

The Vienna Conventions on the Law of Treaties

A Commentary

VOLUME I

Edited by

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SECTION 2 RESERVATIONS

1969 Vienna Convention

Article 19

Formulation of reservations

State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

the reservation is prohibited by the treaty;
the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty

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A. The freedom to formulate reservations in the Vienna Convention—summary presentation

1. Articles 19 to 23, concerning reservations, form part of the most often discussed provisions of the Vienna Convention, and the difficulties linked to their adoption *in extremis* failed to capsize the Conference.² Resulting from a rather unbalanced compromise, they only imperfectly resolved the problems posed by one of the most controversial domains within the law of treaties—so much so that the ILC decided in 1994 to add the question of reservations to its agenda in an attempt to clarify once and for all the rules which are applicable to them.³ However, one could consider that with their lacunae and ambiguities, the Vienna rules in these matters have acquired global customary status.

The eventful history of the provisions relating to reservations in the Convention⁴

2. The institution of reservations has relatively recently emerged in international law. It is part of the general movement which has led to the 'multilateralization' of the modes to conclude treaties,⁵ and responds to the needs resulting from the enlargement of the 'international community of States': the growth in the number of States which are potential parties to multilateral conventions concluded on the universal level has led to the quest for an equilibrium between the search for universality and the concern for preservation of the treaty's integrity.

3. Despite some uncertainties, the traditional rules applicable to reservations relied upon the requirement of unanimous consent among the other parties to the treaty. A reservation was only 'valid [if] it was accepted by all the contracting parties without exception'.⁶ This system of unanimity preserved its 'undisputed value as a

² See UN Conference on the Law of Treaties, 1st 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), pp 106–38; *ibid*, United Nations Conference on the Law of Treaties, 2nd session Vienna, 9 April–22 May 1969, Summary Records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11/Add.1), pp 1–47, 181–5, and 220–1. See also, Reports of the Committee of the Whole, A/CONF.39/14, *ibid*, 1st and 2nd sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2), pp 112, 132–42; and A/CONF.39/15, *ibid*, pp 239–40; and the Proposals and Amendments submitted to the Plenary Conference, pp 265–667. See also the working document of the Secretariat 'analytical compilation of comments and observations made in 1966 and 1967 on the final draft articles on the law of treaties' (A/CONF.39/5 (vol. I)), *ibid*, pp 158–72.

³ Report of the ILC to the General Assembly on the work of its 46th session, *YILC*, 1994, vol. II, Part Two, p 179, para. 381. See *infra* paras 70–3.

⁴ On all these matters, see the Preliminary Report of the author, as Special Rapporteur of the ILC on Reservations to Treaties (*YILC*, 1995, vol. II, Part One, p 121, A/CN.4/470); see also the more recent and detailed explanation on the French version of these commentaries: *La Convention de Vienne sur le droit des traités—Commentaire article par article* (Brussels: Bruylant, 2008), pp 645–73.

⁵ See Paul Reuter, *Introduction au droit des traités* (3rd revised and updated edn by P Cahier, Paris: Armand Collin, 1995), pp 4–8. It is only through a disputable abuse of language that one can speak of 'reservations' to a bilateral treaty, see *supra* commentary on Art. 2 of the Vienna Convention by P. Gautier, paras 43 and 44. See also draft guideline 1.5.1 of the ILC's Guidelines on Reservations, ILC Report on the Work of its 51st session (A/54/10), *YILC*, 1999, vol. II, Part Two, pp 120–4. Even though the technique of multilateral treaties had not yet been stabilized at the time, it can be considered that the first reservation to a multilateral instrument is without doubt the declaration made by the Kingdoms of Sweden and Norway to the Final Act of the Conference of Vienna of 1815, in relation to sovereignty over Lucca and the recognition of Ferdinand IV as King of the Two-Sicilies.

⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, p 15, para. 21.

principle',⁷ at the international level at least, until the intervention of the well-known Advisory Opinion of the International Court of Justice (ICJ) of 1951 in the *Case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.⁸ This conception, 'directly inspired by the notion of contract',⁹ considerably restricted the ability to make reservations: this was not possible unless accepted by all other parties to the treaty,¹⁰ in the absence of which the author of the reservation remained outside the conventional circle.

4. This system was not without merit:¹¹ aside from its obvious simplicity, it preserved the integrity of the treaty and guaranteed control by the States parties (or signatories)¹² on the validity or opportunity of reservations. Moreover, the customary rule on which it was based was purely supplementary to consent and the parties remained free to derogate from it through the inclusion of clauses on reservations or by derogating in another manner.¹³

5. On a regional level, the system of unanimity was nonetheless in competition with the pan-American practice,¹⁴ which was more flexible and more favourable towards the formulation of reservations. This practice partially inspired the ICJ when it rendered the Advisory Opinion in 1951 from which the Vienna regime emanates. This 'regional derogation' from the traditional rule finds its origin in the Havana Convention of 20 February 1928,¹⁵ and has been explained in the following terms by a report approved by the Council of the Panamerican Union of 4 May 1932:

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed;
2. It shall be in force as between the Governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservation;

⁷ Ibid. See also the Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo, *ibid*, p 32.

⁸ Ibid, p 15.

⁹ Ibid, p 21. See also p 24 where the Court described this system as resting on a 'contractual conception of the absolute integrity of the convention as adopted'. For a clear explanation of the contractual thesis, see the statements by Charles Rousseau as agent for France, 14 April 1951, *ICJ Pleadings, Oral Arguments, Documents*, pp 421-2.

¹⁰ The rigidity of the system was attenuated by the fact that, in practice, the absence of objections was considered as an acceptance of the reservation. Cf M. Owen, 'Reservations to Multilateral Treaties', *Yale LJ*, 1928-29, vol. 38, p 1118; F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: TMC Asser Instituut, Swedish Institute of International Law, Studies in International Law, 1988), vol. 5, pp 17-18. See nevertheless the doubts expressed by G. H. Hackworth, *Digest of International Law* (Washington DC: Government Printing Office, 1943), vol. V, p 130.

¹¹ For an extremely well-argued defence see G. G. Fitzmaurice, 'Reservations to Multilateral Conventions', *ICLQ*, 1953, vol. 2, p 1, *passim* and esp. at pp 11-12.

¹² In practice, the Secretary-General has sought the consent of the signatory States as well, and not only of the States parties. Cf M. Coccia, 'Reservations to Multilateral Treaties on Human Rights', *California Western Int'l LJ*, 1985, vol. 15, p 4; J. M. Ruda, 'Reservations to Treaties', *RCADI*, 1975, vol. 146, p 115.

¹³ Cf the Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo, *supra* n 7, p 37:

Against this background of principle [that reservations require the consent of other parties to the treaty], the law does not dictate what practice they must adopt, but leaves them free to do what suits them best in the light of the nature of each convention and the circumstances in which it is being negotiated.

¹⁴ On the pan-American system, see the bibliography in P. H. Imbert, *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), pp 485-6. See also the description given by Imbert himself, *ibid*, pp 33-8; and M. M. Whiteman, *Digest of International Law* (Washington DC: Department of State, 1970), vol. 14, pp 141-4; J. M. Ruda, *supra* n 12, pp 115-33.

¹⁵ See Arts 6 and 7 of this Convention.

3. It shall not be in force between a Government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.¹⁶

6. Limited to the western hemisphere, this system, which did not *a priori* aspire to substitute the universal system of unanimity,¹⁷ distinguished itself in a profound manner due to the fact that, while entirely preserving the requirement of consent of other States parties, it facilitated accession to pan-American conventions to the detriment of their integrity by not conferring on other States a type of veto to the participation of the signatory State, which resulted in a sort of 'bilateralization' of the application of multilateral Conventions.¹⁸

7. There is no doubt that the pan-American system was present in the minds of the ICJ judges when they answered the request for an Advisory Opinion formulated by the UN General Assembly in 1950 on the issue of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁹ However, whereas the judges of the minority saw therein a derogation from the general rule in force,²⁰ those of the majority found therein a source of inspiration,²¹ which furthered the 'jurisprudential revolution' which they initiated.²²

8. Asked by Resolution 478 (V) of 16 November 1950 whether a State which has formulated a reservation to the Convention on Genocide can 'be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the Parties to the Convention but not by others',²³ the Court responded in the affirmative with a majority of seven votes against five,²⁴ 'if the reservation is compatible with the object and purpose of the Convention'.²⁵

¹⁶ The text is reproduced in Report of the ILC on the work of its 17th session, *YILC*, 1965, vol. II, p 79. See also Res. XXIX of 23 December 1938 of the Eighth Panamerican Conference, reproduced *ibid*, p 80.

¹⁷ P.H. Imbert remarks that 'les États américains respectaient le principe du consentement unanime dans le cadre des conventions élaborées en dehors de l'Union' ('the American States respected the principle of unanimous consent in the framework of conventions drafted outside the Union'), *supra* n 14, p 38, editor's translation.

¹⁸ In this sense, J. K. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', *Harvard Int'l LJ*, 1982, vol. 23, pp 71, 82-4.

¹⁹ See the OAS written arguments in *ICJ Pleadings, Oral Arguments, Documents, Reservations to the Genocide Convention*, *supra* n 6, pp 15-20.

²⁰ See the Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo, *supra* n 7, p 37.

²¹ That they only mention furtively, see *Reservations to the Genocide Convention*, *supra* n 6, p 25.

²² Cf C. Tomuschat, 'Admissibility and Legal Effects of Reservations to Multilateral Treaties. Comments on Articles 16 and 17 of the International Law Commission's Draft Articles on the Law of Treaties', *ZaöRV*, 1967, p 478; A. Pellet, 'La CIJ et les réserves aux traités—Remarques cursives sur une révolution inachevée' in N. Ando, E. McWhinney, and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (The Hague: Kluwer, 2002), p 481, esp. pp 482-503.

²³ For a detailed explanation of the facts that gave rise to the request for an Advisory Opinion, see W. Bishop Jr, 'Reservations to Treaties', *RCADI*, 1961, vol. 103, pp 245, 281-6; W. W. Cox, 'Reservations to Multilateral Conventions', *ASIL Proceedings*, 1952, vol. 46, p 26; P. H. Imbert, *supra* n 14, 59-61; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), 424-8; J.M. Ruda, *supra* n 12, pp 133-9. For an inventory of the principal commentaries on the Advisory Opinion, see A. Pellet, *supra* n 22, p 482, fn 5, and Second Report on Reservation to Treaties, 8 April 1999, A/CN.4/478/Rev.1, p 11. For a recent and vigorous critique see L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff, 1994), pp 15-27.

²⁴ In addition to the Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo (*supra* n 7), see the Dissenting Opinion of Judge Alvarez according to whom there is a complete impossibility to make reservations to the Genocide Convention, *supra* n 6, p 49.

²⁵ *ICJ Reports 1951*, p 29.

9. At the same time, the Court specified in its response to the second question asked by the General Assembly:²⁶

- a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
- b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.²⁷

In addition, the Court explained in the reasoning of its Advisory Opinion:

Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.²⁸

By doing this, the Court clearly rejected the theory of absolute sovereignty and the principle of unanimity.

10. Generally speaking, the Advisory Opinion of 1951 was badly received by the doctrine²⁹ and, paradoxically, encountered strong resistance in the ILC. While the Court had adopted a resolutely innovative solution, taking into account the aspiration towards greater flexibility which had manifested itself in the General Assembly, the ILC maintained a conservative approach and for the first time behaved as the advocate of the traditional principle of unanimity.

11. Since his First Report in 1950, James L. Brierly, first Special Rapporteur on the Law of Treaties, has briefly evoked the question of reservations and pronounced clearly in favour of the unanimity rule,³⁰ which was accepted with barely any discussion by the Commission.³¹ Following a request from the General Assembly,³² the ILC commenced work in 1951 on the Special Report of James L. Brierly,³³ in which he insisted, on the one hand, on the necessity 'to maintain the integrity of international multilateral conventions' and, on the other hand, on the necessity to ensure 'the widest possible acceptance of it'.³⁴ He con-

²⁶ 'If the answer to Question 1 is in the affirmative, what is the effect of the reservation as between the reserving State and: (a) The parties which object to the reservation? (b) Those which accept it?'

²⁷ *ICJ Reports 1951*, pp 29-30.

²⁸ *Ibid*, p 27.

²⁹ See *supra* n 23 and the short survey of doctrinal reactions in C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', *BYIL*, 1993, vol. 74, pp 245, 252; J. M. Ruda, *supra* n 12, pp 146-7. See, however, C. de Visscher, *Théories et réalités en droit international public* (Paris: Pedone, 1970), 291-4 or *Les effectivités en droit international public* (Paris: Pedone, 1967), 82-5; H. Lauterpacht, *The Development of International Law by the International Court* (London: Stevens, 1958), 186-96, 372-4.

³⁰ First Report on the Law of Treaties, A/CN.4/23, *ILC Yearbook*, 1950, vol II, 238-42. Cf draft Article 10(3), proposed to the Commission: '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', at p 240.

³¹ See *ILC Yearbook*, 1950, vol I, 53rd meeting, 90, and the ILC Report on the work of its second session, *ILC Yearbook*, 1950, vol II, 381, para. 164.

³² Resolution 478 (V), 16 November 1950.

³³ Second Report on the Law of Treaties, A/CN.4/41, in *ILC Yearbook*, 1951, vol II, 1-17. This report was accompanied by five annexes: A. Summary of debates in the Sixth Committee of the General Assembly; B. Opinions of writers; C. Examples of clauses in conventions regarding reservations; D. Practice with regard to reservations; E. Draft articles on reservations.

³⁴ *Ibid*, 3-4 (paras 11-12).

cluded that the best solution would be to include explicit provisions adapted to the different types of treaties, of which he gave some examples in an Annex to the Report.³⁵ In its Report of 1951, the Commission noted:

the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general. It involves a classification of the provisions of a convention into two categories, those which do and those which do not form part of its object and purpose. It seems reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose.³⁶

12. The Commission—commenting entirely on the point that ‘multilateral conventions are so diversified in character and object that, when the negotiating States have omitted to deal in the text of a convention with the admissibility or effect of reservations, no single rule uniformly applied can be wholly satisfactory’³⁷—recommended no less than a procedure which, while making the issue more precise and complete in certain aspects, purely and simply illustrated the system of unanimity.³⁸ This position was to a great degree similar to the one taken in the Joint Dissenting Opinion to the Advisory Opinion of the ICJ.³⁹

13. After long debates,⁴⁰ the Sixth Committee of the General Assembly adopted with a narrow majority⁴¹ the text which would become Resolution 598 (VI) of 12 January 1952, which has been described as ‘one of the fundamental documents in the history of the law of treaties’.⁴² Although the text is slightly sibyllic and does not formally abandon the unanimity principle, it in fact confirms the position of the ICJ,⁴³ at least with regard to conventions concluded in the future and for which the Secretary-General is the depository. Nonetheless, with respect to anterior treaties, the traditional principle remained applicable until the adoption by the General Assembly of Resolution 1452 B (XIV) of 7 December 1959,⁴⁴ which expanded the rules of 1952 to all conventions concluded under the auspices of the UN. This was the triumph of the flexible system recommended by the Court in 1951.

14. The resistance of the ILC was more durable. However, the reports of Sir Hersch Lauterpacht (1953 and 1954)⁴⁵ and Sir Gerald Fitzmaurice (1956)⁴⁶ constituted the swan

³⁵ Ibid, 16–17 (annex E).

³⁶ Report of the ILC, A/1858, in *YILC*, 1951, p 128, para. 24.

³⁷ Ibid, p 7, para. 28.

³⁸ Ibid, pp 8–9, para. 34.

³⁹ See *supra* n 7.

⁴⁰ A/C.6/SR.264–278, General Assembly, Official Documents, 6th session, Sixth Commission, pp 71–153. See also the report of the Sixth Commission, A/2047, *ibid*, Annex 49, pp 9–12.

⁴¹ 23 votes to 18, 7 abstentions.

⁴² S. Rosenne, *supra* n 23, p 430. For an analysis of the resolution and its scope, see W. Bishop, *supra* n 23, pp 295–9; C. G. Fenwick, ‘When a Treaty is not a Treaty’, *AJIL*, 1952, vol. 46, p 296; J. M. Ruda, *supra* n 12, pp 151–2.

⁴³ In this sense P. H. Imbert, *supra* n 14, p 72; K. Zemanek, ‘Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties’ in E. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague: Martinus Nijhoff, 1984), p 327. Other authors are more hesitant: S. Rosenne, *supra* n 23; G. G. Fitzmaurice, *supra* n 11, p 8.

⁴⁴ See O. Schachter, ‘The Question of Treaty Reservations at the 1959 General Assembly’, *AJIL*, 1960, vol. 54, p 372; W. W. Bishop, *supra*, n 23 297–300; J. M. Ruda, *supra* n 12, 153–6.

⁴⁵ See his First Report on the Law of Treaties, A/CN.4/63, *YILC*, 1953, vol. II, pp 90, 123–36, and Second Report on the Law of Treaties, A/CN.4/87, *YILC*, 1954, vol. II, pp 131–3.

⁴⁶ First Report on the Law of Treaties, A/CN.4/101, *YILC*, 1956, vol. II, pp 115 and 126–7. Fitzmaurice had strongly criticized the ICJ’s opinion, see ‘Reservations to Multilateral Conventions’, *supra* n 11, pp 1–26; and *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius, 1986), pp 406–27.

song of the unanimity system which, starting from 1962 with the First Report of Sir Humphrey Waldock,⁴⁷ faded away definitively to the benefit of the 'flexible system', issued in the Advisory Opinion of 1951 and confirmed, with non-negligible modifications, by the Vienna Conference in 1969.

15. Starting from the principle that if it is not prohibited by the treaty itself, explicitly or implicitly, a 'State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation',⁴⁸ but it has to '...have regard to the compatibility of the reservation with the object and purpose of the treaty',⁴⁹ Waldock referred clearly to the criteria put forward by the ICJ in 1951 and rejected by the Commission in the same year. Nevertheless, 'although also of the opinion that there is value in the Court's principle as a general concept', he stated his hesitations vis-à-vis this eminently subjective notion and refused to 'us[e] it as a *criterion* of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States'.⁵⁰

16. As stated in paragraph 4(b)(ii) of draft Article 18:

The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.⁵¹

Inversely, 'the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which does not object to the reservation'.⁵²

17. Despite strong reluctance among a minority of its members, the Commission rallied to the principle of the flexible system but, in their detail, independently of some formal modifications and a global simplification of presentation,⁵³ the propositions by Waldock were transformed, in an important manner, by the Commission.⁵⁴

18. In accordance with the position of its Special Rapporteur, the Commission held 'that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them'.⁵⁵ As a result, paragraph 1(d) of draft Article 18 applies the principle of the freedom to formulate reservations 'unless:...(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty'.⁵⁶ Simultaneously, the ILC foresaw that '[a]cceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State',

⁴⁷ A/CN.4/144, *YILC*, 1962, vol. II, pp 60–8. For a general explanation of the report and its discussion by the ILC see J. M. Ruda, *supra* n 12, pp 161–70.

⁴⁸ Article 17, para. 1, *ibid*, p 62.

⁴⁹ Article 17, para. 2(a), *ibid*, p 62.

⁵⁰ *Ibid*, p 66 (original italics); see also draft Art. 16, *ibid*, p 59.

⁵¹ *Ibid*, p 62.

⁵² Article 19, para. 4, *ibid*, p 71.

⁵³ The draft Articles proposed by Waldock went from three to five, which corresponds to the current structure of Arts 19–23 of the Vienna Convention.

⁵⁴ The draft Arts 18–22 adopted by the ILC on first reading, together with their commentaries, can be found in the ILC Report on the work of its 14th session (A/5209), *YILC*, 1962, vol. II, pp 175–82.

⁵⁵ *Ibid*, p 178.

⁵⁶ *Ibid*, p 176.

while an objection based on the incompatibility of the reservation 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'.⁵⁷

19. Nevertheless, the purely consensual system maintained by Sir Humphrey was altered by the inclusion of the eminently subjective criterion of compatibility with the object and purpose of the treaty,⁵⁸ without the respective role of either being clearly defined. This ambiguity, which has never been entirely removed, has been the source of many discussions arising as a result thereof and of a certain number of difficulties but it has undoubtedly allowed for the adoption of the system and is perhaps even the explanation of its relative success.

20. Notwithstanding this ambiguity—or perhaps thanks to it!—the draft of the Commission was favourably received during the debates in the General Assembly.⁵⁹ The 'flexible' system, put forward by the Court since 1951, has henceforth substituted the traditional principle of unanimity and has not been questioned since.

21. However, some non-insignificant arrangements were added to the draft in the second reading after the Fourth Report by Sir Humphrey Waldock presented to the Commission in 1965.⁶⁰ In his report, he proposed the revision of the draft Articles taking into account the observations of the governments⁶¹ which, while approving, on the whole, the 'flexible' system retained by the Commission in 1962,⁶² showed some degree of perplexity and division of opinions regarding the exact role of the criterion of compatibility of reservations with the object and purpose of the treaty in the global consensual mechanism retained by the Commission.⁶³

22. Facing these divergences, the Special Rapporteur firmly maintained the principle retained by the Commission referring to the fact that, on the one hand, a reservation incompatible with the object and purpose of the treaty would be contrary to the principle of good faith and, on the other hand, it was highly improbable that the criterion 'would exercise a material influence in inhibiting participation in multilateral treaties'.⁶⁴ As a result, he proposed a new formulation for paragraph 1 of draft Article 19 in order to reaffirm in a positive manner the principle expressed in 1962: '[w]here a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty...'.⁶⁵ Compatibility remains a condition for the

⁵⁷ Draft Art. 20(2)(b); *ibid.*

⁵⁸ *Ibid.*, p 178.

⁵⁹ See General Assembly, Official Documents, 17th session, Sixth Commission, 736th to 744th meetings (A/C.6/SR.736-44), pp 13-56 and A/5287, para 24.

⁶⁰ Fourth Report on the Law of Treaties, A/CN.4/177 and Add.1 and 2, *YILC*, 1965, vol. II, pp 45-56 (Arts 18-22). On this report and its discussion by the Commission see J. M. Ruda, *supra* n 12, pp 171-5.

⁶¹ In addition to the observations of governments (A/CN.4/175 and Add.1-5 and A/CN.4/182 and Add.1-3), the Commission had at its disposal the following documents: 'Resolutions of the General Assembly concerning the Law of Treaties—Memorandum prepared by the Secretariat', A/CN.4/154, *YILC*, 1963, vol. II, pp 18-28, paras 106-24, and 'Depositary practice in relation to reservations Report of the Secretary-General', A/5687, *YILC*, 1965, vol. II, pp 75-106 (Annexes: I. Questionnaire addressed to depositaries; II. Examples of reservation clauses appearing in conventions concluded under the auspices of the United Nations; III. General Assembly resolutions governing the practice of the Secretary-General in respect of reservations).

⁶² Fourth Report, A/CN.4/177, *supra* n 60, p 49.

⁶³ See *supra* para. 19.

⁶⁴ Fourth Report, A/CN.4/177, *supra* n 60, p 51.

⁶⁵ *Ibid.*, pp 50, 54.

validity of a reservation, in contrast with the conditions for the validity of an objection,⁶⁶ contrary to the position adopted by the Court in 1951.⁶⁷

23. Save for the last editorial amendments in 1966,⁶⁸ the final text of the Articles relating to reservations was adopted by the ILC in 1965,⁶⁹ although the final commentary was not published until the following year together with the entire draft.⁷⁰ The Commission did not go back on the general economy of the draft, and the 'flexible' system, retained in 1962, was never put into question again. Conversely, after long and difficult debates,⁷¹ important modifications were added to the new propositions of the Special Rapporteur.

24. The two most notable changes are the following:

- (1) Article 16, previously limited to the 'formulation of reservations', made compatibility with the object and purpose of the treaty one of the general conditions to which the right to formulate a reservation is subordinated according to the principle retained by the Advisory Opinion of 1951.⁷² Nevertheless the previous ambiguity⁷³ was far from removed since, in its commentary, the Commission noted that:

The admissibility or otherwise of a reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations.⁷⁴

- (2) A specification was introduced in paragraph (4)(b) of Article 17 which provides that:

An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States *unless a contrary intention is expressed by the objecting State*.⁷⁵

That opened a gateway for the possibility for the State author of the reservation and for the objecting State to be nevertheless bound by the treaty. Simultaneously the Commission confirmed that an objection does not necessarily have to be motivated by the incompatibility of the reservation with the object and purpose of the treaty.⁷⁶

25. Fruit of a slow maturation, the ILC draft consecrated the triumph of 'flexibility' over the principle of unanimity and framed it in a globally satisfactory way in spite of the

⁶⁶ Ibid, pp 50, 54–5.

⁶⁷ See *ICJ Reports 1951*, p 24. For a rigorous analysis of the differences between the Advisory Opinion of 1951 and the system retained by the Commission, see J.K. Koh, *supra* n 18, 88–95.

⁶⁸ *ILC Yearbook*, 1966, vol. I, 887th and 892nd meetings, 11 and 18 July, pp 287 and 326.

⁶⁹ These Articles were renumbered as follows: Art. 16 (Formulation of reservations); Art. 17 (Acceptance of and objection to reservations); Art. 18 (Procedure regarding reservations); Art. 19 (Legal effects of reservations); Art. 20 (Withdrawal of reservations).

⁷⁰ Report of the ILC on the work of its 18th session (A/6309/Rev.1), *YILC*, 1966, vol. II, pp 179–80 and 201–9.

⁷¹ *YILC*, 1965, vol. I, 796th to 801st, 813rd, 814th, and 816th meetings, pp 142–84, 263–74, and 280–6.

⁷² Report of the ILC on the work of its 18th session *supra*, n 70, p 202.

⁷³ See *supra* para. 19.

⁷⁴ Report of the ILC on the work of its 18th session *supra*, n 70, p 207.

⁷⁵ Ibid, p 207, emphasis added.

⁷⁶ '[O]bjections are sometimes made to reservations for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States', Report of the ILC on the work of its 18th session, *supra* n 70, p 207.

ambiguities and persistent lacunae. Even so, it did not give full satisfaction to the advocates of 'absolute sovereignty', especially the USSR and its allies, who obtained new and important satisfactions in Vienna,⁷⁷ since the text which was ultimately adopted not only upheld the 'flexible' system but also actually increased flexibility on a number of important points.

26. Hence:

the Conference adopted an amendment suggested originally by Poland,⁷⁸ with regard to Article 19(b),⁷⁹ in order to authorize, if necessary, supplementary reservations to a treaty enumerating certain tacit reservations if this enumeration was not exhaustive; paragraph (c) was likewise modified as a consequence; and moreover, after a Soviet amendment,⁸⁰ the presumption posed by Article 17, paragraph (4)(b) of the ILC draft⁸¹ was inversed to the corresponding Article⁸² of the Convention which adopts the principle according to which the objection to a reservation does not impede the entry into force of the treaty between the reserving State and the objecting State, unless the latter has 'explicitly expressed' a contrary intent; Article 21(3) was likewise modified as a result. Interestingly, the Expert Consultant, Sir Humphrey Waldock, did not oppose this change, although it was far from insignificant, considering that 'the problem was merely that of formulating a rule one way or the other'.⁸³

27. The following conclusions may be drawn from the long and tortuous history of the Vienna rules relating to reservations:

- Although it concerns a topic which is by nature ostensibly technical, the legal regime of reservations lies at the heart of fundamental controversies linked to the procedure of the elaboration of treaties; it touches on the equilibrium between the interest of States to preserve their sovereignty and the necessity of international cooperation in a world which is at once divided and interdependent.
- The pendulum between these two preoccupations has finally come to rest—under the influence of eminently 'sovereign-minded' States—in the direction of an expansive licence to formulate and, simultaneously, object to reservations.
- The difficult consensus on this point was reached at the cost of, largely deliberate, lacunae and ambiguities which, without doubt, explain the affection of States for the 'Vienna regime'.

⁷⁷ See, notably, I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester: Manchester University Press, 1984), pp 61–3; K. Zemanek, *supra* n 43, pp 328–30. For an analysis of the differences between the ILC draft and the text of the Convention, see J. K. Koh, *supra* n 18, pp 95 ff.

⁷⁸ A/CONF.39/C.1/L.136, see Reports of the Committee of the Whole (A/CONF.39/14), Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 133.

⁷⁹ Corresponding to Art. 16(b) of the ILC draft. See also *infra* para 85.

⁸⁰ V.A/CONF.39/L.3, Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 137. The Committee of the Whole has already rejected previous similar amendments presented by Syria (A/CONF.39/C.1/L.97), Czechoslovakia (A/CONF.39/C.1/L.85), and the USSR (A/CONF.39/C.1/L.115).

⁸¹ See *supra* para. 24(2).

⁸² Article 20(4)(b).

⁸³ Summary Records (A/CONF.39/11/Add.1), *supra* n 2, 10th plenary meeting, p 34, para. 74. The Soviet amendment was approved with 49 votes to 21, with 30 abstentions, *ibid*, p 35, para. 79.

A controversial legal regime⁸⁴

28. As Paul Reuter wrote in his Tenth Report on the Law of Treaties concluded between States and International Organizations or between two or more International Organizations, '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'⁸⁵ and, notably, does not in itself allow for a conclusion to the eternal debate whether one ought to encourage or discourage reservations.

29. Whether one is *pro* or *contra* reservations appears to have little connection with rational considerations and is more akin to 'religious war': for some, reservations are an absolute evil because they cause injury to the integrity of the treaty; conversely, for others they facilitate a broader cohesion and are, thereby, a factor of universality.

30. The debate—which is focused on reservations to normative treaties to the exclusion of those which envisage synallagmatic rights and duties for the parties—is fixed since the Advisory Opinion of the ICJ and its terms stand in remarkable relief against the opposition between the majority and the dissenting judges in the case concerning *Reservation to the Genocide Convention*:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.⁸⁶

To the contrary, for the judges in the minority:

It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order to attain a high objective for all humanity... In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.⁸⁷

These conventions ['multilateral conventions of a special character'],⁸⁸ by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest.⁸⁹

31. This clear-cut opposition of views calls for three comments:

- it manifests itself from the very origin of the controversy in connection with a human rights treaty; hence it is relevant in the subcategory of normative treaties concerning which the debate has recently re-emerged;⁹⁰

⁸⁴ See A. Pellet, Second Report on Reservations to Treaties, A/CN.4/477/Add.1, ch. II: Unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties), *YILC*, 1996, vol. II, Part One, pp 52–82, paras 55–260.

⁸⁵ Tenth Report, A/CN.4/341 and Add.1/Corr.1, *YILC*, 1981, vol. II, Part One, p 56, para. 53.

⁸⁶ *ICJ Reports* 1951, *supra* n 6, p 24.

⁸⁷ Joint Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo, *supra* n 7, p 47.

⁸⁸ Dissenting Opinion Judge Alvarez, *supra* n 24, p 51.

⁸⁹ *Ibid*, p 53.

⁹⁰ See *infra* paras 35–46.

- the two 'camps' start from exactly the same premise (the objectives pursued by the Convention in the interest of all mankind) to end in radically opposing conclusions (reservations to the Convention should/should not be accepted);
- everything has been said since 1951; hence the corroded dialogue of the deaf has persisted for more than 50 years without interruption and without fundamental evolution in the arguments from either side.⁹¹

32. In reality, everything is a matter of measure, equilibrium, and circumstances. The prerequisite of universality coerces to open as broadly as possible the rights of States to formulate reservations which, evidently, facilitate universal participation in treaties. Nonetheless, this liberty of States to formulate reservations should not be unlimited. It collides with the other prerequisite, equally imperative, to preserve what forms the essence itself of the treaty. It would be absurd for example to allow a State to become a party to the Convention on Genocide with the exclusion of Articles I, II, and III, being the only substantial provisions of the Convention.

33. The issue can also be seen as a problem of consent.⁹² By definition, the law of treaties is consensual. 'Treaties are binding by virtue of the will of States to be bound by them. They are legal acts, involving the operation of human will.'⁹³ States are bound *because* they have expressed their consent to be bound. They are free to engage themselves and they are only bound by those obligations which they have accepted voluntarily and in full knowledge of the cause. 'No State can be bound by contractual obligations it does not consider suitable.'⁹⁴ This applies also to reservations.⁹⁵ As the ICJ has put it:

It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.⁹⁶

34. The rules applicable to reservations thus have to realize a double equilibrium:

⁹¹ On the unchanged sides of the dispute see eg J. L. Brierly, Report on reservations to multilateral conventions, A/CN.4/41, *supra* n 33, pp 3–4, paras 11, 12, 16; ILC Report A/1858, of the same year, *supra* n 36, p 129, para. 26; see also J. K. Gamble Jr, 'Reservations to Multilateral Treaties: A Macroscopic View of State Practice', *AJIL*, 1980, vol. 74, pp 372–3; B. T. Halajczuk, 'Les conventions multilatérales entre l'universalité et l'intégrité', *RDI*, 1960, vol. 38, pp 38–50 and 147–58; P. H. Imbert, *supra* n 14, pp 461–4; W. A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', *Canadian Yearbook of Int'l L*, 1994, vol. 32, pp 39, 40–1, or 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly*, 1996, vol. 18, p 472; G. Teboul, 'Remarques sur les réserves aux conventions de codification', *RGDIP*, 1982, vol. 86, pp 679, 682–3.

⁹² Cf the First Report of H. Lauterpacht on the law of treaties, where he explains that the problem of consent constitutes 'a question closely, though indirectly, connected with that of the intrinsic justification of reservations', A/CN.4/63 in *YLC*, 1953, vol. II, p 125.

⁹³ P. Reuter, *supra* n 5, pp 20–1.

⁹⁴ C. Tomuschat, *supra* n 22, p 466. See, in this sense *The SS Wimbledon*, PCIJ, Series A, no. 1, p 25; *International Status of South West Africa*, ICJ, Advisory Opinion, 11 July 1950, *ICJ Reports* 1950, p 139.

⁹⁵ See W. Bishop Jr, *supra* n 23, p 255.

⁹⁶ *Reservations to the Genocide Convention*, *supra* n 6, p 21. The authors of the Dissenting Opinion stated this idea in a much stronger way:

The consent of the parties is the basis of treaty obligations. The law governing reservations is only a particular application of this fundamental principle, whether the consent of the parties to a reservation is given in advance of the proposal of the reservation or at the same time or later. (pp 31–2)

See also the award in the *Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic)*, ILR, 1977, vol. 54, pp 6, 51–2, paras 60–1.

- between the prerequisites of universality and the integrity of the treaty, on the one hand;
- between the liberty of the consent of the reserving State and that of the other States parties, on the other hand,

while it is understood that these two 'dialectic pairs' otherwise overlap to a large extent. Undoubtedly, that is what the 'Vienna regime' strives for. Starting from a presumption in favour of the validity of reservations (the chapeau of Art. 19), thereby abandoning the principle of unanimity (Art. 20(4)) and establishing that of tacit acceptance instead (Art. 20(5)), the 1969 Convention facilitates the formulation of reservations and, as a result, a treaty participation as broad as possible. By generously opening the possibility to object and to modulate the effects of their objections to other contracting parties (Arts 20(4)(b) and 21), it preserves the liberty to consent of those latter parties. And, by excluding reservations which are incompatible with the object and purpose of the treaty (Art. 19(c)), it guarantees, if not the *integral* application of its provisions, at least the *integrity* of its essential content. In addition—and, perhaps, above all—the Vienna rules, auxiliary to the will of the States, only apply in the absence of special clauses, which parties remain free to insert in the treaty in order to derogate from it or specify it.⁹⁷

35. Nevertheless, this equilibrium is contested by the advocates of parochial approaches of 'specialized' fields of international law and, singularly, by 'human rightists',⁹⁸ who invoke the specificity of human rights treaties to contest the applicability of the Vienna regime to reservations formulated in their respect.⁹⁹ Actually, here one finds again the same arguments as those advanced by the advocates of integrity, on the one side, and universality, on the other side—but expressed with even more vehemence—while the whole debate in reality is not based on the adaptation of the reservations *regime* to human rights treaties, but centres around questions as to whether these treaties lend themselves to the *formulation* of reservations and *what* the powers of the *monitoring bodies created by these treaties* are in this matter.¹⁰⁰

36. There is no doubt that the reservations regime accepted by the 1969 Convention had been envisaged by its authors as first and foremost applicable to all multilateral treaties, regardless of their object, with the only exceptions being certain treaties concluded with the intent of applying them integrally and of constitutive acts of international organizations, for which limited derogations have been foreseen by paragraphs 2 and 3 of Article 20.¹⁰¹ And the absence of any mention of human rights treaties¹⁰² (and, more generally, of the entirety of normative treaties—to which the preceding comments are

⁹⁷ On this element of flexibility, see A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), pp 124–6; J. K. Gamble Jr, *supra* n 91, pp 383–91; P. H. Imbert, *supra* n 14, pp 162–230; Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), pp 169–73; J. Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg: Conseil de l'Europe, 1999), pp 85–90, 101–4; R. Riquelme Cortado, *La reservas a los tratados—Formulación y ambigüedades del régimen de Viena* (Murcia: Universidad de Murcia, 2004), pp 89–136.

⁹⁸ On this notion, see A. Pellet, "Human Rightism" and International Law', *IYBIL*, 2001, vol. 10, p 3.

⁹⁹ These are, as a general rule, more numerous than the reservations made to treaties concerning other fields: see B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women', *AJIL*, 1991, vol. 85, pp 281, 316–20; W. A. Schabas, *supra* n 91, p 42.

¹⁰⁰ On this specific question, see the bibliography related to 'General studies on reservations to human rights treaties' at the beginning of this commentary; see also the text dedicated to this question in the French version of the present commentary, *supra* n 4, pp 679–96.

¹⁰¹ See *infra* the commentaries on these provisions.

¹⁰² 'Nothing in the Vienna Convention suggests that a special regime applies to human rights treaties or to a particular type of treaty which type includes human rights treaties', F. Hampson, 'Reservations to Human Rights Treaties', Final working paper, E/CN.4/SUB.2/2004/42, para. 6.

fully applicable, notably in environmental matters) is even more significant because, on the one hand, the flexible system retained by the authors of the Convention directly emanates from the ICJ Advisory Opinion,¹⁰³ which precisely dealt with a human rights treaty, and, on the other hand, the ILC had posed itself since the Vienna Conference the question regarding the possibility of exceptions (other than the two which had been explicitly retained),¹⁰⁴ in order to answer in the negative.¹⁰⁵

37. Basing itself on these arguments, the ILC has, in its Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties,¹⁰⁶ vigorously reaffirmed the unity of the legal regime incorporated in Articles 19 to 23 of the 1969 and 1986 Vienna Conventions:

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;
3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments.¹⁰⁷

38. Adopted at the initiative of the Special Rapporteur,¹⁰⁸ these Conclusions, well-received as a whole by the States during the examination of the ILC report in the General Assembly in 1997,¹⁰⁹ have in return been very coldly received by the human rights monitoring bodies.¹¹⁰ However, their criticisms related much more to the positions taken by the Commission on the competences of the monitoring bodies regarding reservations than to the reaffirmation of the unity of the reservations regime.¹¹¹

¹⁰³ See *supra* paras 7–20.

¹⁰⁴ It is not without interest to mention that, when they thought it useful, both the ILC and later the Vienna Conference did not hesitate to introduce rules applicable to treaties related to specific domains—cf Art. 60(5) on 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'.

¹⁰⁵ See eg ILC Report on the work of its 3rd session (A/1858), *YILC*, 1951, vol. II, p 129, para. 28; ILC Report (A/6309/Rev.1) of 1966, *supra* n 70, p 225, or the rejection by the Vienna Conference of a US amendment aiming at introducing the criterion of the 'character' of the treaty among the elements to be taken into consideration to assess the admissibility of a reservation, A/CONE.39/C.1/L.126 and Add.1, see Reports of the Committee of the Whole (A/CONE.39/14), Documents of the Conference (A/CONE.39/11/Add.2), *supra* n 2, p 134; Summary Records (A/CONE.39/11), 1st session, 21st meeting of the Committee of the Whole, *supra* n 2: United States (107–8, 130–1), Spain (109), or China (121), and against: Ukraine (114–15), Poland (118), Ghana (119), Italy (120), Hungary (121–2), Argentina (129–30), and USSR (134). See also the US reaction to the rejection of the proposed amendment: Summary Records, 10th plenary meeting, 2nd session (A/CONE.39/11/Add.1), *supra* n 2, p 35.

¹⁰⁶ On these preliminary conclusions, see: E. A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties', *Berkeley J of Int'l L*, 1999, vol. 17, pp 277, 322–6; B. Simma, 'Reservations to Human Rights Treaties—Some Recent Developments' in G. Hafner (ed.), *Liber Amicorum Professor Seidl-Hohenveldern—In Honour of his 80th Birthday* (The Hague: Kluwer, 1998), pp 676–9; K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', *EJIL*, 2002, vol. 13, pp 437, 468–71.

¹⁰⁷ Report of the ILC on the work of its 49th session (A/52/10), *YILC*, 1997, vol. II, Part Two, p 57.

¹⁰⁸ See the Second Report, A/CN.4/477/Add.1, *YILC*, 1996, vol. II, Part One, pp 52–82, paras 55–260.

¹⁰⁹ See A/C.6/52/SR.17 to 25.

¹¹⁰ See A. Pellet, Third Report on reservations to treaties, A/CN.4/491, *YILC*, 1998, vol. II, Part One, p 231, para. 16; Fifth Report on reservations to treaties, A/CN.4/508, pp 4–9, paras 10–15.

¹¹¹ Since the Guide to Practice on reservations to treaties as provisionally adopted by the ILC in 2010 covers those issues (see in particular Sub-Section 3.2, 'Assessment of the permissibility of reservations', which includes several guidelines on the competence of treaty monitoring bodies in this respect), it is likely that the Commission will not adopt final Conclusions on these issues.

39. In this respect, while fully recognizing that the monitoring bodies created by the treaties 'are competent to comment upon and express recommendations with regard, *inter alia*, to the admissibility of reservations by States, in order to carry out the functions assigned to them',¹¹² the ILC underlined:

that, 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.¹¹³

40. It is in respect of this point that the human rights organs have reacted most negatively.¹¹⁴ In fact, the position of the ILC aimed clearly at stopping a deviation which, if not 'supranational', was at least not very respectful of State consent that lies at the basis of all conventional commitment,¹¹⁵ initiated by the European Commission and Court of Human Rights and broadcasted via General Comment No. 24 of the Human Rights Committee.

41. Although, at first, these bodies showed themselves to be extremely hesitant about controlling the validity of the reservations made by the States parties,¹¹⁶ the turning point was established by the Report adopted by the European Commission on 5 May 1982 in the *Temeltasch* case,¹¹⁷ in which, relying on the 'particular nature' of the Convention, the Commission:

considers that the very system of the Convention confers on it the competence to consider whether, in a specific case, a reservation or an interpretative declaration has or has not been made in accordance with the Convention.¹¹⁸

As a result, the Commission, on the one hand, qualified the Swiss interpretative declaration relating to Article 6(3)(e) of the Convention as a reservation¹¹⁹ and, on the other hand, held that this was not in conformity with the provisions of Article 64 of the Convention.¹²⁰

¹¹² Preliminary conclusions, *supra* n 106, p 57, para. 5.

¹¹³ *Ibid.*, p 57, para. 10.

¹¹⁴ For an exhaustive explanation of the positions of the human rights treaties control organ, see D. W. Greig, 'Reservations: Equity as a Balancing Factor?', *Australian Yearbook of Int'l L.*, 1995, vol. 16, pp 21, 90-107; R. Riquelme Cortado, *supra* n 97, pp 345-53. In particular, in relation to the European Convention on Human Rights, see I. Cameron and F. Horn, 'Reservations to the European Convention on Human Rights: The Belilos Case', *GYIL*, 1990, vol. 33, pp 69, 88-92.

¹¹⁵ See *supra* para. 32.

¹¹⁶ Memorandum addressed by the Secretariat to the Director of the Division of Human Rights in *UNJY*, 1976, pp 220-1, and the Note of the Secretary General, CERD/C/R.93, largely relied upon in the Report of the Committee for the Elimination of Racial Discrimination to the General Assembly (A/33/18), para. 374. On the position of the Committee on the Elimination of Discrimination Against Women, see B. Clark, *supra* n 99, pp 283-9. On the initial carefully ambiguous attitude of the Human Rights Committee, see M. G. Schmidt, 'Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants' in J. P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out—Reservations and Objections to Human Rights Conventions* (London: BIICL, 1997), p 24.

¹¹⁷ Application no. 9116/80, Report of 5 May 1982, para. 65. See notably G. Cohen-Jonathan, *La Convention européenne des Droits de l'homme* (Paris: Economica, 1989), pp 86-93; P. H. Imbert, 'Les réserves à la Convention européenne des Droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)', *RGDIP*, 1983, vol. 87, p 580 (also published in English: 'Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The *Temeltasch* Case', *ICLQ*, 1984, vol. 33, p 558).

¹¹⁸ *Temeltasch* case, p 17, para. 65.

¹¹⁹ *Ibid.*, pp 18-22, paras 68-82. Article 64 became Art. 57 after the entry into force of Protocol XI.

¹²⁰ *Temeltasch* case, pp 22-5, paras 83-92.

42. Six years later, in its *Belilos* decision of 29 April 1988, the Strasbourg Court adopted the position of principle of the Commission.¹²¹ In turn, it proceeded to 're-qualify' the 'interpretative declaration' of Switzerland (relating to Art. 6(1) of the Convention)¹²² as a reservation and estimated that:

the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid,¹²³

after having observed that:

The Court's competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Articles 45 and 49 of the Convention... and from Article 19 and the Court's case-law (see, as the most recent authority, the *Ettli and Others* judgment of 23 April 1987, Series A no. 117, p. 19, § 42).¹²⁴

Since then, the European Commission and the Court of Human Rights have made this jurisprudence an almost routine application and extended it to the reservations expressed by the States to their competence.¹²⁵

43. The positions of the monitoring bodies instituted by the universal instruments relating to human rights aligned themselves, *mutatis mutandis*, to those of the Strasbourg organs, as shown in General Comment No. 24 of the Human Rights Committee in particular,¹²⁶ in which it affirms that it:

necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.¹²⁷

¹²¹ Series A, no. 132, p. 1. See, notably, H. J. Bourguignon, 'The *Belilos* Case: New Light on Reservations to Multilateral Treaties', *VaJIL*, 1988–89, vol. 29, p. 347; I. Cameron and F. Horn, *supra* n 114, pp 69–129; G. Cohen-Jonathan, 'Les réserves à la Convention européenne des Droits de l'homme (à propos de l'arrêt *Belilos* du 29 avril 1988)', *RGDI*, 1989, vol. 93, p. 273; R. W. Edwards Jr, 'Reservations to Treaties: The *Belilos* Case and the Work of the International Law Commission', *Toledo L Rev*, 2000, vol. 31, p. 195; R. J. Stuart MacDonald, 'Reservations Under the European Convention on Human Rights', *RBDI*, 1988, vol. 21, p. 29; and S. Marks, 'Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights', *ICLQ*, 1990, vol. 39, p. 300.

¹²² *Belilos* case, paras 40–9.

¹²³ *Ibid*, para. 60; see paras 51–9.

¹²⁴ *Ibid*, para. 50.

¹²⁵ See *Chrysostomos et al v Turkey*, Application nos 15299/89, 15300/89, and 15318/89, ECommHR, 4 March 1991; *F and ML v Austria*, Application no. 18249/91, ECommHR, 6 September 1994; *Gradinger v Austria*, Application no. 15963/90, ECommHR, 19 May 1994 and ECtHR, 23 October 1995, Series A, no. 328-C, para. 51; *Loizidou v Turkey*, Application no. 15318/89, ECtHR, Preliminary Objections, 23 March 1995, Series A, no. 310, para. 95; *Fischer v Austria*, Application no. 16922/90, ECtHR, 26 April 1995, Series A, no. 312, paras 36–42; *Stallinger and Kuso v Austria*, Application nos 14696/89 and 14697/89, ECommHR, 7 December 1995, and ECtHR, 23 April 1997, *RCADI*, 1997-II, paras 40–9; *Pauger v Austria*, Application no. 16717/90, ECtHR, 28 May 1997, *RCADI*, 1997-III, para. 54; *Helle v Finland*, Application no. 20772/92, ECommHR, 15 October 1996 and ECtHR, 19 December 1997, *RCADI*, 1997-VIII, paras 43–4 (concluding that the reservation is valid); *Jėčius v Lithuania*, Application no. 34578/97, ECommHR, 11 September 1999 and ECtHR, 31 July 2000, *RCADI*, 2000-IX, paras 77–81 (concluding that the reservation is valid); *Eisenstecken v Austria*, Application no. 29477/95, ECtHR, 3 October 2000, *RCADI*, 2000-X, paras 21–30; *Kolb and others v Austria*, Application nos 35021/97 and 45774/99, ECtHR, 17 April 2003, para. 59; *Richter v Austria*, Application no. 4490/06, ECtHR, 18 December 2008, para. 35. For its part, in its third Advisory Opinion, dated 8 September 1983 on *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, the Inter-American Court of Human Rights considered that certain reservations made by Guatemala to the Convention were not admissible, see OC-3/83, 8 September 1983, Series A, no. 3.

¹²⁶ Human Rights Committee, General Comment 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994.

¹²⁷ *Ibid*, para. 18.

44. Moreover, invoking an alleged doctrine of 'severability'¹²⁸ the Committee considers 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.¹²⁹

The Committee applied this principle in its decision of 31 December 1999.¹³⁰

45. This very absolute position is different from that of the Strasbourg organs which, in the cases decided so far, arrived at the same result but after having sought the intention of the reserving State. Thus, by claiming to seek the intentions of the State in question, they preserve at least the appearance of assent.¹³¹ And, since the legally impeccable position of the ILC (which leaves with the reserving State the concern of drawing conclusions from a declaration of invalidity),¹³² risks posing difficult practical problems, the Strasbourg solution has been endorsed by the ILC in the provisional version of the Guide to practice adopted in 2010, which lays down the 'positive rebuttable presumption' according to which: '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.'¹³³

46. Moreover—and independently of the problems, which arose after its adoption (but still badly solved), related to the role of the monitoring bodies in its implementation—the Vienna regime is, due to its suppleness and its flexibility, applicable to all multilateral, either normative or synallagmatic, treaties, whatever their object, including instruments relating to human rights. Failing to ensure their absolute integrity, which would hardly be compatible with the very definition of reservations, it nonetheless preserves the essence of their contents and guarantees that their nature is not distorted.

47. Moreover and more generally, although they constitute an undeniable success, the provisions of the Vienna Convention on reservations have not solved all problems arising from this legal institution, both indispensable and vilified, offering necessary relief from the all too constraining rigidity of the principle *pacta sunt servanda*.

48. As Professor Bruno Simma has written:

¹²⁸ Which rests on a confusion between the 'severability' of the provisions of a treaty—established by Art. 44 of the Convention—and the 'severability' of the consent of the State party, which has no legal or logical basis. See A. Pellet, Second Report on reservations to treaties, A/CN.4/477/Add.1, *supra* n 84, pp 78–9, paras 220–30.

¹²⁹ General Comment 24, *supra* n 126, para. 18.

¹³⁰ Communication No 845/1999, *Rawle Kennedy v Trinidad and Tobago*, CCPR/C/67/D/845/1999, para. 6.7. This decision led the concerned State to denounce the optional protocol (see Multilateral Treaties Deposited with the Secretary-General (MTDSG), available at: <<http://treaties.un.org/pages/ParticipationStatus.aspx>>—Status as at 13 December 2010, ch. IV.5, fn 1), which did not impair the Committee, in a later decision of 26 March 2002, to consider that Trinidad and Tobago had breached multiple provisions of the 1966 Covenant that were covered by the reservation. See *Rawle Kennedy v Trinidad and Tobago*, Communication No. 845/1998, CCPR/C/74/D/845/1998. See also *infra* para. 121 and n 360.

¹³¹ See the decisions in *Belilos*, *supra* n 121, para. 60; *Loizidou*, *supra* n 125, paras 94, 97.

¹³² See *supra* para. 37.

¹³³ Paragraph 2 of this guideline contains a non-exhaustive list of the factors relevant to identify the intention of the author of the reservation. For the commentary of this guideline, see Report of the ILC (2010) (A/65/10), pp 192–208. While this solution was approved by a majority of States during the debates of the Sixth Committee in 2010, the vociferous opposition of several influential States will probably incite the Commission to turn to revise guideline 4.5.2.

What we are looking for in the Convention is actually two different things: First, we want to know the conditions of the admissibility *vel non* of a reservation; second, if according to these rules a particular reservation is to be deemed inadmissible, we look for guidance as to the courses available to another contracting party which is unwilling to accept this state of things. Unfortunately, on both of these issues, our analysis of the Vienna Convention yields only partial and unsatisfactory results.¹³⁴

To these two major lacunae, others are added, of lesser weight, as well as a number of ambiguities.¹³⁵ It is sufficient here to highlight the reasons for these deficiencies, some of which have been deliberated and are perhaps a pledge of realism.

49. The great doctrinal debate which expresses the main difficulties is that which opposes the advocates of what one has qualified as the 'permissibility school',¹³⁶ on the one hand, to the 'opposability school', on the other hand.¹³⁷

50. The key question, on which the Vienna Convention barely sheds any light, is to know whether the validity of the reservations is an objective question or whether it resorts under the subjective appreciation of the other States parties. It is expressed in the following terms by Sir Derek Bowett:

The issue of 'permissibility' is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as matter of policy, other Parties find the reservations acceptable or not. The consequence of finding a reservation 'impermissible' may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State's acceptance of the treaty as a whole.¹³⁸

51. This particularly authoritative opinion represents the quintessence of the positions of the 'permissibility school' (or of the 'objective admissibility'). On the opposite side, however, the authors who belong to the opposability school consider that in the system retained by the Vienna Convention, 'the validity of a reservation depends solely on the acceptance of the reservation by another contracting State'. Consequently, Article 19(c) was described 'as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that'.¹³⁹

52. For the advocates of the opposability thesis, the answers to the questions relating to the admissibility of the reservations, entirely subjective, are to be found in the provisions of Article 20 of the 1969 and 1986: '[t]he validity of a reservation depends, under

¹³⁴ B. Simma, *supra* n 106, p 662. In the same sense L. Sucharipa-Behrmann, 'The Legal Effects of Reservations to Multilateral Treaties', *ARIEL*, 1996, vol. 1, pp 67, 87. For a particularly critical view, see L. Lijnzaad, *supra* n 23, *passim*, esp. p 37.

¹³⁵ See R. Riquelme Cortado, *supra* n 97, *passim*. See also A. Pellet, Preliminary Report A/CN.4/470, *YILC*, 1995, vol. II, Part One, pp 126-37, paras 91-135.

¹³⁶ The word 'permissibility' is better translated in French as 'validité'; as to the precise respective meanings of the words 'permissibility' and 'validity' in English, see *infra* para. 184.

¹³⁷ On these two schools see J. K. Koh, *supra* n 18, pp 71-116, *passim* and esp. pp 75-7; see also C. Redgwell, *supra* n 29, pp 243-82, esp. pp 263-9; R. Riquelme Cortado, *supra* n 97, pp 73-82; and I. Sinclair, *supra* n 77, p 81, fn 78.

¹³⁸ D. W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties', *BYIL*, 1976-77, vol. 48, pp 67, 88.

¹³⁹ J. M. Ruda, *supra* n 12, p 190. For similar points of view, see J. Combacau, *Le droit des traités* (Paris: PUF, 1991), p 60; and 'Logique de la validité contre logique de l'opposabilité dans la Convention de Vienne sur le droit des traités' in *Le droit international au service de la paix, de la justice et du développement—Mélanges Michel Virally* (Paris: Pedone, 1991), p 200; G. Gaja, 'Unruly Treaty Reservations' in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan: Giuffrè, 1987), vol. I, pp 313-20; P. H. Imbert, *supra* n 14, pp 134-7; P. Reuter, *supra* n 5, p 74; K. Zemanek, *supra* n 43, pp 331-3.

the Convention's system, on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty'.¹⁴⁰ To the contrary, the supporters of the admissibility thesis regard as accepted that an invalid reservation is not opposable to the other States. Consequently:

the issue of 'opposability' is the secondary issue and pre-supposes that the reservation is permissible. Whether a Party chooses to accept the reservation, or object to the reservation, or object to both the reservation and the entry into force of the treaty as between the reserving and objecting States is a matter for a policy decision and, as such, not subject to the criteria governing permissibility and not subject to judicial review.¹⁴¹

53. These doctrinal controversies have important practical repercussions with regard to the system of objections to reservations. Thus, for example, under the terms of the opposability thesis, the dispute-settlement bodies, judicial or otherwise, would have to abstain from rendering an opinion on the admissibility of a reservation in the absence of objections by the other parties.¹⁴² On the contrary, according to the admissibility thesis, an objection to a reservation, which is incompatible with the object and the purpose of the treaty or prohibited by this treaty, has no particular effect, as the reservation is, in any event, null and void. Another problem which the admissibility and opposability schools solve in an opposite manner is whether, to the principle of the freedom of expressing reservations, corresponds an equivalent faculty to make objections to the reservations. Here, still, the Convention is tacit and leaves the door open to the most extreme theses.

54. Without aiming to present an exhaustive list, the principal uncertainties resulting from the provisions of the 1969 Convention regarding reservations are the following:¹⁴³

- (1) What is the exact meaning of the expression 'compatibility with the object and purpose of the treaty'?
- (2) When does a Convention have to be regarded as a restricted multilateral treaty (Art. 20(2))?
- (3) Is an invalid reservation null in itself and does its nullity entail that of the expression of the State's consent to be bound (or does it not)?
- (4) Is an invalid reservation null independently of the objections which can be made?
- (5) Can the other contracting States or international organizations accept a reservation which is formulated in spite of the provisions of Article 19 of the Vienna Convention?
- (6) What are the effects of such an acceptance?
- (7) If the invalidity of such a reservation has been established (by whom?), can the reserving State replace it with another reservation or withdraw from the treaty?
- (8) Are the contracting States free to formulate objections independently of the validity of the reservation?

¹⁴⁰ J. M. Ruda, *supra* n 12, p 190.

¹⁴¹ D. W. Bowett, *supra* n 138, p 88.

¹⁴² Whereas this is not the case in practice, see *supra* paras 41-3.

¹⁴³ This list is based on a similar list appearing in A. Pellet, Preliminary Report, A/CN.4/470, YILC, 1995, vol II, Part One, p 146, para. 124. See also A. Aust, *supra* n 97, p 123.

- (9) Do they have to or should they indicate the motives for their objections?
- (10) What precisely are the effects of an objection to a valid reservation?
- (11) And to an invalid reservation?
- (12) In which measure do these effects distinguish themselves from those of an acceptance of a reservation when the objecting State does not neatly express its intention that the treaty does not enter into force between itself and the reserving State?
- (13) Can the reserving State in such a case exclude the applicability of treaty provisions other than those that are envisaged by the reservation?
- (14) And is the objecting State bound to accept these conclusions?
- (15) What is the precise meaning of the expression 'to the extent of the reservation'?
- (16) What are the effects of reservations on the entry into force of the treaty?

So many questions to which the Vienna Convention does not give an answer—or answers in an ambiguous way—that can raise, and do raise, real practical problems.

Customary status and new *travaux* of the ILC

55. It is not in doubt that, during their adoption, the Vienna rules relating to reservations displayed to a large extent a *de lege ferenda* character. Their adoption and their systematic implementation by the States and the bodies charged with supervising the implementation of the human rights treaties (in spite of the doctrinal criticisms) have, however, consolidated these rules, the customary status of which is today mostly indisputable.

56. The deep division of the ICJ judges during the adoption of the Advisory Opinion of 1951 on the *Reservations to the Genocide Convention*,¹⁴⁴ the very sharp doctrinal criticisms of which this Advisory Opinion was the object, the ILC's late and hesitant acceptance of the flexible system which ended up overriding the traditional unanimity rule,¹⁴⁵ and the considerable amendments added *in extremis* to the Commission's draft by the Vienna Conference¹⁴⁶ show it straightforwardly: the Vienna rules relating to reservations are the fruit of controversies which are evidence of their largely *de lege ferenda* character at the time when they were adopted.¹⁴⁷

57. The ILC's 1966 final report is hardly enlightening on this point: in accordance with its practices, the Commission does not make a distinction between what, in its draft Articles is, on the one hand, part of codification *stricto sensu*, and of progressive development of international law, on the other hand.¹⁴⁸

58. In any case, one can assume that the passing of time made the question whether the rules laid down in 1969 regarding reservations concerned codification or progressive development largely obsolete. Indeed, the Convention has consolidated or 'crystallized' prior initiated evolutions which had already largely begun;¹⁴⁹ while, however, during the 26 years 'that have elapsed since the Vienna Convention was opened for signature, the

¹⁴⁴ See *supra* para. 7.

¹⁴⁵ See *supra* paras 14–20.

¹⁴⁶ See *supra* paras 25–6.

¹⁴⁷ In this sense, see notably D. H. Hylton, 'Default Breakdown: The Vienna Convention on the Law of Treaties—Inadequate Framework on Reservations', *Vanderbilt J Trans'l L*, 1994, vol. 27, pp 419, 423.

¹⁴⁸ See the general notice which appeared at the beginning of the draft: 'it is not practicable to determine into which category each provision falls' in ILC Report 1966, A/6309/Rev.1, *supra* n 70, p 177, para. 35.

¹⁴⁹ See R. R. Baxter, 'Treaties and Customs', *RCADI*, 1970, vol. 129, pp 25, 48.

rules regarding reservations stated in that treaty have come to be seen as basically wise and to have introduced desirable certainty'.¹⁵⁰

59. This consolidation is due to several factors. In particular, these standards corresponded precisely to the state and the needs of the international community at the time when they were adopted and were part of a general tendency aiming to confer flexibility and more openness on multilateral conventions. It is moreover significant that, in spite of the very sharp debates to which their adoption gave rise, they were adopted with quasi-unanimity by the Vienna Conference.¹⁵¹ These considerations have elsewhere led States largely to conform to these provisions, whether or not they ratified the Convention,¹⁵² and even if, like France, they did not sign it.¹⁵³

60. Although disputes on the matter are less numerous than the existing legal uncertainties might lead one to think, the international arbitrators or judges who had to decide such cases often referred expressly or by implication to the provisions of the Convention. Thus, the Arbitral Tribunal called to decide the *Anglo-French Continental Shelf* case did not hesitate to invoke and apply the rules of the Convention,¹⁵⁴ even when it had been agreed that the applicable rules were those in force in 1965–66.¹⁵⁵ In the same way, although the ICJ did not expressly attribute customary status to the Vienna rules relating to reservations, it has, by its orders of 2 June 1999 in the cases concerning the *Legality of the use of force* brought by Yugoslavia against Spain and the United States, decided to strike these cases off the role, because of the reservations formulated by the defendants to Article IX of the Genocide Convention, thus considering, implicitly but necessarily, that they were not contrary to the object and purpose of the treaty.¹⁵⁶ In 2006, the Court reaffirmed the applicability of the object and purpose test, without however mentioning Article 19(c) of the Convention, and considered that a reservation made by Rwanda

¹⁵⁰ R. W. Edwards Jr, 'Reservations to Treaties', *Michigan J Int'l L*, 1989, vol. 10, pp 362, 365; see also R. Riquelme Cortado, *supra* n 97, pp 139–43; T. L. McDorman, 'Reservations and the Law of the Sea Treaty', *Journal of Maritime Law and Commerce*, 1982, vol. 13, pp 481, 499; L. Lijnzaad, *supra* n 23, who concedes, apparently with some regret, that 'though these provisions were progressive development rather than codification at the time of the drafting of the Vienna Convention, they have [been] by now accepted as the law to be applied to reservations', at p 76.

¹⁵¹ The relevant Articles were adopted with the following voting record: Art. 19, 92 votes to 4, with 7 abstentions; Art. 20: 83 votes to 0, with 7 abstentions; Arts 21, 22, and 23 were adopted with the respective following majorities: 94, 98, and 90 to 0, see Summary Records, A/CONF.39/11/Add.1, 2nd session, 10th and 11th plenary meetings, *supra* n 2, pp 30, 35, 36, 38. As indicated by P. H. Imbert: '[l]e vote n'étant pas nominatif, il est impossible de savoir quels sont les États qui ont voté contre' ('votes not being nominative, it is impossible to know which States voted against' Art. 19 [editor's translation]); Australia and Japan had indicated they would abstain, *ibid*, pp 14, 81, fn 15.

¹⁵² See eg for the United Kingdom, the statement of Sir Ian Sinclair, 'The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation', *ASIL Proceedings*, 1984, vol. 78, pp 273–4; for the United States, the statement by R. E. Dalton, *ibid*, pp 276, 278. The *Third Restatement of Foreign Relations Law of the United States* (St Paul: American Law Institute, 1987) generally adopts the rules of the 1969 Vienna Convention and adds a few specifications better to reflect the needs of US practice. On this question, see (in relation to the *Second Restatement*), C. L. Piper, 'Reservations to Multilateral Treaties: The Goal of Universality', *Iowa L Rev*, 1985–86, vol. 71, pp 295, 317.

¹⁵³ See F. Coulée and E. Paillard, 'Pratique française du droit international—2001', *AFDI*, 2001, vol. 47, pp 555, 579; J. F. Lachaume, 'Conseil d'État et réserves aux traités et accords internationaux' in *Apprendre à douter—Mélanges Claude Lombois* (Limoges: PULIM, 2004), p 851.

¹⁵⁴ *Supra* n 96, esp. p 52, para. 61.

¹⁵⁵ *Ibid*, pp 42–3, paras. 37–8.

¹⁵⁶ See paras 32, 33, and 40 of the Order concerning Spain, *ICJ Reports 1999*, pp 761, 772, 774; and paras 24, 25, and 34 of the Order concerning the United States, *ICJ Reports 1999*, pp 916, 924, 926.

excluding the jurisdiction of the Court under the Genocide Convention and under the Convention on the Elimination of All Forms of Racial Discrimination was not contrary to the object and purpose of the said conventions.¹⁵⁷ More significant still is the jurisprudence of the human rights bodies which, in spite of their supposed reticence with regard to the Vienna regime, apply it without any hesitation.¹⁵⁸ Thus, in 1994, the presidents of the organs created on the basis of the international instruments relating to human rights, recommended that these bodies:

state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law.¹⁵⁹

61. This same belief is evidenced by the drafting itself of the reservation clauses appearing in the international instruments. In spite of their diversity, the constant concern of the draftsmen to promote a reservations system modelled on that of Article 19 of the Vienna Conventions is very striking: many of the human rights treaties expressly refer to the object and purpose as a criterion for the appreciation of the legality of reservations.¹⁶⁰ Moreover, it is evident from the *travaux préparatoires* of the treaties which do not contain reservations clauses that this silence must be interpreted as a *renvoi*, implicit but deliberate, to the customary law regime enshrined by the Convention of 23 May 1969.¹⁶¹

62. Hence there is no doubt that 'there is a general agreement that the Vienna principle of "object and purpose" is the test'.¹⁶² It is thus rightly so that, in its preliminary Conclusions of 1997, the ILC estimated that:

Articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations.¹⁶³

¹⁵⁷ *Judgment of 3 February 2006, Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, *ICJ Reports 2006*, p 32, para. 67, p 35, para. 78. See also the Court's Order of 10 July 2002, *ICJ Reports 2002*, p 246, para. 72.

¹⁵⁸ See eg *Temeltasch* case, ECommHR, *supra* n 117, para. 68; General Comment No. 24, Human Rights Committee, *supra* n 126, para. 6. See also Art. 75 of the Covenant of San José. On this clause, see A. E. Montalvo, 'Reservations to the American Convention on Human Rights: A New Approach', *American Univ Int'l L Rev*, 2000–01, vol. 16, p 269, esp. p 277; for instances of the application of Art. 75, see the following Advisory Opinions of the Inter-American Court of Human Rights: '*Other treaties' subject to the advisory jurisdiction of the Court (Art. 64 American Convention on Human Rights)*', Advisory Opinion OC-1/82, 24 September 1982, Series A, no. 1; '*The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*', Advisory Opinion OC-2/82, 24 September 1982, Series A, no. 2; '*Restrictions to the Death Penalty*', *supra* n 125.

¹⁵⁹ See Note by the Secretary-General, *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, A/49/537, 19 October 1994, para. 30.

¹⁶⁰ See the examples in A. Pellet, Second Report on reservations to treaties, A/CN.4/477, fn 49 and Add.1, *YILC*, 1996, vol. II, Part One, p 69, para. 172; R. Riquelme Cortado, *supra* n 97, pp 116–20.

¹⁶¹ In relation to the Covenant on Civil and Political Rights, see P. H. Imbert, *supra* n 14, pp 223–4, 411–12; R. Higgins, 'Derogations under Human Rights Treaties', *BYIL*, 1976–77, vol. 48, pp 281, 317–18. On 'Reservations to the Additional Protocols to the Geneva Conventions on the Protection of the Victims of War', see J. Gaudreau, 'Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre', *IRRC*, 2003, vol. 85, pp 143–4.

¹⁶² R. Higgins, 'Introduction' in J. P. Gardner (ed.), *supra* n 116, p xxi; this remark is all the more relevant since its author inspired the Human Rights Committee's General Comment No. 24.

¹⁶³ Report of the ILC on the work of its 49th session (A/52/10), *supra* n 107, p 57, para. 1.

Concerning in particular Article 19, the ILC adopted in 2006 draft guideline 3.1 reproducing faithfully the wording of the corresponding provision of the 1986 Vienna Convention (which includes the hypothesis of reservations formulated by international organizations).¹⁶⁴ It constitutes a further element which strengthens the customary character of this provision.

63. In any event, the Convention did not freeze the law.¹⁶⁵ Even independently of the fact that it allows many ambiguities to remain, that it contains lacunae on sometimes extremely important points, and that it could not foresee rules applicable to difficulties which did not, or seldom, arise at the time of its development,¹⁶⁶ the adoption of the Convention constituted the starting point of new practices which are currently not consolidated or are consolidated in a far from ideal fashion.¹⁶⁷

64. Regarding reservations, the Vienna Convention constitutes the end point of an evolution initiated long ago, which consists of the maximal facilitation of participation in multilateral conventions while preserving their purpose and object. At the same time, the Convention forms the starting point of a multiform and not always coherent practice which, as a whole, appears to answer better to considerations of political opportunity, based on an approach on a case-by-case basis, than to firm legal convictions.

65. 'Despite what has been written on the subject, most reservations can be dealt with perfectly well by application of the provisions in Articles 19–23.'¹⁶⁸ For this reason States display a rarely failing compliance to the Vienna regime. However, due to the extreme practical importance of the question, they are constrained in its implementation by its lacunae and ambiguities.¹⁶⁹ This is why the General Assembly has, in its Resolution 48/31 of 9 December 1993, endorsed 'the decision of the International Law Commission to include in its agenda the [topic] "The law and practice relating to reservations to treaties", ultimately simplified to "Reservations to treaties"'.¹⁷⁰

66. In 1994, the Commission appointed a Special Rapporteur for this topic.¹⁷¹ From 1995 until 2010, the Rapporteur presented 16 reports to the ILC which have not completely exhausted the subject,¹⁷² thereby evidencing its extreme complexity.

¹⁶⁴ Report of the ILC (2006) (A/61/10), pp 327, 328, para. 1 of the commentaries.

¹⁶⁵ As demonstrated by Gaja, in a detailed analysis, the practice of States in relation to the Convention does not rigorously comply with the Convention, see *supra* n 139.

¹⁶⁶ See *supra* paras 47–54.

¹⁶⁷ See R. W. Edwards Jr, *supra* n 150, p 405.

¹⁶⁸ A. Aust, *supra* n 97, p 107; *contra*: L. Lijnzaad, *supra* n 23, p 53.

¹⁶⁹ See the Report of the ILC on the work of its 45th session (A/48/10), *YILC*, 1993, vol. II, Part Two, p 96, paras 428–9.

¹⁷⁰ See *infra* para. 140. Since then, the interest of States on this subject has not declined, as was noted by an informed observer: 'In 1997, the Sixth (Legal) Committee of the UN General Assembly discussed that year's report of the International Law Commission. There were forty-seven speakers—evidence of the importance attached to the subject', see A. Aust, *supra* n 97, p 124.

¹⁷¹ See the Report of the ILC on the work of its 46th session (A/49/10), *YILC*, 1994, vol. II, Part Two, p 178, para. 381. For a general discussion of the ILC's resumption of work on this matter, see A. Tanzi, 'The Resumed Codification of the Law of Reservations to Treaties' in T. Treves (ed.), 'Six Studies on Reservations', *Comunicazioni e Studi*, 2002, vol. XXII, pp 9–34.

¹⁷² Preliminary Report, A/CN.4/470 and Corr.1 and 2 (78 pages); Second Report, A/CN.4/477 (23 pages), Add.1 (90 pages); and A/CN.4/478 (bibliography) (22 pages); Third Report, A/CN.4/491 and Add.1–6 (127 pages); Fourth Report, A/CN.4/508 and Add.1 and 2 (84 pages); Add.3 and 4 (34 and 7 pages respectively); Sixth Report, A/CN.4/518 (9 pages) and Add. 1–3 (29, 16, and 7 pages respectively); Seventh Report, A/CN.4/526 (22 pages) and Add.1–3 (12, 42, and 13 pages respectively); Eighth Report, A/CN.4/535 (20 pages) and Add.1 (17 pages); Ninth Report, A/CN.4/544 (9 pages); Tenth Report, A/CN.4/558 (24 pages) and Add.1 (40 pages) and 2 (32 pages); Eleventh Report, A/CN.4/574 (65 pages); Twelfth Report, A/CN.4/584

67. Concerning the debate on the preliminary report of the Special Rapporteur (1995), the Commission upheld his conclusions in the following terms:

- a) The Commission considers that the title of the topic should be amended to read 'Reservations to treaties';
- b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
- c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;
- d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.¹⁷³

68. These conclusions principally call for two remarks:

- (1) Contrary to habit, the Commission immediately decided on the form of its draft: it would prepare a 'Guide to Practice' and not a draft convention; the objective of which would be to orient State practice by clearing up existing uncertainties but not putting into question again what was achieved in 1969.¹⁷⁴
- (2) While doing so, the ILC would confirm its opinion—shared by quasi-all of its members, already expressed in 1993,¹⁷⁵ and almost unanimously approved by the States—according to which the Vienna regime is globally satisfactory and should be completed and explained but not modified; since then, this resolution has been strictly observed.¹⁷⁶ The motives for this 'modest approach' were made explicit by the Special Rapporteur in his preliminary report of 1995.¹⁷⁷

69. Conforming to these orientations, between 1997 and 2010 the Commission adopted 199 drafts of guidelines and three model clauses accompanied by commentaries concerning the definition of reservations, procedures of formulation and withdrawal of reservations, procedure concerning acceptances and objections, and the validity of reservations.¹⁷⁸

(33 pages); Thirteenth Report, A/CN.4/600 (25 pages); Fourteenth Report, A/CN.4/614 (34 pages) and Add.1 (31 pages), Fifteenth Report, A/CN.4/624 (32 pages) and Add.1 (53 pages) and Add.2 (18 pages); Sixteenth Report, A/CN.4/624 (43 pages) and Add.1 (7 pages)—a total of 1,100 pages. Besides introducing a final version of the Guide to Practice in view of the Observations of States and international organisations, in his 17th and last Report, the Special Rapporteur envisages to propose the text of two annexes to the Guide to practice relating respectively to the 'Reservation dialogue' and the 'Implementation of the Guide'.

¹⁷³ Report of the ILC on the work of its 47th session (A/50/10), *YILC*, 1995, vol. II, Part Two, p 108, para. 487.

¹⁷⁴ For a critical commentary of this decision, see A. Tanzi, *supra* n 171, pp 26–33.

¹⁷⁵ See Report of the ILC on the work of its 45th session, *supra* n 169, p 96, para. 430.

¹⁷⁶ However, the Guidelines include not only reservations (and interpretative declarations) made by States, but also those formulated by international organizations. Consequently, the Guide to practice reproduces (when necessary) the more complete provisions of the 1986 Convention rather than those of the 1969 Convention.

¹⁷⁷ Preliminary Report, *supra* n 4, A/CN.4/470, p 153, para. 166.

¹⁷⁸ For the complete text see Report of the ILC on the work of its 62nd session (A/65/10), pp 36–73, para. 123. These drafts concern both reservations *stricto sensu* and interpretative declarations. Interpretative declarations constitute one of the most surprising *lacunae* of the Vienna Convention, which does not contain any provision on the matter; see the commentary to guideline 1.2 ('Definition of interpretative declaration') of the Guide to Practice on reservations to treaties, *YILC*, 1999, vol. II, Part Two, pp 97–103.

B. Prohibited reservations

70. Article 19 constitutes without any doubt the masterpiece of the law on reservations established by the Vienna Convention.¹⁷⁹ It puts forward 'the general principle that the formulation of reservations is permitted',¹⁸⁰ essential for the 'flexible system', and it is not an exaggeration to say that it reverses on this point the traditional presumption that resulted from the system of unanimity,¹⁸¹ for the avowed purpose of facilitating an as large as possible membership and, as a result, the universality of treaties.

71. In this regard, the text of Article 19, directly emanating from Waldock's proposals, is the opposite of the drafts established by the Special Rapporteurs on the law of treaties who preceded him. These Special Rapporteurs all shared the reverse presumption and expressed negatively or in a limited way the principle according to which a reservation *cannot* be formulated (or 'made')¹⁸² *except when* certain conditions are fulfilled.¹⁸³ Sir Humphrey for his part presented the principle as the 'the power to formulate, that is, to *propose*, a reservation', a power belonging to the State 'in virtue of its sovereignty'.¹⁸⁴

72. This ability is however not unlimited.¹⁸⁵ On the one hand, it results from the text itself that the formulation of reservations might be incompatible with the object of certain treaties, either because they are restricted to a small groups of States—an hypothesis which takes into consideration Article 20(2) of the Convention, which reverts to the system of unanimity concerning these instruments¹⁸⁶—either, in the framework of treaties with a universal vocation, because the parties intend to make the integrity of the Convention prevalent to its universality or, in any case, limit the ability of States to formulate reservations. On the other hand, on this point as on all others, the Vienna Convention is only supplementary to the will of States and nothing impedes negotiators from inserting into a treaty 'reservation clauses' which limit or modulate the principle ability stipulated in Article 19.¹⁸⁷ It is thus probably excessive to talk about a 'right to reservations', even if the Convention itself starts from the principle that a presumption in this sense exists.

73. Such is the significance of the title of Article 19 ('*Formulation of reservations*'), confirmed by the first sentence of the provision: 'A State...*can formulate* a reservation,

¹⁷⁹ Cf J. M. Ruda, *supra* n 12, p 180.

¹⁸⁰ Commentary on draft Art. 18, *YILC*, 1962, vol. II, p 180, para. 15; see also the commentary on draft Art. 16 adopted in second reading, *YILC*, 1966, vol. II, Part Two, p 207, para. 17.

¹⁸¹ See *supra* paras 2–4. In its observations on draft Art. 18 adopted by the ILC in 1962, Japan proposed to return to the reverse presumption (see H. Waldock, Fourth Report on the law of treaties, A/CN.4/177, *supra* n 60, p 46).

¹⁸² On this point see *infra* para. 74.

¹⁸³ See eg the drafts of Art. 10(1) prepared by Brierly in 1950, A/CN.4/23, *supra* n 30, p 238; nine of the drafts prepared by H. Lauterpacht, First Report, A/CN.4/63, pp 91–2; Second Report, A/CN.4/87, *supra* n 45, p 131; or Art. 39(1) of the draft prepared by G. G. Fitzmaurice, *YILC*, 1956, vol. II, p 115. See the remarks by P. H. Imbert, *supra* n 14, pp 88–9.

¹⁸⁴ Commentary on Art. 17, First Report, A/CN.4/144, *supra* n 47, p 65, para. 9—original emphasis; for the text of the Article, see *ibid*, pp 60–1.

¹⁸⁵ It is limited in time, since the formulation of reservations can only occur at the time of 'signing, ratifying, acceding to or accepting a treaty'. In this sense, Art. 19 takes up a limitation that appears in the definition of reservation contained in Art. 2(1)(d) of the Convention. This superfluous repetition was rightly criticized by Denmark in 1962, see H. Waldock, Fourth Report on the law of treaties, A/CN.4/177, *supra* n 60, p 46.

¹⁸⁶ See *infra* the commentary on this provision, paras 96–105.

¹⁸⁷ See *supra* para. 34, and in particular, n 97.

unless...'. Certainly, using the verb 'can', '[l]a clause liminaire de l'article 19 reconnaît un droit aux États; mais il ne s'agit que du droit de "formuler" des réserves'.¹⁸⁸

74. The words 'formulate' and 'formulation' have been chosen with care. They signify that, if it is up to the State which intends to associate the expression of its consent to be bound by a reservation indicating how it intends to modulate its participation to the treaty,¹⁸⁹ this formulation does not suffice in and of itself: the reservation is not 'made', does not resort its effects, from the sole fact of its declaration. It is not 'established'¹⁹⁰ unless certain procedural conditions—very few obligatory, it is true¹⁹¹—are fulfilled, but still it has to respect the basic conditions expressed in the three paragraphs of Article 19, which is clearly shown by the words 'at least'.¹⁹² This is the reason for which an amendment by China aiming to replace the words 'formulate a reservation' by 'make a reservation'¹⁹³ was dismissed by the Drafting Committee of the Vienna Conference.¹⁹⁴ As Waldock noted:

there is an inherent ambiguity in saying...that a State may 'make' a reservation; for the very question at issue is whether a reservation *formulated* by one State can be held to have been effectively 'made' unless and until it has been assented to by the other interested States.¹⁹⁵

The scope of clauses prohibiting reservations

75. In draft Article 17(1)(a) which he submitted to the ILC in 1962, Waldock distinguished three hypotheses:

- the reservations 'prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization';
- those that are not affected by the provisions of a clause limiting the ability to make reservations; or
- by those that authorize certain reservations.¹⁹⁶

¹⁸⁸ '[T]he preliminary clause of article 19 recognizes a right of States; but it is only the right to "formulate" reservations' (editor's translation), P. H. Imbert, *supra* n 14, p 83. See also P. Reuter, *supra* n 5, p 75; R. Riquelme Cortado, *supra* n 97, p 84. It can also be mentioned that a proposal made by Briggs for the replacement of the phrase 'a state is free', which appeared in the Waldock's draft (First Report, A/CN.4/144, *supra* n 47, Art. 17(1)(a), p 60) with 'a state is legally entitled' (YILC, 1962, vol. I, 651st meeting, 25 May 1962, p 140, para. 22) was not adopted. An amendment in this sense proposed by the USSR during the Vienna Conference was also rejected, A/CONF.39/C.1/L.115, Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 144, para. 175. The current wording ('a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless...') was adopted by the ILC's Drafting Committee, see YILC, 1962, vol. I, 663rd meeting, 18 June 1962, p 221, para. 3 and then by the ILC in plenary meeting, YILC, 1962, vol. II, pp 175–6, Art. 18(1). It was not substantially modified in 1966, although the words 'Tout État' were replaced with the words 'Un État' in the French text, see YILC, 1965, 813rd meeting, 29 June 1965, p 264, para. 1 (text adopted by the Drafting Committee) and YILC, 1966, vol. II, p 202 (Art. 16 adopted in second reading).

¹⁸⁹ Cf D. W. Greig, *supra* n 114, p 22.

¹⁹⁰ See the *chapeau* of Art. 21 and, *infra* the commentary on this provision, at para. 18.

¹⁹¹ See Arts 20(3)–(5), 21(1), and 23(1)–(3), and *infra* the corresponding commentaries. See also M. Coccia, *supra* n 12, p 28.

¹⁹² See H. Waldock, First Report, A/CN.4/144, *supra* n 47, p 62, para. 1 of the commentary on draft Arts 17–19.

¹⁹³ A/CONF.39/C.1/L.161, Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 133, para. 177.

¹⁹⁴ See Summary Records (A/CONF.39/11), *supra* n 2, 23rd meeting, 11 April 1968, p 121, para. 2 (explanations by China) and 24th meeting, 16 April 1968, p 125, para. 13 (intervention of Waldock, expert consultant of the Conference A/CN.4/144e).

¹⁹⁵ H. Waldock, First Report, A/CN.4/144, *supra* n 47, p 62, para. 1 of the commentary on draft Arts 17–19.

¹⁹⁶ *Ibid*, p 60.

To the difference of reservations incompatible with the object and purpose of the treaty,¹⁹⁷ the common point in these three cases is that '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 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.'¹⁹⁸

76. Although this typology was taken up again under a slightly different form by the Commission,¹⁹⁹ it was unnecessarily complicated and, at a level of sufficiently great generality in which the editors of the Convention had to place themselves, it was pointless to operate with the distinction between the two first hypotheses put forward by the Special Rapporteur.²⁰⁰ In draft Article 18(2), which the Special Rapporteur proposed in 1965 in view of the observations of the governments, he had to limit himself to distinguishing between the reservations expressly prohibited by the treaty (or 'by the rules in force in an international organisation')²⁰¹ and those which are implicitly prohibited as a result of the authorization of certain reservations by the treaty.²⁰² It is this binary distinction which one finds again, in a neat form,²⁰³ in paragraphs (a) and (b) of Article 19 of the Convention,

¹⁹⁷ An hypothesis which is envisaged in draft Art. 17(2), although quite differently from the current text of Art. 19, see *infra* para. 98.

¹⁹⁸ H. Waldock, First Report, A/CN.4/144, *supra* n 47, p 65, para. 9 of the commentary.

¹⁹⁹ Draft Art. 18(1)(b), (c), and (d), ILC Report (A/5209), 1962, *supra* n 54, pp 175-6 (see the commentary on this paragraph, p 180, para. 15).

²⁰⁰ To the contrary, during the discussion of the draft, Briggs had considered that 'the distinction was between the case set out in sub-paragraph (a), where all reservations were prohibited, and the case set out in sub-paragraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded', in *YILC*, 1962, vol. I, 663rd meeting, 18 June 1962, p 222, para. 12; *contra*: Waldock, *ibid*, p 223, para. 32; this remark is highly relevant as shown by the example of Art. 12 of the 1958 Convention on the Continental Shelf (*infra* para. 88).

²⁰¹ Although the principle was not contested during the discussions of the plenary meetings in 1965 (it had been contested by Lachs in 1962, *YILC*, 1962, vol. I, 651st meeting, 25 May 1962, p 142, para. 53) and was maintained in the text adopted during the first part of the 17th meeting (*YILC*, 1965, vol. II, pp 161-2), this specification disappeared without explanation from draft Art. 16 adopted by the Drafting Committee, see *YILC*, 1966, vol. I, 887th meeting, 11 July 1966, p 295, para. 91. The suppression of this expression must be seen in light of the general safeguard clause concerning 'any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization', which appears in Art. 5 of the Convention and which was adopted in its final draft on that same day by the ILC (*ibid*, p 294, para. 79). In practice, it is exceptional that reservations may be formulated to treaties establishing international organizations, see M. H. Mendelson, 'Reservations to the Constitutions of International Organizations', *BYIL*, 1971, vol. 45, p 137. In relation to treaties adopted within an international organization, the best example of a (supposed) exclusion of reservations is that of the ILO, whose constant practice is not to accept the deposit of instruments of ratification of international labour conventions when these instruments are accompanied by reservations, cf Memorandum by the Director of the International Labour Organization to the Council of the League of Nations on the admissibility of reservations to general conventions, *JOSdN*, 1927, p 882, or the written statement of the ILO to the ICJ in relation to the Advisory Opinion on *Reservations to the Genocide Convention*, *Pleadings, Oral Arguments, Documents*, pp 216, 227-8, or the ILO Memorandum, *ibid*, p 234. For an explanation and critical discussion of this position, see the commentary on guideline 1.1.8 of the Guide to practice, in Report of the ILC on the work of its 52nd session (A/55/10), *YILC*, 2000, vol. II, Part Two, pp 108-9, paras 3-5.

²⁰² Fourth Report, A/CN.4/177, *supra* n 60, p 50.

²⁰³ On the amendments made by the Commission to the wording of the Article, see the debates on draft Art. 18 (*YILC*, 1965, vol. I, esp. 797th and 798th meetings, 7 and 9 June 1965, pp 147-63) and the text adopted by the Drafting Committee (*ibid*, 813rd meeting, 29 June 1965, pp 263-4, para. 1). The final text of Art. 16(a) and (b) adopted in second reading by the Commission read: 'A State may... formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty authorizes specified reservations which do not include the reservation in question', *YILC*, 1966, vol. II, p 179. See also *infra* n 233.

without any distinction being made according to which the treaty, totally or partially, prohibits or authorizes reservations.²⁰⁴

The explicit prohibition on reservations

77. According to Professor Tomuschat, the prohibition in paragraph (a) as drafted, has to be understood as covering both the explicit as well as the implicit prohibitions on reservations.²⁰⁵ This interpretation finds justification in the *travaux préparatoires* of this provision:

- in its original draft, proposed by Waldock in 1962,²⁰⁶ it had been specified that it concerned 'explicitly prohibited' reservations, a specification which was abandoned in 1965 without explanation by the Special Rapporteur and without the discussions in the Commission being very enlightening in this respect;²⁰⁷
- in the commentary to draft Article 16 adopted during the second reading in 1965, the ILC seems in effect to place '[r]eservations expressly or impliedly prohibited by the terms of the treaty' at the same level.²⁰⁸

78. This interpretation is however disputable. The idea that certain treaties can, 'by nature', exclude reservations had been discarded in 1962 by the Commission, which rejected the proposal in this sense made by Waldock.²⁰⁹ It is therefore hard to see which prohibitions could result 'implicitly' from the treaty, apart from the cases covered by paragraphs (b) and (c)²¹⁰ of Article 19,²¹¹ whereas one has to assume that paragraph (a) only concerns reservations which are expressly prohibited by the treaty. Moreover, this interpretation is only compatible with the marked liberalism which impregnates the entirety of the Convention's provisions relating to reservations.

79. No problem—other than to know whether the declaration at hand constitutes a reservation—arises if the prohibition is clear and straightforward, in particular if the prohibition is general, albeit understood that there are relatively few examples,²¹² even if certain examples are well known, such as that in Article 1 of the League of Nations Charter:

²⁰⁴ The 'alternative drafts' proposed *de lege ferenda* in 1953 by H. Lauterpacht (see *supra* para. 17) mentioned together treaties that '[do] not prohibit or [that] restrict the faculty of making reservations', First Report, A/CN.4/63, YILC, 1953, vol. II, pp 91–2.

²⁰⁵ *Supra* n 22, p 469.

²⁰⁶ See *supra* para. 75.

²⁰⁷ See, nevertheless, the intervention by Yasseen, YILC, 1965, vol. I, 797th meeting, 8 June 1965, p 149, para. 19—although he was referring to the text of 1962.

²⁰⁸ Just as 'expressly or impliedly authorized', YILC, 1966, vol. II, p 205, para. 10 of the commentary. See also p 207, para. 17 of the commentary.

²⁰⁹ See *supra* para. 75. The Special Rapporteur indicated that in drafting this clause he was thinking about 'the Charter of the United Nations which, by its nature, was not open to reservations', YILC, 1962, vol. I, 651st meeting, 25 May 1962, p 143, para. 60. This exception is covered by the safeguard clause of Art. 5 of the Convention. The expression 'character of the treaty' did not attract much attention during the discussion in the Commission (Castrén considered the expression to be vague, *ibid*, 652nd meeting, 28 May 1962, p 148, para. 28; see also Verdross, *ibid*, p 149, para. 35). It was eventually deleted by the Drafting Committee, *ibid*, 663rd meeting, 18 June 1962, p 221, para. 3.

²¹⁰ Amendments proposed by Spain (A/CONF.39/C.1/L.147), the United States, and Colombia (A/CONF.39/C.1/L.126 and Add.1), aiming to reintroduce the notion of the 'character of the treaty' in para. (c) were either retired or rejected during the Vienna Conference.

²¹¹ This is, moreover, the final conclusion of C. Tomuschat, see *supra* para. 77, *ibid*, p 471.

²¹² The same holds in the field of human rights, cf P. H. Imbert, 'La question des réserves et les conventions en matière de droits de l'homme' in *Actes du cinquième colloque sur la Convention européenne des droits de l'homme* (Paris: Pedone, 1982), p 100; W. A. Schabas, *supra* n 91, p 46. See, however, Art. 9 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226

The original Members of the League of Nations shall be those of the Signatories...as shall accede without reservation to this Covenant.²¹³

Equally, Article 120 of the Rome Statute of the International Criminal Court of 1998 stipulates:

No reservations may be made to this Statute.²¹⁴

In addition, by virtue of Article 26(1) of the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal:

No reservation or exception may be made to this Convention.²¹⁵

80. In any case, it may happen that the prohibition is more ambiguous. Hence, in the words of paragraph 14 of the Final Act of the Conference which adopted in 1961 the European Convention on International Commercial Arbitration, 'the delegations taking part in negotiation of the European Convention . . . declare that their respective countries do not intend to make any reservations to the Convention'.²¹⁶ In a case of this type, one

UNTS 3; Art. 9(7) of the Convention against Discrimination in Education, 429 UNTS 93; Art. 4 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, ETS 114; Art. 21 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS 126; all of which prohibit reservations to their provisions. Reservation clauses contained in human rights treaties may either expressly refer to the provisions of the Vienna Convention on reservations (cf Art. 75 of the Inter-American Convention on Human Rights)—a reference that is implicit in those treaties which do not contain provisions concerning reservations—or include the wording of the Vienna Convention provisions (cf Art. 28(2) of the Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13; Art. 51(2) of the 1989 Convention on the Rights of the Child, 1577 UNTS 3).

²¹³ It can be maintained that this rule was relinquished when the Council of the League of Nations recognized Switzerland's neutrality. In this sense, see M. Mendelson, *supra* n 201, pp 140–1.

²¹⁴ As 'clear-cut' as this provision may sound, the prohibition is not totally devoid of ambiguity: the very regrettable Art. 124 of the Rome Statute which allows a State party to 'declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court' with respect to the category of war crimes, constitutes an exception to the rule established in Art. 120, since these declarations are in substance proper reservations. See A. Pellet, 'Entry into Force and Amendment of the Statute' in A. Cassese, P. Gaeta, and J. R. W. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol 1, p 157. See also the European Convention on the Service Abroad of Documents Relating to Administrative Matters, ETS 95, Art. 21 of which generally prohibits reservations although some specific provisions allow them. For other examples, see S. Spiliopoulou Åkermark, 'Reservations Clauses in Treaties Concluded within the Council of Europe', *ICLQ*, 1999, vol. 48, pp 479, 493–4; P. Daillier, M. Forteau, and A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (Paris: LGDJ, 2009), pp 198–9; P. H. Imbert, *supra* n 14, pp 165–6; F. Horn, *supra* n 10, p 113; R. Riquelme Cortado, *supra* n 97, pp 105–8; W. A. Schabas, *supra* n 91, p 46.

²¹⁵ For a very detailed commentary, see A. Fodella, 'The Declarations of States Parties to the Basel Convention' in T. Treves (ed.), *supra* n 171, pp 111–48. Paragraph (2) of Art. 26 authorizes States parties to make 'declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of the Convention in their application to that State'; the distinction between the reservations of para. (1) and the declarations of para. (2) can be subtle, but it is merely a problem of definition which does not limit in the slightest the prohibition established in para. (1): if a declaration made pursuant to para. (2) turns out to be a reservation, then it is prohibited. The combination of Arts 209 and 310 of the Convention on the Law of the Sea 1982 raises the same problems and calls for the same answers. See eg A. Pellet, 'Les réserves aux conventions sur le droit de la mer' in *La mer et son droit—Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec* (Paris: Pedone, 2003), pp 505–17; see also *infra* n 239.

²¹⁶ Example given by P. H. Imbert, *supra* n 14, pp 166–7.

could think that the reservations are not strictly speaking prohibited, but that if a State formulated one, the other parties would logically have to object to it.

81. More often the prohibition is partial and concerns one or more determined reservations or one or more categories of reservations. The most simple (but rather rare) hypothesis is that clauses enumerate the provisions of the Convention to which reservations are prohibited.²¹⁷ This is the case of Article 42 of the Refugee Convention of 28 July 1951,²¹⁸ or of Article 26 of the IMO Convention of 1972 on containers.

82. More complicated is the hypothesis in which the treaty does not prohibit reservations to specific provisions, but excludes instead certain categories of reservations.²¹⁹ In fact, these exclusions²²⁰ raise problems (of interpretation)²²¹ of the same nature as those evoked by the criterion of compatibility with the object and purpose of the treaty,²²² which certain clauses explicitly actually take over.²²³ The ILC, underlying the unity of the regime of reservations under the Convention,²²⁴ emphasized that such clauses prohibiting certain categories of reservations fall also under the provisions of Article 19(a).

The implicit prohibition of reservations—the permissibility of specified reservations

83. The origin of paragraph (b) of Article 19 dates back to paragraph 3 of draft Article 37 submitted to the ILC in 1956 by Fitzmaurice:

In those cases where the treaty itself permits certain specific reservations, or a class of reservations, to be made, there is a presumption that any other reservations are excluded and cannot be accepted.²²⁵

It is this idea that Waldock resumed in draft Article 17(1)(a), which he proposed in 1962, and the Commission retained in draft Article 18(1)(c), which it adopted in the same year²²⁶ and which, with some minor editorial modifications, became Article 16(b) of the draft of 1966,²²⁷ and later Article 19 of the Convention.

84. This was not without controversy as a matter of fact, since during the Vienna Conference multiple amendments envisaged abolishing this provision²²⁸ under the pretexts that it was 'too

²¹⁷ This hypothesis is very similar to the one in which the treaty specifies the provisions that allow reservations—see *infra* para. 87, and Briggs' remarks *supra* n 200.

²¹⁸ In relation to this provision, P. H. Imbert has noted that 'the influence of the Advisory Opinion [of the ICJ] in relation to *Reservations to the Genocide Convention* adopted two months earlier] is very clear since such a clause is aimed at preserving the provisions that cannot be the subject of reservations', *ibid*, p 167 (editor's translation); for a commentary on this provision see A. Pellet in A. Zimmermann, *The Refugee Convention: A Commentary* (Oxford: Oxford University Press, 2011). See the other examples given, *ibid*, or *infra* paras 87–8.

²¹⁹ This distinction was made by Waldock in his draft of 1962—see *supra* n 195.

²²⁰ For an example, see Art. 78(3) of the International Sugar Agreement of 1977 ('Any Government entitled to become a Party to this Agreement may, on signature, ratification, acceptance, approval or accession, make reservations which do not affect the economic functioning of this Agreement...').

²²¹ 'Whether a reservation is permissible under exceptions (a) or (b) will depend on interpretation of the treaty', A. Aust, *supra* n 97, p 110.

²²² See *infra* para. 113.

²²³ See the examples given *supra* n 212.

²²⁴ See guideline 3.1.1, ILC Report (A/61/10), 1006, pp 333, 340, para. 12 of the commentary.

²²⁵ First Report (A/CN.4/101), *supra* n 46, p 115; see also p 127, para. 95.

²²⁶ See *supra* paras 75–80.

²²⁷ See *supra* n 203.

²²⁸ Amendments by the US and Colombia (A/CONF.39/C.1/L.126 and Add.1) and of the Federal Republic of Germany (A/CONF.39/C.1/L.128) aiming at the deletion of para. (b); by the USSR (*supra* n 188), France (A/CONF.39/C.1/L.169), Sri Lanka (A/CONF.39/C.1/L.139), and Spain (A/CONF.39/C.1/L.147), proposing broad changes to Art. 16 (or Arts 16 and 17) which would also have entailed the elimination of this

rigid',²²⁹ superfluous in that it duplicated paragraph (a),²³⁰ or was not confirmed by practice;²³¹ all of which reasons have in the meantime been withdrawn or rejected.²³²

85. The only modification made to paragraph (b) was introduced by a Polish amendment, which was accepted by the Editorial Committee of the Vienna Conference 'in the interest of greater clarity'.²³³ This apparently innocent change should not obscure the very large practical bearing of this specification which, in reality, inverses the presumption retained by the Commission and—in conformity with the aim obstinately pursued by the eastern countries to maximally facilitate the formulation of reservations—thereby allows for reservation whereas the negotiators have taken the precaution of expressly indicating the provisions to which a reservation is permissible.²³⁴ Nevertheless this amendment does not exonerate a reservation which is neither explicitly authorized nor implicitly permitted from respecting the criterion of compatibility with the object and purpose of the treaty.²³⁵

86. Consequently Article 19(b) is not only the negative expression of paragraph (a). It is not sufficient that some reservations are expressly permitted by the treaty for every other reservation to be permitted. Nor is it sufficient that a treaty expressly authorizes the formulation of some reservations for all others to be prohibited. According to the wording of paragraph (b), the treaty must authorize exclusively the formulation of specific reservations ('*réerves déterminées*'), which creates further problems of identification.²³⁶ The ILC held that:

a reservation should be considered specified if a reservation clause indicated the treaty provisions in respect of which a reservation was possible or...indicated that reservations were possible to the treaty as a whole in certain specific aspects.²³⁷

provision. For the text of these amendments, see Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, pp 133–4, paras 174–7. Also during the discussion of the draft by the ILC, some members had considered that this provision was superfluous, see statements by Yasseen, *YILC*, 1965, vol. I, 797th meeting, 8 June 1965, p 149, para. 18; Tunkin, *ibid*, p 150, para. 29. For a more nuanced position, see Tunkin, *ibid*, p 151, para. 33; or Ruda, *ibid*, p 154, para. 70.

²²⁹ According to the wording used by the representatives of the United States and Poland during the 21st meeting of the Committee of the Whole of the Vienna Conference, 10 April 1968, Summary Records (A/CONF.39/11), 1st session, *supra* n 2, p 108, para. 8, and p 110, para. 42. See also the statement by the representative of Germany, *ibid*, p 109, para. 23.

²³⁰ Statement by Colombia, *ibid*, p 113, para. 68.

²³¹ Statement by Sweden, *ibid*, p 110, para. 29.

²³² See Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, pp 136–8, paras 181–8. See the explanations by Waldock, the Conference's expert consultant, Summary Records (A/CONF.39/11), 1st session, *ibid*, p 2, 24th meeting of the Committee of the Whole, 16 April 1968, p 126, para. 6; and the results of the votes on these amendments, *ibid*, 25th meeting, 16 April 1968, p 135, paras 23–5.

²³³ A/CONF.39/C.1/L.136. See Summary Records (A/CONF.39/11), 1st session, *ibid*, p 2, 70th meeting of the Committee of the Whole, 14 May 1968, p 415, para. 16. Already in 1965, during the discussions on the Drafting Committee's Art. 18(b) at the ILC, Castrén had proposed changing the drafting of the provision in para. 18 and adding the word 'only' after the word 'authorised', *YILC*, 1965, vol. I, 797th meeting, 8 June 1965, p 149, para. 14 and 813rd meeting, 29 June 1965, p 264, para. 13. See also a similar proposal made by Yasseen, *ibid*, 813rd meeting, 29 June 1965, p 264, para. 11. This proposal was not accepted by the Drafting Committee, see *ibid*, 816th meeting, 2 July 1965, p 283, para. 41.

²³⁴ In this sense, see F. Hoti, *supra* n 10, p 114; L. Lijnzaad, *supra* n 23, p 39; J. M. Ruda, *supra* n 12, p 181; R. Szafarz, 'Reservations to Multilateral Treaties', *Polish Yearbook of Int'l L*, 1970, vol. 3, pp 293, 299–300. Such limiting formulations are not, however, usual. See eg Art. 17(1) of the 1961 Convention on the Reduction of Statelessness, 989 UNTS 175, and the other examples given by R. Riquelme Cortado, *supra* n 97, pp 128–9. On the importance of reversing the presumption see also Robinson, *YILC*, 1995, vol. I, 2402nd meeting, p 158, para. 17.

²³⁵ See *infra* paras 97–8.

²³⁶ See guideline 3.1.2 and its commentary, ILC Report (2006), A/61/10, pp 340–50.

²³⁷ *Ibid*, p 350, para. 13 of the commentary.

In practice, the typology of clauses allowing for specific reservations is comparable to that of prohibiting provisions and raises the same kind of problems concerning the determination *a contrario* of reservations that cannot be formulated:²³⁸

- those that authorize reservations to determined provisions, explicitly and limitatively enumerated;
- others that authorize specific categories of reservations.

87. Article 12(1) of the Geneva Convention of 1958 on continental shelves seems to constitute an illustration of the first of these categories:

At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive.²³⁹

As Sir Ian Sinclair noted, 'Article 12 of the 1958 Convention did not provide for specified reservations, even though it may have specified articles to which reservations might be made'²⁴⁰ and, as a consequence, neither the scope nor the effects of this authorization are self-evident as shown by the judgment of the ICJ in the cases concerning the *Delimitation of the North Sea Continental Shelf*,²⁴¹ and, especially, the arbitral award rendered in 1977 in the *Anglo-French Continental Shelf* case.²⁴²

88. It is different when the reservation clause defines categories of authorized reservations. An example can be found in Article 39 of the General Arbitration Act of 1928:

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

As the ICJ noted in its judgment of 1978 relating to the *Aegean Sea Continental Shelf* case:

²³⁸ See *supra* paras 77–82.

²³⁹ For its part, Art. 309 of the UN Convention on the Law of the Sea establishes that: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention'; on this provision, see A. Pellet, *supra* n 215, pp 505–11. A treaty may establish the maximum number of reservations admissible or establish which provisions can be the subject of reservations (see eg Art. 25 of the 1967 European Convention on the Adoption of Children, ETS 58). These provisions are similar to those which authorize the parties to accept certain obligations or to make a choice between the provisions of a treaty, neither of which constitute reservation clauses *stricto sensu*. On this, see guidelines 1.4.6 and 1.4.7 of the ILC and their commentary in ILC Report (2000) (A/55/10), *supra* n 201, pp 112–16.

²⁴⁰ *Supra* n 77, p 73. On the distinction between specified and non-specified reservations, see the partly divergent positions of D. Bowett, *supra* n 138, pp 71–2 and R. H. Imbert, 'La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord', *AFDI*, 1978, vol. 24, pp 29, 50–3. For a particularly clear example of a 'specific reservation' clause, see Art. 53 of the 1993 Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, ETS 150.

²⁴¹ See the judgment of 20 February 1969, *ICJ Reports* 1969, pp 3, 38–41, paras 63–9.

²⁴² *Supra* n 96, pp 43–5, paras. 39–44. See *infra* para. 99.

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

even though the States have not 'meticulously followed the pattern' provided for in the reservation clause.²⁴³

89. Another example, particularly famous and commented upon,²⁴⁴ of a clause authorizing reservations (and equally connected to the third category mentioned *supra*²⁴⁵) is supplied by Article 57 (ex Art. 64) of the European Convention of Human Rights:

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

In this case, the possibility of formulating reservations is simultaneously limited by formal and substantial conditions, aside from the usual limitations *ratione temporis*;²⁴⁶ thus a reservation to the Rome Convention must:

- refer to a particular provision in the Convention;
- be justified by the state of legislation of its author at the moment of formulation of the reservation;
- not to be 'couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope';²⁴⁷ and
- be accompanied by a brief account which allows appreciation of 'the scope of the Convention provision whose application a State intends to prevent by means of a reservation'.²⁴⁸

The appreciation of the realization of each of these conditions poses problems.

²⁴³ Judgment of 19 December 1978, *ICJ Reports 1978*, pp 3, 23, para. 55.

²⁴⁴ See the works quoted *supra* at nn 118 and 122. See also A. Bonifazi, 'La disciplina delle riserve alla Convenzione europea dei diritti dell'uomo' in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Proceedings of the Round Table, 17 and 18 December 1973, Faculty of Law, University of Bari) (Bari: Levante, 1974), pp 301–19; J. A. Frowein, 'Reservations to the European Convention on Human Rights' in *Protecting Human Rights: the European Dimension—Studies in Honour of Gerard J. Warda* (Köln: C. Heymann Verlag, 1988), pp 193–200; R. Kühner, 'Vorbehalte und auslegende Erklärungen zur Europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen "auslegenden Erklärung" zu Art. 6 Abs. 3 lit. e MRK', *ZaöRV*, 1982, vol. 42, p 58 (summary in English); S. Marcus-Helmons, 'L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme', *RDIDC*, 1968, vol. 45, p 7; M. J. Morais Pires, *As reservas a Convenção europeia dos direitos do homem* (Coimbra: Livraria Almedina, 1997); R. Sapienza, 'Sull'ammissibilità di riserve all'accettazione della competenza della Commissione europea dei diritti dell'uomo', *RDI*, 1987, vol. 70, p 641; W. A. Schabas, 'Article 64' in E. Decaux, P. H. Imbert, and L. Pettiti (eds), *La Convention européenne des droits de l'homme: commentaire article par article* (Paris: Economica, 1995), pp 923–42.

²⁴⁵ Paragraph 86. For other examples, see A. Aust *supra* n 97, pp 109–10; S. Spiliopoulou Åkermark, *supra* n 214, pp 495–6; W. W. Bishop Jr, *supra* n 23, pp 323–4; P. Daillier, M. Forteau, and A. Pellet, *supra* n 214, p 181. See also the table of conventions of the Council of Europe that contain clauses resembling each of the two first categories of permissive reservation clauses, mentioned *supra* para. 86, in R. Riquelme Cortado, *supra* n 97, p 125 and the other examples of partial authorizations given by this author at pp 126–9.

²⁴⁶ See *supra* n 185.

²⁴⁷ ECtHR, judgment of 29 April 1988, *Belilos*, *supra* n 121, para. 55.

²⁴⁸ Report of the Commission, 5 May 1982, *Temeliasch*, *supra* n 117, para. 90.

90. As noted with regard to the subject of prohibition of reservations with a general character, this wording 'is not fundamentally different'²⁴⁹ from that retained for example by Article 26(1) of the Convention of the Council of Europe on extradition of 1957:

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

even though one could therein see a general authorization (to the exclusion nevertheless of transversal reservations).²⁵⁰

91. As a matter of fact, a general authorization of reservations²⁵¹ itself does not necessarily resolve all problems. Notably, it leaves open the questions whether other parties can nevertheless object to it,²⁵² and whether these explicitly authorized reservations²⁵³ are subjected to the compatibility test with the object and purpose of the treaty.²⁵⁴

The effect of the formulation of a reservation which is prohibited by the treaty

92. It has always been understood that a reservation could not be formulated (and even less 'made') when a treaty clause prohibits it explicitly or implicitly.²⁵⁵ This logical postulate was never put into question by the ILC.²⁵⁶ It only recalled that the provisions of the

²⁴⁹ P. H. Imbert, *supra* n 14, p 186. See also R. Riquelme Cortado, *supra* n 97, p 122.

²⁵⁰ On this notion, see guideline 1.1.1 of the ILC Guidelines on reservations to treaties and its commentary, in ILC Report (1999) (A/54/10), *supra* n 5, pp 93–5.

²⁵¹ For another even clearer example, see Art. 18.1 of the 1983 European Convention on the Compensation of victims of violent crimes, ETS 116, pursuant to which 'Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more reservations'.

²⁵² Something that they often expressly establish. See eg Art. VII of the 1952 Convention on the Political Rights of Women, 193 UNTS 135, and the comments on this respect by R. Riquelme Cortado, *supra* n 97, p 121. On this matter, see the commentary on Art. 20, paras. 85, 92.

²⁵³ It cannot be reasonably maintained that para. (b) could include 'implicitly authorised' reservations—if only because all those reservations that are not prohibited are, *a contrario*, authorized, subject to the provisions of para. (c). Thus, the expression 'specific reservation' in para. (b) of Art. 19 appears to be synonymous with 'reservation expressly authorised by a treaty', which appears in Art. 20(1). See *infra* the commentary on this provision, at paras 87 ff.

²⁵⁴ See *infra* para 99. See the questions posed by S. Spiliopoulou Åkermark, *supra* n 214, pp 496–7; or R. Riquelme Cortado, *supra* n 97, p 124.

²⁵⁵ See eg the wording used by Brierly to introduce paras 1, 2, and 4 of draft Art. 10: 'Unless the contrary is indicated in a treaty...', which he proposed be adopted. See A/CN.4/23, *YILC*, 1959, vol. II and the commentary on this provision, *ibid*, p 238, para. 88, and pp 239–40, para. 90.

²⁵⁶ See Lauterpacht, First Report, A/CN.4/63, *YILC*, 1953, vol. II, p 136, para. 4, and Second Report, A/CN.4/87, *YILC*, 1954, vol. II, p 131, para. 1; Waldock, First Report, A/CN.4/144, *supra* n 47, p 60, Art. 17(1)(a)(i), and p 65, para. 9, see also the explanations given during the debates of the Commission, *YILC*, 1962, vol. I, 653rd meeting, 29 May 1962, p 159, para. 57; and the text adopted by the Commission, *YILC*, 1962, vol. II, pp 175–6, Art. 18(1)(a) and its commentary at pp 179–80, para. 10 and p 180, para. 15; Waldock, Fourth Report, A/CN.4/177, *supra* n 60, p 50, Art. 18(2)(a), and the text adopted by the Commission in 1965, *YILC*, 1965, vol. II, Art. 18(a) and its commentary, *YILC*, 1966, vol. II, p 207, Art. 16(a) at para. 17. Paragraph (b) of draft Art. 16 did not raise any problems during the Vienna Conference; only the amendments presented by Ceylon, A/CONE.39/C.1/L.147, Documents of the Conference (A/CONE.39/11/Add.2), *supra* n 2, p 133, subsequently withdrawn (see Summary Records (A/CONE.39/11), 1st session, *supra* n 2, 24th meeting of the Committee of the Whole, 16 April 1968, p 130, para. 51) and the USSR, which completely redrafted draft Arts 16 and 17, would have entailed the elimination of this paragraph (A/CONE.39/C.1/L.115, *supra* n 80). According to the representative of the USSR, para. (b) 'seemed to be unnecessary, since cases where reservations were prohibited by the treaty were extremely rare. Moreover, retention of the sub-paragraph would have the effect of laying

Convention have a subsidiary character:²⁵⁷ 'where the treaty itself deals with the question of reservations, the matter is concluded by the terms'²⁵⁸ of the treaty and when such a clause prohibits the envisaged reservation, it cannot be formulated, while in the opposite case, when it permits it, the question of its validity does not arise.²⁵⁹ The apparent simplicity of these common sense rules²⁶⁰ conceals no fewer delicate problems. Once the problems of the scope of a conventional prohibition on the formulation of reservations has been decided, the question arises what the possible effect is of a reservation formulated in spite of the clause which prohibits such reservations explicitly (para. (a) of Art. 19) or implicitly (para. (b)).

93. No provision in the Vienna Convention gives an explicit answer to this question, which is of great concrete importance, and the *travaux préparatoires* of Article 19²⁶¹ shed no light in this regard.²⁶² Perhaps this response appeared evident concerning paragraphs (a) and (b).²⁶³ But, if it is, there is no reason for not transposing it into the hypothesis, generally held to be much more mysterious, of paragraph (c): nothing in the text of the Convention or in the logic justifies different responses.²⁶⁴ However, the question of the effects of a reservation incompatible with the object and purpose of the treaty (hypothesis of para. (c)) has formed the object of long, rather inconclusive, debates, outside the *travaux préparatoires* of the Convention. It hence seems preferable to study it in its entirety, in junction with paragraph (c) of Article 19.²⁶⁵

94. It suffices to indicate at this stage that a number of commentators estimate that a reservation formulated in spite of a conventional prohibition is null and void,²⁶⁶ and assume that its formulation entails the invalidity of the expression of consent to being bound.²⁶⁷ If this is the case, these conclusions have to influence the response to the question 'which are the effects of a reservation formulated despite the provisions of Article 19(c)?'.²⁶⁸

down a rule which formed an exception, thus restricting the power of States to make reservations', see Summary Records, (A/CONF.39/11), 1st session, *supra* n 2, 21st meeting of the Committee of the Whole, 10 April 1968, p 107, para. 5. This amendment was rejected by the Committee of the Whole 70 votes to 10, with 3 abstentions, *ibid*, 25th meeting, 16 April 1968, p 135, para. 23.

²⁵⁷ See *supra* paras 34 and 72.

²⁵⁸ Report of the ILC on the work of its 14th session, *YILC*, 1962, vol. II, pp 178-9, commentary on draft Arts 18-20 (para. 10). Paragraphs (a) and (b) of Art. 19 'are little more than an acknowledgment that the parties are free to make provision in their treaty whether or to what extent to allow reservations to its terms', D. W. Greig, *supra* n 189, p 51.

²⁵⁹ Cf the arbitral award of 30 June 1977 in the *Anglo-French Continental Shelf* case, *supra* n 96, p 43, para. 39: 'Under Article 12 [of the Geneva Convention on the Continental Shelf, *supra* para. 87], in short, the United Kingdom bound itself not to contest the right of the French Republic to be a party to the Convention on the basis of reservations the making of which is authorised by that Article'—but this does not solve the preliminary question of whether the reservations formulated by France were valid, see *supra* para. 87.

²⁶⁰ To the point that it has been maintained that 'there is clearly no need for an additional rule in the Vienna Convention', L. Lijnzaad, *supra* n 23, p 39.

²⁶¹ See *supra* n 203.

²⁶² See D. W. Greig, *supra* n 114, pp 52-3; A. Fodella, *supra* n 215, p 140. See also C. Tomuschat, who considers that the *travaux préparatoires* show that the ILC considered that it was impossible to accept a reservation excluded by paras (a) and (b), *supra* n 22, p 477.

²⁶³ For a critical analysis of this pseudo-evidence, see D. W. Greig, *supra* n 114 pp 52-3, 154.

²⁶⁴ In this sense, A. Aust, *supra* n 97, p 118 or D. W. Bowett, who considers that this conclusion is applicable *a fortiori* to the case envisaged in para. (c), *supra* n 138, p 83.

²⁶⁵ See *infra* paras 174-90.

²⁶⁶ See eg D. W. Bowett, *supra* n 138, p 84. For a more nuanced analysis, see D. W. Greig, *supra* n 114, pp 56-7.

²⁶⁷ D. W. Bowett, *ibid*; G. Gaja, *supra* n 139, p 314. See also C. Tomuschat, *supra* n 22, p 467; see the references to the debates of the ILC, *ibid*, fn 12. But these debates are much less conclusive than this author would have.

²⁶⁸ See *infra* para. 176.

C. Reservations which are incompatible with the object and purpose of the treaty

95. '[I]n cases not failing under subparagraphs (a) and (b)', Article 19(c) of the Convention excludes the formulation of reservations incompatible 'with the object and purpose of the treaty'. This principle constitutes one of the elements fundamental to the flexible system laid out by the Vienna regime in that it tempers its 'radical relativism'.²⁶⁹ Such relativism results from the pan-American system, which reduces multilateral conventions to a network of bilateral relations,²⁷⁰ while the principle of Article 19(c) allows the flexible system to avoid the rigidity resulting from the system of unanimity.²⁷¹

96. However, it displays a subsidiary character only because it intervenes outside the hypotheses envisaged by paragraphs 2 and 3 of Article 20 of the Convention,²⁷² and if the treaty itself does not regulate the fate of reservations. Paragraph (a) of Article 19 does not pose any problems in this regard: there is no doubt that a reservation explicitly prohibited by the treaty cannot be held valid under the pretext that it would be compatible with the object and purpose of the treaty.²⁷³ But what if the prohibition is implicit (hypothesis of para. (b))?

97. Despite appearances, the problem does not arise in the same manner in the second case. As indicated *supra*,²⁷⁴ the amendment by Poland to paragraph (b) adopted by the Vienna Conference in 1968 has limited the hypothesis of implicit prohibition of reservations solely to treaties which provide 'that only specified reservations, which do not include the reservation in question, may be made'. It results therefrom that others can be made. But it would be, at least, paradoxical that they would be admitted more liberally when dealing with treaties that do not contain clauses on reservations.²⁷⁵

98. The modification made to paragraph (c) after the Polish amendment would otherwise seem to point in this direction. In the text of the ILC, paragraph (c) was edited as follows:

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.²⁷⁶

This followed the logic of paragraph (b) which prohibited the formulation of reservations other than those authorized by a clause on reservations. Since an authorization is no

²⁶⁹ P. Reuter, *supra* n 5, p 73, para. 130. The eminent author applies this expression to the system applied by the ICJ in its 1951 Advisory Opinion on *Reservations to the Genocide Convention*, *supra* paras 7-9; the criticism is without doubt excessive, see *infra* paras 114-16; it is clearly applicable, however, to the pan-American system.

²⁷⁰ See *supra* para. 7.

²⁷¹ See *supra* paras 2-4.

²⁷² These hypotheses do not constitute cases of implicit prohibitions to the formulation of reservations; but they reintroduce, for specific treaties, the unanimity system.

²⁷³ In its observations on the draft adopted in first reading by the ILC, Canada had suggested extending 'the criterion of "compatibility with the object and purpose" equally to reservations made pursuant to express treaty provisions in order not to have different criteria for cases where the treaty is silent on the making of reservations and cases where it permits them', see Waldock, Fourth Report, A/CN.4/177, *supra* n 60, p 46. This proposal (not a very clear one) was not retained by the Commission. See in the same sense the proposal made by Briggs (clearer than the Canadian one), in *YILC*, 1962, vol. I, 663rd meeting, 18 June 1962, p 222, paras 13-14, and *YILC*, 1965, vol. I, 813rd meeting, 29 June 1965, p 264, para. 10; *contra*: Ago, *ibid*, p 264, para. 16.

²⁷⁴ Paragraph 85.

²⁷⁵ In this sense, see Rosenne, *YILC*, 1965, vol. I, 797th meeting, 8 June 1965, pp 148-9, para. 10.

²⁷⁶ *YILC*, 1966, vol. II, p 180.

longer interpreted *a contrario* as automatically excluding other reservations, this formula could not be maintained;²⁷⁷ thus it was modified in favour of the current wording of the Drafting Committee of the Vienna Conference.²⁷⁸ As a result, 'implicitly authorized' reservations by the fact that they are not formally excluded by the treaty have to be compatible with the object and purpose of the treaty.²⁷⁹ This has been expressly recognized by the ILC in guideline 3.1.3.²⁸⁰

99. This is equally true for certain explicitly authorized reservations, if one accepts the idea that, among these, only those which are 'specific', ie as indicated by the ILC, reservations which are authorized by the treaty and the content of which is determined by the treaty,²⁸¹ are legally valid without, on the one hand, having to be accepted by the other contracting States²⁸² or, on the other hand, having to pass the compatibility test with the object and purpose of the treaty.²⁸³ In the *Anglo-French Continental Shelf* case, the arbitral tribunal estimated that Article 12 of the Geneva Convention on the Continental Shelf,²⁸⁴ which authorizes certain reservations with specifying them:

cannot be understood to compel States to accept in advance any kind of reservation to articles other than articles 1 to 3. Such an interpretation of article 12 would almost give contracting States the freedom to draft their own treaty, which would clearly go beyond the object of this article. Only if the article in question had authorized the formulation of specific reservations could it be understood that parties to the Convention had accepted in advance a specified reservation.²⁸⁵

In such a case, the admissibility of the reservation 'cannot be assumed simply on the ground that it is, or purports to be, a reservation to an article to which reservations are permitted'.²⁸⁶ Its validity has to be assessed in the light of its compatibility with the object and purpose of the treaty.²⁸⁷

²⁷⁷ Poland, nevertheless, had not proposed any amendments to para. (c) in order to adapt this paragraph to the consequences of the modifications to para. (b) that it had succeeded to have the Conference adopt. Instead, an amendment from Vietnam, aiming at deletion of the phrase 'in cases where the treaty contains no provisions regarding reservations' (A/CONF.39/C.1/L.125, Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 134, para. 177), was rejected by the Committee of the Whole, *ibid*, p 136, para. 181.

²⁷⁸ Curiously, the reason given by the President of the Drafting Committee does not link this modification of para. (c) to those made to para. (b): Yasseen was content to indicate that '[s]ome members of the Committee had considered that a treaty might conceivably contain a provision on reservation which did not fall into any of the categories contemplated in paragraphs (a) and (b)', see Summary Records (A/CONF.39/11), 1st session, *supra* n 2, 70th meeting of the Committee of the Whole, 14 May 1968, p 415, para. 17. Briggs had already made a remark going in the same direction during the debates of the ILC in 1965, *YILC*, 1965, vol. I, 796th meeting, 4 June 1965, p 146, para. 37.

²⁷⁹ In his Fourth Report (A/CN.4/177), Waldock admitted that 'A conceivable exception [to the principle of validity of reservations authorized by the treaty] might be where a treaty expressly forbids certain specified reservations and thereby impliedly permits others; for it might not be unreasonable to regard compatibility with the object and purpose as still an implied limitation on the making of other reservations'; he had excluded this possibility not on the basis of it being wrong, but because 'this may, perhaps, go too far in refining the rules regarding the intentions of the parties, and there is something to be said for keeping the rules in article 18 as simple as possible', *supra* n 60, p 50, para. 4.

²⁸⁰ ILC Report (2006), A/61/10, pp 350–4.

²⁸¹ See guideline 3.1.4, *ibid*, pp 354–6.

²⁸² Cf Art. 20(1).

²⁸³ See guideline 3.1.4, *supra* n 281, pp 354–6. See also *supra* para. 87.

²⁸⁴ See *supra* para. 87.

²⁸⁵ *Supra* n 96, p 43, para. 39.

²⁸⁶ D. Bowett, *supra* n 138, p 72. In this sense J. M. Ruda, *supra* n 12, p 182; G. Teboul, *supra* n 91, pp 691–2. *Contra* P. H. Imbert, *supra* n 240, pp 50–3; this opinion, although strongly argued, does not take sufficiently into account the consequences of the amendment of para. (c) during the Vienna Conference (see *supra* para. 98).

²⁸⁷ C. Tomuschat gives a pertinent example:

100. First applied in the matter of reservations in the Advisory Opinion of the ICJ in 1951,²⁸⁸ this notion has progressively been imposed and today has become the equilibrium point between the necessity of preserving the essential core of the treaty and the willingness to facilitate membership of an as large as possible number of States to multi-lateral conventions. However, while in the Opinion the criterion of compatibility with the object and purpose of the treaty applies to the formulation of reservations as well as to that of the objections,²⁸⁹ in the Convention it is limited to reservations only: Article 20 does not restrict the ability of other contracting States to formulate objections.²⁹⁰

101. There is no doubt that today the criterion of validity of reservations reflects a customary rule which no one puts into question.²⁹¹ Nevertheless, its content remains vague and the consequences of incompatibility with the object and purpose of the treaty are impregnated with distinct uncertainty.

The notion of object and purpose of the treaty

102. Two authors concluded a meticulous study dedicated to the notion of 'the object and purpose of a treaty' observing with regret 'that the object and purpose of a treaty are indeed something of an enigma'.²⁹² It is certain that the attempt in paragraph (c) of Article 19 to introduce an objective element in a largely subjective system is not entirely conclusive:²⁹³ '[t]he claim that a particular reservation is contrary to object and purpose is easier made than substantiated'.²⁹⁴ In their collective opinion, the dissenting judges of 1951 criticized the solution retained by the majority in the case concerning *Reservations to the Genocide Convention* by making reference to the fact that it does not 'produce final and consistent results'²⁹⁵ and this had been one of the principal motives of the resistance of the ILC in regard to the flexible system retained by the ICJ in 1951:

Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively.²⁹⁶

If, for example, a convention on the protection of human rights prohibits in a 'colonial clause' the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance. (*supra* n 22, p 474)

²⁸⁸ See *supra* paras 7–9.

²⁸⁹ *ICJ Reports 1951*, p 24. On this difference, see M. Coccia, *supra* n 12, p 9; L. Lijnzaad, *supra* n 23, p 40; M. Rama-Montaldo, 'Human Rights Conventions and Reservations to Treaties' in *Héctor Gros Espiell Amicorum Liber: persona humana y derecho internacional* (Brussels: Bruylant, 1997), vol. II, pp 1265–6; I. Sinclair, *supra* n 77, p 61.

²⁹⁰ See the commentary on Art. 20, paras 72 ff.

²⁹¹ See the numerous arguments given in support of this by R. Riquelme Cortado, *supra* n 97, pp 138–43, and *supra* paras 55–62.

²⁹² I. Buffard and K. Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma', *ARIEL*, 1998, vol. 3, p 342. The uncertainties linked to this criterion have been unanimously noted (and criticized with more or less strength) by doctrine: see eg A. Aust, *supra* n 97, p 111; G. G. Fitzmaurice, *supra* n 11, p 12; M. Rama-Montaldo, *supra* n 289, p 1265; C. Rousseau, *Droit international public* (Paris: Sirey, 1970), vol. I, p 126; G. Teboul, *supra* n 91, pp 695–6; A. Pellet, Preliminary Report (A/CN.4/470), p 143, para. 109.

²⁹³ According to J. K. Koh, '[t]he International Court thereby introduced putpositive words into the vocabulary of reservations which had previously been dominated by the term "consent"', *supra* n 18, p 85.

²⁹⁴ L. Lijnzaad, *supra* n 23, pp 82–3.

²⁹⁵ *ICJ Reports 1951*, p 44.

²⁹⁶ A/1858 in *YILC*, 1951, vol. II, p 128, para. 24.

And Sir Humphrey Waldock himself, in his very important First Report on the law of treaties in 1962, still showed his hesitation on the compatibility of the reservation with the object and purpose of the treaty as a true 'test' of the validity of this reservation.²⁹⁷ This was no doubt a tactical prudence since the same Special Rapporteur 'converted' swiftly²⁹⁸ to the compatibility with the object and purpose of the treaty not only as a criterion of the validity of reservations but also as a key element to take into consideration in matters of interpretation.²⁹⁹

103. This criterion in fact presents great merit. And, notwithstanding the inevitable 'margins of subjectivity' limited however by the general principle of good faith, paragraph (c) of Article 19 provides without doubt a useful guideline allowing resolution of most problems which arise, in a reasonable manner.

The meaning of the expression 'object and purpose of the treaty'

104. The *travaux préparatoires* of this provision are not a great help in determining the meaning of the expression.³⁰⁰ As noted by one commentator,³⁰¹ the commentary to draft Article 16 adopted in 1966 by the ILC, normally more circumstantial, is reduced to one paragraph and this one does not even make an allusion to the difficulties linked to the definition of the object and purpose of the treaty, or, very indirectly, by a cautious (or incautious?)³⁰² reference to draft Article 17:³⁰³ '[t]he admissibility or otherwise of a reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States'.³⁰⁴

²⁹⁷ *YILC*, 1962, vol. II, p 65, para. 10; in the same sense, see the oral statement by Waldock, *YILC*, 1962, vol. I, 651st meeting, 25 May 1962, p 139, paras 4–6; during the debates, the Special Rapporteur did not hesitate to qualify the principle of compatibility as the 'test', see *ibid*, p 145, para. 85—this paragraph also shows that, according to Waldock, from the beginning this test was the decisive one in the formulation of reservations (as opposed to those objections maintaining that the only applicable principle was the consensual principle). The wording finally adopted for draft Art. 17(2)(a), proposed by the Special Rapporteur, reflected this uncertain position: 'a state shall have regard to the compatibility of the reservation with the object and purpose of the treaty' (Ago, *YILC*, 1962, vol. I, 651st meeting, p 169, para. 58). This principle was generally agreed during the debates of the Commission in 1962; see, notably, Briggs, *YILC*, 1962, vol. I, 651st meeting, 15 May 1962, p 140, para. 23; Lachs, *ibid*, p 142, para. 54; Rosenne, *ibid*, pp 144–5, para. 79—who does not hesitate to speak of a 'test', see also *ibid*, p 145, para. 82, and *ibid*, 653rd meeting, 29 May 1962, p 156, para. 27; Castrén, *YILC*, 1962, vol. I, 652nd meeting, p 148, para. 25. It was also agreed during the debates in 1965, see Yasseen, *YILC*, 1965, vol. I, 797th meeting, 8 June 1965, p 149, para. 20; Tunkin, *ibid*, p 150, para. 25. See however the objections by de Luna, *YILC*, 1962, vol. I, 652nd meeting, 28 May 1962, p 148, para. 18 and *ibid*, 653rd meeting, 29 May 1962, p 160, para. 67; Gros, *ibid*, 652nd meeting, 28 May 1962, p 150, paras 47–51; Ago, *ibid*, 653rd meeting, 29 May 1962, pp 148–9, para. 34; or during the debates in 1965, see the objections by Ruda, *YILC*, 1965, vol. I, 796th meeting, 4 June 1965, p 147, para. 55, *ibid*, 797th meeting, 8 June 1965, p 154, para. 69; Ago, *ibid*, 798th meeting, 9 June 1965, p 161, para. 71. Only at the end, Tsuruoka, the Japanese member of the Commission, opposed para. (c), and for this reason he abstained from voting on draft Art. 18, adopted with *ibid* 16 votes to 0, with 1 abstention on 2 July 1965, *ibid*, 816th meeting, p 283, paras 41–2.

²⁹⁸ See I. Buffard and K. Zemanek, *supra* n 292, pp 320–1.

²⁹⁹ See Art. 31(1) of the Convention.

³⁰⁰ See I. Buffard and K. Zemanek, *supra* n 292, pp 320–1.

³⁰¹ C. Redgwell, 'The Law of Reservations in Respect of Multilateral Conventions' in J. P. Gardner (ed.), *supra* n 116, p 7.

³⁰² See *supra* paras 66–71 of the commentary on Art. 20.

³⁰³ Which became Art. 20 of the Convention.

³⁰⁴ *YILC*, 1966, vol. II, p 207, para. 17. The commentary on the corresponding provision adopted in 1962, Art. 18(1)(d), does not add anything more. See *YILC*, 1962, vol. II, p 180, para. 15.

105. The discussion in the ILC on paragraph (c)³⁰⁵ and later in the Vienna Conference³⁰⁶ does not throw sufficient light on the meaning of the expression 'object and purpose of the treaty' at the end of this provision, nor do the other provisions of the Convention which use it.

106. There are seven of these Articles,³⁰⁷ of which one—Article 20(2)—concerns reservations. But none define the notion of the object and purpose of the treaty or offer particular 'tracks' to this end.³⁰⁸ All that can be deducted therefrom is that one should rather place oneself at a sufficiently large level of generality: it is not a case of 'analysing' the treaty, of examining its provisions one after the other, but rather of discovering the 'essence', the global 'project'.

107. There is little doubt that the expression 'the object and purpose of the treaty' covers well the same meaning in all these provisions: proof thereof is that Waldock—who can without exaggeration be considered as the 'inventor' or, at least, the 'midwife' of the right of reservations to treaties in the Vienna Convention—explicitly referred to these,³⁰⁹ to justify the inclusion of this criterion in paragraph (c) by a sort of reasoning *a fortiori*. Seeing that 'the objects and purposes of the treaty...are criteria of fundamental importance for the interpretation...of a treaty' and 'the Commission has proposed that a State which has signed, ratified, acceded to, accepted or approved a treaty should, even before it comes into force, refrain from acts calculated to frustrate its objects', it would be 'somewhat strange if a freedom to make reservations incompatible with the objects and purposes of the treaty were to be recognized'.³¹⁰ But this does not resolve the problem: we have a criterion, and a unique, polyvalent criterion; but not a definition of this criterion.

108. The international case-law does not provide a means to discern it. Although it is often used,³¹¹ what one finds therein are some useful indications, notably in the Opinion of the ICJ in 1951 on the *Reservations to the Genocide Convention*. It is however difficult

³⁰⁵ See *supra* n 296.

³⁰⁶ It is significant that none of the proposed amendments to the ILC's draft Art. 16—including the most radical ones (see *supra* n 255)—did not call the principle into question. At most, the amendments of Spain, the United States, and Colombia proposed to add the notion of 'character' of the treaty, or to substitute this notion for that of the 'object'.

³⁰⁷ Cf Arts 18, 20(2), 31(1), 33(4), 41(1)(b)(ii), 58(1)(b)(ii), and 60(3)(b). One could compare to these the provisions concerning the 'bases' or those concerning the 'essential conditions of the consent to be bound', cf P. Reuter, 'Solidarité et divisibilité des engagements conventionnels' in Y. Dinstein and M. Tabor (eds), *International Law at a Time of Perplexity—Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1999), p 627, also reproduced in P. Reuter, *Le développement de l'ordre juridique international—Écrits de droit international* (Paris: Economica, 1999), p 366.

³⁰⁸ As I. Buffard and K. Zemanek have remarked (*supra* n 292, p 322), the commentaries on the 1966 ILC draft Articles are almost completely silent on this question.

³⁰⁹ More specifically, to the (current) Arts 18 and 31.

³¹⁰ Fourth Report (A/CN.4/177), *supra* n 60, p 51, para. 6.

³¹¹ See, again, I. Buffard and K. Zemanek, *supra* n 292, pp 312–19. From then on, it appears the Court's terminology on this matter has been fixed. Cf the judgments in *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, 20 December 1988, *ICJ Reports* 1988, pp 69, 89, para. 46; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, Judgment, 14 June 1993, *ICJ Reports* 1993, pp 38, 49–51, paras 25–7; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, *ICJ Reports* 1994, pp 6, 25–6, para. 52; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, 12 December 1996, *ICJ Reports* 1996, pp 803, 813, para. 27; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, *ICJ Reports* 1997, pp 7, 64, para. 104, p 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Preliminary Objections, 11 June 1998, *ICJ Reports* 1998, pp 275, 318, para. 98; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, *ICJ Reports* 1999, pp 1045, 1072–3, para. 43; *LaGrand (Germany v United States of America)*, Judgment, 27 June 2001, *ICJ Reports* 2001, p 466, 502–3, para. 102;

to infer something remarkable from this relatively abundant jurisprudence concerning the method to follow in order to determine the object and purpose of a treaty. The Court proceeds often by simple affirmations³¹² and, when it shows itself anxious to justify its position, it follows an empirical approach. Moreover one can discover that the Court has deduced the object and purpose of a treaty:

- from its title;³¹³
- from its preamble;³¹⁴
- from an Article placed at the head of the treaty which 'must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied';³¹⁵
- from a treaty Article which shows 'the major concern of each Contracting Party' at the time of conclusion of the treaty;³¹⁶
- from its *travaux préparatoires*;³¹⁷ or
- from its general architecture.³¹⁸

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, 17 December 2002, *ICJ Reports* 2002, pp 625, 652, para. 51; *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, 31 March 2004, *ICJ Reports* 2004, pp 12, 48, para. 85; *Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, 15 December 2004, *ICJ Reports* 2004, pp 279, 319, para. 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, pp 136, 179, para. 109.

³¹² See eg *Jurisdiction of the European Commission of the Danube*, PCIJ, Advisory Opinion, 8 December 1927, Series B, no. 14, p 64: 'It is obvious that the object of the Treaty of Paris [of 1856]...has been to assure freedom of navigation'. See also, *International Status of South West Africa*, ICJ, Advisory Opinion, 11 July 1950, *ICJ Reports* 1950, p 139, and the judgments cited *supra* in *Jan Mayen*, 14 June 1993, *ICJ Reports* 1993, p 50, para. 27; *Gabčíkovo-Nagymaros Project*, Judgment, 27 September 1997, *ICJ Reports* 1997, p 67, para. 110; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, 11 June 1998, *ICJ Reports* 1998, p 318, para. 98; *LaGrand*, Judgment, 27 June 2001, *ICJ Reports* 2001, p 502, para. 102; *Legality of the Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections, Judgment, 15 December 2004, *ICJ Reports* 2004, p 319, para. 102; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para. 198.

³¹³ Cf ICJ judgment in *Certain Norwegian Loans (France v Norway)*, Judgment, 6 July 1957, *ICJ Reports* 1957, pp 9, 24; but see the judgments in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, *ICJ Reports* 1986, pp 14, 137, para. 273; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Judgment, 12 December 1996, *ICJ Reports* 1996, p 814, para. 28.

³¹⁴ Cf *Greco-Bulgarian Communities*, PCIJ, Advisory Opinion, 31 July 1930, Series B, no. 17, p 19; *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment, 27 August 1952, *ICJ Reports* 1952, p 196; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, *ICJ Reports* 1986, p 138, para. 275; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, *ICJ Reports* 1994, pp 25–6, para. 52; *Pulau Ligitan and Pulau Sipadan*, *supra* n 311, *ICJ Reports* 2002, p 652, para. 51. See also the Dissenting Opinion of Judge Anzilotti to the PCIJ Advisory Opinion on *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, 15 November 1932, Series A/B, no. 50, p 384.

³¹⁵ *Oil Platforms*, *supra* n 313, *ICJ Reports* 1996, p 814, para. 28.

³¹⁶ *Kasikili/Sedudu Island*, *supra* n 311, *ICJ Reports* 1999, pp 1072–3, para. 43.

³¹⁷ Often as confirmation of the interpretation based on the text itself; cf *Libya/Chad*, *supra* n 314, *ICJ Reports* 1994, pp 27–8, paras 55–6; *Kasikili/Sedudu Island*, *supra* n 311, *ICJ Reports* 1999, p 1074, para. 46; *Palestinian Wall Advisory Opinion*, *supra* n 311, *ICJ Reports* 2004, p 179, para. 109. See also the Dissenting Opinion of Judge Anzilotti on the PCIJ, Advisory Opinion, *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*, 15 November 1932, Series A/B, no. 50, pp 388–9. In its Advisory Opinion on *Reservations to the Genocide Convention*, the ICJ gave some weight to the 'origin' of the Convention, *supra* n 6, *ICJ Reports* 1951, p 23.

³¹⁸ Cf *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, PCIJ, Advisory Opinion, 23 July 1926, Series B, no. 13, p 18; *Greco-Bulgarian Communities*, *supra* n 314, p 20; *Oil Platforms*, *supra* n 313, *ICJ Reports* 1996, p 813, para. 27; *Pulau Ligitan and Pulau Sipadan*, *supra* n 311, *ICJ Reports* 2002, p 652, para. 51; *Bosnian Genocide*, para. 198.

It is difficult, however, to regard this as a 'method' properly speaking: these disparate elements are taken into consideration, sometimes separately, sometimes together, and the Court forms a 'general impression', in which subjectivity inevitably plays a considerable part.³¹⁹

109. To get round the inconvenience linked to these uncertainties, one wonders whether it would not be suitable to decompose the concept of 'the object and purpose of the treaty' by examining its object, on the one hand, and its purpose, on the other hand. Hence, during the discussion on the rule of *pacta sunt servanda* embodied in Article 55, Reuter mentioned that 'the object of an obligation is one thing, while the purpose is another'.³²⁰ As has been noted, the distinction is common in the French doctrine (or francophone)³²¹ while it awakens the scepticism of authors with German or English training.³²²

110. All the same, a (French) author convincingly shows that the international case-law 'ne permet pas de trancher la question'.³²³ And hence, neither the object—defined as the very content of the treaty³²⁴—nor, even less, the purpose of the treaty—the intended result³²⁵—remain invariable in time, as the theory of the *emergent purpose* put forward by Sir Gerald Fitzmaurice clearly shows: '[t]he notion of object or [and?] purpose is itself not a fixed and static one, but is liable to change, or rather develop as experience is gained in the operation and working of the convention'.³²⁶

111. It is therefore hardly surprising that the endeavours of the doctrine to define a general method by which to determine the object and purpose of the treaty turn out to be disappointing. The most convincing attempt, by Ms Buffard and Mr Zemanek, suggests proceeding in two phases: in a first phase, it is convenient to have 'recourse to the title, preamble, and, if available, programmatic articles of the treaty'; in the second, the conclusion thus reached *prima facie* has to be tested in the light of the text of the treaty.³²⁷ But the application of this seemingly logical method³²⁸ to concrete hypotheses hardly proves conclusive: the authors confess to being incapable of determining objectively and in a simple manner the object and the purpose of four out of five treaties or groups of retained treaties³²⁹ and conclude that the notion remains unquestionably an 'enigma'.³³⁰

³¹⁹ 'One could just as well believe that it was simply by intuition', I. Buffard and K. Zemanek, *supra* n 292, p 319.

³²⁰ *YILC*, 1964, 726th meeting, 19 May 1964, vol. I, p 26, para. 77. The same author, however, expressed elsewhere a certain scepticism in relation to the usefulness of the distinction, see *supra* n 307, p 628—or in *Le développement de l'ordre juridique international*, *supra*, p 367.

³²¹ See I. Buffard and K. Zemanek, *supra* n 292, pp 325–7.

³²² *Ibid*, pp 322–5, 327–8.

³²³ '[D]oes not allow to solve the question' (editor's translation), G. Teboul, *supra* n 91, p 696.

³²⁴ See eg J. P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris: LGDJ, 1972), p 142: 'L'objet d'un acte réside dans les droits et obligations auxquels il donne naissance' ('The object of an act is found in the rights and obligations to which it gives rise' (editor's translation)).

³²⁵ *Ibid*.

³²⁶ G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and other Treaty Points', *BYIL*, 1957, vol. 33, pp 203, 208. See also G. Teboul, *supra* n 91, p 697; W. A. Schabas, 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly*, 1996, vol. 18, pp 472, 479.

³²⁷ I. Buffard and K. Zemanek, *supra* n 292, p 333.

³²⁸ Even though it reverses the priorities established in Art. 31 of the Vienna Convention, pursuant to which the 'terms of the treaty' are the point of departure of the interpretation. See the Advisory Opinion by the Inter-American Court in *Restrictions to the Death Penalty*, *supra* n 125, para. 50.

³²⁹ The five treaties are: the UN Charter, 1 UNTS 16; the Vienna Convention on Diplomatic Relations, 500 UNTS 95; the Vienna Convention on the Law of Treaties, 1155 UNTS 331; the General Conventions on Human Rights and the Convention on the Elimination of All Forms of Racial Discrimination against Women, 1249 UNTS 13; and the other human rights conventions concerning specific rights. The proposed method is not conclusive; but on this last hypothesis, see I. Buffard and K. Zemanek, *supra* n 292, pp 334–42.

³³⁰ See *supra* para. 102.

112. The other doctrinal endeavours are no more convincing even if the authors provide evidence of less modesty and often show themselves emphatic concerning the definition of the object and purpose of the treaty studied. Certainly these studies often concern human rights conventions which lend themselves easily to conclusions inspired by ideologically oriented attitudes, of which one of the manifestations consists in maintaining that all substantial provisions in these treaties reveal their object and purpose (which, pressed to its ultimate logic, amounts to excluding the validity of every reservation).³³¹

113. Given the diversity of situations and their susceptibility to change over time,³³² it seems impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable. However, that is not incongruous in law in general, and in international law in particular. Ultimately, this is a problem of interpretation: the 'general rule on interpretation' expressed in Article 31 of the Vienna Convention is applicable *mutatis mutandis* to the examination of the object and purpose of the treaty.³³³

114. As Ago mentioned during the ILC debates on draft Article 17 (Art. 19 in the Vienna Convention):

The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.³³⁴

These are the two fundamental elements: the object and purpose can only be found by the examination of the treaty in its entirety;³³⁵ and this criterion leads to dismissal of reservations to 'essential' clauses³³⁶ and to these alone.

115. In other words, it is the 'efficiency',³³⁷ the '*raison d'être*'³³⁸ of the treaty, its 'fundamental core',³³⁹ that needs to be preserved. 'It implies a distinction between all obligations

³³¹ For criticism of this extreme position, see W. A. Schabas, *supra* n 326, pp 476–7; 'Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?', *Brooklyn J of Int'l L*, 1995–96, vol. 21, pp 277, 291–3. On the position of the Human Rights Committee, see *infra* para. 123.

³³² See *supra* para. 110. Once could add the question whether a series of limited reservations, which are admissible when taken individually, can, when taken cumulatively, be incompatible with the object and purpose of the treaty. See B. Clark, *supra* n 99, p 314; R. J. Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', *VaJIL*, 1989–90, vol. 30, pp 643, 706–7.

³³³ See, the Advisory Opinion of the Inter-American Court in *Reservations to the Death Penalty*, *supra* n 125, para. 63; see also L. Sucharipa-Behrman, *supra* n 134, p 76. Although clearly showing its awareness that the rules concerning the interpretation of treaties were not purely and simply transposable to the unilateral declarations formulated by parties to a treaty (reservations and interpretative declarations), the ILC admitted that these rules constituted useful guidelines in this respect. Cf guideline 1.3.1 (Method of implementation of the distinction between reservations and interpretative declarations) and its commentary, *YILC*, 1999, vol. II, Part Two, pp 107–9. This is *a fortiori* the case when the compatibility of a reservation with the object and purpose of the treaty itself is in question.

³³⁴ *YILC*, 1962, 651st meeting, 25 May 1962, p 141, para. 35.

³³⁵ The question is to examine whether the reservation is compatible with the 'general tenor' of the treaty, Bartoš, *ibid*, p 142, para. 40.

³³⁶ But not to those that 'relate to detail' only, Paredes, *ibid*, p 146, para. 90.

³³⁷ See the judgment by the European Court of Human Rights in *Loizidou*, *supra* n 125, para. 75: the acceptance of different regimes for the implementation of the European Convention on Human Rights 'diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)'.

³³⁸ *Reservations to the Genocide Convention*, *supra* n 6, *ICJ Reports* 1951, p 21: 'none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention'.

³³⁹ Statement by the representative of France before the Third Committee of the General Assembly, 11th session, 703rd meeting, 6 December 1956, reproduced in A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris: CNRS, 1962), vol. I, p 277, fn 552.

in the treaty and the core obligations that are the treaty's *raison d'être*.³⁴⁰ During its *travaux* concerning reservations, the ILC equally found merits in these criteria. In default of a definition of the object and purpose of the treaty, it considered that a 'reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust,'³⁴¹ in such a way that the reservation impairs the *raison d'être* of the treaty.³⁴² These are very general guidelines, but even if they do not allow for the resolution of all problems, applied in good faith and with a bit of common sense, they can certainly contribute to it.

The application of the criterion

116. In certain cases, the application of this criterion does not create any problem. It is self-evident that a reservation to the Genocide Convention by which a State reserves for itself the possibility of committing certain prohibited acts on its territory or certain parts thereof will be incompatible with the object and purpose of the Convention.³⁴³ In this spirit, for example, Germany and several European countries have explained as support for their objections to a reservation by Vietnam to the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances of 1988, that:

The reservation made in respect of article 6 is contrary to the principle '*aut dedere au iudicare*' which provides that offences are brought before the court or that extradition is granted to the requesting States.

The Government of the Federal Republic of Germany is therefore of the opinion that the reservation jeopardizes the intention of the Convention, as stated in article 2 paragraph 1, to promote cooperation among the parties so that they may address more effectively the international dimension of illicit drug trafficking.

The reservation may also raise doubts as to the commitment of the Government of the Socialist Republic of Viet Nam to comply with fundamental provisions of the Convention.³⁴⁴

³⁴⁰ L. Lijnzaad, *supra* n 23, p 83; L. Sucharipa-Behrmann, *supra* n 134, p 76.

³⁴¹ On this term, see the commentary on guideline 3.1.5, ILC Report (2007), A/62/10, 77, para. 14(ii) of the commentary.

³⁴² *Ibid*, pp 66–77.

³⁴³ In its 2007 judgment, the Court considered that 'the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, para. 198). The question has special relevance in relation to the scope of the not very glorious 'colonial clause', included in Art. 12 of the Convention and contested, not without reason, by the States of the Soviet bloc, which had made reservations to this provision. See MTDSG, *supra* n 130, vol. I, ch. IV.1: here, it is the validity of this semi-clause which is in question; but this poses the further question of the validity of the objections to this reservation.

³⁴⁴ See MTDSG, *supra* n 130, vol. I, ch. VI.19. In the same sense, see the objections by Belgium, Denmark, Spain, Greece, Ireland, Italy, the Netherlands, Portugal, Sweden, and the United Kingdom, and the less explicitly motivated objections by Austria and France, *ibid*, pp 587–9. See, also, the objection by Norway, or those—less explicit—by Germany and Sweden in relation to the Tunisian declaration concerning the application of the Convention on the Reduction of Statelessness of 1961, 989 UNTS 175, *ibid*, ch. V.4, pp 500–1. For another meaningful example, see the declaration by Pakistan in relation to the 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, excluding the application of the Convention to 'struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination', *ibid*, vol. III, ch. XVIII.9, pp 159–60; a number of States considered that this 'declaration' was contrary to the object and purpose of the Convention, namely 'the suppression of terrorist bombings, irrespective of where they take place and of who carries them out', see the objections by Germany, Australia, Austria, Canada, Denmark, Finland, France, Spain, United States, India, Italy, Japan (very specifically motivated), Norway, New Zealand, the Netherlands, United Kingdom, and Sweden, *ibid*, pp 162–70. Similarly, Finland justified its objection to the reservation made by Yemen to Art. 5 of the 1966 Convention

117. The prohibited reservation may have a bearing on less contradictory provisions but is no less contrary to the object and purpose of the treaty of which it renders the application impossible.³⁴⁵ It is for this reason that only an interpretation made in good faith can result in establishing the object and purpose of the treaty and the conformity of a reservation with this rather mysterious criterion,³⁴⁶ it being understood that, to put it in the words of the ILC, '[s]uch a process undoubtedly requires more "*esprit de finesse*" than "*esprit de géométrie*," like any act of interpretation, for that matter—and this process is certainly one of interpretation'.³⁴⁷

118. Following the Tenth Report of the Special Rapporteur on reservations,³⁴⁸ in 2007 the ILC adopted a series of guidelines relating to certain categories of reservations which pose specific problems,³⁴⁹ and which endeavour to circumscribe more precisely the notion of the object and purpose of a treaty in cases which particularly often raise problems.

Reservations to clauses on compulsory dispute settlement

119. In his First Report on the law of treaties, Fitzmaurice categorically stated: '[i]t is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties'.³⁵⁰ His position, obviously inspired by the cold war debate on reservations to the Genocide Convention, is too sweeping; moreover, it was rejected by the International Court of Justice, which, in its orders of 2 June 1999 in response to Yugoslavia's requests for the indication of provisional measures against Spain and against the United States in the cases concerning *Legality of Use of Force*, clearly recognized the validity of the reservations made by those two States to Article IX of the Genocide Convention of 1948, which gives the Court jurisdiction to hear all disputes relating to the Convention,³⁵¹ even though some of the parties had considered that such reservations were not compatible with the object and purpose of the Convention.³⁵² In its 2006 judgment in the case concerning *Armed*

on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, because 'provisions prohibiting racial discrimination in the granting of such fundamental political rights and civil liberties as the right to participate in public life, to marry and choose a spouse, to inherit and to enjoy freedom of thought, conscience and religion are central in a convention against racial discrimination', *ibid.*, vol. I, ch. IV.2, p. 167.

³⁴⁵ Moreover, this explains the suspicion of the Vienna Convention in relation to reservations to the constitutive instruments of international organizations. Thus, in ratifying the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, the German Democratic Republic declared that it would contribute to the expenses linked to the functioning of the Committee against Torture only insofar as the Committee's activities fell within competence of the Committee as recognized by the German Democratic Republic, see MTDSG, *supra* n 130, vol. I, ch. IV.9, fn 3. See also R. W. Edwards Jr, *supra* n 150, pp 391–3, 400. This 'declaration' (in fact, a reservation) gave rise to objections on the part of Luxembourg, which rightly argued that it would 'inhibit activities of the Committee in a manner incompatible with the purpose and the goal of the Convention', *ibid.*, p 375. Cf equally Art. 20(3); see *infra* the commentary on this provision, at paras 106–15.

³⁴⁶ See guideline 3.1.7 and its commentary (ILC Report (2007), A/62/10, pp 77–82).

³⁴⁷ *Ibid.*, p 77, para. 1 of the commentary.

³⁴⁸ A/CN.4/558/Add.1.

³⁴⁹ See guidelines 3.1.7 (Vague or general reservations), 3.1.8 (Reservations to a provision reflecting a customary norm), 3.1.9 (Reservations contrary to a rule of *jus cogens*), 3.1.10 (Reservations to provisions relating to non-derogable rights), 3.1.11 (Reservations relating to internal law), 3.1.12 (Reservations to general human rights treaties), and 3.1.13 (Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty) and their commentary, ILC Report (2007), A/62/10, pp 82–121.

³⁵⁰ A/CN.4/101, *supra* n 46, p 127, para. 96; this was the object of draft Art. 37(4), proposed by the Special Rapporteur.

³⁵¹ *Legality of Use of Force (Yugoslavia v Spain)*, p 772, paras 29–33, (*Yugoslavia v United States of America*) pp 923–4, paras 21–5.

³⁵² See MTDSG, *supra* n 130, ch. IV.1; in particular, see the very clear objections of Brazil, China (Taiwan), Mexico, and the Netherlands.

Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), the Court adopted the same position and considered 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.³⁵³

120. This conclusion is corroborated by the very common nature of such reservations and the erratic practice followed in the objections to them.³⁵⁴ On the other side, it is self-evident that, if the obligation of compulsory settlement is the very object of the treaty, a reservation which excludes it would be, without doubt, contrary to the object and purpose of such treaty. This is actually the solution recommended by the judges who, in their joint separate Opinion to the ICJ judgment in *RDC v Rwanda*, considered that:

We believe it is now clear that it had not been intended to suggest that the fact that a reservation relates to jurisdiction rather than substance necessarily results in its compatibility with the object and purpose of a convention. Much will depend upon the particular convention concerned and the particular reservation. In some treaties not all reservations to specific substantive clauses will necessarily be contrary to the object and purpose of the treaty... Conversely, a reservation to a specific 'procedural' provision in a certain convention, could be contrary to the treaty's object and purpose.³⁵⁵

At the time of this judgment, the ILC Special Rapporteur had already proposed a draft guideline 3.1.13 which in substance corresponded to the position adopted by the Court as well as by the authors of the Joint Separate Opinion.³⁵⁶ This draft guideline was finally adopted by the ILC, with some modifications, in 2007.³⁵⁷

121. According to the Human Rights Committee, reservations relating to guarantees of implementation of the Covenant of 1966 on civil and political rights would in principle be incompatible with its object and purpose:

These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose.... The Covenant also envisages, for the better attainment

³⁵³ *Armed activities on the territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, *ICJ Reports 2006*, pp 6, 32, para. 67. See also the Court's Order of 10 July 2002, *ICJ Reports 2002*, pp 219, 246, para. 72.

³⁵⁴ See in this sense R. Riquelme Cortado, *supra* n 97, pp 192–202. Objections to reservations on dispute-settlement clauses are rare. Apart from the objections made to reservations to Art. IX of the Genocide Convention, see the objections formulated by several States to reservations concerning Art. 66 of the Vienna Convention on the Law of Treaties, especially the objections by Germany, Canada, Egypt, the United States (which specified that the reservation made by Syria was 'incompatible with the object and purpose of the Convention and undermines the principle of impartial settlement of disputes concerning the invalidity, termination, and suspension of the operation of treaties, which was the subject of extensive negotiation at the Vienna Conference', MTDSG, *supra* n 130, ch. XXIII.1; see also *infra* para. 145), Japan, New Zealand, the Netherlands (*ibid*, p 530), and Sweden (same position as the United Kingdom, *ibid*, pp 533–4).

³⁵⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *ICJ Reports 2006*, pp 65, 70, para. 21.

³⁵⁶ Tenth Report, A/CN.4/558/Add.1, para. 99. In para. 14 of their Opinion, the authors expressly cross-referred to the Second and Tenth Reports by the Special Rapporteur, *ICJ Reports 2006*, p 68, para. 14.

³⁵⁷ ILC Report (2007), A/62/10, pp 117–21.

of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.³⁵⁸

With respect to the Optional Protocol, the Committee added:

A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol because such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.³⁵⁹

Based on this reasoning, the Committee, in the *Rawle Kennedy* case, held that a reservation made by Trinidad and Tobago excluding the Committee's competence to consider communications relating to a prisoner under sentence of death was not valid.³⁶⁰

122. The European Court of Human Rights has adopted a position just as radical. In the *Loizidou* case, it deduced from an analysis of the object and purpose of the Rome Convention 'that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their "jurisdiction" from supervision by the Convention institutions'³⁶¹ and that every restriction to its competence *ratione loci* or *ratione materiae* was incompatible with the nature of the Convention.³⁶²

Reservations to general human rights treaties

123. It is in the area of human rights that the discussions are most vivid, particularly concerning reservations made to general treaties such as the European, Inter-American and African Conventions, the Covenants on Economic, Social and Cultural Rights and Civil and Political Rights. Regarding the latter, the Human Rights Committee declared in its celebrated (and disputable) General Comment No. 24:

³⁵⁸ General Comment No. 24, *supra* n 126, para. 11; see also F. Hampson, Working paper, *supra* n 102, para. 55.

³⁵⁹ General Comment No. 24, *supra* n 126, para. 13. In the following paragraph, the Committee considered that 'reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose'.

³⁶⁰ See *supra* n 130. As a justification of its reservation, Trinidad and Tobago had maintained that it accepted the principle that States cannot use the Optional Protocol as a vehicle to enter reservations to the International Covenant on Civil and Political Rights itself; the Government of Trinidad and Tobago stresses that its reservation to the Optional Protocol in no way detracts from its obligations and engagements under the Covenant (MTDSG, *supra* n 130, ch. IV.5). Before Trinidad and Tobago had denounced the Optional Protocol, its reservation had summoned objections from seven States.

³⁶¹ *Loizidou*, *supra* n 125, para. 77.

³⁶² *Ibid.*, paras 70–89; see esp. para. 79. See also the decision of the Grand Chamber of the European Court of Human Rights of 4 July 2001 concerning the admissibility of Application no. 48787/99 in the case of *Ilaşcu and others v Moldova and the Russian Federation*.

In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.³⁶³

Taken literally, this position leads to holding invalid every global reservation bearing on any one of the rights protected by the Covenant. However, such is not the position of the States parties which have not systematically formulated objections to reservations of this type³⁶⁴ and the Committee itself does not go that far since, in the paragraphs following the statement of its position of principle,³⁶⁵ it sets out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant. It does not follow that, by its very nature, a general reservation bearing on one of the protected rights would be invalid as such.³⁶⁶

124. Likewise, regarding the Convention of 1989 on the Rights of the Child, a large number of reservations have been formulated to the provisions regarding adoption.³⁶⁷ As noted by one author, who can hardly be suspected of 'anti-human rightism': '[i]t would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose'.³⁶⁸

125. The ILC, having in mind the particular difficulties for identifying the object and purpose of general human right treaties—by contrast to treaties concerning particular rights, such as the Torture Convention or the Non-Discrimination Convention—proposed criteria in order to assess the validity of a reservation to such a convention, such as the indivisibility, interdependence, and interrelatedness of the rights set out in the treaty, the importance that the right or the provision which is the subject of the reservation has within the general thrust of the treaty, and finally the gravity of the impact of the reservation.³⁶⁹

Reservations relating to the application of internal law

126. Another question is raised frequently—and not only in the domain of human rights: can a State formulate a reservation to preserve the application of its internal law?³⁷⁰ Here

³⁶³ General Comment No. 24, *supra* n 126, para. 7. Cf F. Hampson, Working paper, *supra* n 102, para. 50.

³⁶⁴ See eg the reservation formulated by Malta to Art. 13 of the ICCPR (on the conditions of expulsion of aliens) which did not raise any objections, MTDSG, *supra* n 130, ch. IV.4.

³⁶⁵ Paragraphs 8–10 of General Comment No. 24, *supra* n 126; these criteria concern, in addition to the compatibility of the reservation with the object and purpose of the treaty, the customary, peremptory, or non-derogable character of the norm concerned. See *infra* paras 136–40.

³⁶⁶ See, however, *infra* n 370.

³⁶⁷ Articles 20 and 21; see MTDSG, *supra* n 130, ch. IV.11.

³⁶⁸ W. A. Schabas, *supra* n 326, p 480.

³⁶⁹ See guideline 3.1.12 (ILC Report (2007), A/62/10, p 113) and in particular paras 5–8 of the commentary, *ibid*, pp 115–16.

³⁷⁰ In the Concluding Observations to the first report of the United States, dated 6 April 1995, the Committee noted that it regretted:

the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant' (Concluding Observations of the Human Rights Committee: United States, 10/03/1995, CCPR/C/79/Add.50, para. 279)

See the analysis by W. A. Schabas, *supra* n 331, pp 277–328; J. McBride, 'Reservations and the Capacity of States to Implement Human Rights Treaties' in J. P. Gardner (ed), *supra* n 116, p 172.

again, a nuanced response is suited and it is certainly not possible to respond categorically in the negative as certain objections to reservations of this type would seem to suggest. For instance, several States have objected to the reservation formulated by Canada to the Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 on the grounds that the reservation '[r]ender[s] compliance with the provisions of the Convention dependent on certain norms of Canada's internal legislation'.³⁷¹

127. This ground for objection is hardly convincing. Without doubt, according to Article 27 of the Vienna Convention,³⁷² a party cannot 'invoke the provisions of its internal law as justification for its failure to perform a treaty'. The assumption, however, is that the problem is settled, in the sense that the provisions in question are applicable to the reserving States; but that is precisely the issue. As one commentator rightly noted, relatively often a State formulates a reservation *because* the treaty imposes on it obligations which are incompatible with its internal law, which it is not in a position to amend,³⁷³ at least initially.³⁷⁴ Moreover, Article 57 of the European Convention on Human Rights not only authorizes a State party to formulate a reservation in cases where its internal law is in conflict with a Convention provision but restricts even that authority exclusively to instances where 'any law then in force in its territory is not in conformity with the provision'.³⁷⁵

128. It is thus a nuanced solution which is retained by ILC draft guideline 3.1.11. According to the commentary, the function of this provision is:

to establish that, contrary to an erroneous but fairly widespread perception, a reservation is not invalid solely because it aims to preserve the integrity of particular norms of internal law—it being understood that, as in the case of any reservation, those made with such an objective must be compatible with the object and purpose of the treaty to which they relate.³⁷⁶

³⁷¹ See the objections by Spain, France, Norway, Ireland, Luxembourg, and Sweden, MTDSG, *supra* n 130, ch. XXVII.4. See also the objections by Finland to the reservations by Indonesia, Malaysia, Qatar, Singapore, and Oman to the 1989 Convention on the Rights of the Child, 1577 UNTS 3, MTDSG, *supra* n 130, ch. IV.11. See also eg the objections by Denmark, Finland, Greece, Ireland, Mexico, Norway, and Sweden to the second reservation by the United States to the Genocide Convention, MTDSG, *supra* n 130, ch. IV.1. For the text of the US second reservation, see *infra* para. 131.

³⁷² Expressly invoked, eg, by Estonia and the Netherlands in support of their objections to the US reservation mentioned *supra*, MTDSG, *supra* n 130, ch. IV.1.

³⁷³ Cf W. A. Schabas, *supra* n 326, pp 479–80 and *supra* n 91, p 59.

³⁷⁴ The reserving State may indicate the time it requires to adapt its internal law to the international treaty, cf the reservation made by Estonia to the application of Art. 6 of the European Convention on Human Rights, and a similar reservation made by Finland to Art. 5(3) of the same Convention, both of which were limited for a year, available at: <<http://conventions.coe.int/>>. It may also occur that the reserving State indicates its intention to adapt its internal law to the international treaty, without specifying a time frame, cf the reservations made by Cyprus and Malawi upon accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, which they effectively carried out, see MTDSG, *supra* n 130, ch. IV.8. See also the declaration by Indonesia made upon accession to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1673 UNTS 57, MTDSG, *supra* n 130, ch. XXVII.3. It is equally frequent for States to renounce reservations formulated without a specific duration after having modified the national laws that had been the cause of the reservation, cf the withdrawal of multiple reservations to the Convention on the Elimination of All Forms of Discrimination against Women by France, Ireland, and the United Kingdom, MTDSG, *supra* n 130, ch. IV.8. See also the successive partial withdrawals (1996, 1998, 1999, 2001) by Finland of its reservation to Art. 6(1) of the European Convention on Human Rights (<<http://conventions.coe.int/>>). Such practices are praiseworthy and must surely be encouraged, cf guideline 2.5 of the ILC Guidelines on reservations to treaties, Report of the ILC on the work of its 55th session (A/58/10), pp 183–6; one cannot deduce from this the invalidity of the principle of the 'reservations of internal law'.

³⁷⁵ See *supra* para. 89.

³⁷⁶ ILC Report (2007), A/62/10, 112, para. 7 of the commentary.

Vague and general reservations

129. Article 19(c) of the Vienna Convention does not explicitly envisage this hypothesis. However, one has to consider that a general reservation is not compatible with the object and purpose of the Convention which results from the definition itself of reservations that their object is to exclude or to modify 'the legal effect of certain provisions of the treaty in their application' to their authors.³⁷⁷ Thus, it cannot be maintained that the effect of reservations could possibly be to prevent a treaty as a whole from producing its effects. And, although 'across-the-board' reservations are common practice, they are, as specified in draft guideline 1.1.1 of the ILC Guide to Practice,³⁷⁸ valid only if they purport 'to exclude or modify the legal effect...of the treaty as a whole with respect to *certain specific aspects*...'. Furthermore, it follows from the inherently consensual nature of the law of treaties in general and the law of reservations in particular³⁷⁹ that, although States are free to *formulate* (not *make*)³⁸⁰ reservations, the other parties must be entitled to react by accepting the reservation or objecting to it. That is not the case if the text of the reservation does not allow its scope to be assessed..

130. Therefore, the reference to the domestic law of the reserving State is not *per se* the problem³⁸¹—as a matter of fact, there are examples of such reservations that have not raised and do not call for any objection³⁸²—but the frequent vagueness and generality of the reservations referring to domestic law, which make it impossible for the other States parties to take a position on them. Such was the spirit of an amendment presented by Peru to the Vienna Conference aiming at adding a paragraph (d), thus drafted, to the future Article 19:

(d) The reservation renders the treaty inoperative by making its application subject, in a general and indeterminate manner, to national law.³⁸³

³⁷⁷ See the observations made by the Israeli government on the first draft of the ILC on the law of treaties, which led to the alignment of the English and French definitions of reservation, by the addition of the word 'certain' instead of the word 'some' in the English version, in Waldock, Fourth Report (A/CN.4/177), *supra* n 60, p 15. See also the declaration of Chile during the Vienna Conference, Summary Records (A/CONF.39/11), 1st session, *supra* n 2, 4th meeting of the Committee of the Whole, p 21, para. 5: 'that the words "to vary the legal effect of certain provisions of the treaty" (sub-paragraph (d)) meant that the reservation must state clearly what provisions it related to. Imprecise reservations must be avoided'.

³⁷⁸ See *supra* n 250. See also the remarks by R. Riquelme Cortado, *supra* n 97, p 172.

³⁷⁹ See *supra* para. 32.

³⁸⁰ See *supra* para. 74.

³⁸¹ See also *supra* paras 126–8.

³⁸² See eg the reservation by Mozambique to the the 1979 International Convention against the Taking of Hostages, 1316 UNTS 205, in MTDSG, *supra* n 130, ch. XVIII.5 (the same reservation, concerning the extradition of nationals of Mozambique, is found in many other treaties, such as the International Convention on the Suppression of the Financing of Terrorism, *ibid*, ch. XVIII.11). See also the reservations by Guatemala and the Philippines to 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 UNTS 231, MTDSG, ch. XVI.3, or those of Colombia (formulated at the time of signature), Iran, and the Netherlands (very vague) to the United Nations Convention against the Illicit Traffic of Narcotic Drugs and Psychotropic Substances, 976 UNTS 105, MTDSG, ch. VI.19. The French reservation to Art. 15(1) of the European Convention on Human Rights has been discussed more extensively—see N. Questiaux, 'La Convention européenne des droits de l'homme et l'article 16 de la Constitution du 4 octobre 1958', *RDH*, 1970, vol. 3, p 651; A. Pellet, 'La ratification par la France de la Convention européenne des droits de l'homme', *RDP*, 1974, p 1358; V. Coussirat-Coustère, 'La réserve française à l'article 15 de la Convention européenne des droits de l'homme', *JDI*, 1975, vol. 102, p 269.

³⁸³ Reports of the Committee of the Whole (A/CONF.39/14), Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 133, para. 177; see the explanations of the representative of Peru at the 21st meeting of the Committee of the Whole, 10 April 1968, Summary Records (A/CONF.39/11), 1st session, *supra* n 2, p 109, para. 25. The amendment was rejected by 44 votes to 16, with 26 abstentions, *ibid*,

131. Finland's objections to reservations by several States to the Convention on the Rights of the Child were certainly more solidly motivated on this ground than by a reference to Article 27 of the Convention of 1969.³⁸⁴ Thus, in response to the reservation of Malaysia which had accepted several provisions of the Convention on the Rights of the Child only 'if they are in conformity with the Constitution, national laws and national policies of the government of Malaysia',³⁸⁵ Finland held that the 'broad nature' of this reservation left open 'to what extent Malaysia commits itself to the Convention and to the fulfilment of its obligations under the Convention'.³⁸⁶ Equally, Thailand's declaration to the effect that it 'does not interpret and apply the provisions of this Convention [of 1966 on the elimination of all forms of racial discrimination] as imposing upon the Kingdom of Thailand any obligation beyond the confines of the Constitution and the laws of the Kingdom of Thailand',³⁸⁷ prompted an objection on the part of Sweden that, in so doing, Thailand was making 'the application of the Convention subject to a general reservation referring to the confines of national legislation, without specifying its contents'.³⁸⁸

132. Some of the so-called 'sharia reservations' give rise to the same objection³⁸⁹ of which a topical example is provided by the reservation by which Mauritania accepted the New York Convention of 1979 on the Elimination of All Forms of Discrimination Against Women 'in each and every one of its parts which are not contrary to Islamic Sharia'.³⁹⁰ Here again, the problem lies not in the very fact that Mauritania is invoking a

1st session, 25th meeting of the Committee of the Whole, 16 April 1968, p 135, para. 26. The records of the debates give few explanations on this rejection. Without doubt a number of delegations, like Italy, considered that it was 'unnecessary to state that case expressly, since it was a case of reservations incompatible with the object of the treaty', *ibid*, 1st session, 22nd meeting of the Committee of the Whole, 10 April 1968, p 120, para. 75; in this sense, see R. Szafarz, *supra* n 234, p 302.

³⁸⁴ See *supra* para. 126. Similarly, the reasons given by the Netherlands and the UK in support of their objections to the second reservation of the United States on the Genocide Convention, pursuant to which the objection was based on the 'uncertainty [the reservation creates] as to the extent of the obligations which the Government of the United States of America is prepared to assume with regard to the Convention' (MTDSG, *supra* n 130, ch. IV.1), are more convincing than objections resting on the invocation of internal law (see *supra* n 372).

³⁸⁵ MTDSG, *supra* n 130, ch. IV.11.

³⁸⁶ *Ibid*, p 402. See also the objections raised by Finland and several other States to similar reservations by other States parties, *ibid*, pp 401–5.

³⁸⁷ *Ibid*, vol. I, ch. IV.2, pp 164–5.

³⁸⁸ *Ibid*, vol. I, ch. IV.2, p 171. In the same sense, see the objections by Sweden and Norway, of 15 March 1999, to the reservation made by Bangladesh to the 1953 Convention on the Political Rights of Women, 193 UNTS 135, in MTDSG, ch. XVI.1; or the objections made by Finland to a Guatemalan reservation to the Vienna Convention on the Law of Treaties, and the objections by the Netherlands, Sweden, and Austria to a comparable reservation made by Peru to the same Convention, *ibid*, ch. XXIII.1.

³⁸⁹ For doctrinal discussions, see esp. A. Sassi, 'General Reservations to Multilateral Treaties' in T. Treves (ed.), *supra* n 171, pp 96–9; and more particularly on its application to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, see B. Clark, *supra* n 99, pp 299–302, 310–11; J. Connors, 'The Women's Convention in the Muslim World' in J. P. Gardner (ed.), *supra* n 116, pp 85–103; R. Cook, *supra* n 332, pp 690–2; J. McBride, *supra* n 370, pp 149–56 (with very many examples); Y. Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', *BYIL*, 2000, vol. 71, pp 181, 198–201, and more specifically, A. Jenefsky, 'Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discriminations against Women', *Maryland J of Int'l L and Trade*, 1991, vol. 15, p 199.

³⁹⁰ MTDSG, *supra* n 130, ch. IV.8. See also the reservations by Saudi Arabia (mentioning the 'norms of Islamic law'), *ibid*, p 298; Malaysia, *ibid*, pp 290–1; or the initial reservation by the Maldives, pursuant to which 'the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded', *ibid*, p 342, fn 36. The latter reservation having raised a number of objections, the Maldives modified it and restricted its scope. Nevertheless, Germany once again raised an objection

law of religious origin which it applies³⁹¹ but, as Denmark observed, 'the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character'.³⁹² As a result, as the United Kingdom put it, such a reservation 'which consists of a general reference to national law without specifying its contents does not clearly define for other States Parties to the Convention the extent [to] which the reserving State has accepted the obligations of the Convention'.³⁹³

133. The same applies when a State reserves the general right to have its constitution prevail over a treaty.³⁹⁴ This is the case, for example, of the reservation of the United States to the Genocide Convention:

nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.³⁹⁵

134. It is, essentially, the impossibility to assess the compatibility of such reservations with the object and purpose of the treaty rather than the certainty of their incompatibility, which makes them fall within the purview of paragraph (c) Article 19. As the Human Rights Committee pointed out:

Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.³⁹⁶

For its part, the European Court of Human Rights, in the *Belilos* case, declared invalid the declaration (equivalent to a reservation) of Switzerland to Article 6(1) of the Rome Convention because it was 'couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope'.³⁹⁷ But it is without doubt the European

to the reservation and Finland criticized it, *ibid*, p 342 (for the text of the amended reservation see *ibid*, p 291). Similarly, several States formulated objections to the reservation made by Saudi Arabia to the 1966 Convention on the Elimination of All Forms of Racial Discrimination, pursuant to which Saudi Arabia would apply the provisions of the Convention 'providing these do not conflict with the precepts of the Islamic Shariah', *ibid*, vol. I, ch. IV.2, p 163.

³⁹¹ The Holy See ratified the Convention on the Rights of the Child, subject to the reservation that their application 'be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law', MTDSG, *supra* n 130, ch. IV.11. As has been noted, this wording raises, *mutatis mutandis*, the same problems as the 'Shar'ia reservation', see W. A. Schabas, *supra* n 326, pp 478–9.

³⁹² MTDSG, *supra* n 130, ch. IV.8.

³⁹³ *Ibid*, p 334. See also the objections by Germany, Austria, Finland, Norway, the Netherlands, Portugal, and Sweden, *ibid*, pp 305–34. The reservations made by many Islamic States to specific provisions of the Convention, justified by the incompatibility of said provisions with Shar'ia law, are certainly less subject to criticism on this plane, even though many of these reservations have been objected to by certain States parties. See eg B. Clark, *supra* n 99, p 300, who notes that the reservation by Iraq to Art. 16 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women, based on Shar'ia law, was specific and entailed a regime which was more favourable than that of the Convention. This reservation was nevertheless objected to by Mexico, the Netherlands, and Sweden, MTDSG, *supra* n 130, ch. IV.8.

³⁹⁴ Cf the reservation by Pakistan to the Convention on the Elimination of All Forms of Discrimination against Women (*ibid*, p 296) and the objections by Austria, Finland, Germany, and Portugal, *ibid*, pp 305–6, 312–13, 316–17, 344 (fn 49), respectively.

³⁹⁵ MTDSG, *supra* n 130, ch. IV.1.

³⁹⁶ General Comment No. 24, *supra* n 126, para. 19; see also para. 12, which links the question of the invocation of internal law to that of 'reservations formulated in general terms'.

³⁹⁷ Judgment of 29 April 1988, *Belilos*, *supra* n 121, para. 55—see *supra* para. 42. For a detailed analysis of the condition of generality established in Art. 57 of the Convention, see esp. I. Cameron and F. Horn, *supra* n 114, pp 97–109; R. St. J. MacDonald, *supra* n 121, pp 433–8, 443–8.

Commission for Human Rights that most clearly formulated the principle applicable here when it judged that 'a reservation is of a general nature when it does not refer to a specific provision of Convention or when it is worded in such a way that it does not allow its scope to be determined'.³⁹⁸

135. Draft guideline 3.1.7 adopted by the ILC is drafted in consequence: it does not state that vague reservations are contrary to the object and purpose of the treaty concerned, but it is worded to make clear that a reservation shall be formulated in such a manner that its scope can be determined reasonably in order to permit the assessment of its compatibility with the object and purpose test.³⁹⁹

Reservations relating to provisions reflecting customary norms

136. It has happened that States parties to a treaty objected to reservations and challenged their compatibility with its object and purpose under the pretext that they were contrary to well-established customary rules. Thus, Austria declared that it:

is of the view that the Guatemalan reservations [to the 1969 Vienna Convention on the Law of Treaties] refer almost exclusively to general rules of [the said Convention] many of which are solidly based on international customary law. The reservations could call into question well-established and universally accepted norms. Austria is of the view that the reservations also raise doubts as to their compatibility with the object and purpose of the [said Convention].⁴⁰⁰

Similarly, the Netherlands objected to reservations formulated by several States in respect of various provisions of the Vienna Convention of 1961 on diplomatic relations and took 'the view that this provision remains in force in relations between it and the said States in accordance with international customary law'.⁴⁰¹

137. It has often been thought that this inability to formulate reservations to treaty provisions which codify customary norms could be deduced from the judgment of the International Court of Justice in the *North Sea Continental Shelf*.⁴⁰²

speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.⁴⁰³

While the wording adopted by the Court is certainly not the most felicitous, the conclusion that some have drawn from it seems incorrect if this passage is put back into its context.

³⁹⁸ Report of the Commission, 5 May 1982, *Temeltasch*, *supra* n 117, p 588. See P. H. Imbert, *supra* n 117, pp 599–607.

³⁹⁹ ILC Reports (2007), *A/62/10*, pp 82–8, and, in particular, pp 82–3, para. 1 of the commentary.

⁴⁰⁰ MTDSG, *supra* n 130, ch. XXIII.1. See also the objections formulated in similar terms by Germany, Belgium, Denmark, Finland, United Kingdom, and Sweden, *ibid*. In the *Anglo-French Continental Shelf* case, the United Kingdom maintained that the French reservation to Art. 6 of the Convention on the Continental Shelf was in reality a reservation 'to the rules of customary law' and was as such 'inadmissible as a reservation to Article 6', *supra* n 96, p 48, para. 50.

⁴⁰¹ MTDSG, *supra* n 130, ch. III.3. In reality, it is not the provisions in question which remain in force, but rather the customary norms that they express, see *infra* para. 140. See also the objections of Poland to the reservations by Bahrain and Libya, *ibid*, p 111; and D. W. Greig, *supra* n 189, p 88.

⁴⁰² See the Dissenting Opinion of Judge Morelli to the 1969 *North Sea Continental Shelf* (*Federal Republic of Germany v Denmark and Netherlands*), Judgment, 20 February 1969, *ICJ Reports 1969*, pp 197–8, and the numerous comments quoted by P. H. Imbert, *supra* n 14, p 244, fn 20; see also G. Teboul, *supra* n 91, p 685.

⁴⁰³ *North Sea Continental Shelf*, *ibid*, pp 38–9, para. 63.

138. The Court goes on to exercise caution in respect of the deductions called for by the exclusion of certain reservations. Noting that the faculty of reservation to Article 6 of the 1958 Geneva Convention on the Continental Shelf (delimitation) was not excluded by Article 12 on reservations,⁴⁰⁴ as it was for Articles 1 to 3, it appeared 'normal' to the Court and:

a legitimate inference that it was considered to have a different and less fundamental status and not, like those articles, to reflect pre-existing or emergent customary law.⁴⁰⁵

It is thus 'pas vrai que la Cour affirme l'inadmissibilité des réserves à l'égard des règles de droit coutumier';⁴⁰⁶ it only finds that, in the case at hand, the different treatment which the authors of the Convention accorded to Articles 1 to 3, on the one hand, and Article 6, on the other hand, suggested that they did not consider that the latter codified a customary norm which, moreover, confirms the Court's own conclusion.

139. Moreover, the judgment itself indicates, in an often-neglected *dictum*, '[n]o reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention [on the Continental Shelf]'.⁴⁰⁷ This clearly implies that the customary character of the norm reflected in a conventional provision with regard to which a reservation is formulated does not constitute by itself a ground of invalidity of the reservation.⁴⁰⁸

140. Although it is sometimes challenged,⁴⁰⁹ this principle is in the main recognized by the majority of the doctrine,⁴¹⁰ and rightly so:

- Customary norms are binding on States independently of the expression of their consent to the conventional norm⁴¹¹ but, unlike peremptory norms, the States can derogate therefrom by an *inter se* agreement; it is not clear why they could not do so by a reservation⁴¹²—*providing that* the latter is valid, but that is precisely the question raised.

⁴⁰⁴ See *supra* para. 87.

⁴⁰⁵ *North Sea Continental Shelf*, *supra* n 402, p 40, para. 66 and p 39, para. 63. In the same sense, see the Separate Opinion of Judge Padilla Nervo, *ibid*, pp 85, 89; *contra*: Dissenting Opinion of Judge Koretsky, *ibid*, p 154.

⁴⁰⁶ '[N]ot true that the Court affirms the inadmissibility of reservations with regard to the rules of customary law' (editor's translation), P. H. Imbert, *supra* n 14, p 244. In the same sense, See A Pellet, *supra* n 22, pp 507–8. In his Dissenting Opinion, Judge Tanaka took the opposite position that:

a State party to the Convention cannot exclude by reservation the application of the provision for settlement by agreement, since this is required by general international law, notwithstanding the fact that Article 12 of the Convention does not expressly exclude Article 6, paragraphs 1 and 2, from the exercise of the reservation faculty. (*ibid*, pp 171, 182)

But this opinion confuses the question of the faculty to make reservations with that of the effects of the reservation when the provision to which it is attached has customary character, or even peremptory character (Judge Tanaka considered that the principle of equidistance 'must be recognized as *jus cogens*', *ibid*).

⁴⁰⁷ *North Sea Continental Shelf*, *supra* n 402, p 40, para. 65; see, in this sense, the Dissenting Opinion of Judge Morelli, *ibid*, p 198.

⁴⁰⁸ See, in this sense, the Dissenting Opinion of Judge Ad Hoc Sørensen, *ibid*, pp 241, 248.

⁴⁰⁹ See the position of Briggs in the declaration appended to the arbitral award in the *Anglo-French Continental Shelf* case, *supra* n 96, pp 127f.

⁴¹⁰ See esp. M. Coccia, *supra* n 12, pp 31–2; G. Gaja, 'Le riserve al Patto sui diritti civili e politici e il diritto consuetudinario', *RDI*, 1996, p 451; P. H. Imbert, *supra* n 240, p 48; R. Riquelme Cortado, *supra* n 97, pp 159–71; L. Sucharipa-Behrman, *supra* n 134, pp 76–7.

⁴¹¹ Cf the objection made by Finland to the reservation formulated by Yemen to Art. 5 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination: 'By making a reservation a State cannot contract out from universally binding human rights standards' (this holds true as a general rule), *MTDSG*, *supra* n 130, ch. IV.2.

⁴¹² In this sense, see the Dissenting Opinion of Judge Sørensen in the *North Sea Continental Shelf* cases, *supra* n 402, p 248; see also M. Coccia, *supra* n 12, p 32. See, however, *infra* para. 147.

- A reservation only concerns the 'conventionality' of the norm, not its existence as a customary rule even though, in certain cases, it can cast doubt on its general acceptance 'as of right';⁴¹³ as the United Kingdom noted in its observations on General Comment No. 24, 'there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law'.⁴¹⁴
- If this nature is recognized, the States remain bound by the customary rule independently of the treaty.⁴¹⁵
- Despite appearances, they can have an interest in it (albeit not necessarily a laudable one); for example, that of avoiding application to the relevant obligations of the monitoring or dispute-settlement mechanisms envisaged in the treaty or of limiting the role of domestic judges, who may have different competences with respect to conventional rules, on the one hand, and customary rules, on the other hand.⁴¹⁶
- Moreover, as France noted in its commentary on General Comment No. 24 of the Human Rights Committee, 'the State's duty to observe a general customary principle should [not] be confused with its agreement to be bound by the expression of that principle in a treaty, especially with the developments and clarifications that such formalization involves'.⁴¹⁷
- Finally, a reservation could be a means for a 'persistent objector' to demonstrate the persistence of its objection: it could certainly refuse the application, through a treaty, of a rule which is not opposable to it by virtue of general international law.⁴¹⁸

141. This principle has been transposed by the ILC in draft guideline 3.1.8, paragraph 1. Paragraph 2 of that same guideline emphasizes the possible effect, or the absence of any effect, of such a reservation on the binding character of the customary norm as such;⁴¹⁹ this issue is nevertheless unrelated to the assessment of the validity of the reservation, and in particular to the issue of its compatibility with the Article 19(c) test. In spite of the contrary position of the Human Rights Committee,⁴²⁰ this solution is transposable in the human rights area.⁴²¹

142. On the more general issue of codifying conventions, it may be wondered whether formulating reservations to them is not contrary to their object and purpose. There is no doubt that 'the desire to codify is normally accompanied by a concern to preserve the rule being affirmed'.⁴²² 'if it were possible to formulate a reservation to a provision of customary

⁴¹³ In this sense, see R. R. Baxter, 'Treaties and Customs', *RCADI*, 1970, vol. 129, pp 25, 50; M. Coccia, *supra* n 12, p 31; G. Gaja, *supra* n 410, p 451; G. Teboul, *supra* n 91, pp 711–14. The same can occur, in certain circumstances (but not always), for the existence of a reservation clause, cf P. H. Imbert, *supra* n 14, p 246; P. Reuter, *supra* n 307, p 631; or pp 370–1, fn 16.

⁴¹⁴ Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, para. 7.

⁴¹⁵ See *infra* para. 145.

⁴¹⁶ This is the case in France where treaties (by virtue of Art. 55 of the Constitution), but not customary norms, prevail over the internal law (cf Conseil d'Etat, Ass., 20 October 1989, *Nicolo*, and 6 June 1997, *Aquarone*, *Leb.* p 206, concl. Bachelier).

⁴¹⁷ Report of the Human Rights Committee to the General Assembly, 1996, A/51/40, vol. I, p 105, para. 2. In the same sense, see the comments by the United States in Report of the Human Rights Committee to the General Assembly, 1995, A/50/40. See also G. Cohen-Jonathan, 'Les réserves dans les traités de droits de l'homme', *RGDIP*, 1996, vol. 100, pp 915, 932–3.

⁴¹⁸ See F. Hampson, Working document, *supra* n 102, fn 45.

⁴¹⁹ See also *infra* para. 145.

⁴²⁰ General Comment No. 24, *supra* n 126, para. 8.

⁴²¹ See A. Pellet, Second Report, A/CN.4/477/Add.1, *supra* n 83, pp 64–5, paras 143–7.

⁴²² '[W]hat deserves reflection is the balance of the entirety to which the reservation applies, which constitutes not the object and purpose of the treaty itself, but the object and purpose of the negotiation from which this treaty emanates', P. H. Imbert, *supra* n 14, p 246. See also G. Teboul, *supra* n 91, p 680: 'Toutes deux utiles,

origin in the context of a codification treaty, the codification treaty would fail in its objectives,⁴²³ to the point that one can view the reservations and, in any case, their accumulation, as 'the very negation of the work of codification'.⁴²⁴

143. It does not result therefrom that, by definition, every reservation to a codifying treaty is contrary to its object and purpose:

- It is certain that reservations are hardly compatible with the desired objective of standardizing and clarifying customary law but 'à y bien réfléchir, l'équilibre d'ensemble auquel la réserve porte atteinte, constitue non l'objet et le but du traité lui-même, mais l'objet et le but de la négociation dont ce traité émane'.⁴²⁵
- The very notion of a 'codifying convention' is uncertain. As the ILC has often underlined, it is impossible to separate codification *stricto sensu* of international law from its progressive development.⁴²⁶ 'Quel *quantum* de règles d'origine coutumière un traité doit-il contenir pour être qualifié de "traité de codification"?'⁴²⁷
- The status of norms included in a treaty changes over time: a norm which falls in the category of progressive development can grow into a pure codification and, a 'codification convention' often crystallizes into a rule of general international law a norm which was not of this nature at the time of its adoption.⁴²⁸

144. As a result, the nature of codifying conventions does not constitute, as such, more of an obstacle to the formulation of reservations to some of their provisions under the same title (and with the same restrictions) than to any other treaty. The arguments that one can refer to, in a general manner, in favour of the ability to formulate reservations to a conventional provision reflecting a customary rule⁴²⁹ are also fully transposable thereto. Furthermore, there is well-established practice in this sense: along with human rights treaties (that are otherwise largely codifying existing law), the codifying conventions are, out of all treaties, those that are the object of the largest number of reservations.⁴³⁰ And, if it

les notions de réserve et de convention de codification s'accommodent pourtant mal l'une de l'autre' ('Both being useful, the notions of reservations and codification convention badly adapt to each other': editor's translation) (this study centres on the question of reservations to codification conventions, pp 679–717, *passim*).

⁴²³ P. Reuter, *supra* n 307, pp 630–1 or 370. The author adds that, in this way, the treaty would also have 'engendré une situation plus éloignée de son objet et de son but que s'il n'avait pas existé, puisqu'une règle générale voit son champ d'application se restreindre' ('generated a situation farther removed from its object and purpose than if the treaty had not existed at all, since a general rule would see its scope of application restricted': editor's translation). This second statement is more debatable: it appears to postulate that the reserving State finds itself, by virtue of the reservation, freed from the application of the rule; this is not the case, see *infra* n 432.

⁴²⁴ Ago, *YILC*, 1965, vol. I, 797th meeting, 8 June 1965, p 153, para. 58.

⁴²⁵ '[O]n reflection, the overall balance which the reservation threatens is not the object and purpose of the treaty itself, but the object and purpose of the negotiations which gave rise to the treaty' (editor's translation), G. Teboul, *supra* n 91, p 700.

⁴²⁶ See eg the reports of the ILC on the work of its 8th (1956) and 48th (1995) sessions, *YILC*, 1956, vol. II, pp 255–6, para. 26, and *YILC*, 1996, vol. II, Part Two, p 86, paras 156–7. See also *supra* para. 57.

⁴²⁷ 'Which quantum of rules of customary origin should a treaty include to qualify as a "codification treaty"?' (editor's translation), P. Reuter, *supra* n 307, p 632 (or p 371).

⁴²⁸ See *supra* para. 110, and on the question of the death penalty in relation to Arts 6 and 7 of the 1966 Covenant on Civil and Political Rights (only to conclude in the negative), *supra* n 331, pp 308–10.

⁴²⁹ See *supra* para. 136.

⁴³⁰ As examples, as at 12 December 2010, the Vienna Convention on Diplomatic Relations, 500 UNTS 95, had 55 reservations or declarations (of which 50 are still in force) from 44 States parties (currently, 41 States parties maintain reservations in force), see MTDSG, *supra* n 130, ch. III.3; and the 1969 Convention on the Law of Treaties had 74 reservations or declarations (of which 68 are still in force) formulated by 37 States (currently 35), *ibid*, ch. XXIII.1. For its part, the 1966 Covenant on Civil and Political Rights, which today appears to be largely codificatory of customary international law, has 233 reservations or declarations, formulated by 65 States, *ibid*, ch. IV.4.

happens that certain objections are founded on the customary character of the rules concerned,⁴³¹ the specific nature of these conventions seems never to have been invoked in support of a declaration of incompatibility with their object and purpose.

145. Nevertheless, the customary nature of a provision forming the object of a reservation has important consequences concerning the effects it produces: once established, it paralyses the application of the *conventional* norm which is the object of the reservation in the relations of the reserving State with the other parties to the treaty, but it does not eliminate the State's obligation to respect the customary norm (the content of which is, by hypothesis, identical).⁴³² The reason for this is simple and appears with great clarity in the celebrated *dictum* of the ICJ in the *Nicaragua* case:

The fact that the abovementioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.⁴³³

As shown by Judge Ad Hoc Sørensen, in his Dissenting Opinion appended to the 1969 judgment of the Court in the cases concerning the *North Sea Continental Shelf*:

There is no incompatibility between the faculty of making reservations to certain articles of the Convention on the Continental Shelf and the recognition of that Convention or the particular articles as an expression of generally accepted rules of international law.⁴³⁴

It is therefore correct that, in the objection it made to a reservation by Syria to the Convention on the Law of Treaties, the United States considers that:

the absence of treaty relations between the United States of America and the Syrian Arab Republic with regard to certain provisions in Part V will not in any way impair the duty of the latter to fulfil any obligation embodied in those provisions to which it is subject under international law independently of the Vienna Convention on the Law of Treaties.⁴³⁵

Reservations to provisions which express *jus cogens* rules

146. For the reasons set out above,⁴³⁶ one can assume that a reservation to a conventional provision which expresses a peremptory norm of general international law is inconceivable: the scope of reservations and acceptances shows a 'contractual connection' between

⁴³¹ See *supra* para. 136.

⁴³² In this sense, see R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, Harlow: Longman, 1992), vol. II, p 1244; G. Teboul, *supra* n 91, p 711; P. Weil, 'Vers une normativité relative en droit international?', *RGDIP*, 1982, pp 5, 43–4, published in English as 'Towards Relative Normativity in International Law?', *AJIL*, 1983, vol. 77, p 413. See also the authors quoted *supra* n 409; W. A. Schabas, *supra* n 91, p 56. Reuter gives a contrary argument: ('...entre l'État qui formule la réserve et les parties qui s'abstiennent de présenter une objection, la règle coutumière cesse de s'appliquer puisque par un mécanisme conventionnel postérieur à l'établissement de la règle coutumière son application a été suspendue' ('...between the State which formulates a reservation and the parties who abstain to present an objection, the customary rule ceases to apply since through a conventional mechanism subsequent to the establishment of the customary rule, its application has been suspended' (editor's translation)), *supra* n 307, pp 630–1, 370; in the same sense, see G. Teboul, *supra* n 91, pp 690, 708. This reasoning faces serious objections: see *infra* para. 147.

⁴³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, *ICJ Reports 1984*, pp 392, 424–5, para. 73; see also the Dissenting Opinion of Judge Morelli appended to the *North Sea Continental Shelf* cases, *supra* n 402, p 198.

⁴³⁴ *North Sea Continental Shelf*, *supra* n 402, p 248.

⁴³⁵ *MTDSG*, *supra* n 130, ch. XXIII.1; see also *supra* nn 351–3 and the objections by the Netherlands and Poland quoted *supra* para. 136.

⁴³⁶ Paragraph 140, first bullet point.

the parties; hence, the agreement which results would be automatically null and void as a consequence of the principle established in Article 53 of the Vienna Convention.⁴³⁷

147. This reasoning is not however axiomatic: it rests upon postulates of the 'opposability' school⁴³⁸ which are far from evident.⁴³⁹ Moreover, and most importantly, it assimilates the mechanism of reservations with a purely treaty-based process; whereas a reservation is a unilateral act, linked to the treaty certainly, but without exogenous effects. By definition, it 'purports to exclude or to modify the legal effect of certain provisions of the treaty in their application' to the reserving State⁴⁴⁰ and, if it is accepted, those are indeed its consequences.⁴⁴¹ However, whether or not it is accepted, 'neighbouring' international law remains intact; the legal situation of interested States is affected by it only in their *treaty relations*.⁴⁴²

148. Other, more numerous, authors assert the incompatibility of every reservation to a provision reflecting a peremptory norm of general international law either without putting forward any explanation,⁴⁴³ or arguing that such a reservation would, *ipso facto*, be contrary to the object and purpose of the treaty.⁴⁴⁴

149. This is also the position of the Human Rights Committee in its General Comment No. 24:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant.⁴⁴⁵

This formulation is disputable,⁴⁴⁶ and in any case, cannot be generalized: it is perfectly conceivable that a treaty might refer marginally to a rule of *jus cogens* without the latter being its object and purpose.

150. It has however been asserted that 'la règle prohibant la dérogation à une règle de *jus cogens* vise non seulement les rapports conventionnels mais aussi tous les actes juridiques, dont les actes unilatéraux'.⁴⁴⁷ This is certainly correct and, in truth, constitutes the only convincing intellectual motive for not transposing to reservations to peremptory provisions the reasoning that would not exclude, in principle, the ability to formulate reservations to treaty provisions embodying customary rules.⁴⁴⁸

⁴³⁷ See also, G. Teboul, *supra* n 91, pp 690, 707.

⁴³⁸ See *supra* para. 51.

⁴³⁹ See *infra* the commentary on Arts 20 and 21.

⁴⁴⁰ Article 2(1)(d) of the Vienna Convention.

⁴⁴¹ See Art. 21 of the Convention.

⁴⁴² See *supra* para. 145.

⁴⁴³ See eg R. Riquelme Cortado, *supra* n 97, p 147. See also A. Pellet, Second Report, A/CN.4/477/Add.1, *supra* n 84, p 64, paras 141–2.

⁴⁴⁴ See also the Dissenting Opinion of Judge Tanaka in *North Sea Continental Shelf*, *supra* n 402, p 182.

⁴⁴⁵ General Comment No. 24, *supra* n 126, para. 8. Not without reason, France in its commentaries (see *supra* n 417, A/51/40, p 104, para. 3), maintained that 'Paragraph 8 of general comment No. 24 (52) is drafted in such a way as to link the two distinct legal concepts of "peremptory norms" and rules of "customary international law," to the point of confusing them'.

⁴⁴⁶ Cf the doubts expressed in this respect by the United States, which, in its observations to General Comment No. 24, transposed to the provisions codifying peremptory norms the solution applied to the case of customary norms, see Observations, *supra* n 6, pp 149–50.

⁴⁴⁷ '[T]he rule prohibiting the derogation from a *jus cogens* norm does not only concern conventional relations but also all legal acts, among which the unilateral acts', G. Teboul, *supra* n 91, p 707, fn 52, referring to J. D. Sicault, 'Du caractère obligatoire des engagements unilatéraux en droit international public', *RGDIP*, 1979, vol. 83, pp 633, 663 and the scholarship quoted therein.

⁴⁴⁸ This is all the more so if one considers the 'couple' reservation/acceptance as an agreement modifying the treaty in the relations between the two States concerned, cf M. Coccia, *supra* n 12, pp 30–1; this analysis is, however, not very convincing, see *infra* paras 187–90.

151. When formulating a reservation, a State can indeed seek to exempt itself from the rule to which the reservation itself relates and, in the case of a peremptory norm of general international law, this is out of question⁴⁴⁹—all the more so because one cannot allow a persistent objector to thwart such a norm. But the aims envisaged by the reserving State can be different. While accepting the contents of the rule, a State can intend to escape the consequences which it induces, in particular with regard to its monitoring,⁴⁵⁰ and, on this point, there is no reason not to transpose to the peremptory norms the reasoning followed with regard to the merely binding customary rules. However, as regrettable as that can appear, reservations do not have to be justified and, in reality, they seldom are. Consequently, in the absence of a clear motivation in every case, it is impossible for the other contracting parties or the monitoring bodies to check the validity of the reservation and it is preferable to postulate in principle that any reservation to a provision formulating a *jus cogens* norm is *ipso facto* void.⁴⁵¹ However, this explanation was so uncertain that, at its session in 2007, the ILC could not adopt a clear solution and finally abstained from adopting a guideline on this problem in the first version of its Guide to Practice.

152. For its part, draft guideline 3.1.9 adopted in the same year⁴⁵² does not directly address the question of the compatibility of reservations to a provision reflecting a peremptory norm of general international law with the objet and purpose of a treaty, but relates to the possible legal effect of a reservation on the treaty by providing that if the conventional relation resulting from the treaty thwarts the realization of a peremptory norm, the reservation is not valid. In any case, there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to 'secondary' articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision.⁴⁵³ Moreover, guideline 4.4.3 ('Absence of effect on a peremptory norm of general international law') adopted in 2010 provides that:

A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.⁴⁵⁴

⁴⁴⁹ There are, of course, only a few examples of reservations clearly contrary to a *jus cogens* norm. See, however, the reservation by Myanmar, formulated at the time of accession, in 1993, to the 1989 Convention on the Rights of the Child, pursuant to which Myanmar reserved the possibility not to apply Art. 37 of the Convention and to exercise its 'powers of arrest, detention, imprisonment, exclusion, interrogation, enquiry and investigation' in relation to children for 'the protection of the supreme national interest', in MTDSG, *supra* n 130, ch. IV.11. This reservation, objected to by four States (on the basis that the reservation referred to national law, and not because the reservation was contrary to a peremptory norm), was withdrawn in 1993, see *id.*

⁴⁵⁰ See *supra* para. 140.

⁴⁵¹ This prohibition is not the consequence of Art. 19(c) of the Vienna Convention, but rather the consequence of the principle established in Art. 53 of the same Convention.

⁴⁵² ILC Report (2007), A/62/10, pp 99–104.

⁴⁵³ In this sense, see eg the reservations formulated by Malawi and Mexico to the Convention against the Taking of Hostages, which subordinate the application of Art. 17 to the conditions of their declarations for the acceptance of the Court's compulsory jurisdiction, made pursuant to Art. 36(2) of the Statute of the ICJ, in MTDSG, *supra* n 130, ch. XVIII.5. It cannot be doubted that these reservations are not excluded as a matter of principle, see *supra* para. 119.

⁴⁵⁴ See the commentary of guideline 4.4.3 in ILC Report (2010), A/65/10, pp 174–5.

153. Seemingly, the problem of reservations to non-derogable clauses contained in human rights treaties is formulated in very similar terms.⁴⁵⁵ States frequently justify their objections to reservations to such provisions on grounds of the treaty-based prohibition on suspending their application whatever the circumstances.⁴⁵⁶

154. It is obvious that, insofar as the non-derogable provisions relate to *jus cogens* norms, the reasoning applicable to the latter norms applies to the former as well. However, the two are not necessarily identical. According to the Human Rights Committee:

While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.⁴⁵⁷

This last point is question-begging and is undoubtedly motivated by commendable reasons of convenience but is not based on any principle of positive law.

155. Incidentally, it follows *a contrario* from this position that, in the Committee's view, if a non-derogable right is not a matter of *jus cogens*, it can in principle be the object of a reservation. For its part, the Inter-American Human Rights Committee declared in its Advisory Opinion of 8 September 1983 on the *Restrictions to the death penalty*:

Article 27 of the Convention allows the States Parties to suspend, in time of war, public danger, or other emergency that threatens their independence or security, the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed by Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a nonderogable right without depriving the right as a whole of its basic purpose. Since the reservation referred to by the Commission in its submission does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as not being incompatible with the object and purpose of the Convention.⁴⁵⁸

156. In opposition to any possibility of formulating reservations to a non-derogable provision, it can be argued that, since any suspension of the obligations in question is excluded by the treaty, 'with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are...without any caveat, incompatible with the object and purpose of those treaties'.⁴⁵⁹ The argument is not persuasive: it is one thing to prevent derogations from a binding provision, but

⁴⁵⁵ On this question, see esp. R. Riquelme Cortado, *supra* n 97, pp 152–9. See also guideline 3.1.10 and its commentary, ILC Report (2007), A/62/10, pp 104–9.

⁴⁵⁶ See Art. 4(2) of the Covenant on Civil and Political Rights; Art. 15(2) of the European Convention (see also, Art. 3 of Protocol 6, Art. 4(3) of Protocol 7, and Art. 2 of Protocol 13); and Art. 27 of the Inter-American Convention. Neither the Covenant on Social, Economic and Cultural Rights, 993 UNTS 3, nor the African (Banjul) Charter, 1520 UNTS 21, contains similar clauses. See F. Ouguergouz, 'L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme', *RGDIP*, 1994, vol. 98, p 287.

⁴⁵⁷ General Comment No. 24, *supra* n 126, para. 10.

⁴⁵⁸ *Supra* n 125, para. 61.

⁴⁵⁹ Separate Opinion of Judge Cançado Trindade to the Inter-American Court of Human Rights, Judgment in *Blake v Guatemala*, Reparations and Costs, 22 January 1999 Series C, no. 27, para. 11. See the favourable comments by R. Riquelme Cortado, *supra* n 97, p 155. In the same sense, see the objection by the Netherlands, quoted *infra* n 462.

another thing to determine whether the State is bound by the provision at issue.⁴⁶⁰ It is precisely this second problem which needs to be solved.

157. It must therefore be accepted that if certain reservations to non-derogable provisions are definitely ruled out—either because they would hold in check a peremptory norm or because they would be contrary to the object and purpose of the treaty, this is not always and inevitably the case.⁴⁶¹ The non-derogable nature of a right protected by a human rights treaty is not per se an obstacle for a reservation to be formulated, but it reveals the importance with which it is viewed by the contracting parties, and it constitutes a useful guide for the assessment of the criterion based on the object and purpose of the treaty.

158. This balanced solution is well illustrated by the objection of Denmark to the United States reservations to Articles 6 and 7 of the Covenant of 1966 relating to civil and political rights:

...Denmark would like to recall article 4, para 2 of the Covenant according to which no derogation from a number of fundamental articles, *inter alia* 6 and 7, may be made by a State Party even in time of public emergency which threatens the life of the nation.

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.⁴⁶²

Conversely, it should be noted that in certain cases the parties did not formulate an objection against reservations dealing with provisions from which no derogation is permitted.⁴⁶³

159. On the other hand, the fact that a provision can in principle form the object of derogation does not mean that any reservation relating to it is valid.⁴⁶⁴ The criterion of compatibility with the object and purpose of the treaty applies equally to this situation.

⁴⁶⁰ See the commentary of the United Kingdom to General Comment No. 24 of the Human Rights Committee: 'there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law', Report of the Human Rights Committee to the General Assembly, 1995, A/50/40, para. 6.

⁴⁶¹ See F. Hampson, Working document, *supra* n 102, para. 52; R. Higgins, 'Human Rights: Some Questions of Integrity', *MLR*, 1989, vol. 52, pp 1, 15; J. McBride, *supra* n 370, pp 163–4; J. Polakiewicz, *supra* n 97, p 113; C. J. Redgwell, 'Reservations to treaties and Human Rights Committee General Comment No 24(52)', *ICLQ*, 1997, vol. 46, pp 390, 402; *contra*: L. Lijnzaad, *supra* n 23, p 91.

⁴⁶² MTDSG, *supra* n 130, ch. IV.4. See also, although less clearly based on the non-derogable nature of Arts 6 and 7, the objections by Germany, Belgium, Finland, Italy, Norway, the Netherlands (which specified that the US reservation to Art. 7 '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'), Portugal, and Sweden, *ibid*, pp 218–31.

⁴⁶³ See the numerous examples given by Schabas in relation to the 1966 Covenant on Civil and Political Rights, the European Convention, and the Inter-American Convention on Human Rights, *supra* n 91, pp 51–2, fn 51.

⁴⁶⁴ Cf C. J. Redgwell, *supra* n 461, p 402.

The assessment of the compatibility of a reservation with the object and purpose of a treaty and its consequences

The ability to examine the compatibility of a reservation with the object and purpose of the treaty

160. It should be admitted that, though less ‘enigmatic’ than usually described,⁴⁶⁵ the concept of the object and purpose of a treaty does not lend itself to a doctrinal systematization. In each specific case, it is for the interpreter to proceed with a detailed examination taking into account the following elements, which follow from all preceding considerations:

- the text of the treaty;
- its context, thereby included, the preamble, the Articles defining the spirit in which it was concluded and the objectives pursued by the parties and, when needed, in the light of the *travaux préparatoires*;
- taking into account the evolution of the law since its adoption;
- the degree of precision of the reservation; and
- the effect which it is likely to produce on the overall framework of the treaty.

Moreover, it is fitting to investigate the nature (customary, non-derogable, peremptory) of the norm to which the reservation applies (even if, in reality, this determination is not directly linked to that of the object and purpose).⁴⁶⁶

161. Overall, this will encompass a variety of (subjective) indications rather than objective criteria. However, one should not exaggerate the inconveniences resulting from this appeal to the subjectivity of the interpreter. After all, these guidelines, which constitute orientations of a general character through which the interpreter has to allow him or herself to be guided by good faith, are no more vague than those resulting from the rules proclaimed in Articles 31 and 32 of the Vienna Convention, to which they are closely related.⁴⁶⁷ That aside, the issue, as was said with regard to just title, is ‘one of the most remarkable achievements’ of the Convention.⁴⁶⁸ And if the practical application of these guidelines is not necessarily simple, they do not pose insurmountable problems and operate in a very reasonable manner.

162. Consequently, even though it is perfectly true that the Vienna Convention does not provide any method for settling disputes relating to the compatibility of a reservation with the object and purpose of the treaty,⁴⁶⁹ the real ‘fixation abscess’ of the doctrine on the question as to who has competence to determine the compatibility (or incompatibility) of a reservation with the object and purpose of the treaty is misplaced.

163. It goes without saying that every treaty could encompass a special provision foreseeing particular rules to examine the validity of the reservation either by a certain percentage of States parties or by an organ which is competent for that purpose. One of the best-known and most commented upon such clauses⁴⁷⁰ appears in Article

⁴⁶⁵ See *supra* paras 102, 111.

⁴⁶⁶ See *supra* esp. paras 140–4, 149–50.

⁴⁶⁷ See *supra* para. 113. See also guideline 3.1.6 and its commentary, ILC Report (2007), A/62/10, pp 77–82.

⁴⁶⁸ P. Reuter, *supra* n 5, p 89.

⁴⁶⁹ See eg J. Combacau, ‘Logique de la validité’, *supra* n 139, pp 197–8, 201–2; K. Zemanek, *supra* n 43, p 331.

⁴⁷⁰ See eg A. Cassese, ‘A New Reservations Clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)’ in *Recueil d’études de droit international en hommage à Paul Guggenheim* (Geneva: IUHEL, 1968), pp 266–304; C. Redgwell, *supra* n 301, pp 13–14; R. Riquelme Cortado, *supra* n 97, pp 317–22.

20(2) of the Convention of 1965 on the Elimination of All Forms of Racial Discrimination.⁴⁷¹

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. *A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.*⁴⁷²

164. Nonetheless, it is difficult to see how such clauses, however alluring they may appear intellectually,⁴⁷³ could in any way solve all associated problems: in practice they do not encourage States parties to be particular vigilant to the issue,⁴⁷⁴ and they leave important questions unanswered:

- Do they exclude the possibility open to States parties to make objections by applying the provisions of paragraphs 4 and 5 of Article 20? Considering the very wide leeway which States possess in this regard, a negative answer is undoubtedly due.⁴⁷⁵
- On the other hand, the mechanism instituted by Article 20 dissuaded the Committee for the Elimination of Racial Discrimination instituted by the Convention to control the validity of reservations.⁴⁷⁶ That raises the question whether this attitude reveals an appreciation of opportunity or whether the existence of specific appreciation mechanisms means that the monitoring bodies abstain from taking a position. In truth, nothing obliges them to do so. From the moment one admits that such mechanisms are superimposed on the conventional processes provided for the determination of the validity of reservations and that the human rights bodies are called to

⁴⁷¹ This reservation clause is inspired, without doubt, by the failed attempts to include in the Vienna Convention itself a majority mechanism for the appreciation of the validity of reservations. For a summary of the discussions on this question at the ILC and during the Vienna Conference, see R. Riquelme Cortado, *supra* n 97, pp 314–15; see also, the French version of the present commentary, *supra* n 4, pp 768–9.

⁴⁷² See also eg the 1954 Convention Concerning Customs Facilities for Touring, 276 UNTS 191, Art. 20(1), pursuant to which reservations are acceptable if they are made ‘before the signing of the Final Act’ and if they ‘have been accepted by a majority of the members of the Conference and recorded in the Final Act’, and Art. 20(2) and (3) allowing reservations made after the signature if one-third of the States parties formulate no objections within 90 days of the notification of the reservation by the Secretary-General. Similar provisions can be found in Art. 14 of the Additional Protocol to the Convention, 276 UNTS 191, and Art. 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles, 282 UNTS 249. See also Art. 50(3) of the 1961 Single Convention on Narcotic Drugs, 520 UNTS 204, and Art. 32(3) of the 1971 Convention on Psychotropic Substances, 1019 UNTS 175, both of which subject the admissibility of reservations to the absence of objections from one-third of the States parties.

⁴⁷³ One can nevertheless have doubts in relation to the validity of a collegiate system since the object of the reservation itself is precisely to ‘cover the position of a state which regarded as essential a point on which a two-thirds majority had not been obtained’, Jiménez de Aréchaga, *YILC*, 1962, vol. I, 654th meeting, 30 May 1962, p 164, para. 37. See also the sharp critiques by A. Cassese, *supra* n 470, *passim* and esp. pp 301–4.

⁴⁷⁴ On the inactivity of States in this subject, see the comments by Waldock as expert consultant to the Vienna Conference, Summary Records (A/CONF.39/11), *supra* n 2, 24th meeting of the Committee of the Whole, 16 April 1968, p 126, para. 9; P. H. Imbert, *supra* n 14, pp 146–7; R. Riquelme Cortado, *supra* n 97, pp 316–21. See also *infra* para. 178.

⁴⁷⁵ See *infra* the commentary on Art. 20, at paras 72 ff.

⁴⁷⁶ See *supra* para. 41. Nevertheless, the Committee on the Elimination of Racial Discrimination has subsequently softened its position; thus, in 2003, it held, in relation to a reservation formulated by Saudi Arabia that: ‘The broad and imprecise nature of the State party’s general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it’, Report of the Committee on the Elimination of Racial Discrimination on the work of its 62nd and 63rd sessions (2003), General Assembly, Official Documents, 58th session, Supplement No. 18, A/58/18, p 42, para. 209.

assess this point in the exercise of their function,⁴⁷⁷ they can do so in all cases, in the same way as States.

165. Generally speaking, it must be considered that this competence belongs to different authorities called on to interpret treaties: States, their domestic courts, and, within the limits of their competence, the organs of dispute settlement and those that monitor the application of the treaty. This would certainly be the case if a treaty expressly foresees the intervention of a judicial organ in litigation relating to the validity of reservations, but such a clause does not seem to exist, though the matter clearly lends itself to judicial determination.⁴⁷⁸ Besides, there is no doubt that such a case can be decided by any organ designed by the parties to settle disputes relating to the interpretation or the application of the treaty. Consequently, it is arguable that every general dispute-settlement clause establishes the competence in this matter of the designated organ.⁴⁷⁹

166. On the other hand, according to the largely dominant principle of the 'depository-mailbox'⁴⁸⁰ enshrined in Article 77 of the Convention, the depositary can in principle only take note of the reservations notified to him and transmit them to the contracting States⁴⁸¹ without assessing their validity, except perhaps in cases where the absence of validity is manifest.⁴⁸²

167. In reality, the doctrinal quarrel which has been raging in this regard focuses essentially on factors essentially ideological, linked to the 'hyper-sensibility' of human rights militants and the 'human rightism' doctrine on the matter, which has not contributed to alleviating this largely artificial quarrel. However, things are less complicated than would initially appear. First, there should be no doubt that the human rights bodies are competent to decide, when they are seized of the question of the validity of a reservation—including of course the reservation's compatibility with the object and purpose of the convention.⁴⁸³ Secondly, on this occasion, the human rights bodies possess no more or less power than in any other matter: the Human Rights Committee and the other universal human rights organs which do not have the power to decide do not simply acquire it in matters of reservations; the regional courts whose judgments enjoy the *res judicata* authority, have, on the contrary, such a power—though within certain limits.⁴⁸⁴ In fact, in the third and final place, if all human rights (or dispute-settlement) organs can

⁴⁷⁷ See *supra* para. 123.

⁴⁷⁸ In this sense, see H. J. Bourguignon, *supra* n 121, p 359; D. Bowett, *supra* n 138, p 81.

⁴⁷⁹ In this sense, see the Advisory Opinion of the ICJ on *Reservations to the Genocide Convention*, *supra* n 6, *ICJ Reports 1951*, p 27, and the case law quoted *supra* at para. 119. See also the arbitral award in the *Anglo-French Continental Shelfcase*, *supra* n 96, p 50, para. 56. See also the position of the ICJ concerning the validity of 'reservations' (albeit of a peculiar nature) included in the optional declarations for the acceptance of the compulsory jurisdiction of the Court, formulated pursuant to Art. 36(2) of the ICJ Statute in, eg, *Right of Passage over Indian Territory (Portugal v India)*, Preliminary Objections, 26 November 1957, *ICJ Reports 1957*, pp 125, 141–4; Separate Opinion of Judge H. Lauterpacht, *Certain Norwegian Loans (France v Norway)*, Judgment, 6 July 1957, *ICJ Reports 1957*, pp 34, 43–55; Dissenting Opinion Judge H. Lauterpacht, *Interhandel (Switzerland v United States of America)*, Preliminary Objections, 21 November 1959, *ICJ Reports 1959*, pp 95, 103–6. See also the Dissenting Opinions of President Klaestad, *ICJ Reports 1959*, p 75 and Judge Armand-Ugon, *ICJ Reports 1959*, pp 85, 93.

⁴⁸⁰ See also J. Combacau, 'Logique de la validité', *supra* n 139, p 199, and *infra* the commentary on Art. 23, para. 70.

⁴⁸¹ See *infra* the commentary on Art. 23, paras 71–6.

⁴⁸² See *ibid*, paras 77, 78, and *infra* para. 176.

⁴⁸³ See *supra* paras 41–4.

⁴⁸⁴ See guideline 3.2.1 of the ILC Guide to Practice and its commentary (ILC Report, 62nd session (2009), A/64/10, pp 350–4.

examine the validity of the contested reservation, they cannot instead substitute their own appreciation for that of the State which consents to be bound by the treaty.⁴⁸⁵

168. It goes without saying that the competences belonging to these organs do not conflict with the one of States to accept or to object to reservations, such as established and regulated under Articles 20, 21, and 23 of the Vienna Convention.⁴⁸⁶ In the same way, nothing precludes national tribunals from examining, if necessary, the validity of reservations issued by a State,⁴⁸⁷ including their compatibility with the object and purpose of a treaty, if domestic law allows them to apply treaty-based rules—for the States parties to the Vienna Convention—or customary law rules—since the principle stated in Article 19(c) has customary status.⁴⁸⁸

169. The present situation concerning the control of the validity of reservations to treaties, and specifically to human rights conventions, is hence characterized by the competition between, or in any event the coexistence of, several controlling mechanisms of the validity of reservations:⁴⁸⁹

- One such mechanism, which constitutes *ius commune* and is purely of an interstate nature, is that enshrined in Article 20 of the Vienna Convention; it can be arranged by particular reservation clauses which feature in the given treaties.
- When the treaty establishes an organ monitoring its application, it is currently accepted that this organ can also decide on issues of validity.
- However, this leaves open the possibility for States parties to resort, if necessary, to habitual modes of peaceful dispute settlement, including jurisdictional or arbitral means, should a dispute arise between them relating to the admissibility of a reservation.⁴⁹⁰
- Moreover, it is not excluded that national tribunals, in the manner of the Swiss jurisdictions,⁴⁹¹ assume they are endowed with the power to examine the validity of a reservation in regard to international law.

170. It is clear that the multiplicity of control possibilities entails some inconvenience, the least of which is not the risk of contradiction between the opposing positions that may be adopted regarding the same reservation (or on two identical reservations by

⁴⁸⁵ See *supra* paras 40 ff.

⁴⁸⁶ See *infra* the commentaries to these provisions. See, however, General Comment No. 24 of the Human Rights Committee, *supra* n 126, para. 18: 'This [the determination whether a specific reservation is compatible with the object and purpose of the Covenant]... is an inappropriate task for States parties in relation to human rights treaties'; this sentence contradicts the previous paragraph, where the Committee had recognized that 'an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant'.

⁴⁸⁷ See the judgment of the Swiss Federal Tribunal of 17 December 1991, in the case of *Elisabeth B c Conseil d'État du canton de Thurgovie* (*Journal des Tribunaux*, 1. *Droit fédéral*, 1995, pp 523–37), and the commentary by J. F. Flauss, 'Le contentieux des réserves à la CEDH devant le Tribunal fédéral suisse: *Requiem* pour la déclaration interprétative relative à l'article 6 para. 1', *RUDH*, 1993, vol. 5, p 297.

⁴⁸⁸ See *supra* paras 58–62.

⁴⁸⁹ Paragraphs 169–73 take on the Tenth Report on reservations to treaties (2005) (A/CN.4/558/Add.2, paras 161–5), which in turn take largely from the Second Report on reservations to treaties (A/CN.4/477/Add.1, *supra* n 83, pp 76–7, paras 211–15), although it adds a list of five guidelines (3.2 to 3.2.4, A/CN.4/558/Add.2, paras 166–80). For a very clear opinion in favour of complementarity of control systems, see L. Lijnzaad, *supra* n 23, pp 97–8; G. Cohen-Jonathan, *supra* n 417, p 944.

⁴⁹⁰ Nevertheless, this is subject to the existence of 'self-contained' regimes, among which are the regimes created by the European and Inter-American Conventions on human rights and the African (Banjul) Charter. Cf B. Simma, 'Self-Contained Regimes', *NYIL*, 1985, vol. 16, pp 111, 130 ff; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989), pp 230 ff.

⁴⁹¹ See *supra* n 486.

different States).⁴⁹² In truth, this risk is inherent in every control system—over time the same organ may make contradictory decisions, and it is perhaps better to have too much control rather than no control at all.

171. More serious in this scenario is the menace which constitutes the succession of control in the absence of any limitation on the duration of the period during which these examinations may take place. The problem does not arise concerning the 'Vienna regime' since Article 20(5) of the Convention limits the period during which a State can formulate an objection to 12 months following the date of receipt of the notification of the reservation (or the expression of consent to be bound by the objecting State).⁴⁹³ However, the problem emerges acutely in every case of jurisdictional or quasi-jurisdictional control that, by assumption, is uncertain and depends on the *seisin* of the regulatory or monitory organ. To counter this it has been proposed also to limit the right of these organs to exercise their control to 12 months.⁴⁹⁴ In addition to the fact that none of the relevant texts currently in force provides for such a limitation, it hardly seems compatible with the foundation of the intervention of monitoring bodies which aims at assuring respect for general principles of international law (the preservation of the object and purpose of the treaty). In addition, as one commentator noted, one of the reasons why States issue so few objections relates precisely to the fact that the 12-month rule is too short.⁴⁹⁵ The same problem could arise *a fortiori* for monitoring bodies and they may find themselves paralysed by it.

172. One could suppose that the variety of control mechanisms reinforces the chances of the reservations regime—and in particular of the principle of compatibility with the object and purpose of the treaty—playing its true role. The problem does not lie in opposing them or affirming the monopoly of one mechanism,⁴⁹⁶ but in combining them in a conciliatory manner to best serve the two contradictory but fundamental requirements of the integrity of the treaty and the universality of participation.⁴⁹⁷ It is normal that States which wanted the treaty can put forward their point of view. It is natural that the controlling organs fully play the role of treaty guardians which the parties have entrusted to them.

173. This situation does not exclude but rather implies a certain complementarity between the different modes of control and cooperation between the organs that are in charge of them. This is particularly indispensable when, in examining the validity of a

⁴⁹² See esp. P. H. Imbert, who notes the risk of incompatibilities internal to the European Convention, especially in the positions taken by the Court and the Committee of Ministers, *supra* n 117, pp 617–19; *ICLQ*, 1984, vol. 33, pp 558, 590–1 of the English version.

⁴⁹³ It must be noted, however, that the problem is posed by virtue of the extension in time of ratifications and accessions; see *infra* the commentary on Art. 20, at para. 39.

⁴⁹⁴ See P. H. Imbert, *supra* n 14, p 146, fn 25; *supra* n 212, pp 113–14, 130–1. *Contra*: statement by H. Golsong during the Rome Colloquium, 5–8 November 1975, *Fourth International Colloquium on the European Convention on Human Rights* (Strasbourg: Council of Europe, 1976), para. 7; R. W. Edwards Jr, *supra* n 150, pp 387–8.

⁴⁹⁵ Cf B. Clark, *supra* n 99, pp 312–14.

⁴⁹⁶ Whereas this is their natural tendency. Cf the opposing points of view between the Human Rights Committee ('This [the determination whether a specific reservation is compatible with the object and purpose of the Covenant]...is an inappropriate task for States parties in relation to human rights treaties', General Comment No. 24, para. 18, see *supra* para. 42, and n 484) and France ('it is therefore for the [States parties], and for them alone, unless the treaty states otherwise, to decide whether a reservation is incompatible with the object and purpose of the treaty', Observations to General Comment No. 24, *supra* n 417, p 106, para. 7).

⁴⁹⁷ See *supra* paras 29–34.

reservation, the monitoring bodies (as well as the dispute-settlement organs) take fully into account the positions adopted by the contracting parties by means of acceptances or objections. Inversely, the States which have to conform to the decision taken by the monitoring organs to which they have granted decision-making power, have also to take the considered and reasoned decisions of these organs seriously, even if these organs cannot make juridically binding decisions.⁴⁹⁸

The consequences of the incompatibility of a reservation with the object and purpose of a treaty

174. Article 19 does not draw the conclusions from the formulation of a prohibited reservation, expressly (para. (a)) or implicitly (para. (b)), under the treaty to which it applies nor in respect of the effects of the formulation of a reservation prohibited by paragraph (c)⁴⁹⁹ and nothing in the text of the Vienna Convention indicates how these provisions interact with those of Article 20 relating to the acceptance of reservations and to objections. There is a 'normative gap',⁵⁰⁰ perhaps deliberately created by the authors of the Convention.⁵⁰¹

175. One cannot but acknowledge that the *travaux préparatoires* of paragraph (c) are confused and equally unrevealing about the consequences the drafters of the Convention intended to attach to the incompatibility of a reservation with the object and purpose of the Convention.⁵⁰²

- In draft Article 17 proposed by Waldock in 1962, the object and purpose of the treaty only featured as a guideline to advise the reserving State.⁵⁰³
- The debates on this draft were particularly confused during the plenary sessions of the ILC⁵⁰⁴ and revealed above all a divide between the members favouring an individual appreciation by the States and those which spoke out in favour of a collegial mechanism⁵⁰⁵ without really discussing the consequences of such an examination.

⁴⁹⁸ See, however, the extremely fierce reaction to General Comment No. 24 contained in the Bill presented to the US Senate by Senator Helms on 9 June 1995, according to which:

no funds authorized to be appropriated by this Act nor any other Act, or otherwise made available may be obligated or expended for the conduct of any activity which has the purpose or effect of (A) reporting to the Human Rights Committee in accordance with Article 40 of the International Covenant on Civil and Political Rights, or (B) responding to any effort by the Human Rights Committee to use the procedures of Articles 41 and 42 of the International Covenant on Civil and Political Rights to resolve claims by other parties to the Covenant that the United States is not fulfilling its obligations under the Covenant, until the President has submitted to the Congress the certification described in paragraph (2). (2) CERTIFICATION—The certification referred to in paragraph (1) is a certification by the President to the Congress that the Human Rights Committee established under the International Covenant on Civil and Political Rights has (A) revoked its General Comment no 24 adopted on November 2, 1994; and (B) expressly recognized the validity as a matter of international law of the reservations, understandings, and declarations contained in the United States instrument of ratification of the International Covenant on Civil and Political Rights.

(A Bill to authorize appropriations for the Department of State for fiscal years 1996 through 1999, 104th Congress, 1st session, S.908-Report No. 104-95, pp 87–8.)

⁴⁹⁹ Cf D. W. Greig, *supra* n 189, p 83.

⁵⁰⁰ F. Horn, *supra* n 10, p 131; see also J. Combacau, 'Logique de la validité', *supra* n 139, p 199.

⁵⁰¹ See P. H. Imbert, *supra* n 14, pp 137–40.

⁵⁰² It is useful to recall that the test was included in the draft only at a late stage, for its origin is to be found in Waldock's First Report of 1962, see *supra* para. 14.

⁵⁰³ Article 17(2)(a); see *supra* paras 14, 102; see also the intervention by the Special Rapporteur during the 651st meeting of the ILC, *YILC*, 1962 vol. I, 651st meeting, 25 May 1962, pp 145–6, para. 85.

⁵⁰⁴ See *YILC*, 1962, vol. I, 651st to 654th meeting, pp 139–68, and 656th meeting, pp 172–5.

⁵⁰⁵ *Ibid.*

- However, after the restructuring of the draft by the Drafting Committee in a manner that was very close to the drafting of the current Article 19, the dominant sentiment seems to have been that the object and purpose constituted a criterion which formed the yardstick by which the validity of the reservation was to be appreciated.⁵⁰⁶
- The skilful drafting of the commentary on draft Articles 18 and 20 (which respectively correspond to Arts 19 and 21 of the Convention) adopted in 1962 leaves the question open: there it is simultaneously affirmed that the compatibility of the reservation with the object and purpose of the treaty constitutes the criterion governing the formulation of the reservation and that, since this criterion 'is to some extent a matter of subjective appreciation...the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation', but this only 'in the absence of a tribunal or organ with standing competence'.⁵⁰⁷
- In his report of 1965, the Special Rapporteur also observed, regarding draft Article 19 relating to treaties which keep silent on the question of reservations (which became Art. 20 of the Convention), that 'the Commission recognized that the compatibility criterion is to some extent subjective and that views may differ as to the compatibility of a particular reservation with the object and purpose of a given treaty. In the absence of compulsory adjudication, on the other hand, it felt that the only means of applying the criterion is through the individual State's acceptance or rejection of the reservation'. The Special Rapporteur also recognized that 'the rules proposed by the Commission might be more readily acceptable if their interpretation and application were made subject to international adjudication'.⁵⁰⁸
- However the commentaries of the Commission on draft Articles 16 and 17 (which became Articles 19 and 20 respectively) are also no more clear and limit themselves to indicating that '[t]he admissibility or otherwise of a reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States' and that, for this reason, one has to understand draft Article 16(c), 'in close conjunction with the provisions of article 17 regarding acceptance of and objection to reservations'.⁵⁰⁹
- At the time of the Vienna Conference, certain delegations tried to give more content to the criterion of the object and purpose of the treaty; thus, the Mexican delegation proposed expressly to envisage the consequences of a judicial decision which recognized the incompatibility of a reservation with the object and purpose of the treaty;⁵¹⁰ but it was above all the defendants of the collegial examination system who tried to

⁵⁰⁶ See esp. *YILC*, 1962, vol. I, 663rd meeting, 18 June 1962, p 229: during the debates concerning the new Art. 18*bis*, titled 'The validity of reservations', all the members referred to the test of compatibility with the object and purpose of the treaty, which was however not mentioned in the text of the draft prepared by the Drafting Committee; more generally, see *supra* paras 15–19. Subsequently, the title of Art. 18*bis* became 'The legal effects of reservations', rather than 'The validity of reservations', *YILC*, 1962, vol. I, 667th meeting, 25 June 1962, pp 252–3, which shows that the validity of reservations is the subject of draft Art. 17 (now Art. 19 of the Convention).

⁵⁰⁷ *YILC*, 1962, vol. II, p 181, para. 22.

⁵⁰⁸ Fourth Report, A/CN.4/177, *supra* n 60, p 52, para. 9.

⁵⁰⁹ *YILC*, 1966, vol. II, p 207, para. 17.

⁵¹⁰ Summary Records (A/CONF.39/11), *supra* n 2, 1st session, 21st meeting of the Committee of the Whole, 10 April 1968, p 113, para. 63.

draw concrete consequences from the incompatibility of a reservation with the object and purpose of the treaty.⁵¹¹

176. Moreover, as indicated *supra*,⁵¹² nothing, either in the text of Article 19 or in the *travaux préparatoires*, gave rise to thinking it necessary to make a distinction between one and the other: *ubi lex non distinguit, nec nos distinguere debemus*. In the three cases resulting from the text of Article 19, a State is prevented from formulating a reservation and, since it is admitted that a reservation which is prohibited by the treaty is legally void due to paragraphs (a) and (b) of Article 19,⁵¹³ there is no reason to draw different a conclusion from paragraph (c). Three objections, of unequal importance, were however advanced in opposition to this conclusion.

177. In the first place, it has been pointed out that if the depositary rejects a reservation prohibited by the treaty, it communicates to other contracting States the text which is *prima facie* incompatible with the treaty's object and purpose.⁵¹⁴ This is effectively the practice followed by the Secretary-General of the United Nations⁵¹⁵ but the impact of this must be relativized. In fact:

only if there is no doubt that the statement accompanying the instrument is an unauthorized reservation does the Secretary-General refuse the deposit...*In case of doubt*, the Secretary-General shall request clarification from the State concerned...However, the Secretary-General feels that *it is not incumbent upon him to request systematically such clarifications*; rather, it is for the States concerned to raise, if they so wish, objections to statements which they would consider to constitute unauthorized reservations.⁵¹⁶

In other words, the difference revealed in the practice of the Secretary-General is not based on the distinction between the hypotheses of paragraphs (a) and (b) on the one hand and paragraph (c) of Article 19 on the other hand, but on the certain character of the contradiction of the reservation with the treaty. Since an interpretation is necessary, the Secretary-General relies on the States. For the rest, in draft guideline 2.1.8 of the

⁵¹¹ See the Japanese amendment (A/CONF.39/C.1/L.133 and Rev.1), in Documents of the Conference (A/CONF.39/11/Add.2), *supra* n 2, p 133, para. 177. See also the intervention by the Japanese delegate during the Conference, Summary Records (A/CONF.39/11), *supra* n 2, 1st session, 21st meeting of the Committee of the Whole, 10 April 1968, p 110, para. 29, and *ibid*, 24th meeting of the Committee of the Whole, 16 April 1968, p 131, paras 62–3; and the interventions of other delegations, including, the United Kingdom (*ibid*, 21st meeting of the Committee of the Whole, 10 April 1968, p 114, para. 76); Vietnam (*ibid*, 21st meeting of the Committee of the Whole, 10 April 1968, 109, para 22); Italy (*ibid*, 22nd meeting of the Committee of the Whole, 11 April 1968, p 120, para. 79); China (*ibid*, 23rd meeting of the Committee of the Whole, 11 April 1968, p 121, para. 3); Singapore (*ibid*, 23rd meeting of the Committee of the Whole, 11 April 1968, p 122; para. 16); New Zealand (*ibid*, 24th meeting of the Committee of the Whole, 16 April 1968, p 127, para. 18); India (*ibid*, 24th meeting of the Committee of the Whole, 16 April 1968, pp 128–9, paras 32, 38); Zambia (*ibid*, 24th meeting of the Committee of the Whole, 16 April 1968, p 129, para. 41); Ghana (*ibid*, 22nd meeting of the Committee of the Whole, 11 April 1968, p 120, paras 71–2). The representative of Sweden, who supported in principle the idea of a control mechanism, considered that the Japanese proposal 'was no more than an attempt at solving the problem' (*ibid*, 22nd meeting of the Committee of the Whole, 11 April 1968, p 117, para. 32).

⁵¹² Paragraph 93.

⁵¹³ See *supra* para. 94.

⁵¹⁴ Cf G. Gaja, *supra* n 139, p 317.

⁵¹⁵ See the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ST/LEG/7 (New York: United Nations, 1999), p 57, paras 191–2.

⁵¹⁶ *Ibid*, pp 57–8, paras 194–6, emphasis added. The practice followed by the Secretary General of the Council of Europe is similar in case of difficulty, he can consult (and does consult) the Committee of Ministers; see J. Polakiewicz, *supra* n 97, pp 90–3.

Practice Guide, the ILC, with a view of progressive development, estimated that '[w]here, in the opinion of the depositary, a reservation is manifestly invalid, the depositary shall draw the attention of the author of the reservation to what, in the depositary's view, constitutes the grounds for the invalidity of the reservation'.⁵¹⁷ To that end, 'the Commission did not consider it justified to distinguish among the different types of invalidity listed in article 19'.⁵¹⁸

178. Secondly, in the same spirit as in the hypothesis in paragraphs (a) and (b), the reserving State cannot ignore the prohibition and, consequently, it needs to be known to have accepted the treaty in its entirety, notwithstanding its reservation ('divisibility' doctrine).⁵¹⁹ There is no doubt that the incompatibility of a reservation with the object and purpose of the treaty is less easy to examine objectively than when a prohibition clause exists in the treaty. The remark is certainly relevant but it is not decisive: the examination of the scope of the reservation clause is less evident than may be thought, especially when the prohibition is implicit as in the hypothesis in paragraph (b).⁵²⁰ Moreover, it can be difficult to determine whether a unilateral declaration is or is not a reservation and the State which has formulated it may have thought in good faith that it did not violate the prohibition, while estimating that the acceptance of its interpretation of the treaty conditioned its consent to being bound.⁵²¹ And, in truth, if a State is not supposed to be ignorant of the prohibition resulting from a reservation clause, it needs to be as conscious as possible that it cannot empty a treaty of its substance by means of a reservation which is incompatible with its object and purpose.

179. Thirdly and above all, it has been pointed out that paragraphs 4 and 5 of Article 20 state a sole limitation to the possibility of accepting a reservation: the presence of a contrary provision in the treaty.⁵²² *A contrario*, total liberty to accept reservations notwithstanding the provisions of Article 19(c) results therefrom.⁵²³ If it is correct that in practice States rarely object to reservations which are very likely to be contrary to the object and purpose of the treaty to which they apply⁵²⁴ and that this deprives the rule posed in Article 19(c)⁵²⁵ of concrete effect, at least in the absence of an organ which has the competence to take decisions in this regard,⁵²⁶ nevertheless, several arguments, based on the text itself of the Convention, are opposed to this reasoning.⁵²⁷

- Articles 19 and 20 of the Convention have distinct functions; the rules they incorporate intervene at different 'moments' of the establishment of a reservation: Article 19

⁵¹⁷ ILC Report, 58th session (2006), A/61/10, p 313; the words 'invalid' ('invalide' in French) and 'invalidity' ('non-validité') have been substituted by 'impermissible' (*licite*) and 'impermissibility' (*illicéité*) which were used in the first version of this guideline, adopted in 2002 (54th session (2002), A/57/10, p 59). On this change, see *infra* para. 184.

⁵¹⁸ Ibid (2006), p 361, para. 5 of the commentary on guideline 2.1.8 ('Procedure in case of manifestly invalid reservations').

⁵¹⁹ See A. Fodella, *supra* n 215, pp 143–7.

⁵²⁰ See *supra* paras 87–9.

⁵²¹ On the distinction between reservations and interpretative declarations, simple or conditional, see guidelines 1.3 to 1.3.3 of the ILC Guide to practice and their commentaries, *YILC*, 1999, vol. II, Part Two, pp 107–12.

⁵²² The phrase common to the two provisions is: '...unless the treaty otherwise provides...'.
⁵²³ See D. W. Greig, *supra* n 189, pp 83–4.

⁵²⁴ See *infra* the commentary on Art. 20.

⁵²⁵ See esp. D. Carreau, *Droit international* (Paris: Pedone, 2007), p 140; G. Gaja, *supra* n 139, pp 315–18; D. W. Greig, *supra* n 189, pp 86–90; P. H. Imbert, *supra* n 14, pp 134–7.

⁵²⁶ See M. Coccia, *supra* n 12, p 33; R. Szafarz, *supra* n 234, p 301.

⁵²⁷ See also *infra* the commentary on Art. 20.

puts forward the cases in which a reservation can be *formulated*; Article 20 indicates what happens when it has been formulated.⁵²⁸

- The proposed interpretation would empty paragraph (c) of Article 19 of any *effet utile*: it would result therefrom that a reservation which is incompatible with the object and purpose of the treaty would produce exactly the same effect as a compatible reservation.
- It also empties the meaning of Article 21(1), which specifies that a reservation is not 'established' except when 'in accordance with Articles 19, 20 and 21'.⁵²⁹
- It introduces a distinction between the scope of paragraphs (a) and (b) on the one hand, and paragraph (c) on the other hand, which the text of this provision by no means authorizes.⁵³⁰

180. Once it is admitted that the three paragraphs of Article 19 have the same function and that a State cannot formulate a reservation which goes against their provisions,⁵³¹ the question arises of what happens if a State formulates a reservation in spite of these prohibitions. It is clear that if a State does so regardless, the reservation cannot produce the legal effects which Article 21 clearly subordinates to its 'establishment' 'in accordance with Articles 19 [in its entirety], 20 and 23'.⁵³² But this is not the end of the question: should one consider that, while thus proceeding, the reserving State commits an internationally wrongful act which engages its international responsibility? In addition, are the other States prevented from acquiescing to a reservation formulated in spite of the prohibitions of Article 19?

181. Concerning the first of these two questions, the point has been made that a reservation which is incompatible with the object and purpose of the treaty⁵³³ 'amounts to a breach of [the] obligation' resulting from Article 19(c):

Therefore, it is a wrongful act, entailing such State's responsibility vis-à-vis each other party to the treaty. It does not amount to a breach of the treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding 'incompatible' reservations.⁵³⁴

This reasoning, expressly based on the rule of the responsibility of the State for internationally wrongful acts⁵³⁵ could not obtain general approval.⁵³⁶

182. It cannot be doubted that:

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character,⁵³⁷

and that the violation of an obligation to refrain from doing so (ie not to formulate a reservation which is incompatible with the object and purpose of the treaty) constitutes

⁵²⁸ See D. Bowett, *supra* n 138, p 80; C. Redgwell, *supra* n 461, pp 404–6.

⁵²⁹ See *supra* para. 74, and *infra* para. 180.

⁵³⁰ See *supra* paras 93, 176.

⁵³¹ See also guideline 3.2 proposed by the Special Rapporteur in his Tenth Report (A/CN.4/558/Add.2, para. 187).

⁵³² Article 21 (Legal effects of reservations and of objections to reservations): 'A reservation established with regard to another party in accordance with articles 19, 20 and 23...'

⁵³³ But it should be so *a fortiori* for reservations not prohibited by the treaty.

⁵³⁴ M. Coccia, *supra* n 12, pp 25–6.

⁵³⁵ Cf Arts 1 and 2, of the ILC Articles attached to Res. 53/86 of the General Assembly, 12 December 2001.

⁵³⁶ See G. Gaja, *supra* n 139, p 314, fn 29.

⁵³⁷ Article 12, ILC Articles on the Responsibility of States for Internationally Wrongful Acts.

an internationally wrongful act susceptible of engaging the international responsibility of the State under the same title as an obligation to act. Again it is necessary that this question arises in the domain of the law of responsibility. Thus, as the ICJ firmly recalled in the case concerning the *Gabčíkovo-Nagymaros Project*, this branch of the law and the law of treaties have 'a scope that is distinct'; just as '[a] determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties',⁵³⁸ it belongs to this same branch of law to determine whether a reservation can or cannot be formulated. It results therefrom, at least, that the eventual responsibility of a reserving State cannot be determined in regard to the Vienna rules and that it does not have relevance for purposes of 'the law on reservations'. Moreover, even if damage does not constitute a necessary condition for engaging the responsibility of the State,⁵³⁹ it conditions the entry into force of such and, particularly, the reparation,⁵⁴⁰ so that for a non-valid reservation to produce consequences in the field of responsibility, it is required that the State which makes use of it can invoke damage—a highly improbable hypothesis.

183. But there is more. It is in fact revealing that a State has never, at the occasion of the formulation of an objection to a prohibited reservation, invoked the responsibility of the reserving State. The consequences arising from the finding of the incompatibility of a reservation with the object and purpose of the treaty can be diverse,⁵⁴¹ but there is never an obligation to make reparations. If an objecting State invites the reserving State to retract its reservation or to modify it in the framework of 'the reservatory dialogue',⁵⁴² it would not be argued on the basis of the law of responsibility but on that of the law of treaties and solely on that.

184. That is otherwise the reason why the ILC—which, initially, had retained the French term 'illicite' as equivalent to 'permissible' to qualify reservations formulated in spite of the provisions of Article 19⁵⁴³—decided in 2002 to postpone taking a position on this point during the waiting period for the examination of the effects of such reservations,⁵⁴⁴

⁵³⁸ *Gabčíkovo-Nagymaros Project*, *supra* n 311, p 38, para. 47. See also the award in *Rainbow Warrior (New Zealand/France)*, *RIAA*, 1990, vol. 20, pp 215, 251, para. 75. On the relationship between these two fields of the law, see esp. D. Bowett, 'Treaties and State Responsibility' in *Mélanges Virally*, *supra* n 139, pp 137–45; J. Combacau, 'Logique de la validité', *supra* n 139, pp 195–203; P. M. Dupuy, 'Droit des traités, codification et responsabilité internationale', *AFDI*, 1997, vol. 43, p 7; P. Weckel, 'Convergence du droit des traités et du droit de la responsabilité internationale', *RGDIP*, 1998, vol. 102, p 647; P. Weil, 'Droit des traités et droit de la responsabilité' in *Le droit international dans un monde en mutation—Liber Amicorum Jiménez de Aréchaga* (Montevideo: FCU, 1994), vol. I, p 523; A. Yahi, 'La violation d'un traité: L'articulation du droit des traités et du droit de la responsabilité internationale', *RBDI*, 1993, vol. 26, p 437.

⁵³⁹ See, in this sense, Art. 1 of the ILC Articles on State Responsibility, *supra* n 535.

⁵⁴⁰ Cf Arts 31 and 34 of the ILC draft.

⁵⁴¹ See *infra* the commentaries on Arts 20 and 21.

⁵⁴² On this notion, see *infra* the commentary on Art. 20, at paras 50–2.

⁵⁴³ See *supra* n 516. This question was raised from the very start of the resumption of work on reservations to treaties by the ILC: within the preliminary outline established in 1993 for this topic, the future Special Rapporteur on the subject had used the expression 'validity of reservations', which the Commission then took up, see Outlines prepared by members of the Commission on Selected topics of international law, A/CN.4/454, *YILC*, 1993, vol. II, Part One, p 231; and Report of the ILC on the work of its 45th session (A/48/10), *YILC*, 1993, vol. II, Part Two, p 96, para. 428. This expression had been criticized by Bowett (who considered that this led to confusion between the lawfulness of the reservation and its opposability) and by the UK government (which considered that a non-permissible reservation was nevertheless a reservation), see A. Pellet, First Report on reservations to treaties, A/CN.4/470, paras 97–8.

⁵⁴⁴ See the commentary on guideline 2.1.8 (Procedure in case of manifestly invalid reservations), ILC Report, 58th session (2006), A/61/10, p 361, para. 7; compare with ILC Report, 54th session (2002), A/57/10, p 114, para. 7.

in order, finally in 2006, uniformly to adopt in the entire draft the terms 'valid' or 'invalid' and 'validity' or 'invalidity'.⁵⁴⁵ It did not in fact seem in doubt that the formulation of a reservation excluded by one of the unspecified paragraphs of Article 19 arises from the law of treaties and not of that of State responsibility for internationally wrongful acts and does not engage the responsibility of the reserving State.⁵⁴⁶

185. The question arises whether the other parties can, collectively or unilaterally, accept a reservation which does not fulfil the conditions set by one of such paragraphs of Article 19. This is the central problem which opposes the supporters of the opposability school to those who advocate the permissibility thesis.⁵⁴⁷

186. The majority of authors who belong to the first of these two schools estimate that a reservation formulated in spite of a conventional prohibition is legally void⁵⁴⁸ and those who advocate 'permissibility' consider that its formulation entails the invalidity of the expression of consent to be bound.⁵⁴⁹ If this is the case, these unanimous conclusions have to influence the answer to the question as to what are the effects of a reservation formulated in spite of the provisions of Article 19(c).⁵⁵⁰

187. There is no doubt that the unilateral acceptance of a reservation formulated in spite of paragraphs (a) and (b) of Article 19 is excluded. This was very clearly confirmed during the Vienna Conference, by Sir Humphrey Waldock, expert counsel, without arousing any objection, regarding prohibited reservations.⁵⁵¹ Thus, as indicated *supra*,⁵⁵² there is no reason for not expanding this common sense solution to reservations which fall under the scope of paragraph (c). In reality, the absence of validity of reservations formulated contrary to one of the three paragraphs of Article 19 finds its origin in the same fundamental considerations: a State cannot blow hot and cold at the same time, it cannot, without disrespecting the principle of good faith, formulate a prohibited reservations, or empty the treaty of its substance by formulating a reservation incompatible with the object and purpose of the treaty and also the other parties cannot unilaterally accept it.⁵⁵³ In fact, it results therefrom

⁵⁴⁵ 'Although the Commission initially used the word "impermissible" to characterize reservations covered by the provisions of article 19 of the Vienna Conventions, some members pointed out that the word was not appropriate in that case... At its fifty-eighth session, the Commission therefore decided to replace the words "permissible", "impermissible", "permissibility" and "impermissibility" by "valid", "invalid", "validity" and "invalidity", and to amend this commentary accordingly' (para. (7) of the commentary Guideline 2.1.8, ILC Report, 58th Session (2007), A/61/10, p 361).

⁵⁴⁶ Nor, *a fortiori*, the responsibility of the States which implicitly accept a prohibited reservation or a reservation incompatible with the object and purpose of the treaty. See, however, L. Lijnzaad, *supra* n 23, p 56: 'The responsibility for incompatible reservations is... shared by reserving and accepting States'—but this appears to derive from the fact that the author does not consider incompatible reservations or their acceptance as internationally wrongful acts. See also guideline 3.3.1 of the ILC Guide to practice.

⁵⁴⁷ See *supra* paras 49–51.

⁵⁴⁸ See eg D. Bowett, *supra* n 138, p 84; G. Gaja, *supra* n 139, pp 318–20; see also *supra* para. 94.

⁵⁴⁹ D. Bowett, *ibid*. See the critiques addressed to this position by D. W. Greig, *supra* n 189, pp 56–7. See also the references made by C. Tomuschat to the debate in the ILC (*supra* n 22, p 467, fn 12). However, these debates are less conclusive than the author suggests.

⁵⁵⁰ See *infra* para. 94.

⁵⁵¹ Summary Records (A/CONF.39/11), *supra* n 2, 25th meeting of the Committee of the Whole, 16 April 1968, p 133, para. 2. This interpretation was presented at the plenary session as the 'correct' one by the representative of Canada, who subordinated its acceptance of Art. 16 to this interpretation without contradiction, Summary Records (A/CONF.39/11/Add.1), *supra* n 2, 10th plenary meeting, 29 April 1969, pp 29–30, paras 31–3. See also *supra* paras 92–2; D. Bowett, *supra* n 138, pp 82–3; C. Tomuschat, *supra* n 22, p 467, who notes that during the ILC debates, its members had been unanimous on this point.

⁵⁵² Paragraphs 94, 176.

⁵⁵³ See L. Lijnzaad, *supra* n 23, pp 55–9.

that a modification of the treaty in the relations between the author of the reservation and the States which accept it would not be compatible with Article 41(b)(ii) of the Vienna Convention. This Article precisely excludes every modification of this type if it does not relate 'to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'.⁵⁵⁴ In 2010, the ILC drew conclusions from these considerations and adopted guideline 4.5.1 providing: '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'.⁵⁵⁵

188. But this does not necessarily imply that the parties are prevented from reaching an agreement to accept a reservation in spite of the prohibition foreseen in the treaty. 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'.⁵⁵⁶ It foresaw that, in this hypothesis, 'the prior consent of all the other interested States' is required.⁵⁵⁷ This provision was not taken up again in the draft Articles of the ILC in 1962⁵⁵⁸ or 1966, and does not feature in the Convention.⁵⁵⁹

189. This silence does not solve the problem. One can in fact maintain that it is always permissible for parties to amend the treaty by an *inter se* agreement in accordance with Article 39 of the Vienna Convention and that nothing prevents them from adopting a unanimous agreement⁵⁶⁰ to this end in matters of reservations.⁵⁶¹ This eventuality, according to the consensual principle which impregnates the entire law of treaties,⁵⁶² does not pose any less difficult problems, first that of knowing whether the absence of an objection by all parties before the deadline of one year is equivalent to unanimous

⁵⁵⁴ In this sense, see D. W. Greig, *supra* n 189, p 57; L. Sucharipa-Behrman, *supra* n 134, pp 78–9. See, however, the comments by Jiménez de Aréchaga and Amado during the debates on Waldock's proposals, *YILC*, 1962, vol. I, 653rd meeting, 29 May 1962, p 158, paras 44–5 and p 160, para. 63.

⁵⁵⁵ For the commentary of this guideline, see ILC Report, 62nd Session (2010), A/65/10, pp 182–192.

⁵⁵⁶ First Report, A/CN.4/144, *supra* n 47, p 65, para. 9.

⁵⁵⁷ For the text of the draft article, see *ibid*, p 50.

⁵⁵⁸ The provision faced the opposition of Tunkin (*YILC*, 1962, vol. I, 651st meeting, 25 May 1962, p 140, para 19) and Castrén (*YILC*, 1962, vol. I, 651st meeting, 25 May 1962, paras 67–8), who considered it to be superfluous. It disappeared from the simplified draft eventually adopted by the Drafting Committee (*ibid*, 663rd meeting, 18 June 1962, p 221, para. 3).

⁵⁵⁹ This solution was retained by the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR), of 1 July 1970, Art. 19(2) of which establishes that:

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 objections by other States parties to the Convention, the 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 of States which, at the time, were members of the Community, in MTDSG, *supra* n 130, ch. XI.B.21.

⁵⁶⁰ But not only an agreement between certain parties; see *supra* para. 187.

⁵⁶¹ In this sense, see D. W. Greig, *supra* n 189, pp 56–7; L. Sucharipa-Behrman, *supra* n 134, p 78. This is also the position of D. W. Bowett, who considered however that this possibility did not belong to the law of reservations, *supra* n 138, p 84; see also C. Redgwell, *supra* n 29, p 269.

⁵⁶² See *supra* para. 32. Moreover, it cannot reasonably be claimed that the rules established in Art. 19, particularly in para. (c), constitute peremptory norms of general international law from which the parties cannot derogate though an agreement.

agreement constituting an amendment to the reservation clause. A positive response seems, *prima facie*, to arise from Article 20(5) of the Convention.

190. But, on reflection, this is not self-evident: the silence of the State party does not imply that it takes a position regarding the validity of the reservation. It signifies, at most, that the reservation is opposable to it⁵⁶³ and that it is prohibited from objecting to it in the future.⁵⁶⁴ The proof is that it cannot be sustained that the monitoring bodies—whether the ICJ, an arbitral tribunal, or a monitoring organ of a human rights treaty—are prevented from examining the validity of a reservation even when no objection has been made to it.⁵⁶⁵ In the absence of practice,⁵⁶⁶ it is difficult to decide on the action which needs to be taken; it is however possible to find inspiration in the solution retained by the ILC on the topic of the late formulation of reservations and to admit that a reservation prohibited by the treaty or manifestly contrary to its object and purpose cannot be formulated ‘except if none of the other contracting parties objects to the late formulation of the reservation’⁵⁶⁷ after having been duly consulted by the depositary.⁵⁶⁸ This solution was retained with some nuances by the ILC in guideline 3.3.3.⁵⁶⁹

191. It seems in any case that, except for remaining dead letter, Article 19 of the Convention has to be interpreted as stating the criteria of ‘intrinsic’ validity of reservations. The effects of these criteria remain to be determined *in concreto*; it is indispensable to call upon the mechanisms for the examination of the validity of reservations such as those which may be foreseen by the treaty clauses⁵⁷⁰ or which result from the customary law on reservations featuring in Article 20 of the Vienna Convention.

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⁵⁶³ In this sense, see M. Coccia, *supra* n 12, p 26; F. Horn, *supra* n 10, pp 121, 131; K. Zemanek, *supra* n 43, pp 331–2; see also G. Gaja, *supra* n 139, pp 319–20. As rightly pointed out by L. Lijnzaad, it is not a question of acceptance *stricto sensu*, ‘[i]t is the problem of inactive States whose laxity leads to the acceptance of reservations contrary to object and purpose’, *supra* n 23, p 56.

⁵⁶⁴ And yet, this is not evident. On this point, see the commentary on Art. 20, paras 30 ff.

⁵⁶⁵ See, *ibid* and *supra* paras 41–4; see also D. W. Greig, *supra* n 189, pp 57–8. Already during the ILC debates of 1962, Bartoš had noted that it was not even thinkable that a ‘non-valid’ reservation, by the simple fact of the time limits imposed on the formulation of objections, ‘could no longer be challenged’, *YILC*, 1962, 654th meeting, 20 May 1962, vol. I, p 163, para. 29.

⁵⁶⁶ See, however, the ‘neutrality reservation’, formulated by Switzerland to the Covenant of the League of Nations, which was accepted as a member notwithstanding its reservations to the Covenant, see *supra* n 213.

⁵⁶⁷ Cf guidelines 2.3.1, 2.3.2, and 2.3.3 of the ILC Guidelines on reservations to treaties and their commentaries, in Report of the ILC on the work of its 53rd session (2001) (A/56/10), pp 184–91. This solution brings back, through the back door, the unanimity system, that certain reservation clauses establish expressly, see the examples in W. W. Bishop Jr, *supra* n 23, p 324.

⁵⁶⁸ See the guideline 2.1.8 (Procedure in case of manifestly [impermissible] reservations) of the Guidelines on reservations to treaties, adopted by the ILC in 2002. For the text and the commentary on this guideline, see the Report of the ILC on the work of its 54th session (2002), A/57/10, pp 112–14. Generally on this question, see R. Riquelme Cortado, *supra* n 97, pp 223–30.

⁵⁶⁹ ‘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’ (see the Report of the ILC on the work of its 62nd session (2010), A/65/10, pp 83–6).

⁵⁷⁰ See *supra* para. 163.

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