United Nations A/CN.4/526/Add.3

General Assembly

Distr.: General
14 June 2002
English
Original: French

International Law Commission
Fifty-fourth session
Geneva, 29 April-7 June and 22 July-16 August 2002

Seventh report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

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02-42809 (E) 110702 120702
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***Note*: This report was drafted entirely in French, although some quotations (translated into French by the Special Rapporteur, for which he is solely responsible) are reproduced in their original language.**

B. Modification of reservations

185. The question of the modification of reservations should be posed in connection with the questions of withdrawal and late formulation of reservations. Insofar as a modification is intended to lessen the scope of a reservation, what is involved is a partial withdrawal of the "initial reservation",[321] which poses no problem in principle, being subject to the general rules concerning withdrawals, as set forth above (sect. II.B.1). If, on the other hand, the effect of the modification is to strengthen an existing reservation, it would seem logical to start from the notion that what we are dealing with is the late formulation of a reservation, and to apply to it the rules applicable in this regard (see sect. II.B.2).

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

1. Reduction of the scope of reservations

(Partial withdrawal)

187. In accordance with the prevailing doctrine, "[s]ince a reservation can be withdrawn, it may in certain circumstances be possible to modify or even replace a reservation, provided the result is to limit its effect".[322] While this principle is formulated in prudent terms, it is hardly questionable and can be stated more categorically: nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal.

188. Clearly, this does not raise the slightest problem when such a modification is expressly provided for by the treaty. While this is relatively rare, there are reservation clauses to this effect.[323] Thus, for example, article 23, paragraph 2, of the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterway (CVN) of 6 February 1976 provides that:

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

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[321] While the expression "initial reservation" is used for convenience, it is improper: it would be more accurate to speak of a reservation "as it was initially formulated"; as its name indicates, a "partial withdrawal" does not substitute one reservation for another, but rather one formulation for another.

[322] Anthony Aust, *Modern Treaty Law and Practice*, Cambridge U.P., 2000, p. 128. See also Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Pedone, Paris, 1979, p. 293, or Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Council of Europe Publishing, Strasbourg, 1999, p. 96.

[323] This is also the case, of course, where the treaty authorizes the formulation of new reservations after its entry into force; see sect. II.B.2 below.

189. In addition, we more frequently find reservation clauses expressly contemplating the total *or partial* withdrawal of reservations. For example, article 8, paragraph 3, of the Convention on the Nationality of Married Women, of 20 February 1957, provides that:

> "Any State making a reservation in accordance with paragraph 1 of the present article may at any time withdraw the reservation, in whole or in part, after it has been accepted, by a notification to this effect addressed to the Secretary-General of the United Nations. Such notification shall take effect on the date on which it is received".[324]

The same applies to article 17, paragraph 2, of the Council of Europe Convention on the Protection of the Environment Through Criminal Law, of 4 November 1998, which reads as follows:

> "Any State which has made a reservation ... may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General".[325]

In addition, under article 15, paragraph 2, of the Convention drawn up on the basis of article K.2 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of States members of the European Union, of 26 May 1997:

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

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

191. During the preparation of the draft articles on the law of treaties by the International Law Commission, Sir Humphrey Waldock suggested the adoption of a draft article placing the total and partial withdrawal of reservations on an equal footing.[326] Following the consideration of this draft by the Drafting Committee, it returned to the plenary stripped of any reference to the possibility of withdrawing a reservation "in part",[327] although no reason for this modification can be inferred from the summaries of the discussions.

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[324] See also, for example, article 50, paragraph 4, of the Single Convention on Narcotic Drugs of 1961, as amended in 1975: "A State which has made reservations may at any time by notification in writing withdraw all or part of its reservations".

[325] See also, for example, article 13, paragraph 2, of the European Convention on the suppression of terrorism of 27 January 1977: "Any State may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt". For other examples of conventions concluded under the auspices of the Council of Europe and containing a comparable clause, see para. 97 above.

[326] Cf. draft article 17, para. 6, in Sir Humphrey's first report, *Yearbook ... 1962*, vol. II, p. 69, para. 69.

[327] Ibid., p. 201; on the changes made by the Drafting Committee to the draft prepared by the Special Rapporteur, see para. 70 above.

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

193. The fact remains that this is not entirely self-evident and that the literature appears to be somewhat undecided. Thus, in his masterwork on reservations, published in 1979, Professor Pierre-Henri Imbert regrets that modifications aimed at diminishing the scope of the reservations with which he was familiar were possible only because of the "lack of objections on the part of the other contracting parties", even as he stressed that "it would, however, be desirable to encourage this procedure, which enables States to gradually adapt their participation in the treaty to the evolution of their national law, and which may constitute a transition to the total withdrawal of reservations".[328]

194. In practice, he seems to have been heard, at least in the European context. M. J. Polakiewicz cites a number of reservations concluded within the framework of the Council of Europe which were modified without arousing opposition.[329] For its part, the European Commission of Human Rights "showed a certain flexibility" as to the time requirement set out in article 64 of the European Convention on Human Rights:[330]

> "As internal law is subject to modification from time to time, the Commission considered that a modification of the law protected by the reservation, even if it entails a modification of the reservation, does not undermine the time requirement of article 64. According to the Commission, despite the explicit terms of article 64, ... to the extent that a law *then in force* in its territory is not in conformity ... the reservation signed by Austria on 3 September 1958 (1958-1959) (2 *Annuaire* 88-91) covers ... the law of 5 July 1962, which did not have the result of enlarging, a posteriori, the area removed from the control of the Commission".[331]

195. This latter clarification is essential and undoubtedly provides the key to this jurisprudence: it is *because* the new law *limits* the scope of the reservation that the

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[328] Op. cit., footnote 322, p. 293. Curiously, J.-F. Flauss refers to this work (but to p. 163 — which says nothing of the kind) in stating his belief that "it is, it seems, accepted that a State party to a treaty can limit the scope of a reservation" ("le contentieux de la validité des réserve à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6 § 1", *R.U.D.H.* 1993, p. 301).

[329] Op. cit., footnote 322, p. 95; it is true that it seems to be more a matter of "statements concerning modalities of implementation of a treaty at the internal level" within the meaning of draft guideline 1.4.5 (see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 284-289) than of reservations as such.

[330] Article 57 since the entry into force of Protocol II: "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."

[331] William A. Schabas, commentary on article 64 in L. E. Pettiti, E. Decaux and P. H. Imbert, *La Convention européenne des droits de l'homme — commentaire article par article*, Economica, Paris, 1995, p. 932; italics in text; footnotes omitted. See the reports of the Commission in the cases of *Association X c. Autriche* (req. No. 473/59), *Ann.* 2, p. 405, or *X c. Autriche* (req. No. 88180/78), *DR* 20, pp. 23-25.

Commission considered that it was covered by the law.[332] Technically, what is at issue is not a modification of the reservation itself, but the effect of the modification of the internal law; nevertheless, it seems legitimate to make the same argument. Moreover, in some cases, States formally modified their reservations to the European Convention on Human Rights (in the sense of diminishing their scope) without protest from the other contracting parties.[333]

196. The jurisprudence of the European Court of Human Rights can be interpreted in the same way, in the sense that, while the Strasbourg Court refuses to extend to new, more restrictive laws the benefit of a reservation made upon ratification,[334] it proceeds differently if, following ratification, the law "goes no farther than a law in force on the date of the said reservation".[335]

197. The outcome of the *Belilos* case is, however, likely to raise doubts in this regard.

198. Following the highly disputable[336] position taken by the Strasbourg Court concerning the follow-up to its finding that the Swiss "declaration" made in 1974, relating to article 6, paragraph 1, of the European Convention on Human Rights, was invalid,[337] Switzerland, after much hesitation, first modified its "declaration" — equated by the Court with a reservation, at least insofar as the applicable rules are concerned — so as to render it compatible with the judgement of 29 April 1988.[338] The "interpretative declaration" thus modified was notified by Switzerland to the Secretary General of the Council of Europe, the depositary of the Convention, and to the Committee of Ministers "acting as a monitoring body for the enforcement of judgements of the Court".[339] These notifications do not seem to

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[332] Cf. the partially dissenting opinion of Judge Valticos in the *Chorherr c. Autriche* case: "If the law is modified, the divergence to which the reservation refers could probably, if we are not strict, be maintained in the new text, but it could not, of course, be strengthened" (judgement of 25 August 1993, series A, No. 266-B, p. 40).

[333] Cf. the successive partial withdrawals by Finland of its reservation to article 5 in 1996, 1998, 1999 and 2001 (http://conventions.coe.int/treaty/en/cadreprincipal.htm).

[334] See section II.B.2 below.

[335] Judgement of 25 February 1982, *Campbell et Cosans*, series A, vol. 48, p. 17, para. 37.

[336] See A. Pellet, "Second report on reservations to treaties", A/CN.4/477/Add.1, paras. 218-230. Paragraphs 198 to 201 of this report largely restate the ideas expressed in the second report (paras. 216-252).

[337] The Court held that "the contentious declaration does not meet two requirements of article 64 of the Convention (see footnote 330 above), so that it must be deemed invalid" (series A, vol. 132, para. 60) and that, since "there is no doubt that Switzerland considers itself bound by the Convention, independently of the validity of the declaration" (which, frankly speaking, was no less disputable), the Convention should be applied to Switzerland irrespective of the declaration (ibid.).

[338] Believing (correctly) that the Court's rebuke dealt only with the "penal aspect", Switzerland had limited its "declaration" to civil proceedings.

[339] J.-F. Flauss, op. cit., footnote 328, p. 298, footnote 7; see also William Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform", *Ann. canadien de droit international* 1985, p. 48. For references to these notifications, see Council of Europe, *Série des traités européennes* (STE), No. 5, pp. 16-17, and Committee Resolution DH (89) 24 (Annexe), dated 19 September 1989.

have given rise to disputes or raised difficulties on the part of the Convention bodies or other States parties.[340]

199. However, the situation in the Swiss courts was different. In a decision dated 17 December 1992, *Elisabeth B. v. Council of State of Thurgau Canton*, the Swiss Federal Court decided, with regard to the grounds for the *Belilos* decision, that it was the entire "interpretative declaration" of 1974 which was invalid and thus that there was no validly formulated reservation to be amended 12 years later; if anything, it would have been a new reservation, which was incompatible with the *ratione temporis* condition for the formulation of reservations established in article 64 of the Rome Convention[341] and in article 19 of the 1969 Vienna Convention.[342] On 29 August 2000, Switzerland officially withdrew its "interpretative declaration" concerning article 6 of the European Convention on Human Rights.[343]

200. Despite appearances, however, it cannot be inferred from this important decision that the fact that a treaty body with a regulatory function (human rights or other) invalidates a reservation prohibits any change in the challenged reservation:

– The Swiss Federal Court's position is based on the idea that in this case, the 1974 "declaration" was invalid in its entirety (even if it had not been explicitly invalidated by the European Court of Human Rights);[344] and, above all:

– In that same decision, the Court stated that:

"While the 1988 declaration merely constitutes an explanation of and restriction on the 1974 reservation, there is no reason why this procedure should not be followed. While neither article 64 of the European Convention on Human Rights nor the 1969 Vienna Convention on the Law of Treaties (RS 0.111) explicitly settles this issue, it would appear that as a rule, the reformulation of an existing reservation should be possible if its purpose is to attenuate an existing reservation. This procedure does not limit the relevant

[340] Some authors have, however, contested their validity; see Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *RGDIP* 1989, p. 314, and the works cited in the judgement quoted below (footnote 342) of the Swiss Federal Court, of 17 December 1992 (para. 6.b), and by J.-F. Flauss, op. cit., footnote 328, p. 300, as well as the position of that author himself; nonetheless, these objections dealt more with the background than with the very possibility of modifying a (quasi?-) reservation.

[341] See footnote 330 above.

[342] Extensive portions of the Federal Court's decision are cited in French translation in the *Journal des Tribunaux,* vol. I: *Droit fédéral,* 1995, p. 537. The relevant passages are to be found in paragraph 7 of the decision (pp. 533-537).

[343] See: http://conventions.coe.int/treaty/en/cadreprincipal.htm.

[344] The Special Rapporteur is of the view, however, that this does not affect the reserving State's right to modify its reservation in a manner that makes it permissible; moreover, in its preliminary conclusions of 1997, the Commission concluded that it was the reserving State which had the responsibility for taking action in the event of inadmissibility of a reservation (*Yearbook ... 1997*, vol. II (Part Two), para. 10). It does not seem necessary to reopen (or to settle) the issue at this stage.

State's commitment vis-à-vis other States; rather, it increases it in accordance with the Convention.[345]

201. This is an excellent presentation of both the applicable law and its basic underlying premise: there is no valid reason for preventing a State from *limiting* the scope of a previous reservation by withdrawing it, if only in part; the treaty's integrity is better ensured thereby and it is not impossible that, as a consequence, some of the other parties may withdraw objections that they had made to the initial reservation.[346] Furthermore, as has been pointed out, without this option the equality between parties would be disrupted (at least in cases where a treaty monitoring body exists): "States which have long been parties to the Convention might consider themselves to be subject to unequal treatment by comparison with States which ratified the Convention [more recently] and, a fortiori, with future contracting parties"[347] that would have the advantage of knowing the treaty body's position regarding the validity of reservations comparable to the one that they might be planning to formulate and of being able to modify it accordingly.

202. Moreover, it was such considerations[348] which led the Commission to state in its preliminary conclusions of 1997 that in taking action on the inadmissibility of a reservation,[349] the State may, for example, modify its reservation so as to eliminate the inadmissibility;[350] obviously, this is possible only if it has the option of modifying the reservation by partially withdrawing it.

203. In practice, partial withdrawals, while not very frequent, are far from non-existent; however, there are not many withdrawals of reservations in general. In 1988, Frank Horn noted that of 1,522 reservations or interpretative declarations made in respect of treaties of which the Secretary-General of the United Nations is the depositary, "47 have been withdrawn completely or partly ... .[351] In the majority of cases, i.e., 30 statements, the withdrawals have been partial. Of these, 6 have experienced successive withdrawals leading in only two cases to a complete

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[345] See the decision mentioned in footnote 342 above, p. 535. Surprisingly, J.-F. Flauss, who does not cite this passage in his otherwise noteworthy commentary on the above-mentioned decision, maintains that "initially, in the context of current Convention law and international treaty law, it is difficult to agree that "at-fault" States have a right to modify their reservations, even if this right is limited to cases of partial impermissibility", op. cit. (footnote 328 above), p. 298.

[346] See Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, The Hague, 1988, p. 223; however, the author states that he does not know of any actual cases where an objection was withdrawn under such circumstances. The Special Rapporteur is also unaware of such behaviour, although it would be very appropriate.

[347] Flauss, op. cit. (see footnote 328 above), p. 299; the author's position here is (wrongly, in the Special Rapporteur's view) *de lege ferenda*.

[348] See *Yearbook ... 1997*, vol. II (Part Two), paras. 55-56; document A/52/10, paras. 86 and 141-144; and the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 241-251.

[349] See footnote 348 above.

[350] See the preliminary conclusions, (*Yearbook ... 1997*, vol. II (Part Two)), para. 10.

[351] Of these 47 withdrawals, 11 occurred during succession of States. There is no question that a successor State may withdraw reservations made by its predecessor, in whole or in part (cf. article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties); however, as the Commission has decided, all problems concerning reservations related to the succession of States will be studied *in fine* and will be the subject of a separate chapter of the Guide to Practice (cf. *Yearbook ... 1995*, vol. II (Part Two), para. 477 and *Yearbook ... 1997*, vol. II (Part Two), para. 221).

withdrawal".[352] This trend, while not precipitous, has continued in subsequent years, as demonstrated by the following examples:

– On 11 November 1988, Sweden partially withdrew its reservation to article 9, paragraph 2, of the Convention on the Recovery Abroad of Maintenance;[353]

– On two occasions, in 1986 and 1995, Sweden also withdrew, in whole or in part, some of its reservations to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961;[354] and

– On 5 July 1995, following several objections, the Libyan Arab Jamahiriya modified the general reservation that it had made upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, making it more specific.[355]

204. In all these cases (which provide only a few examples) the Secretary-General, as depositary of the conventions in question, took note of the modification without any comment whatsoever.

205. The Secretary-General's practice is not absolutely consistent, however, and in some cases, even those involving modifications which apparently reduce the scope of the reservations in question, he proceeds as in the case of late formulation of reservations[356] and confines himself, "in keeping with the ... practice followed in similar cases", to receiving "the declarations in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged".[357] This practice is defended in the following words in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*: "when States have wished to substitute new reservations for initial reservations made at the time of deposit ... this has amounted to a withdrawal of the initial reservations — which raised no difficulty — and the making of (new)

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[352] Op. cit. (footnote 346 above), p. 226; however, these statistics must be viewed with caution. For example, the author actually mentions only one case in which successive partial withdrawals culminated in the total withdrawal of a reservation (p. 438): that of Denmark and the Convention relating to the Status of Refugees. In reality, (a) with one exception, the statistics are primarily for the total withdrawal of various reservations; and (b) one of the original Danish reservations was reformulated but retained (*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 2000* (United Nations publication, Sales No. E.01.V.5) (hereinafter *Multilateral Treaties* ...), vol. I, chapter V.2, footnote 16).

[353] Ibid., vol. II, chap. XX.1, footnote 9; see also Sweden's 1996 "reformulation" of one of its reservations to the 1951 Convention relating to the Status of Refugees and its simultaneous withdrawal of several other reservations (ibid., vol. I, n. 23) and the partial, then total (in 1963 and 1980, respectively) withdrawal of a Swiss reservation to that Convention.

[354] Ibid., vol. II, chap. XIV.3, footnote 7; see also Finland's modification of 10 February 1994 reducing the scope of a reservation to the same Convention (ibid., footnote 5) and Norway's replacement of a reservation in 1989 (ibid., footnote 6); in that case, however, it is not clear that the withdrawal was a partial one.

[355] Ibid., vol. I, chap. IV.8, footnote 24.

[356] See the fifth report on reservations to treaties (A/CN.4/508/Add. 3-4), paras. 279-325.

[357] Cf., for example, the procedure followed in the case of Azerbaijan's undeniably limiting modification of 28 September 2000 (in response to the comments of States which had objected to its initial reservation) of its reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (*Multilateral Treaties* ..., vol. I, chap. IV.12, footnote 6).

reservations".[358] This position seems to be confirmed by a memorandum dated 4 April 2000 from the United Nations Legal Counsel, which describes "the practice followed by the Secretary-General as depositary in respect of communications from States which seek to modify their existing reservations to multilateral treaties deposited with the Secretary-General or which may be understood to seek to do so" and extends the length of time during which parties may object from 90 days to 12 months.[359]

206. Not only is this position counter to what appears to be the accepted practice when the proposed modification limits the scope of the modified reservation; it is more qualified than initially appears. The note of 4 April 2000 must be read together with the Legal Counsel's reply, of the same date, to a note verbale from Portugal reporting, on behalf of the European Union, problems associated with the 90-day time period. That note makes a distinction between "a modification of an existing reservation" and "a partial withdrawal thereof". In the case of the second type of communication, "the Legal Counsel shares the concerns expressed by the Permanent Representative that it is highly desirable that, as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations".

207. Thus, it is merely a question of wording: the Secretary-General refers to withdrawals which enlarge the scope of reservations as "modifications" and to those which reduce that scope as "partial withdrawals"; the latter are not (or should not be, although this is not always translated into practice) subject to the cumbersome procedure required for the late formulation of reservations.[360] To require a one-year time period before the limitation of a reservation can produce effects, subjecting it to the risk of a "veto" by a single other party, would obviously be counterproductive and in violation of the principle that, to the extent possible, the treaty's integrity should be preserved.

208. Since this is not a new reservation but a limitation of an existing one, reformulated to bring the obligations of the reserving State more fully into line with those stipulated by the treaty, it is unlikely that the other contracting parties will object to the new formulation.[361] If they have adapted to the initial reservation, it is difficult to see how they could object to the new one, the effects of which, in theory, have been reduced. Just as a State cannot object to a pure and simple withdrawal, it cannot object to a partial withdrawal.

209. Despite some elements of uncertainty, the result of the foregoing considerations is that the modification of a reservation whose effect is to reduce its scope must be subject to the same juridical regime as a total withdrawal. In order to

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[358] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, prepared by the Treaty Section of the Office of Legal Affairs* (ST/LEG/7/Rev.1), United Nations publication, Sales No. E.94.V.15, para. 206.

[359] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations (LA41TR/221 (23-1)). For further information on this time period, see the fifth report on reservations to treaties (A/CN.4/508/Add.4), paras. 320-324.

[360] Cf. draft guidelines 2.3.1 to 2.3.3 and the commentary thereon (*Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chap. VI.B.2.2., pp. 462-495).

[361] Nonetheless, they may certainly withdraw their initial objections which, like the reservations themselves, may be withdrawn at any time (cf. article 22, para. 2, of the Vienna Conventions of 1969 and 1986); see also para. 201 above.

avoid any ambiguity, especially in view of the terminology used by the Secretary-General of the United Nations,[362] it is better to refer here to a "partial withdrawal".

210. A single draft guideline should be able to take into account the alignment of the rules applicable to the partial withdrawal of reservations with those governing total withdrawal; to avoid any confusion, however, it would seem useful to specify what is meant by a partial withdrawal. This guideline could be worded as follows:

2.5.11 *Partial withdrawal of a reservation*

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

The partial withdrawal of a reservation is the modification of that reservation by the reserving State or international organization for the purpose of limiting the legal effect of the reservation and ensuring more completely the application of the provisions of the treaty, or of the treaty as a whole, to that State or that international organization.

211. This definition is modelled as closely as possible on the definition of reservations resulting from article 2.1 (d) of the Vienna Conventions of 1969 and 1986 and draft guidelines 1.1 and 1.1.1.

212. On the one hand, while the form and procedure of a partial withdrawal must definitely be aligned with those of a pure and simple withdrawal and may, without any problem, implicitly (or explicitly of the Commission deems that to be clearer) refer to draft guidelines 2.5.1, 2.5.2, 2.5.5 [2.5.5 bis, 2.5.5 ter], 2.5.6 [2.5.6 bis, 2.5.6 ter], 2.5.9, 2.5.10 and, perhaps, 2.5.3, on the other hand the difficulty lies in knowing whether the provisions of draft guidelines 2.5.4 ("Withdrawal of reservations held to be impermissible by a body monitoring the implementation of the treaty"), 2.5.7 ("Effect of withdrawal of a reservation") and 2.5.8 ("Effect of withdrawal of a reservation in cases of objection to the reservation and opposition to entry into force of the treaty with the reserving State or international organization") may be transposed to cases of partial withdrawals.

213. The trickiest case is probably one where a treaty monitoring body has found that the initially formulated reservation was not valid.[363] The *Belilos* case of the European Court of Human Rights and the action taken on that basis by the Swiss Federal Court in the *Elisabeth B.* case[364] may imply that if the monitoring body invalidated the reservation (or if its irregularity may be deduced from the reasoning it followed), the only possible solution is the withdrawal pure and simple of the reservation (for no modification may be made to a reservation said to be null and void ab initio); in this case, the provisions of draft guideline 2.5.4 may not be extended, mutatis mutandis, to a partial withdrawal; the latter may not be envisaged, and the only way for the reserving State or international organization to fulfil its obligations in that respect is by totally withdrawing the reservation.

214. But this reasoning is far from self-evident. It rests on the assumption that a monitoring body itself may take action as a result of finding a reservation impermissible. This is not the position taken by the Commission in the preliminary

[362] See paras. 205-207 above.
[363] Cf. draft guideline 2.5.4, para. 114 above.
[364] See paras. 199-201 above.

conclusions it adopted in 1997.[365] All that matters is that the author of the reservation respects the conditions of validity of the reservation; if it may do so by making a partial withdrawal, there is no reason it should be prevented from doing so — all the more so in that there is a risk of encouraging the pure and simple denunciation of the treaty, which is contrary to the often invoked principle of universality — while the modification of the reservation achieves the desired balance between the integrity of the treaty and the universality of participation (where the latter is a desired goal).

215. Thus, whereas the partial withdrawal is one of the means by which the State or international organization may fulfil its obligations if one of its reservations is found to be impermissible, the question arises as to whether it is useful to so specify in the Guide to Practice, and in what form. The Special Rapporteur sees three possibilities in this regard:

– It may suffice to specify it in the commentaries on draft guidelines 2.5.4 and/or 2.5.11; but the referral of clarifications to the commentary is often an easy option that is particularly questionable when it comes to drafting a guide to practice that must, as far as possible, provide users with answers to any legitimate questions they might have;

– A draft guideline could be modelled on the second paragraph of draft guideline 2.5.4, worded as follows:

> ***2.5.11 bis*** *Partial withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> *Where a body monitoring the implementation of the treaty to which the reservation relates finds the reservation to be impermissible, the reserving State or international organization may fulfil its obligations in that respect by partially withdrawing that reservation in accordance with the finding.*

– Mention could be made, in the second paragraph of draft guideline 2.5.4, of the possibility of a partial withdrawal; but to proceed thus for this guideline alone, without doing the same for all the others which apply to both partial and total withdrawals, does not seem, a priori, very logical; and yet it does seem essential to individualize draft guideline 2.5.11.

216. The Special Rapporteur nevertheless prefers a solution of this type, provided that it does not lead to the elimination of draft guideline 2.5.11. This objective may be attained by combining draft guidelines 2.5.4 and 2.5.11 bis *and* by moving this single draft guideline to the end of section 2.5 of the Guide to Practice. This guideline might read as follows:

> ***2.5.X*** *Withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty*
>
> *The fact that a reservation is found impermissible by a body monitoring the implementation of the treaty to which the reservation relates does not constitute the withdrawal of that reservation.*

[365] See footnote 348 and para. 202 above.

Following such a finding, the reserving State or international organization must take action accordingly. It may fulfil its obligations in that respect by totally or partially withdrawing the reservation.

217. There should be little hesitation with regard to the effect of the partial withdrawal of a reservation, for it cannot be compared to that of a total withdrawal, nor can it be held that "the *partial* withdrawal of a reservation entails the application of a treaty *as a whole* in the relations between the State or international organization which *partially* withdraws the reservation and all the other parties, whether they had accepted or objected to the reservation".[366] Of course, the treaty may be implemented more fully in the relations between the reserving State or international organization and the other contracting parties; but not "as a whole" since, hypothetically, the reservation (in a more limited form, of course) remains.

218. Another specific problem arises in the case of partial withdrawal. In the case of total withdrawal, the effect is to deprive of consequences the objections that had been made to the reservation as initially formulated,[367] even if those objections had been accompanied by the opposition of the entry into force of the treaty with the reserving State or international organization.[368] There is no reason for this to be true in the case of a partial withdrawal. Admittedly, States or international organizations that had made objections would be well advised to reconsider them, and withdraw them if the motive or motives that gave rise to them were eliminated by the modification of the reservation, and they may certainly proceed to withdraw them;[369] they cannot be required to do so, however, and they may perfectly well maintain their objections if they deem it appropriate.[370]

219. The only real question in this regard is to know whether they must formally confirm their objections or whether the latter must be understood to apply to the reservation in its new formulation. In the light of practice, there is scarcely any doubt that this assumption of continuity is essential, for, as indicated above,[371] there seems to be no case where the partial withdrawal of a reservation has led to a withdrawal of objections, and the Secretary-General of the United Nations, as depositary, seems to consider that the continuity of the objection goes without saying.[372] This seems fairly reasonable, for the partial withdrawal does not eliminate the initial reservation and does not constitute a new reservation; a priori, the objections that were made to it rightfully continue to apply as long as their authors do not withdraw them.

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366 Cf. draft guideline 2.5.7; see para. 184 above.

367 Cf. draft guideline 2.5.7, ibid. ("... whether they had accepted or objected to the reservation").

368 Cf. draft guideline 2.5.8; see para. 184 above ("The withdrawal of a reservation entails the entry into force of the treaty in the relations between the State or international organization which withdraws the reservation and a State or international organization which had objected to the reservation and opposed the entry into force of the treaty between itself and the reserving State or international organization").

369 See para. 201 and footnote 361 above.

370 Even though they may not take the opportunity offered by the partial withdrawal of a reservation to formulate new objections; cf. para. 208 above.

371 Footnote 346.

372 See footnote 355 above: the objections of Denmark, Finland, Mexico, Norway, the Netherlands or Sweden to the reservation formulated by the Libyan Arab Jamahiriya were not modified following the reformulation of the reservation and are still listed in *Multilateral Treaties* ..., vol. I, chap. IV.8, pp. 245-250.

220. It seems essential, then, to devote a specific draft guideline to the effect of a partial withdrawal of a reservation. Such a guideline could be presented as follows:

2.5.12 *Effect of a partial withdrawal of a reservation*

The partial withdrawal of a reservation modifies the legal effects of the reservation to the extent of the new formulation of the reservation. Any objections made to the reservation continue to have effect as long as their authors do not withdraw them.

221. Although the wording of the second sentence of this guideline does not seem to call for any particular explanation, it may be useful to indicate that the wording of the first sentence is based on the terminology used in article 21 of the Vienna Conventions,[373] without entering into substantive discussion of the effects of reservations and objections made to them.

[373] Cf. article 21, para. 1: "A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation."