

# The Vienna Conventions on the Law of Treaties

*A Commentary*

VOLUME I

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# 1969 Vienna Convention

## Article 23

### Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

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<b>A. General features</b>	595
Legal status and drafting history of Article 23	595
Gaps in Article 23 and its place within the provisions on reservations as a whole	597
<b>B. Procedure for formulating reservations, express acceptance, and objection</b>	598
Form of reservations, express acceptance, and objection	598
Communication of reservations, express acceptance, and objection	601
Competent authority to formulate a reservation, acceptance, or objection	601
Recipients of reservations, express acceptance, and objection	605
The general rule	605
Reservations to constitutive acts of international organizations	608
Modalities of communication of reservations, express acceptance, and objection	609
Procedure for communication of reservations	609
Functions of the depositary	611
<b>C. Confirmation of reservations, acceptance, and objection</b>	614
A necessary formality (reservations)	614
A superfluous formality (acceptance and objection)	617
<b>D. Form and procedure for withdrawal of reservations and objections</b>	619
Form of withdrawal	619
Procedure for withdrawal of reservations and objections	623

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### *Bibliography*

See the general bibliography on reservations under Article 19, also:

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Pellet, A., 'Formulation, modification and withdrawal of reservations and interpretative declarations', Fifth Report on reservations to treaties, A/CN.4/508/Add.3, paras 223–306; Add.4, paras 307–332; Sixth Report, A/CN.4/518/Add.1, paras 36–133; Add.2, paras 134–73; Seventh Report, A/CN.4/526/Add.2, paras 61–184; Add.3, paras 185–221; Eighth Report, A/CN.4/535, paras 33–68; Add.1, paras 69–106; Ninth Report, A/CN.4/544, paras 27–9; Eleventh Report, A/CN.4/574, paras 58–180; Twelfth Report, A/CN.4/584, paras 181–275 and A/CN.4/586, Note by the Special Rapporteur on guideline 2.1.9 (these reports are to be published in *YILC*, vol. II, Part Two) and the corresponding reports of the ILC to the General Assembly: *YILC*, 2000, vol. II, Part Two, pp 103–6, paras 638–61; *YILC*, 2001, vol. II, Part Two, pp 172–7, paras 112–55; A/57/10 (2002), pp 28–114, paras 53–103; A/58/10 (2003), pp 152–259, paras 326–68, and A/59/10 (2004), pp 268–74; A/61/10 (2006), pp 359–61; A/63/10 (2008), pp 174–89, 193–213, 228–48; A/64/10 (2009), pp 225–38 and 252–3

## A. General features

### Legal status and drafting history of Article 23

1. Relegated to the end of a series of five provisions devoted to reservations, Article 23 is entitled 'Procedure regarding reservations'.<sup>1</sup> Although somewhat eclectic in content, the unifying theme in Article 23 is its procedural dimension, and the fact that the formalities it sets out have characteristics in terms of substance: their violation results in invalidity or, at very least, the ineffectiveness of the reservation (or, in the case of para. 4, its withdrawal). This clearly results, *a contrario*, from the chapeau of Article 21, which affirms that a reservation is only 'established with regard to another party in accordance with articles 19, 20 and 23'.<sup>2</sup>

2. Despite its obvious practical importance, Article 23 received little attention from the ILC and delegates to the Vienna Conferences on the Law of Treaties held in 1968–69 and 1986.

3. In general, the Commission attached limited attention to such procedural questions, despite some sporadic interest in the subject by the successive Special Rapporteurs. It was necessary to wait until it reconsidered the question, more specifically as the subject of 'Reservations to treaties',<sup>3</sup> for the Commission to consider in detail the procedural problems relating to 'Formulation, modification and withdrawal of reservations and interpretative declarations'.<sup>4</sup>

4. The first four Special Rapporteurs of the ILC on the law of treaties made suggestions concerning the form and the procedure for formulation of reservations in the draft

<sup>1</sup> The idea of a provision devoted to the procedure was proposed by the special rapporteur of the ILC in 1965: 'Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur', A/CN.4/177 and Add.1 and 2 (1965), *YILC*, 1965, vol. II, pp 53–4, paras 13–20. The Drafting Committee decided to place it at the end of the section on reservations to multilateral treaties, as this provision 'applied to all the matters dealt with in that section' (United Nations Conference on the Law of Treaties, First Session, Official Records, Summary Records, A/CONF.39/11/Add.1, 29th plenary meeting, 19 May 1969, p 159, para 11).

<sup>2</sup> See the commentary on Art. 21 and Section 4.1 of the ILC Guide to Practice (Establishment of a Reservation).

<sup>3</sup> See the commentary on Art. 19, Section C.

<sup>4</sup> See the bibliography at the beginning of this chapter.

Articles devoted to the subject,<sup>5</sup> but their efforts were hardly noticed until the First Report of Sir Humphrey Waldock (in 1962), when specific and detailed provisions were contemplated.<sup>6</sup> Some of them were retained, but in a simplified form, in the drafts of Articles 18 (Formulation of reservations) and 19 (Acceptance of and objection to reservations) adopted on first reading by the Commission in 1962,<sup>7</sup> although the norms applicable to withdrawal of reservations were not mentioned.

5. Although governments had little comment,<sup>8</sup> the provisions too closely linked the formal and substantive conditions for validity of reservations, and they were awkwardly drafted. This led Sir Humphrey Waldock to propose a new Article that deals more concisely with 'Procedure regarding reservations'.<sup>9</sup> This text, which is the direct ancestor of Article 23 of the Convention, still comprises rather detailed provisions on the procedure concerning notification of reservations, their acceptance, and objections. After noting that the earlier drafts 'contained a number of articles in which reference was made to communications or notifications to be made directly to the States concerned, or if there was a depositary, to the latter', on a suggestion from Mr Rosenne<sup>10</sup> the Commission decided 'it would allow a considerable simplification to be effected in the texts of the various articles if a general article were to be introduced covering notifications and communications'.<sup>11</sup> As a result, it agreed to combine in a group of provisions, to be located at the end of the Convention, all of the provisions concerning notification and communication that were required by the Convention, including those concerning reservations.<sup>12</sup>

6. Article 18 of the Commission's draft<sup>13</sup> was adopted with what were essentially amendments of form<sup>14</sup> as Article 23 of the Vienna Convention,<sup>15</sup> with the addition however of paragraph 4 requiring that withdrawal of a reservation or objection be made in writing.<sup>16</sup>

7. Although it is not a simple matter to take a general position on the 'legal status' of the rather varied norms to be found in Article 23, the absence of debate when the provision was revisited during drafting of the 1986 Convention<sup>17</sup> supports the view that they are customary. In practice, States seem to respect them without difficulty, despite the fact that important gaps remain at the procedural level.

<sup>5</sup> See draft Art. 10(2) (formal communication), proposed by J. L. Brierly in his First Report, *YILC*, 1950, vol. II, pp 239–40, paras 90–2 and draft Art. 37(2) (in writing, formal communication), proposed by Sir Gerald Fitzmaurice in his First Report, *YILC*, 1956, vol. II, pp 115 and 126–7.

<sup>6</sup> See draft Art. 17, paras 3–6 (in writing, confirmation, formal communication, withdrawal), *YILC*, 1962, vol. II, pp 60–1 and 66; see also draft Art. 19, paras 2 and 5, on procedure concerning formulation and withdrawal of objections to reservations, *ibid*, pp 62 and 68.

<sup>7</sup> *YILC*, 1962, vol. II, pp 175–6 and 180.

<sup>8</sup> See the Fourth Report of Sir Humphrey Waldock, *YILC*, 1965, vol. II, pp 45–56.

<sup>9</sup> *Ibid*, draft Art. 20, p 53, para. 13.

<sup>10</sup> *YILC*, 1965, vol. I, 803rd meeting, 16 June 1965, pp 197–9, paras 30–56; for the draft text, see *ibid*, vol. II, p 73.

<sup>11</sup> *YILC*, 1966, vol. II, p 270, para. 1 of the commentary on draft Art. 73.

<sup>12</sup> See Art. 78 (79 in the Vienna Convention of 1986) and, on the functions of the depositary in this area, Arts 76 and 77 (77 and 78 in the 1986 Convention).

<sup>13</sup> *YILC*, 1966, vol. II, p 208.

<sup>14</sup> However, see *infra* paras 50 and 84.

<sup>15</sup> See especially United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Official Records, Documents of the Conference, A/CONF.39/11/Add.2, Art. 18 (Procedure regarding reservations), pp 138–9, paras 190–6, and the references cited. See also Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, Vienna, 18 February–21 March 1986 (A/CONF.129/16), 23rd meeting, 11 April 1968, pp 124–5, paras 29–42.

<sup>16</sup> See *infra* para. 100.

<sup>17</sup> See the commentary on Art. 23 of the 1986 Convention.

## Gaps in Article 23 and its place within the provisions on reservations as a whole

8. Despite its title, Article 23 does not address all the issues that arise concerning 'Procedure regarding reservations'. Some of these are dealt with earlier in the Convention or—implicitly—in Part VII, dealing with 'depositories, notifications, corrections and registration'. Others were not addressed by the drafters of the Convention. Nevertheless, far from confining itself to reservations, Article 23 also covers the procedure concerning their acceptance and objections to them.

9. None of these terms is defined,<sup>18</sup> with the exception of the word 'reservation' itself, in Article 2(1)(d) of the Convention.<sup>19</sup> It declares the moment when a reservation may be formulated ('when signing, ratifying, [formally confirming,<sup>20</sup>] accepting, approving or acceding to a treaty'). This separation of the issues of form and procedure, on the one hand, and timing, on the other hand, is not very successful: the requirement of a written statement and formal communication to other concerned States (or international organizations) does not seem to be any more inherent in the definition of unilateral declarations, which are essentially reservations, than the moment when the communication must be made—something that the drafters of the Convention did not hesitate to repeat at the beginning of Article 19, concerning formal requirements for the 'formulation of reservations'.<sup>21</sup>

10. Similarly, purely procedural norms can be found throughout the provisions concerning reservations:

- tacit acceptance of reservations is governed by Article 20(5);
- an important clarification concerning the contents of objections is provided by Article 21(3);<sup>22</sup> and
- withdrawal of reservations and objections is dealt with in Article 22, with the exception of the requirement of a written formulation, imposed by Article 23(4).

11. Other procedural rules concerning reservations, acceptance, or objections, which were originally included in the ILC draft adopted on first reading in 1962 in the section devoted to reservations, were, quite properly, incorporated in 1966 into the general norms applicable to all notifications and communications concerning treaties.<sup>23</sup>

12. Unfortunately, this dispersal of norms requires the practitioner to look for 'procedure regarding reservations' elsewhere than in Article 23, the title of which may be misleading for this reason; however, Part III of the ILC Guide to Practice on Reservations is entirely devoted to that procedure and covers the matter in great details. In addition, some rules are altogether absent from the Convention, namely:

- those applicable to late reservations;<sup>24</sup> or
- to modification of reservations;<sup>25</sup>

<sup>18</sup> No more than the term 'withdawal'—see the commentary on Art. 22(3) and (4), and *infra* paras 101–3.

<sup>19</sup> See the commentary on this provision. On the definition of acceptance and objection, see the commentary on Art. 20.

<sup>20</sup> This was added to Art. 2(d) of the 1986 Vienna Convention.

<sup>21</sup> See the commentary on Art. 19.

<sup>22</sup> Implying that the State (or international organization) must specify in its objection that it is opposed to the entry into force of the treaty between itself and the reserving State—see the commentary on this provision.

<sup>23</sup> See *supra* para. 5.

<sup>24</sup> See the commentaries on Arts 2(1)(d) and 19.

<sup>25</sup> See the commentary on Art. 22.

- determining the authorities that are competent to formulate a reservation, acceptance, or objection;<sup>26</sup>
- procedure for withdrawal of reservations and objections;<sup>27</sup> and
- as with the Convention as a whole, the procedure applicable to interpretative declarations.<sup>28</sup>

13. In order to deal with the difficulties that result from this dispersal of norms and these gaps, the ILC has attempted to bring together, in the second part of the Guide to Practice it has been working on since 1995,<sup>29</sup> a guideline dealing with formulation and communication of reservations and interpretative declarations.<sup>30</sup>

14. Article 23 addresses three distinct problems, or series of problems, that will be considered in turn:

- the procedure for formulation of reservations, acceptances, and objections *stricto sensu* is dealt with in paragraph 1;
- paragraphs 2 and 3 deal with the mandatory or optional nature of confirmation of the various declarations, as the case may be; and
- paragraph 4 concerns the requirement that withdrawal of reservations and objections be in writing.

## B. Procedure for formulating reservations, express acceptance, and objection

15. Article 23(1) has two purposes: it deals with the form of reservations, objections, and express acceptance, and it determines, although only partially, the procedure for notification of these written declarations and their recipients.

### Form of reservations, express acceptance, and objection

16. Pursuant to Article 23(1), States are to formulate a reservation, 'express acceptance', and objection 'in writing'. Although Article 2 of the Convention requires that the treaty itself be 'in written form', it does not impose the same requirement with respect to a reservation, defined as a 'unilateral statement'. Article 23(1) corrects this oversight.<sup>31</sup> As will be seen, it appears that during drafting of the provision the requirement that a reservation be in written form was never in doubt.<sup>32</sup> For the ILC, this formalism is easily

<sup>26</sup> See *infra* paras 29–44.

<sup>27</sup> See *infra* paras 109–15.

<sup>28</sup> See the commentary on Art. 21.

<sup>29</sup> See the commentary on Art. 19.

<sup>30</sup> The most recent version of the guideline is in the 2010 annual report of the Commission, 65/10.

<sup>31</sup> This requirement concerning the form of a reservation and its notification to States and organizations that are parties to the treaty, as well as confirmation of a reservation, is confirmed in guidelines 2.1.1, 2.1.2, and 2.1.5 of the ILC Guide to Practice. See, on this point, the comments of the Special Rapporteur, 56/10, para. 120. The most recent version of the guideline is in the 2010 annual report of the Commission, 65/10.

<sup>32</sup> See the comments of J. L. Briery in his First Report on the Law of Treaties: *YILC*, 1950, vol. II, p 239; also, G. G. Fitzmaurice, draft Art. 37(2), *YILC*, 1956, vol. II, p 115 (see also draft Art. 39(1)(b)(ii); *ibid*); Sir H. Waldock, *YILC*, 1962, vol. II, p 60.

explained by the need for communication with contracting parties, and the importance of notification and registration with the depositary.<sup>33</sup>

17. A summary reading of the first phrase of Article 23(1) may be misleading, however. It appears to treat reservation, acceptance, and objection equally: 'A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing...'. In reality, a distinction must be made between reservation and objection, on the one hand, and acceptance of the reservation, on the other hand. Pursuant to Article 20(5), 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation'; in other words, acceptance may be express (the term used in Art. 23) but is, in principle, tacit (although nothing prevents a State from stating explicitly and in writing that it accepts a reservation). This is not the situation where the treaty provides otherwise, or in the case of acceptance by the competent organ of an international obligation where the reservation concerns its constitutive act.<sup>34</sup> It is only in such circumstances that acceptance of a reservation must necessarily be written (and also, withdrawal<sup>35</sup>).

18. This requirement, which goes without saying, according to the commentary of the ILC,<sup>36</sup> was formulated by G. Fitzmaurice in 1956:<sup>37</sup> 'Reservations must be formally framed and proposed in writing, or recorded in some form in the minutes of a meeting or conference...'.<sup>38</sup> With a different and more precise wording, this proposal was reprised in the First Report of Sir Humphrey Waldock<sup>39</sup> and in draft Article 18(2)(a) adopted by the Commission at first reading.<sup>40</sup>

19. During second reading of the draft, the Commission opted for a stricter rule—the one that appears in Article 23(1) of the Convention—and excluded the possibility that reservations be included in the final act of the conference adopting the treaty or in a *procès-verbal* adopted on the occasion. It provided the following explanation:

Statements of reservations are made in practice at various stages in the conclusion of a treaty. Thus, a reservation is not infrequently expressed during the negotiations and recorded in the minutes. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. The Commission, however, considered it essential that the State concerned should formally reiterate the statement when signing, ratifying, accepting, approving or acceding to a treaty in order that it should make its intention to formulate the reservation clear and definitive. Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 [19 of the Convention] as a method of formulating a reservation and equally receives no mention in the present article.<sup>41</sup>

<sup>33</sup> 57/10, p 66. Academic commentators have been cited by the Commission in support: F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (The Hague: TMC Asser Instituut, 1988), p 44; and L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin* (The Hague: Martinus Nijhoff, 1994), p 50.

<sup>34</sup> See the commentary on Art. 20.

<sup>35</sup> Article 23(4) creates a symmetry between the formulation and the withdrawal of reservations and objections. See *infra* para. 103.

<sup>36</sup> See *YILC*, 1966, vol. II, p 208.

<sup>37</sup> In his First Report, in 1950, Brierly had proposed the following: Unless the contrary is indicated in a treaty, the text of a proposed reservation thereto must be authenticated together with the text or texts of that treaty or otherwise formally communicated in the same manner as an instrument or copy of an instrument of acceptance of that treaty. (*YILC*, 1950, vol. II, p 239)

<sup>38</sup> Draft Art. 37(2), *YILC*, 1956, vol. II, p 115.

<sup>39</sup> See *YILC*, 1962, vol. II, p 60.

<sup>40</sup> *Ibid*, pp 175–6.

<sup>41</sup> *YILC*, 1966, vol. II, p 208.

Thus, the Convention excludes all reservations made prior to signature, deeming them without legal effect on the treaty.<sup>42</sup>

20. In the same way, the possibility that reservations be made verbally was also eliminated.<sup>43</sup>

21. The requirement that the reservation be in written form is easily explained:

Reservations are formal statements. Although their formulation in writing is not embraced by the term of the definition, it would according to article 23(1) of the Vienna Convention seem to be an absolute requirement. It is less common nowadays that the various acts of consenting to a treaty occur simultaneously; therefore it is not possible for an orally presented reservation to come to the knowledge of all contracting parties. In the era of differentiated treaty-making procedures it becomes essential for reservations to be put down in writing in order to be registered and notified by the depositary, so that all interested States would become aware of them. A reservation not notified cannot be acted upon. Other States would not be able to expressly accept or object to such reservations.<sup>44</sup>

22. The same applies to objections which play—or may play—a fundamental role concerning the effects of reservations.<sup>45</sup> It is inconceivable that objections may be purely verbal, and therefore hardly surprising that the ILC was satisfied in this respect with reflecting the procedural rules relative to reservations themselves.<sup>46</sup> For its part, guideline 2.6.7 included in the ILC Guide to Practice in 2008 provides without surprise that '[a]n objection must be formulated in writing'.<sup>47</sup>

23. States have no obligation to explain or justify their reservations or their objections. However, in guidelines 2.1.9<sup>48</sup> and 2.6.10<sup>49</sup> of its Guide to Practice, the ILC recommended that '[a] reservation [or an objection] should to the extent possible indicate the reasons why it is being made'.

24. Although 'the ... acceptance of a reservation is, in the case of multilateral treaties, almost invariably implicit or tacit',<sup>50</sup> it might happen—but rarely—that a State expressly accepts a reservation formulated by another State party.<sup>51</sup> By definition such a reservation must be formulated in writing, as Article 23(1) makes clear.

25. The problem of the form is different with respect to interpretative declarations, on which the Vienna Convention of 1969 is totally silent.<sup>52</sup> The ILC<sup>53</sup> defined interpretative

<sup>42</sup> In its 2002 report, the Commission does not exclude the possibility of a verbal reservation, noting that the form is of no importance provided that a written document is required subsequently: 57/10, p 67.

<sup>43</sup> It seems that Waldock did not totally exclude the possibility during discussion in the ILC, but what he had in mind was announcement during negotiations that a reservation would be made (see *YILC*, 1962, vol. I, 663rd meeting, 18 June 1962, p 223, para. 34).

<sup>44</sup> F. Horn, *supra* n 33, p 44; see also L. Lijnzaad, *supra* n 33, p 50.

<sup>45</sup> See the commentary on Art. 21.

<sup>46</sup> See the commentary on draft Art. 19 adopted on first reading in 1962 in *YILC*, 1962, vol. II, p 180. The 1966 commentary omits to deal with objections (see *YILC*, 1966, vol. II, p 208).

<sup>47</sup> For the commentary of this guideline, see ILC report 2008, A/63/10, pp 195–7.

<sup>48</sup> See *ibid*, pp 184–9.

<sup>49</sup> See *ibid*, pp 203–6.

<sup>50</sup> D. W. Grieg, 'Reservations: Equity as a Balancing Factor?', *Australian Yearbook of Int'l L*, 1995, p 120. In the same sense, see also F. Horn, *supra* n 33, p 124. L. Lijnzaad, *supra* n 33, p 46; R. Riquelme Cortado, *Las reservas a los tratados: Lagunas y ambigüedades del régimen de Viena* (Murcia: Universidad de Murcia, 2004), pp 211 ff; and D. Müller, commentary on Art. 20.

<sup>51</sup> See the examples cited in ILC report 2009, A/64/10, p 234, para. 7 of the commentary of guideline 2.8.3 (Express acceptance of a reservation).

<sup>52</sup> See the commentary on Art. 2, para. 1(d).

<sup>53</sup> Guideline 1.2 of the ILC Guide to Practice concerning reservations; see the text and the accompanying commentary in *YILC*, 1999, vol. II, Part Two, pp 97–103.



declarations as a taking of position that could occur at any time<sup>54</sup> the purpose of which was to specify or to clarify the meaning or the scope that a State intended to give to a treaty or to certain of its provisions, but without making this a condition for its consent to be bound. Consequently, the written formulation of such declarations is not indispensable, unlike the situation for reservations. It is certainly preferable that these be known to the other parties, but the fact they may not be known to them does not deprive them of all legal effect. The formulation of such verbal declarations is not all that unusual, and this has not led judges and arbitrators to deny them certain effects.<sup>55</sup>

26. The situation is different when the State that formulates the interpretative declaration intends to make its consent to be bound conditional on the interpretation that it has specified. Such a conditional interpretative declaration<sup>56</sup> is subject, as a general rule, to the same legal rules that apply to reservations *stricto sensu*<sup>57</sup> and they must be in written form.

### Communication of reservations, express acceptance, and objection

27. It is obviously not sufficient for the reservation, objection, or express acceptance, as the case may be, to be in written form. In addition, this must be known to other interested States. This is what the second phrase of Article 23(1) establishes, when it requires that such written statements must be 'communicated to the contracting States and other States entitled to become parties to the treaty'.

28. This condition—which is not without its problems—nevertheless raises two delicate questions: which authority is competent to formulate the reservation, acceptance, or objection, and how is the 'communication' to be made?<sup>58</sup>

#### *Competent authority to formulate a reservation, acceptance, or objection*

29. As Sir Humphrey Waldock specified in the draft he submitted to the ILC in 1962, the reservation must be formulated by 'the representative of the reserving State' at the time of signature 'by a duly authorized representative of the reserving State'; or 'by the competent authority of the reserving State'.<sup>59</sup> This amounts to saying the same thing three times, but it is not completely adequate, because it still leaves open the question whether there are rules of general international law that specify the authority that is competent to formulate a reservation at the international level or whether this is left to the national legislation of each State.

30. The answer to this question can be deduced as much from the text of the Convention itself as from the relevant State practice.

<sup>54</sup> See guideline 2.4.3 in *YILC*, 2001, vol. II, Part Two, pp 192–3.

<sup>55</sup> *Ibid.*

<sup>56</sup> See the definition proposed in guideline 1.2.1 of the Guide to Practice (*YILC*, 1999, vol. II, Part Two, p 103).

<sup>57</sup> Significantly, although the ILC initially had devoted a series of guidelines specifically addressed to conditional interpretative declarations, it finally confined itself to a reference to the rules applicable to reservations (see A/63/10, p 141); see also Pellet, Seventh Report on Reservations to Treaties, A/CN.4/526, para. 43.

<sup>58</sup> The following discussion (paras 29–79) is largely based upon the Sixth Report of Alain Pellet to the ILC on reservations to treaties, A/CN.4/518/Add.1, paras 54–133 and Add.2, paras 134–73. They are largely reflected in the commentaries that the Commission accompanied to guidelines 2.1.3–2.1.8 and 2.4.1, 2.4.2, and 2.4.7 of the Guide to Practice concerning reservations (see the ILC Report to General Assembly, 2002, A/57/10, pp 75–131 (*YILC*, 2002, vol. II, Part Two, pp 30–48)).

<sup>59</sup> First Report on the Law of Treaties, draft Art. 17, para. 3(a) (*YILC*, 1962, vol. II, p 60).

31. By definition, the purpose of a reservation is to modify the legal effect of provisions of a treaty in relations between the parties. Although the reservation is an instrument that is distinct from the treaty itself, it is part of the overall regime and directly affects the obligations of the parties. It leaves intact the actual treaty texts, but directly affects the '*negotium*'. Under the circumstances, it seems both logical and inevitable that reservations be formulated under the same conditions as the consent of the State to be bound. This is not a situation where international law depends exclusively on internal legislation.

32. In this respect, Article 7 of the Vienna Convention of 1969 has precise and detailed provisions that undoubtedly reflect the positive law in this area.<sup>60</sup> *Mutatis mutandis*, these rules can certainly be transposed to the issue of the authority to make reservations, it being understood that the formulation of a reservation 'performed by a person who cannot be considered under article 7... as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State'.<sup>61</sup>

33. These limits on the possibility of formulating reservations are largely confirmed by State practice.

34. In an *aide-mémoire* dated 1 July 1976, the Legal Counsel of the United Nations wrote:

A reservation must be formulated in writing (article 23, para. 1, of the Convention), and both reservations and withdrawals of reservations must emanate from one of the three authorities (Head of State, Head of Government or Minister of Foreign Affairs) competent to bind the state internationally.<sup>62</sup>

Similarly, the *Summary Practice of the Secretary-General as depositary of multilateral treaties*, prepared by the Treaty Section of the Office of Legal Affairs, states: 'The reservation must be included in the instrument or annexed to it and must emanate from one of the three qualified authorities.'<sup>63</sup> It thus further refers to the general principles concerning the deposit of instruments through which a State expresses its acceptance to be bound.<sup>64</sup> Moreover, 'Reservations made at the time of signature must be authorized by the full powers granted to the signatory by one of the three qualified authorities or the signatory must be one of these authorities'.<sup>65</sup>

35. These rules are strictly applied: all instruments of ratification (or their equivalent) of treaties for which the Secretary-General is depositary and which contain reservations seem to have been signed by one of the 'three authorities' or, if by the Permanent Representative, a confirmation of full powers issued by one of the three authorities must be annexed. Furthermore, according to information provided to the authors, if this is not the case, the Permanent Representative is requested, unofficially but firmly, to regularize the situation.<sup>66</sup>

<sup>60</sup> See the commentary on Art. 7.

<sup>61</sup> See Art. 8 of the Convention.

<sup>62</sup> *UNJY*, 1976, pp 218–19, para. 7.

<sup>63</sup> Summary of Practice of the Secretary-General as Depositary of Multilateral Agreements—United Nations Publications, ST/LEG/7, p 49, para. 161.

<sup>64</sup> The same passage refers to paras 121 and 122, *ibid*, p 36.

<sup>65</sup> *Ibid*, p 62, para. 208; reference to Ch. VI of Summary of Practice of the Secretary-General as Depositary of Multilateral Agreements (Full powers and signatures).

<sup>66</sup> This is confirmed, by analogy, in the case involving India and Pakistan before the ICJ relating to the aerial incident of 10 August 1999. The oral pleadings show that in an initial communication dated 3 October 1973, the Pakistan Mission to the United Nations notified its intention to succeed to British India as a party to the Arbitration

36. It may be asked whether this practice, which transposes the rules in Article 7 of the Vienna Convention to reservations, is perhaps too rigid. For example, it might be more legitimate to admit that the representative of a State who is accredited to an international organization that is depositary of a treaty to which the State wishes to formulate a reservation should not have the authority to do this. The problem arises because this is indeed allowed by international organizations other than the United Nations.

37. Thus, it seems that the Secretary-General of the Organization of American States allows reservations to be submitted by the Permanent Representatives of Member States. This practice is confirmed by the provisions of Article VII of the 1928 Havana Convention on Treaties of the Pan American Union (not in force), which allows all instruments relating to the consent to be bound by treaties concluded at conferences of American States to be deposited 'by the respective representative on the Governing Board, acting in the name of his Government, without need of special credentials for the deposit of the ratification'.<sup>67</sup> Similarly, at the Council of Europe numerous reservations appear to have been consigned in letters of Permanent Representatives.<sup>68</sup>

38. In order to take account of this varied practice, in 2002 the ILC adopted guideline 2.1.3 as part of its Guide to Practice.<sup>69</sup> This relatively flexible approach incorporates without change the rules set out in Article 7 of the Vienna Conventions on the Law of Treaties,<sup>70</sup> the status of which as customary law is beyond question. It also preserves the less-rigid approach followed by international organizations other than the United Nations when they act as depositaries, in the following manner: 'Subject to the customary practices in international organizations which are depositaries of treaties...'.<sup>71</sup>

39. The international phase in the formulation of reservations is only the tip of the iceberg. As with all aspects of the procedure involving a State's consent to be bound, it is the conclusion of domestic processes that may be very complex. The formulation of reservations is part of the broader procedure of ratification (or acceptance, approbation, or adhesion).<sup>72</sup>

40. According to Paul Reuter, '[l]es pratiques constitutionnelles nationales en ce qui concerne les réserves et objections changent d'un pays à l'autre',<sup>73</sup> and even their

Act 1928. In a note dated 31 January 1974, the Secretary-General requested that this notification be made 'in the form prescribed', ie by one of the three authorities mentioned *supra*; this subsequently took the form of a new communication (formulated somewhat differently than that of the previous year) dated 30 May 1974, signed by the Prime Minister of Pakistan (see the pleadings of Sir Elihu Lauterpacht for Pakistan, 5 April 2000, CR/2000/3, and A. Pellet for India, 6 April 2000, CR/2000/4). Although the episode concerned a notification of succession and not the formulation of a reservation, in a general sense it attests to the vigilance of the Secretary-General in applying rules that concern the intent of States to express their consent to be bound by treaties.

<sup>67</sup> See the reply of the OAS in 'Depositary practice in relation to reservations', Secretary-General's Report submitted in accordance with Res. 1452 B (XIX) of the General Assembly, A/5687, reprinted in *YILC*, 1965, vol. II, p 84.

<sup>68</sup> See ETS no. 24. The rules applied to States ought also to be applicable to international organizations in a more complete manner than is suggested by Art. 7(2) of the Vienna Convention on the Law of Treaties 1986. Specifically, the head of the secretariat of an international organization or its representatives accredited to States or to another organization should be considered competent to engage the organization.

<sup>69</sup> See para. 17 of the commentary on guideline 2.1.3, *YILC*, 2002, vol. II, Part Two, p 32..

<sup>70</sup> The Guide to Practice covers treaties concluded between States and those to which international organizations are parties.

<sup>71</sup> See the commentary on Art. 7.

<sup>72</sup> P. Daillier, M. Forteau, and A. Pellet, *Droit international public* (8th edn, Paris: LGDJ, 2009), pp 161–2, fn 85.

<sup>73</sup> P. Reuter, *Introduction au droit des traités* (3rd revised and expanded edn by Philippe Cahier, Paris: PUF, 1995), pp 84–5, para. 133\* ('[n]ational constitutional practices concerning reservations and objections vary from one country to another'—own translation). Paul Reuter, *Introduction to the law of treaties* (trans. Jose Mico and Peter Hagenmacher, London, New York: Kegan Paul International/J. Wiley & Sons, 1995).

summary description goes beyond the bounds of the present commentary.<sup>74</sup> It bears mention that the procedure in formulating reservations does not necessarily correspond to that which is generally imposed with respect to consent to be bound. For example, in France only recently has the practice been followed of informing parliament of the text of reservations that the President of the Republic or the government intends to attach to the ratification of treaties or the approval of agreements, even when such instruments must be submitted to parliament pursuant to Article 53 of the 1958 Constitution.<sup>75</sup>

41. As noted by the ILC, 'the only conclusion that can be drawn from these observations is that international law does not impose any specific rule with regard to the internal procedure for formulating reservations'.<sup>76</sup> The manner in which States determine the authority that is competent to formulate reservations, and the requisite procedure, raises issues that are comparable to those with respect to ratification in general. It might seem reasonable to apply the rules concerning 'imperfect ratification' that are raised by Article 46 of the Convention (Provisions of internal law regarding competence to conclude treaties).

42. However, such transposition is not appropriate, because rules concerning the authority to conclude treaties are generally derived from the constitution, whereas this is not the case with reservations, which are a matter of practice. It seems unlikely that a violation of domestic legal provisions concerning reservations could be 'manifest', in the sense of Article 46 of the Convention.

43. In its Guide to Practice, the ILC incorporated guideline 2.1.4, which reads as follows:

2.1.4. Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

The determination of the competent authority and the procedure to be followed at the internal level for formulating a reservation is a matter for the internal law of each State or the relevant rules of each international organization.

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.<sup>77</sup>

44. These considerations can be readily transposed to issues of acceptance of reservations and objections.<sup>78</sup> Domestic legal rules on their formulation are even less definitive, less public, and less accessible than those respecting reservations as such. Thus, to the extent that acceptance and objection affect the obligations of the State, it seems necessary that they be made by the authority competent to bind the State, and there can be no

<sup>74</sup> In para. 3 of the commentary on guideline 2.1.4 of the Guide to Practice (*YILC*, 2002, vol. II, Part Two, p 32), the ILC notes that 'of the 23 States which replied to the Commission's questionnaire on reservations to treaties and whose answers to questions 1.7, 1.7.1, 1.7.2, 1.8, 1.8.1 and 1.8.2 134 are utilizable, competence to formulate a reservation belongs to: the executive branch alone in six cases; the Parliament alone in five cases; and it is shared between them in 12 cases', according to various modalities (references omitted).

<sup>75</sup> A. Pellet, 'Commentaire de l'article 53' in Fr. Luchaire and G. Conac, *La Constitution de la République française de 1958* (2nd edn, Paris: Economica, 1987), pp 1047–50.

<sup>76</sup> See para. 7 of the commentary on guideline 2.1.4, *YILC*, 2002, vol. II, Part Two, p 33.

<sup>77</sup> *Ibid*, p 75.

<sup>78</sup> See R. Baratta, *Gli effetti delle riserve ai trattati* (Milan: Giuffrè, 1999), pp 339–41.

justification for a departure from the principles of Article 7 of the Convention. Like reservations, these declarations must come from one of the 'three authorities' that may commit a State at the international level,<sup>79</sup> or from an individual producing full powers that have been issued by one or another of the three authorities.

45. Despite the flexibility of rules applicable to their form and the time when they may be formulated,<sup>80</sup> interpretative declarations are not without effects at the international level with respect to the treaty with which they are associated.<sup>81</sup> They must be formulated by a person who is deemed to represent the State for the adoption or authentication of a text, or for expression of its consent to be found by the treaty.<sup>82</sup>

### *Recipients of reservations, express acceptance, and objection*

#### **The general rule**

46. According to the second phrase of Article 23(1), a reservation, express acceptance, or objection must be communicated 'to the contracting States and other States entitled to become parties to the treaty'. Certain issues arise in the construction of these words.

47. The expression 'contracting State' raises no particular problems. It is defined by Article 2(1)(f) of the 1969 Convention as 'a State which has consented to be bound by the treaty, whether or not the treaty has entered into force'.<sup>83</sup> More troublesome is the definition, and the determination in each concrete situation, of the scope of 'other States entitled to become parties to the treaty'. As has been noted, '[n]ot all treaties are wholly clear as to which other states may become parties'.<sup>84</sup>

48. In his 1951 report on reservations to multilateral treaties, Brierly wrote:

The following classes of States shall be entitled to be consulted as to any reservations formulated after the signature of this convention (or after this convention has become open to signature or accession):

- a) States entitled to become parties to the convention,
- b) States having signed or ratified the convention,
- c) States having ratified or acceded to the convention.<sup>85</sup>

In accordance with his recommendations, the ILC proposed that 'in the absence of contrary provisions in any multilateral convention the depositary of a multilateral convention should, upon receipt of each reservation, communicate it to all States which are or which are entitled to become parties to the convention'.<sup>86</sup>

<sup>79</sup> See *supra* paras 31–8.

<sup>80</sup> See *supra* para. 25. Conditional interpretative declarations follow rules of form and procedure applicable to reservations. See *supra* para. 26.

<sup>81</sup> *Ibid.*

<sup>82</sup> See guideline 2.4.1 adopted by the ILC in 2002 (*YILC*, 2002, vol. II, Part Two, p 46). Also, guideline 2.4.2 (Formulation of an interpretative declaration at the internal level), *ibid.*, p 47.

<sup>83</sup> See also Art. 2(1)(f) of the 1986 Convention and Art. 2(k) of the Vienna Convention on Succession of States in respect of Treaties of 1978, which adopt the same definition of 'contracting States'.

<sup>84</sup> Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law*, vol. I, *Peace* (9th edn, Harlow: Longman, 1992), p 1248, fn 4.

<sup>85</sup> *YILC*, 1951, vol. II, p 16.

<sup>86</sup> *Ibid.*, p 130, para. 34. In 1953, Lauterpacht proposed a more vague formulation: 'The text of the reservations received shall be communicated by the depositary authority to all the interested States' (*YILC*, 1953, vol. II, p 92). Fitzmaurice contemplated 'all the States which have taken part in the negotiation and drawing up of the treaty or which, by giving their signature, ratification, accession or acceptance, have manifested their interest in it' (draft Art. 39(1)(b)(ii), *YILC*, 1956, vol. II, p 115).

49. Essentially, this formula was taken up by Waldock in 1962.<sup>87</sup> It was also adopted by the Commission in the text adopted on first reading following slight modifications of a formal nature by the Drafting Committee.<sup>88</sup> In 1966, it agreed upon requiring a communication to 'the other States entitled to become parties to the treaty'<sup>89</sup> an expression 'regarded as more appropriate to describe the recipients of the type of communications in question'.<sup>90</sup>

50. At the Vienna Conference, the Canadian delegation noted that the proposed wording might 'create difficulties for the depositary, because there were no criteria permitting a determination of what such States were. It then seemed preferable... to replace the expression with "negotiating States and contracting States"', according to the amendment previously presented by Canada.<sup>91</sup> But instead of this very sensible proposal, the Drafting Committee opted for a Spanish amendment<sup>92</sup> that was incorporated into the final text of Article 23(1).

51. As can be seen, not only is the language obscure, the preparatory work of the 1969 Convention provides no clarification of the terms of paragraph 1(b) and (e) which, although they make so specific reference to reservations, require the depositary to communicate a copy of the text of the treaty 'to the parties and to the States entitled to become parties to the treaty' and to inform them of 'notifications and communications relating to the treaty'.<sup>93</sup>

52. It is unfortunate that the Canadian proposal to limit the recipients of communications related to reservations<sup>94</sup> was not accepted. It would have avoided practical difficulties for depositaries, without significantly reducing the 'useful' notification provided to genuinely interested States and international organizations.<sup>95</sup>

53. It goes without saying that there is no problem when the treaty itself clearly determines those States or international organizations capable of becoming parties to the

<sup>87</sup> First Report on the Law of Treaties, *YILC*, 1962, vol. II, p 60. The language subsequently underwent some modifications: Sir Humphrey Waldock, Fourth Report, *YILC*, 1965, vol. II, p 45 (see *infra* para. 64) and the 1965 report of the Commission, *ibid*, p 162.

<sup>88</sup> Draft Art. 18(3), *YILC*, 1962, vol. II, p 176.

<sup>89</sup> Draft Art. 18(1), *YILC*, 1966, vol. II, p 208.

<sup>90</sup> Explanation provided by Briggs, president of the Drafting Committee, *YILC*, 1966, vol. I, Part Two, p 293.

<sup>91</sup> Official Records of the United Nations Conference on the Law of Treaties, 1st and 2nd sessions (Documents of the Conference), 23rd session of the Plenary Committee, 11 April 1968, para. 38, referring to A/CONF.39/C.1/L.151. Jochen A. Frowein has noted that the United States expressed the same concern in the General Assembly in 1966 when the draft Articles of the ILC concerning the depositary were discussed by the General Assembly in 1966 (A/6309/Rev.1, p 176) ('Some Considerations Regarding the Function of the Depositary—Comments on Art. 72 Para 1 (d) of the ILC's Draft Articles on the Law of Treaties' [1967] *ZaöRV*, 1967, p 533); see also S. Rosenne, 'More on the Depositary of International Treaties', *AJIL*, 1970, vol. 64, pp 847–8.

<sup>92</sup> A/CONF.39/C.1/L.149, para. 192(i). For the text that was adopted, see *ibid*, para. 196.

<sup>93</sup> On the origin of these provisions, see notably Briery's 1951 report (*YILC*, 1951, vol. II, p 27), and the conclusions of the Commission (*ibid*, p 130, para. 34(1)); Arts 17(4)(c) and 27(6)(c) of Waldock's 1962 draft (*YILC*, 1962, vol. II, pp 60 and 82), and Art. 29(5) of the draft adopted by the Commission on first reading (*ibid*, pp 185–6); and the draft Art. 72 adopted definitively by the Commission in 1966 (*YILC*, 1966, vol. II, p 269).

<sup>94</sup> And by Ushakov during the discussions in the Commission in 1977 (see *YILC*, 1977, vol. I, 1451st meeting, 1 July 1977, pp 193–4).

<sup>95</sup> Although some States may not be a party to the United Nations Convention on Privileges and Immunities of 1947 and are not eligible to ratify it, the specialized bodies of the United Nations receive communications concerning reservations that are formulated by these States. See Summary of Practice, *supra* n 63, pp 60–1, paras 199–203.

instrument, and certainly for 'closed' treaties such as those generally concluded under the auspices of regional international organization such as the Council of Europe,<sup>96</sup> the Organization of American States,<sup>97</sup> and the African Union.<sup>98</sup> There is more difficulty with treaties that do not clearly specify those States that may become parties, or so-called 'open' treaties containing an 'all States'<sup>99</sup> clause or where it is 'otherwise established' that States that have participated in negotiating a treaty may subsequently accede to it.<sup>100</sup> This is notably the case when the functions of depositary are assumed by a State that does not have diplomatic relations with some States,<sup>101</sup> and that moreover does not recognize as States certain entities that claim this title. The 1997 Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties devotes an entire chapter to the problems encountered by the Secretary-General in determining 'States and international organizations which may become parties'.<sup>102</sup> This has been endorsed by scholars.<sup>103</sup> Sometimes, 'depositary notifications' by the Secretary-General of the United Nations indicate that 'all states' have been informed, without other detail, while others provide a list of member States and non-member States to whom notification has been made, whether or not they have observer status.

55. Essentially all acceptance of reservations is tacit,<sup>104</sup> and there is virtually no practice concerning express acceptance. By contrast, there is a considerable body of practice concerning objections. It tends to reinforce the practice with respect to reservations themselves: they are transmitted to all signatory States, whether or not they are parties to the treaty.<sup>105</sup>

56. The rules applicable to the communication of reservations are not transposable to simple interpretative declarations,<sup>106</sup> which may be formulated orally.<sup>107</sup> Consequently, it would make no sense to require that they be formally communicated to interested States, it being understood that the State making such a declaration takes the risk that it will not produce the desired effect.

<sup>96</sup> eg see Art. K(1) of 3 May 1996 version of the European Social Charter: 'This Charter shall be open for signature by the member States of the Council of Europe'. Or Art. 32(1) of the Criminal Law Convention on Corruption of 27 January 1999.

<sup>97</sup> eg Art. XXI of the Inter-American Convention against Corruption of 29 March 1996.

<sup>98</sup> eg Art. 12(1) of the Lusaka Agreement on Co-operative Enforcement. Operations directed at Illegal Trade in Wild Fauna and Flora.

<sup>99</sup> See Art. XIII of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid: 'The present Convention is open for signature by all States'; or Art. 84(1) of the Vienna Convention of 1986: 'The present Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by any international organization which has the capacity to conclude treaties'. See also Art. 305 of the United Nations Convention on the Law of the Sea of 1982 which is open not only to 'all States', but also to Namibia (prior to its independence) and to autonomous territories and States. Article 81 of the 1969 Vienna Convention, on the other hand, specifies that only States may become parties.

<sup>100</sup> See the commentary on Art. 15 of the Vienna Convention of 1969 in the present work.

<sup>101</sup> See the commentary on Art. 74 of the Vienna Convention of 1969 in the present work.

<sup>102</sup> *Supra* n 63, ch. V, pp 21–30, paras 73–100.

<sup>103</sup> See esp. J. A. Frowein, *supra* n 91, pp 533–9, and S. Rosenne, *supra* n 91, pp 847–8.

<sup>104</sup> See *supra*, 600. There is, however, practice with respect to acceptance of reservations to constitutive acts of international organizations. See *infra* paras 57–63.

<sup>105</sup> See P. H. Imbert, *Les réserves aux traités multilatéraux* (Paris: Pedone, 1979), p 151, or R. Baratta, *supra* n 78, pp 342–3. With respect to treaties under the auspices of the Council of Europe, the Secretary-General of the Organization communicates objections to all member States: J. Polakiewicz, *Treaty-Making in the Council of Europe* (Strasbourg: Council of Europe Publishing, 1999), p 99.

<sup>106</sup> In contrast to conditional interpretative declarations, which are subject to the same legal regime as reservations.

<sup>107</sup> See *supra* para. 22.

**Reservations to constitutive acts of international organizations**

57. In addition to the problems relating to the determination of States that are eligible to become parties to a treaty, Article 23(1) has a lacuna, probably due to inadvertence of the drafters of the Convention. It is silent on the special case of constitutive acts of international organizations. Article 20(3) requires the 'acceptance of the competent organ' of the organization for a reservation to a constitutive act to produce effects. This clearly requires that the reservation be communicated to the organization concerned, because it cannot pronounce itself on a reservation about which it has not been informed.

58. The first three Special Rapporteurs did not deal with the point. It was first addressed by Sir Humphrey Waldock in his 1962 report. He proposed a lengthy draft Article 17 on the 'Power to formulate and withdraw reservations'. Paragraph 5 stated:

However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.<sup>108</sup>

Waldock explained that this had been inserted 'to cover a point to which attention is drawn in paragraph 81 of the Summary of the Practice of the Secretary-General' (ST/LEG/7), where it is said:

If the agreement should be a constitution establishing an international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions.<sup>109</sup>

59. It is hardly surprising that Waldock raised the issue, because three years earlier the problem had arisen with respect to a reservation by India to the Convention on the Inter-Governmental Maritime Consultative Organization. The Secretary-General of the United Nations, who was depositary of the Convention, communicated the text of the Indian reservation to the Organization. It had actually been formulated on the opening day of the first session of the General Assembly of the Inter-Governmental Maritime Consultative Organization. The Secretary-General suggested that the Secretariat refer the matter 'for decision' by its General Assembly. When challenged about the procedure, the Secretary-General said that the practice was consistent with the provisions of the Convention in question, with precedents applicable to deposit when an organ is able to pronounce on a reservation, and the views expressed on the subject by the General Assembly in earlier debates about reservations to multilateral treaties.<sup>110</sup> The Secretary-General said that in previous cases reservations had been formulated to multilateral treaties in force that were the constitutions of organizations or that created deliberative bodies, and that he had always considered that the matter should be referred to the organ empowered to interpret the treaty in question.<sup>111</sup> Examples that he gave included the reference to the World Health

<sup>108</sup> *YILC*, 1962, vol. II, p 61.

<sup>109</sup> *Ibid.*, para. 12 of the commentary on draft Art. 17, p 66.

<sup>110</sup> 'Reservations to Multilateral Treaties: Convention creating the Inter-Governmental Maritime Consultative Organization', *A/4235*, para. 18. See also O. Schachter, 'The Question of Treaty Reservations at the 1959 General Assembly', *AJIL*, 1960, vol. 54, p 372.

<sup>111</sup> *A/4235*, para. 21.



Assembly of the 1948 reservation by the United States to the Constitution of the World Health Organization<sup>112</sup> and the 1949 reservations of the South African Custom Union to the General Agreement on Tariffs and Trade.<sup>113</sup> In the 1997 Summary of Practice, the Secretary-General gave as another example of consistent practice in this area:

when Germany and the United Kingdom accepted the Agreement establishing the African Development Bank of 17 May 1979, as amended, they made reservations which had not been contemplated in the Agreement. The Secretary-General, as depositary, duly communicated the reservations to the Bank and accepted the deposit of the instruments only after the Bank had informed him that it had accepted the reservations.<sup>114</sup>

60. Despite the silence of Article 23 on this point, the ILC specified, in the second paragraph of guideline 2.1.5 entitled 'Communication of reservations', adopted in 2002: 'A reservation to a treaty in force which is the constituent instrument of an international organization or to a treaty which creates an organ that has the capacity to accept a reservation must also be communicated to such organization or organ'.<sup>115</sup>

61. At the same time, as the word 'also' indicates, the Commission clearly signalled that the reservation must be communicated not only to the organization itself but also to the member States. The accompanying commentary explains this as follows:

Two arguments are advanced in support of this position. The first is that it is by no means evident that an organization's acceptance of the reservation precludes member States (and international organizations) from objecting to it... Secondly, there is a good practical argument to support this affirmative reply: even if the reservation is communicated to the organization itself, it is in fact its own member States (or international organizations) that will decide. It is therefore important for them to be aware of the reservation. A two-step procedure is a waste of time.<sup>116</sup>

### *Modalities of communication of reservations, express acceptance, and objection*

#### **Procedure for communication of reservations**

62. Article 23(1) requires the communication of reservations to certain recipients, albeit somewhat enigmatically, but it does not identify the person who is responsible for such communication. In most cases, this will be the depositary, a conclusion that also results from Article 78 of the Convention, which provides some indications on the modalities of the communication and its effects. However, according to both Article 77 and the general scheme of the Convention governing reservations, the role of the depositary is strictly confined, essentially to that of a transmission belt between the author of the reservation and the States to which it must be communicated.

<sup>112</sup> See also O. Schachter, 'Development of International Law through the Legal Opinions of the United Nations Secretariat', *BYBIL*, 1948, vol. 24, p 124.

<sup>113</sup> *A/4235*, para. 22.

<sup>114</sup> *Supra* n 63, p 59, para. 198 (references omitted). For another example, concerning France's reservation to the Agreement of 12 August 1977 for the creation of the Asia-Pacific Institute for Broadcasting Development, see F. Horn, *supra* n 33, pp 346-7.

<sup>115</sup> *YILC*, 2002, vol. II, Part Two, p 47. The reference to 'an organ that has the capacity to accept a reservation' recalls Waldock's allusion to 'deliberative organs' in the Summary of Practice (see *supra* para. 5) and which probably contemplated the GATT. In its commentary on this provision, the Commission said:

It would seem justifiable to apply this same rule to reservations to constituent instruments *stricto sensu* and to reservations to treaties creating oversight bodies that assist in the application of the treaty whose status as international organizations might be subject to challenge. (*ibid*, p 38, para. 28 of the commentary on guideline 2.1.5)

<sup>116</sup> *Ibid*, p 38, para. 31 of the commentary on guideline 2.1.5.

63. As early as 1951, the ILC considered that the depositary was required 'to communicate the text of any reservation to the Governments of all States on whose behalf the Convention has been signed or who are parties or entitled to become parties to the Convention'.<sup>117</sup> In his Fourth Report, in 1965, Waldock specified the communication of reservations 'by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty'.<sup>118</sup> This language was not retained by the Commission, which preferred to consolidate all the rules relevant to notification and communication in a single provision, which became Article 78 of the Convention.<sup>119</sup> It expressly requires the depositary, if there is one, to receive all notifications and communications relating to the treaty (para. (a)). Moreover, in accordance with Article 77, the depositary is assigned to inform 'the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty'.

64. Obviously, the communication of reservations, express acceptance, and objection are those 'relating to the treaty'. In its 1966 draft, the ILC expressly required the depositary to examine 'whether a signature, an instrument *or a reservation* is in conformity with the provisions of the treaty and of the present articles'.<sup>120</sup> The expression was replaced at Vienna with more general language: 'the signature or any instrument, notification or communication relating to the treaty',<sup>121</sup> although this does not imply the exclusion of reservations from the scope of this provision.<sup>122</sup> It is therefore beyond question that where there is a depositary, it is the initial recipient of communications by States concerning reservations. The depositary bears the responsibility to notify other interested States.

65. In its 1966 commentary the ILC 'underline[d] the obvious desirability of the prompt performance of this function by a depositary'.<sup>123</sup> It is an important issue, because the reservation, express acceptance, and objection do not produce legal effects until they are received by the States to whom they are destined, rather than from the date of their formulation. If the communication is made directly by the author of the declaration, it is obvious that it has the responsibility for its prompt transmission. However, if there is a depositary, it must act with diligence, failing which the system breaks down: the reservation is without effect, and the State to whom it is destined may not react.<sup>124</sup>

<sup>117</sup> See *supra* para. 48.

<sup>118</sup> *YILC*, 1965, vol. II, p 56. In observations on draft Art. 22 adopted on first reading, Israel had suggested that reservations should be notified to the depositary (see *YILC*, 1966, vol. II, p 336, para. 14).

<sup>119</sup> See *supra* para. 5.

<sup>120</sup> *YILC*, 1966, vol. II, p 293, draft Art. 72(1)(d), emphasis added.

<sup>121</sup> Article 77(1)(d). The new language came from an amendment proposed by the Byelorussian SSR, adopted by the Plenary Committee by a majority of 32 to 24, with 27 abstentions (Official Records of the United Nations Conference on the Law of Treaties, 1st and 2nd sessions (Documents of the Conference), paras 657(iv) and 660(i)).

<sup>122</sup> As the ILC explained in the commentary on draft Art. 73 (which became Art. 78 of the 1969 Convention), the rule set out in para. (a) of this provision 'relates essentially to notifications and communications relating to the "life" of the treaty—acts establishing consent, *reservations*, objections, notices regarding invalidity, termination, etc.' (*YILC*, 1966, vol. II, p 270, para. 2, emphasis added).

<sup>123</sup> *YILC*, 1966, vol. II, para. 5, p 270.

<sup>124</sup> See the commentary on draft Art. 72 in the 1966 ILC Report (*YILC*, 1966, vol. II, pp 170–1, paras 3–6). See also T. O. Elias, *The Modern Law of Treaties* (Leiden: Sijthoff; Dobbs Ferry: Oceana, 1974), pp 216–17.

66. The ILC and its Special Rapporteur on reservations to treaties have collected information from the major international organizations that are depositaries of treaties<sup>125</sup> which shows that with modern methods of communication (fax and email in particular) the lapse of time involved in communication is extremely brief, varying between 24 hours and a few weeks.<sup>126</sup>

67. Based upon these observations, in 2002 the Commission adopted its guideline 2.1.6 (Procedure for communication of reservations), which was revised in 2008 and now reads as follows:

Unless otherwise provided in the treaty or agreed by the contracting States and contracting international organizations, a communication relating to a reservation to a treaty shall be transmitted:

- (i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting international organizations and other States and international organizations entitled to become parties to the treaty; or
- (ii) If there is a depositary, to the latter, which shall notify the States and international organizations for which it is intended as soon as possible.

A communication relating to a reservation shall be considered as having been made with regard to a State or an organization only upon receipt by that State or organization.

Where a communication relating to a reservation to a treaty is made by electronic mail or by facsimile, it must be confirmed by diplomatic note or depositary notification. In such a case the communication is considered as having been made at the date of the electronic mail or the facsimile.

68. These provisions apply to 'Communication of reservations' as a whole, and may also cover express acceptance and objection. They are based upon Articles 77 and 78 of the Vienna Convention, reflect established practice, and may be viewed as pure codification, subject perhaps to some hesitation with respect to the role of transmission by facsimile and electronic mail.<sup>127</sup>

### Functions of the depositary

69. However, this is not the case with respect to the positions taken by the ILC concerning the procedure to be followed in the case of reservations that are manifestly forbidden, a matter that belongs to progressive development of the law rather than codification.

70. The general provisions concerning the international character of the functions of the depositary and the obligation to act impartially, which are found in Article 76(2), obviously apply with respect to reservations. This has a concrete application in Article 77(2), which treats the depositary as a 'letter box' that remains entirely neutral with respect to the various difficulties that may arise concerning a State party or a signatory.

71. These provisions are of particular importance with respect to reservations, because it is as a result of problems that arose with certain reservations that considerable limitations were imposed upon the functions of the depositary.

72. As early as 1927, when problems arose with respect to reservations that Austria intended to subject to its deferred signature of the International Opium Convention of

<sup>125</sup> The United Nations, the International Meteorological Association, the Council of Europe, and the Organization of American States.

<sup>126</sup> See the commentary on guideline 2.1.6 of the Guide to Practice, *YILC*, 2002, vol. II, Part Two, pp 40–1, paras 14–17.

<sup>127</sup> See the commentary on this provision (*ibid*, pp 39–42).

19 February 1925, the Council of the League of Nations adopted a resolution endorsing the conclusions of a Committee of Experts<sup>128</sup> and giving instructions to the Secretary-General of the League on what conduct to adopt.<sup>129</sup> But it is in the context of the United Nations that the most serious problems have arisen.

73. The main stages in the evolution of the role of the Secretary-General as depositary in respect of reservations should be recalled:<sup>130</sup> initially, the Secretary-General seemed to determine alone his own rules of conduct in this area,<sup>131</sup> subjecting the admissibility of reservations to the unanimous acceptance of the contracting parties or the international organization whose constituent instrument was involved.<sup>132</sup> Following the Advisory Opinion of the International Court of Justice (ICJ) of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>133</sup> the General Assembly adopted its first resolution calling on the Secretary-General in respect of future conventions:

- (i) To continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
- (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.<sup>134</sup>

These guidelines were extended to all treaties for which the Secretary-General assumes depositary functions under Resolution 1452 B (XIV) of 7 December 1959, adopted as a result of the problems related to the reservations formulated by India to the constituent instrument of the International Maritime Consultative Organization (IMCO).<sup>135</sup>

74. This is the practice followed since then by the Secretary-General of the United Nations and, apparently, by all international organizations (or the heads of the secretariats of international organizations) with regard to reservations where the treaty in question does not contain a reservations clause.<sup>136</sup> And this is the practice that the ILC drew on in formulating the rules to be applied by the depositary in this area, tending to impose increasing limits on its powers.<sup>137</sup> They were further restricted by the Vienna Convention to simple review of the form of communications regarding the treaty, including reservations and objections.<sup>138</sup>

75. As the ICJ noted in its 1951 Advisory Opinion, 'the task of the Secretary-General would be simplified and would be confined to receiving reservations and objections and

<sup>128</sup> See the report of the Committee, composed of Messrs Fromageot, McNair, and Diéna, in *JOSdN*, 1927, p 881.

<sup>129</sup> Resolution of 17 June 1927. See also Res. XXIX of the Eighth Conference of American States (Lima 1938), which established the rules to be followed by the Pan American Union with regard to reservations.

<sup>130</sup> See also, eg, Pierre-Henri Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités—Réflexions sur la pratique suivie par le Secrétaire général des Nations Unies dans l'exercice de ses fonctions de dépositaire', *AFDI*, 1980, pp 528–9, or Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge: Cambridge University Press, 1987), pp 429–34.

<sup>131</sup> Jacques Dehaussy, 'Le dépositaire de traités', *RGDIP*, 1952, p 514.

<sup>132</sup> See the Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties, *supra* n 63, pp 50–1, paras 168–71.

<sup>133</sup> *ICJ Reports 1951*, p 15.

<sup>134</sup> Resolution 598 (VI) of 12 January 1952, para. 3(b).

<sup>135</sup> See *supra* para. 59.

<sup>136</sup> See the Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties, *supra* n 63, pp 60–1, paras 168–71.

<sup>137</sup> Compare draft Art. 29(5), adopted on first reading in 1962 (*YILC*, 1962, vol. II, p 185) and draft Art. 72(1)(d) (*YILC*, 1966, vol. II, p 293) and the commentary on this provision (*ibid*, pp 293–4).

<sup>138</sup> See Art. 77(1)(d).

notifying them'.<sup>139</sup> This may be regarded as a positive innovation, or perhaps clarification of the modern law of treaties, especially of reservations to multilateral treaties, and is likely to reduce or at least limit the "dispute" element of unacceptable reservations.<sup>140</sup> But bearing in mind the practice of the Secretary-General and its consolidation in the 1969 Convention, this might also be viewed as a system that is unnecessarily complex,<sup>141</sup> to the extent that the depositary is no longer able to impose even a degree of coherence and consistency in the interpretation and implementation of reservations.<sup>142</sup>

76. Guideline 2.1.7, which was included in 2002 in the Guide to Practice by the ILC, does not challenge these principles and confines itself essentially to formulating the general rules of Article 76(1)(d) and (2) of the 1986 Convention, applying them specifically to reservations:<sup>143</sup>

#### 2.1.7 Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form and, where appropriate, bring the matter to the attention of the State or international organization concerned.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

- (a) The signatory States and organizations and the contracting States and contracting organizations; or
- (b) Where appropriate, the competent organ of the international organization concerned.

77. But the ILC decided to go beyond this prudent approach, although not without hesitation, as can be gleaned from its reports to the General Assembly.<sup>144</sup> It adopted guideline 2.1.8 which reads as follows:

#### 2.1.8 Procedure in case of manifestly invalid reservations

Where, 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.

If the author of the reservation maintains the reservation, the depositary shall communicate the text of the reservation to the signatory States and international organizations and to the contracting States and international organizations and, where appropriate, the competent organ of the international organization concerned, indicating the nature of legal problems raised by the reservation.<sup>145</sup>

<sup>139</sup> *ICJ Reports 1951*, p 27.

<sup>140</sup> S. Rosenne, *supra* n 130, pp 435–6.

<sup>141</sup> P. H. Imbert, *supra* n 130, p 534. The writer speaks only of the practice of the Secretary-General, and seems to consider that the Vienna Convention simplifies the issues, a questionable conclusion.

<sup>142</sup> The depositary may play a not insignificant role in the 'reservation dialogue' by bringing together, where appropriate, the conflicting views of the reserving State and the State or States that object to the reservation. See H. Han, 'The UN Secretary General's Treaty Depositary Function: Legal Implications', *Brooklyn J Int'l L*, 1988, vol. 14 pp 570, 571.

<sup>143</sup> Corresponding perfectly to Art. 77 of the Vienna Convention of 1969, subject only to the mention of international organizations.

<sup>144</sup> See the 2001 report, *YILC*, 2001, vol. II, Part Two, p 18, para. 25 and the commentary on guideline 2.1.8 in its 2002 report, *YILC*, 2002, vol. II, Part Two, pp 45–6.

<sup>145</sup> This version was adopted in 2006 in order to replace the word 'impermissible' which had been placed in square brackets until the Commission would have reconsidered the appropriate terminology (see para. 7) of the commentary on the 2002 draft, *ibid*, p 114). The new text, with the adapted commentary, appears in the 2006 report, A/61/10, pp 359–61.

78. This is obviously a constructive innovation, because if the author of a reservation decides to maintain it, the normal procedure is followed. Nevertheless, it is a break with the tendency, which is reflected in the Vienna Convention, to limit the depositary to purely mechanical functions.

79. For their part, guidelines 2.6.9 (Procedure for the formulation of objections)<sup>146</sup> and 2.8.5 (Procedure for formulating express acceptance) respectively align *mutatis mutandis* those procedures on that applicable to reservations and, very logically, the ILC considered that the rules of procedure applicable to the formulation of a reservation apply *mutatis mutandis* to that of express acceptances.<sup>147</sup>

### C. Confirmation of reservations, acceptance, and objection

80. Article 23(2) deals with the question of confirmation of reservations, while Article 23(3) concerns express acceptance and objection, formulated or made before<sup>148</sup> the reserving State has expressed its consent to be bound by the treaty. In the case of a reservation, it must be confirmed by the reserving State when expressing its consent to be bound by the treaty. This formality is not required in the case of express acceptance and objection.

#### A necessary formality (reservations)

81. Both the definition of reservations in Article 2(1)(d) and Article 19 of the 1969 Vienna Convention make it clear that a reservation must be formulated, in principle, at the time of signature, ratification, approval, or accession.<sup>149</sup> It is not unusual during negotiation of a treaty for a State to declare its intent to formulate a reservation. Moreover, in the case of treaties in solemn form, signature only manifests the agreement of the State with the text of the instrument and is not an expression of its willingness to be bound. In such cases, the reservation must be formally confirmed when it expresses its agreement to be bound, in accordance with Article 23(2).<sup>150</sup>

82. The text results from a remark in the First Report by Sir Humphrey Waldock: ‘The present draft takes the line that the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained.’<sup>151</sup> The Special Rapporteur acknowledged candidly: ‘Clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all’.<sup>152</sup>

83. The Commission accepted the idea contained in draft Article 18(2), which was adopted on first reading in 1962. The commentary is of interest, because it explains concisely the rationale for the rule, while at the same time hinting at some discontent with

<sup>146</sup> For the text and the commentary on guideline 2.6.9, see *ibid.*, pp 198–203.

<sup>147</sup> For the text and the commentary on guideline 2.8.5, see *ibid.*, p 236.

<sup>148</sup> On the distinction between the two terms, see the commentary on Art. 21 in this work.

<sup>149</sup> See *supra* paras 21–6.

<sup>150</sup> The material that follows is largely based on the Fifth Report by Special Rapporteur Alain Pellet of the ILC on reservations to treaties, A/CN.4/508/Add.3, paras 235–78 (*YILC*, 2000, vol. II, Part One). They were incorporated in large part into the commentaries adopted by the Commission to its guidelines 2.1.2, 2.2.1–2.2.3, 2.4.4, and 2.4.5 of the Guide to Practice (see the reports of the ILC to the General Assembly for 2002, A/57/10, pp 67–8 (guideline 2.1.2) and *YILC*, 2001, vol. II, Part Two, pp 180–4 and 193–4.

<sup>151</sup> Draft Art. 17(3)(b), *YILC*, 1962, vol. II, p 60.

<sup>152</sup> *Ibid.*

the institution of reservations. It required the State to 'formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear'.<sup>153</sup> The text was simplified on second reading,<sup>154</sup> but the requirement that the reservation be confirmed was retained. Interesting comments were made on the 'status' of a reservation formulated upon signature and while awaiting ratification.<sup>155</sup> At the time, the Special Rapporteur insisted that rules concerning acceptance of reservations should only apply once the reservation was confirmed, 'otherwise, it might be difficult to frame a rule governing the case of tacit consent'.<sup>156</sup>

84. The only difference between draft Article 18(2) as finally adopted<sup>157</sup> and the text of Article 23(2) of the Convention is the reference to reservations 'formulated on the occasion of the adoption of the Text', which was dropped at the Vienna Conference under circumstances described as 'mysterious'.<sup>158</sup> The commentary on the provision repeats almost verbatim the 1962 text,<sup>159</sup> adding:

Paragraph 2 concerns reservations made [after the negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [Art. 20 in the Convention].<sup>160</sup>

85. Although there can hardly be any doubt that when Article 23(2) of the 1969 Convention was adopted, the text was rather more a matter of progressive development than codification,<sup>161</sup> today it seems safe to consider that the obligation of formal confirmation of reservations formulated at the time of signature of treaties in solemn form is now a rule of general international law. Crystallized in the 1969 Convention, confirmed in 1986, and endorsed in guideline 2.2.1 of the ILC's Guide to Practice,<sup>162</sup> it is followed in practice and seems consistent with *opinio necessitatis juris* such that it may be described as a customary norm.

86. In an *aide-mémoire* dated 1 July 1976, the Legal Counsel of the United Nations, describing the 'practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding . . . reservations and objections to reservations relating to treaties not containing provisions in that respect', relied on Article 23(2) of the 1969 Vienna Convention in concluding: 'If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have

<sup>153</sup> *YILC*, 1962, vol. II, p 186.

<sup>154</sup> See *supra* para. 19.

<sup>155</sup> See esp. the comments of Bartoš and Lachs, *YILC*, 1965, vol. I, 813rd meeting, pp 268–9.

<sup>156</sup> *Ibid*, p 269.

<sup>157</sup> *YILC*, 1966, vol. II, p 208.

<sup>158</sup> M. Ruda, 'Reservations to Treaties', *RCADI*, 1975, vol. 146, p 195.

<sup>159</sup> See *supra* para. 49.

<sup>160</sup> *YILC*, 1966, vol. II, p 208.

<sup>161</sup> See the First Report of Sir Humphrey Waldock, *supra* n 59, para. 82. Also D. W. Greig, 'Reservations: Equity as a Balancing Factor?', *Australian Yearbook of Int'l L*, 1995, p 28, and F. Horn, *supra* n 33, p 41.

<sup>162</sup> See *YILC*, 2001, vol. II, Part Two, p 180.

been withdrawn'.<sup>163</sup> In 1980, the Council of Europe modified its practice in this respect.<sup>164</sup> Article 23(2) has met with general approval from academic commentators<sup>165</sup> although this was not always the case.<sup>166</sup>

87. At the initiative of the Special Rapporteur,<sup>167</sup> when the ILC considered the question of confirmation of reservations, it also asked whether 'embryonic' reservations<sup>168</sup> formulated at the time of initialling and signature *ad referendum*, which are referred to in Article 10 of the Convention along with signature, as means of authenticating the text of a treaty, should also be confirmed in the same way as reservations to signature. Concerned about 'encouraging a growing number of statements which were intended to limit the scope of the text of the treaty, were formulated before the adoption of its text and were thus not in keeping with the definition of reservations', a majority of members of the Commission was opposed to including a guideline on the subject in the Guide to Practice.<sup>169</sup>

88. Nevertheless, the ILC provided three useful clarifications of the text of Article 23(2), even if these appear almost obvious.

89. First, in guideline 2.2.2, the Commission reached the conclusion, based on an *a contrario* reading of the text of the provision, that the obligation to confirm applies exclusively to reservations to treaties in solemn form, and not to agreements that enter into force by mere signature:<sup>170</sup>

#### 2.2.2 Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.<sup>171</sup>

90. Secondly, basing itself upon practice that was predominant but not constant at the time, the ILC considered, not without some hesitation, that confirmation is not required

<sup>163</sup> UNJY, 1976, p 211. In reality, non-confirmation of the reservation does not amount to withdrawal. See *infra* n 104. See also: M. M. Whiteman, *Digest of International Law*, 1970, vol. 14, pp 158 and 159. Curiously, the United Nations Secretary-General includes reservations formulated at the time of signature in the publication *Multilateral Treaties Deposited with the Secretary-General*, regardless of whether they have been confirmed, and even when the State has formulated other reservations at the time it expresses its consent to be bound definitively. See the examples provided in the commentary on guideline 2.2.1 of the ILC Guide to Practice, YILC, 2001, vol. II, Part Two, p 181, n 1107.

<sup>164</sup> See F. Horn, *supra* n 33, p 41; J. Polakiewicz, *supra* n 105, p 96.

<sup>165</sup> See D. W. Greig, *supra* n 161, p 28; P. H. Imbert, 'A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 285.

<sup>166</sup> See the authors cited by P. H. Imbert, *ibid*, pp 253–4.

<sup>167</sup> Alain Pellet, Fifth Report on Reservations to Treaties, 2000, A/CN.4/508/Add.3, paras 352–8.

<sup>168</sup> *Ibid*.

<sup>169</sup> Commentary on guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty), YILC, 2001, vol. II, Part Two, p 183, para. 17.

<sup>170</sup> On the distinction between treaties in solemn and in simplified form, see: C. Chayet, 'Les accords en forme simplifiée', *AFDI*, 1957, p 1; P. Daillier, M. Forteau, and A. Pellet, *supra* n 72, pp 157–60; P. F. Smets, *La conclusion des accords en forme simplifiée* (Brussels: Bruylant, 1969). The distinction is more common in academic literature of the *Romano-germanique* tradition than that of the common law, which generally refers to executive agreements, a concept that is not identical to that of agreements in simplified form (see G. J. Horvath, 'The Validity of Executive Agreements', *ÖZöRV*, 1979, pp 105–31). However, Sir Ian Sinclair (*The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984), p 41) and I. Brownlie (*Principles of Public International Law* (7th edn, Oxford: Oxford University Press, 2008), p 611) refer to the concept of 'agreements' or 'treaties in simplified form'.

<sup>171</sup> YILC, 2001, vol. II, Part Two, p 183.



where a reservation is formulated at the time of signature of a treaty that expressly allows reservations to be made at this stage.<sup>172</sup>

91. Finally, basing itself on the adverb 'formally' in Article 23(2), the Commission said that '[f]ormal confirmation of a reservation must be made in writing'.<sup>173</sup> This requirement reflects the same concerns as those that justify reservations themselves to be made in writing.<sup>174</sup>

### A superfluous formality (acceptance and objection)

92. The result is quite different for express acceptances (where this is necessary) and objections. According to Article 23(3), if these are made prior to confirmation of the reservation they do not themselves require confirmation.<sup>175</sup> An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation. This explains why, in contrast with paragraph 2 which uses the word 'formulated', paragraph 3 uses the word 'made'. Unlike reservations, acceptances and objections are sufficient in and of themselves, and require no other special condition.<sup>176</sup> If they are 'made' prior to the confirmation of the reservation, this presents itself as premature. The act is without effect as long as the reserving State has not confirmed its reservation. However, once the reservation is 'established',<sup>177</sup> the acceptance or objection produces its effects pursuant to Article 20 of the Vienna Convention.

93. However, although it was presented at that time as *lex ferenda*,<sup>178</sup> this is a commonsense rule. Formulation of a reservation concerns all contracting States or those that may become contracting States. Acceptance and objection are a matter for the bilateral relations between the reserving State and the State that accepts or objects. The reservation is an 'offer' addressed to the contracting States as a whole, and they may accept or refuse it. The reserving State imperils the integrity of the treaty, threatening to reduce it to a series of bilateral relationships. Whether acceptance or objection takes place before or after confirmation of the reservation has no significance. What is important is that the reserving State be aware of the intent of its partners.<sup>179</sup> This is the case as long as the latter respect the rules of notification in paragraph 1.

94. The rule in Article 23(3) only appeared in the final stages of the work of the ILC, in draft Article 18(3), adopted on second reading in 1966.<sup>180</sup> It was without explanation or illustration, and was plainly presented as *lex ferenda*.<sup>181</sup> It only referred to objections,

<sup>172</sup> See guideline 2.2.3 and the commentary, *ibid.*, pp 183–4.

<sup>173</sup> Guideline 2.1.2, 'Form of formal confirmation'. See the Report of the ILC to the General Assembly, *YILC*, 2002, vol. II, Part Two, pp 29–30.

<sup>174</sup> See *supra* para. 16.

<sup>175</sup> For another view—although a mere affirmation, made *en passant*—see the position taken by Tunkin during the debates in the ILC, *YILC*, 1965, vol. I, 799th meeting, 10 June 1965, p 167, para. 38.

<sup>176</sup> See the commentary on Art. 21(1) *supra*.

<sup>177</sup> *Ibid.*

<sup>178</sup> 'The Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event' (*ibid.*, para. 5 of the commentary).

<sup>179</sup> In its Advisory Opinion of 28 May 1951, the ICJ described an objection made by a signatory State as a 'notice' given to the reserving State (*ICJ Reports 1951*, p 29).

<sup>180</sup> *YILC*, 1966, vol. II, p 208. That rule was mentioned neither in the draft adopted in 1962, nor in the proposals by Waldock in his Fourth Report (1965), his last report dealing with reservations.

<sup>181</sup> '[T]he Commission did not consider that an objection to a reservation made previously to the latter's confirmation would need to be reiterated after that event' (*ibid.*, para. 5 of the commentary).

the mention of express acceptance being added at the Vienna Conference following proposals from Hungary and Ceylon,<sup>182</sup> probably driven by a desire for parallelism with Article 23(1).<sup>183</sup>

95. State practice concerning confirmation of objections is sparse and uncertain. The provision contained in Article 23, paragraph 3 of the 1969 Vienna Convention was included only at a very late stage of the drafting history of the Convention. It was only in 1966 that the non-requirement of confirmation of an objection was expressed in draft Article 18, paragraph 3, adopted on second reading in 1966,<sup>184</sup> without explanation or illustration.

96. Sometimes, States confirm earlier objections with the reserving State once the latter has confirmed its reservation, but sometimes they do nothing.<sup>185</sup> Aside from the fact that the second approach seems to be more common, the existence of confirmations does not negate the validity of the rule set out in Article 23(3). Rather, such confirmations are made out of caution, and not because they indicate the belief that there is any legal obligation (*opinio juris*).

97. One problem was overlooked during the preparatory work. It results from Article 20(4)(b) of the Vienna Convention, which requires that an objection to a reservation be made by a contracting State.<sup>186</sup> This restriction should not be taken as an invitation to States to make objections. It means simply that only an objection made by a State that has agreed to be bound by the treaty may have legal effect.<sup>187</sup> Under these conditions, it would have been useful to provide that an earlier objection be confirmed when a State indicates its consent to be bound. A proposal along these lines made at the Vienna Conference by Poland<sup>188</sup> was not considered, and there is a gap in the Convention.<sup>189</sup>

98. In its Advisory Opinion of 1951 on reservations to the Genocide Convention, the ICJ wrote:

Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification... The reserving State would be given notice that as soon as the constitutional

<sup>182</sup> See Official Records of the United Nations Conference on the Law of Treaties, 1st and 2nd sessions (Documents of the Conference), 23rd meeting, 11 April 1968, paras 31 (Hungary—A/CONF.39/C.1/L.138) and 37 (Ceylon—A/CONF.39/C.1/L.151), and 70th meeting, 14 May 1968, para. 26.

<sup>183</sup> Nevertheless, no change was made to the text during the drafting of the 1986 Convention (see *infra* commentary on Art. 23 of the 1986 Convention, para. 23).

<sup>184</sup> *YILC*, 1966, vol. II, p 208.

<sup>185</sup> eg Australia and Ecuador did not confirm the objections that they formulated to reservations made upon signature of the 1948 Genocide Convention by Byelorussia, Ukraine, Czechoslovakia, and the Soviet Union when these States confirmed their reservations at the time of ratification. Similarly, Ireland and Portugal did not confirm objections made to a reservation formulated by Turkey upon signature of the Convention on the Rights of the Child when the reservation was confirmed upon ratification. However, Sweden confirmed its objection to a reservation by Qatar to the Convention on the Rights of the Child; Sweden had objected to the reservation made upon signature, and acted again when the reservation was confirmed upon ratification.

<sup>186</sup> See the commentary on this provision in this work, *supra*.

<sup>187</sup> P. H. Imbert, 'A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 150.

<sup>188</sup> A/CONF.39/6/Add.1, p 19.

<sup>189</sup> See F. Horn, *supra* n 33, p 137.

or other processes, which cause the lapse of time before ratification, have been completed, it would be confronted with a valid objection which carries full legal effect.<sup>190</sup>

The Court seemed to admit that the effectiveness of the objection was automatic as a simple result of ratification, without confirmation being necessary.<sup>191</sup> It did not take a formal position on the point.

99. There is almost no practice in this area,<sup>192</sup> and the 1969 Convention is silent. In its 1951 Advisory Opinion, the ICJ seemed to take the view that objections made by non-party States do not require confirmation.<sup>193</sup> Moreover:

It is possible... to deduce from the omission from the text of the Vienna Conventions of any requirement that an objection made by a State or an international organization prior to ratification or approval should be confirmed that neither the members of the Commission nor the delegates at the Vienna Conference<sup>194</sup> considered that such a confirmation was necessary. The fact that the Polish amendment,<sup>195</sup> which aimed to bring objections in line with reservations in that respect, was not adopted further confirms this argument.<sup>196</sup>

For these reasons and others,<sup>197</sup> the ILC adopted, in 2008, guideline 2.6.12 providing that there is no need for confirmation of an objection formulated prior to the expression of consent to be bound by a treaty, except in the case when the objecting State or international organization had not signed the treaty when it had formulated the objection.

## D. Form and procedure for withdrawal of reservations and objections

### Form of withdrawal

100. Article 23(4) specifies that withdrawal of a reservation or of an objection<sup>198</sup> 'must be formulated in writing'. The provision should be read together with Article 22, which deals more generally with 'Withdrawal of reservations and of objections to reservations'. The separation of the two is arbitrary, and Article 23(4) logically belongs with Article 22.<sup>199</sup>

<sup>190</sup> *ICJ Reports 1951*, pp 28–9.

<sup>191</sup> F. Horn, *supra* n 33, p 137.

<sup>192</sup> See however the 'observation' of 26 May 1971, made with respect to a reservation formulated by Syria to the Vienna Convention itself. The United States, which is not a party to the Convention, considered the reservation to be contrary to the object and purpose of the Convention and indicated that it 'intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection to the foregoing reservation'. The United States made a similar statement with respect to Tunisia.

<sup>193</sup> See *ICJ Reports 1951*, pp 28–9.

<sup>194</sup> See in this sense F. Horn, *supra* n 33, p 137.

<sup>195</sup> See Mimeograph A/CONF.39/6/Add.1, p 18.

<sup>196</sup> Commentary on guideline 2.6.12, para. 4, *ILC Reports 2008*, A/63/10, p 209.

<sup>197</sup> See the whole commentary on guideline 2.6.12, *ibid*, pp 208–13.

<sup>198</sup> Withdrawal of an objection is extremely rare. See P. H. Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 293; F. Horn, *supra* n 33, pp 226–8 (with some examples); L. Migliorino, 'La revoca di riserve e di obiezioni a riserve', *RDI*, 1994, p 328; L. Lijnzaad, *supra* n 33, p 50.

<sup>199</sup> The decision was taken quite late in the proceedings of the Vienna Convention, on 19 May 1969. See Official Records of the United Nations Conference on the Law of Treaties, 1st and 2nd sessions (Documents of the Conference), paras 10–13. See also J. M. Ruda, *supra* n 158, p 194, for a brief overview of the preparatory work; L. Migliorino, *supra* n 198, p 319.

101. During the preparatory work of the Convention, the two provisions were considered in parallel as a general rule.<sup>200</sup> The requirement of written form, although conceived somewhat differently, was already present at the first phase of draft Article 40(3), proposed in 1956 by Sir Gerald Fitzmaurice: 'A reservation... may be withdrawn by formal notice at any time.'<sup>201</sup> Waldock returned to the idea in draft Article 17(6), which appeared in his First Report, in 1962: 'Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.'<sup>202</sup> Draft Article 19(5) applied the same approach to objections.<sup>203</sup>

102. Article 22 of the draft adopted on first reading by the ILC in 1962 took the same approach, but more indirectly, by providing that withdrawal of a reservation 'takes effect when notice of it has been received by the other States concerned',<sup>204</sup> the word 'notice' implying that this be in writing. On second reading, any allusion to written form had disappeared, both in draft Article 18 on 'Procedure regarding reservations' and draft Article 20 on withdrawal of reservations. Only during the Vienna Conference was paragraph 4 added to Article 23, pursuant to amendments proposed by various States<sup>205</sup> with a view to making the provision consistent with Article 22.<sup>206</sup> Although K. Yasseen considered this to be a useless additional condition for a procedure that 'should be facilitated as much as possible',<sup>207</sup> the principle was adopted by 98 to 0.<sup>208</sup> The provision was reproduced without change in the 1986 Vienna Convention.<sup>209</sup>

103. Unquestionably, the procedure for withdrawal 'should be facilitated as much as possible'.<sup>210</sup> However, the small burden imposed by the requirement of written form should not be exaggerated. Furthermore, even if parallelism is not an absolute principle in international law,<sup>211</sup> it would be incongruous that a reservation or an objection that must necessarily be in writing<sup>212</sup> could be withdrawn orally. This could lead to considerable uncertainty for other contracting States, who would have received the written text of the reservation but might not have been informed of its withdrawal.<sup>213</sup>

104. Examining the issue of the form and procedure for withdrawal of reservations within the framework of the topic 'Reservations on treaties', the ILC considered whether

<sup>200</sup> See the commentary on Art. 22 in this work, paras 7–15.

<sup>201</sup> *YILC*, 1956, vol. II, p 116.

<sup>202</sup> *YILC*, 1962, vol. II, p 61.

<sup>203</sup> *Ibid*, p 62.

<sup>204</sup> *Ibid*, p 181. The 1962 draft did not mention withdrawal of objections. On the effective date of withdrawal of a reservation, see the commentary on Art. 22 in this work, paras 29–42.

<sup>205</sup> See the amendments proposed by Austria and Finland (A/CONF.39/C.1/L.4 and Add.1), Hungary (A/CONF.39/C.1/L.178 and A/CONF.39/L.17), and the United States (A/CONF.39/C.1/L.171), reproduced in Official Records of the United Nations Conference on the Law of Treaties, 1st and 2nd sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference. See Documents of the Committee of the Whole, 25th plenary meeting, 16 April 1968, p 138.

<sup>206</sup> Explanation of Ms Bokor-Szegő (Hungary), Official Records, *ibid*, 11th plenary meeting, 30 April 1969, p 36, para. 13.

<sup>207</sup> *Ibid*, p 38, para. 39.

<sup>208</sup> *Ibid*, p 38, para. 41.

<sup>209</sup> See the commentary on this provision, *infra*.

<sup>210</sup> See *supra* para. 102.

<sup>211</sup> See *infra* para. 110.

<sup>212</sup> Article 23(1).

<sup>213</sup> J. M. Ruda, *supra* n 158, pp 195–6.

withdrawal of a reservation might be implied and result from circumstances other than formal withdrawal.<sup>214</sup>

105. Certainly, withdrawal of a reservation cannot be presumed,<sup>215</sup> but the question nevertheless arises as to whether certain acts or behaviour by a State should not be deemed as withdrawal of a reservation. For example, agreement by the same parties to a subsequent treaty with provisions identical to those in the treaty to which reservation was made might, in the absence of a reservation to the subsequent treaty, have the same effect as withdrawal of the initial reservation.<sup>216</sup> But that would involve a distinct instrument, and the obligation of the reserving State would be defined by that second instrument rather than withdrawal of the reservation to the former. If, for example, a third State were to become a party to the first treaty, the reservation would continue to produce its full effects in relations between that State and the reserving State.<sup>217</sup>

106. The ICJ considered the possibility that a reservation had been withdrawn in the absence of formal notification in writing to the depository of the treaty, in the case between the Democratic Republic of the Congo and Rwanda. Rwanda had formulated a reservation to Article IX of the Genocide Convention at the time of ratification, but had subsequently indicated its intent to withdraw the reservation and had even adopted legislation authorizing the withdrawal. The Court signalled the absence of any agreement by which a reservation could be withdrawn in the absence of notification to the depository.<sup>218</sup> According to the Court:

the adoption of that *décret-loi* and its publication in the Official Journal of the Rwandese Republic cannot in themselves amount to such notification. In order to have effect in international law, the withdrawal would have had to be the subject of a notice received at the international level.<sup>219</sup>

Furthermore:

it observes that this Convention is a multilateral treaty whose depository is the Secretary-General of the United Nations, and it considers that it was normally through the latter that Rwanda should have notified withdrawal of its reservation. Thus the Court notes that, although the Convention does not deal with the question of reservations, Article XVII thereof confers particular responsibilities on the United Nations Secretary-General in respect of notifications to States parties to the Convention or entitled to become parties; it is thus in principle through the medium of the Secretary-General that such States must be informed both of the making of a reservation to the Convention and of its withdrawal. Rwanda notified its reservation to Article IX of the Genocide Convention to the Secretary-General. However, the Court does not have any evidence that Rwanda notified the Secretary-General of the withdrawal of this reservation.<sup>220</sup>

<sup>214</sup> The material that follows is largely based on the Seventh Report by Alain Pellet to the ILC on reservations to treaties, *A/CN.4/526/Add.2*, paras 91–151 (*YILC*, 2002, vol. II, Part One). They were incorporated in large part into the commentaries adopted by the Commission on its guidelines 2.5.2–2.5.6 of the Guide to Practice (see the reports of the ILC to the General Assembly for 2003, *A/58/10*, pp 200–26).

<sup>215</sup> J. F. Flauss, 'Note sur le retrait par la France des réserves aux traités internationaux', *AFDI*, 1986, pp 357–8; *contra*: E. Tiberghien, *La protection des réfugiés en France* (Paris: Economica, 1984), pp 34–5 (cited by Flauss, *ibid*, p 858, fn 8).

<sup>216</sup> J. M. Ruda, *supra* n 158, p 196.

<sup>217</sup> Likewise, the non-confirmation of a reservation upon signature, when a State expresses its consent to be bound, cannot be interpreted as being a withdrawal of the reservation, which may well have been 'formulated' out, for lack of formal confirmation, has not been 'made' (see *supra* para. 92). *Contra*: P. H. Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 286.

<sup>218</sup> *Armed activities on the territory of the Congo (New application: 2002) (Democratic Republic of the Congo v Rwanda)*, *ICJ Reports 2006*, 3 February 2006, p 26, para. 42.

<sup>219</sup> *Ibid*.

<sup>220</sup> *Ibid*, p 26, para. 43.

The Court made no reference to Article 23 of the Vienna Convention in its ruling. The matter was not addressed in any of the dissenting or individual Opinions.

107. It seems impossible to conclude that an expired reservation has been withdrawn. There are cases where a clause in a treaty limits the duration of the validity of reservations.<sup>221</sup> But while withdrawal is a unilateral act, expiration is the consequence of the juridical event constituted by the lapse of a fixed period of time. The same can be said of reservations made for a pre-determined period.<sup>222</sup> The reservation ceases to be in force not because of a particular act by the reserving State but as a result of the terms of the text itself.

108. The case of what are called 'forgotten reservations'<sup>223</sup> is more troublesome. A reservation is 'forgotten', in particular, when it forms part of a provision of domestic law which has subsequently been amended by a new text that renders it obsolete. This situation, which generally results from the negligence of the relevant authorities or insufficient consultation between the relevant services, has its drawbacks. Indeed, it can lead to legal chaos, particularly in States with a tradition of legal monism. Judges are expected to apply treaties (taking into account any reservations) that have been properly ratified. They take precedence over domestic legislation, even if it is posterior.<sup>224</sup> The result can be a paradox, where a State that has brought its domestic law into conformity with a treaty may see the treaty itself prevail, minus the provisions subject to reservation, if the reservation itself has not been withdrawn properly. Moreover, since domestic laws are 'merely facts' from the standpoint of international law,<sup>225</sup> a reservation which has not been withdrawn, having been made at the international level, will continue, in principle, to be fully effective and the reserving State will continue to avail itself of the reservation with regard to the other parties, although such an attitude could be questionable in terms of the principle of good faith.

109. Although it did not consider that a 'forgotten reservation' amounted to withdrawal, the Commission was alive to the growing concerns of various organs charged with implementation and oversight of treaties, especially although not exclusively in the area of human rights.<sup>226</sup> During the presentation of periodic reports, human rights treaty bodies more or less systematically request States that have formulated reservations to

<sup>221</sup> See the examples provided by P. H. Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 287, fn 21; S. Spiliopoulou Kermaark, 'Reservation Clauses in Treaties Concluded Within the Council of Europe', *ICLQ*, 1999, vol. 48, pp 499–500 or by the ILC in the commentary on draft guideline 2.5.2 in its 2003 report to the General Assembly, A/58/10, p 205, fn 362.

<sup>222</sup> See *ibid*, p 205, para. 10 of the commentary and fn 364.

<sup>223</sup> J. F. Flauss, *supra* n 215, p 861; F. Horn, *supra* n 33, p 223. A reservation may also be 'forgotten' when a State omits to take into account a fundamental change in circumstances (including withdrawal of the reservation itself) with respect to withdrawal of an objection; see F. Horn, *ibid* and P. H. Imbert, 'À l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', *supra* n 130, p 293.

<sup>224</sup> eg Art. 55 of the French Constitution and the numerous constitutional provisions in francophone Africa that are inspired by it.

<sup>225</sup> PCIJ judgment of 25 May 1926, *German interests in Polish Upper Silesia*, Series A, no. 7, p 19.

<sup>226</sup> For recent examples: 'Rights of the child', A/RES/64/146, para. 3; 'Torture and other cruel, inhuman or degrading treatment or punishment', A/RES/64/153, para. 25; 'International Covenants on Human Rights', A/RES/64/152, para. 8. See also Res. 2000/26 of the Subcommission on the Promotion and Protection of Human Rights of 18 August 2000 (para. 1), the Declaration of the Committee of Ministers of the Council of Europe adopted on 10 December 1998 on the occasion of the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights and, more generally (in that it is not limited to human rights treaties), Parliamentary Assembly of the Council of Europe Recommendation 1223 (1993), para. 7, dated 1 October 1993.

review them and to consider their withdrawal.<sup>227</sup> Accordingly, in 2003 the ILC adopted guideline 2.5.3 recommending that States and international organizations periodically review the usefulness of reservations that they have formulated.<sup>228</sup>

### Procedure for withdrawal of reservations and objections

110. Although the purpose of adding paragraph 4 to Article 23 was to align the procedure for withdrawal of reservations and objections with that applicable to their formulation,<sup>229</sup> the Convention contains no express norm to this effect. The ILC has endeavoured to fill this gap in its Guide to Practice.

111. For this purpose, it has adopted three guidelines which reproduce, *mutatis mutandis*, the corresponding provisions of the guidelines relative to the procedure for the formulation of reservations, to the absence of consequences at the international level for the breach of relevant domestic rules, and to the communication of reservations.<sup>230</sup>

112. The transposition of norms pertaining to the formulation of reservations is not without posing some difficulties. It is not obvious that the rule of parallelism of form belongs to international law. Referring to draft Article 51 on the law of treaties concerning the end of a treaty or the withdrawal of consent of the parties, in 1966 the Commission considered that ‘this theory reflects the constitutional practice of particular States and not a rule of international law. In its opinion, international law does not accept the theory of the “*acte contraire*”’.<sup>231</sup> However, as Paul Reuter noted, the Commission ‘is really taking exception only to the formalist conception of international agreements: it feels that what one conceptual act has established, another can undo, even if the second takes a different form from the first. In fact, the Commission is really accepting a non-formalist conception of the theory of the *acte contraire*’.<sup>232</sup> According to the ILC:

This nuanced position surely can and should be applied to the issue of reservations: it is not essential that the procedure followed in withdrawing a reservation should be identical with that used for formulating it, particularly since a withdrawal is generally welcome. The withdrawal should, however, leave all the Contracting Parties in no doubt as to the will of the State or the

<sup>227</sup> eg ‘Concluding observations of the Human Rights Committee, Australia’, CCPR/C/AUS/CO/5, para. 9; ‘Concluding observations of the Human Rights Committee, Sweden’, CCPR/C/SWE/CO/6, para. 6; ‘Concluding observations of the Human Rights Committee, Netherlands’, CCPR/C/NLD/CO/4, para. 4; ‘Concluding observations of the Human Rights Committee, Switzerland’, CCPR/C/CHE/CO/3, para. 4.

<sup>228</sup> See the text and the commentary on the guideline in Report to the General Assembly, 2003, A/58/10, pp 207–9.

<sup>229</sup> See *supra* para. 50.

<sup>230</sup> Guidelines 2.5.4 (Formulation of the withdrawal of a reservation at the international level) which corresponds to guideline 2.1.3—see *supra* para. 38, 2.5.5 (Absence of consequences at the international level of the violation of internal rules regarding the withdrawal of reservations), corresponding to guideline 2.1.4—see *supra* para. 43, and 2.5.6 (Communication of withdrawal of a reservation) which refers to guidelines 2.1.5 and 2.1.6 (see the text and the commentaries on these provisions, A/58/10, pp 209–26).

<sup>231</sup> Paragraph 3 of the commentary on draft Art. 51, *YILC*, 1966, vol. II, p 249. See also the commentary on Art. 35, *ibid*, pp 231–5.

<sup>232</sup> *Supra* n 73, p 141, para. 211; see also Sir I. Sinclair, *supra* n 170, p 183. For a more flexible position on denunciation of a treaty, see: *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction of the Court, Judgment (2000), *ICJ Reports 2000*, p 12 at p 25, para. 28.

international organization which takes that step to renounce its reservation. It therefore seems reasonable to proceed on the basis of the idea that the procedure for withdrawing reservations should be modelled on the procedure for formulating them, although that may involve some adjustment and fine-tuning where appropriate.<sup>233</sup>

113. There is no real reason not to transpose these rules to the withdrawal of reservations. Their justification with respect to formulation of reservations also applies to their withdrawal. The reservation has altered the respective obligations of the reserving State and the other contracting parties. It must emanate from the same individuals or organs as those with the authority to engage the State at the international level. The same must therefore apply, *a fortiori*, to the withdrawal, which completes the commitment of the reserving State.

114. The Legal Counsel of the United Nations took a clear position in this respect in an opinion dated 11 July 1974.<sup>234</sup> He noted that:

on several occasions, there has been a tendency in the Secretary-General's depositary practice, with a view to a broader application of treaties, to receive in deposit withdrawals of reservations made in the form of notes verbales or letters from the Permanent Representative to the United Nations. It was considered that the Permanent Representative duly accredited with the United Nations and acting upon instructions from his Government, by virtue of his functions and without having to produce full powers, had been authorized to do so.<sup>235</sup>

115. Since then, the Secretary-General of the United Nations seems to have reconsidered his position, and no longer accepts notification of the withdrawal of reservations from permanent representatives accredited to the Organization. In the most recent edition of the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, the Treaty Section of the Office of Legal Affairs indicated that '[w]ithdrawal must be made in writing and under the signature of one of the three recognized authorities, since such withdrawal shall normally result, in substance, in a modification of the scope of the application of the treaty'.<sup>236</sup> On the other hand, publications of the Council of Europe indicate that reservations may be formulated and withdrawn by letters from permanent representatives accredited to the Organization.<sup>237</sup>

116. As for the procedure for communication of withdrawal of reservations, the practice of the Secretary-General of the United Nations and that of the Council of Europe are the same. They both follow the procedure applicable to the communication of reservations. They are the recipients of reservations formulated by States with respect to those treaties for which they are the depositary, and they communicate these to other States parties and those capable of becoming States parties.<sup>238</sup> Moreover, when express

<sup>233</sup> Commentary on guideline 2.5.4, Report to the General Assembly, 2003, A/58/10, pp 209–18.

<sup>234</sup> UNJY, 1974, pp 190–1.

<sup>235</sup> Ibid. This is also confirmed by an *aide-mémoire* of 1 July 1976: 'On this point, the Secretary-General's practice in some cases has been to accept the withdrawal of reservations simply by notification from the representative of the State concerned to the United Nations' (UNJY, 1976, p 211, fn 121). The same problem arises with respect to the formulation of reservations themselves. See *supra* para. 34.

<sup>236</sup> ST/LEG/7/Rev.1, p 63, para. 216.

<sup>237</sup> European Committee on Legal Co-operation (CDCJ), Reservations to CDCJ Conventions, notes from the Secretariat of the Directorate General of human rights and legal affairs, 30 March 1999, CDCJ (99), p 36.

<sup>238</sup> See the examples provided in the commentary on guideline 2.5.6 of the Guide to Practice, ILC Report to the General Assembly, 2003, A/58/10, p 223, fns 420 and 421.



conventional provisions deal with the procedure for withdrawal of reservations, they generally follow the model applicable to their formulation.<sup>239</sup> In its guideline 2.7.3, adopted in 2008, the ILC has stated that the rules applicable to the withdrawal of reservations 'are applicable *mutatis mutandis* to the withdrawal of objections to reservations'.<sup>240</sup>

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<sup>239</sup> For examples, see *ibid*, fns 422–4.

<sup>240</sup> See the text and the commentary on that guideline in ILC report 2008, A/63/10, pp 230–1.

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