "Reservations under the European Convention on Human Rights", *Revue belge de droit international*, vol. 21 (1988), pp. 433–438 and 443–448.

[230] 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*, footnote XXX above, pp. 599–607.

[231] *Cf.* Malta's reservation to the International Covenant on Civil and Political Rights of 1966: "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 article 14, paragraph 6, of the Covenant" (*Multilateral Treaties* ..., chap. IV.4).

[232] See paragraphs (5)–(9) above.

[233] On the effects of reservations in general, see Part 4 of the Guide to Practice, below.

[234] See paragraphs (1) or (4) above.

Commentary

(1) Guideline 3.1.5.3 relates to a problem which arises fairly often in practice: that of the permissibility of a reservation to a treaty provision which simply reflects a rule of customary international law – the word "reflect" is preferred here to "enunciate" in order to stress that the process of enshrining the rule in question in a treaty has no effect on its continued operation as a customary rule. Guideline 3.1.5.3 therefore sets out the principle that a reservation to a treaty rule which reflects a customary rule 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) On occasion States parties to a treaty have objected to reservations and challenged their compatibility with its object and purpose on the pretext that they were contrary to well-established customary rules. 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] ...".[235]

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".[236]

(3) It has often been thought that this inability to formulate reservations to treaty provisions which codify customary rules could be deduced from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases:[237]

> "... 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".[238]

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[235] *Multilateral Treaties* …, chap. XXIII.1; see also the objections formulated in similar terms by Belgium, Denmark, Finland, Germany, Sweden and the United Kingdom (*ibid.*). In the arbitration concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, 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", decision of 30 June 1977, UNRIAA, vol. XVIII, p. 38, para. 50.

[236] *Multilateral Treaties* …, chap. III.3; strictly speaking, it is not the provisions in question that remain in force, but rather the rules of customary law that they express (see guideline 4.4.2 (Absence of effect on rights and obligations under customary international law)). See also Poland's objections to the reservations of Bahrain and the Libyan Arab Jamahiriya (*ibid.*) and D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 88.

[237] 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 in P.-H. Imbert, *Les réserves* ..., footnote XXX above, p. 244, note 20; see also G. Teboul, footnote XXX above, p. 685.

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

(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, in fact, is quite circumspect about the deductions called for by the exclusion of certain reservations. Noting that the faculty to formulate reservations to article 6 (on delimitation) of the 1958 Geneva Convention on the Continental Shelf was not excluded by article 12 on reservations,[239] as it was in the case of articles 1 to 3, the Court considered it a normal and

> "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".[240]

(5) Thus, it is not true that the Court affirmed the inadmissibility of reservations in respect of customary law;[241] 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 rule 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] ...".[242] 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."[243] This clearly implies that the customary nature of the rule 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".[244]

(7) Moreover, although this principle is sometimes challenged,[245] it is recognized in the preponderance of the literature,[246] and rightly so:

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[239] See paragraph (5) of the commentary to guideline 3.1.2.

[240] *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; *contra*, see the dissenting opinion of Judge Koretsky, *ibid.*, p. 163.

[241] P.-H. Imbert, footnote XXX above, p. 244, note 22, 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. 507–508. 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.*)

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

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

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

[245] See the position taken by Briggs in the declaration which he attached to the arbitral award of 30 June 1977 in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, UNRIAA, vol. XVIII, pp.123–124.

- Customary rules are binding on States, independently of their expression of consent to a treaty rule[247] 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[248] — providing that the latter is permissible — but this is precisely the question at hand;

- A reservation concerns only the expression of the rule in the context of the treaty, not its existence as a customary rule, even if, in some cases, it may cast doubt on the rule's general acceptance "as of right";[249] as the United Kingdom remarked in its observations on general comment No. 24 of the Human Rights Committee, "there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law";[250]

- If the customary nature of the rule is well-established, States remain bound by it, independently of the treaty;[251]

- Appearances to the contrary, States may have a rationale for their action – for example, the desire to avoid placing the obligations in question within the purview of the monitoring or dispute settlement mechanisms envisaged in the treaty or to limit the role of domestic judges, who may have different competences with respect to treaty rules, on the one hand, and customary rules, on the other;[252]

- Moreover, as noted by France in its observations on general comment No. 24, "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";[253]

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[246] See Massimo Coccia, "Reservations to multilateral treaties on human rights", *California Western International Law Journal*, vol. 15 (1985), pp. 31–32; Giorgio Gaja, "Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario", *Rivista di diritto internazionale*, vol. 79 (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*, vol. 23 (1978), p. 48; R. Riquelme Cortado, footnote XXX above, pp. 159–171; and L. Sucharipa-Behrmann, footnote XXX above, pp. 76 and 77.

[247] *Cf.* 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* ..., chap. IV.2).

[248] 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, footnote XXX above, p. 32.

[249] *Cf.* article 38, paragraph 1 (b), of the Statute of the International Court of Justice. In that regard, see R.R. Baxter, "Treaties and customs", *Recueil des cours* ..., vol. 129 (1970–I), p. 50; M. Coccia, footnote XXX above, p. 31; G. Gaja, "Le riserve ...", footnote XXX above, p. 451; and G. Teboul, footnote XXX above, 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, *Les réserves* ..., footnote XXX above, p. 246, and P. Reuter, "Solidarité ...", footnote XXX above, p. 631 (also reproduced in P. Reuter, *Le développement* ..., footnote XXX above, pp. 370 and 371), note 16).

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

[251] See guideline 4.4.2 and commentary below.

[252] 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.

[253] Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first*

- 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 rule which cannot be invoked against it under general international law.[254]

(8) The question has been raised, however, whether this solution can be transposed to the field of human rights.[255] 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."[256]

(9) First, it should be noted that the Committee confirmed that reservations to customary rules 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[257] — first, because a reservation to a human rights treaty provision which reflects a customary rule in no way absolves the reserving State of its obligation to respect the rule as such[258] and, second, because in practice it is quite likely that a reservation to

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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 Committee's 1996 report, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40, vol. I), pp. 126–130). See also Gérard Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", RGDIP, vol. 70 (1966), pp. 932 and 933.

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

255 See A. Pellet, second report on reservations to treaties (A/CN.4/477/Add.1), paras. 143–147. See also Bruno Simma and Gleider I. Hernandéz, "Legal consequences of an impermissible reservation to a human rights treaty: where do we stand?" in *The Law of Treaties beyond the Vienna Convention*, footnote XXX above, pp. 63–68.

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

257 For an opposing view, see Thomas Giegerich, "Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien – Ein konstitutioneller Ansatz", ZaöRV, vol. 55 (1995), p. 744 (English summary, pp. 779 and 780). See also A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil ...", footnote XXX above, pp. 531–533.

258 See paragraph (7) above and guideline 4.4.2 (Absence of effect on rights and obligations under customary international law). 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 religion, or use their own language" (general comment No. 24, cited in footnote XXX 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, "Le riserve ...", footnote XXX above, 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*" (Theodore Meron, "The Geneva Conventions as customary norms", AJIL, vol. 81 (1987) p. 55; see also W.A. Schabas's well-argued critique concerning articles 6 and 7 of the Covenant ("Invalid Reservations ...", footnote XXX above,

such a rule (especially if it is a peremptory norm) will be incompatible with the object and purpose of the treaty by virtue of the applicable general rules.[259]

(10) On the more general issue of codifying conventions, it might be wondered whether reservations to them are not incompatible with their object and purpose. There is no doubt that "*le désir de codifier s'accompagne normalement du souci de preserver la règle qui est affirmée*" [the desire to codify is normally accompanied by a concern to preserve the rule being affirmed].[260] "*En effet, si l'on peut, à l'occasion d'un traité de codification, formuler une reserve portent sur une disposition d'origine coutumière, le traité de codification aura (…) manqué son but …*" [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],[261] to the point that reservations and, at all events, multiple reservations, have been viewed as "la négation même du travail de codification" [the very negation of the work of codification].[262]

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

- It is true that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but, "*à y bien réfléchir, l'équilibre d'ensemble auquel la reserve porte atteinte, constitue non l'objet et le but du traité lui-même, mais l'objet et le but de la négociation don't ce traité émane*" [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];[263]
- The very concept of a "codification convention" is tenuous. As the Commission has often stressed, it is impossible to distinguish between codification *stricto sensu* of international law and progressive development.[264] "*Quel quantum de règles d'origine coutumière un traité doit-il contenir pour être qualifié de 'traité de*

pp. 296–310).

259 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, 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."

260 P.-H. Imbert, *Les réserves ...*, footnote XXX above, p. 246; see also G. Teboul, footnote XXX above, p. 680, who notes: "*Toutes deux utiles, les notions de réserve et de convention de codification s'accommodent mal l'une de l'autre*" [while both are useful, the concepts of reservation and codification convention are hard to reconcile with one another]. His study provides a clear overview of the whole question of reservations to codification conventions (*ibid.*, pp. 679–717, *passim*).

261 P. Reuter, "Solidarité ...", footnote XXX above, pp. 630 and 631 (also reproduced in *Le développement ...*, footnote XXX above, 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 debatable: it seems to assume that the reserving State, by virtue of its reservation, is exempt from the application of the rule; this is not the case (see footnote XXX below).

262 R. Ago in *Yearbook ... 1965*, vol. I, 797th meeting, 8 June 1965, p. 153, para. 58.

263 G. Teboul, footnote XXX above, p. 700.

264 See, for example, the Commission's reports on its eighth (1956) and forty-seventh (1995) sessions, *Yearbook ... 1956*, vol. II, pp. 255–256, para. 26, and *Yearbook ... 1996*, vol. II (Part Two), p. 86, paras. 156 and 157.

codification'?" [how many rules of customary origin must a treaty contain in order to be defined as a "codification treaty"?];[265]

- The status of the rules included in a treaty changes over time: a rule which falls under the heading of progressive development may become pure codification and a "codification convention" often crystallizes as rules of general international law rules which did not have that status at the time of its adoption.[266]

(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 limits) as any other treaty, and the arguments that can be put forward, in general terms, in support of the faculty to formulate reservations to a treaty provision that sets forth a customary rule[267] are also fully transposable to them. Moreover, 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.[268] And while some objections may have been based on the customary nature of the rules concerned,[269] 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) The customary nature of the rule "reflected" by the treaty provision to which a reservation is formulated must be assessed at the time of formulation. It is not out of the question that the adoption of the treaty contributed to crystallizing the customary nature of the rule, especially if the reservation is formulated long after the treaty was concluded.[270]

(14) The Commission did not consider it necessary to draft a specific guideline on reservations to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*). Such a norm is, in almost all cases, customary in nature.[271] It follows that the reasoning applicable to reservations to treaty provisions reflecting "normal" customary rules can be transposed to reservations to provisions reflecting *jus cogens* norms.

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[265] P. Reuter, "Solidarité ...", footnote XXX above, p. 632 (also reproduced in *Le développement ...*, footnote XXX above, p. 371).

[266] See paragraph (13) below; on the issue of the death penalty with regard to articles 6 and 7 of the 1966 Covenant on Civil and Political Rights (taking a contrary position), see W.A. Schabas, "Invalid reservations ...", footnote XXX above, pp. 308–310.

[267] See paragraph (2) above.

[268] For example, as of 20 June 2011, the Vienna Convention on Diplomatic Relations was the object of 51 reservations or declarations by 31 States parties (*Multilateral Treaties …*, chap. III.3) and the 1969 Vienna Convention on the Law of Treaties was the object of 68 reservations or declarations by 34 States (*ibid.*, chap. XXXIII.1). For its part, the 1966 Covenant on Civil and Political Rights, which (by now, at least) seems to a great extent to codify general international law currently in force, has attracted 196 reservations or declarations by 62 States (*ibid.*, chap. IV.4).

[269] See paragraph (2) above.

[270] In its judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, the International Court of Justice also recognized that "a norm-creating provision [may constitute] 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 *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).

[271] Although the wording of article 53 of the 1969 and 1986 Vienna Conventions does not exclude the possibility that a treaty rule may, in fact, be a peremptory norm.

(15) However, 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.[272]

(16) This reasoning is far from self-evident: it is based on one of the postulates of the "opposability" school, according to which the question 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.[273] This assumption meets with serious objections;[274] above all, it likens the reservations mechanism to the process by which a treaty is concluded, 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[275] and, if it is accepted, those are indeed its consequences;[276] 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*.[277] 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,[278] or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.[279]

(17) 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."[280]

This formulation is debatable[281] 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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[272] P. Reuter, "Solidarité ...", footnote XXX above, pp. 630–631 (also reproduced in P. Reuter, *Le développement* ..., footnote XXX above, p. 360). See also G. Teboul, footnote XXX above, pp. 690 and 707.

[273] "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" (José María Ruda, "Reservations to treaties", *Recueil des cours* ..., vol. 146 (1975-III), p. 190).

[274] Alain Pellet, first report on the law and practice relating to reservations to treaties (A/CN.4/470), paras. 100–105. See also paragraph (4) of the general commentary to Part 3 of the Guide to Practice and paragraph (11) of the commentary to guideline 4.1.

[275] *Cf.* article 2, paragraph 1 (d), of the Vienna Conventions, reproduced in guideline 1.1.

[276] See article 21 of the Vienna Conventions.

[277] See section 4.4 of the Guide to Practice (Effect of a reservation on rights and obligations independent of the treaty).

[278] See, for example, R. Riquelme Cortado, footnote XXX above, p. 147.

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

[280] 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 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.)

[281] *Cf.* the doubts expressed on this subject by the United States of America which, in its observations on general comment No. 24, transposes to provisions expressing peremptory norms the solution

(18) It has, however, been argued that "*la règle prohibant la derogation à une règle de* jus cogens *vise non seulement les rapports conventionnels mais aussi tous les actes juridiques, dont les actes unilatéraux*" [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].[282] This is certainly true and in fact constitutes the most convincing argument for not transposing to reservations to provisions expressing peremptory norms the reasoning that results in not excluding, in principle, the freedom to formulate reservations to treaty provisions reflecting customary rules.[283]

(19) Conversely, it should be noted that when formulating a reservation, a State may, it is true, be seeking to exempt itself from the rule to which the reservation relates, and in the case of a peremptory norm of general international law this is out of the question[284] – particularly since it is unacceptable that a persistent objector should be able to 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,[285] and on this point there is no reason why the line of argument followed in respect of customary rules which are merely binding should not be transposed to peremptory norms.

(20) It should be noted, however, that 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 limiting their scope to a particular substantive provision.[286]

(21) Dissociation of this sort is illustrated by the line of argument followed by the International Court of Justice in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*):

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applicable to provisions expressing customary rules: "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" (*Official Records of the General Assembly, Fiftieth Session* (A/50/40), vol. I, p. 127).

[282] G. Teboul, footnote XXX above, p. 707, note 52, referring to J.-D. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", RGDIP, vol. 83 (1979), p. 663, and the legal literature cited therein.

[283] 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 M. Coccia, footnote XXX above, pp. 30–31; see also the position of P. Reuter referred to in paragraph (15) above); this analysis, however, is unconvincing (see paragraph (16) above).

[284] 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 ...*, 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.*).

[285] See paragraph (7) above.

[286] In this regard, see, for example, the reservations of Malawi and Mexico to the International Convention against the Taking of Hostages of 1979, 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 ...*, chap. XVIII.5. There can be no doubt that such reservations are not prohibited in principle; see guideline 3.1.5.7 and commentary.

> "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 [[287]]): 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."[288]

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.

(22) While it is of the view that the principle stated in guideline 3.1.5.3 applies to reservations to treaty provisions reflecting a customary peremptory norm,[289] the Commission considers that States and international organizations should refrain from formulating such reservations and, when they deem it indispensable, should instead formulate reservations to the provisions concerning the treaty regime governing the rules in question.

3.1.5.4 Reservations to provisions concerning rights from which no derogation is permissible under any circumstances

A State or an international organization may not formulate a reservation to a treaty provision concerning rights from which no derogation is permissible under any circumstances, 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.

Commentary

(1) In appearance, the question of reservations to provisions concerning obligations from which no derogation is permissible under any circumstances[290] contained in human rights treaties, as well as in certain conventions on the law of armed conflict,[291] environmental protection[292] or diplomatic relations,[293] is very similar to the question of

[287] On this aspect of the judgment, see paragraphs (2) and (3) of the commentary to guideline 3.1.5.7.

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

[289] On the effects of such reservations, see guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*)).

[290] On this concept, see C. Dtenersen, I. Oseredzuk, D. Premont (eds.), *Droits intangibles et états d'exception* (Bruylant, 1996), 644 p.; or Ludovic Hennebel, "Les droits intangibles" in E. Bribosia and L. Hennebel (eds.), *Classer les droits de l'Homme* (Bruylant, 2004), pp. 195–218.

[291] 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".

[292] 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,

reservations to treaty provisions reflecting peremptory norms of general international law;[294] it can, however, be resolved on its own terms. States frequently justify their objections to reservations to such provisions on the grounds of the treaty-based prohibition against suspending their application whatever the circumstances.[295]

(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.[296] However, the two are not necessarily identical.[297] 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."[298]

This last point is question-begging and 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*. 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.

(3) The Inter-American Court 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 permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-

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of the United Nations Convention on the Law of the Sea.

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

294 On this issue, see paragraphs (13) to (22) of the commentary to guideline 3.1.5. See also R. Riquelme Cortado, footnote XXX above, pp. 152–159; or A. Pellet, "Article 19 (1969)", footnote XXX above, pp. 760–766, paras. 224–237.

295 See article 4, paragraph 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 vol. 98 (1994), pp. 289–335; in the same sense, Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international* (Pedone, 2004), p. 302).

296 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).

297 See the Human Rights Committee's general comment No. 29 (CCPR/C/21/Rev.1/Add.11), para. 11. See also R. Riquelme Cortado, footnote XXX above, pp. 153–155, or Teraya Koji "Emerging hierarchy in international human rights and beyond: from the perspective of non-derogable rights", EJIL, vol. 12 (2001), pp. 917–947.

298 General comment No. 24, cited in note XXX above, para. 10.

> 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."[299]

(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".[300] 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.[301] 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, or because they would be contrary to the object and purpose of the treaty — this is not necessarily always the case.[302] 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.[303] 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*

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[299] OC-3/83, *Series A*, No. 3, para. 61, p. 306.

[300] Separate opinion of Mr. Antonio 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, footnote XXX above, p. 155. In the same sense, 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* …, chap. IV.4).

[301] See the observations of 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" (Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session* (A/50/40), vol. I, p. 131, para. 6).

[302] 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 Review*, vol. 88 (1989), p. 15; J. McBride, footnote XXX above, pp. 163–164; Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg, Council of Europe, 1999), p. 113, or Catherine J. Redgwell, "Reservations to Treaties and Human Rights Committee general comment No. 24 (52)", ICLQ, vol. 46 (1997), p. 402; *contra*: L. Lijnzaad, footnote XXX above, p. 91.

[303] See 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 …".

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.

"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."[304]

Denmark objected not only because the United States reservations related to non-derogable rights, but also because their wording was such that they left essential provisions of the treaty 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.[305]

(7) Naturally, the fact that a provision may in principle be the object of derogation does not mean that all reservations relating to it will be permissible.[306] The criterion of compatibility with the object and purpose of the treaty also applies to them. As O. de Frouville remarks, where inderogable rights are concerned, assessing the compatibility of the reservation with the object and purpose of the treaty entails determining whether "*la reserve revient à nier l'existence d'un droit de l'Homme reconnu par la convention. (…) Mais qu'entend-on par la 'négation de l'existence' d'un droit? (…) On retrouve la distinction classique entre* l'essence *et* l'exercise *d'un droit. Un droit peut être réglementé dans son exercice, mais cette réglementation ne doit jamais attenter à sa substance.*" [the reservation amounts to denying the existence of a human right recognized by the convention. (…) But what is meant by "denying the existence" of a right ? (…) Here we encounter the classic distinction between the *essence* and the *exercise* of a right. There may be regulation of the exercise of a right, but regulation must never undermine the substance of the right.][307]

(8) This leads to several observations:

- In the first place, reservations to provisions from which a treaty allows no derogation are certainly possible provided they do not call into question the basic principle set forth in the treaty provision; in that situation, the methodological guidance contained in guideline 3.1.5.1[308] is fully applicable;
- In the second place, however, it is necessary to proceed with the utmost caution, and this is why the Commission has drafted the first sentence of guideline 3.1.5.4 in the negative ("A State or an international organization may not formulate a reservation

[304] *Multilateral Treaties* ..., 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, footnote XXX above, Norway, Portugal or Sweden (*ibid.*).

[305] 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, W.A. Schabas, "Reservations to human rights treaties ...", footnote XXX above, pp. 51–52, note 51.

[306] *Cf.* C.J. Redgwell, "Reservations ...", footnote XXX above, p. 402.

[307] Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international*, footnote XXX above, p. 302.

[308] "Determination of the object and purpose of the treaty".

... 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.[309]

(9) Moreover, in elaborating this 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.[310]

3.1.5.5 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 rules of the internal law of that State or of specific rules of that organization in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenor.

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 rules 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 the 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 guideline 3.1.5.5 seeks to answer is a different one, namely whether the formulation of a reservation (clearly expressed and sufficiently detailed) can be justified by considerations arising from internal law.[311]

(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".[312] Similarly, Finland objected to reservations made by several States to the Convention on the Rights of the Child of 1989 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".[313]

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[309] *Cf.* guidelines 2.3 (Late formulation of a reservation), 2.4.7 (Late formulation of an 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).

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

[311] See paragraphs (4) to (6) of the commentary to guideline 3.1.5.2.

[312] See the objections of Spain, France, Ireland, Luxembourg, Norway and Sweden in *Multilateral Treaties* …, chap. XXVI.4.

[313] Objections by Finland to the reservations of Indonesia, Malaysia, Qatar, Singapore and Oman, *ibid*., 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

(4) This ground for objection is unconvincing. True, in accordance with article 27 of the Vienna Convention,[314] a party may not "invoke the provisions of its internal law as justification for its failure to perform a treaty".[315] The assumption, however, is that the issue is settled, that is, that the provisions in question are applicable to the reserving States; but that is precisely the question. As has been correctly pointed out, a State very often formulates a reservation *because* the treaty imposes on it obligations incompatible with its internal law, which it is not in a position to amend,[316] at least initially.[317] Moreover, article 57 of the European Convention on Human Rights not only authorizes a State party to formulate a reservation where its internal law is not in conformity with a provision of the Convention, but restricts that faculty exclusively to instances where "a law ... in force in its territory is not in conformity with the provision".[318] Apart from the European Convention, there are instances of reservations relating to the application of internal law that give rise to no objections and have in fact not met with any.[319] On the other hand, this same provision expressly prohibits "reservations of a general character".

Prevention and Punishment of the Crime of Genocide, *ibid*., chap. IV.1; concerning the wording of the reservation, see paragraph (6) of the commentary to guideline 3.1.5.2; see also paragraph (4) of that commentary.

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

[315] 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 27 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.

[316] See W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote XXX above, pp. 479–480 and also "Reservations to human rights treaties ...", footnote XXX above, p. 59.

[317] 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 set 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* …, 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.*, chap. XXVII.3). It is also not unusual for a State to withdraw a reservation formulated without a time indication, once it has amended the provisions of its national law that had prompted the reservation: (*cf.* the withdrawal by France, Ireland and the United Kingdom of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women, *ibid.*, 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 or the full withdrawal by Serbia of its reservations to the same Convention on 10 May 2011 (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); yet they cannot be used as an argument for the impermissibility in principle of reservations relating to internal law.

[318] See paragraph (8) of the commentary to guideline 3.1.2.

[319] See, for example, Mozambique's reservation to the International Convention against the Taking of Hostages of 17 December 1979, *Multilateral Treaties* …, chap. XVIII.5 (a similar reservation regarding the extradition of Mozambican nationals reappears in connection with other treaties such as, for example, the International Convention for the Suppression of the Financing of Terrorism (*ibid*., chap. XVIII.11)); the reservations by Guatemala and the Philippines to the Convention on Consent for Marriage, Minimum Age for Marriage and Registration of Marriages of 1962 (*ibid*., chap. XVI.3); the reservations by Colombia (made upon signature), the Islamic Republic of Iran and the Netherlands (though very vague) to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (*ibid*., chap. VI.19). France's reservation to article 5, paragraph 1, of the

(5) What matters here is that the State formulating the reservation should not use its internal law[320] as a cover for not actually accepting any new international obligations,[321] whereas the aim of the treaty is to change the practice of States parties to the treaty. While article 27 of the Vienna Conventions cannot rightly be said to apply to the case in point,[322] it should nevertheless be borne in mind that national laws are "merely facts" from the standpoint of international law[323] and that the very aim of a treaty can be to lead States to modify them.

(6) The Commission preferred the expression "specific rules of the internal law" to "provisions of internal law", which might have seemed to suggest that only the written rules of a constitutional, legislative or regulatory nature were involved, whereas guideline 3.1.5.5 applies also to customary rules or case law. Similarly, the expression "rules of the organization" refers to the "established practice of the organization" as well as the constituent instruments and "decisions, resolutions and other acts of the international organization adopted in accordance with those instruments".[324]

European Convention on Human Rights has given rise to more extensive 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 réserve française à l'article 15 de la Convention européenne des droits de l'homme", *Journal du droit international*, vol. 102 (1975), pp. 269–293.

320 Or in the case of 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 2, subparagraph (b), of the Commission's draft articles on responsibility of international organizations as adopted by the Drafting Committee on second reading in 2011 (see A/CN.4/L.778). THIS CITATION SHOULD BE UPDATED LATER TO MAKE REFERENCE TO THE 2011 REPORT OF THE COMMISSION. However, the reference to the rules of the organization may not raise a similar problem if the reservation only applies to the relations between the organization and its members.

321 O. de Frouville calls reservations that have effect "reserves potestatives" [potestative reservations] (see *L'intangibilité des droits de l'homme en droit international*, footnote XXX above, pp. 347–349). In the same sense, F. Coulée points out that such reservations cast doubt on the reality of the State's commitment ("A propos d'une controverse autour d'une codification en cours: les reactions aux reserves incompatibles avec l'objet et le but des traits de protection des droits de l'homme", footnote XXX above, p. 503). 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 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 W.A. Schabas, "Invalid Reservations ...", footnote XXX above, pp. 277–328; and J. McBride, footnote XXX above, p. 172.

322 See paragraph (4) above.

323 Permanent International Court of Justice, *Polish Upper Silesia*, Judgment of 25 May 1926, *P.C.I.J.*, *Series A*, No. 7, p. 19; see also Arbitration Commission for Yugoslavia, Opinion No. 1 of 29 November 1991, reproduced in RGDIP, vol. 96, (1992), p. 264. The principle is confirmed in article 4 of the International Law Commission's 2001 articles on responsibility of States for internationally wrongful acts, annexed to General Assembly resolution 56/83.

324 Article 2, subparagraph (b), of the International Law Commission's draft articles on responsibility of international organizations as adopted by the Drafting Committee on second reading in 2011 (A/CN.4/L.778). THIS CITATION SHOULD LATER BE UPDATED TO MAKE REFERENCE TO THE 2011 REPORT OF THE COMMISSION.

(7) The Commission is aware that guideline 3.1.5.5 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 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 specific rules of internal law – on the understanding that, as is 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.

3.1.5.6 Reservations to treaties containing numerous interdependent rights and obligations

To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenor of the treaty, and the extent of the impact that the reservation has on the treaty.

Commentary

(1) Reservations to complex treaties containing an interdependent set of rights and obligations pose particular problems, because it is especially difficult to determine at what point that interdependence, which is the *raison d'être* of the treaty, is threatened by a reservation relating to one of its elements.

(2) It is in the area of human rights that reservations to treaties of this type, whether universal (like the two 1966 Covenants) or regional (like the European or Inter-American conventions or the African Charter)[325] have most often been formulated and have occasioned the liveliest debates on their permissibility.[326] In view of the abundance of practice in that regard, the Commission initially devoted a separate draft guideline to reservations to general human rights treaties.[327] On reflection, however, it appeared that the problem could be posed in the same terms in other areas (such as peace treaties or general conventions for the protection of the environment): what distinguishes the problems posed by reservations to such conventions is not that the conventions are intended to protect human rights[328] but that reservations to them may undermine the interdependence which such treaties affirm and create among the different rights with which they deal. The distinctive nature of the problems in question is that they are often linked to the concept of "integral and interdependent treaties".[329] However, authors taking this approach recognize

[325] These treaties are not the only ones covered by this guideline: a treaty such as the Convention on the Rights of the Child of 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).

[326] See A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil …", footnote XXX above, pp. 533–535.

[327] See draft guideline 3.1.12 (Reservations to general human rights treaties) provisionally adopted by the Commission at its fifty-ninth session (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 113).

[328] Whenever it considers that human rights treaties pose particular problems with regard to reservations, the Commission has pointed this out in the commentary; with respect to the guidelines on the permissibility of reservations, see in particular paragraphs (8) and (9) of the commentary to guideline 3.1.5.2 (Vague or general reservations), paragraphs (17) and (19) to (20) of the commentary to guideline 3.1.5.3 (Reservations to a provision reflecting a customary norm) and the commentary to guideline 3.1.5.4 (Reservations to provisions concerning rights from which no derogation is permissible under any circumstances), *passim.*

[329] Sir Gerald Fitzmaurice, who promoted the concept, defined such instruments as "multilateral treaties

that the category is not limited to human rights treaties.[330] Hence there is no reason to depart from one of the principles consistently followed in the elaboration of the Guide to Practice by applying different rules to reservations according to the subject matter of the treaty,[331] even though it is in the field of reservations to general human rights treaties that practice is the most abundant and enlightening.

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the rights and obligations of which are not of the mutually reciprocating type, but which are either (a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others" (Third report on the law of treaties (A/CN.115), *Yearbook … 1958*, vol. II, pp. 27–28).

330 Thus, for B. Simma, it is a question of "those multilateral treaties the rights and obligations of which are integral in the sense that they constitute an indivisible whole and have to be performed by every party vis-à-vis every other party" (B. Simma, "From bilateralism to community interest in international law", *Recueil des cours*, vol. 250 (1994), p. 351). The author identifies two categories: "the first sub-group of such treaties, namely integral treaties embodying genuine reciprocity operative as between the parties, like treaties banning nuclear tests or the proliferation of nuclear weapons" and "integral treaties of the second variety, exemplified by human rights conventions" (*ibid*., p. 352). F. Coulée defines integral obligations as "*des obligations conventionelles non réciproques visant non pas la satisfaction d'intérêts opposés, mais la protection d'un intérêt commun*" [non-reciprocal treaty obligations aiming not at the satisfaction of opposed interests but at the protection of a common interest] (F. Coulée, "A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", *Mélanges offerts à Gérard Cohen-Jonathan*, footnote XXX above, pp. 502. See also F. Capotorti, "Cours général de droit international public", *Recueil des cours*, vol. 248 (1994), p. 157; J. Pauwelyn, "A typology of multilateral treaty obligations: are WTO obligations bilateral or collective in nature?", EJIL, vol. 14 (2003), pp. 907–952; or F. Coulée, *Droit des traits et non-réciprocité: recherché sur l'obligation intégrale en droit international public*, thesis, (Université Paris 2, 1999). Some authors propose a civil-law analysis of the object and purpose of an integral treaty, an analysis based on the notion of "cause": "*Dans un traité réciproque, la cause d'un engagement d'une partie est l'engagement d'une autre partie. (...) Dans un traité intégral, à l'inverse, la cause de l'engagement est la même pour toutes les parties: c'est l'énoncé même. (...) Rechercher si une réserve est incompatible avec l'objet et le but du traité, dans un traité intégral, c'est donc rechercher si la réserve ne contredit pas la cause objectivement déterminée du traité, et, par conséquent, si l'Etat réservataire s'est véritablement engagé à respecter le traité. (...) Le critère de 'compatibilité avec l'objet et le but du traité' protège donc, dans un traité intégral, toutes les clauses qui participent à l'objet et au but du traité, qui comportent des obligations essentielles relativement à ceux-ci.*" [In a reciprocal treaty, the cause of a commitment made by one party is the commitment made by another party (…) In an integral treaty, on the other hand, the cause of commitment is the same for all parties: it is precisely what is enunciated. (…) To assess whether a reservation is incompatible with the object and purpose of the treaty in the case of an integral treaty is therefore to assess whether the reservation does not contradict the objectively determined cause of the treaty and hence whether the reserving State is truly committed to respecting the treaty. (…) The criterion of "compatibility with the object and purpose of the treaty" thus, in the case of an integral treaty, protects all the clauses that have to do with the object and purpose of the treaty, which constitute the essential obligations relative to them.] (Olivier de Frouville, *L'intangibilité des droits de l'homme en droit international*, (Pedone, 2004), p. 287–288).

331 Even authors who militate for recognition of a special regime for reservations to human rights treaties explain that they would be based on a distinction that such treaties share with other normative treaties. F. Coulée, for example, puts forward the notion of their "*imperméabilité à la réciprocité*" [impermeability to reciprocity], a trait shared by "*la plupart des obligations conventionnelles en matière de protection de l'environnement, tout comme nombre d'obligations de droit humanitaire (...) qui sont des obligations intégrales.*" [most treaty obligations relating to environmental protection and

(3) In the case of the Covenant on Civil and Political Rights, 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."[332]

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant.[333] That is not, however, the position of States parties, which have not systematically formulated objections to reservations of this type,[334] and the Committee itself does not go that far since, in the paragraphs following the statement of its position of principle,[335] it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant: it does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be impermissible as such.

(4) Likewise, in the case of the Convention on the Rights of the Child of 1989, a great many reservations have been made to the provisions concerning adoption.[336] As has been

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a number of humanitarian law obligations (…) which are integral obligations] ("A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme", footnote XXX above, p. 502).

[332] 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; or D. Müller, "Commentaire sur l'article 48", in E. Decaux (ed.), *Le Pacte international relative aux droits civils et politiques, Commentaire article par article* (Paris, Economica, 2011) pp. 802–803.

[333] Some authors have maintained that the reservations regime is completely incompatible with human rights. See Pierre-Henri Imbert, who does not share this radical view, "La question des réserves et les conventions en matière de droits de l'homme", in *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 conventions", *Human Rights Review*, vol. 6, (1981), p. 28) or *Les réserves aux traités multilatéraux*, footnote XXX above, p. 249; M. Coccia, footnote XXX above, p. 16, or R.P. Anand, "Reservations to Multilateral Treaties", *Indian Journal of International Law*, vol. 1 (1960), p. 88; see also the commentary on Human Rights Committee general comment No. 24 cited in note XXX above, by Elena A. Baylis, "General comment 24: confronting the problem of reservations to human rights treaties", *Berkeley Journal of International Law*, vol. 17 (1999), pp. 277–329; Catherine J. Redgwell, "Reservations ...", footnote XXX above, pp. 390–412; Rosalyn Higgins, "Introduction", in J.P. Gardner (ed.), footnote XXX above, pp. xvii–xxix; or Konstantin Korkelia, "New challenges to the regime of reservations under the International Covenant on Civil and Political Rights", *E.J.I.L.*, vol. 13, (2002), pp. 437–477.

[334] 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 (*Multilateral Treaties* ..., chap. IV.4). See also the reservation by Barbados to article 14, paragraph 3, or the reservation by Belize to the same provision (*ibid*.); or the reservation by Mauritius to article 22 of the Convention on the Rights of the Child (*ibid*., chap. IV.11).

[335] See paragraphs 8 to 10 of general comment No. 24: 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 guidelines 3.1.5.3 and 3.1.5.4.

[336] Articles 20 and 21; see *Multilateral Treaties* ..., chap. IV.11.

noted, "[i]t 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".[337]

(5) In contrast to 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 are complex.[338] 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 or at any rate it may be that a treaty provision dealing with them has a central place in the structure of the treaty.[339] Moreover, even in the case of essential rights, one cannot rule out that a reservation dealing with certain limited aspects of the implementation of the right in question may be permissible. In this respect reservations to treaties relating to interdependent rights and obligations pose problems similar to those of reservations to provisions relating to non-derogable rights.[340]

(6) Guideline 3.1.5.6 attempts to strike a particularly delicate balance[341] between these different considerations by combining three elements:

- The interdependence of the rights and obligations;
- The importance that the provision to which the reservation relates has within the general tenor of the treaty; and
- The extent of the impact that the reservation has on the treaty.

(7) The first element, the interdependence of the rights and obligations affected by the reservation, lays emphasis on the goal of achieving global realization of the object and purpose of a treaty and aims at preventing the dismantling of its obligations, that is, their disintegration into a bundle of obligations, the individual, separate realization of which would not achieve the realization of the object of the treaty as a whole.

(8) The second element qualifies the previous one by recognizing — in keeping with practice — that nonetheless certain rights protected by these instruments are less essential than others – in particular, than the non-derogable ones.[342] The importance of the provision

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[337] W.A. Schabas, "Reservations to the Convention on the Rights of the Child", footnote XXX above, p. 480.

[338] See also A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil …", footnote XXX above, pp. 539–541.

[339] See paragraph (4) above.

[340] See guideline 3.1.5.4 above, and in particular paragraphs (4) to (8) of the commentary.

[341] On the importance of striking that balance with respect to human rights treaties, see A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil …", footnote XXX above, pp. 523–524.

[342] See guideline 3.1.5.4 above. On the fundamental nature of a protected right, starting from the provision that guarantees it, O. de Frouville considers that a dual understanding is possible: "*L'examen de la pratique des États et des organes de contrôle montre que le constat de l'incompatibilité d'une réserve avec l'objet et le but du traité fait en réalité appel à deux types de considérations: il est d'abord question du caractère 'fondamental' d'un droit, caractère qui interdirait d'y apporter une réserve. Cette 'fondamentalité' renvoie elle-même à certaines caractéristiques du droit en question. Il est ensuite fait référence à l'impossibilité de 'nier' un droit ou de se soustraire totalement à l'obligation de le respecter, considération qui reflète l'idée d'intangibilité.*" [An analysis of the practice of States and monitoring bodies shows that assessment of the incompatibility of a reservation with the object and purpose of the treaty actually calls for two types of considerations: first of all, there is the question of the "fundamental" nature of a right, which would prohibit a reservation to it. Whether it is fundamental or not in turn depends on certain characteristics of the right in question. The issue then arises of the impossibility of "denying" a right or of withdrawing completely from the obligation to respect it, a consideration that reflects the idea of

affected assessment must, of course, be assessed in the light of the "general tenor" of the treaty, an expression taken from guideline 3.1.5.[343]

(9) Lastly, the reference to "the extent of the impact that the reservation has" upon the right or the provision to which it relates allows for the inference 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.

3.1.5.7 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."[344] His position, obviously inspired by the cold war debate on reservations to the Genocide Convention, is too 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,[345] even though some of the parties thought that such reservations were not compatible with the object and purpose of the Convention.[346]

(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".[347] It upheld that position in its Judgment of 3 February 2006: in response to the Democratic Republic of the Congo, which had held that the Rwandan reservation to article IX of the Genocide Convention "was invalid", after reaffirming the

non-derogability.] (O. de Frouville, *L'intangibilité des droits de l'homme en droit international*, footnote XXX above, p. 294).

[343] See in particular paragraph (14) (ii) of the commentary to guideline 3.1.5.

[344] 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).

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

[346] See *Multilateral Treaties* ..., chap. IV.1 (see in particular the clear objections to that effect of Brazil, China (Taiwan), Mexico and the Netherlands).

[347] Order of 10 July 2002, *I.C.J. Reports 2002*, p. 246, para. 72.

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*,[348] 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 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."[349]

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.[350]

(3) In their joint separate opinion, however, several judges expressed 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.[351]

(4) The Human Rights Committee, meanwhile, has considered 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

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

[349] *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, *I.C.J. Reports 2006*, para. 67.

[350] See in this connection R. Riquelme Cortado, footnote XXX above, pp. 192–202. See also A. Pellet, "Article 19 (1969)" in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traits, Commentaire article par article*, footnote XXX above, pp. 742–744, paras. 199–201. 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 …*, 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*.), 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*.) and Sweden (espousing essentially the same position as the United Kingdom, *ibid*.).

[351] Joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma to the judgment of 3 February 2006, cited in footnote XXX above, para. 21.

> 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."[352]

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 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."[353]

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.[354]

(5) The European Court of Human Rights, in the *Loizidou* case, 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"[355] and that any restriction of its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.[356]

(6) This body of case law led the Commission to:

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[352] 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.

[353] Human Rights Committee, general comment No. 24 mentioned above, 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".

[354] Communication No. 845/1999, *Kennedy v. Trinidad and Tobago* (CCPR/C/67/D/845/1999), 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 ...*, chap. IV.5). Seven States reacted with objections to the reservation, before Trinidad and Tobago finally denounced the Protocol as a whole (*ibid*.).

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

[356] *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 guideline 3.1.5.7,

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 previous substantive 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) The Commission felt that there was no reason to draw a distinction between the two types of clauses: even if their purposes are somewhat different,[357] the reservations that can be formulated to both types give rise to the same type of problems, and splitting them into two separate guidelines would have entailed setting out the same rules twice.

3.2 Assessment of the permissibility of reservation

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

Commentary

(1) Guideline 3.2 introduces the section of the Guide to Practice dealing with assessment of the permissibility of reservations. It is a general provision whose purpose is to recall that there are various modalities for assessing permissibility which, far from being mutually exclusive, are mutually reinforcing – in particular and including when the treaty establishes a body to monitor its implementation. This statement corresponds to the one found in a different form in paragraph 6 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.[358] Of course, these generally applicable modalities for the permissibility of reservations may be supplemented or replaced by specific modalities of assessment established by the treaty itself.

(2) It goes without saying, of course, that any treaty can include a special provision establishing particular procedures for assessing the permissibility of a reservation either by a certain percentage of the States parties or by a body with competence to do so. One of the most well-known and discussed clauses[359] of this kind is article 20, paragraph 2, of the 1965 Convention on the Elimination of All Forms of Racial Discrimination:

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[357] Only somewhat, because the (non-binding) settlement of disputes may be one of the functions of a treaty monitoring body and part of its overall task of monitoring.

[358] "The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties" (*Yearbook … 1997*, vol. II (Part Two), para. 157).

[359] See, for example, Antonio Cassese, "A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)", *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, I.U.H.E.I., 1968), pp. 266–304; C.

"A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties object to it.*"[360]

(3) This reservations clause no doubt draws its inspiration from the unsuccessful attempts made to include in the Vienna Convention itself a mechanism enabling a majority to assess the permissibility of reservations:[361]

- Two of the four proposals submitted as rules *de lege ferenda* in 1953 by Hersch Lauterpacht made the acceptance of a reservation conditional upon the consent of two thirds of the States concerned;[362]
- Fitzmaurice made no express proposal on this matter because he held to a strict interpretation of the principle of unanimity,[363] yet on several occasions he let it be known that he believed that a collective assessment of the permissibility of reservations was the "ideal" system;[364]
- Although Waldock had also not proposed such a mechanism in his first report in 1962,[365] several members of the Commission took up its defence;[366]

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, B.I.I.C.L., 1997), pp. 13–14; or Riquelme Cortado, footnote XXX above, pp. 317–322.

360 Emphasis added. Other examples are article 20 of the Convention concerning Customs Facilities for Touring of 4 June 1954, which authorizes reservations if they have been "accepted by a majority of the members of the Conference and recorded in the Final Act" (para. 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras. 2 and 3); the similar clauses in article 14 of the Additional Protocol to this Convention and in article 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles (see the *Handbook of Final Clauses prepared by the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat* (ST/LEG/6), 5 August 1957, pp. 103–107); or article 50, para. 3, of the 1961 Single Convention on Narcotic Drugs and article 32, para. 3, of the 1971 United Nations Convention on Psychotropic Substances, which make the admissibility of the reservation subject to the absence of objections by one third of the contracting States.

361 For a summary of the discussions on the matter by the Commission and during the Vienna Conference, see Riquelme Cortado, footnote XXX above, pp. 314–315.

362 Alternative drafts A and B of draft article 9 in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, pp. 91–92. Alternative drafts C and D, respectively, assigned the task of assessing the admissibility of reservations to a committee set up by the States parties and to a Chamber of Summary Procedure of the International Court of Justice (*ibid.*, p. 92); see also the proposals submitted during the drafting of the Covenant of Human Rights reproduced in Hersch Lauterpacht's second report (A/CN.4/87), *Yearbook ... 1954*, vol. II, p. 132.

363 First report (A/CN.4/101), *Yearbook ... 1956*, vol. II, pp. 115 and 126–127.

364 See in particular Gerald G. Fitzmaurice, "Reservations to multilateral conventions", *I.C.L.Q.* 1953, pp. 23–26.

365 First report (A/CN.4/144) *Yearbook ... 1962*, vol. II.

366 See especially Briggs in *Yearbook ... 1962*, vol. I, 651st meeting, of 25 May 1952, para. 28, and the 652nd meeting, 28 May 1962, paras. 73–74; Gros, 654th meeting, 30 May 1962, para. 43; Bartoš, 654th meeting, para. 66; *contra*: Rosenne, 651st meeting, para. 83; Tounkine, 653rd meeting, 29 May 1962, paras. 24–25 and 654th meeting, para. 31; Jiménez de Aréchaga, 653rd meeting, para. 47; and Amado, 654th meeting, para. 34. Waldock proposed alternative drafts reflecting these views (see 654th meeting, para. 16), and although they were rejected by the Commission, they appear in the

- During the Vienna Conference, an amendment to this effect proposed by Japan, the Philippines and the Republic of Korea[367] was rejected by a large majority[368] despite the support of several delegations;[369] the Expert Consultant Waldock,[370] and some other delegations[371] were very doubtful about this kind of collective monitoring system.

(4) It must be admitted, however, that such clauses — however attractive they may seem intellectually,[372] — are, in any case, far from resolving all the problems: in practice they do not encourage States parties to maintain the special vigilance that is to be expected of them[373] and they leave important questions unanswered:

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commentary to draft article 18 (*Yearbook ... 1962*, vol. II, p. 179, para. (11)) and in the 1966 commentaries to draft articles 16 and 17 (*Yearbook ... 1966*, vol. II, p. 205, para. (11)). See also Waldock's fourth report (A/CN.4/177) *Yearbook ... 1965*, vol. II, p. 46, para. 3.

[367] The amendment to article 16, para. 2, stipulated that, if objections "have been raised ... by a majority of the contracting States as of the time of expiry of the 12-month period, the signature, ratification, acceptance, approval or accession accompanied by such a reservation shall be without legal effect" (A/CONF.39/C.1/L.133/Rev.1 in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Documents of the Conference, Committee of the Whole* (A/CONF.39/11/Add.2), para. 177 (i) (a)). The original amendment (A/CONF.39/C.1/L.133) had set a time limit of 3 months instead of 12 months. See also Japan's statement at the Conference, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), Committee of the Whole, 21st meeting, 10 April 1968, para. 29, and 24th meeting, 16 April 1968, paras. 62–63; and another amendment along the same lines introduced by Australia (A/CONF.39/C.1/L.166 in A/CONF.39/11/Add.2, para. 179), which subsequently withdrew it (see *ibid.*, para. 181). Without submitting a formal proposal, the United Kingdom indicated that "there was an obvious need for some kind of machinery to ensure that the [compatibility] test was applied objectively, either by some outside body or through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty" (*Summary records* (A/CONF.39/11), Committee of the Whole, 21st meeting, para. 76).

[368] By 48 votes to 14, with 25 abstentions (A/CONF.39/11/Add.2 , footnote XXX above, para. 182 (c)).

[369] Viet Nam (*Summary records* (A/CONF.39/11), footnote XXX above, Committee of the Whole, 21st meeting, 10 April 1968, para. 22), Ghana (22nd meeting, paras. 71 and 72), Italy (22nd meeting, 11 April 1968, para. 79), China (23rd meeting, 11 April 1968, para. 3), Singapore (23rd meeting, para. 16), New Zealand (24th meeting, 16 April 1968, para. 18), India (24th meeting, paras. 32 and 38), Zambia (24th meeting, para. 41). The Swedish representative, while supportive in principle of the idea of a monitoring mechanism, believed that the Japanese proposal was "no more than an attempt at solving the problem (22nd meeting, para. 32). See also the reservations expressed by the United States of America (24th meeting, para. 49) and by Switzerland (25th meeting, 16 April 1968, para. 9).

[370] With regard to the amendment proposed by Japan and other delegations (see footnote XXX above), the view of the Expert Consultant was that "proposals of that kind, however attractive they seemed, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult. In any case, such a system might prove somewhat theoretical, since States did not readily object to reservations" (*Summary records* (A/CONF.39/11), footnote XXX above, 24th meeting, 16 April 1968, para. 9).

[371] Thailand (*ibid.*, 21st meeting, 10 April 1968, para. 47), Argentina (24th meeting, 16 April 1968, para. 45), Czechoslovakia (24th meeting, para. 68), Ethiopia (25th meeting, 16 April 1968, para. 17).

[372] It is possible, though, to question the value of a collegiate system when the very purpose of a reservation is precisely "to cover the position of a State, which regarded as essential a point on which a two-thirds majority had not been obtained" (*Yearbook ... 1962*, vol. I, Jiménez de Aréchaga, 654th meeting, 30 May 1962, para. 37). See also the sharp criticisms by Cassese, footnote XXX above, *passim* and, in particular, pp. 301–304.

[373] On the question of State inertia in this regard, see the comments of the Expert Consultant during the Vienna Conference, footnote XXX above, and P.-H. Imbert, footnote XXX above, pp. 146–147, or R. Riquelme Cortado, footnote XXX above, pp. 316–321.

- Do such clauses make it impossible for States parties to avail themselves of the right to raise objections under article 20, paragraphs 4 and 5, of the Vienna Convention? Given the very broad latitude that States have in this regard, the answer must be in the negative; indeed, States objecting to reservations formulated under article 20 of the Convention on the Elimination of All Forms of Racial Discrimination have maintained their objections[374] even though their position did not receive the support of two thirds of the States parties, which is needed for an "objective" determination of incompatibility under article 20;

- On the other hand, the mechanism set up by article 20 dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the permissibility of reservations,[375] which raises the issue of whether the Committee's attitude is the result of a discretionary judgment or whether, in the absence of specific assessment mechanisms, the monitoring bodies have to refrain from taking a position. Actually, nothing obliges them to do so; once it is recognized that such mechanisms are superimposed on the procedures provided for in the treaty for determining the permissibility of reservations, and that the human rights treaty bodies are called upon to rule on that point as part of their mandate,[376] they can do so in every instance, just as States can.[377]

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

- The issue really arises only in connection with the human rights treaties;

- This is the case because, to begin with, it is in this area and only in this area that modern treaties almost invariably create mechanisms to monitor the implementation of the rules that they enunciate; however, while it has never been contested that a judge or an arbitrator is competent to assess the permissibility of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,[378] the human rights treaties endow the bodies which they establish with a variety of powers (some — at the regional level — can issue binding decisions but others, including the Human Rights Committee, can address to States only general recommendations or recommendations related to an individual complaint);

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[374] See *Multilateral Treaties* ..., chap. IV.2.

[375] "The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision — even a unanimous decision — by the Committee that a reservation is unacceptable could not have any legal effect" (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 18* (A/33/18), para. 374). On this subject, see the comments of P.-H. Imbert, "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), pp. 125–126 (Human Rights Review, 1981, pp. 41–42); and Dinah Shelton, "State practice on reservations to human rights treaties", *Canadian Human Rights Yearbook*, 1983, pp. 229–230. Recently, however, the Committee on the Elimination of Racial Discrimination has taken a somewhat more flexible position: for instance, in 2003, it stated with reference to a reservation made by Saudi Arabia that "the broad and imprecise nature of the State party's general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it" (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 18* (A/58/18), para. 209).

[376] See paragraph (8) below.

[377] See also A. Pellet and D. Müller, "From bilateralism to community interest – reservations to human rights treaties: not an absolute evil …" footnote XXX above, pp. 536–537 and pp. 542–544.

[378] See footnote XXX below.

- This is a relatively new phenomenon which was not taken into account by the drafters of the Vienna Convention;
- Furthermore, the human rights treaty bodies have held to a particularly broad concept of their powers in this field: not only have they regarded themselves as competent to assess the compatibility of a reservation with the object and purpose of the treaty that established them, but they have also seemed to consider that they have a decision-making power to that end, even when they are not otherwise so empowered,[379] and, applying the "severability theory, they have declared the States making the reservations they have judged to be impermissible to be bound by the treaty, including by the provision or provisions of the treaty to which the reservations related;[380]
- In doing so, they have aroused the opposition of States, which do not expect to be bound by a treaty beyond the limits they have accepted; some States have even denied that the bodies in question have any jurisdiction in the matter;[381]
- This is compounded by the reactions of human rights activists and the doctrine peculiar to this area, which has done nothing to calm a contentious debate that is nevertheless largely artificial.

(6) In reality, the issue is unquestionably less complicated than it is generally presented – which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, including the compatibility of the reservation with the object and purpose of the treaty, when the question comes before them in the exercise of their functions.[382] Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of complaints by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.[383] Secondly, in so doing, they have neither more nor less

[379] See, in this connection, the comments of A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, Cambridge University Press, 2000), pp. 122–123.

[380] Human Rights Committee, general comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994, para. 18; communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, CCPR/C/67/D/845/1999, Report of the Human Rights Committee, 2000 (A/55/40), vol. 2, annex XI.A, para. 6.7. This decision led the State party in question to denounce the Optional Protocol (see *Multilateral Treaties* …, chap. IV.5), which did not prevent the Committee from declaring, in a subsequent decision of 26 March 2002, that it considered that Trinidad and Tobago had violated several provisions of the 1966 Covenant, including the provision to which the reservation related (*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 40* (A/57/40), vol. II, annex IX.T).

[381] See in particular the very sharp criticisms expressed by the United States of America (Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, vol. I, p. 127), the United Kingdom (*ibid.*, p. 132) and France (*ibid.*, 1996, A/51/40, vol. I, p. 102).

[382] See paragraph 5 of the Commission's 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties: "… where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them", (footnote XXX above, para. 157).

[383] For an exhaustive presentation of the position of the human rights treaty bodies, see the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 193–210; see also D.W. Greig, footnote XXX above, pp. 90–107; Riquelme Cortado, footnote XXX above, pp. 345–353 and, with particular reference to the bodies established by the European Convention on Human Rights, see I. Cameron

authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits.[384] Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgement for the State's consent to be bound by the treaty.[385] It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Convention.[386]

(7) Similarly, although guideline 3.2 does not expressly mention the possibility that national courts might have competence in such matters, neither does it exclude it: domestic courts are, from the viewpoint of international law, an integral part of the "State", and they may, if need be, engage its responsibility.[387] Hence, nothing prevents national courts, when necessary, from assessing the permissibility of reservations made by a State on the occasion of a dispute brought before them,[388] including their compatibility with the object and purpose of a treaty.

(8) It follows that the competence to assess the permissibility of a reservation can also belong to international courts or arbitrators. This would clearly be the case if a treaty expressly provided for the intervention of a jurisdictional body to settle a dispute regarding the permissibility of reservations, but no reservation clause of this type seems to exist, even though the question easily lends itself to a jurisdictional determination.[389] Nevertheless, there is no doubt that such a dispute can be settled by any organ designated by the parties to rule on differences in interpretation or application of the treaty. It should therefore be

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and F. Horn, "Reservations to the European Convention on Human Rights: the Belilos case", *G.Y.B.I.L. 1990*, pp. 88–92.

[384] See paragraph 8 of the Commission's preliminary conclusions: "The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role", footnote XXX above.

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

[386] See, however, Human Rights Committee general comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 18: "... It is an inappropriate task [the determination of the compatibility of a reservation with the object and purpose of the treaty] for States parties in relation to human rights treaties ...". This passage contradicts the preceding paragraph in which the Committee recognizes that "an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant".

[387] See article 4 (Conduct of organs of a State) of the Commission's articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex.

[388] See the decision of the Swiss Federal Tribunal of 17 December 1991 in the case of *Elisabeth B. v. The State Council of the Canton of Thurgau (Journal des Tribunaux*, I. *Droit fédéral*, 1995, pp. 523–537), and the commentary by Jean-François Flauss, "Le contentieux des réserves à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6, paragraphe 1", *Revue Universelle des Droits de l'Homme*, 1993, pp. 297–303.

[389] In this sense, see Henry J. Bourguignon, "The Belilos case: new light on reservations to multilateral treaties", *Virginia Journal of International Law* 1989, p. 359; or D. Bowett, "Reservations to non-restricted multilateral treaties", *B.Y.B.I.L.*, vol. 48 (1976–1977), p. 81.

understood that any general clause on settlement of disputes establishes the competence of the body designated by the parties in that respect.[390] What is more, that was the position of the International Court of Justice in its advisory opinion of 1951 on *Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide*:

> "It may be ... that certain parties, who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by the procedure laid down in Article IX of the Convention."[391]

(9) It must therefore be concluded that the competence to assess the permissibility of a reservation belongs, more generally, to the various entities that are called on to apply and interpret treaties: States, and, within the limits of their competence, their domestic courts, bodies for the settlement of disputes and for monitoring the implementation of the treaty; however, the positions that these bodies may adopt in such matters have no greater legal value than that accorded by their status: the verb "assess" that the Commission has chosen to use in the introductory sentence of guideline 3.2 is neutral and does not prejudge the question of the authority underlying the assessment. Similarly, the phrase "within their respective competences" indicates that the competence of the dispute settlement and monitoring bodies to carry out such an assessment is not unlimited but corresponds to the competences accorded to these bodies by States.

(10) On the other hand, in accordance with the widely dominant principle of the "letter box depositary"[392] endorsed by article 77 of the 1969 Vienna Convention,[393] in principle the

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[390] On the role that dispute settlement bodies can play in this area, see guideline 3.2.5 below.

[391] *I.C.J. Reports 1951*, p. 27. Likewise, in its decision of 30 June 1977, the arbitral tribunal constituted for the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* implicitly held itself competent to rule on the permissibility of the French reservations by finding "that the three reservations to article 6 [of the Convention on the Continental Shelf of 1958] are true reservations and admissible" (*Reports of International Arbitral Awards (U.N.R.I.A.A.)*, vol. XVIII, p. 40, para. 56). See also the position of the International Court of Justice concerning the permissibility of "reservations" (of a specific nature, it is true, and different from those covered in the Guide to Practice – *cf.* guideline 1.5.3 (Unilateral statements made under a clause providing for options) and the commentary thereto, included in optional declarations of acceptance of its obligatory jurisdiction (see in particular its judgment of 26 November 1957, *Right of Passage over Indian Territory (Preliminary Objections)*, *I.C.J. Reports 1957*, pp. 141–144, the separate opinion of Judge Hersch Lauterpacht in the case concerning *Certain Norwegian Loans* (Judgment of 6 July 1957, *I.C.J. Reports 1957*, pp. 43–45) and his dissenting opinion in the *Interhandel* case (Judgment of 21 November 1959, *I.C.J. Reports 1959*, pp. 103–106 – see also the dissenting opinions of President Klaedstad and Judge Armand-Ugon, *ibid.*, pp. 75 and 93). See also the orders of 2 June 1999 in the cases concerning *Legality of Use of Force (Yugoslavia v. United States of America)*, *I.C.J. Report 1999*, p. 772, para. 29 to 33, and *Legality of Use of Force (Yugoslavia v. Spain)*, *ibid.*, pp. 923–924, paras. 21 to 25; and the order of 10 July 2002 on *Armed Activities on the Territory of the Congo (New Application: 2002)*, *I.C.J. Reports 2002*, p. 246, para. 72.

[392] See paragraph (3) of the commentary to guideline 2.1.7 (Functions of depositaries). See also Palitha T.B. Kohona, "Some notable developments in the practice of the UN Secretary-General as depositary of multilateral treaties: reservations and declarations" in *American Journal of International Law*, vol. 99, 2005, pp. 433–450; see also J. Combacau, "Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités", *Le droit international au service de la paix, de la justice et du développement – Mélanges Michel Virally* (Paris, Pedone, 1991), p. 199.

[393] Which corresponds to article 78 of the 1986 Convention.

depositary can only take note of reservations of which it has been notified and transmit them to the contracting States[394] without ruling on their permissibility.

(11) The present situation regarding assessment of the permissibility of reservations to treaties, more particularly human rights treaties, is therefore one in which there is concurrence, or at least coexistence of several mechanisms for assessing the permissibility of reservations:[395]

- One of these, which constitutes general law, is the purely inter-State mechanism provided for by article 20 the Vienna Conventions and which can be adapted by special reservation clauses contained in the treaties concerned;
- Where the treaty establishes a body to monitor its implementation, it is accepted that such a body can also assess the permissibility of reservations, the position taken thereby having no greater authority than that accorded by the status of the body in question;
- However, this still leaves open the possibility for the States and international organizations parties to have recourse, where appropriate, to the customary methods of peaceful settlement of disputes, including jurisdictional or arbitral methods, in the event of a dispute arising among them concerning the permissibility of a reservation;[396]
- It is not out of the question, moreover, that national courts, like those in Switzerland,[397] may consider themselves entitled to determine the permissibility of a reservation in the light of international law – but that is not a supposition separate from the first bullet point, inasmuch as domestic courts are part of the State apparatus.

(12) It is clear that the multiplicity of possibilities for assessment presents certain disadvantages, not least of which is the risk of conflict between the positions different parties might take on the same reservation (or on two identical reservations of different States).[398] In fact, however, this risk is inherent in any assessment system — over time, any given body may take conflicting decisions — and it is no doubt better to have too much assessment than no assessment at all.

(13) A more serious danger is that constituted by the succession of assessments over time, in the absence of any limitation of the duration of the period during which the assessment may be carried out. In the case of the "Vienna regime", article 20, paragraph 5,

394 See guideline 2.1.7 (Functions of depositaries) and commentary.

395 See the second report on reservations to treaties, A/CN.4/477/Add.1, paras. 211–215 or A. Pellet "Article 19 (1969)" in O. Corten and P. Klein, *Les Conventions de Vienne sur le droit des traits, Commentaire article par article*, footnote XXX above, pp. 766–774, paras. 238–249. For a very clear position in favour of the complementarity of systems of monitoring, see Lijnzaad, footnote XXX above, pp. 97–98; see also G. Cohen-Jonathan, "Les réserves dans les traités de droits de l'homme", *R.G.D.I.P*. 1966, p. 944.

396 Subject, however, to the possible existence of "self-contained regimes", among which those instituted by the European and inter-American conventions on human rights or the African Charter should undoubtedly be included (*cf.* Bruno Simma, "Self-contained regimes", *Netherlands Yearbook of International Law*, vol. 16 (1985), pp. 130 ff., or Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, (Oxford, Clarendon Press, 1989), pp. 230 ff.).

397 See footnote XXX above.

398 See, in particular, P.-H. Imbert, who refers to the risks of incompatibility within the European Convention system, in particular between the positions of the Court and the Committee of Ministers ["Reservations to the European Convention on Human Rights before the Strasbourg Commission: the Temeltasch case", (*I.C.L.Q.*, vol. 33 (1984), pp. 590–591) in French *R.G.D.I.P*. 1983, pp. 617–619].

of the Convention, insofar as it is applicable, sets a time limit of 12 months following the date of receipt of notification of the reservation (or following the expression by the objecting State of its consent to be bound) on the period during which a State may formulate an objection.[399] A real problem arises, however, in all cases of jurisdictional or quasi-jurisdictional assessments, which are unpredictable and depend on referral of the question to the monitoring or settlement body. In order to overcome this problem, it has been proposed that the right of the monitoring bodies to give their opinion should also be limited to a 12-month period.[400] Apart from the fact that none of the relevant texts currently in force provides for such a limitation, the limitation seems scarcely compatible with the very basis of intervention by monitoring bodies, which is intended to ensure compliance with the treaty by the parties, in particular the preservation of the object and purpose of the treaty. Furthermore, as has been pointed out, one of the reasons why States lodge few objections is precisely that the 12-month rule often allows them insufficient time;[401] the same problem is liable to arise *a fortiori* for the monitoring bodies, so that the latter may find themselves paralysed.

(14) It could be concluded that the possibilities of cross-assessment in fact strengthen the opportunity for the reservations regime, and in particular the principle of compatibility with the object and purpose of the treaty, to play its real role. The problem is not to set up one possibility against another or to affirm the monopoly of one mechanism,[402] but to combine them so as to strengthen their overall effectiveness, for while their modalities differ, their end purpose is the same: the aim in all cases is to reconcile the two conflicting but fundamental requirements of integrity of the treaty and universality of participation. It is only natural that the States that wished to conclude the treaty should be able to express their point of view; it is also natural that the monitoring bodies should play fully the role of guardians of treaties entrusted to them by the parties.

(15) This situation does not exclude — in fact it implies — a degree of complementarity among the various methods of assessment, as well as cooperation among the bodies concerned. In particular, it is essential that, in assessing the permissibility of a reservation, monitoring bodies (as well as dispute settlement bodies) should take fully into account the positions taken by the contracting parties through acceptances or objections. Conversely, States, which are required to abide by the decisions taken by monitoring bodies when they have given those bodies decision-making power, should pay serious attention to the well-

399 It should be noted that the problem nevertheless arises because ratifications and accessions are spread over time.

400 See P.-H. Imbert, footnote XXX above, p. 146, or footnote XXX above, pp. 113–114 and 130–131 (*H.R.R.* 1981, pp. 36 and 44); *contra:* Héribert Golsong, statement to the Rome Colloquium, 5–8 November 1975, *Report of the fourth international colloquium on the European Convention on Human Rights*, Council of Europe, Strasbourg, 1976, pp. 269–270, and "Les réserves aux instruments internationaux pour la protection des droits de l'homme", in Catholic University of Louvain, Fourth Colloquium of the Department of Human Rights, 7 December 1978, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), para. 7; or R.W. Edwards Jr., "Reservations to treaties", *Michigan Journal of International Law*, vol. 10 (1989), footnote XXX above, pp. 387–388.

401 See B. Clark, "The Vienna Convention reservations regime and the Convention on Discrimination Against Women", *A.J.I.L.*, vol. 85 (1991), pp. 312–314.

402 It is, of course, the natural tendency of competent institutions to issue rulings; see the opposing points of view between the Human Rights Committee ("this is an inappropriate task for States parties in relation to human rights treaties" – general comment No. 24, footnote XXX above, para. 18) and France ("it is [for States parties] and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty", Report of the Human Rights Committee to the General Assembly, 1996 (A/51/40), vol. I, para. 7).

thought-out and reasoned positions of those bodies, even when the latter cannot take legally binding decisions.[403]

3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.

2. The assessment made by such a body in the exercise of this competence has no greater legal effect than that of the act which contains it.

Commentary

(1) Guideline 3.2.1, like those that follow, clarifies the scope of the general guideline 3.2.

(2) Guideline 3.2 implies that the monitoring bodies established by the treaty[404] are competent to assess the permissibility of reservations formulated by the contracting parties but does not expressly state this, unlike paragraph 5 of the preliminary conclusions adopted by the Commission in 1997, whereby even if the treaty is silent on the subject, the monitoring bodies established by normative multilateral treaties "are competent to comment upon and express recommendations with regard to the admissibility of reservations by States, in order to carry out the functions assigned to them".

(3) The meaning of this last phrase is illuminated by paragraph 8 of the preliminary conclusions:

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

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[403] See, however, the extremely strong reaction to general comment No. 24 found in the bill submitted to the United States Senate by Senator Helms on 9 June 1995 in terms of which "no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2).

"(2) CERTIFICATION – The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its general comment No. 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights" (a bill to authorize appropriations for the Department of State for fiscal years 1996 through 1999 ..., 104th Congress, 1st session, S.908-Report No. 104-95, pp. 87–88).

[404] In very rare cases, a monitoring body may also be set up after the adoption of a treaty, by collective decision of the parties or of an organ of an international organization – *cf.* the Committee on Economic, Social and Cultural Rights (Economic and Social Council resolution 1985/17 of 28 May 1985).

(4) Guideline 3.2.1 combines these two principles by recalling, in the first paragraph, that the treaty monitoring bodies are necessarily competent to assess the permissibility of reservations made to the treaty whose implementation they are responsible for overseeing and, in the second paragraph, that the legal force of their findings in that regard cannot exceed that which is generally recognized for the instruments that they are competent to adopt.[405]

(5) However, guideline 3.2.1 deliberately refrains from addressing the consequences of the assessment of the permissibility of a reservation: such consequences, which cannot be determined without considering the effects of the acceptance of reservations and of the objections that might be made to them, are explained in Part 4 of the Guide to Practice, on the effects of reservations and related declarations.

3.2.2 Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations

When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.

Commentary

(1) Guideline 3.2.2 reproduces and incorporates in the Guide to Practice the basic idea underlying the recommendation set out in paragraph 7 of the preliminary conclusions of 1997,[406] which reads as follows:

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

(2) It would certainly not be appropriate to include a provision of this type in draft articles intended for adoption in the form of an international convention. Such is not the case, however, with the Guide to Practice, which is intended to constitute a "code of recommended practices" designed to "guide" the practice of States and international organizations with regard to reservations but without being legally binding.[407] Moreover, the Commission decided to include in the Guide several other guidelines clearly drafted in the form of a recommendation to States and international organizations.[408]

(3) On the other hand, the Commission, being well aware of the difficulties of this sort of enterprise, decided not to recommend expressly to States and international organizations that they should include in future multilateral treaties that provide for the establishment of a monitoring body specific clauses conferring competence on that body to assess the permissibility of reservations and specifying the legal effect of such assessments, even though that would undoubtedly be desirable when feasible.

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[405] For more clarification on this point, see the commentary to guideline 3.2, in particular paragraphs (6) and (9).

[406] See footnote XXX above.

[407] On this subject, see paragraph (5) of the commentary to guideline 2.5.3.

[408] See guideline 2.5.3 (Periodic review of the usefulness of reservations) and paragraph (5) of the commentary thereto; see also guidelines 2.1.2 (Statement of reasons for reservations), 2.6.9 (Statement of reasons), 2.9.5 (Form of approval, opposition and recharacterization) and 2.9.6 (Statement of reasons for approval, opposition and recharacterization).

(4) The Commission wishes to point out, moreover, that it does not purport in this guideline to take a position on the appropriateness of establishing such monitoring bodies. It merely considers that *if* such a body is established, it might be helpful to specify the nature and limits of its competence to assess the permissibility of reservations in order to avoid any uncertainty and controversy in the matter.[409] This is what is meant by the neutral wording that introduces the guideline: "When providing bodies with the competence to monitor the application of treaties ...". In the same spirit, the expression "where appropriate" emphasizes the purely recommendatory nature of the guideline.

3.2.3 Consideration of the assessments of treaty monitoring bodies

States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body shall give consideration to that body's assessment of the permissibility of the reservations.

Commentary

(1) Guideline 3.2.3 reflects the spirit of the recommendation formulated in paragraph 9 of the preliminary conclusions of 1997, which states:

> "9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future."[410]

(2) This call to States and international organizations to cooperate with monitoring bodies is carried over into guideline 3.2.3, which has nonetheless been reformulated so as to remove the ambiguity in the wording adopted in 1997: the phrase "if such bodies were to be granted competence to that effect *in the future*" seems to imply that they do not have such competence at the present time. This is not so, since there is no question but that they may assess the permissibility of reservations to treaties whose observance they are required to monitor.[411] On the other hand, they may not:

- Compel reserving States and international organizations to accept their assessment, since they do not have general decision-making power;[412] or
- Take the place of the author of the reservation, in any case, in determining the consequences to be drawn from the impermissibility of a reservation.[413]

(3) Although paragraph 9 of the preliminary conclusions is drafted as a recommendation ("The Commission calls upon States ..."), it seemed possible to adopt firmer wording in guideline 3.2.3: there is no doubt that contracting parties have a general duty to cooperate with the treaty monitoring bodies that they have established – which is what is evoked by the expression "shall give consideration" in the first part of the guideline. Of course, if such

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[409] See paragraph (1) above.

[410] See footnote XXX above.

[411] See paragraph (6) of the commentary to guideline 3.2 above; see also the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 206–209. In the same sense, see, *inter alia*, F. Coulée, "A propos d'une controverse autour d'une codification en cours: les reactions aux reserves incompatibles avec l'objet et le but des traits de protection des droits de l'homme", footnote XXX above, p. 504 and pp. 512–518).

[412] See the second paragraph of guideline 3.2.1.

[413] See paragraph 10 of the preliminary conclusions (see footnote XXX above) and the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 218–230. See also guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) and commentary.

bodies have been vested with decision-making power the parties must respect their decisions, but this is currently not the case in practice except for some regional human rights courts.[414] In contrast, the other monitoring bodies lack any juridical decision-making power, either in the area of reservations or in other areas in which they possess declaratory powers.[415] Consequently, their conclusions are not legally binding, and States parties are obliged only to "take account" of their assessments in good faith.

(4) Of course, there should be reciprocity, and it is incumbent upon monitoring bodies to take account of the positions expressed by States and international organizations with respect to the reservation.

3.2.4 Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body

When a treaty establishes a treaty monitoring body, the competence of that body is without prejudice to the competence of the contracting States or contracting international organizations to assess the permissibility of reservations to that treaty, or to that of dispute settlement bodies competent to interpret or apply the treaty.

Commentary

(1) Guideline 3.2.4 further clarifies, from a particular angle and in the form of a "without prejudice" clause, the principle established in guideline 3.2 of the plurality of bodies competent to assess the permissibility of reservations.

(2) It should also be noted that the wording of guideline 3.2 takes up only part of the substance of paragraph 6 of the preliminary conclusions of 1997:[416] it lists the persons or institutions competent to rule on the permissibility of reservations but does not specify that such powers are cumulative and not exclusive of each other. The Commission considered it useful to spell that point out in a separate guideline.

(3) As in the case of guideline 3.2.3, the monitoring bodies in question are those established by a treaty,[417] not dispute settlement bodies whose competence in this area forms the subject matter of guideline 3.2.5.

3.2.5 Competence of dispute settlement bodies to assess the permissibility of reservations

When a dispute settlement body is competent to adopt decisions binding upon the parties to a dispute, and the assessment of the permissibility of a reservation is necessary for the discharge of such competence by that body, such assessment is, as an element of the decision, legally binding upon the parties.

Commentary

(1) The Commission found it necessary to draw a distinction between monitoring bodies in the strict sense, which have no decision-making power and whose competence to assess the permissibility of reservations forms the subject matter of guideline 3.2.3, and dispute settlement bodies that have been vested with decision-making power. Even though the regional human rights courts may in a broader sense be considered monitoring bodies, they are included in the second category because their decisions constitute *res judicata*. Such

[414] Given their very specific nature, these bodies — like all dispute settlement bodies — are dealt with in a separate guideline; see guideline 3.2.5 below.
[415] See paragraph 2 of guideline 3.2.1.
[416] See footnote XXX above.
[417] See, however, footnote XXX above.

bodies also include those which, like the International Court of Justice, have general competence to settle disputes between States and which, in the event of a dispute involving a potentially broader subject matter, may be called upon to rule on the permissibility of a reservation.

(2) The clarification that their assessment of the permissibility of a reservation "is, as an element of the decision, legally binding upon the parties" indicates that the principle established by the guideline applies not only to cases in which the dispute has a direct bearing on this question, but also to those cases, much more frequent, in which the permissibility of the reservation constitutes a related problem that must be resolved first so that the broader dispute submitted to the competent body can be settled.

(3) It goes without saying that in any event the assessment of the dispute settlement body only has the authority of *res judicata*[418] if the body in question has the power to render such a judgement.

3.3 Consequences of the non-permissibility of a reservation

3.3.1 Irrelevance of distinction among the grounds for non-permissibility

A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.

Commentary

(1) Guideline 3.3.1 establishes the unity of the rules applicable to the consequences of the non-permissibility of a reservation, whatever the reason for such non-permissibility, among those set out in guideline 3.1.[419]

(2) Just as it does not specify the consequences of the formulation of a reservation prohibited, either expressly (subparagraph (a)) or implicitly (subparagraph (b)), by the treaty to which it refers, so article 19 of the Vienna Conventions makes no reference to the effects of the formulation of a reservation prohibited by subparagraph (c),[420] and nothing in the text of the Vienna Convention indicates how these provisions relate to those of article 20, concerning acceptance of reservations and objections. The question has been raised as to whether this "normative gap"[421] may not have been deliberately created by the authors of the Convention.[422]

(3) It must in any case be acknowledged that the *travaux préparatoires* of subparagraph (c) are confused and do not offer any further indications of the consequences that the drafters of the Convention intended to draw from the incompatibility of a reservation with the object and purpose of the Convention:[423]

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[418] Or "finding", if it is assumed that a non-judicial body may, in the exercise of its competence, be called upon to assess the permissibility of a reservation.

[419] For a critical assessment of these guidelines in their 2010 version, see B. Simma and G.I. Hernandéz, "Legal consequences of an impermissible reservation to a human rights treaty: where do we stand?", footnote XXX above, pp. 73–75.

[420] *Cf.* D.W. Greig, footnote XXX above, p. 83.

[421] F. Horn, footnote XXX above, p. 131; see also J. Combacau, footnote XXX above, p. 199.

[422] See P.-H. Imbert, footnote XXX above, pp. 137–140.

[423] It should be recalled that this criterion was included in the draft belatedly, going back only to Waldock's first report in 1962 (A/CN.4/144, *Yearbook ... 1962*, vol. II, pp. 66–67, para. 10); see also

- In draft article 17 proposed by Waldock in 1962, the object and purpose of the treaty appeared only to function as guidance for the reserving State itself;[424]
- The debates on that draft were particularly confused during the Commission's plenary meetings[425] and, more than anything else, revealed a split between members who advocated an individual assessment by States and those who were in favour of a collegial mechanism,[426] although the consequences of such assessment were not really discussed;
- However, after the Drafting Committee had recast the draft along lines very close to the wording of the present article 19, the overriding feeling seems to have been that the object and purpose constituted a criterion by which the permissibility of the reservation should be assessed.[427] This is attested by the new amendment to article 18 *bis*, which entailed, on the one hand, the inclusion of the criterion of incompatibility and, on the other hand, and most importantly, the modification of the title of that provision, which became "The legal effect of reservations" instead of "The validity of reservations",[428] which suggests that the validity of reservations was the subject of draft article 17 (which became article 19 of the Convention);
- The deft wording of the commentary to draft articles 18 and 20 (corresponding respectively to articles 19 and 21 of the Convention) adopted in 1962 leaves the question open: it affirms both that the compatibility of the reservation with the object and purpose of the treaty is the criterion governing the formulation of reservations and that, since this criterion "is to some extent a matter of subjective appreciation ... the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation", but only "in the absence of a tribunal or an organ with standing competence";[429]
- In his 1965 report, the Special Rapporteur also noted, in connection with draft article 19 relating to treaties that are silent on the question of reservations (subsequently, article 20 of the Convention), that "the Commission recognized that the 'compatibility' criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation"; it also recognized that "the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication";[430]

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the oral presentation by Waldock, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 139, paras. 4–6.

[424] Article 17, para. 2 (a): see *ibid.*; see also the remarks by the Special Rapporteur at the fourteenth session (*Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, para. 85).

[425] See *Yearbook ... 1962*, vol. I, pp. 139–168 and pp. 172–175.

[426] See paragraph (3) of the commentary to guideline 3.2.

[427] See in particular *Yearbook ... 1962*, vol. I, pp. 225–234. During the discussion on new article 18 *bis*, entitled "The validity of reservations", all the members referred to the criterion of compatibility with the object and purpose of the treaty, which was not mentioned, however, in the draft adopted by the Drafting Committee.

[428] *Ibid*., vol. I, pp. 252–253.

[429] *Ibid*., vol. II, p. 181, para. 22.

[430] Sir Humphprey Waldock's fourth report on the law of treaties, *Yearbook ... 1965*, vol. II, p. 52, para. 9.

- The Commission's commentaries to draft articles 16 and 17 (which subsequently became 19 and 20 respectively) are not as clear, however, and merely state that "the admissibility or otherwise of a reservation under paragraph (c) ... is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States" and that, for that reason, draft article 16 (c) should be understood "in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations";[431]

- At the Vienna Conference, some delegations tried to give more content to the criterion of the object and purpose of the treaty. Accordingly, the Mexican delegation proposed that the consequences of a judicial decision recognizing the incompatibility of a reservation with the object and purpose of the treaty should be spelled out.[432] However, it was mainly those in favour of a system of collegial assessment who tried to draw concrete conclusions from the incompatibility of a reservation with the object and purpose of the treaty.[433]

(4) Moreover, nothing, either in the text of article 19 or in the *travaux préparatoires*, gives grounds for thinking that a distinction should be made between the different cases: *ubi lex non distinguit, nec nos distinguere debemus*. In all three cases, as clearly emerges from the *chapeau* of article 19, a State is prevented from formulating a reservation and, once it is accepted that a reservation prohibited by the treaty is null and void by virtue of subparagraphs (a) and (b) of article 19, there is no reason to draw a different conclusion from subparagraph (c). Three objections, of unequal weight, have nevertheless been raised to this conclusion.

(5) First, it has been pointed out that, whereas the depositaries reject reservations prohibited by the treaty, they communicate to other contracting States the text of those that are, *prima facie*, incompatible with its object and purpose.[434] Such is indeed the practice followed by the Secretary-General of the United Nations,[435] but its significance is only relative. For "only *if there is no doubt* that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit ... *In case of doubt*, the Secretary-General shall request clarification from the State concerned ... However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations".[436] In other words, the difference noted in the practice of the Secretary-General is not based on the distinction between the situations in subparagraphs (a) and (b) on the one hand and

[431] *Yearbook ... 1966*, vol. II, p. 207, para. 17.

[432] United Nations Conference on the Law of Treaties, *Official Records, First Session, Summary Records* (A/CONF.39/11), Plenary Commission, 21st meeting, 10 April 1968, para. 63. Mexico proposed two solutions. The first was that the State that had formulated the incompatible reservation should be obliged to withdraw it, failing which it should forfeit the right to become a party to the treaty; and the second was that the treaty in its entirety should be deemed not to be in force between the reserving State and the objecting State.

[433] See in particular the statements of the various delegations cited above, commentary to guideline 3.2, para. (3) (footnotes XXX to XXX above).

[434] *Cf.* G. Gaja "Unruly treaty reservations" *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, p. 317.

[435] See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1) United Nations publication, Sales No. E.94.V.15, paras. 191 and 192.

[436] *Ibid*., paras. 194–196, emphasis added. The practice followed by the Secretary-General of the Council of Europe is similar, except that, in the event of difficulty, he or she may consult (and does consult) the Committee of Ministers (see J. Polakiewicz, *Treaty-making in the Council of Europe*, Council of Europe, Strasbourg, 1999, pp. 90–93).

subparagraph (c) on the other of article 19, but on the certainty that the reservation is contrary to the treaty. When an interpretation is necessary, the Secretary-General relies on States; such is always the case when the reservation is incompatible with the object and purpose of the treaty; it may also be so when the reservations are expressly or implicitly prohibited.

(6) Secondly, it has been pointed out in the same spirit that in the situation in subparagraphs (a) and (b), the reserving State could not be unaware of the prohibition and that, for that reason, it should be assumed to have accepted the treaty as a whole, notwithstanding its reservation (doctrine of "severability").[437] There is no doubt that it is less easy to determine objectively that a reservation is incompatible with the object and purpose of a treaty than it is when there is a prohibition clause. The remark is certainly relevant, but not decisive. It is less obvious than is sometimes thought to determine the scope of reservation clauses, especially when the prohibition is implicit, as in the situation in subparagraph (b).[438] Furthermore, it may be difficult to determine whether or not a unilateral statement is a reservation, and the State concerned may have thought in good faith that it had not violated the prohibition, while considering that its consent to be bound depended on the acceptance of its interpretation of the treaty.[439] In fact, if a State is assumed not to be ignorant of the prohibition resulting from a reservation clause, it should be equally aware that it cannot divest a treaty of its substance through a reservation that is incompatible with the treaty's object and purpose.

(7) Thirdly and most significantly, it has been argued that paragraphs 4 and 5 of article 20 mention just one limitation on the possibility of accepting a reservation: that is, when the treaty contains a contrary provision.[440] *A contrario*, that would imply complete freedom to accept reservations, notwithstanding the provisions of article 19, subparagraph (c).[441] While it is true that, in practice, States object infrequently to reservations that are very possibly contrary to the object and purpose of the treaty to which they relate and that, in consequence, the rule contained in article 19, subparagraph (c),[442] is deprived of concrete effect, at least in the absence of a body competent to take decisions in that regard,[443] many arguments based on the text of the Convention itself conflict with that reasoning:

- Articles 19 and 20 of the Convention have distinct purposes; the rules that they establish are applicable at different stages of the formulation of a reservation: article 19 sets out the cases in which a reservation may not be formulated; article 20 describes what happens after one has been formulated;[444]

[437] See Alessandro Fodella, "The declarations of States parties to the Basel Convention" in Tullio Treves (ed.), "Six studies on reservations", *Communicazioni e Studi*, vol. XXII, 2002, pp. 143–147.

[438] See in particular the commentary to guideline 3.1.2 (Definition of specified reservations).

[439] On the distinction between reservations, on the one hand, and interpretative declarations, whether simple or conditional, on the other, see guidelines 1.3 to 1.3.3 and commentaries.

[440] The wording used in both provisions is "unless the treaty otherwise provides".

[441] See D.W. Greig, footnote XXX above, pp. 83–84.

[442] See, in particular, D. Carreau, *Droit international*, (Pedone, 2004), p. 137; Gaja, footnote XXX above, pp. 315–318; D.W. Greig, footnote XXX above, pp. 86–90 or P.-H. Imbert, footnote XXX above, pp. 134–137.

[443] See paragraphs (8) and (9) of the commentary to guideline 3.2 (Assessment of the permissibility of a reservation); see also M. Coccia, "Reservations to multilateral treaties on human rights", *California Western I.L.J.I.* 1985, p. 33, or R. Szafarz, "Reservations to multilateral treaties", *Polish Yearbook of International Law* 1970, p. 301.

[444] See Bowett, footnote XXX above, p. 80; or C.J. Redgwell, "Reservations to treaties and Human Rights Committee general comment No. 24 (52)", *I.C.L.Q.*, vol. 46 (1997), pp. 404–406.

- The proposed interpretation would strip article 19, subparagraph (c), of any real effect: in consequence, a reservation incompatible with the object and purpose of the treaty would have exactly the same effect as a compatible reservation;
- It would also render meaningless article 21, paragraph 1, which stipulates that a reservation is "established" only "in accordance with articles 19, 20 and 23";[445] and
- It introduces a distinction between the scope of article 19, subparagraphs (a) and (b), on the one hand and article 19, subparagraph (c), on the other, which the text in no way authorizes.[446]

(8) Consequently, there is nothing in the text of article 19 of the Vienna Conventions, or in its context, or in the *travaux préparatoires* for the Conventions, or even in the practice of States or depositaries to justify drawing such a distinction between the consequences of the formulation of a reservation in spite of a treaty-based prohibition (article 19 (a) and (b)), on the one hand, and of its incompatibility with the object and purpose of the treaty (article 19 (c)), on the other.

3.3.2 Non-permissibility of reservations and international responsibility

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organization which has formulated it.

Commentary

(1) Once it has been accepted that, in accordance with guideline 3.3.1, the three subparagraphs of article 19 (reproduced in guideline 3.1) have the same function and that a reservation that is contrary to their provisions is impermissible, it still remains to be seen what happens when, in spite of these prohibitions, a State or an international organization formulates a reservation. If it does so, the reservation certainly cannot have the legal effects which, pursuant to article 21, are clearly contingent on its "establishment" "in accordance with articles 19 [in its entirety], 20 and 23".[447]

(2) Whatever its effects,[448] questions remain: On the one hand, should it be concluded that, by proceeding thus, the author of the reservation is committing an internationally wrongful act which engages its international responsibility? And further, are other parties prevented from accepting a reservation formulated in spite of the prohibitions contained in article 19?

(3) With regard to the first of these two questions,[449] it has been argued that a reservation that is incompatible with the object and purpose of the treaty[450] "amounts to a breach of [the] obligation" arising from article 19, subparagraph (c). "Therefore, it is a wrongful act, entailing such State's responsibility *vis-à-vis* each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding 'incompatible' reservations."[451] This reasoning, based

[445] See paragraph (6) of the commentary to guideline 3.1 and the commentary to guideline 4.1.
[446] See paragraph (4) above.
[447] Article 21 (Legal effects of reservations and of objections to reservations): "A reservation established with regard to another party in accordance with articles 19, 20 and 23 ...".
[448] These will form the subject of Part 4 of the Guide to Practice.
[449] See also paragraphs (2) to (7) of the general commentary to Part 3 of the Guide to Practice.
[450] This should also hold true *a fortiori* for reservations prohibited by the treaty.
[451] M. Coccia, footnote XXX above, pp. 25–26.

expressly on the rules governing the responsibility of States for internationally wrongful acts,[452] is not entirely convincing.[453]

(4) It is clear that "[t]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character",[454] and that a breach of an obligation not to act (which in this case would be the obligation not to formulate a reservation which is incompatible with the object and purpose of the treaty) is an internationally wrongful act liable to engage the international responsibility of a State in the same way as an obligation to act. However, the question would have to be posed in the sphere of the law of responsibility. As the International Court of Justice forcibly recalled in the case concerning the *Gabčikovo-Nagymaros Project*, the law of responsibility and the law of treaties "obviously have a scope that is distinct"; while "a determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties",[455] it falls to this same branch of law to determine whether or not a reservation may be formulated. It follows, at the very least, that the potential responsibility of a reserving State cannot be determined under the Vienna rules and that it is not pertinent to the "law of reservations". Furthermore, even if injury is not a requirement for engaging the responsibility of a State,[456] it influences how that responsibility is realized, particularly with regard to reparation;[457] hence, for an impermissible reservation to have concrete consequences in the sphere of the law of responsibility, a State relying on it would have to be able to invoke an injury – which is highly unlikely.

(5) There is more, however. It is telling that no State has ever, when formulating an objection to a prohibited reservation, invoked the responsibility of the reserving State. The consequences of the finding that a reservation is not permissible may be varied,[458] but they never entail an obligation to make reparation, and if an objecting State were to invite the reserving State to withdraw its reservation or to modify it within the framework of the "reservations dialogue", it would be acting not in the sphere of the law of responsibility but in that of the law of treaties alone. There seems to be no doubt, in fact, that the formulation of a reservation excluded by any of the subparagraphs of article 19 falls within the sphere of the law of treaties and not within that of responsibility of States for internationally

[452] See articles 1 and 2 of the Commission's articles on responsibility of States for internationally wrongful acts, General Assembly resolution 56/83 of 12 December 2001, annex.

[453] See G. Gaja, footnote XXX above, p. 314, note 29.

[454] Article 12 of the articles on responsibility of States for internationally wrongful acts.

[455] Judgment of 25 September 1997, *Gabčikovo-Nagymaros Project* case, *I.C.J. Reports 1997*, p. 38, para. 47; see also the arbitral ruling of 30 April 1990 in the *Rainbow Warrior* case, *Revue générale de droit international public*, 1990, p. 851, para. 75. On the relationships between the two branches of law, see in particular D. Bowett, "Treaties and State responsibility", *Le droit international au service de la paix, de la justice et du développement – Mélanges Michel Virally* (Paris, Pedone, 1991), pp. 137–145; J. Combacau, footnote XXX above, pp. 195–203; P.-M. Dupuy, "Droit de traités, codification et responsabilité internationale", *Annuaire français de droit international*, 1997, pp. 7–30; Ph. Weckel, "Convergence du droit des traités et du droit de la responsabilité internationale", *Revue générale de droit international public*, 1998, pp. 647–684; P. Weil, "Droit de traités et droit de la responsabilité", *Le droit international dans un monde en mutation* – Liber Amicorum *Jiménez de Aréchaga*, (Montevideo, FCU, 1994), pp. 523–543; A. Yahi, "La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale", *Revue belge de droit international*, 1993, pp. 437–469.

[456] See in this connection article 1 of the Commission's articles on the responsibility of States for internationally wrongful acts (footnote XXX above, above).

[457] *Cf.* articles 31 and 34 of the articles on responsibility of States for internationally wrongful acts.

[458] They arise, *a contrario*, from article 20 and in particular from article 21 of the Vienna Conventions.

wrongful acts. Accordingly, it does not entail the responsibility of the reserving State.[459] While this seems self-evident, the Commission's intention in adopting guideline 3.3.2 was to remove any remaining ambiguity.

(6) That is in fact why the Commission, which had at first used the term "*illicite*" as an equivalent to the English word "impermissible" to describe reservations formulated notwithstanding the provisions of article 19, decided at its fifty-eighth session, to replace the words "*licite*", "*illicite*" "*licéité*" and "*illicéité*" with "*valide*", "*non-valide*", "*validité*" and "*non-validité*" and to modify the commentary to all the guidelines of the Guide to Practice accordingly.[460]

3.3.3 Absence of effect of individual acceptance of a reservation on the permissibility of the reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation.

Commentary

(1) According to the first part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility), "a reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and the purpose of the treaty is impermissible". The provision makes it clear that the impermissibility of the reservation results *ipso facto* from one of the grounds listed in article 19 of the Vienna Conventions and reproduced in guideline 3.1 of the Guide to Practice. In other words, either the prohibition (explicit or implicit) of the reservation or alternatively its incompatibility with the object and purpose of the treaty constitutes the necessary and sufficient condition for its impermissibility.

(2) Consequently, it is clear that the acceptance of a reservation by a contracting State or international organization formulated notwithstanding article 19, subparagraphs (a) and (b), cannot cure this impermissibility, which is the "objective" consequence of the prohibition of the reservation or of its incompatibility with the object and purpose of the treaty.[461] That is what is explained in guideline 3.3.3.

(3) Waldock, in his capacity as Expert Consultant, clearly expressed his support for this solution at the Vienna Conference on the Law of Treaties when he stated that:

> "a contracting State could not purport, under article 17 [current article 20], to accept a reservation prohibited under article 16 [19], paragraph (a) or paragraph (b),

[459] Much less that of States which implicitly accept a reservation that is prohibited or incompatible with the object and purpose of the treaty — see, however, L. Lijnzaad, footnote XXX above, p. 56: "The responsibility for incompatible reservations is ... shared by reserving and accepting States" — but it appears from the context that the author does not consider either the incompatible reservation or its acceptance as internationally wrongful acts; rather than "responsibility" in the strictly legal sense, it is no doubt necessary to refer here to "accountability" in the sense of having to provide an explanation.

[460] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 324–327, para. 159. See also paragraphs (2) to (7) of the general commentary to Part 3 of the Guide to Practice.

[461] See in this sense A. Pellet and D. Müller, "Reservations to treaties: an objection to a reservation is definitely not an acceptance" in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (Oxford University Press, 2011), in particular pp. 54–56.

because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance".[462]

(4) The logical consequence of the "impossibility" of accepting a reservation that is impermissible either under subparagraph (a) or (b) of article 19 (or of guideline 3.1), or under paragraph (c) — which follows exactly the same logic and which there is no reason to distinguish from the other two paragraphs of the provision[463] — is that such an acceptance is devoid of legal effect.[464] It cannot "permit" the reservation, nor can it cause the reservation to produce any effect whatsoever – and certainly not the effect envisaged in article 21, paragraph 1, of the Vienna Conventions, which requires that the reservation must have been established.[465] Furthermore, if the acceptance of an impermissible reservation were considered to constitute an agreement between the author of the impermissible reservation and the State or international organization that accepted it, it would result in a modification of the treaty in the relations between the two parties, a result that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".[466]

(5) The Commission decided that this guideline should be included in Part 3 of the Guide to Practice relating to the permissibility of reservations and not in Part 4 concerning their consequences: it is a question of identifying not the effect of acceptance of an impermissible reservation, but rather the effect of acceptance on the permissibility of the reservation itself (an issue which arises earlier in the process than the question of the effect of reservations). Permissibility logically precedes acceptance (the Vienna Conventions also follow this logic) and guideline 3.3.3 relates to the permissibility of the reservation – in other words, to the fact that acceptance cannot cure an absence of permissibility. The aim of the guideline is not to determine the effects of acceptance of a reservation by a State, but simply to establish that, if the reservation in question is impermissible, it remains impermissible despite an acceptance.

(6) Individual[467] — even express — acceptance of an impermissible reservation has no effect as such on the consequences of this nullity, which are outlined in Part 4 of the Guide to Practice. The question of the consequences of acceptance in terms of the effects of the

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462 *United Nations Conference on the Law of Treaties, First Session, Summary records* (A/CONF.39/11), footnote XXX above, 25th meeting, 16 April 1968, p. 133, para. 2.

463 See the last part of guideline 3.3.1 (Irrelevance of distinction among the grounds for non-permissibility): "A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is impermissible, *without there being any need to distinguish between the consequences of these grounds for non-permissibility*."

464 See below guideline 4.5.2 (Reactions to a reservation considered invalid) and commentary.

465 See guidelines 4.2.1 to 4.2.5 and commentaries below.

466 In this sense see D.W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law*, vol. 16 (1995), p. 57; or L. Sucharipa-Behrmann, "The legal effects of reservations to multilateral treaties", *Austrian Review of International and European Law*, 1996, pp. 78–79; *contra*, however, see the comments made by Jiménez de Aréchaga and d'Amado during the discussions on Waldock's proposals of 1962 (*Yearbook … 1962*, vol. I, 653rd meeting, 29 May 1962, p. 158, paras. 44–45 and p. 160, para. 63).

467 The term "individual acceptance" is also used in guideline 2.8.10 to refer to the acceptance of a reservation to the constituent instrument of an international organization by a State or an international organization as opposed to acceptance by the competent body of the organization in question. The problem is different when there is collective acceptance of a reservation by all contracting States and contracting international organizations; on this point see paragraphs (8) to (13) below.

reservation is not and should not be raised; the inquiry stops at the stage of permissibility, which is not and cannot be acquired as a result of the acceptance.

(7) Guideline 3.3.3 establishes that acceptance of an impermissible reservation cannot have any effect either on the permissibility of the reservation or *a fortiori* on the legal consequences that flow from the nullity of the impermissible reservation. Those consequences are discussed in section 4.5 of the Guide to Practice.

(8) The question remains, however, whether collective acceptance of an otherwise impermissible reservation is possible.

(9) Draft article 17 (1) (b) proposed by Waldock in 1962 envisaged "the exceptional case of an attempt to formulate a reservation of a kind which is actually prohibited or excluded by the terms of the treaty";[468] he proposed that, in such case, "the prior consent of all the other interested States" is required.[469] This provision was not retained in the Commission's draft articles of 1962[470] or 1966 and does not appear in the Convention.[471]

(10) It can be argued, however, that the parties always have a right to amend the treaty by general agreement *inter se* in accordance with article 39 of the Vienna Conventions and that nothing prevents them from adopting a unanimous agreement[472] to that end on the subject of reservations.[473] This possibility, which accords with the principle of consent that underpins all the law of treaties, nevertheless poses some very difficult problems. The first problem is whether the absence of objections by all the other parties within a 12-month period is equivalent to a unanimous agreement constituting an amendment to the reservation clause. At first sight, article 20, paragraph 5, of the Convention seems to answer this in the affirmative.

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[468] First report on the law of treaties, A/CN.4/144, in *Yearbook ... 1962*, vol. II, p. 65, para. (9).

[469] See *ibid.*, p. 60, for the text of the draft article.

[470] The provision came up against opposition from Mr. Tunkin (*ibid.*, vol. I, 651st meeting, 25 May 1962, para. 19) and Mr. Castrén (*ibid.*, para. 68, and 652nd meeting, 28 May 1962, para. 30), who believed it to be superfluous, and it disappeared from the simplified draft retained by the Drafting Committee (*ibid*., 663rd meeting, 18 June 1962, para. 3).

[471] This solution was, however, adopted in the reservation clause of the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport of 1 July 1970, of which article 21, para. 2 provides as follows: "If at the time of depositing its instrument of ratification or accession a State enters a reservation other than that provided for in paragraph 1 of this article, the Secretary-General of the United Nations shall communicate the reservation to the States which have previously deposited their instruments of ratification or accession and have not since denounced this Agreement. The reservation shall be deemed to be accepted if none of the said States has, within six months after such communication, expressed its opposition to acceptance of the reservation. Otherwise the reservation shall not be admitted, and, if the State which entered the reservation does not withdraw it the deposit of that State's instrument of ratification or accession shall be without effect." On the basis of this provision and in the absence of an objection from the other States parties to the Convention, the States members of the European Economic Community formulated a reservation, not authorized by the Agreement, excluding the application of the agreement to certain operations. See the reservations made by the States which, at the time, were members of the Community, *Multilateral Treaties* ..., chap. XI.B.21.

[472] But not an agreement between certain of the parties only; see article 41 of the Vienna Conventions.

[473] In this regard, see D.W. Greig, footnote XXX above, pp. 56–57; or L. Sucharipa-Behrman, footnote XXX above, p. 78. This is also the position of D.W. Bowett, but he considers that this possibility does not come under the law of reservations ("Reservations to non-restricted multilateral treaties", *British Yearbook of International Law*, 1976–1977, p. 84; see also C. Redgwell, footnote XXX above, p. 269). Moreover, it cannot reasonably be argued that the rules established in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

(11) However, after further consideration, this is not necessarily the case: silence on the part of a State party does not mean that it is taking a position as to the permissibility of the reservation; at most, it means that the reservation may be invoked against it[474] and that the State undertakes not to object to it in the future.[475] This is shown by the fact that it cannot be argued that monitoring bodies — whether the International Court of Justice, an arbitral tribunal or a human rights treaty body — are prevented from assessing the permissibility of a reservation even if no objection has been raised to it.[476]

(12) An example could be cited, however, in support of the opposite: the well-known neutrality reservation formulated by Switzerland upon acceding to the Covenant of the League of Nations. Even though the Covenant prohibited reservations, the reserving State was admitted into the circle of States parties.[477] This "precedent"[478] certainly does not, however, help to prove the existence of a customary norm along those lines.

(13) In the absence of a well-established rule, the Commission considered that it was better not to take a position on the question, which, in any event, has more to do with the general problem of the amendment of treaties than that of reservations *stricto sensu*.[479]

3.4 Permissibility of reactions to reservations

Commentary

(1) Unlike the case of reservations, the Vienna Conventions do not set forth any criteria or conditions for the permissibility of reactions to reservations, although acceptances and objections occupy a substantial place as a means for States and international organizations to give or refuse their consent to a permissible reservation. Such reactions do not, however, constitute criteria for the permissibility of a reservation that can be evaluated objectively in accordance with the conditions established in article 19 of the Vienna Conventions and independently of the acceptances or objections to which the reservation has given rise. They are a way for States and international organizations to express their point of view regarding the permissibility of a reservation, but the permissibility (or impermissibility) of a reservation must be evaluated independently of the acceptances or objections to which it gave rise. Moreover, this idea is clearly expressed in section 3.3 (Consequences of the non-permissibility of a reservation). The fact remains, however, that acceptances and objections provide a means for States and international organizations to express their point of view

[474] In this regard, see M. Coccia, footnote XXX above, p. 26; F. Horn, footnote XXX above, pp. 121–131; or Karl Zemanek, "Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, Nijhoff, 1984), pp. 331–332; see also G. Gaja "Unruly treaty reservations" *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, pp. 319–320. As Liesbeth Lijnzaad quite rightly points out, it is not a question of acceptance *stricto sensu*, "it is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose" (footnote XXX above, p. 56).

[475] See guideline 2.8.13 and commentary.

[476] See D.W. Greig, footnote XXX above, pp. 57–58. Even during the Commission's debate in 1962, Bartoš had made the point that it was almost inconceivable that the simple operation of time limits for the making of objections could mean that a clearly inadmissible reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

[477] See M. H. Mendelson, "Reservations to the constitutions of international organizations", *British Yearbook of International Law*, vol. 45 (1971), pp. 140–141.

[478] Not an exact precedent, since, strictly speaking, it was not a case of unanimous acceptance by the parties to the Covenant but rather acceptance by the organization itself.

[479] In this sense see D.W. Bowett, "Reservations to non-restricted multilateral treaties", *British Yearbook of International Law*, 1976–1977, p. 84.

regarding the permissibility of a reservation, and they may accordingly be taken into account in assessing the permissibility of a reservation.[480]

(2) The *travaux préparatoires* of the Vienna regime in respect of objections leave no doubt as to the lack of connection between the permissibility of a reservation and the reactions thereto.[481] It also follows that while it may be appropriate to refer to the "permissibility" of an objection or acceptance, the term does not have the same connotation as in the case of reservations themselves. The main issue is whether the objection or acceptance can produce its full effects.

3.4.1 Permissibility of the acceptance of a reservation

Acceptance of a reservation is not subject to any condition of permissibility.

Commentary

(1) It seems self-evident that contracting States or international organizations can freely accept a reservation that is permissible and that the permissibility of such acceptances cannot be questioned.[482] It is clear whether it is a different matter when a State or an international organization accepts a reservation that is impermissible.

(2) While acceptance cannot determine the permissibility of a reservation, some authors have argued that the inverse is not true:

> "An acceptance of an inadmissible reservation is theoretically not possible. Directly or indirectly prohibited reservations under article 19 (1) (a) and (b) cannot be accepted by any confronted state. Such reservations and acceptances of these will not have any legal effects. (…) Similarly, an incompatible reservation under article 19 (1) (c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effect."[483]

(3) The Commission, however, has not taken that view. Although the statement in the literature may not be debatable as far as it goes, there is no need to conclude that acceptance of an impermissible reservation is in turn and *ipso facto* impermissible. It would seem more accurate to say that it simply cannot produce the legal effects that its author expected to produce. The reason for the absence of effects is not the impermissibility of the acceptance but the impermissibility of the reservation. The acceptance as such cannot be said to be either permissible or impermissible.

(4) In any case, only express acceptances could conceivably have been subject to conditions of permissibility, since it is difficult to envisage a regime of impermissibility for a non-existent act, such as a tacit acceptance. Now, it is hard to imagine that there could be a regime of permissibility for express acceptances and another for tacit acceptances, since that would run counter to the 1969 and 1986 Vienna Conventions, which place them on the same plane.

(5) For these reasons the Commission considers that acceptance is not subject to any condition of permissibility. This position is without prejudice to the absence of effect of the individual acceptance of a reservation on the latter's permissibility.[484]

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[480] See the commentary to guideline 4.5.2 below.

[481] See paragraphs (4)–(6) of the commentary to guideline 2.6.2 above.

[482] See guideline 4.1 and commentary below. See also the commentary to guideline 2.8.3 (Express acceptance of reservations).

[483] See F. Horn, footnote XXX above, p. 121.

[484] See guidelines 3.3.3 (Absence of effect of individual acceptance of a reservation on the permissibility

3.4.2 Permissibility of an objection to a reservation

An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if:

(1) The additional provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and

(2) The objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.

Commentary

(1) Guideline 3.4.2 relates solely to a very particular category of objections, frequently called those with "intermediate effect", through which a State or international organization considers that treaty relations should be excluded beyond what is provided for in article 21, paragraph 3, of the Vienna Conventions, yet does not oppose the entry into force of the treaty between itself and the author of the reservation. The Commission has noted the existence of such objections, which might be called objections of the "third type", in the commentary to guideline 2.6.1 on the definition of objections to reservations, without taking a position on their permissibility.[485]

(2) While treaty practice provides relatively few specific examples of intermediate-effect or "extensive" objections, some do exist. It would seem, however, that this "*nueva generación*"[486] ["new generation"] of objections developed exclusively around reservations to the 1969 Vienna Convention itself: some States agreed that the Convention could enter into force between themselves and the authors of the reservations, provided that not only the provisions to which the reservations in question had been made,[487] but also other articles related to them were excluded.[488] These objections thus had a much broader scope than that of objections with "minimum effect", yet the authors of the objections did not go so far as to state that they were not bound by the treaty *vis-à-vis* the author of the reservation. While a number of States parties to the Vienna Convention objected to such reservations but limited their objections to the "presumed" effects envisaged in article 21, paragraph 3, of the 1969 Vienna Convention,[489] other States — Canada,[490] Egypt,[491] Japan,[492] the Netherlands,[493] New Zealand,[494] Sweden,[495] the United Kingdom[496] and the United States[497]

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of the reservation) and 4.5.2 (Reactions to a reservation considered invalid).

485 See paragraph (23) of the commentary to guideline 2.6.1.

486 R. Riquelme Cortado, footnote XXX above, p. 293.

487 As a general rule, article 66 of the Convention and the annex thereto (see the reservations formulated by Algeria (*Multilateral Treaties* ..., chap. XXIII.1), Belarus (*ibid.*), China (*ibid.*), Cuba (*ibid.*), Guatemala (*ibid.*), the Russian Federation (*ibid.*), the Syrian Arab Republic (*ibid.*), Tunisia (*ibid.*), Ukraine (*ibid.*) and Viet Nam (*ibid.*). Bulgaria, the Czech Republic, Hungary and Mongolia had formulated similar reservations but withdrew them in the early 1990s (*ibid.*). The German Democratic Republic had also formulated a reservation excluding the application of article 66 (*ibid.*).

488 These are the other provisions in Part V of the Vienna Convention, in particular article 64 on *jus cogens* (arts. 53 and 64). See also para. (9) below.

489 That was the case with Denmark and Germany (*ibid.*).

490 In respect of the reservation by the Syrian Arab Republic (*ibid.*).

491 Egypt's objection was directed not at one reservation in particular, but at any reservation excluding the application of article 66 (*ibid.*)

492 In respect of any reservation excluding the application of article 66 or the annex to the Vienna Convention (*ibid.*).

493 In respect of all States that had formulated reservations concerning the compulsory dispute settlement procedures. This general declaration was reiterated separately for each State that had formulated such

— wanted their objections to produce more serious consequences but did not wish to exclude the entry into force of the Vienna Convention as between themselves and the reserving States.[498] The latter States not only wanted to exclude the application of the obligatory dispute settlement provision or provisions "to which the reservation refers"; they also did not consider themselves bound in their bilateral relations with the reserving State by the substantive provisions to which the dispute settlement procedure or procedures applied. For example, the United States, in its objection to Tunisia's reservation to article 66 (a) of the Vienna Convention, stated that:

> "The United States Government intends, at such time as it becomes a party to the Convention, to reaffirm its objection […] and declare that it will not consider that article 53 or 64 of the Convention is in force between the United States of America and Tunisia."[499]

(3) While the 1969 and 1986 Vienna Conventions do not expressly authorize objections with intermediate effect, nothing in the two Conventions prohibits them. On the contrary, objections with intermediate effect, as their name indicates, may be entertained in that they fall midway between the two extremes envisaged under the Vienna regime: they purport to prohibit the application of the treaty to an extent greater than a minimum-effect objection (article 21, paragraph 3, of the Vienna Conventions), but less than a maximum-effect objection (article 20, paragraph 4 (b), of the Vienna Conventions).[500]

(4) Although in principle, "a State or international organization may formulate an objection to a reservation irrespective of the permissibility of the reservation",[501] the question remains whether objections with intermediate effect must in some cases be deemed to be impermissible.

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a reservation (*ibid.*).

494 In respect of Tunisia's reservation (*ibid.*).

495 In respect of any reservation excluding application of the dispute settlement provisions, in general, and of the reservations made by Cuba, the Syrian Arab Republic and Tunisia, in particular (*ibid.*).

496 To the extent set out in its declaration of 5 June 1987, except in respect of Viet Nam's reservation.

497 The United States objections were formulated before it became a contracting party and concerned the reservations made by the Syrian Arab Republic, Tunisia and Cuba (*ibid.*).

498 The United Kingdom made maximum-effect objections, in due and proper form, to the reservations formulated by the Syrian Arab Republic and Tunisia. The effect of these objections seems, however, to have been mitigated *a posteriori* by the United Kingdom's declaration of 5 June 1987, which constituted in a sense the partial withdrawal of its earlier objection (see guideline 2.7.7 and commentary), since the author did not oppose the entry into force of the Convention as between the United Kingdom and a State that had made a reservation to article 66 or to the annex to the Vienna Convention and excluded only the application of Part V in their treaty relations. This declaration, which the United Kingdom recalled in 1989 (with regard to Algeria's reservation) and 1999 (with regard to Cuba's reservation), stated that "[w]ith respect to any other reservation the intention of which is to exclude the application, in whole or in part, of the provisions of article 66, to which the United Kingdom has already objected or which is made after the reservation by [the USSR], the United Kingdom will not consider its treaty relations with the State which has formulated or will formulate such a reservation as including those provisions of Part V of the Convention with regard to which the application of article 66 is rejected by the reservation" (*ibid.*). Nevertheless, in 2002, the United Kingdom again objected with maximum effect to the reservation made by Viet Nam by excluding all treaty relations with Viet Nam (*ibid.*). New Zealand also chose to give its objection to the Syrian reservation maximum effect (*ibid.*).

499 *Ibid.*

500 See D. Müller, "Article 21" in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article*, footnote XXX above, pp. 925–926, paras. 67–69.

501 Guideline 2.6.2 (Freedom to formulate objections).

(5) Some authors propose to consider that "these extended objections are, in fact, reservations (limited *ratione personae*)".[502] This analysis is to some extent supported by the fact that other States have chosen to formulate reservations in the strict sense of the word in order to achieve the same result.[503] Thus, Belgium formulated a (late) reservation concerning the Vienna Convention, stating that:

> "The Belgian State will not be bound by articles 53 and 64 of the Convention with regard to any party which, in formulating a reservation concerning article 66 (2), objects to the settlement procedure established by this article."[504]

As one author has written:

> "As a partial rejection modifies the content of the treaty in relation to the reserving State to an extent that exceeds the intended effect of the reservation, acceptance or acquiescence on the part of the reserving State appear to be necessary for a partial rejection to take its effect; failing this, no relations under the treaty are established between the reserving State and an objecting State which partially rejects those relations."[505]

(6) This approach has been disputed on the grounds that, by adhering to the letter of the definition of reservations,[506] the objecting State, which typically formulates its objection only after having become a party to the treaty, would be prevented from doing so within the established time period, and would be faced with the uncertainties that characterize the regime of late reservations.[507] As a result, unless a "reservations dialogue" were established, the reserving State would not, in principle, be in a position to respond effectively to such an objection. It has also been pointed out that it would be contradictory to make objections with intermediate effect subject to conditions of permissibility while maximum-effect objections are not subject to such conditions, and further that the determination and assessment of the necessary link between the provisions which could potentially be deprived of legal effect by the interaction between the reservation and the extended objection have really more to do with the question of whether or not the objection with intermediate effect can produce the effect intended by its author.[508]

(7) The Commission was not convinced by this view and considered that objections with intermediate effect, which in some ways constitute "counter-reservations" (but are certainly not reservations strictly speaking), should conform to the conditions of

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[502] See, *inter alia*, J. Sztucki, "Some questions arising from reservations to the Vienna Convention on the Law of Treaties", *German Yearbook of International Law*, 1977, p. 297. The author suggests that such declarations should be viewed as "objections only to the initial reservations and own reservations of the objecting States in the remaining part" (*ibid.*, p. 291).

[503] Belgium's reservation quoted below is quite similar in spirit, purpose and technique to conditional objections (see paragraphs (29) to (34) of the commentary to guideline 2.6.1). See in particular the Chilean objection to the 1969 Vienna Convention, quoted in paragraph (30) of the commentary to guideline 2.6.1.

[504] *Multilateral Treaties* ..., chap. XXIII.1.

[505] G. Gaja, footnote XXX above, p. 326. See also R. Baratta, *Gli effetti delle riserve ai trattati* (Milan, A. Giuffrè, 1999), p. 385.

[506] See guideline 1.1 (and article 2, paragraph 1 (b), of the Vienna Conventions).

[507] See guidelines 2.3 to 2.3.4.

[508] According to this view, "it is one thing to say that an objection with intermediate effect is not valid and quite another to maintain that such an objection cannot produce the effect intended by its author. Thus, the issue does not bear on the validity of an objection and should therefore be included not in the part of the Guide to Practice on the substantive validity of declarations in respect of treaties, but rather in the part dealing with the effects that an objection with intermediate effect can actually produce" (fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 118).

permissibility and formal validity of reservations and, in any event, should not deprive the treaty of its object and purpose, if only because it makes little sense to apply a treaty deprived of its object or purpose. This is what is stated in paragraph 2 of guideline 3.4.2.

(8) That said, it would be unacceptable and entirely contrary to the principle of consent[509] for States and international organizations to use a reservation as an excuse for attaching intermediate-effect objections of their choosing, thereby excluding any provision that they do not like. A look back at the origins of objections with intermediate effect is revealing in this regard.

(9) As was recalled above,[510] the practice of making objections with intermediate effect has been manifest mainly, if not exclusively, in the case of reservations and objections to the provisions of Part V of the 1969 Vienna Convention, and the reasons that led the objecting States to resort to them were made very clear. Article 66 of the Vienna Convention and its annex relating to compulsory conciliation provide procedural guarantees which many States, at the time when the Convention was adopted, considered essential in order to prevent abuse of certain provisions of Part V.[511] This link was stressed by some of the States that formulated objections with intermediate effect in respect of reservations to article 66. For example:

> "The Kingdom of the Netherlands is of the view that the 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."[512]

The United Kingdom stated even more explicitly that:

> "Article 66 provides in certain circumstances for the compulsory settlement of disputes by the International Court of Justice (...) or by a conciliation procedure (...). 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."[513]

(10) The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal which some States had sought to undermine through reservations and which, save through a maximum-effect reservation,[514] could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[515]

(11) It is thus clear from the practice concerning objections with intermediate effect that there must be an intrinsic link between the provision which gave rise to the reservation and the provisions whose legal effect is affected by the objection.

(12) After asking itself how best to define this link, and having contemplated calling it "intrinsic", "indissociable" or "inextricable", the Commission finally settled on the word "sufficient", which does not seem contradictory to the words just mentioned but has the

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509 See in particular the commentary to guideline 3.1.5.2, especially paragraph (3).

510 Paragraph (2).

511 J. Sztucki, footnote XXX above, pp. 286 and 287 (see also the references provided by the author).

512 Emphasis added – see footnote XXX above.

513 United Kingdom, objection of 5 June 1987 in respect of a Soviet reservation to article 66 of the Vienna Convention; see footnote XXX above.

514 See article 20, paragraphs 4 (b), and article 21, paragraph 3, of the Vienna Conventions.

515 D. Müller, "Article 21", footnote XXX above, pp. 927–928, para. 70.

merit of showing that the particular circumstances of each case have to be taken into account. Moreover, guideline 3.4.2 probably partakes more of the nature of progressive development of international law than of codification *per se*; the use of the adjective "sufficient" has the merit of leaving room for the clarification that might come from future practice.

(13) Other limitations on the permissibility of objections with intermediate effect have been suggested. It might seem logical to exclude objections aimed at articles to which reservations are not permitted under article 19, subparagraphs (a) and (b), of the Vienna Conventions.[516] The Commission does not disagree, but such situations are so hypothetical and marginal that it seems unnecessary to address them expressly in guideline 3.4.2.

(14) One might also think that since, according to guideline 4.4.3, paragraph 2, "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law", the same principle should apply to objections with intermediate effect. However, the Commission did not adopted that point of view, considering that objections, even those with intermediate effect, are not reservations and have the main purpose of countering a reservation, and that the "proximity" to the reservation of the provisions excluded by the objection[517] suffices to avert any risk of lack of conformity with *jus cogens*.

(15) Consequently, the Commission deliberately rejected the idea of referring to the impermissibility of an objection owing to its being contrary to a rule of *jus cogens*: it considers that, in reality, such a hypothesis could not arise.

(16) It is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible: an objection purports only to, and can only, exclude the application of one or more treaty provisions. Such an exclusion cannot "produce" a rule that is incompatible with a *jus cogens* norm. The effect is simply "deregulatory", thus leading to the application of customary law. Ultimately, therefore, the rules applicable as between the author of the reservation and the author of the objection are never different from those that pre-dated the treaty and, unless application of the treaty as a whole is excluded, from treaty-based provisions not affected by the reservation. It is impossible under these circumstances to imagine an "objection" that could violate a peremptory norm.

(17) Furthermore, when the definition of "objection" was adopted, the Commission refused to take a position on the question of the permissibility of objections that purport to produce a "super-maximum" effect.[518] These are objections in which the authors deem not only that the reservation is not valid but also that, as a result, the treaty as a whole applies *ipso facto* in the relations between the two States. The permissibility of objections with super-maximum effect has frequently been questioned,[519] primarily because "the effect of such a statement is not to bar the application of the treaty as a whole or of the provisions to which the reservation refers in the relations between the two Parties but to render the reservation null and void without the consent of its author. This greatly exceeds the consequences of the objections to reservations provided for in article 21, paragraph 3, and

[516] The text of which is incorporated in guideline 3.1 of the Guide to Practice.

[517] See subparagraph (1) of guideline 3.4.2.

[518] See paragraphs (24) and (25) of the commentary to draft guideline 2.6.1 (Definition of objections to reservations).

[519] See the eighth report on reservations to treaties (A/CN.4/535/Add.1), paras. 97 and 98 and footnote 154. See also the commentary to guideline 2.6.1, in particular paragraphs (24) and (25).

article 20, paragraph 4 (b), of the Vienna Conventions. Whereas 'unlike reservations, objections express the attitude of a State, not in relation to a rule of law, but in relation to the position adopted by another State', in this case it is the rule itself advocated by the reserving State which is challenged, and this is contrary to the very essence of an objection".[520]

(18) It is not, however, the permissibility of the objection as such that is called into question; the issue raised by this practice is whether the objection is capable of producing the effect intended by its author;[521] this is far from certain and depends, among other things, on the permissibility of the reservation itself.[522] A State (or an international organization) may well make an objection and wish to give it super-maximum effect, but this does not mean that the objection is capable of producing such an effect, which is not envisaged by the Vienna regime. However, as the Commission acknowledges in its commentary on guideline 2.6.1, where the definition of the term "objection" unquestionably includes objections with super-maximum effect:

> "[T]he Commission has endeavoured to take a completely neutral position with regard to the validity of the effects [and not of the objection] that the author of the objection intends its objection to produce. This is a matter to be taken up in the consideration of the effects of objections."[523]

(19) Furthermore, it should be stressed once again that an objection may not validly be formulated if its author has previously accepted the reservation in question. While this condition could be understood as a condition of permissibility of an objection, it may also be viewed as a question of form or of formulation. Thus, guideline 2.8.13 (Final nature of acceptance of a reservation) states that "acceptance of a reservation cannot be withdrawn or amended". There seems to be no need to revisit the issue in the present guideline.

3.5 Permissibility of an interpretative declaration

A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is prohibited by the treaty.

Commentary

(1) The Vienna Conventions contain no rule on interpretative declarations as such, or, of course, on the conditions for the permissibility of such unilateral declarations. In that regard, and in many others as well, they differ from reservations and cannot simply be equated with them. Guideline 3.5 and those that follow are intended to fill that gap in respect of the permissibility of these instruments – it being understood in this connection that "simple" interpretative declarations (guideline 3.5) must be distinguished from conditional interpretative declarations, which in this respect follow the legal regime of reservations.[524]

(2) The definition of interpretative declarations provided in guideline 1.2 (Definition of interpretative declarations) is limited to identifying the practice in positive terms:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or

[520] Eighth report on reservations to treaties (A/CN.4/535/Add.1), para. 97.
[521] *Ibid.*, para. 95, and paragraphs (24) and (25) of the commentary to guideline 2.6.1.
[522] See guidelines 4.3.4 and 4.5.3. below.
[523] Paragraph (25) of the commentary to guideline 2.6.1 (Definition of objections to reservations).
[524] For the definition of conditional interpretative declarations, see guideline 1.4, which states that "[c]onditional interpretative declarations are subject to the rules applicable to reservations".

that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions.

(3) However, this definition, as noted in the commentary, "in no way prejudges the validity or the effect of such declarations and (…) the same precautions taken with respect to reservations must be applied to interpretative declarations: the proposed definition is without prejudice to the permissibility and the effects of such declarations from the standpoint of the rules applicable to them".[525]

(4) There is, however, still some question as to whether an interpretative declaration can be permissible, a question that is clearly different from that of whether a unilateral statement constitutes an interpretative declaration or a reservation. Indeed, it is one thing to determine whether a unilateral statement "purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions" — which corresponds to the definition of interpretative declaration — and another to determine whether the interpretation thus proposed is valid, or, in other words, whether the meaning or scope attributed by the declarant to a treaty or to certain of its provisions is valid.

(5) The issue of the permissibility of interpretative declarations can, of course, be addressed in the treaty itself;[526] although quite uncommon in practice, this is still a possibility. Thus, a treaty's prohibition of any interpretative declaration would render impermissible any declaration that purported to "specify or clarify the meaning or scope" of the treaty or certain of its provisions. Article XV.3 of the 2001 Canada-Costa Rica Free Trade Agreement[527] is an example of such a provision. Other examples exist outside the realm of bilateral treaties. The third draft agreement for the Free Trade Area of the Americas (FTAA) of November 2003, though still in the drafting stage, states in Chapter XXIV, draft article 4:

> "This Agreement shall not be subject to reservations [or unilateral interpretative declarations] at the moment of its ratification."[528]

(6) It is also conceivable that a treaty might merely prohibit the formulation of certain interpretative declarations to certain of its provisions. To the Special Rapporteur's knowledge, no multilateral treaty contains such a prohibition in this form. But treaty practice includes more general prohibitions which, without expressly prohibiting a particular declaration, limit the parties' capacity to interpret the treaty in one way or another. It follows that if the treaty is not to be interpreted in a certain manner, interpretative declarations proposing the prohibited interpretation are impermissible. The European Charter for Regional or Minority Languages of 5 November 1992 includes examples of such prohibition clauses; article 4, paragraph 4, states:

> "Nothing in this Charter shall be construed as limiting or derogating from any of the rights guaranteed by the European Convention on Human Rights."

And article 5 states:

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[525] Paragraph (33) of the commentary to guideline 1.2.

[526] M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen* (Berlin Duncker and Humblot, 2005), p. 114.

[527] Article XV.3 – Reservations: "This Agreement shall not be subject to unilateral reservations or unilateral interpretative declarations" (available from http://www.sice.oas.org/Trade/cancr/English/text3_e.asp).

[528] See the FTAA website, http://www.ftaa-alca.org/FTAADraft03/ChapterXXIV_e.asp; the square brackets are original to the text.

> "Nothing in this Charter *may be interpreted as* implying any right to engage in any activity or perform any action in contravention of the purposes of the Charter of the United Nations or other obligations under international law, including the principle of the sovereignty and territorial integrity of States."

(7) Similarly, articles 21 and 22 of the Framework Convention for the Protection of National Minorities of 1 February 1995 also limit the potential to interpret the Convention:

> "Article 21
>
> "Nothing in the present framework Convention *shall be interpreted as* implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.
>
> "Article 22
>
> "Nothing in the present framework Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any Contracting Party or under any other agreement to which it is a Party."

(8) These examples show that the prohibition against interpretative declarations in guideline 3.5 may be express as well as implicit.

(9) This is why the Commission did not consider it necessary to provide in guideline 3.5 for a situation where an interpretative declaration was incompatible with the object and purpose of the treaty: that would be possible only if the declaration was considered a reservation, since by definition such declarations do not purport to modify the legal effects of a treaty, but only to specify or clarify them.[529] This situation is covered in guideline 3.5.1.

(10) Similarly, but for different reasons, the Commission declined to consider that an objectively wrong interpretation — for example, one contrary to the interpretation given by an international court adjudicating the matter — should be declared impermissible.

(11) It goes without saying that an interpretation may be held to be with or without merit although, in absolute terms, it is impossible to determine whether the author is right or wrong until a competent body rules on the interpretation of the treaty. Interpretation remains an eminently subjective process and it is rare that a legal provision, or a treaty as a whole, can be interpreted in only one way. "The interpretation of documents is to some extent an art, not an exact science."[530]

(12) As Kelsen has noted:

> "If 'interpretation' is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and

[529] See paragraph (16) of the commentary to guideline 1.2. See also the famous dictum of the International Court of Justice in its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 229; see also *Rights of Nationals of the United States of America in Morocco (France v. the United States of America)*, Judgment of 27 August 1952, *I.C.J. Reports 1952*, p. 196.

[530] See the Commission's draft articles on the law of treaties, paragraph (4) of the commentary to draft articles 27 and 28, in the report of the International Law Commission on the work of its eighteenth session (A/6309/Rev.1), *Yearbook ... 1966*, vol. II, p. 218. See also Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge University Press, 2007), p. 230.

thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value ... .”[531]

As has also been pointed out:

“*Le processus interprétatif [en droit international n’]est en effet qu’exceptionnellement centralisé, soit par un organe juridictionnel, soit de toute autre manière. La compétence d’interprétation appartient à l’ensemble des sujets, et, individuellement, à chacun d’eux. L’éclatement des modes d’interprétation qui en résulte n’est qu’imparfaitement compensé par leur hiérarchie. Les interprétations unilatérales sont en principe d’égale valeur, et les modes concertés sont facultatifs et par là même aléatoires. Il ne faut cependant pas surestimer les difficultés pratiques. Il ne s’agit pas tant d’une imperfection essentielle du droit international que d’une composante de sa nature, qui l’oriente tout entier vers une négociation permanente que les règles en vigueur permettent de rationaliser et de canaliser*.” [The process of interpretation [in international law] is, in fact, only occasionally centralized, either through a judicial body or in some other way. Competence to interpret lies with all subjects and, individually, with each one of them. The resulting proliferation of forms of interpretation is only partially compensated for by their hierarchy. Unilateral interpretations are, in principle, of equal value, and the agreed forms are optional and consequently unpredictable. However, the practical difficulties must not be overestimated. It is not so much a question of an essential flaw in international law as an aspect of its nature, which guides it in its entirety towards an ongoing negotiation that can be rationalized and channelled using the rules currently in force].[532]

(13) Thus, “*[e]n vertu de sa souveraineté, chaque État a le droit d’indiquer le sens qu’il donne aux traités auxquels il est partie, en ce qui le concerne*” [on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party].[533] If States have the right to interpret treaties unilaterally, they must also have the right to let their point of view be known as regards the interpretation of a treaty or of certain of its provisions.

(14) International law does not, however, provide any criterion allowing for a definitive determination of whether a given interpretation has merit. There are, of course, methods of interpretation (see, to begin with, articles 31 to 33 of the Vienna Conventions), but they are only guidelines as to the ways of finding the “right” interpretation; they do not offer a final “objective” (or “mathematical”) test of whether the interpretation has merit. Thus, article 31, paragraph 1, of the Vienna Conventions specifies that “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*”. This clarification in no way constitutes a criterion for assessing the correctness, and still less a condition of the permissibility, of the interpretations given to the treaty, but a means of deriving one interpretation. That is all.

[531] Hans Kelsen, *Pure Theory of Law*, tr. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), p. 351.

[532] Jean Combacau and Serge Sur, *Droit international public*, 8th ed. (Paris, Montchrestien, 2008), p. 171.

[533] P. Daillier, M. Forteau and A. Pellet, *Droit international public*, 7th ed. (Paris, L.G.D.J., 2009), p. 277, para. 164. See also Ch. Rousseau, *Droit international public*, vol. I, *Introduction et Sources* (Paris, Sirey, 1970), p. 250.

(15) In international law, the value of an interpretation is assessed not on the basis of its content, but of its authority. It is not the "right" interpretation that wins out, but the one that was given either by all the parties to the treaty — in which case it is called an "authentic" interpretation — or by a body empowered to interpret the treaty in a manner that is binding on the parties. In that regard, the instructive 1923 opinion of the Permanent Court of International Justice in the *Jaworzina* case is noteworthy. Although the Court was convinced that the interpretation reached by the Conference of Ambassadors was unfounded, it did not approach the problem as a question of validity, but rather of opposability. The Court stated:

> "And even leaving out of the question the principles governing the authoritative interpretation of legal documents, it is obvious that the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time. There are still stronger grounds for refusing to recognize the authority of such an opinion when, as in the present case, a period of more than two years has elapsed between the day on which it was expressed and the day on which the decision to be interpreted was itself adopted."[534]

(16) International law in general and treaty law in particular do not impose conditions for the permissibility of interpretation in general and of interpretative declarations in particular. It has only the notion of the opposability of an interpretation or an interpretative declaration, and that comes into play in the context of determing the effects of an interpretative declaration.[535] In the absence of any condition of permissibility, "*[e]infache Interpretationserklärungen sind damit grundsätzlich zulässig*" ["simple interpretative declarations are therefore, in principle, admissible"],[536] although this does not mean that it is appropriate to speak of permissibility or non-permissibility unless the treaty itself sets the criterion.[537]

(17) In addition, it seemed to the Commission that in the course of assessing the permissibility of interpretative declarations, one must not slip into the domain of responsibility – which, for reservations, is excluded by guideline 3.3.2. This would be the case for interpretative declarations if one were to consider that a "wrong" interpretation constituted an internationally wrongful act that "violated" articles 31 and 32 of the Vienna Convention.

3.5.1 Permissibility of an interpretative declaration which is in fact a reservation

If a unilateral statement which purports to be an interpretative declaration is in fact a reservation, its permissibility must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.5.7.

Commentary

(1) Section 1.3 of the Guide to Practice envisages a situation in which an interpretative declaration purports, in fact, to exclude or to 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.[538] In such a situation, it is not an interpretative declaration but a

[534] Advisory opinion of 6 December 1923, *P.C.I.J., Series B*, No. 8, p. 38.
[535] See guidelines 4.7.1 to 4.7.3.
[536] M. Heymann, footnote XXX above, p. 113.
[537] See paragraphs (5) and (8) above.
[538] Guideline 1.3.3 (Formulation of a unilateral statement when a reservation is prohibited). It goes without saying that it is not enough for another State or another international organization to

reservation, which should be treated as such and must therefore meet the conditions for the permissibility and formal validity of reservations.

(2) The Court of Arbitration that settled the dispute between France and the United Kingdom concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* confirmed this approach. In that case, the United Kingdom maintained that France's third reservation to article 6 of the Geneva Convention on the Continental Shelf was merely an interpretative declaration and hence opposed that interpretation on the grounds that it could not be invoked against the United Kingdom. The Court rejected this line argument and considered that France's declaration was not simply an interpretation; it had the effect of modifying the scope of application of article 6 and was therefore a reservation, as France had maintained:

> "This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that régime dependent on acceptance by the other State of the French Republic's designation of the named areas as involving 'special circumstances' regardless of the validity or otherwise of that designation under Article 6. Article 2 (1) (d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a 'reservation', provides that it means 'a unilateral statement, however phrased or named, made by a State … whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State'. This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'".[539]

(3) While States often maintain or imply that an interpretation proposed by another State is incompatible with the object and purpose of the treaty concerned,[540] an interpretative declaration, by definition, cannot be contrary to the treaty or to its object or purpose. If it is otherwise, the statement is, in fact, a reservation, as noted in many States' reactions to "interpretative declarations".[541] Spain's reaction to the "declaration" formulated by Pakistan in signing the 1966 International Covenant on Economic, Social and Cultural

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"recharacterize" an interpretative declaration as a reservation for the nature of the declaration in question to be modified (see guideline 2.9.3 (Recharacterization of an interpretative declaration) and commentary, in particular paragraphs (3) to (6)).

[539] Arbitral award of 30 June 1977, U.N.R.I.A.A., vol. XVIII, p. 40, para. 55 (emphasis in the original).

[540] See, for example, Germany's reactions to Poland's interpretative declaration to the European Convention on Extradition of 13 December 1957 (European Treaty Series No. 24 (http://conventions.coe.int)) and to India's declaration interpreting article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (*Multilateral Treaties* …, chap. IV.3 and 4).

[541] In addition to the aforementioned example of Spain's reservation, see Austria's objection to the "interpretative declaration" formulated by Pakistan in respect of the International Convention for the Suppression of Terrorist Bombings of 1997 and the comparable reactions of Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the United Kingdom and the United States of America (*Multilateral Treaties* ..., chap. XVIII.9). See also the reactions of Germany and the Netherlands to Malaysia's unilateral statement (*ibid.*) and the reactions of Finland, Germany, the Netherlands and Sweden to the "interpretative declaration" formulated by Uruguay in respect of the Statute of the International Criminal Court (*ibid.*, chap. XVIII.10). For other examples of recharacterization, see the commentary to guideline 1.2, footnote XXX.

Rights also demonstrates the different stages of thought in cases where the proposed "interpretation" is really a modification of the treaty that is contrary to its object and purpose. The "declaration" must first be characterized; only then will it be possible to apply to it the conditions of permissibility (of reservations):

> "The Government of the Kingdom of Spain has examined the Declaration made by the Government of the Islamic Republic of Pakistan on 3 November 2004 on signature of the International Covenant on Economic, Social and Cultural Rights, of 16 December 1966.
>
> "The Government of the Kingdom of Spain points out that regardless of what it may be called, a unilateral declaration made by a State for the purpose of excluding or changing the legal effects of certain provisions of a treaty as it applies to that State constitutes a reservation.
>
> "The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan, which seeks to subject the application of the provisions of the Covenant to the provisions of the constitution of the Islamic Republic of Pakistan is a reservation which seeks to limit the legal effects of the Covenant as it applies to the Islamic Republic of Pakistan. A reservation that includes a general reference to national law without specifying its contents does not make it possible to determine clearly the extent to which the Islamic Republic of Pakistan has accepted the obligations of the Covenant and, consequently, creates doubts as to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant.
>
> "The Government of the Kingdom of Spain considers that the Declaration made by the Government of the Islamic Republic of Pakistan to the effect that it subjects its obligations under the International Covenant on Economic, Social and Cultural Rights to the provisions of its constitution is a reservation and that that reservation is incompatible with the object and purpose of the Covenant.
>
> "According to customary international law, as codified in the Vienna Convention on the Law of Treaties, reservations that are incompatible with the object and purpose of a treaty are not permissible.
>
> "Consequently, the Government of the Kingdom of Spain objects to the reservation made by the Government of the Islamic Republic of Pakistan to the International Covenant on Economic, Social and Cultural Rights. This objection shall not preclude the entry into force of the Covenant between the Kingdom of Spain and the Islamic Republic of Pakistan."[542]

(4) Therefore, the issue is not the "permissibility" of interpretative declarations. Such unilateral statements are, in reality, reservations and accordingly must be treated as such, including with respect to their permissibility and formal validity. The European Court of Human Rights followed that reasoning in its judgement in the case of *Belilos v. Switzerland*. Having recharacterized Switzerland's declaration as a reservation, it applied the conditions for the permissibility *of reservations* to the European Convention on Human Rights:

> "In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of article 6 § 1 (art. 6-1) and to secure itself against an

[542] *Multilateral Treaties* ..., chap. IV.3.

> interpretation of that article (art. 6-1) which it considered to be too broad. However, the Court must see to it that the obligations arising under the Convention are not subject to restrictions which would not satisfy the requirements of article 64 (art. 64) as regards reservations. Accordingly, it will examine the validity of the interpretative declaration in question, as in the case of a reservation, in the context of this provision."[543]

3.6 Permissibility of reactions to interpretative declarations

An approval of, opposition to, or recharacterization of, an interpretative declaration shall not be subject to any conditions for permissibility.

Commentary

(1) The question of the permissibility of reactions to interpretative declarations — approval, opposition or recharacterization[544] — must be considered in light of the study of the permissibility of interpretative declarations themselves. Since any State, on the basis of its sovereign right to interpret the treaties to which it is a party, has the right to make interpretative declarations, there seems little doubt that the other contracting parties also have the right to react to these interpretative declarations and that, where appropriate, these reactions are subject to the same conditions for permissibility as those for the declaration to which they are a reaction.

(2) As a general rule, like interpretative declarations themselves, the approval or opposition they arouse may prove to be correct or erroneous, but that does not imply that they are permissible or impermissible.

(3) The question of the permissibility of recharacterizations of interpretative declarations should be approached slightly differently. In a recharacterization, the author does not call into question[545] the content of the initial declaration, but rather its legal nature and the regime applicable to it.[546]

(4) The characterization of a reservation or interpretative declaration must be determined objectively, taking into account the criteria that the Commission set forth in guidelines 1.3 and 1.3.1 to 1.3.3. Guideline 1.3 states:

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

(5) This "objective" test takes into account only the declaration's potential effects on the treaty *as intended by its author*. In other words:

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[543] Judgement, 29 April 1988, *Series A*, vol. 132, para. 49, p. 18.

[544] See guidelines 2.9.1 to 2.9.3.

[545] It may *simultaneously* call into question and object to the content of the recharacterized declaration by making an objection to it; in such cases, however, the recharacterization and the objection remain conceptually different from one another. In practice, States almost always combine the recharacterization with an objection to the reservation. It should be borne in mind, however, that recharacterizing an interpretative declaration as a reservation is one thing and objecting to the reservation thus "recharacterized" is another. Nonetheless, it should be noted that even in the case of a reservation that is "disguised" (as an interpretative declaration) — which, from a legal standpoint, has always been a reservation — the rules of procedure and formulation as set out in the present Guide to Practice remain fully applicable. This clearly means that a State wishing to formulate a recharacterization and an objection must abide by the procedural rules and time periods applicable to objections. This is why it is specified, in the second paragraph of draft guideline 2.9.3, that that State should accordingly treat the recharacterized declaration as a reservation.

[546] See paragraph (5) of the commentary to guideline 2.9.3.

> "only an analysis of the potential — and objective — effects of the statement can determine the purpose sought. In determining the legal nature of a statement formulated in connection with a treaty, the decisive criterion lies in the effective result that implementing the statement has (or would have). If it results (or would result) in modifying or excluding the legal effect of the treaty or certain of its provisions, it is a reservation 'however phrased or named'; if the statement simply clarifies the meaning or scope that its author attributes to the treaty or certain of its provisions, it is an interpretative declaration."[547]

(6) Without prejudging the effects of such unilateral statements,[548] it is clear that they are an important factor in determining the legal nature of the initially formulated act: in order to determine whether the act constitutes an interpretative declaration or reservations, these statements must be taken into account as expressing the position of parties to a treaty as to the nature of the "interpretative declaration" or "reservation", with all the consequences that this entails. Nevertheless, the author of a recharacterization is simply expressing its opinion on the matter. That opinion may prove to be justified or unjustified when the test of guideline 1.3 is applied, but that in no way implies that the recharacterization is permissible or impermissible; they are two different questions.

(7) Recharacterizations, whether justified or unjustified, are not subject to criteria of permissibility. Abundant State practice[549] shows that contracting parties consider themselves entitled to make such declarations, often in order to ensure the integrity of the treaty or to ensure respect for treaty-based prohibitions of reservations.[550]

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[547] See paragraph (3) of the commentary to draft guideline 1.3.1 (Method of determining the distinction between reservations and interpretative declarations).

[548] See guidelines 4.7.1 to 4.7.3 and commentaries.

[549] See in particular paragraph (4) of the commentary to guideline 2.9.3.

[550] For a particularly telling example, see the reactions of several States to the Philippines' "interpretative declaration" to the United Nations Convention on the Law of the Sea of 1982 (*Multilateral Treaties* ..., chap. XXI.6).