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Fifteenth report on reservations to treaties

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Addendum*

Contents

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IV. Effects of reservations and interpretative declarations (continuation and conclusion)

B. Effects of interpretative declarations, approvals, oppositions, silence and reclassifications

527. Despite a long-standing and highly developed practice, neither the Vienna Convention of 1969 nor of 1982 contains rules concerning interpretative declarations, much less the possible effects of such a declaration.[832]

528. The *travaux preparatoires* to the Conventions explain this absence. While the problem of interpretative declarations was completely overlooked by the first Special Rapporteurs,[833] Sir Humphrey Waldock[834] was aware both of the practical difficulties these declarations created, and of the utterly simple solution required. Indeed, several governments returned in their commentary to the draft articles adopted on first reading, not just to the absence of interpretative declarations and the distinction that should be drawn between such declarations and reservations,[835] but also to the elements to be taken into account when interpreting a treaty.[836] In 1965, the Special Rapporteur made an effort to reassure those States by affirming that the question of interpretative declarations had not escaped the notice of the Commission. As Sir Humphrey continued:

> "Interpretive declarations, however, remained a problem, and possible also statements of policy made in connexion with a treaty. The question was what the effect of such declarations and statement should be. Some rules which touch the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the

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[832] See *Yearbook of the International Law Commission* 1999, vol. II, 2nd part, p. 97, para. 1 of the commentary on draft guideline 1.2.

[833] Fitzmaurice limited himself to specifying that the term "reservation" "does not include mere statements as to how the State concerned proposes to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty" (first report on the law of treaties, A/CN.4/101, *Yearbook of the International Law Commission* 1956, vol. II, p. 110.

[834] In his definition of the term "reservation", Sir Humphrey explained that "[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation". (First report on the law of treaties, A/CN.4/144, *Yearbook of the International Law Commission*, 1962, vol. II, p. 37.

[835] See in particular the commentary of the Japanese government summarized in the fourth report on the law of treaties by Sir Humphrey Waldock (A/CN.4/177 and Add.1 and 2, *Yearbook of the International Law Commission* 1965, vol. II, p. 50) and the comment of the British Government that "article 18 deals only with reservations and assumes that the related question of statements of interpretation will be taken up in a later report" (ibid., p. 51).

[836] See the comments of the United States of America on draft articles 69 and 70 concerning interpretation, summarized in the sixth report on the law of treaties by Sir Humphrey Waldock (A/CN.4/183 and Add.1 to 4, *Yearbook of the International Law Commission* 1966, vol. II, p. 100).

> treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant."[837]

Contrary to the positions expressed by some members of the Commission,[838] the effect of an interpretive declaration "was governed by the rules on interpretation".[839] Although "[i]nterpretative statements are certainly important, (...) it may be doubted whether they should be made the subject of specific provisions; for the legal significance of an interpretative statement must always depend on the particular circumstances in which it is made".[840]

529. At the Vienna Conference of 1968-1969, the question of interpretative declarations was debated once again, in particular concerning a Hungarian amendment to the definition of the term "reservation"[841] and to article 19 (which became article 21) concerning the effects of a reservation.[842] The effect of this amendment was to liken interpretative declarations to reservations, without making any distinction between the two categories, in particular with regard to their respective effects. Several delegations were nevertheless clearly opposed to such a comparison.[843] Sir Humphrey Waldock, in his capacity as expert consultant, had

> "issued a warning against the dangers of the addition of interpretative declarations to the concept of reservations. In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law on reservations".[844]

Consequently, he appealed

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[837] *Yearbook of the International Law Commission* 1965, vol. I, 799th meeting, 10 June 1965, p. 181, para. 13. See also Sir Humphrey Waldock, Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook of the International Law Commission 1965*, vol. II, p. 52, para. 2.

[838] See the comments of Mr. Verdross (*Yearbook of the International Law Commission* 1965, vol. I, 797th meeting, 8 June 1965, p. 166, para. 36 and 799th meeting, 10 June 1965, p. 182, para. 23) and Mr. Ago (ibid., 798th meeting, 9 June 1965, p. 178, para. 76). See also Mr. Castren (ibid., 10 June 1965, p. 183, para. 30) and Mr. Bartos (ibid., para. 29).

[839] *Yearbook of the International Law Commission* 1965, vol. I, 799th meeting, 10 June 1965, p. 181, para. 14. See also Sir Humphrey Waldock, Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook of the International Law Commission* 1965, vol. II, p. 49, para. 2 ("Statements of interpretation were not dealt with by the Commission in the present section for the simple reason that *they are not reservations and appear to concern the interpretation rather than the conclusion of treaties*") [emphasis added].

[840] Ibid.

[841] A/CONF.39/C.1/L.23, *Documents of the Conference* (A/CONF.39/11/Add.2), note 606 above, p. 122, para. 35 (vi) (e). The Hungarian delegation proposed the following text: "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a *multilateral* treaty, whereby it purports to exclude, to vary *or to interpret* the legal effect of certain provisions of the treaty in their application to that State (italics in the text).

[842] A/CONF.39/C.1/L.177, ibid., p. 151, para. 199 (ii) (d) and (iii). See also the explanations provided at the Conference, *Summary records* (A/CONF.39/11), note 607 above, 25th meeting, 16 April 1968, pp. 148 and 149, paras. 52 and 53.

[843] See in particular the position of Australia (*Summary records* (A/CONF.39/11), note 607 above, 5th meeting, 29 March 1968, p. 33, para. 81), Sweden (ibid., p. 34, para. 102), the United States of America (ibid., 6th meeting, p. 35, para. 116) and the United Kingdom (ibid., 25th meeting, 16 April 1968, p. 149, para. 60).

[844] Ibid., p. 149, para. 56.

> "to the Drafting Committee to bear the delicacy of the question in mind and not to regard the assimilation of interpretative declarations to reservations as an easy matter".[845]

530. In the end, the Drafting Committee had not retained the Hungarian amendment. Although Mr. Sepulveda Amor, on behalf of Mexico, had drawn attention to "the absence of a definition of the instrument envisaged in paragraph 2 (b) of article 27 [which became article 31]", while "interpretative declarations of that type were common in practice"[846] and suggested that "it was essential to set forth clearly the legal effects of such declarations, as distinct from those of actual reservations",[847] as none of the provisions of the Vienna Convention had been devoted specifically to interpretative declarations. Sir Humphrey's conclusions regarding the effects of these declarations[848] were thus confirmed by the work of the Conference.

531. Neither the work of the Commission, nor the Vienna Conference of 1986 have further elucidated the question of the concrete effects of an interpretative declaration.

532. The absence of a specific provision in the Vienna Conventions concerning the legal effects an interpretative declaration is likely to produce does not mean, however, that they contain no indications on that subject, as the comments made during their elaboration will show.[849]

533. As their name clearly indicates, their aim and function consists in proposing an interpretation of the treaty.[850] Consequently, in accordance with the definition arrived at by the Commission:

> "Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.[851]

Giving a precise definition of or clarifying the provisions of a treaty is indeed to interpret it and for this reason, the Commission used those terms to define interpretative declarations.[852] Although, as the commentary on draft guideline 1.2 (Definition of interpretative declarations) makes clear, the definition accepted "in no way prejudges the validity or the effect of such declarations",[853] it seems quite evident that the effect of an interpretative declaration is essentially produced through the highly complex process of interpretation.

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[845] Ibid.

[846] Ibid., 21st meeting, 10 April 1968, p. 123, para. 62.

[847] Ibid.

[848] See note 840 above.

[849] See para. 528 above.

[850] *Yearbook of the International Law Commission* 1999, vol. II, second part, p. 106, para. 16 of the commentary on draft guideline 1.2.

[851] Draft guideline 1.2 (Definition of interpretative declarations), *Yearbook of the International Law Commission* 1999, vol. II, Part Two, pp. 103 to 109.

[852] See the commentary on draft guideline 1.2 (Definition of interpretative declarations), ibid., p. 106, para. 18).

[853] Ibid., p. 103, para. 33 of the commentary.

534. Before considering the role such a declaration may play in the interpretation process, it is important to specify the effect that it may definitely not produce. It is clear from the comparison between the definition of interpretative declarations and that of reservations that whereas the latter are intended to modify the treaty or exclude certain of its provisions, the former have no other aim than to specify or clarify its meaning. The author of an interpretative declaration does not seek to relieve itself of its international obligations under the treaty; it intends to give a particular meaning to those obligations. As Yaseen has clearly explained:

> A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.
>
> A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.[854]

If the effect of an interpretative declaration consisted of modifying the treaty, it would actually constitute a reservation, not an interpretative declaration. The Commission's commentary on article 2, paragraph 1 (d), of its 1966 draft articles describes this dialectic unequivocally:

> States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.[855]

535. The International Court of Justice has also maintained that the interpretation of a treaty may not lead to its modification. As it held in its advisory opinion concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*: "It is the duty of the Court to interpret the Treaties, not to revise them".[856]

536. It may be deduced from the foregoing that an interpretative declaration may in no way modify the treaty provisions. Whether or not the interpretation is correct, its

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[854] *Yearbook of the International Law Commission* 1965, vol. I, 799th meeting, 10 June 1965, p. 166, paras. 25-26.

[855] *Yearbook of the International Law Commission* 1966, vol. II, p. 190, para. (11) of the commentary. See also Sir Humphrey Waldock's explanations, *Yearbook of the International Law Commission* 1965, vol. I, 799th meeting, p. 165, para. 14 ("[t]he crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation").

[856] Advisory opinion of 18 July 1950, *I.C.J. Reports 1950*, p. 229. See also the Judgments of 27 August 1952, *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, *I.C.J. Reports 1952*, p. 196, and 18 July 1966, *South West Africa cases* (*Liberia and Ethiopia v. South Africa*), *I.C.J. Reports 1966*, p. 48, para. 91.

author remains bound by the treaty. This is certainly the intended meaning of the *dictum* of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration

> may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation.[857]

In other words, a State may not escape the risk of violating its international obligations by basing itself on an interpretation that it put forward unilaterally. In the case where the State's interpretation does not correspond to the "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (article 31, para. 1, of the Vienna Conventions), its actions in the course of enforcing the treaty run a serious risk of violating its treaty obligations.[858]

537. If a State or international organization has made its interpretation a condition for its agreement to be bound by the treaty, in the form of a conditional interpretative declaration within the meaning of guideline 1.2.1 (Definition of conditional interpretative declarations),[859] the situation is slightly different. Of course, if the interpretation proposed by the author of the declaration and the interpretation of the treaty given by an authorized third body[860] are in agreement, there is no problem; the interpretative declaration remains merely interpretative and may play the same role in the process of interpreting the treaty as that of any other interpretative declaration. If, however, the interpretation given by the author of the interpretative declaration does not correspond to the interpretation of the treaty objectively established (following the rules of the Vienna Conventions) by an impartial third body, a problem arises: the author of the declaration does not intend to be bound by the treaty as it has thus been interpreted, but only by the treaty text as interpreted and applied in the manner which it has proposed. It has therefore made its consent to be bound by the treaty dependent upon a particular "interpretation" which — it is assumed — does not fall within the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (article 31, para. 1, of the Vienna Conventions). In this case — but in this case only — the conditional interpretative declaration must be equated to a reservation and may produce only the effects of a reservation, if the corresponding conditions have been met. This eventuality, which is not merely hypothetical, explains why such an interpretative declaration, although not intended under its

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[857] Report of 7 May 1986, vol. 1, No. 32, para. 102.

[858] See also Donald M. McRae, "The Legal Effect of Interpretative Declarations", British Year Book of International Law, vol. 49, 1978, p. 161; Monika Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, Duncker & Humblot, Berlin, 2005, p. 126; or Frank Horn, *Reservations and Interpretive Declarations*, see note 462 above (A/CN.4/624), p. 326.

[859] *Yearbook of the International Law Commission* 1999, vol. II, Part Two, pp. 103-106.

[860] It is hardly likely that the "authentic" interpretation of the treaty (that is, the one agreed by the parties as a whole) will differ significantly from that given by the author of the interpretative declaration: by definition, an authentic interpretation arises from the parties themselves. See Jean Salmon (ed.), *Dictionnaire de droit international public*, Bruylant, Brussels, 2001, p. 604: "An interpretation issued by the author or by all the authors of the provision being interpreted — in the case of a treaty, by all the parties — in due form so that its authority may not be questioned"; see also paras. 567-572 above.

terms to modify the treaty, must nonetheless be subject to the same legal regime that applies to reservations. As McRae has pointed out:

> Since the declaring State is maintaining its interpretation regardless of the true interpretation of the treaty, it is purporting to exclude or to modify the terms of the treaty. Thus, the consequences attaching to the making of reservations should apply to such a declaration.[861]

538. In view of the foregoing, draft guideline 4.7.4 concerns the specific case of conditional interpretative declarations that do not appear to be equatable, purely and simply, to reservations in respect of their definition, but which produce the same effects:

> **4.7.4 Effects of a conditional interpretative declaration**
>
> A conditional interpretative declaration produces the same effects as a reservation in conformity with guidelines 4.1 to 4.6.

539. In cases of a simple interpretative declaration, however, the mere fact of proposing an interpretation which is not in accordance with the provisions of the treaty in no way changes the declaring State's position with regard to the treaty. The State remains bound by it and must respect it. This position has also been confirmed by McRae:

> [T]he State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty.[862]

540. Although an interpretative declaration does not affect the normative force and binding character of the obligations contained in the treaty, it may still produce legal effects or play a role in the interpretation of the treaty. It has already been noted during the consideration of the validity of interpretative declarations[863] that "on the basis of its sovereignty, every State has the right to indicate its own understanding of the treaties to which it is party".[864] This corresponds to a need: those to whom a

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[861] McRae, "The Legal Effect of Interpretative Declarations", note 858 above, p. 161. See also Heymann, note 858 above, pp. 147-148. Heymann shares the view that a conditional interpretative declaration should be treated as a reservation only in the case where the treaty creates a competent body to provide an authentic interpretation. In other cases, she considers that the conditional interpretative declaration may never modify the treaty provisions (ibid., pp. 148-150).

[862] McRae, note 858 above, p. 160.

[863] Fourteenth report on reservations to treaties (2009) (A/CN.4/614/Add.1, para. 142).

[864] P. Daillier, M. Forteau and A. Pellet, *Droit international public* (*Nguyen Quoc Dinh*), Librairie générale de droit et de jurisprudence (LGDJ), Paris, 2010, p. 277.

legal rule is addressed must necessarily interpret it in order to apply it and meet their obligations.[865]

541. Interpretative declarations are above all an expression of the parties' concept of their international obligations under the treaty. Accordingly, they are a means of determining the intention of the contracting States or organizations with regard to their treaty obligations. It is in this connection, as an element relating to the interpretation of the treaty, that case law[866] and doctrine have affirmed the need to take into account interpretative declarations in the treaty process. McRae puts it this way:

> In fact, it is here that the legal significance of an interpretative declaration lies, for it provides evidence of intention in the light of which the treaty is to be interpreted.[867]

542. Monika Heymann shares this view. She affirms, on the one hand, that an interpretation which is not accepted or is accepted only by certain parties cannot constitute an element of interpretation under article 31 of the Vienna Convention; on the other hand, she adds: "That does not exclude the possibility, however, that it may be used, under certain conditions, as an indication of the common intention of the parties"[868] [*translation for the purposes of the report*].

543. The French Constitutional Council shares this view and has clearly limited the object and role of an interpretative declaration by the French Government to the interpretation of the treaty alone: "Whereas, moreover, the French Government has accompanied its signature with an interpretative declaration in which it specifies the meaning and scope which it intends to give to the Charter or to some of its provisions with regard to the Constitution, such unilateral declaration shall have normative force only in that it constitutes an instrument in conformity with the treaty and may contribute, in the case of a dispute, to its interpretation."[869]

544. Draft guideline 4.7, which opens the section concerning the legal effects of an interpretative declaration, takes up these two ideas in order to clarify, on the one hand, that an interpretative declaration has no impact on the rights and obligations under the treaty and, on the other, that it produces its effects only in the process of interpretation. It could be worded as follows:

> **4.7 Effects of an interpretative declaration**
>
> An interpretative declaration may not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to some of its provisions and, accordingly, may constitute an element to be taken into account as an aid to interpreting the treaty.

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[865] Georges Abi-Saab, "'Interprétation' et 'auto-interprétation': quelques réflexions sur leur rôle dans la formation et la résolution du différend international", in *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt*, Berlin, Springer, 1995, p. 14.

[866] See note 857 above.

[867] McRae, note 858 above, p. 169.

[868] Note 858 above, p. 135.

[869] Constitutional Council, Decision No. 99-412 DC, 15 June 1999, *European Charter for Regional or Minority Languages, Official Gazette of the French Republic*, 18 June 1999, p. 8964, para. 4.

545. In addition, it should be recalled that an interpretative declaration is also a unilateral declaration expressing its author's intention to accept a certain interpretation of the treaty or of its provisions. Accordingly, although the declaration in itself does not create rights and obligations for its author or for the other parties to the treaty, it may prevent its author from taking a position contrary to that expressed in its declaration. It does not matter whether or not this phenomenon is called estoppel;[870] in any case it is a corollary of the principle of good faith,[871] in the sense that, in its international relations, a State cannot "blow hot and cold". It cannot declare that it interprets a given provision of the treaty in one way and then take the opposite position before a judge or international arbitrator.[872]

546. It cannot be deduced from the above that the author of an interpretative declaration is bound by the interpretation it puts forward — which might ultimately prove unfounded. The validity of the interpretation depends on other circumstances and can be assessed only under the rules governing the interpretation process. In this context, Bowett presents a sound analysis:

> The estoppel rests on the representation of fact, whereas the conduct of the parties in construing their respective rights and duties does not appear as a representation of fact so much as a representation of law. The interpretation of

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[870] As Judge Alfaro had explained in the important separate opinion in the *Temple of Preah Vihear* (*Cambodia v. Thailand*) case, "[w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consiliuim suum in alterius injuriam*). ... Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)" (*I.C.J. Reports 1962*, p. 40). See also the Judgments of 20 February 1969 (*North Sea Continental Shelf cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), *I.C.J. Reports 1969*, p. 26, para. 30; 22 July 1920, *Serbian loans*, *Series A, No. 20*, pp. 38-39; 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 415, para. 51; or 13 September 1990, *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*)), *Request by Nicaragua for Permission to Intervene, I.C.J. Reports 1990*, p. 118, para. 63.

[871] See the Judgment of 12 October 1984, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), *I.C.J. Reports 1984*, p. 305, para. 130. The doctrine is in agreement on this point. Thus, as Bowett explained more than a half-century ago, the raison d'être of estoppel lies in the principle of good faith: "The basis of the rule is the general principle of good faith and as such finds a place in many systems of law" ("Estoppel Before International Tribunals and its Relation to Acquiescence", British Year Book of International Law, vol. 33, 1957, p. 176 (footnotes omitted)). See also Alain Pellet and James Crawford, "Aspects des modes continentaux et anglo-saxons de plaidoiries devant la C.I.J.", in *International Law between Universalism and Fragmentation-Festschrift in Honour of Gerhard Hafner*, Nijhoff, Leiden/Boston, 2008, pp. 831-867.

[872] See the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006 by the International Law Commission, principle 10: "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: ... (ii) The extent to which those to whom the obligations are owed have relied on such obligations; ...", *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 369.

rights and duties of parties to a treaty, however, should lie ultimately with an impartial international tribunal and it would be wrong to allow the conduct of the parties in interpreting these rights and duties to become a binding interpretation on them.[873]

547. Nonetheless, the author of an interpretative declaration, by formulating an interpretation in a given sense, has created an expectation in the other contracting parties, who, acting in good faith, may take cognizance of and place confidence in it.[874] The author of an interpretative declaration may not, therefore, change its position at will, as long as its declaration has not been withdrawn or modified. Indeed, under draft guidelines 2.4.9 (Modification of an interpretative declaration)[875] and 2.5.12 (Withdrawal of an interpretative declaration),[876] the author of an interpretative declaration is free to modify or withdraw it at any time.

548. Like the author of an interpretative declaration, any State or international organization that approves this declaration must also refrain from invoking, in respect of the author of the declaration, a different interpretation.

549. In view of the foregoing, it would be appropriate to insert a draft guideline 4.7.2 into the Guide to Practice in order to take into account this opposability of an interpretative declaration in respect of its author:

4.7.2 Validity of an interpretative declaration in respect of its author

The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in the declaration.

550. Because of the very nature of the operation of interpretation — which is a process,[877] an art rather than an exact science[878] — it is not possible in a general and abstract manner to determine the value of an interpretation other than by referring to the "general rule of interpretation" which is set out in article 31 of the Vienna Conventions on the Law of Treaties and which cannot be called into question or "revisited" in the context of the present exercise. Therefore, in the present study, any research must necessarily be limited to the question of the authority of a proposed interpretation in an interpretative declaration and the question of its probative value for any third party interpreter, that is, its place and role in the process of interpretation.

551. With regard to the first question — the authority of the interpretation proposed by the author of an interpretative declaration — it should be remembered that,

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873 Bowett, note 871 above, p. 189. See also McRae, note 858 above, p. 168.

874 See Heymann, note 858 above, p. 142.

875 This guideline reads as follows: "Unless the treaty provides that an interpretative declaration may be made or modified only at specified times, an interpretative declaration may be modified at any time" (*Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), pp. 275-277).

876 This guideline reads as follows: "An interpretative declaration may be withdrawn at any time, following the same procedure applicable to its formulation, by the authorities competent for that purpose" (ibid., fifty-ninth session, Supplement No. 10 (A/59/10), pp. 278-280).

877 A "logico-intellective" operation, according to Rosario Sapienza, "Les déclarations interprétatives unilatérales et l'interprétation des traités", *Revue générale de droit international public*, vol. 103, 1999, p. 623.

878 See the fourteenth report on reservations to treaties, A/CN.4/614/Add.1, paras. 140 and 141.

according to the definition of interpretative declarations, they are unilateral statements.[879] The interpretation which such a statement proposes, therefore, is itself only a unilateral interpretation which, as such, has no particular value and certainly cannot, as such, bind the other parties to the treaty. This common-sense principle was affirmed as far back as Vattel:

> Neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy.[880]

During the discussion on draft article 70 (which became article 31) containing the general rule of interpretation, Mr. Rosenne expressed the view

> that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties.[881]

552. The Appellate Body of the Dispute Settlement Body of the World Trade Organization has expressed the same idea as follows:

> The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty.[882]

553. Since the declaration expresses only the unilateral intention of the author — or, if it has been approved by certain parties to the treaty, at best a shared intention[883] — it certainly cannot be given an objective value that is applicable *erga omnes*, much less the value of an authentic interpretation accepted by all parties.[884] Although it does not determine the meaning to be given to the terms of the treaty, it nonetheless affects the process of interpretation to some extent.

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[879] *Yearbook of the International Law Commission 1999*, vol. II (Part Two), pp. 97-103.

[880] Emerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Washington, Carnegie Institution of Washington, 1916), Part II, p. 462, para. 265.

[881] *Yearbook of the International Law Commission 1964*, vol. I, 769th meeting, 17 July 1964, p. 313, para. 52.

[882] Decision of 5 June 1998, *European Communities — Customs Classification of Certain Computer Equipment*, WT/DS62-67-68/AB/R, para. 84 (emphasis in the original text) (also available on the World Trade Organization website: http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm).

[883] Monika Heymann has explained in this regard: "Wird eine einfache Interpretationserklärung nur von einem Teil der Vertragsparteien angenommen, ist die *interprétation partagée* kein selbständiger Auslegungsfaktor im Sinne der [Wiener Vertragsrechtskonvention]. Dies liegt daran, dass bei der Auslegung eines Vertrags die Absichten aller Vertragsparteien zu berücksichtigen sind und die *interprétation partagée* immer nur den Willen einer mehr oder weniger großen Gruppe von Vertragsparteien zum Ausdruck bringt" (*Einseitige Interpretationserklärungen zu multilateralen Verträgen* (see note 858 above), p. 135, footnote omitted). [If a mere interpretative declaration is accepted by only some of the contracting parties, the shared interpretation does not constitute an autonomous factor in interpretation within the meaning of the Vienna Convention on the Law of Treaties. This is because, when the treaty is interpreted, the intentions of the parties must be taken into account while the shared interpretation expresses only the will of a more or less large group of the contracting parties.]

[884] On this case, see paras. 567 to 572 below.

554. However, it is difficult to determine precisely on what basis an interpretative declaration would be considered a factor in interpretation under articles 31 and 32 of the Vienna Conventions. An element of doubt about the question was raised in a particularly careful manner as far back as Sir Humphrey:

> Statements of interpretation were not dealt with by the Commission in the present action for the simple reason that they are not reservations and appear to concern the interpretation rather than the conclusion of treaties. In short, they appear rather to fall under articles 69-71. These articles provide that the "context of the treaty, for the purposes of its interpretation", is to be understood as comprising "any agreement or instrument related to the treaty and reached or drawn up in connexion with its conclusion" (article 69, paragraph 2); that "any agreement between the parties regarding the interpretation of the treaty" and "any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation" are to be taken into account "together with the context" of the treaty for the purposes of its interpretation (article 69, paragraph 3); that as "further means of interpretation" recourse may be had, inter alia, to the "preparatory work of the treaty and the circumstances of its conclusion" (article 70); and that a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning. Any of these provisions may come into play in appreciating the legal effect of an interpretative declaration in a given case. ... In the view of the Special Rapporteur the Commission was entirely correct in deciding that the matter belongs under articles 69-71 rather than under the present section.[885]

555. Whether interpretative declarations are regarded as one of the elements to be taken into consideration for the interpretation of the treaty essentially depends on the context of the declaration and the assent of the other States parties. But it is particularly noteworthy that, in 1966, the Special Rapporteur very clearly refused to include unilateral declarations or agreements *inter partes* in this "context", even though the United States had suggested doing so by means of an amendment. The Special Rapporteur explained that only a degree of assent by the other parties to the treaty would have made it possible to include declarations or agreements *inter partes* in the interpretative context:

> As to the substance of paragraph 2, ... the suggestion of the United States Government that it should be made clear whether the "context" includes (1) a unilateral document and (2) a document on which several but not all of the parties to a multilateral instrument have agreed raises problems both of substance and of drafting which the Commission was aware of in 1964 but did not find it easy to solve at the sixteenth session. … But it would seem clear on principle that a unilateral document cannot be regarded as part of the "context" for the purpose of interpreting a treaty, unless its relevance for the interpretation of the treaty or for determining the conditions of the particular State's acceptance of the treaty is acquiesced in by the other parties. Similarly, in the case of a document emanating from a group of the parties to a

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[885] Fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook of the International Law Commission 1965*, vol. II, p. 49, para. 2 (observations of the Special Rapporteur on draft articles 18, 19 and 20 (footnotes omitted)).

multilateral treaty, principle would seem to indicate that the relevance of the document in connexion with the treaty must be acquiesced in by the other parties. Whether a "unilateral" or a "group" document forms part of the context depends on the particular circumstances of each case, and the Special Rapporteur does not think it advisable that the Commission should try to do more than state the essential point of the principle — the need for express or implied assent.[886]

556. Mr. Sapienza also concludes that interpretative declarations which have not been approved by the other parties do not fall under article 31, paragraph 2 (b), of the Vienna Conventions:

> In primo luogo, ci si potrebbe chiedere quale significato debba attribuirsi all'espressione "accepté par les autres parties en tant qu'instrument ayant rapport au traité". Deve intendersi nel senso che l'assenso delle altre parti debba limitarsi al fatto che lo strumento in questione possa ritenersi relativo al trattato o, invece, nel senso che debba estendersi anche al contenuto dell'interpretazione? Ci pare che l'alternativa non abbia, in realtà, motivo di porsi, dato che il paragrafo 2 afferma che dei documenti in questione si terrà conto "ai fini dell'interpretazione". Dunque, l'accettazione delle altre parti nei confronti degli strumenti di cui alla lettera (b) non potrà che essere un consenso a che l'interpretazione contenuta nella dichiarazione venga utilizzata nella ricostruzione del contenuto normativo delle disposizioni convenzionali cui afferisce, anche nei confronti degli altri Stati.[887]
>
> [First, it could be asked what meaning should be given to the phrase "accepted by the other parties as an instrument related to the treaty". Does it mean that the assent of the other parties should be limited to the fact that the instrument in question could be considered to be related to the treaty or, rather, should it also cover the content of the interpretation? It seems that, in fact, the alternative should not be considered, since paragraph 2 states that the instruments in question will be taken into account "for the purpose of the interpretation". Consequently, acceptance by the other parties of the instruments referred to in subparagraph (b) can only be consent to the use of the interpretation contained in the declaration for the reconstruction of the normative content of the treaty provisions in question, even with respect to other States.]

557. Nonetheless, although at first glance such interpretative declarations do not seem to fall under articles 31 and 32 of the Vienna Conventions, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may, on that basis, play a role in the process of interpretation.

558. In its advisory opinion on the *International status of South-West Africa*, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate:

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[886] Sir Humphrey Waldock, sixth report on the law of treaties, *Yearbook of the International Law Commission 1966*, vol. II, p. 98, para. 16.

[887] Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Giuffrè, Milan, 1996), pp. 239-240. See also Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, vol. I, 1992, p. 1268 ("An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration.")

> These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court.[888]

559. The Court thus specified that declarations by States relating to their international obligations have "probative value" for the interpretation of the terms of the legal instruments to which they relate, but that they corroborate or "support" an interpretation that has already been determined by other methods. In this sense, an interpretative declaration may therefore confirm an interpretation that is based on the objective factors listed in articles 31 and 32 of the Vienna Conventions.

560. In the case concerning maritime delimitation in the Black Sea (*Romania v. Ukraine*),[889] the Court again had to make a determination as to the value of an interpretative declaration. In signing and ratifying the United Nations Convention on the Law of the Sea, Romania formulated the following interpretative declaration:

> "Romania states that according to the requirements of equity as it results from Articles 74 and 83 of the Convention on the Law of the Sea, the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States".[890]

In its Judgment, however, the Court paid little attention to the Romanian declaration, merely noting the following:

> "Finally, regarding Romania's declaration[...], the Court observes that under Article 310 of the United Nations Convention on the Law of the Sea, a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of the United Nations Convention on the Law of the Sea in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of United Nations Convention on the Law of the Sea as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania's declaration as such has no bearing on the Court's interpretation."[891]

561. The wording is radical and seems to call into question whether interpretative declarations are relevant at all. It seems to suggest that the declaration has "*no* bearing" on the interpretation of the provisions of the Montego Bay Convention that the Court has been asked to give. Such a radical remark is qualified, however, by the use of the expression "as such": while the Court does not consider itself bound by the unilateral interpretation proposed by Romania, that does not preclude the

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[888] *International status of South-West Africa, Advisory opinion of 11 July 1950, I.C.J. Reports 1950*, pp. 135-136.

[889] Judgment of 3 February 2009, Maritime Delimitation in the Black Sea (*Romania v. Ukraine*) available on the Court website (http://www.icj-cij.org/).

[890] *Multilateral Treaties Deposited with the Secretary-General,* http://treaties.un.org/(chap.XXI,6).

[891] Judgment of 3 February 2009, see note 889 above, para. 42.

unilateral interpretation from having an effect as a means of proof or a piece of information that might corroborate the Court's interpretation "in accordance with Article 31 of the Vienna Convention on the Law of Treaties".

562. The Strasbourg Court took a similar approach. After the European Commission of Human Rights, which had already affirmed that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted",[892] the Court chose to take the same approach in the case of *Krombach v. France*: interpretative declarations may confirm an interpretation derived on the basis of sound practice. Thus, in order to respond to the question of knowing whether the higher court in a criminal case may be limited to a review of points of law, the Court first examined State practice, then its own jurisprudence, in the matter and ultimately cited a French interpretative declaration:

> "The Court reiterates that the Contracting States dispose in principle of a wide margin of appreciation to determine how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. Thus, the review by a higher court of a conviction or sentence may concern both points of fact and points of law or be confined solely to points of law. Furthermore, in certain countries, a defendant wishing to appeal may sometimes be required to seek permission to do so. However, any restrictions contained in domestic legislation on the right to a review mentioned in that provision must, by analogy with the right of access to a court embodied in Article 6 § 1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right (see *Haser v. Switzerland* (dec.), no. 33050/96, 27 April 2000, unreported). This rule is in itself consistent with the exception authorised by paragraph 2 of Article 2 and is backed up by the French declaration regarding the interpretation of the Article, which reads: '... in accordance with the meaning of Article 2, paragraph 1, the review by a higher court may be limited to a control of the application of the law, such as an appeal to the Supreme Court'".[893]

563. States also put forward their interpretative declarations on those grounds. Thus, the argument by the Agent for the United States in the case concerning Legality of Use of Force (*Yugoslavia v. United States of America*) was tangentially based on the interpretative declaration made by the United States in order to demonstrate that the *mens rea specialis* is a *sine qua non* element of the qualification of genocide:

> "[T]he need for a demonstration in such circumstances of the specific intent required by the Convention was made abundantly clear by the United States Understanding at the time of the United States ratification of the Convention. That Understanding provided that 'acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention'. The Socialist Federal Republic of Yugoslavia did not object to this Understanding, and the Applicant made no attempt here to take issue with it."[894]

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[892] See note 857 above.

[893] European Court of Human Rights, Judgment of 13 February 2001, *Krombach v. France*, application No. 29731/9, para. 96.

[894] Report 1999/35, 12 May 1999, p. 9 (Mr. Andrews).

564. It is therefore clear from practice and doctrinal analyses that interpretative declarations come into play only as an auxiliary or complementary means of interpretation corroborating a meaning given by the terms of the treaty, considered in the light of its object and purpose. As such, they do not produce an autonomous effect: when they have an effect at all, interpretative declarations are associated with another instrument of interpretation, which they usually uphold.

565. The interpreter can thus rely on interpretative declarations to confirm his conclusions regarding the interpretation of a treaty or a provision of it. Interpretative declarations constitute the expression of a subjective element of interpretation — the intention of one of the States parties — and, as such, may confirm "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In that same vein, the reactions that may have been expressed with regard to the interpretative declaration by the other parties — all of them potential interpreters of the treaty as well — should also be taken into consideration. An interpretative declaration that was approved by one or more States certainly has greater value as evidence of the intention of the parties than an interpretative declaration to which there has been an opposition.[895]

566. This "confirming" effect of the interpretative declarations is the subject of draft guideline 4.7.1, as follows:

4.7.1 Clarification of the terms of the treaty by an interpretative declaration

An interpretative declaration may serve to elucidate the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose in accordance with the general rule of interpretation of treaties. In determining how much weight should be given to an interpretative declaration in the interpretation of the treaty, approval of and opposition to it by the other contracting States and contracting organization shall be duly taken into account.

567. Acquiescence to an interpretative declaration by the other parties to the treaty, however, radically alters the situation. Thus, in the International Law Commission, Sir Humphrey recalled that the Commission

> "agreed that the relevance of statements of the parties for purposes of interpretation depended on whether they constituted an indication of common agreement by the parties. Acquiescence by the other parties was essential".[896]

568. Unanimous agreement by all the parties constitutes a genuine interpretative agreement which represents the will of the "masters of the treaty" and thus an authentic interpretation.[897] One example is the unanimous approval by the

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[895] D.M. McRae (see note 858 above), pp. 169-170.

[896] *Yearbook of the International Law Commission 1966*, Vol. I, Part I, 829th meeting, 12 January 1966, p. 47, para. 53. See also R. Kolb, *Interpretation et création du droit international*, Bruylant, Brussels, 2006, p. 609.

[897] See note 860 above. See also M. Heymann (note 858 above), pp. 130-135; I. Voïcu, *De l'interprétation authentique des traités internationaux*, Paris, Pedone, 1968, p. 134 or M. Herdegen, "Interpretation in International Law", *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com/, para. 34.

contracting States to the 1928 Kellogg-Briand Pact of the interpretative declaration of the United States of America concerning the right to self-defence.[898]

569. In this case, it is still just as difficult to determine whether the interpretative agreement is part of the internal context of the treaty (article 31, paragraph 2) or the external context (article 31, paragraph 3) of the treaty. The fact is that everything depends on the circumstances in which the declaration was formulated and in which it was approved by the other parties. Indeed, in a case where a declaration is made before the signature of the treaty and approved when (or before) all the parties have expressed their consent to be bound by it, the declaration and its unanimous approval, combined, give the appearance of an interpretative agreement that could be construed as being an "agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" within the meaning of article 31, paragraph 2(a) or as "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" within the meaning of article 31, paragraph 2(b) of that same article. If, however, the interpretative agreement is reached only once the treaty has been concluded, a question might arise as to whether it is merely a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31, paragraph 3(b) or if, by virtue of their formal nature, the declaration and unanimous approval combined constitute a veritable "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".[899]

570. Without really coming to a decision on the matter, the Commission wrote in its commentary to article 27 (which has become article 31), paragraph 3(a) of its draft articles:

> "A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation. But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the *Ambatielos* case the Court said: '... the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty ...'. Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation".[900]

571. The fact remains, however, that an agreement between the parties as to the interpretation of the treaty must be taken into account together with the text.

572. Draft guideline 4.7.3 recognizes this practice of interpretative declarations approved by all the parties to the treaty:

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[898] *American Journal of International Law (A.J.I.L.) Supplement*, vol. 23, 1929, pp. 1-13.

[899] In this regard, see, in particular, M. Heymann (see note 858 above), p. 130.

[900] *Yearbook of the International Law Commission 1966*, vol. II, p. 221, para. (14) of the commentary (footnotes omitted).

4.7.3 Effects of an interpretative declaration approved by all the contracting States and contracting organizations

An interpretative declaration that has been approved by all the contracting States and contracting organizations constitutes an agreement regarding the interpretation of the treaty.

573. Even in instances where unanimous agreement on an interpretative declaration is not certain, the interpretative declaration does not lose all significance. Since it might well constitute the basis for agreement on the interpretation of the treaty, it could also preclude such an agreement from being made.[901] In this connection, Professor McRae noted:

> "*The 'mere interpretative declaration' serves notice of the position to be taken by the declaring State and may herald a potential dispute between that State and other contracting parties*".[902]

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[901] M. Heymann (see note 858 above), p. 129.

[902] D.M. McRae (see note 858 above), pp. 160-161 (footnotes omitted).