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Chapter IV
Reservations to treaties

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3.3.2 [3.3.3] Effect of individual acceptance of an impermissible reservation

Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation.

Commentary

(1) According to the first part of guideline 3.3 (Consequences of the non-permissibility of a reservation), "a reservation formulated in spite of 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".[1] 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 in spite of 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. That is what is explained in guideline 3.3.2.

(3) Sir Humphrey 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), because, by prohibiting the reservation, the contracting States would expressly have excluded such acceptance.[2]

(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[3] — is that such an acceptance is devoid of legal effect.[4] 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.[5] Furthermore, if the acceptance of an impermissible reservation constituted an agreement between the author of the impermissible reservation and the State or

[1] For the commentary to this provision, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 302–308.

[2] *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), 25th meeting, 16 April 1968, p. 133, para. 2.

[3] See the last part of guideline 3.3 (Consequences of the impermissibility of a reservation): "A reservation formulated in spite of 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*."

[4] See below guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation) and the commentary thereto.

[5] See guidelines 4.2.1 to 4.2.5 above and the commentaries thereto.

international organization that accepted it, it would result in a modification of the treaty in relations between the two parties; that would be incompatible with article 41, paragraph 1 (b) (ii), of the Vienna Conventions, which excludes any modification of the treaty if it relates "to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".[6]

(5) Despite some views to the contrary, the Commission considers 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 draft guideline 3.3.2 relates to the permissibility of the reservation – in other words, to the fact that acceptance cannot change its impermissibility. Its aim 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[7] — even express — acceptance of an impermissible reservation has no effect as such on the consequences of this nullity, which are specified in Part 4 of the Guide to Practice. The question of the consequences of acceptance in terms of the effects of the 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 3.4.1 (Permissibility of the acceptance of a reservation)[8] very clearly confirms this point of view. It provides that the express acceptance of an impermissible reservation also cannot have any effect; it, too, is impermissible. Guidelines 3.3.2 and 3.4.1 answer the question of the effect of an acceptance of an impermissible reservation: it can have no effect on either the permissibility of the reservation — apart from the special case envisaged in guideline 3.3.3 — or, *a fortiori*, on the legal consequences of the nullity of an impermissible reservation. These are dealt with in section 4.5 of the Guide to Practice.

3.3.3 [3.3.4] Effect of collective acceptance of an impermissible reservation

A reservation that is prohibited by the treaty or which is incompatible with its object and purpose shall be deemed permissible if no contracting State or contracting organization objects to it after having been expressly informed thereof by the depositary at the request of a contracting State or a contracting organization.

Commentary

(1) The principle set out in guideline 3.3.2 must be accompanied by an important caveat: it applies only to acceptances by States and international organizations on an individual basis. While there is little doubt that an individual acceptance by a contracting

[6] In this regard, 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; see however *contra* 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).

[7] In contrast to collective acceptance which is addressed in guideline 3.3.3. The term "individual acceptance" is also used in guideline 2.8.9 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.

[8] Guideline 3.4.1 reads: "The express acceptance of an impermissible reservation is itself impermissible."

State or contracting organization cannot have the effect of "permitting" an impermissible reservation or produce any other effect in relation to the reservation or the treaty, the situation is different where all the contracting States and contracting organizations expressly approve a reservation that — without this unanimous acceptance — would be impermissible, which is the scenario contemplated in guideline 3.3.3.

(2) More specifically, the situation envisaged in the present guideline is as follows: a reservation that is prohibited (explicitly or implicitly) by the treaty or which is incompatible with its object and purpose is formulated by a State or an international organization. Subsequently, another contracting State or contracting organization[9] which regards the reservation as impermissible requests the depositary to communicate this position to all the contracting States and contracting organizations but does not raise an objection. Following such notification by the depositary, when no contracting State or organization, duly alerted, objects to the reservation producing its intended effects, it is then "deemed permissible".[10]

(3) 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";[11] he proposed that, in such case, "the prior consent of all the other interested States" is required.[12] This provision was not retained in the Commission's draft articles of 1962[13] or 1966 and does not appear in the Convention.[14]

(4) Silence does not solve the problem. Indeed, it can be argued 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[15] to that end on the subject of reservations.[16] This possibility, which accords with

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[9] The author of the reservation itself might well take that step if it is aware of the impermissibility of the reservation.

[10] For this term, see below para. (8) of the commentary to this guideline.

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

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

[13] 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).

[14] 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 Deposited with the Secretary-General*, available from http://treaties.un.org, *Status of Treaties (MTDSG)*, chap. XI.B.21.

[15] But not an agreement between certain of the parties only; see para. (7) of the commentary to guideline 3.3.2 above.

[16] In this regard, see D.W. Greig, *op. cit.*, footnote 6, pp. 56–57 or L. Sucharipa-Behrman, *op. cit.*, footnote 6, 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 Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", *British Yearbook of International Law*, 1993, p. 269). Moreover, it cannot reasonably be argued that the rules established

the principle of consent that underpins all treaty law, 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.

(5) 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[17] and that the State undertakes not to object to it in the future.[18] 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.[19]

(6) The idea underlying this draft guideline is, moreover, supported to some extent by practice. Although it is not, strictly speaking, a case of unanimous acceptance by the parties to a treaty, the reservation of neutrality formulated by Switzerland upon acceding to the Covenant of the League of Nations is an example in which, despite the prohibition of reservations, the reserving State was admitted into the circle of States parties.[20] This "precedent" does not, however, help to prove the existence of a customary norm along those lines. Thus, rather than leaving a gap on an issue that could arise, the Commission should approach it from the standpoint of *lex ferenda* and progressive development of international law.

(7) That is the approach taken in guideline 3.3.3. Its wording is based in part on the solution chosen by the Commission on the subject of the late formulation of a reservation. In this case it has concluded that a reservation that is prohibited by the treaty or is clearly contrary to its object and purpose may not be formulated except if none of the other contracting parties objects,[21] after having been duly consulted by the depositary.[22]

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in article 19, and in particular subparagraph (c), constitute peremptory norms of general international law from which the parties may not derogate by agreement.

[17] In this regard, see Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, 1985, p. 26; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5 (The Hague, 1988), 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), p. 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 pointed out quite rightly by Liesbeth Lijnzaad, 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" (*Reservations to U.N. Human Rights Treaties: Ratify and Ruin?* (Dordrecht, T.M.C. Asser Institut, Nijhoff), 1994, p. 56).

[18] See guideline 2.8.12 and the commentary thereto, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 252–253.

[19] See D.W. Greig, *op. cit*., footnote 6, 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 invalid reservation "could no longer be challenged" (*Yearbook ... 1962*, vol. I, 654th meeting, 30 May 1962, p. 163, para. 29).

[20] See Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, vol. 45, 1971, pp. 140–141.

[21] Guideline 2.3.1 (Late formulation of a reservation), adopted on first reading, reads: "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty *except if none of the other Contracting Parties objects to the late formulation of the reservation.*"

[22] See draft guideline 2.1.8 (Procedure in case of manifestly impermissible reservations) and the

(8) The Commission nevertheless considered that it should proceed cautiously. This explains the phrase "shall be deemed permissible if", which is intended to indicate that, while the reservation remains impermissible in principle, the subsequent agreement of the parties has, in fact, modified the original treaty, thereby enabling the author of the reservation to avail itself of the reservation after all. Furthermore, the phrase should be understood as allowing for the possibility of the reservation being declared impermissible on other grounds by a body competent to decide on such matters.

(9) The phrase "at the request of a contracting State or a contracting organization" appearing at the end of the guideline is intended to make it clear that the initiative must come from the contracting parties and that the Commission does not intend to derogate from the strict limits laid down by article 77 of the 1969 Vienna Convention and article 78 of the 1986 Vienna Conventions concerning the functions of depositaries. The phrase is also in keeping with part of the rationale behind the present guideline, which aims to facilitate the reservations dialogue.

(10) The Commission is aware that guideline 3.3.3 does not take a position on the time period within which contracting States and organizations must react (or be deemed not to have objected to the reservation producing its effects). It might be thought that the "customary" 12-month period, within which, in accordance with the provisions of article 20, paragraph 5, of the Vienna Conventions, guideline 2.6.13 allows States to object to a reservation, would be appropriate. However, legally, such a transposition is not inevitable: all the parties to a treaty always have the right to modify it by agreement without any time limit. On the other hand, allowing for this possibility to remain open indefinitely could undermine the security of treaty relations. Faced with such conflicting considerations, the Commission has preferred to leave matters open. The silence of the guideline on this point implies that the contracting States and organizations should react within a reasonable period of time.[23]

(11) Like guideline 3.3.2,[24] guideline 3.3.3 is placed in Part 3 of the Guide to Practice on the permissibility of reservations. In any event, it would be illogical to place such a draft guideline in the part that deals with the effects of invalid reservations. By definition, the reservation in question here has become permissible by reason of the unanimous acceptance or the absence of unanimous objection.

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commentary thereto (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 359–361). For more on this issue, see Rosa Riquelme Cortado, *Las reservas a los tratados – Formulación y ambigüedades del regimen de Viena* (Universidad de Murcia, 2004), pp. 223–230.

[23] As the International Court of Justice underlined in the context of rules governing the termination of treaties: "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith. Some indications as to the possible periods involved, as the Court has said, can be seen in provisions of host agreements, including Section 37 of the Agreement of 25 March 1951, as well as in article 56 of the Vienna Convention on the Law of Treaties and in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations. But what is reasonable and equitable in any given case must depend on its particular circumstances." (Advisory Opinion of 20 December 1980, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 96; see also International Court of Justice Judgment of 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application), *I.C.J. Reports 1984*, p. 420, para. 63.

[24] See paras. (6) and (7) of the commentary to guideline 3.3.2.

4.5 Consequences of an invalid reservation

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

(2) The effects attributed to a non-established reservation by the Commission's early Special Rapporteurs arose implicitly from their adherence to the traditional system of unanimity: the author of such a reservation could not claim to have become a party to the treaty. Moreover, it was not a question of determining the effects of a reservation that did not fulfil certain conditions of validity, since such conditions were of little relevance under the wholly intersubjective system,[25] but rather of determining the effects of a reservation which had not been accepted by all the other contracting States and which, for that reason, did not become "part of the bargain between the parties".[26]

(3) From this perspective, J.L. Brierly wrote in 1950 that "the acceptance of a treaty subject to a reservation is ineffective unless or until every State or international organization whose consent is requisite to the effectiveness of that reservation has consented thereto".[27] H. Lauterpacht expressed the same idea: "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."[28] Thus, unless a reservation is established in this manner, it produces no effect and nullifies the consent to be bound by the treaty. The League of Nations Committee of Experts for the Progressive Codification of International Law had already stressed that a "null and void" reservation had no effect:

> In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.[29]

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

(4) However, even Brierly, though a strong advocate of the system of unanimity, was aware that there might be reservations which, by their very nature or as a result of the treaty to which they referred, might *ipso jure* have no potential effect. In the light of treaty practice, he considered that some treaty provisions "allow only certain reservations specified in the text, and prohibit all others; these do not bear on the position of a depository or the question of States being consulted in regard to reservations, for *such*

[25] See, however, para. (4) below.

[26] J.L. Brierly, report on the law of treaties (A/CN.4/23), *Yearbook ... 1950*, vol. II, p. 241, para. 96. See also *ibid.*, vol. I, 53rd meeting, 23 June 1953, p. 90, para. 3 (Brierly).

[27] Draft article 10, para. 3, in Brierly, report on the law of treaties (A/CN.4/23), p. 240, *Yearbook .... 1950*, vol. II, p. 224.

[28] Draft article 9 in Brierly, report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 91.

[29] League of Nations, *Official Journal*, eighth year, No. 7, p. 880.

questions cannot arise as no reservations at that stage are permissible".[30] It followed that States were not free to "agree upon any terms in the treaty",[31] as he had maintained the previous year; there were indeed reservations that could not be accepted because they were prohibited by the treaty itself. Gerald Fitzmaurice endorsed this idea in his draft article 37, paragraph 3, which stated:

> In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.[32]

(5) The situation changed with Sir Humphrey Waldock's first report. The fourth Special Rapporteur on the law of treaties, a supporter of the flexible system, deliberately made the sovereign right of States to formulate reservations subject to certain conditions of validity. Despite the uncertainty concerning his position on the permissibility of reservations that are incompatible with the object and purpose of the treaty,[33] draft article 17, paragraph 1, (in his first report) "accepts the view that, *unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations*, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit".[34] However, Sir Humphrey did not deem it appropriate to specify the effects arising from the formulation of a prohibited reservation; in other words, he set the criteria for the permissibility of reservations without establishing the regime governing reservations which did not meet them.[35]

(6) Sir Humphrey's first report does, however, contain several reflections on the effects of a reservation that it is prohibited by the treaty:

> when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the

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

[31] Brierly, report on the law of treaties (A/CN.4/23), para. 88; *Yearbook ... 1950*, vol. II, p. 239.

[32] Brierly, report on the law of treaties (A/CN.4/101); *Yearbook ... 1956*, vol. II, p. 115.

[33] Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, pp. 65–66, para. (10) of the commentary to draft article 17. See also paras. (2) and (3) of the commentary to guideline 3.1 (Permissible reservations) in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), pp. 328–329.

[34] Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, pp. 65–66, *Yearbook ... 1962*, vol. II, p. 65, para. (9) of the commentary to draft article 17 (emphasis Sir Humphrey's). See also *ibid.*, p. 67, para. (15) of the commentary to draft article 18. See also the Commission's debate, *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 143, para. 64 (Mustafa Kamil Yasseen) and the conclusions of the Special Rapporteur, *ibid.*, 653rd meeting, 29 May 1962, p. 159, para. 57 (Sir Humphrey).

[35] During the debate, Alfred Verdross expressed the view that the case of a "treaty which specifically prohibited reservations ... did not present any difficulties" (*ibid.*, 652nd meeting, 28 May 1962, p. 148, para. 33), without, however, taking a clear position regarding the effects of the violation of such a specific prohibition. The members of the Commission were, however, aware that the problem could arise, as seen from the debate on draft article 27 on the functions of a depositary (*Yearbook ... 1962*, vol. I, 658th meeting, 6 June 1962, para. 59, p. 191 (Sir Humphrey); and *ibid.*, 664th meeting, 19 June 1962, paras. 82–95, p. 236.

> 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.[36]

While this explanation does not directly address the question of the effect of prohibited reservations, it has the merit of suggesting that they are excluded from the scope of the provisions concerning the consent of the contracting States and, subsequently, of all the provisions concerning the effects of reservations with the exception of the potential validation of an otherwise inadmissible reservation through the unanimous consent of all the contracting States.[37]

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

> An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[38]

(8) It is also clear from this statement that the effect of an objection — which was (at that time) also subject to the requirement that it must be compatible with the object and purpose of the treaty, in accordance with the advisory opinion of the International Court of Justice[39] — was envisaged only in the case of reservations that were incompatible (or deemed incompatible) with the object and purpose of the treaty. In 1965, however, in response to several States' criticism of this restriction of the right to make objections to reservations, the Special Rapporteur proposed new wording[40] in order to make a clearer

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

[37] Draft article 17, para. 1 (b), in Waldock, first report on the law of treaties (A/CN.4/144); *Yearbook ... 1962*, vol. II, p. 60: "The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of subparagraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained." See also draft article 18 as proposed by Waldock in his fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2); *Yearbook ... 1965*, vol. II, p. 50. On the question of the unanimous consent of the contracting States and contracting organizations, see guideline 3.3.3 below and the commentary thereto, in particular paragraph (3).

[38] *Yearbook ... 1962*, vol. II, p. 176.

[39] In 1951, the Court stated: "it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 24). For a thorough analysis of the differences between the legal system adopted by the Commission and the Court's 1951 advisory opinion, see Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", *Harvard International Law Journal*, vol. 23, 1982, pp. 88–95.

[40] Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 52, para. (9) of the commentary to draft article 19. Draft article 19, paragraph 4, as proposed by Sir Humphrey, states:

> 4. In other cases, unless the State [*sic* – read 'the treaty'?] concerned otherwise specifies:

distinction between objections and the validity of reservations. But as a result, invalid reservations fell outside of the work of the Commission and the Conference and would remain so until the adoption of the Vienna Convention.

(9) The fact that the 1969 Vienna Convention contains no rules on invalid reservations is, moreover, a consequence of the wording of article 21, paragraph 1, on the affect of acceptance of a reservation: only reservations that are permissible under the conditions established in article 19, formulated in accordance with the provisions of article 23 and accepted by another contracting party in accordance with article 20[41] can be considered established under the terms of this provision. Clearly, a reservation that is not valid does not meet these cumulative conditions, even if it has been accepted by one or more contracting parties.

(10) This explanation is not, however, included in article 21, paragraph 3, on objections to reservations. But that does not mean that the Convention determines the legal effects of an invalid reservation to which an objection has been made: under article 20, paragraph 4 (c), in order for such an objection to produce the effect envisaged in article 21, paragraph 3, at least one acceptance is required;[42] however, the effects of acceptance of an invalid reservation are not governed by the Convention.

(11) The *travaux préparatoires* of the Vienna Conference clearly confirm that the 1969 Convention says nothing about the consequences of invalid reservations, let alone their effects. In 1968, during the first session of the Conference, the United States of America proposed to add, in the chapeau of future article 20, paragraph 4, after "In cases not falling under the preceding paragraphs", the following specification: "and unless the reservation is prohibited by virtue of [future article 19]:".[43] According to the explanation given by Herbert W. Briggs, the United States representative, in support of the amendment:

> The purpose of the United States amendment to paragraph 4 was to extend the applicability of the prohibited categories of reservations set out in article 16 to the decisions made by States under paragraph 4 of article l7 in accepting or objecting to a proposed reservation. In particular, the proposal would preclude acceptance by another contracting State of a reservation prohibited by the treaty, and the test of incompatibility with the object or purpose of the treaty set out in subparagraph (*c*) of article l6 would then be applicable to such acceptance or objection. It was a shortcoming of subparagraph (*c*) that it laid down a criterion of incompatibility for a prohibited reservation, but failed to make it explicitly applicable to the acceptance or objection to a reservation.[44]

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

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

[41] See guideline 4.1 above (Establishment of a reservation with regard to another State or another organization) and the commentary thereto.

[42] See paras. (2) and (3) of the commentary to guideline 4.3.2.

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

[44] *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), 21st plenary meeting of the Committee of the Whole, 10 April 1968, p. 108, para. 11.

(12) Although it is unclear from Briggs' explanations, which focus primarily on extending the criteria for the permissibility of a reservation to include acceptances and objections, the effect of the United States amendment would unquestionably have been that the system of acceptances of and objections to reservations established in article 20, paragraph 4, applied only to reservations that met the criteria for permissibility under article 19. Acceptance of and objection to an impermissible reservation are clearly excluded from the scope of this amendment[45] even though no new rule concerning such reservations was proposed. The representative of Canada, Max H. Wershof, then asked, "Was paragraph C of the United States amendment (A/CONF.39/C.1/L.127) consistent with the intention of the International Law Commission regarding incompatible reservations?"[46] Sir Humphrey, in his capacity as Expert Consultant, replied: "The answer was ... Yes, since it would in effect restate the rule already laid down in article 16."[47]

(13) The "drafting" amendment proposed by the United States was sent to the Drafting Committee.[48] However, neither the language that was provisionally adopted by the Committee and submitted to the Committee of the Whole on 15 May 1968,[49] nor the language ultimately adopted by the Committee of the Whole and referred to the plenary Conference,[50] contained the wording proposed by the United States, although the failure to incorporate it is not explained in the *travaux préparatoires* of the Conference. It is, however, clear that the Commission and the Conference considered that the case of impermissible reservations was not the subject of express rules adopted at the conclusion of their *travaux préparatoires* and that the provisions of articles 20 and 21 of the Vienna Convention did not apply to that situation.

(14) During the Commission's work on the question of treaties concluded between States and international organizations or between two or more international organizations and the *travaux préparatoires* of the 1986 Vienna Conference, the question of the potential effects of a formulated reservation that did not meet the conditions for permissibility in article 19 was not addressed. Nevertheless, Paul Reuter, Special Rapporteur of the Commission on the topic, recognized that "even in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties".[51] Nonetheless, the

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

[46] Document cited in footnote 2 above, 24th meeting, 16 April 1968, pp. 132–133, para. 77.

[47] *Ibid.*, 25th meeting, 16 April 1968, p. 133, para. 4. Draft article 16 became article 19 of the Convention.

[48] *Ibid.*, pp. 135–136, para. 38.

[49] A/CONF.39/C.1/L.344, reproduced in *Official Records of the United Nations Conference on the Law of Treaties* (see footnote 43 above), p. 137, para. 185.

[50] The language was approved by 60 votes to 15, with 13 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Treaties Second Session, Vienna, 9 April–2 May 1969 (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)* (A/CONF.39/11/Add.1), 85th meeting of the Committee of the Whole, 10 April 1969, paras. 33–34), p. 221. For the text of this provision, see Documents of the Conference (A/CONF.39/11/Add.2), p. 258, para. 57.

[51] Reuter, tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/341 and Add.l), para. 53; *Yearbook ... 1981*, vol. II, Part One, p. 56, para. 53. The Special Rapporteur referred to Pierre-Henri Imbert, *Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979); and, by the same author, "La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-

Special Rapporteur "thought it wise not to depart from that Convention where the concept of reservations was concerned".[52]

(15) In its observations on the Human Rights Committee's general comment No. 24, the United Kingdom also recognized, at least in principle,[53] that the 1969 Vienna Convention did not cover the question of impermissible reservations:

> The Committee correctly identifies articles 20 and 21 of the Vienna Convention on the Law of Treaties as containing the rules which, taken together, regulate the legal effect of reservations to multilateral treaties. The United Kingdom wonders however whether the Committee is right to assume their applicability to incompatible reservations. The rules cited clearly do apply to reservations which are fully compatible with the object and purpose but remain open for acceptance or objection (...). It is questionable however whether they were intended also to cover reservations which are inadmissible *in limine*.[54]

(16) Admittedly, neither the 1969 nor the 1986 Vienna Convention — which are quite similar, including in this respect — contains clear, specific rules concerning the effects of an invalid reservation.[55] That is, without a doubt, one of the most serious lacunae in the matter of reservations in the Vienna Conventions. It has been referred to as a "normative gap", and the gap is all the more troubling in that the *travaux préparatoires* did not offer any clear indications as to the intentions of the authors of the 1969 Convention, but instead gave the impression that they had deliberately left the question open. However, what was acceptable in a general treaty on the law of treaties, in view of the disputes raised by the question, was not acceptable in a work whose purpose was precisely that of filling the gaps left by the Vienna Conventions in the matter of reservations.

(17) In this area, it is particularly striking that "the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (...), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time".[56] In accordance with the method of work that has been followed by the Commission in the context of preparation of the Guide to Practice,[57] it has assumed that the treaty rules — which are silent on the question of the

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Bretagne et d'Irlande du Nord", *Annuaire français de droit international*, vol. XXIV, 1978, pp. 29–58.

[52] *Yearbook ... 1977*, vol. I, 1,434th meeting, 6 June 1977, p. 98, para. 4 (Paul Reuter).

[53] See footnote 92 below. While the United Kingdom considered that inadmissible reservations were not covered by the Vienna Conventions, the solution that it proposed was, ultimately, simply to apply article 21, paragraph 3, of the Conventions to them.

[54] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, p. 133, para. 13.

[55] In that regard, see Giorgio Gaja, "Il regime della Convenzione di Vienna concernente le riserve inammissibili" in *Studi in onore di Vincenzo Starace* (Naples, Ed. Scientifica, 2008), pp. 349–361; Bruno Simma, "Reservations to human rights treaties: some recent developments" in *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* (The Hague, Kluwer, 1998), pp. 667–668; and Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *Recueil des Cours de L'Academie de Droit International de la Haye*, vol. 281, 1999, p. 321.

[56] Alain Pellet, first report on the law and practice relating to reservations to treaties (A/CN.4/470, para. 161); *Yearbook ... 1995*, vol. II, Part One, p. 152.

[57] In 2006, during the Commission's consideration of the tenth report on reservations to treaties, "[i]t was even questioned whether the Commission should take up the matter of the consequences of the

effects of invalid reservations — are established, and that it "simply try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility".[58]

(18) In so doing, the Commission did not intend to legislate and to establish *ex nihilo* rules concerning the effects of a reservation that does not meet the criteria for validity. State practice, international jurisprudence and doctrine have already developed approaches and solutions on this matter which the Commission considers perfectly suitable for guiding its work. It is a question not of creating, but of systematizing, the applicable principles and rules in a reasonable manner and of preserving the general spirit of the Vienna system.

(19) The title of section 4.5 of the Guide to Practice "Consequences of an invalid reservation" was preferred over the one that was initially proposed, "Effects of an invalid reservation"[59] because the main consequence of these instruments is, precisely, that they are devoid of legal effects.

(20) Furthermore, it should be noted that invalid reservations, whose consequences are explicitly set out in this part of the Guide to Practice, are invalid either because they do not meet the formal and procedural requirements prescribed in Part 2 or because they are deemed impermissible according to the provisions of Part 3. The use of the words "validity/invalidity" and "valid/invalid" is consistent with the broad definition of the expression "validity of reservations" adopted by the Commission in 2006 in order "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation".[60]

4.5.1 [4.5.1 and 4.5.2] Nullity of an invalid reservation

A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect.

Commentary

(1) By clearly indicating that a reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void and by formally stating the consequence that it is devoid of effect, guideline 4.5.1 aims to

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invalidity of reservations, which, perhaps wisely, had not been addressed in the Vienna Conventions. Perhaps that gap should not be filled; the regime that allowed States to decide on the validity of reservations and to draw the consequences already existed, and there was no reason to change it" (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 142). In the Sixth Committee, however, this was said to be a key issue for the study (A/C.6/61/SR.17, para. 5 (France)). Several delegations supported the idea that impermissible reservations were null and void (A/C.6/61/SR.16, para. 43 (Sweden); *ibid.*, para. 51 (Austria); and A/C.6/61/SR.17, para. 7 (France)); it was hoped that the specific consequences arising from that nullity would be spelled out in the Guide to Practice (A/C.6/61/SR.16, para. 59 (Canada)). See also the fourteenth report on reservations to treaties (2009) (A/CN.4/614), para. 14.

[58] First report on the law and practice relating to reservations to treaties (A/CN.4/470), para. 163; *Yearbook ... 1995*, vol. II, Part One, p. 152.

[59] Fifteenth report on reservations to treaties (A/CN.624/Add.1), para. 419.

[60] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 324, para. (2) of the general introduction to section 3 of the Guide to Practice.

fill one of the major gaps in the Vienna Conventions, which deliberately left this question unanswered,[61] despite its very great practical importance.

(2) This guideline, which is probably one of the most important provisions in the Guide to Practice, does not duplicate guideline 3.3 (Consequences of the impermissibility of a reservation).[62] First of all, it deals with both the formal invalidity and the impermissibility of reservations;[63] whereas Part 3, and in particular the first three sections thereof, concerns only the permissibility of reservations. There is no reason to exclude from the conditions for the validity of a reservation — which, if not met, render the reservation null and void — those which concern form. A reservation which was not formulated in writing,[64] was not communicated to the other concerned parties[65] or was formulated late[66] is also, in principle, unable to produce legal effects; it is null and void.[67] Secondly, guideline 4.5.1 is "downstream" from guidelines 3.1 and 3.3.2, of which it draws the consequences: the latter establish the conditions under which a reservation is impermissible, while guideline 4.5.1 infers from such impermissibility that the reservation is null and void produces no legal effects.

(3) The purpose of the phrase "and void" is to recall that this nullity is not dependent on the reactions of other contracting States or contracting organizations, something that guidelines 3.3.2 and 4.5.3 state even more clearly.

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

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

> *[u]n acte juridique est nul lorsqu'il se trouve privé d'effets par la loi, bien qui'il ait été réellement accompli, et qu'aucun obstacle ne le rende inutile. La nullité suppose que l'acte pourrait produire tous ses effets, si la loi le permettait* [a legal act is null and void when it is deprived of effect by law, even if it was in fact carried out and

[61] See above, para. (16) of the general introduction to section 4.5 of the Guide to Practice.

[62] See above, footnote 3.

[63] See above, para. (20) of the general introduction to section 4.5 of the Guide to Practice. This broad scope explains why guideline 4.5.1 is in Part 4 and not Part 3 of the Guide to Practice (see *a contrario* the reasons for the inclusion of guideline 3.3.2 in Part 3, in paras. (5) to (7) of the commentary to the latter (see also para. (11) of the commentary to guideline 3.3.3)).

[64] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.1 (Written form), *Yearbook … 2002*, vol. II (Part II), p. 26.

[65] Art. 23, para. 1, of the Vienna Conventions. See also guideline 2.1.5 (Communication of reservations), *Ibid.*, p. 26.

[66] See guideline 2.3 (Late reservations) and guidelines 2.3.1 (Late formulation of a reservation) to 2.3.5 (Widening of the scope of a reservation), *Yearbook … 2001*, vol. II (Part Two), p. 179 … and *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 269–274.

[67] In addition, guideline 4.5 is the equivalent for invalid reservations of guideline 4.1 for valid reservations (established reservations): these guidelines both related to the two types of conditions (substantive or formal) that allow a reservation to be considered "established", in the first case (provided that it was also accepted by at least one other contracting State or contracting organization) or "invalid", in the second case.

no obstacle renders it useless. Nullity presupposes that the act could produce all of its effects if the law allowed it to do so].[68]

The Dictionnaire du droit international public defines "nullity" as a

"*caractéristique d'un acte juridique, ou d'une disposition d'un acte, dépourvu de valeur juridique, en raison de l'absence des conditions de forme ou de fond nécessaires pour sa validité*" [characteristic of a legal act or of a provision of an act, lacking legal value due to the absence of formal or substantive requirements necessary for its validity].[69]

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

(6) Leaving it to the contracting parties to assess the permissibility of a reservation ultimately amounts to denying any useful effect to article 19 of the Vienna Conventions (the 1986 text of which is reproduced in guideline 3.1), even though it is central to the Vienna regime and formulates (*a contrario*, at least) the conditions for the permissibility of reservations not as a set of factors which States and international organizations should take into account, but in prescriptive language.[70] The opposite position would imply that, by accepting a reservation that does not meet the conditions for permissibility established in the 1969 and 1986 Vienna Conventions, States can validate it; this would deprive article 19 of any substance and would contradict guideline 3.3.2.

(7) It therefore is reasonable and in line with the logic of the Vienna regime to establish this solution on which those who espouse permissibility and those who espouse opposability[71] agree, and which also accords with the positions taken by the human rights treaty bodies,[72] namely that failure to respect the conditions for the permissibility of reservations laid down in article 19 of the Vienna Conventions and repeated in draft guideline 3.1 nullifies the reservation. In no way does the nullity of an impermissible reservation fall into the *lex ferenda* category; it is solidly established in State practice.

(8) It is not unusual for States to formulate objections to reservations which are incompatible with the object and purpose of the treaty while at the same time noting that they consider the reservation to be "null and void".

(9) As early as in 1955 and 1957, upon ratifying the 1949 Geneva Conventions, the United Kingdom and the United States of America made objections to reservations

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[68] Cited by Paul Guggenheim, "La validité et la nullité des actes juridiques internationaux", *Receuil des Cours. Academie de Droit International de la Haye*, vol. 74, 1949-I, p. 208.

[69] Jean Salmon (Ed.), *Dictionnaire de droit international public* (Brussels, Bruylant, 2001), p. 760 (*nullité*).

[70] "A State may … formulate a reservation, unless …" which clearly means "a State *cannot* formulate a reservation *if* …".

[71] Even though they do not draw all the consequences. On the opposition between these two "schools", see the introductory commentary to Part 3 of the Guide to Practice (Permissibility of reservations and interpretative declarations), para. (3) (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 342; see also the preliminary report on reservations to treaties, A/CN.4/470, *Yearbook … 1995*, pp. 155–156, paras. 101–105.

[72] See para. (16) of the commentary to guideline 3.2 (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 295, as well as the commentary to guidelines 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of a reservation) and 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), *ibid.*, pp. 296–299.

formulated by several Eastern European States, stating that, since the reservations in question were null and void, the Conventions in their entirety applied to the reserving States. Thus, the United Kingdom declared that

> whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates.[73]

For its part, in 1982,

> the Government of the Union of Soviet Socialist Republics [did] not recognize the validity of the reservation made by the Government of the Kingdom of Saudi Arabia on its accession to the 1961 Vienna Convention on Diplomatic Relations, since that reservation [was] contrary to one of the most important provisions of the Convention, namely, that "the diplomatic bag shall not be opened or detained".[74]

Similarly, Italy formulated an objection to the reservation to the International Covenant on Civil and Political Rights formulated by the United States:

> In the opinion of Italy reservations to the provisions contained in article 6 are not permitted, as specified in article 4, paragraph 2, of the Covenant. Therefore this reservation is null and void since it is incompatible with the object and the purpose of article 6 of the Covenant.[75]

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

> the Kingdom of the Netherlands considers the declaration on the requirement of prior permission for passage through the territorial sea made by Egypt a reservation which is null and void.[76]

The Governments of Finland and Sweden also stated in their objections that they considered the declarations to be null and void.[77] The reactions of Sweden to reservations judged invalid frequently contain this statement, regardless of whether the reservation is prohibited by the treaty,[78] was formulated late[79] or is incompatible with the object and

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[73] United Nations, *Treaty Series*, vol. 278, 1957, p. 268. See also the identical objections to the four Geneva Conventions made by the United States of America. The objection to the Geneva Convention relative to the treatment of prisoners of war reads: "Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations" (*ibid.*, vol. 213, 1955, p. 383).

[74] *Multilateral treaties* … (chap. III, 3), available from http://treaties.un.org, *Status of Treaties*.

[75] *Ibid.* (chap. IV, 4).

[76] *Ibid.* (chap. XXVII, 3). Art. 26, para. 1, of the Basel Convention stipulates that "No reservation or exception may be made to this Convention."

[77] *Ibid.* (chap. XXVII, 3).

[78] See footnote 70 above.

[79] Sweden's objection to Egypt's late declaration to the Basel Convention was, however, justified by both the Convention's prohibition of reservations and the fact that "these declarations were made almost two years after the accession by Egypt contrary to the rule laid down in article 26, paragraph 2 of the Basel Convention" (*ibid.*). Finland, however, justified its objection based solely on the fact that the declarations were, in any event, late (*ibid.*). Belgium also considered that the declarations

purpose of the treaty.[80] In the latter category, Sweden's reaction to the declaration in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment formulated by the German Democratic Republic[81] is particularly explicit:

> The Government of Sweden has come to the conclusion that the declaration made by the German Democratic Republic is incompatible with the object and purpose of the Convention and therefore is invalid according to article 19 (c) of the Vienna Convention on the Law of Treaties.[82]

(10) This objection makes it clear that the nullity of the reservation is a consequence not of the objection made by the Government of Sweden, but of the fact that the declaration made by the German Democratic Republic does not meet the requirements for the permissibility of a reservation. This is an objective issue which does not depend on the reactions of the other contracting parties, even if they might help to assess the compatibility of the reservation with the requirements of article 19 of the Vienna Conventions as reflected in guideline 3.1 (Permissible reservations).[83]

(11) It is not a question of granting the parties a competence which is clearly not theirs; individually, the contracting States and contracting organizations are not authorized to annul an invalid reservation.[84] Moreover, that is not the purpose of these objections and they should not be understood in that manner.

(12) However, and this is particularly important in a system that lacks a control and annulment mechanism, such objections express the views of their authors on the question of the validity and effects of an invalid reservation[85] and are of particular importance in the context of the reservations dialogue. As the representative of Sweden pointed out in 2005 in the Sixth Committee:

> Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection per se; consequently, the time limit of 12 months specified in article 20, paragraph 5, of the Convention, should not apply. However, in the absence of a body that could

formulated by Egypt were late and that "for these reasons, the deposit of the aforementioned declarations cannot be allowed, regardless of their content" (*ibid.*).

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

[81] The German Democratic Republic had declared upon signing and ratifying the Convention that it "will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic" (*ibid.*, chap. IV, 9). See also the third report on reservations to treaties (A/CN.4/491 and Add.1 through 6), para. 217; *Yearbook … 1998*, vol. II, Part One, p. 259.

[82] *Ibid.* (chap. IV, 9).

[83] See also paras. (1) to (3) of the commentary to guideline 3.3.2 above.

[84] See also Jan Klabbers, "Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties", *Nordic Journal of International Law*, vol. 69, No. 2, 2000, p. 184.

[85] See also guideline 3.2 (Assessment of the permissibility of reservations), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 283–296.

> authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.[86]

(13) It is also highly significant that in formulating objections to reservations that they consider invalid, States often pay very little attention to the conditions governing the efficacy of their objections. With regard to the Convention against Torture, for example, nine States[87] formulated objections against 4 reservations; of the 18 objections, 12 were late, which tends to show that their authors were convinced that the nullity of the reservations in question did not depend on their negative reactions but pre-dated their formulation. In other words, these objections recognize a pre-existing nullity based on objective criteria.

(14) Simply to state that a reservation is null and void, as in the first part of guideline 4.5.1, does not resolve the question of the effects — or lack thereof — of this nullity on the treaty and on potential treaty relations between the author of the reservation and the other contracting parties; the Vienna Conventions are silent on this matter.[88] It is therefore necessary to refer to the basic principles underlying all treaty law (beginning with the rules applicable to reservations), and above all, to the principle of consent.

(15) Many objections are formulated in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty. This practice is fully consistent with the principle set out in article 20, paragraph 4 (b), and article 21, paragraph 3, of the Vienna Conventions, although it might seem surprising that it was primarily (but not exclusively) the Western States which, at the Vienna Conference, expressed serious misgivings regarding the reversal of the presumption that was strongly supported by the Eastern countries.[89] But the fact that the treaty remains in force does not answer the question of the status of the reservation.

(16) Belgium's objection to the reservations of the United Arab Republic and the Kingdom of Cambodia to the Convention on Diplomatic Relations illustrates the problem. Upon ratifying the Convention in 1968, the Belgian Government stated that it considered

> "the reservation made by the United Arab Republic and the Kingdom of Cambodia to paragraph 2 of article 37 to be incompatible with the letter and spirit of the Convention",[90]

without drawing any particular consequences. But in 1975, in reaction to the confirmation of these reservations and to a comparable reservation by Morocco, Belgium explained:

> The Government of the Kingdom of Belgium objects to the reservations made with respect to article 27, paragraph 3, by Bahrain and with respect to article 37, paragraph 2, by the United Arab Republic (now the Arab Republic of Egypt),

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[86] A/C.6/60/SR.14, para. 22.

[87] Denmark, France, Finland, Germany, Luxembourg, the Netherlands, Norway, Spain and Sweden (*Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 9, available from http://treaties.un.org, *Status of Treaties*).

[88] See above, commentary to the introduction to section 4.5, paras. (1) to (13).

[89] See the commentary to guideline 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect), paras. (7) to (13). See also the commentary to guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 197, para. (1).

[90] *Multilateral Treaties Deposited with the Secretary-General*, chap. III, 3, available from http://treaties.un.org/, *Status of Treaties*.

> Cambodia (now the Khmer Republic) and Morocco. The Government nevertheless considers that the Convention remains in force as between it and the aforementioned States, respectively, *except in respect of the provisions which in each case are the subject of the said reservations*.[91]

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

(17) The approach taken in Belgium's objection, which is somewhat unusual,[92] appears to correspond to the one envisaged in article 21, paragraph 3, of the Vienna Conventions in the case of a simple objection.[93]

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[91] *Ibid.* (emphasis added).

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

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

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

"In the opinion of the Government of the Kingdom of the Netherlands this reservation has the same effect as a general derogation from this article, while according to article 4 of the Covenant, no derogations, not even in times of public emergency, are permitted.

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

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

In its observations on general comment No. 24 of the Human Rights Committee, the United Kingdom also gave some weight to the exclusion of the parties to the treaty to which a reservation relates: "[t]he United Kingdom is absolutely clear that severability would entail excising both the reservation and the parts of the treaty to which it applies. Any other solution they would find deeply contrary to principle, notably the fundamental rule reflected in Article 38 (1) of the Statute of the International Court of Justice, that international conventions establish rules 'expressly recognized by' the Contracting States. The United Kingdom regards it as hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept" (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 163, para. 14).

In its report to the 18th meeting of chairpersons of the human rights treaty bodies, the working group on reservations also did not completely rule out such an approach. In its recommendations, it suggested that "the only foreseeable consequences of invalidity are that the State could be considered as not being a party to the treaty, or *as a party to the treaty but the provision to which the reservation has been made would not apply*, or as a party to the treaty without the benefit of the reservation" (HRI/MC/2006/5/Rev.1, para. 16, recommendation No. 7, emphasis added). This position was, however, subsequently modified (see footnote 96 below).

(18) It is, however, highly debatable; it draws no real consequences from the nullity of the reservation but treats it in the same way as a permissible reservation by letting in "through the back door" what was excluded by the authors of the 1969 and 1986 Vienna Conventions.[94] Unquestionably, nothing in the wording of article 21, paragraph 3, of the Vienna Conventions expressly suggests that it does not apply to the case of invalid reservations, but it is clear from the *travaux préparatoires* that this question was no longer considered relevant to the draft article that was the basis for this provision.[95]

(19) As the representative of Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee's debate on the report of the Commission on the work of its fifty-seventh session,

> A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.[96]

(20) Moreover, the irrelevance of the Vienna rules is clearly confirmed by the great majority of States' reactions to reservations that they consider invalid. Whether or not they state explicitly that their objection will not preclude the entry into force of the treaty with the author of the reservation, they nevertheless state unambiguously that an impermissible reservation has no legal effect.

(21) The objections made many years ago by the United States of America and the United Kingdom to some of the reservations formulated by Eastern European States to the 1949 Geneva Conventions is a significant example.[97]

(22) Belarus, Bulgaria, Russia and Czechoslovakia also made objections to the Philippines' "interpretative declaration" to the United Nations Convention on the Law of the Sea, stating that this reservation had no value or legal effect.[98] Norway and Finland made objections to a declaration made by the German Democratic Republic in respect of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[99] the declaration was broadly criticized by several States, which considered

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[93] See the commentary to guideline 4.3.5 (Effects of an objection on treaty relations).

[94] See the United Kingdom's observations on general comment No. 24 of the Human Rights Committee (*Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), pp. 162–163, para. 13). See also the Sub-Commission on the Promotion and Protection of Human Rights expanded working paper by Ms. Françoise Hampson on the question of reservations to human rights treaties, prepared in accordance with Sub-Commission decision 2001/17 (E/CNOTE4/Sub.2/2003/WP.2), para. 16.

[95] See above, introductory commentary to section 4.5, paras. (5) to (13).

[96] A/C.6/60/SR.14, para. 22. See also Malaysia (A/C.6/60/SR.18, para. 86) and Greece (A/C.6/60/SR.19, para. 39), as well as the report of the meeting of the working group on reservations to the 19th meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (HRI/MC/2007/5, para. 18): "It cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying."

[97] See above, paras. (9) and (10) of the commentary to this guideline.

[98] *Multilateral Treaties Deposited with the Secretary-General*, chap. XXI, 6, available from http://treaties.un.org/, *Status of Treaties*.

[99] See footnote 81 above.

that "any such declaration is without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention".[100] And although Portugal had expressed doubt regarding the nullity of an impermissible reservation, it stressed in its objection to the Maldives' reservation to the Convention on the Elimination of All Forms of Discrimination against Women:

> Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto.[101]

(23) State practice is extensive — and essentially homogeneous — and is not limited to a few specific States. Recent objections by Finland,[102] Sweden;[103] other States, such as Belgium,[104] Spain,[105] the Netherlands,[106] the Czech Republic[107] and Slovakia;[108] and even

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[100] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 9, available from http://treaties.un.org/, *Status of Treaties.*

[101] *Ibid.*, chap. IV, 8.

[102] See Finland's objections to the reservation to the International Convention on the Elimination of All Forms of Racial Discrimination made by Yemen (*Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 2, available from http://treaties.un.org/, *Status of Treaties*); the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by Kuwait, Malaysia, Lesotho, Singapore and Pakistan (*ibid.*, chap. IV, 8); the reservations to the Convention on the Rights of the Child made by Malaysia, Qatar, Singapore and Oman *(ibid.*, chap. IV, 11); and the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI, 2).

[103] See Sweden's objection to the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (*ibid.*, chap. XXVI, 2). Sweden specified, however, that "this objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefiting from its reservation".

[104] See Belgium's objection to the reservation to the Convention on the Rights of the Child made by Singapore: "The Government considers that paragraph 2 of the declarations, concerning articles 19 and 37 of the Convention and paragraph 3 of the reservations, concerning the constitutional limits upon the acceptance of the obligations contained in the Convention, are contrary to the purposes of the Convention and are consequently without effect under international law" (*ibid.*, chap. IV, 9).

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

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

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

[108] See Slovakia's objection to the reservation to the International Covenant on Economic, Social and

some international organizations[109] quite often include a statement that the impermissible reservation is devoid of legal force. And it is highly revealing that in principle, this practice of making objections with "super-maximum" effect[110] elicits no opposition on principle from other contracting States or contracting organizations — including the authors of the reservations in question.

(24) The absence of any legal effect as a direct consequence of the nullity of an impermissible reservation — which, moreover, arises directly from the very concept of nullity[111] — was also affirmed by the Human Rights Committee in its general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant. The Committee considered that one aspect of the "normal consequence" of the impermissibility of a reservation was that its author did not have the benefit of the reservation.[112] It is significant that, despite the active response to general comment No. 24 by the United States of America, France and the United Kingdom, none of the three States challenged this position.[113]

(25) The Committee subsequently confirmed this conclusion from its general comment No. 24 during its consideration of the *Rawle Kennedy v. Trinidad and Tobago* communication. In its decision on the admissibility of the communication,[114] the Committee

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

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

[110] See the commentary to guideline 4.3.7, paras. (1) to (4), and the eighth report on reservations to treaties (2003), (A/CN.4/535/Add.1), para. 96. See also Bruno Simma, footnote 55 above, pp. 667–668.

[111] See para. (5) of the commentary to guideline 4.5.1 above.

[112] Report of the Human Rights Committee, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/40), vol. I, pp. 151–152, para. 18. See also Françoise Hampson's final working paper on reservations to human rights treaties (E/CN.4/Sub.2/2004/42), para. 57 ("A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty") and para. 59 of her expanded working paper on the same topic (see footnote 94 above): "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty". The Human Rights Committee combined in a single statement the idea that an incompatible reservation cannot produce effects (which is not contested) and the question of the effect of that incompatibility on the author's status as a party (which has been widely debated; see paras. 435–481 below).

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

[114] Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999).

ruled on the permissibility of the reservation formulated by the State party on 26 May 1998 upon reacceding to the First Optional Protocol to the International Covenant on Civil and Political Rights, having denounced the Optional Protocol on the same day. Through its reservation, Trinidad and Tobago sought to exclude the Committee's jurisdiction in cases involving prisoners under sentence of death.[115] On the basis of the discriminatory nature of the reservation, the Committee considered that the reservation "cannot be deemed compatible with the object and purpose of the Optional Protocol".[116] The Committee concluded,

> "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol."[117]

In other words, according to the Committee, Trinidad and Tobago's reservation did not exclude application of the Optional Protocol in respect of the applicant, who was a prisoner under sentence of death. It therefore produced neither the legal effect of an established reservation,[118] nor that of a valid reservation to which an objection has been made.[119] It produced no effect.

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

> Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention.[120]

(27) The European Court of Human Rights took this approach in the principle invoked in *Weber v. Switzerland*,[121] *Belilos v. Switzerland*[122] and *Loizidou v. Turkey*.[123] In all three cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and Turkey, applied the European Convention on Human Rights as if the reservations had not been formulated and, consequently, had produced no legal effect.

(28) In light of this general agreement, the Commission considers that the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.

(29) According to one, isolated view expressed within the Commission, the principle is laid out in too rigid a fashion: the nullity of invalid reservations and their lack of effects

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

[116] *Ibid.*, para. 6.7.

[117] *Ibid.*

[118] See the guidelines in section 4.2 of the Guide to Practice.

[119] See the guidelines in section 4.3 of the Guide to Practice.

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

[121] *Weber v. Switzerland,* 22 May 1990, Series A, No. 177, paras. 36–38.

[122] *Belilos v. Switzerland*, 29 April 1988, Series A, No. 132, para. 60.

[123] *Loizidou v. Turkey*, 23 March 1995, Series A, No. 310, paras. 89–98.

could be assessed only if the question of validity was — and could be — submitted to an impartial third party with decision-making power. Absent such a mechanism, it was for each State to decide for itself, and the nullity of a reservation would be revealed only in relation to States that considered it null and void. It was obviously correct (and inherent in the international legal system) that as long as an impartial third party with decision-making authority had not taken a position on the matter, the question of the validity of a reservation remained an open one (this, in fact, is what makes the reservations dialogue something of interest). However, the Commission considers that this position inevitably entails a generalized relativism that should not be encouraged: the substance of the applicable law (which the Guide to Practice endeavours to enunciate) must not be confused with the settlement of disputes that arise when it is put into effect. A reservation is or is not valid, irrespective of the individual positions taken by States or international organizations in this connection and, accordingly, its nullity is not a subjective question or a relative matter, but can and must be determined objectively, although this does not mean that the reactions of other parties are devoid of interest – but this is the subject of the guidelines in section 4.3 of the Guide to Practice.

4.5.2 [4.5.3] Status of the author of an invalid reservation in relation to the treaty

When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- The wording of the reservation
- Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
- Subsequent conduct of the author of the reservation
- Reactions of other contracting States and contracting organizations
- The provision or provisions to which the reservation relates
- The object and purpose of the treaty

Commentary

(1) Guideline 4.5.1 does not resolve all the issues concerning the effects of the nullity of an impermissible reservation. While it is established that such a reservation cannot produce legal effects, it is essential to answer the question of whether its author becomes a contracting party without the benefit of its reservation, or whether the nullity of its reservation also affects its consent to be bound by the treaty. Both approaches are consistent with the principle that the reservation has no legal effect: either the treaty enters into force for the author of the reservation without the latter benefiting from its invalid reservation, which thus does not have the intended effects; or the treaty does not enter into force for the author of the reservation and, obviously, the reservation also does not produce effects since no treaty relations exist.[124] Guideline 4.5.2 establishes the principle of finding a middle ground between these apparently irreconcilable positions, based on the (simple –

[124] See D.W. Greig, footnote 6 above, p. 52; and Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *American Journal of International Law*, vol. 96, 2006, p. 531.

"rebuttable") presumption that the author of the reservation is bound by the treaty without claiming to have the benefit thereof, unless the author has expressed the opposite intention.

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

(3) This approach is confirmed by the practice, followed, *inter alia*, by the Nordic States,[125] of formulating what have come to be called objections with "super-maximum" effect (or intent),[126] along the lines of Sweden's objection to the reservation to the Convention on the Rights of Persons with Disabilities formulated by El Salvador:

> The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.[127]

(4) Such objections, of which the Nordic States — though not the originators of this practice[128] — make frequent use, have been appearing for some 15 years and are used more and more often, especially by the European States. Apart from Sweden, Austria,[129] the Czech Republic[130] and the Netherlands[131] have also sought to give super-maximum effect to their objections to the reservations of El Salvador and Thailand to the 2006 Convention on the Rights of Persons with Disabilities.

(5) More recently, in early 2010, several European States objected to the reservation formulated by the United States of America upon expressing its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. No fewer than five of these objections contain wording intended to

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[125] Concerning this practice, see, *inter alia*, Klabbers (footnote 84 above), pp. 183–186.

[126] See footnote 110 above.

[127] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 15, available from http://treaties.un.org, *Status of Treaties*. See also Sweden's objection to the reservation to the same Convention formulated by Thailand (*ibid.*).

[128] One of the earliest objections that, while not explicit in this regard, can be termed an objection with "super-maximum" effect was made by Portugal in response to the reservation to the Convention on the Elimination of All Forms of Discrimination against Women made by the Maldives (footnote 74 above).

[129] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 15, available from http://treaties.un.org, *Status of Treaties*. In its objection, the Austrian Government stressed that "[t]his objection, however, does not preclude the entry into force, *in its entirety*, of the Convention between Austria and El Salvador" (emphasis added).

[130] *Ibid.*

[131] *Ibid.* (chap. IV, 15). The Government of the Netherlands explained that "it is the understanding of the Government of the Kingdom of the Netherlands that the reservation of the Government of the Republic of El Salvador does not exclude or modify the legal effect of the provisions of the Convention in their application to the Republic of El Salvador".

produce so-called "super-maximum" effect.[132] Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia and Spain included in their objections to Qatar's reservation to the Convention on the Elimination of All Forms of Discrimination against Women the proviso that those objections did not preclude the entry into force of the Convention as between those States and the reserving State, without the latter benefiting from the reservation.[133] This largely European practice is undoubtedly influenced by the 1999 recommendation of the Council of Europe on responses to inadmissible reservations to international treaties, which includes a number of model response clauses for use by member States;[134] the above-mentioned objections closely mirror these clauses.

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

(7) In its landmark judgment in *Belilos v. Switzerland*,[135] the European Court of Human Rights, sitting in plenary session, not only reclassified the interpretative declaration formulated by the Swiss Government, but also had to decide whether the reservation (incorrectly referred to as an interpretative declaration) was valid. Having concluded that Switzerland's reservation was invalid, particularly in relation to the conditions set out in article 64[136] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the Court added:

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

[133] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 8, available from http://treaties.un.org, *Status of Treaties*.

[134] Council of Europe, Committee of Ministers, recommendation No. R(99)13, 18 May 1999.

[135] Application No. 10328/83, judgment of 29 April 1988, Series A, No. 132.

[136] Now article 57.

> "At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."[137]

In its judgment in *Weber v. Switzerland*,[138] a chamber of the Court was called upon to decide whether article 6, paragraph 1, of the Convention was applicable, whether it had been violated by the respondent State and whether Switzerland's reservation in respect of that provision — which, according to the respondent State, was separate from its interpretative declaration — was applicable. In this connection, the Swiss Government claimed that "Switzerland's reservation in respect of Article 6 § 1 (art. 6-1) (…) would in any case prevent Mr. Weber from relying on non-compliance with the principle that proceedings before cantonal courts and judges should be public."[139] The Court went on to consider the validity of Switzerland's reservation and, more specifically, whether it satisfied the requirements of article 64 of the Convention. It noted that the reservation:

> does not fulfil one of them, as the Swiss Government did not append "a brief statement of the law — or laws — concerned" to it. The requirement of paragraph 2 of Article 64 (art. 64-2), however, "both constitutes an evidential factor and contributes to legal certainty"; its purpose is to "provide a guarantee — in particular for the other Contracting Parties and the Convention institutions — that a reservation does not go beyond the provisions expressly excluded by the State concerned" (see the *Belilos* judgment previously cited, Series A No. 132, pp. 27–28, § 59). Disregarding it is a breach not of "a purely formal requirement" but of "a condition of substance" (*ibid.*). The material reservation by Switzerland must accordingly be regarded as invalid.[140]

In contrast to its practice in the *Belilos* judgment, the Court did not go on to explore whether the reservation's nullity had consequences for Switzerland's consent to be bound by the Convention. It simply confined itself to considering whether article 6, paragraph 1, of the Convention had in fact been violated, and concluded that "there ha[d] therefore been a breach of Article 6 § 1 (art. 6-1)".[141] Thus, without saying so explicitly, the Court considered that Switzerland remained bound by the European Convention, despite the nullity of its reservation, and that it could not benefit from the reservation; that being the case, article 6, paragraph 1, was enforceable against it.

(8) In its judgment on preliminary objections in *Loizidou v. Turkey*,[142] a chamber of the European Court took the opportunity to supplement and considerably clarify its jurisprudence. While in this case the issue of validity arose in respect not of a reservation to a provision of the Convention, but of a "reservation" to the optional declaration whereby Turkey recognized the compulsory jurisdiction of the Court pursuant to articles 25 and 46 of the Convention, the lessons of the judgment can easily be transposed to the problem of reservations. Having found that the restrictions *ratione loci* attached to Turkey's declarations of acceptance of the Court's jurisdiction were "invalid", the Strasbourg judges pursued their line of reasoning by considering "whether, as a consequence of this finding, the validity of the acceptances themselves may be called into question".[143] The Court noted:

> 93. In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the

[137] Application No. 10328/83, para. 60.
[138] Application No. 11034/84, judgment of 22 May 1990, Series A, No. 177.
[139] *Ibid.*, para. 36.
[140] *Ibid.*, para. 38.
[141] *Ibid.*, para. 40.
[142] Application No. 15318/89, judgment of 23 March 1995, Series A, No. 310.
[143] *Ibid.*, para. 89.

protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".

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

95. The Court does not consider that the issue of the severability of the invalid parts of Turkey's declarations can be decided by reference to the statements of her representatives expressed subsequent to the filing of the declarations either (as regards the declaration under Article 25) (art. 25) before the Committee of Ministers and the Commission or (as regards both Articles 25 and 46) (art. 25, art. 46) in the hearing before the Court. In this connection, it observes that the respondent Government must have been aware, in view of the consistent practice of Contracting Parties under Articles 25 and 46 (art. 25, art. 46) to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs. It is of relevance to note, in this context, that the Commission had already expressed the opinion to the Court in its pleadings in the *Belgian Linguistic* (Preliminary objection) and *Kjeldsen, Busk Madsen and Pedersen v. Denmark* cases (judgments of 9 February 1967 and 7 December 1976, Series A Nos. 5 and 23 respectively) that Article 46 (art. 46) did not permit any restrictions in respect of recognition of the Court's jurisdiction (see respectively, the second memorial of the Commission of 14 July 1966, Series B No. 3, vol. I, p. 432, and the memorial of the Commission (Preliminary objection) of 26 January 1976, Series B no. 21, p. 119). The subsequent reaction of various Contracting Parties to the Turkish declarations (…) lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic — albeit qualified — intention to accept the competence of the Commission and Court.

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

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

> 98. It follows that the declarations of 28 January 1987 and 22 January 1990 under Articles 25 and 46 (art. 25, art. 46) contain valid acceptances of the competence of the Commission and Court.[144]

(9) In its judgment on preliminary objections in *Hilaire v. Trinidad and Tobago*,[145] the Inter-American Court of Human Rights likewise noted that, in light of the object and purpose of the American Convention on Human Rights, Trinidad and Tobago could not benefit from the limitation included in its instrument of acceptance of the Court's jurisdiction but was still bound by its acceptance of that compulsory jurisdiction.[146]

(10) With the individual communication, *Rawle Kennedy v. Trinidad and Tobago*, a comparable problem concerning a reservation formulated by the State party upon reacceding to the First Optional Protocol to the International Covenant on Civil and Political Rights was brought before the Human Rights Committee. Having found the reservation thus formulated to be impermissible by reason of its discriminatory nature, the Committee merely noted, "The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol".[147] In other words, Trinidad and Tobago was still bound by the Protocol without benefit of the reservation.

(11) This decision of the Human Rights Committee is consistent with its conclusions in general comment No. 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,[148] in which the Committee affirmed that:

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.[149]

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

(13) On the other hand, in its observations on the Human Rights Committee's general comment No. 24, France stated categorically

> that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.[150]

(14) This view, which reflects the opposite answer to the question of whether the author of an impermissible reservation becomes a contracting party, is based on the principle that the nullity of the reservation affects the whole of the instrument of consent to be bound by

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144 *Ibid.*, paras. 93–98.

145 Judgment of 1 September 2001, Series C, No. 80.

146 *Ibid.*, para. 98.

147 Communication No. 845/1999, decision of 2 November 1999 (CCPR/C/67/D/845/1999), para. 6.7. See also para. (25) of the commentary to guideline 4.5.1 above.

148 *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), vol. I, annex V, pp. 119–125.

149 *Ibid.*, p. 124, para. 18.

150 Report of the Human Rights Committee, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 40* (A/51/40), vol. I, p. 106, para. 13.

the treaty. In a 1951 advisory opinion, the International Court of Justice answered, in response to the General Assembly's question I,

> that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; *otherwise, that State cannot be regarded as being a party to the Convention.*[151]

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

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

> 191. If the treaty forbids any reservation, the Secretary-General will refuse to accept the deposit of the instrument. The Secretary-General will call the attention of the State concerned to the difficulty and shall not issue any notification concerning the instrument to any other State concerned (…).
>
> 192. If the prohibition is to only specific articles, or conversely reservations are authorized only in respect of specific provisions, the Secretary-General shall act, *mutatis mutandis*, in a similar fashion if the reservations are not in keeping with the relevant provisions of the treaty. (…)
>
> 193. However, only if there is *prima facie* no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit. Such would evidently be the case if the statement, for example, read "State XXX shall not apply article YYY", when the treaty prohibited all reservations or reservations to article YYY.[152]

(17) There is, however, no need to distinguish between reservations that are prohibited by the treaty and reservations that are invalid for other reasons.[153]

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

> the Government of the State of Israel regards the reservation entered by the Government of Burundi as incompatible with the object and purpose of the

[151] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 29 (emphasis added).

[152] *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* (ST/LEG/7/Rev.1), p. 57, paras. 191–193.

[153] See guideline 3.3 (Consequences of the non-permissibility of a reservation) and the commentary thereto (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 302–308).

> Convention and is unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn,[154]

the other two States that objected to Burundi's reservation did not include such a statement in their objections.[155]

(19) The Government of the Republic of China, which ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1951,[156] stated that it

> ... objects to all the identical reservations made at the time of signature or ratification or accession to the Convention by Bulgaria, Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics. The Chinese Government considers the above-mentioned reservations as incompatible with the object and purpose of the Convention and, therefore, by virtue of the Advisory Opinion of the International Court of Justice of 28 May 1951, would not regard the above-mentioned States as being Parties to the Convention.[157]

In spite of the large number of similar reservations, only the Government of the Netherlands formulated a comparable objection, in 1966.[158]

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

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

[156] This notification was made prior to the adoption, on 25 October 1971, of General Assembly resolution 2758 (XXVI), whereby the Assembly decided "to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations"; the Government of the People's Republic of China declared, upon ratifying the 1948 Genocide Convention on 18 April 1983, that "The ratification to the said Convention by the Taiwan local authorities on 19 July 1951 in the name of China is illegal and therefore null and void" (*ibid.*, chap. IV.1).

[157] *Ibid.*

[158] The objection by the Netherlands reads: "The Government of the Kingdom of the Netherlands declares that it considers the reservations made by Albania, Algeria, Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, India, Morocco, Poland, Romania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics in respect of article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature at Paris on 9 December 1948, to be incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands therefore does not deem any State which has made or

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

> States often object to a reservation that they consider incompatible with the object and purpose of the treaty, but without opposing the entry into force of the treaty between themselves and the author of the reservation. The Commission would be particularly interested in Governments' comments on this practice. It would like to know, in particular, what effects the authors expect such objections to have, and how, in Governments' view, this practice accords with article 19 (c) of the 1969 Vienna Convention on the Law of Treaties.[159]

The views expressed by several delegations in the Sixth Committee clearly show that there is no agreement on the approach to the thorny question of the validity of consent to be bound by the treaty in the case of an invalid reservation. Several States[160] have maintained that this practice was "paradoxical" and that, in any event, the author of the objection "could not simply ignore the reservation and act as if it had never been formulated".[161] The French delegation stressed that

> such an objection would create the so-called "super-maximum effect", since it would allow for the application of the treaty as a whole without regard to the fact that a reservation had been entered. That would compromise the basic principle of consensus underlying the law of treaties.[162]

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

> The practice of severing reservations incompatible with the object and purpose of a treaty accorded well with article 19, which made it clear that such reservations were not expected to be included in the treaty relations between States. While one alternative in objecting to impermissible reservations was to exclude bilateral treaty relations altogether, the option of severability secured bilateral treaty relations and opened up possibilities of dialogue within the treaty regime.[163]

(21) However, it should be noted that those who share this point of view have made the entry into force of the treaty conditional on the will of the author of the reservation: "However, account must be taken of the will of the reserving State regarding the relationship between the ratification of a treaty and the reservation."[164]

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which will make such reservation a party to the Convention" (*ibid.*).

159 *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 29.

160 See A/C.6/60/SR.14, paras. 3 (United Kingdom) and 72 (France); and A/C.6/60/SR.16, paras. 20 (Italy) and 44 (Portugal).

161 A/C.6/60/SR.14, para. 72 (France).

162 *Ibid.*

163 A/C.6/60/SR.14, para. 23 (Sweden). See also A/C.6/60/SR.17, para. 24 (Spain); A/C.6/60/SR.18, para. 86 (Malaysia); and A/C.6/60/SR.19, para. 39 (Greece).

164 A/C.6/60/SR.14, para. 23 (Sweden). See also the position of the United Kingdom (*ibid.*, para. 4): "On the related issue of the 'super-maximum effect' of an objection, consisting in the determination not only that the reservation objected to was not valid but also that, as a result, the treaty as a whole

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

(23) In the context of the specific but comparable issue of reservations to the optional clause concerning the compulsory jurisdiction of the International Court of Justice in article 36, paragraph 2, of the Statute of the Court, Judge Lauterpacht, in his dissenting opinion to the Court's judgment on the preliminary objections in the *Interhandel* case, stated:

> If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.[165]

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

(24) In its judgment in the *Belilos* case, the European Court of Human Rights paid particular attention to Switzerland's position with regard to the European Convention. It expressly noted: "At the same time, Switzerland was, and regarded itself as, bound by the Convention irrespective of validity of the declaration."[166] Thus, the Court clearly took into consideration the fact that Switzerland itself — the author of the invalid "reservation" — considered itself to be bound by the treaty despite the nullity of this reservation and had behaved accordingly.

(25) In the *Loizidou* case, the European Court of Human Rights also based its judgment, if not on the will of the Turkish Government — which had maintained during the proceedings before the Court that "if the restrictions attached to the Articles 25 and 46 (art. 25, art. 46) declarations were not recognized to be valid, as a whole, the declarations were to be considered null and void in their entirety"[167] — then on the fact that Turkey had knowingly run the risk that the restrictions resulting from its reservation would be declared invalid:

> That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.[168]

(26) The "Strasbourg approach"[169] thus consists of acting on the reserving State's will to be bound by the treaty even if its reservation is invalid.[170] In so doing, the Court did not,

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applied *ipso facto* in the relations between the two States, his delegation considered that that could occur only in the most exceptional circumstances, for example, if the State making the reservation could be said to have accepted or acquiesced in such an effect."

[165] *Interhandel (Switzerland v. United States of America)*, dissenting opinion of Sir Hersch Lauterpacht, *I.C.J. Reports 1959*, p. 117.

[166] Judgment cited above, footnote 121.

[167] See footnote 123 above, para. 90.

[168] *Ibid.*, para. 95.

[169] B. Simma, *op. cit*., footnote 55 above, p. 670.

however, rely only on the express declarations of the State in question — as, for example, it did in the *Belilos* case[171] — it also sought to "reconstruct" the will of the State. As William A. Schabas wrote:

> The European Court did not set aside the test of intention in determining whether a reservation is severable. Rather, it appears to highlight the difficulty in identifying such intention and expresses a disregard for such factors as formal declarations by the State.[172]

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

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

> In addressing this issue the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in Article 19 (art. 19), "to ensure the observance of the engagements undertaken by the High Contracting Parties".[173]

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

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

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[170] See also footnote 96 above. According to G. Gaja, "*Una soluzione alternativa alla quale si può giungere nella ricostruzione della volontà dello Stato autore della riserva è che tale Stato abbia inteso vincolarsi in base al trattato anche nel caso in cui la riserva fosse considerata inammissibile e quindi senza il beneficio della riserva*" [An alternative conclusion that one might reach in reconstructing the will of the reserving State is that the State in question must have purported to be bound by the treaty even if the reservation was considered inadmissible, i.e., without the benefit of the reservation] (*op. cit.*, footnote 55 above, p. 358).

[171] On this case and its impact, see Roberto Baratta, *Gli effetti delle riserve ai trattati* (Milan, Antonio Giuffrè, 1999), pp. 160–163; Henry J. Bourguignon, "The Belilos Case: New Light on Reservations to Multilateral Treaties", *Virginia Journal of International Law*, vol. 29 (1989), pp. 347–386; 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. 69–116; Susan Marks, "Reservations unhinged: the Belilos case before the European Court of Human Rights", *International Comparative Law Quarterly*, vol. 39 (1990), pp. 300–327; and Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)", *Revue générale de droit international public*, vol. 93, No. 2 (1989), pp. 272–314.

[172] William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?", *Brooklyn Journal of International Law*, vol. 21 (1995), p. 322.

[173] Footnote 123 above, para. 93.

> 94. The American Convention and the other human rights treaties are inspired by a set of higher common values (centred around the protection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties ...[174]

(29) The position expressed by the Human Rights Committee in its general comment No. 24 is even more categorical.[175] In fact, the Committee makes no connection between the entry into force of the treaty, despite the nullity of the invalid reservation, and the author's wishes in that regard. It simply states that the "normal consequence"[176] is the entry into force of the treaty for the author of the reservation without benefit of the reservation. However, as noted above,[177] this "normal" consequence, which the Committee apparently views as somewhat automatic, does not exclude (and, conversely, suggests) the possibility that the invalid reservation may produce other "abnormal" consequences. But the Committee is silent on both the question of what these other consequences might be, and the question of how and by what the "normal" consequence and the potential "abnormal" consequence are triggered.

(30) In any event, the position taken by the human rights bodies has become considerably more nuanced in recent years. For example, at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, it was noted:

> In a meeting with ILC on 31 July 2003, HRC confirmed that the Committee continued to endorse general comment No. 24, and several members of the Committee stressed that there was growing support for the severability approach, but that there was no automatic conclusion of severability for inadmissible reservations but only a presumption.[178]

In 2006, the working group on reservations, which was established to examine the practice of human rights treaty bodies, in that regard, noted that there were several potential consequences of a reservation that had been ruled invalid. It ultimately proposed the following recommendation No. 7:

> ... *The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation.* This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.[179]

According to the revised recommendation No. 7 of 2006 submitted by the working group on reservations established to examine the practice of human rights treaty bodies,[180] which the sixth inter-committee meeting of the human rights treaty bodies endorsed[181] in 2007:

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[174] Judgment of 1 September 2001 (preliminary objections), Series C, No. 80, paras. 93–94.

[175] In her expanded working paper, Hampson states: "A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty. The result is the application of the treaty without the reservation, whether that is called 'severance' or disguised by the use of some other phrase, such as non-application" (see footnote 94 above, para. 59).

[176] See footnote 113 above.

[177] See above paragraph (11) of the commentary to this guideline.

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

[179] HRI/MC/2006/5, para. 16 (emphasis added).

[180] See HRI/MC/2007/5, pp. 6–8.

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

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

(32) The phrase "the reserving State or the reserving international organization is considered a contracting State or contracting organization" was preferred by the Commission over that initially proposed by the Special Rapporteur, which provided that "the treaty applies to the reserving State or to the reserving international organization, not withstanding the reservation",[182] in order to indicate clearly that the guideline states a mere presumption and does not have the incontrovertible nature of a rule. The word "unless" has the same function.

(33) There might, however, be doubts as to the nature of the presumption; intellectually, it might be presumed either that there was the intention that the treaty should enter into force or, the reverse, that the author of the reservation did not intend for it to enter into force.

(34) A negative presumption — refusing to consider the author of the reservation to be a contracting State or contracting organization until an intention to the contrary has been established — might, at first glance, appear to reflect better the principle of consent according to which, in the words of the International Court of Justice, "in its treaty relations a State cannot be bound without its consent".[183] From this point of view, a State or international organization that has formulated a reservation — even though it is invalid — has, in fact, expressed its disagreement with the provision or provisions which the reservation purports to modify or the legal effect of which it purports to exclude. In its observations on general comment No. 24, the United Kingdom states that it is "hardly feasible to try to hold a State to obligations under the Covenant which it self-evidently has not 'expressly recognized' but rather has indicated its express unwillingness to accept".[184] From that point of view, no agreement to the contrary can be noted or presumed unless the State or organization in question consents, or at least acquiesces, to be bound by the provision or provisions without benefit of its reservation.

(35) The reverse — positive — presumption has, however, several advantages which, regardless of any consideration of desirability, argue in its favour even though it is clear that this rule is not established in the Vienna Conventions[185] or in international customary

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[181] Report of the sixth inter-committee meeting of human rights treaty bodies (A/62/224), Annex, para. 48 (v).

[182] Fifteenth report on reservations to treaties (A/CN.4/624/Add.1), guideline 4.5.3, pp. 39–40.

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

[184] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 133, para. 14.

[185] As noted above, the Vienna Conventions do not address the issue of impermissible reservations; see

law.[186] However, the decisions of the human rights courts, the positions taken by the human rights treaty bodies and the increasing body of State practice in this area should not be ignored.

(36) First and foremost, it should be borne in mind that the author of the reservation, by definition, wished to become a contracting party to the treaty in question. The reservation is formulated when the State or international organization expresses its consent to be bound by the treaty, thereby conveying its intention to enter the privileged circle of parties and committing itself to implementation of the treaty. The reservation certainly plays a role in this process; for the purposes of establishing the presumption, however, its importance should not be overestimated. As Ryan Goodman has stated: "The package of reservations a State submits reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound."[187]

(37) Furthermore, and perhaps most importantly, it is certainly wiser to presume that the author of the reservation is part of the circle of contracting States or contracting organizations in order to resolve the problems associated with the nullity of its reservation in the context of this privileged circle. In that regard, it must not be forgotten that, as the Commission has noted in its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties,[188]

> in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.[189]

To that end, as stressed at the fourth inter-committee meeting of the human rights treaty bodies and the seventeenth meeting of chairpersons of these bodies, "human rights treaty bodies" — or any other mechanism established by the treaty or the parties to the treaty as a whole — "should be encouraged to continue their current practice of entering into a dialogue with reserving States, with a view to effecting such changes in the incompatible reservation as to make it compatible with the treaty".[190] This goal may more readily be achieved if the reserving State or reserving international organization is deemed to be a party to the treaty.

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

(39) In light of these considerations, the Commission supports the idea of a relative and rebuttable presumption, according to which the treaty would apply to a State or international organization that is the author of an invalid reservation, not withstanding that reservation, in the absence of a contrary intention on the part of the author. In other words, if this basic condition is met (absence of a contrary intention on the part of the author of the

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paras. ... – ... above.

[186] See, *inter alia*, Roberto Baratta, "Should Invalid Reservations to Human Rights Treaties Be Disregarded?", *European Journal of International Law*, vol. 11, No. 2 (2000), pp. 419–420.

[187] "Human Rights Treaties, Invalid Reservations, and State Consent", *American Journal of International Law*, vol. 96, 2002, p. 537.

[188] *Yearbook ... 1997*, vol. II, Part Two, pp. 56–57, para. 157.

[189] *Ibid.*, p. 57 (para. 10 of the preliminary conclusions).

[190] HRI/MC/2005/5, para. 42.

reservation), the treaty is presumed to have entered into force for the author — provided that the treaty has, in fact, entered into force in respect of the contracting States and contracting organizations — and the reservation has no legal effect on the content of the treaty,[191] which applies in its entirety.

(40) The expression "unless a contrary intention of the said State or organization can be identified", which appears at the end of the first paragraph of guideline 4.5.2, reflects this positive presumption retained by the Commission subject to the intention of the reserving State or reserving international organization. If a contrary intention can be identified, the presumption is overturned.[192]

(41) It was proposed to accord even greater weight to the will of the author of the reservation by including a recommendation in guideline 4.5.2 that advised easing the conditions for the withdrawal from a treaty in the event a reservation was declared invalid. Although certain members of the Commission found that proposal attractive, the Commission rejected it. Granted, the Vienna Conventions do not indicate what rules to follow in the case of invalid reservations; but they do lay down precise rules concerning withdrawal from a treaty, and such a recommendation (which had no precedent on which it could be based) would exceed the scope of the "law of reservations" and would be impossible to reconcile with what was prescribed in articles 42, paragraph 2, 54 and 56 of the Vienna Conventions.

(42) In practice, determining the intention of the author of an invalid reservation is a challenging process. It is not easy to establish what led a State or an international organization to express its consent to be bound by the treaty, on the one hand, and to attach a reservation to that expression of consent, on the other, since "in international society at the present stage, the State alone could know the exact role of its reservation to its consent".[193] Since the basic presumption is rebuttable, however, it is vital to establish whether the author of the reservation would knowingly have ratified the treaty without the reservation or whether, on the contrary, it would have refrained from doing so. Several factors come into play.

(43) First, the text of the reservation itself may well contain elements that provide information about its author's intention in the event that the reservation is invalid. At least, that is the case when reasons for the reservation are given as recommended in guideline 2.1.9 of the Guide to Practice.[194] The reasons given for formulating a reservation, in addition to clarifying its meaning, may also make it possible to determine whether the reservation is deemed to be an essential condition for the author's consent to be bound by the treaty. Any declaration made by the author of the reservation upon signing, ratifying or acceding to a treaty or making a notification of its succession thereto may also provide an indication. Any declaration made subsequently, particularly declarations that the author of the reservation may be required to make in the context of judicial proceedings concerning

[191] See paras. (14) to (17) of the commentary to guideline 4.5.1 above.

[192] In English, the word "identified" was preferred over that of "established", which seemed too rigid to certain English-speaking members of the Commission. In addition, "established" seemed to reflect a greater degree of clarity than that provided by the non-exhaustive list of elements in the second paragraph.

[193] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 83; *Yearbook ... 1997*, vol. II, Part Two, p. 49.

[194] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184–189.

the validity, and the effects of the invalidity, of its reservation, should, however, be treated with caution.[195]

(44) In line with the approach taken by the European Court of Human Rights in its judgment in the *Belilos* case,[196] it is also advisable to take into consideration the author's subsequent attitude with respect to the treaty. The representatives of Switzerland, by their actions and their statements before the Court, left no doubt that Switzerland would regard itself as bound by the European Convention even in the event that its interpretative declaration was deemed invalid. Moreover, as Schabas pointed out in relation to the reservations to the 1966 International Covenant on Civil and Political Rights made by the United States of America:

> Certain aspects of the U.S. practice lend weight to the argument that its general intent is to be bound by the Covenant, whatever the outcome of litigation concerning the legality of the reservation. It is useful to recall that Washington fully participated in the drafting of the American Convention whose provisions are very similar to articles 6 and 7 of the Covenant and were in fact inspired by them. … Although briefly questioning the juvenile death penalty and the exclusion of political crimes, [the U.S. representative] did not object in substance to the provisions dealing with the death penalty or torture. The United States signed the American Convention on June 1, 1977 without reservation.[197]

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

(45) The reactions of other States and international organizations must also be taken into account. Although these reactions obviously cannot, in themselves, produce legal effects by neutralizing the nullity of the reservation, they can facilitate an assessment of the author's intention or, more accurately, the risk that it may intentionally have run in formulating an invalid reservation. This is particularly well illustrated by the European Court of Human Rights in the *Loizidou* case; the Court, citing case law established before Turkey formulated its reservation, as well as the objections made by several States parties to the Convention,[198] concluded that:

> The subsequent reaction of various Contracting Parties to the Turkish declarations ... lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.[199]

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[195] See in this regard *Loizidou v. Turkey*, application No. 15318/89, judgment of 23 March 1995, Series A, No. 310, para. 95.

[196] See paras. (24) to (26) above.

[197] W.A. Schabas, *op. cit.*, footnote 172, p. 322 (footnotes omitted).

[198] Application No. 15318/89, judgment of 23 March 1995, Series A, No. 310, paras. 18–24.

[199] *Ibid*., para. 95.

(46) In addition to the actual text of the reservation and the reasons given for its formulation, as well as these circumstantial and contextual elements, the content and context of the provision or provisions of the treaty to which the reservation relates, on the one hand, and the object and purpose of the treaty, on the other, must also be taken into account. As mentioned above, the European Court of Human Rights and the Inter-American Court of Human Rights have paid considerable attention to the "special character" of the treaty in question;[200] there is no reason to limit these considerations to human rights treaties, which do not constitute a specific category of treaty for the purposes of applying rules relating to reservations[201] and are not the only treaties to establish "higher common values".

(47) The combination of these criteria — and of others, where appropriate — should serve as a guide to the authorities required to issue a ruling on the consequences of the nullity of an invalid reservation, given that this list is by no means exhaustive and that all elements that are likely to identify the intention of the author of the reservation must be taken into consideration. A reference to the non-exhaustive nature of this list appears twice in the chapeau of the second paragraph of guideline 4.5.2: in the expression "all factors that may be relevant to that end" and the term "including". In turn, the phrase "to that end" underscores the fact that only factors relevant to identifying the intention of the author of the reservation are to be taken into consideration.

(48) The order in which the various factors are listed reflects the logical order in which they are taken into consideration but has no particular significance with regard to their relative importance; the latter depends on the specific circumstances of each situation. The factors contained in the first four bullet points relate directly to the reservation and to the attitude towards the reservation of the State or international organization concerned; the last two factors, which are more general in nature, relate to the subject of the reservation.

(49) That said, the Commission is of the view that the establishment of such a presumption should not be taken as approval of what are now generally called objections with "super-maximum" effect. Certainly, the result of the presumption may ultimately be the same as the intended result of such objections. But whereas an objection with "super-maximum" effect apparently purports to require that the author of the reservation should be bound by the treaty without the benefit of its reservation simply because the reservation is invalid, the presumption embodied in guideline 4.5.2 is based on the intention of the author of the reservation. Although this intention may be hypothetical if not expressly indicated by the author, it is understood that nothing prevents the author from making its true intention known to the other contracting parties. Thus, the requirement that the treaty must be implemented in its entirety would derive not from a subjective assessment by another contracting party, but solely from the nullity of the reservation and the intention of its author. An objection, whether simple or with "super-maximum" effect, cannot produce such an effect. "No State can be bound by contractual obligations it does not consider

[200] See para. (27) above.

[201] See the second report on reservations to treaties (A/CN.4/477 and Add.1), paras. 55–260; *Yearbook ... 1996*, vol. II, Part One, pp. 52–83; and the Commission's Preliminary Conclusions on reservations to normative multilateral treaties including human rights treaties (*Yearbook ... 1997*, vol. II, Part Two, para. 157, pp. 56–57). For that reason, the Commission did not, despite a contrary view, expressly mention the nature of the treaty in question as one of the factors listed in the second paragraph of guidelines 4.5.2 to be taken into consideration in identifying the intention of the author of the reservation – especially since it was observed that that criterion was not easy to distinguish from the object and purpose of the treaty.

suitable",[202] neither the objecting State nor the reserving State, although such considerations clearly do not mean that the practice has no significance.[203]

(50) Draft guideline 4.5.2 intentionally refrains from establishing the date on which the treaty enters into force in such a situation. In most cases, this is subject to specific conditions established in the treaty itself.[204] The specific effects, including the date on which the treaty enters into force for the author of the invalid reservation, are therefore determined by the relevant provisions of the treaty or, failing any such provision, by treaty law[205] in general and are not derived specifically from the rules concerning reservations.

4.5.3[4.5.4] Reactions to an invalid reservation

The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.

Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

Commentary

(1) The first paragraph of guideline 4.5.3 is essentially a reminder — which it was considered desirable to include in the fourth part of the Guide to Practice — of a fundamental principle embodied in several previous guidelines, according to which the nullity of an invalid reservation depends on the reservation itself and not on the reactions it may elicit. The second paragraph should be seen as a recommendation to States and international organizations that they should not, as a consequence, refrain from objecting to such a reservation, specifying the reasons why they consider the reservation to be invalid.

(2) The first paragraph of draft guideline 4.5.3 is perfectly consistent with guideline 3.1 (which reproduces the text of article 19 of the Vienna Conventions), guideline 3.3.2[206] and guideline 4.5.1.[207] It illustrates what is meant by the term "void" included in draft guideline 4.5.1, by serving as a reminder that the nullity of an invalid reservation is based on objective factors and does not depend on the reaction of a contracting State or contracting organization other than the author of the reservation – in other words, as expressly indicated in the first paragraph, on their acceptance or their objection.

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[202] Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27, 1967, p. 466; see also second report on reservations to treaties (A/CN.4/477/Add.1), paras. 97 and 99; *Yearbook ... 1996*, vol. II, Part One, p. 57; and Daniel Müller, "Article 20 (1969)", in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, commentaire article par article* (Brussels, Bruylant, 2006), pp. 809–811, paras. 20–24.

[203] See paras. (20) to (28) of the commentary to guideline 4.5.1 below.

[204] Art. 24, para. 1, of the 1969 Vienna Convention states: "A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree."

[205] See art. 24, paras. 2 and 3, of the 1969 Vienna Convention. These paragraphs state:

> 2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
>
> 3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

[206] "Acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not cure the nullity of the reservation."

[207] "A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect."

(3) In State practice, the vast majority of objections are based on the invalidity of the reservation to which the objection is made. But the authors of such objections draw very different conclusions from them: some simply note that the reservation is invalid while others state that it is null and void and without legal effect. Sometimes (but very rarely), the author of the objection states that its objection precludes the entry into force of the treaty as between itself and the reserving State; sometimes, on the other hand, it states that the treaty enters into force in its entirety in these same bilateral relations.[208]

(4) The jurisprudence of the International Court of Justice is not a model of consistency on this point.[209] In its 1999 orders concerning the requests for provisional measures submitted by Yugoslavia against Spain and the United States of America, the Court simply considered that:

> Whereas the Genocide Convention does not prohibit reservations; whereas Yugoslavia did not object to Spain's reservation to article IX; and whereas the said reservation had the effect of excluding that article from the provisions of the Convention in force between the Parties (…).[210]

The Court's reasoning did not include any review of the validity of the reservation, apart from the observation that the 1946 Convention did not prohibit it. The only determining factor seems to have been the absence of an objection by the State concerned; this reflects the position which the Court had taken in 1951 but which had subsequently been superseded by the Vienna Convention, with which it is incompatible:[211]

> The object and purpose [of the treaty] (…) limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[212]

Nonetheless, in its order concerning the request for provisional measures in the case of *Armed activities on the territory of the Congo (New Application: 2002) (Democratic*

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[208] The reactions to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women illustrate virtually the full range of objections imaginable: while the 18 objections (including late ones made by Mexico and Portugal) all note that the reservation is incompatible with the object and purpose of the Convention, one (that of Sweden) adds that it is "null and void", and two others (those of Spain and the Netherlands) point out that the reservation does not produce any effect on the provisions of the Convention. Eight of these objections (those of Belgium, Finland, Hungary, Ireland, Italy, Mexico, Poland and Portugal) specify that the objections do not preclude the entry into force of the treaty, while 10 (those of Austria, the Czech Republic, Estonia, Latvia, the Netherlands, Norway, Romania, Slovakia, Spain and Sweden) consider that the treaty enters into force for Qatar without the reserving State being able to rely on its impermissible reservation. See *Multilateral Treaties Deposited with the Secretary-General* (chap. IV-8), available from http://treaties.un.org, *Status of Treaties*.

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

[210] Orders of 2 June 1999, *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, I.C.J. Reports 1999*, p. 772, para. 32, and p. 924, para. 24.

[211] See paras. (2) to (9) of the commentary to guideline 2.6.3.

[212] Advisory Opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 24.

Republic of the Congo v. Rwanda), the Court modified its approach by considering *in limine* the permissibility of Rwanda's reservation:

> That reservation does not bear on the substance of the law, but only on the Court's jurisdiction; … it therefore does not appear contrary to the object and purpose of the Convention.[213]

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

> Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[214]

The Court thus "added its own assessment as to the compatibility of Rwanda's reservation with the object and purpose of the Genocide Convention".[215] Even though an objection by the Democratic Republic of the Congo was not required in order to assess the validity of the reservation, the Court found it necessary to add:

> As a matter of the law of treaties, when Rwanda acceded to the Genocide Convention and made the reservation in question, the DRC made no objection to it.[216]

(5) This clarification is not superfluous. Indeed, although an objection to a reservation does not determine the validity of the reservation as such, it is an important element to be considered by all actors involved – the author of the reservation, the contracting States and contracting organizations, and any body with competence to assess the validity of a reservation. Nonetheless, it should be borne in mind that, as the Court indicated in its 1951 advisory opinion:

> each State which is a party to the Convention is entitled to appraise the validity of the reservation and it exercises this right individually and from its own standpoint.[217]

(6) The judgment of the European Court of Human Rights in the *Loizidou* case also attaches great importance to the reactions of States parties as an important element to be

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

[214] Judgment of 3 February 2006, *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 32, para. 67.

[215] Joint separate opinion, cited above in footnote 209, p. 70, para. 20.

[216] See footnote 215 above, p. 33, para. 68.

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

considered in assessing the validity of Turkey's reservation.[218] The Human Rights Committee confirmed this approach in its general comment No. 24:

> The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant (...). However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.[219]

(7) During consideration of the report of the Commission on the work of its fifty-seventh session in 2005 (A/60/10), Sweden, replying to the Commission's question regarding "minimum effect" objections based on the incompatibility of a reservation with the object and purpose of the treaty,[220] expressly maintained this position:

> Theoretically, an objection was not necessary in order to establish that fact but was merely a way of calling attention to it. The objection therefore had no real legal effect of its own and did not even have to be seen as an objection ... . However, in the absence of a body that could authoritatively classify a reservation as invalid, such as the European Court of Human Rights, such "objections" still served an important purpose.[221]

(8) As established above,[222] the Vienna Conventions do not contain any rule concerning the effects of reservations that do not meet the conditions of permissibility set out in article 19, or — as a logical consequence thereof — concerning the potential reactions of States to such reservations. Under the Vienna regime, an objection is not an instrument by which contracting States or organizations assess the validity of a reservation; rather, it renders the reservation inapplicable as against the author of the objection.[223] The acceptances and objections mentioned in article 20 concern only valid reservations. The mere fact that these same instruments are used in State practice to react to invalid reservations does not mean that these reactions produce the same effects or that they are subject to the same conditions as objections to valid reservations.

(9) In the opinion of the Commission, however, this is not a sufficient reason to refuse to consider these reactions as true objections. Such a negative reaction is fully consistent with the definition of the term "objection" adopted by the Commission in guideline 2.6.1 and constitutes

> a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the former State or organization purports to exclude … the legal effects of the reservation, or to exclude the application of the treaty as a whole, in relations with the reserving State or organization.[224]

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[218] See para. 95 of the judgment of the European Court and para. (8) of the commentary to guideline 4.5.2 above.

[219] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40* (A/50/40), p. 151, para. 17.

[220] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 29.

[221] A/C.6/60/SR.14, para. 22.

[222] See paras. (1) to (18) of the general commentary to section 4.5.

[223] See paras. (2) to (5) of the commentary of guideline 4.3.

[224] For the full text of guideline 2.6.1 (Definition of objections to reservations) and the commentary thereto, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/60/10), pp. 186–202.

The mere fact that ultimately, it is not the objection that achieves the desired goal by depriving the reservation of effects, but rather the nullity of the reservation, does not change the goal sought by the objecting State or organization: to exclude all effects of the invalid reservation. Thus, it seems neither appropriate nor useful to create a new term for these reactions to reservations, since the current term not only corresponds to the definition of "objection" adopted by the Commission but is used extensively in State practice and, it would appear, is accepted and understood universally.

(10) Moreover, although an objection to an invalid reservation adds nothing to the nullity of the reservation, it is undoubtedly a prime instrument both for initiating the reservations dialogue and for bringing the matter to the attention of treaty bodies and international and domestic courts when they are called upon, as appropriate, to assess the validity of a reservation. Consequently, it would not be advisable — and would, in fact, be misleading — simply to note in the Guide to Practice that an objection to an invalid reservation is without effect.

(11) On the contrary, it is vitally important for States to continue to formulate objections to reservations that they consider invalid, even though such declarations do not add anything to the effects that arise, *ipso jure* and without any other condition, from the invalidity of the reservation. This is all the more important as there are, in fact, only a few bodies that are competent to assess the validity of a contested reservation. As is usual in international law — in this area as in many others — the absence of an objective assessment mechanism remains the rule, and its existence the exception.[225] Hence, pending a very hypothetical intervention by an impartial third party, "each State establishes for itself its legal situation *vis-à-vis* other States" – including, of course, on the issue of reservations.[226]

(12) States should not be discouraged from formulating objections to reservations that they consider invalid. On the contrary, in order to maintain stable treaty relations, they should be encouraged to do so and encouraged to provide, as far as possible, reasons for their position.[227] This is why draft guideline 4.5.3 does not merely set out the principle that an objection to an invalid reservation does not, as such, produce effects; it also discourages any hasty inference, from the statement of that principle, that such an objection is futile.

(13) Indeed, it is in every respect very important for States and international organizations to formulate an objection, when they deem it justified, in order to state publicly their position on the invalidity of a reservation. Nevertheless, they do so on the basis merely of their power of appraisal, which is why the second paragraph of guideline 4.5.3 takes the form of a simple recommendation to States and international organizations, the purely optional nature of which is evidenced by the use of the conditional "should" and the expression "if it deems it appropriate".

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[225] Judgment of 18 July 1966, *South West Africa Cases, Second Phase, I.C.J. Reports 1966*, para. 86: "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception".

[226] Decision of 9 December 1978, Case of *Air Service Agreement of 27 March 1946 between the United States of America and France, Reports of International Arbitral Awards*, vol. XVIII, p. 483, para. 81.

[227] See guideline 2.6.10 (Statement of reasons), which recommends that the author of an objection to a reservation should indicate the reasons why it is being made. (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 203–206).

(14) Moreover, while it may be preferable, it is not indispensable[228] for these objections to be formulated within the time period of 12 months, or within any other time period set out in the treaty.[229] Although they have, as such, no legal effect on the reservation, such objections still serve an important purpose not only for the author of the reservation — which would be alerted to the doubts surrounding its validity — but also for the other contracting States or contracting organizations and for any authority that may be called upon to assess the validity of the reservation. This was underscored clearly in the commentary to guideline 2.6.15 (Late objections):

> This practice [of late objections] should certainly not be condemned. On the contrary, it allows States and international organizations to express — in the form of objections — their views as to the validity of a reservation, even when the reservation was formulated more than 12 months earlier, and this practice has its advantages, even if such late objections do not produce any immediate legal effect.[230]

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

(15) This comment is not, however, to be taken as an encouragement to formulate late objections on the grounds that, even without the objection, the reservation is null and void and produces no effect. It is in the interests of the author of the reservation, the other contracting States and contracting organizations and, more generally, of a stable, clear legal situation, for objections to invalid reservations to be made and to be formulated as quickly as possible, so that the legal situation can be appraised rapidly by all the actors and the author of the reservation can potentially remedy the invalidity within the framework of the reservations dialogue. For this reason, the second paragraph of guideline 4.5.3 calls on States and organizations to formulate a reasoned objection "as soon as possible".

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[228] The Government of Italy, in its late objection to Botswana's reservations to the International Covenant on Civil and Political Rights, explained: "The Government of the Italian Republic considers these reservations to be incompatible with the object and the purpose of the Covenant according to article 19 of the 1969 Vienna Convention on the Law of Treaties. These reservations do not fall within the rule of article 20, paragraph 5, and can be objected to at any time" (*Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 4, available from http://treaties.un.org, *Status of Treaties*). See also Italy's objection to the reservation of Qatar to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, formulated by Qatar (*ibid.*, chap. IV, 9); and the position expressed by Sweden in the Sixth Committee during consideration of the report of the Commission on the work of its fifty-seventh session (A/C.6/60/SR.14, para. 22).

[229] For other recent examples, see the objections of Portugal and Mexico to the reservation formulated by Qatar upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (*Multilateral Treaties Deposited with the Secretary-General*, chap. IV-8, available from http://treaties.un.org, *Status of Treaties*). Both objections were made on 10 May 2010 (C.N.260.2010.TREATIES-16A and C.N.264.2010.TREATIES-16); Qatar's instrument of accession was communicated by the Secretary-General on 8 May 2009.

[230] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 222, para. (3) of the commentary.