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Alain Pellet

The ILC Guide to Practice on Reservations to Treaties
A General Presentation by the Special Rapporteur

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New York University School of Law
New York, NY 10011
USA

THE ILC GUIDE TO PRACTICE ON RESERVATIONS TO TREATIES
A GENERAL PRESENTATION BY THE SPECIAL RAPPORTEUR

By Alain Pellet[*]

Abstract

The purpose of this article is to revisit the protracted saga of the International Law Commission Guide to Practice on Reservations to Treaties, as the Special Rapporteur has lived it for nearly 18 years and 16 reports. In the first part, the article recounts the elaboration procedure, pointing in particular to the elements of innovation and flexibility introduced in the process. The principal innovation is the very type of instrument adopted, namely a Guide to practice, and not a set of draft articles that would eventually become a convention. In the second part, the main issues of significant interest for the ILC, as well as for other international bodies and the academic community, are briefly recalled: the question of the unity or diversity of regimes, the permissibility of reservations and the status of the author of an impermissible reservation have been among the most debated issues. Finally, the article explains the structure of the Guide to Practice.

[*] Professor, University Paris-Ouest, Nanterre-La Défense; former Chairperson, ILC; Associé de l'Institut de Droit international

On 11 August 2011, the International Law Commission (ILC) adopted a 630-pages document[1] entitled 'Guide to Practice on Reservations to Treaties'. This ILC product is doubly unusual:

- it contrasts by its size with the usual drafts adopted by the Commission which are normally self-sufficient and stand by themselves, independently of the commentaries adopted by the Commission,[2] while, in the present case, the ILC specified that 'the commentaries are an integral part of the Guide and an indispensable supplement to the guidelines';[3]

- it has been conceived from the origin as a non-binding instrument with no vocation to be transformed into a convention[4], and is presented as such from the outset.[5]

The present paper, the purpose of which is to introduce this very peculiar instrument, does not claim to scientific objectivity. The author has devoted a non-negligible part of his working time during eighteen years to preparing reports to the ILC on the topic of 'Reservations to Treaties' for which he was appointed the Special Rapporteur in 1994. These reports have been dissected, discussed and in part rebuffed by the Commission or its Drafting Committee. However, even though, in some cases, the Commission made what I consider to be mistakes and undermined the global consistency of the draft, I must admit that, globally, the end-product has been improved owing to the careful scrutiny of the reports by the Commission or, more precisely, by a handful of able interested colleagues whose input has been extremely positive, while the great majority

[1] Report of the ILC on the Work of its 63rd session, General Assembly, Official Records, 66th Session, Supplement n° 10, Addendum 1, doc. A/66/10/Add.1 – Hereinafter: 'Guide to Practice' or 'Guide'). Given its size and the necessity to have it translated into the sixth official languages of the General Assembly, it was only issued and posted on the Commission's Website in January 2012.
[2] The commentaries are nevertheless of an utmost importance to understand and interpret the ILC drafts, but they are not part of them and the drafts in question are, in principle, called to be transformed into conventions – which is not the case of the Guide.
[3] Guide, p. 34, para. (1).
[4] See below, sub-section *2. A Special Kind of Instrument*.
[5] Guide, p. 34, paras (2)-(5).

seem to have been discouraged by the austere and technical character of the topic[6] and some – one at least[7] – have been pure nuisances.

With this in mind, I will briefly describe the process which has led to the adoption of this instrument (I.) before succinctly presenting some of the main issues and the more or less fortunate solutions adopted by the Commission (II.).

I. THE PROCESS

The 1969 and 1986 Vienna Conventions on the Law of Treaties[8] devote six provisions to reservations: article 2(1)(d) gives a definition of reservations for the purpose of the

[6] Regrettable as this might be, a majority of the members of the ILC are very respectable individuals but are no more highly qualified international lawyers.

[7] A special mention must be made in this respect to the Chinese member, Mr Huikang Huang, whose intolerable and anti-scientific attitude threatened the completion of the study and the final adoption of the Guide during the very last days of the 63rd session (2011) – see in particular Provisional summary records of the 3121st meeting (9 August 2011, doc. A/CN.4/SR.3121 (http://untreaty.un.org/ilc//documentation/english/a_cn4_sr3121.pdf), pp. 13-14; 3122nd meeting, 9 August 2011 (http://untreaty.un.org/ilc//documentation/english/a_cn4_sr3122.pdf), pp. 12-13); 3123rd meeting, 10 August 2011, doc. A/CN.4/SR.3123 (http://untreaty.un.org/ilc//documentation/english/a_cn4_sr3123.pdf), pp. 16-19); or 3125th meeting, 11 August 2011, A/CN.4/SR.3125 (http://untreaty.un.org/ilc//documentation/english/a_cn4_sr3125.pdf), pp. 3 and 8-9).

conventions, and articles 19 to 23 provides general indications as to their legal regime. For its part, the 1978 Vienna Convention on Succession of States in Respect of Treaties confirms the 1969 definition[9] and limits itself to summary regulations concerning the rights and obligations of newly independent States in matters of reservations.

Given the difficult technical issues posed by reservations, their practical importance in the international legal life and the incomplete and sometimes obscure character of the rules embodied in the Vienna Conventions, it appeared, at the beginning of the 1990s that the topic of 'the law and practice relating to reservations to treaties' would be a good candidate for inclusion in the programme of work of the Commission as had been recommended by its Planning Group in 1992.[10] On this basis, the ILC decided to include the topic in its agenda in 1993[11] and, the following year, appointed its Special Rapporteur on the topic.[12]

With excessive confidence – or recklessness – I then declared that '[i]t does not seem unrealistic to think that the Commission would be in a position to adopt an initial set of draft articles, or a first draft to serve as a 'guide' (...), within three or four years of the subject being included on its agenda and the appointment of a Special Rapporteur'.[13] This was a genuine belief: I thought that I had been assigned a gentle little topic,

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[8] Vienna Convention on the Law of Treaties, 23 May 1969, and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986.
[9] See Art. 1(j).
[10] [1992] ILC YB, vol. II(2), p. 54, para. 368. The pretext invoked by the Working Group which was at the origin of this proposal was that 'various delegations' had suggested during the debates of the Sixth Committee of the General Assembly the previous year that it would be a possible topic (see Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the ILC during the 46th session of the General Assembly, doc. A/CN.4/L.469, para. 422); in reality, it seems that only one delegation (Sweden, in the name, it is true, of the Nordic countries) had made such a suggestion (General Assembly, 6th Committee, Summary Record of the 37th meeting, 13 November 1991, doc. A/C.6/46/SR.37, p. 14, para. 72); but the Commission was short of topics, the General Assembly obstinately made no request for new studies by the ILC and the topic met the criteria for codification and progressive development (see the working paper written by the present author; Outlines prepared by Members of the Commission on Selected Topics of International Law in ILC, reproduced in doc. A/CN.4/454, [1993] ILC YB, vol. II(1), pp. 228-237).
[11] See [1993] ILC YB, vol. II(2), pp. 96-97, paras. 427-430 and 440. This decision was approved by General Assembly resolution 48/31 of 9 December 1993 (para. 7).
[12] [1994] ILC YB, vol. II(2), p. 179, para. 381.
[13] [1993] ILC YB, vol. II(1), p. 335, para. 55; see also Second Report on Reservations to Treaties : 'The Special Rapporteur feels that, subject to unforeseen difficulties, the task can and should be carried out within four years' (doc. A/CN.4/477, [1996] ILC YB, vol. II(1), p. 51, para. 54).

technical in nature, which could be dealt with within a few years. I rapidly became disillusioned and realized that, as my illustrious predecessors had noted, 'the subject of reservations to multilateral treaties is one of unusual – in fact baffling – complexity and it would serve no useful purpose to simplify artificially an inherently complex problem'[14] or, to put it in Reuter's words: '[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna Convention may not have eliminated all these difficulties';[15] moreover, the topic brings with it an emotional charge at the political level which I had underestimated and which made things even more complicated.[16] Indeed, eighteen years seems – and is – too much and I have my share of responsibility in this excessive length; but the difficulty of the topic would certainly have excluded an acceptable outcome in the short period of time I had in mind when we started tackling the topic.

Besides its relative length,[17] the process which led to the adoption of the rather special instrument constituted by the Guide to Practice (2.) is relatively classical in that the ILC did not fundamentally move away from its usual practice (1.).

1. A Mainly Classical Process

Once on the agenda of the Commission, the topic was mostly dealt with in the usual way.

[14] Sir Hersch Lauterpacht, Report on the Law of Treaties, doc. A/CN.4/63, [1953] ILC YB, vol. II, p. 124.
[15] Mr Paul Reuter, Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, doc. A/CN.4/341 and Add.l, [1981] ILC YB, vol. II(1), p. 56, para. (53).
[16] The 'sharia reservations' is but the most striking example of this political sensitiveness of the subject. More generally, reservations to human rights conventions, although they are by no means special legally speaking, are the object of harsh doctrinal and ideological debates.
[17] The elaboration of other ILC drafts has lasted even longer. Thus the topic of Responsibility of States was put on the agenda of the Commission in 1949 and approved by the General Assembly in 1954 (GA Res. 799 (VIII), 7 December 1953) (not to speak of the LoN attempts) and the final Articles were adopted in 2001; similarly, the draft articles on International liability in case of loss from transboundary harm arising out of hazardous activities were adopted in 2006 after having been on the ILC agenda since 1973 (G.A. Res. 3071 (XXVIII), 30 November 1973).

The Special Rapporteur first prepared a 'Preliminary Report' in which, after having summarized the previous work of the Commission on reservations, he tackled two main topics: (1) the problems left in abeyance, and (2) the possible forms of the results of the work of the Commission on the topic.[18] This second point was somewhat unusual in that, normally, the Commission decides on the final form of its drafts at the very end of its work on a topic. However, in the present case, the Special Rapporteur urged for an early decision[19] and insisted on the specificity of the issue in relation with pre-existing treaty rules on the question. An early decision seemed necessary since you do not (or, at least should not[20]) draft a draft convention in the same way as you draft guidelines or recommendations.

In Chapter 1 of his preliminary report, the Special Rapporteur detailed the previous work of the Commission on reservations, on the occasion of each of the preparation of the three conventions on the law of treaties of 1969, 1978 and 1986.[21] The present paper is certainly not the appropriate place to summarize these rather lengthy developments; however, one thing was striking: the incredibly conservative approach of the Commission. While, the ICJ had promoted a creative methodology to deal with the validity of reservations inspired from the pre-war Pan-American practice,[22] the ILC – whose statutory functions are both 'the promotion of the progressive development of international law and its codification',[23] resisted for more than a decade to the adoption of the indispensable 'flexible principle'. It was not until Sir Humphrey Waldock's first

[18] Alain Pellet, First Report on the Law and Practice Relating to Reservations to Treaties, doc. A/CN.4/470, [1995] ILC YB, vol. II(1), pp. 151-155, paras. 150-179.
[19] Report of the ILC on the Work of its 47th Session, [1995] ILC YB, vol. II(2), p. 103, para. 435.
[20] And this is why I tend to disapprove the usual practice of the Commission to wait until the last minute to decide on the form of its drafts. Concerning the Guide to Practice, the early decision taken on this point had important consequences on the substance of the guidelines.
[21] See First Report on Reservations to Treaties, supra fn. 18, pp. 126-141, paras. 8-90.
[22] ICJ, Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* ICJ Reports (1951) 15; see also: Pellet, 'La C.I.J. et les réserves aux traités – Remarques cursives sur une révolution jurisprudentielle', *in* Liber Amicorum *Judge Shigeru Oda* (2002), at 481-514.
[23] See article 1 of the ILC Statute, adopted by the General Assembly in resolution 174 (II), 21 November 1947, as amended by resolutions 485 (V), 12 December 1950, 984 (X), 3 December 1955, 985 (X), 3 December 1955 and 36/39, 18 November 1981.

report,[24] in 1962, that the Commission changed its mind and at last sanctioned the fortunate progress promoted by the Court.

However, the recognition of the flexible approach (retained in the 1969 Convention) was clearly the result of a compromise reached thanks to a great deal of ambiguity.[25] As explained in the first report on reservations to treaties:

> The most remarkable of these ambiguities results from the exact role of the 'criterion' of the compatibility of the reservation with the object and purpose of the treaty, to which the Convention 'doctrinally' pays tribute, but from which it does not draw any clear-cut conclusions.[26]

The most perplexing question in this respect is the relationship between article 19 of the Vienna Convention,[27] which sets out the rules concerning the 'Formulation of reservations' – in reality their validity – on the one hand, and article 20, which concerns 'Acceptance of and objection to reservations' – in reality their opposability.[28] If you put the emphasis on the former provision, you will be seen as belonging to the 'permissibility school', in contrast to the 'opposability school', which focuses on the reactions of other States, as envisaged in article 20.[29]

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[24] Doc. A/CN.4/144, [1962] ILC YB, vol. II, pp. 31-35, 60-68 and 73-80. See the presentation of Sir Humphrey Waldock's decisive contribution in First Report ..., supra fn. 18, pp. 130-134, paras. 35-57 and Pellet, *op. cit.* fn. 22, at 498.

[25] First Report on Reservations to Treaties, supra fn. 18, p. 132, paras. 44-46.

[26] *Ibid*., p. 136, para. 61(b).

[27] In the present paper, absent a precision to the contrary, I will reason on the basis of the 1969 Vienna Convention. However, it must be noted that the guidelines included in the Guide to Practice follow the model of the 1986 Convention which is more comprehensive in that it includes the rules applicable to treaties to which an international organisation is a party.

[28] 'One of the main "mysteries" of the reservations regime established by the 1969 and 1986 Vienna Conventions is clearly that of the relations which exist, might exist, or should exist, between article 19, on the one hand, and the following articles, on the other.' (Second Report on Reservations to Treaties, supra fn. 13, p. 70, para. 177).

[29] On this opposition see e.g. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', 23 *Harvard International Law Journal* (1982) 71, at 75-77 and First Report on Reservations to Treaties, supra fn. 18, pp. 142-144, paras. 97-110. Bowett can be seen as one of the main advocates of the permissibility school (see in particular: 'Reservations to Non-Restricted Multilateral Treaties', *British Yearbook of International Law* (1976-1977) 67, at 67-92 while the opposability school is represented e.g. by Ruda ('Reservations to Treaties', 146 *Recueil des cours* (1975-III), at 95-218) or J. Combacau (*Le droit des traités* (1991), at 53-63).

The first report also highlighted various other ambiguities, lacunas and shortcomings of the Vienna Conventions,[30] while emphasising the global success of the reservations regime.[31] Moreover, it was noted that:

> the 1969 Vienna Convention is, at one and the same time, the culminating point of a development which began long ago and which consists in facilitating participation in multilateral conventions to the maximum extent while preserving their purpose and their object, and the starting point of a multifaceted and not always consistent practice, which, on the whole, seems to be much more the result of considerations of political expediency based on a case-by-case approach than of firm legal beliefs.[32]

Under these circumstances the (challenging) road map of the Commission seemed rather obvious: the future instrument should

- preserve the substantial achievements embodied in the Vienna Conventions;
- take into account the subsequent developments;
- fill the gaps and eliminate the very many ambiguities which sprinkle the text of the Conventions in respect to reservations.

With this in mind, the Commission endorsed the conclusions of the Special Rapporteur which constituted, 'in the view of the Commission, the result of the preliminary study requested by [the] General Assembly...':[33]

> (b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission's statute and its usual practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses[34];

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[30] First Report on Reservations to Treaties, supra fn. 18, p. 146-150, paras. 126-149.
[31] *Ibid*., p. 151-154, paras. 153-169.
[32] *Ibid*., p. 152, para. 162.
[33] Report of the ILC on the Work of its 47th Session, supra fn. 19, p. 108, para. 488.
[34] In spite of an attempt to introduce alternative model clauses on the deferment of the effective date of the withdrawal of a reservation, on an earlier effective date of withdrawal of a reservation and on the freedom to set the effective date of withdrawal of a reservation (Report of the ILC on the Work of its 54th

> (c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;
>
> (d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[35]

These directives were followed during the whole process of the elaboration of the Guide. In spite of blames of disloyalty, the Special Rapporteur established himself as the watchful guardian of the fidelity to the text of the Conventions – which is integrally reproduced in the Guide.[36] And, while not conceived as being eligible to become a binding instrument,[37] the Guide appears in effect as a succession of provisions (called 'guidelines' and not 'articles'), explained by abundant commentaries introducing the relevant case-law, practice and doctrinal views.

The next stages should have logically been a proposition for the future work of the Commission on the basis of its conclusions adopted in 1995 and a discussion of the definition of reservations. However, the second report on reservations to treaties only deals with the first of those aspects; its first Chapter describes the area to be covered by the study of the Commission and its form, and sketches out the general outline of the study[38] – an outline which was globally followed during the subsequent work of the Commission on the topic.[39] The second Chapter of the second report was different in

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Session, [2002] ILC YB, vol. II(2), at 19, para. 62), the final version of the Guide does not include any model clause.

[35] Report of the ILC on the Work of its 47th Session, supra fn. 19, p. 108, para. 487.

[36] See the correlation table in Annex I to this article.

[37] See infra, sub-section 2. *A Special Kind of Instrument*.

[38] Cf. Second Report on Reservations to Treaties, supra fn. 13, pp. 43-51, paras. 1-54. Section A of the first Chapter is devoted to a reminder of the 'First Report on Reservations to Treaties and the Outcome' (and the habit has been taken to introduce the following reports with a reminder of the previous 'episodes' together with an account of the recent developments (mainly in the jurisprudence) concerning reservations. Section B of this first Chapter bears upon 'The Future Work of the Commission on the Topic of Reservations to Treaties'.

[39] See the 'Provisional Plan of the Study', *ibid.*, pp. 48-49, para. 37.

nature. It was entitled 'Unity or diversity of the legal regime for reservations to treaties' and sub-titled 'Reservations to human rights treaties'.[40]

The Special Rapporteur considered that there were necessity and urgency for the consideration of the question – which had already been raised with some insistence during the debates in the ILC and the Sixth Committee the previous year – by the Commission:[41] in regional contexts, human rights courts, had taken positions which could be seen as hardly defensible with regard to the Vienna rules on reservations[42] and, above all, the Human Rights Committee had just adopted, on 2 November 1994, its General Comment n° 24 on reservations to the International Covenant on Civil and Political Rights,[43] which had been vigorously opposed by three States – and not insignificant ones.[44]

The crux of the issue was whether it was open to a human rights body to assess the validity of reservations to 'its' convention and, in case of an affirmative answer, what was the effect of such an assessment. As explained in the second report:

> While it is obviously fundamental for human rights bodies to state their views on the question, the Commission must also make heard the voice of international law in this important domain, and it would be unfortunate for it not to take part in a discussion which is of concern to the Commission above all.[45]

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[40] Second Report on Reservations to Treaties, supra fn. 13, pp. 52-82, paras. 55-260.
[41] For a detailed presentation of the reasons for this urgency, see *ibid.*, pp. 52-53, paras. 56-63.
[42] See e.g.: European Commission of Human Rights, 5 May 1982, *Temeltasch* v. *Switzerland*, Application No. 9116/80, 31 *Decisions and Reports* at 120; ECHR, judgment, 29 April 1988, *Belilos* v. *Switzerland*, Series A, vol. 132, paras. 50-60; or judgment, 23 March 1995, *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, vol. 310; IACHR, Advisory Opinion OC–2/82, 24 September 1982, *The effect of reservations on the entry into force of the American Convention (arts. 74 and 75)*, Series A, No. 2; and Advisory Opinion OC–3/83, 8 September 1983, *Restrictions to the death penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, Series A, No. 3.
[43] Report of the Human Rights Committee, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40, doc. A/50/40, vol. I, annex V.
[44] See the extremely critical remarks on General Comment n° 24 by the United States, the United Kingdom (*ibid.*, annex VI) and France (ibid., Fifty-first Session, Supplement No. 40 (A/51/40), vol. I, annex VI).
[45] Second Report on Reservations to Treaties, supra fn. 13, p. 53, para. 62.

Based on this observation, the Special Rapporteur studied the issue of reservations to human rights treaties in the more general context of reservations to 'normative treaties'[46] following a two-stage approach:

- he first wondered whether it would be justified to apply a different regime to reservations to treaties of these kinds (normative and, more practically, human rights treaties);[47] then,

- having firmly answered in the negative,[48] he dealt with the question of the role of the treaty monitoring bodies in the implementation of this regime.[49]

By way of conclusion, the Special Rapporteur suggested that the Commission could adopt a resolution on reservations to normative multilateral treaties, including human rights treaties, a draft proposal of which was annexed to his second report. Although, on the substance, the propositions made by the Special Rapporteur were rather well received by the members of the ILC, the very idea of a resolution was rejected on the pretext that it was 'a somewhat unusual procedure, (...) premature at the present stage of the Commission's work on the topic (...) [and that] the text crystallized positions which were not yet entirely clear-cut and which might subsequently be changed'.[50] They were replaced by 'Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties4[51] adopted by consensus,[52] the status of which was even more uncertain.

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[46] The peculiarity of these 'normative' conventions is 'that they operate in, so to speak, the absolute, and not relatively to the other parties - *i.e.*, they operate *for* each party *per se*, and not *between* the parties *inter se*—coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* States, that gives these Conventions their special juridical character.' (Fitzmaurice, 'Reservations to Multilateral Conventions', 2 *ICLQ* (1953) 1, at 15).

[47] Second Report on Reservations to Treaties, supra fn. 13, pp. 56-89, paras. 52-166. See also Pellet and Müller, 'Reservations to Human Rights Treaties: Not an Absolute Evil', in *From Bilateralism to Community Interest - Essays in Honour of Judge Bruno Simma* (2011) 521, at 521-551.

[48] Second Report on Reservations to Treaties, supra fn. 13, p. 67, para. 163.

[49] *Ibid.*, pp. 67-82, paras. 164-252.

[50] Report of the ILC on the Work of its 49th Session, [1997] ILC YB, vol. II(2), p. 56, para. 149 .

[51] *Ibid.*, p. 57, para. 157 .

[52] [1998] ILC YB, vol. I, p. 159, para. 4.

Although the principles embodied in these 'Preliminary Conclusions' were rather balanced,[53] they received a fairly cold reception, to say the least, from human rights bodies and activists.[54] Until the very last stages of the study,[55] the question of the special regime, *vel non*, for reservations to human rights treaties remained an object of debates and a source of concern for the ILC and its Special Rapporteur. Various meetings were organized with human rights bodies and the Sub-Commission on Human Rights either individually or globally.[56] Although it was a time and energy consuming process, it has undoubtedly facilitated a better mutual understanding and it induced me to take a clearer conscience of the issues and to propose what I think were more appropriate and realistic solutions than the ones initially envisaged.[57]

This human rights excursion was the main infringement to the usual codification process through the ILC.[58] For the rest, the Special Rapporteur submitted his reports to the Commission, which, as is usual, introduced draft guidelines.[59] The reports were

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[53] A good evidence of their balanced character is that they were not only criticized by the human rights bodies and activists, but also by many States from various sensitivities (see Fourth Report on Reservations to Treaties, doc. A/CN.4/499, [1999] ILC YB, vol. II(1), pp. 129-131, paras. 10-16).

[54] See in particular: Third Report on Reservations to Treaties, doc. A/CN.4/491 and Add.1–6, [1998] ILC YB, vol. II(2), p. 231, para. 16, describing the reactions received from the Chairperson of the Human Rights Committee and Fourth Report on Reservations to Treaties, supra fn. 53, p. 129, para. 11 concerning the feedback given by the Committee against Torture.

[55] See Fourteenth Report on Reservations to Treaties, doc. A/CN.4/614, paras. 52-64 and doc. A/CN.4/614 /Add. 2, paras. 285-290; in 2010, in relation to the effect of invalid reservation, see the Fifteenth Report on Reservations to Treaties, doc. A/CN.4/624/Add.1, paras. 436-473.

[56] As was the case in 2007, when the Commission promoted a two days meeting with representatives of the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee against Torture; the Committee on the Rights of the Child; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women; the Committee on Migrant Workers; the Council of Europe (European Court of Human Rights and the Committee of Legal Advisers on Public International Law (CAHDI)); and the Sub-Commission on the Promotion and Protection of Human Rights (see Summary of discussions, held in 2007, with United Nations and other experts in the field of human rights, including representatives from various human rights treaty bodies, prepared by the Special Rapporteur, doc. ILC(LIX)/RT/CRP.1, available online: http://untreaty.un.org/ilc/documentation/english/ilc%28lix%29_rt_crp1.pdf).

[57] See infra in particular the solution retained in guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty).

[58] May I say that it was a fortunate infringement and that the ILC may find beneficial for its future projects to consult more with other expert bodies?

[59] Instead of draft articles – on the choice of the word 'guideline', see infra. The Special Rapporteur submitted seventeen reports between 1995 and 2011 included (no report was prepared in 1997; two were circulated in 2010); all of which can easily be found on the website of the Commission – the easiest way for finding them being to use the Analytical Guide (http://untreaty.un.org/ilc/guide/1_8.htm); see the list of the reports by the Special Rapporteur in Annex II to the present paper. The Sixteenth Report, which

discussed in plenary, which then sent the draft guidelines to the Drafting Committee[60] which carefully discussed them (and, sometimes, rather deeply modified them, usually for better, sometimes for worse).[61] The new drafts were re-discussed in plenary and usually adopted without any change, which enabled the Special Rapporteur to prepare the commentaries of the guidelines for inclusion in the report of the Commission after discussion in the plenary.

Then, and equally as usual, the guidelines and their commentaries were discussed by the Sixth Committee as parts of the Report of the Commission. Leaving aside the character too often stereotyped of the speeches in the Sixth Committee and the lack of preparation of too many delegations, there is clearly something wrong in this cycle of exchanges between the ILC and the Committee. Except by transforming its drafts in a Penelope's tapestry, the Commission cannot take into account the remarks made in the Sixth Committee – at least when they are made: it is only on the occasion of the second reading that the ILC can adapt its drafts in view of the States' remarks. When a study spreads over a long period of time, it would in any case make no sense to change a work in progress every year. This is why I made a point to review, as carefully as possible, all

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was devoted to the 'Status of reservations, acceptances of and objections to reservations and interpretative declarations in the case of succession of States' (doc. A/CN.4/626) was preceded and amply facilitated – the topic is formidable! – by a remarkable paper prepared by the Secretariat (6 May 2009, Reservations to Treaties in the Context of Succession of States: Memorandum by the Secretariat, doc. A/CN4/616, 26 p.).

[60] In only three instances did the Commission postpone the referral of draft guidelines to the Drafting Committee (such was the case for draft guideline 3.1.5 (Definition of the object and purpose of the treaty), for which the Special Rapporteur considered that further reflection was needed, in the light of the discussions held in the Commission – see Eleventh Report on Reservations to Treaties, doc. A/CN.4/574, para. 4; also for draft guidelines 3.3.2 (Nullity of invalid reservations) and 3.3.3 (Effect of unilateral acceptance of an invalid reservation) and 3.3.4 (Effect of collective acceptance of an invalid reservation) which could not be considered until the Commission adopted the guidelines on the effect of objections to and acceptance of reservations (see the Report of the ILC on the Work of its 58th Session, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, doc. A/61/10, para. 157); the same situation occurred in relation to draft guidelines 3.5.2 and 3.5.3 on the validity of conditional interpretative declarations, the consideration of which was seen as premature in 2009, the ILC having not yet at the time considered the validity of the reservations (see Report of the ILC on the Work of its 61st Session, Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10, doc. A/64/10, para. 68).

[61] Globally, I have enjoyed this usually very fruitful – sometimes exasperating – exercise. I have, however, regretted that the attendance to the meeting of the Drafting Committee was usually limited to a few members, usually professors from Europe or the WEOG Group – most other members being conspicuous by their absence. I take this opportunity to pay special tribute to professors Gaja and McRae and to Sir Michael Wood, whose constructive criticisms and suggestions have been exceptionally helpful, particularly for the ultimate completion of the study.

the interventions made by the delegates to the Sixth Committee all over the years, when we had to prepare the final version of the Guide. And this probably was the most unusual aspect of the preparation of the Guide.

Normally, the ILC's drafts are subject to two different readings, separated by a one year fallow period during which States can prepare and send their comments on the global draft adopted in first reading. It has not been the case concerning the Guide to Practice. It was completed at forced march during the years 2009 and 2010[62] and, in accordance with the General Assembly's wish,[63] a final version[64] was completed in 2011 –the text being adopted by consensus[65] on 11 August of that year.[66] To achieve this result, the Commission and the Secretariat (including the translators) had to make tremendous efforts and, in this respect too, a somewhat unusual method was followed:

- contrary to the custom, the Special Rapporteur did not present a specific report introducing in a systematic manner the comments received from the Governments;[67]

- the Special Rapporteur had prepared two informal documents: a *compendium* of all the written and oral remarks received from Governments during the whole eighteen years when the topic had been on the agenda of the Commission, and a reviewed text of the guidelines established in view of these remarks;

- these documents were widely used by the open-ended Working Group established by the Commission[68] (instead of the Drafting Committee which was not seized of the topic during the sixty-third session);

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[62] While the Guide to Practice includes 179 guidelines (199 in the 2010 version), 89 new guidelines were adopted in 2009 and 2010 – and among them most of the most important ones.

[63] By its resolution 65/26 of 6 December 2010, the General Assembly invited 'Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session' (para. 4).

[64] In view of the very unusual rhythm of this completion, the ILC and the Special Rapporteur avoided to speak of 'second reading'.

[65] In spite of the unfortunate last minute's embarrassment made by the Chinese member (supra fn. 7).

[66] Provisional Summary Record of the 3125th Meeting, 11 August 2011, doc. A/CN.4/SR.3125. A conjunction of reasons can explain this haste. Both the ILC and the Sixth Committee wished to finish with the topic, whose study had lasted much longer than initially envisaged. Moreover, I had made public my firm decision not to run for a sixth term as a member of the Commission and it was apparent that no member was keen to take over the role of Special Rapporteur on the topic...

[67] See Reservations to Treaties. Comments and Observations Received from Governments, 15 February 2011, doc. A/CN.4/639 and 29 March 2011, doc. A/CN.4/639/Add. 1.

- the Working Group was able to adopt the text of the guidelines modified in view of the comments of the Governments and the suggestions of the Special Rapporteur following a marathon of 14 meetings held from 26 April to 18 May 2011;[69]

- fortunately, this could be achieved by the end of the first part of the sixty-third session of the Commission,[70] which allowed the Special Rapporteur (with the very helpful assistance of young researchers in international law)[71] to review and redraft the commentaries of the guidelines as finally adopted by the Commission during the break between the two parts of the session;

- the commentaries thus updated and adapted were (usually briefly) discussed and adopted by the Commission during the second part of the session.

Equally during the second part of the session, the same Working Group was entrusted with the task to review and finalize the text of a draft recommendation or conclusions on the reservations dialogue and of a draft recommendation on technical assistance and assistance on the settlement of dispute proposed by the Special Rapporteur in his seventeenth report. Both texts were adopted by the Commission with some changes but with different statutes: the Conclusions on the reservations dialogue constitute an annex to the Guide to Practice;[72] for its part, the Recommendation of the Commission on mechanisms of assistance in relation to reservations to treaties has been included in the Report of the Commission to the General Assembly,[73] but is not part of the Guide.

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[68] The Working Group was chaired with great distinction and efficiency by the Ecuadorean member of the Commission, Mr. Marcelo Vásquez-Bermúdez. As had been the case in the Drafting Committees which, in the previous years were in charge of reservations to treaties (see supra fn. 61), only a handful of members, mainly from the WEOG, were active in the Working Group.

[69] Oral Report by the Chairman of the Working Group on Reservations to Treaties, Mr. Marcelo Vázquez Bermúdez, 20 May 2011, available at: http://untreaty.un.org/ilc/sessions/63/ReservationstoTreatiesReport20May2011.pdf.

[70] As is now usual, the 63rd session was split into two parts, respectively from 26 April to 3 June and from 4 July to 12 August 2011.

[71] In particular Daniel Müller, Arnaud Tournier, María Alejandra Etchegorry, and Alina Miron; the author is also most grateful to the latter for her assistance in finalizing the present paper.

[72] For a more comprehensive analysis of the reservations dialogue, see Sir Michael Wood's contribution in this Journal, 'Institutional aspects of the Guide to Practice on Reservations'.

[73] Report of the ILC on the Work of its 63rd Session, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10, doc. A/66/10, pp. 18-19, para. 73. By this recommendation, the ILC 'Suggests that the General Assembly:

1. Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation;

2. A Special Kind of Instrument

By contrast with the relatively classical process which led to its adoption, the Guide to Practice on Reservations to Treaties is a very special kind of instrument.

As explained above, the ILC decided in a very early stage of its study of the topic of reservations to treaties on the form the project was to take: instead of drafting an instrument eligible to be transformed into a convention, it was decided as early as 1995 that, subject to a possible change of mind, the Commission would draft a *Guide* to practice made of *guidelines* accompanied with commentaries. This carefully chosen terminology made clear from the outset that the Commission was not turning towards a binding instrument. And this was confirmed at the very end of its study when,

> At its 3125th meeting, on 11 August 2011, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly to take note of the Guide to Practice and ensure its widest possible dissemination.[74]

This makes clear that, contrary to most products of the ILC, the Guide to Practice has not been designed as the basis for the adoption of a convention; deliberately so; and from the very beginning of the process. If the General Assembly follows the ILC's recommendation,[75] it will remain what it is now: a soft law instrument mixing however, hard rules with soft recommendations.

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2. Consider establishing within its Sixth Committee an 'observatory' on reservations to treaties, and also recommend that States consider establishing similar 'observatories' at the regional and subregional levels', while an annex summarily sketches the 'reservations assistance mechanism' could be.

[74] ILC Report (2011), supra fn. 73, p. 18, para. 72.

[75] At the time when this paper is written (June 2012), the Sixth Committee has not yet taken a decision in this respect: due to its length, the Guide to Practice could not be circulated in all the six official languages of the General Assembly and its examination was reported to the sixty-seventh session of the General Assembly (October/November 2012). Consequently, in its resolution 66/98 the General Assembly decided 'that the consideration of chapter IV of the report of the International Law Commission on the work of its sixty-third session, dealing with the topic 'Reservations to Treaties', shall be continued at the sixty-seventh session of the General Assembly, during the consideration of the report of the Commission on the work of its sixty-fourth session' (doc. A/RES/66/98, 9 December 2011, para. 5).

The reasons for this 'modest approach' were explained by the Special Rapporteur in his preliminary report:

> 166. [W]hat should be termed a 'modest approach' certainly offers great advantages:
>
> (a) Amendment of the existing provisions would run into considerable technical difficulty: a State party to one of the existing conventions in force, or that might become a party, might very well refuse to accept such amendments as could be adopted; the result would be a dual legal regime of reservations that would be the source of very great difficulty under international law – at the present stage of its development, there is no means of imposing harmonization of the rules in force;
>
> (b) [...] if the Commission could undertake the task of clarifying the existing provisions, that would at least make it possible to overcome most of the difficulties encountered;
>
> (c) In their statements in the Sixth Committee of the General Assembly in 1993 and 1994, the representatives of States [...] expressed their support for the existing provisions. Above all, whatever their defects, the rules adopted in 1969 have proved their worth in that, on the one hand, they comply with the objective of flexibility which seems to have the support of States as a whole and, on the other, although their application gives rise to some difficulties, it has never degenerated into a serious dispute and, although, from the standpoint of principle, the protagonists have in some cases remained on opposite sides, they have always been reconciled in practice.[76]

These reasons were at the origin of the decision to stick to the existing treaty law as embodied in the three Vienna Conventions and to adopt a non-binding instrument whose aim would only be 'to filling the gaps and to removing the ambiguities in the existing rules, but without embarking on their amendment.'[77]

[76] First Report on Reservations to Treaties, supra fn. 18, p. 153, para. 166 – footnotes omitted.
[77] First Report on Reservations to Treaties, supra fn. 18, p. 154, para. 168.

The option for a non-binding instrument complying with the three existing Vienna Conventions was never put into question later on. As explained in the Introduction to the Guide,

> as the title and the word 'guidelines' indicate, it is not a binding instrument but a *vade mecum*, a 'toolbox' in which the negotiators of treaties and those responsible for implementing them should find answers to the practical questions raised by reservations, reactions to reservations and interpretative declarations, on the understanding that, under positive law, these answers may be more or less certain depending on the question, and that the commentaries indicate doubts that may exist as to the certainty or appropriateness of a solution.[78]

Therefore, the Guide to Practice has been conceived as a means to assist the practitioners, not as a united collection of rules compulsory for them. As a result, the guidelines have very different legal values, from pure recommendations to fully binding rules – not because they appear in the Guide, but because they have acquired (independently of the Conventions and, *a fortiori*, of the Guide) the status of customary rules. The Introduction to the Guide distinguishes between three levels of obligatoriness for the guidelines:

> • Some of them simply reproduce provisions of the Vienna Conventions which set out norms that were either uncontroversial at the time of their inclusion in the Conventions or have since become so as such, while not peremptory in nature, they are nevertheless binding on all States or international organizations, whether or not they are parties to the Conventions;
> • Other rules contained in the Vienna Conventions are binding on the parties thereto, but their customary nature is open to question; reproducing them in the Guide to Practice should contribute to their crystallization as customary rules;
> • In some cases, guidelines included in the Guide supplement Convention provisions that are silent on modalities for their implementation but these rules are themselves indisputably customary in nature or are required for obvious logical reasons;

[78] Introduction to the Guide to Practice, pp. 35-36, para. (4).

• In other cases, the guidelines address issues on which the Conventions are silent but set out rules the customary nature of which is hardly in doubt;
• At times, the rules contained in the guidelines are clearly set out *de lege ferenda* and, in some cases, are based on practices that have developed in the margins of the Vienna Conventions;
• Other rules are simply recommendations and are meant only to encourage.[79]

This last category is particularly significant: it could not have been considered to include in a draft convention a provision according to which: 'When providing bodies with the competence to monitor the application of treaties, States or international organizations should specify, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations.'[80]. It has fully its place in a non-binding instrument like the Guide, whose function is to assist the practice (whether administrative, legislative, arbitral or jurisdictional) without thwarting necessary evolutions, but in guiding them.

The Guide has sometimes been criticized for its length and absence of manageability. There is some truth in this, but adding new ambiguities to the existing ones would not have been of great help. Moreover, in such a technical *and controversial* topic, clear-cut solutions would have been hopeless. It is nevertheless to be hoped that in a majority of cases, the user will find in the Guide the answers to the questions he or she is confronted with. And it is for this reasons that the commentaries form an integral part of the Guide[81]: in a way, the guidelines are only the outline, the table of content, of the Guide, the core of which is constituted by the commentaries.

This being said, even if the rules stated or proposed in the Guide should be followed in the absence of contrary special norms, none of them is peremptory in nature – which

[79] *Ibid*., pp. 34-35, para. (3) of the Introduction – footnotes (giving examples of each category) omitted.
[80] Guideline 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations). For other examples of purely recommendatory guidelines, see: 2.1.2 (Statement of reasons for reservations); 2.4.1 (Form of interpretative declarations); 2.4.5 (Communication of interpretative declarations); 2.6.9 (Statement of reasons for objections); 2.9.3, paragraph 2 (Recharacterization of an interpretative declaration); 2.9.5 (Form of approval, opposition and recharacterization); 2.9.6 (Statement of reasons for approval, opposition and recharacterization); 4.5.2, paragraph 2 (Reactions to a reservation considered invalid).
[81] See supra fn. 3 and the text accompanying it.

means that all are derogable. In other words, States and international organisations are perfectly welcome to provide for a special and derogatory regime for reservations formulated *vis-à-vis* a given instrument.[82] This possibility is too often underestimated by the drafters of international conventions, as well as by those criticising the Vienna regime of reservations, including the human rights bodies and activists.

Before leaving the topic of the (non-)binding force of the Guide to Practice, it is in order to recall that two 'recommendations' have been adopted together with the Guide: 'Conclusions on the Reservations Dialogue' on the one hand, and a 'Recommendation of the Commission on Mechanisms of Assistance in Relation to Reservations to Treaties'.[83] As recalled above, the proposals of the Special Rapporteur on these two sub-topics, which were made on an equal footing,[84] have been treated differently by the Commission.

Concerning the text on the 'reservations dialogue', it must be noted that there exists no definition of this notion which is not a term of art. I used it first in my eighth report to designate a process followed by States (mainly European at the time) by which States 'inform the reserving State of the reasons why they think the reservation should be withdrawn, clarified or modified. Such communications may be true objections, but often they merely open a dialogue that could lead to an objection but could also result in

[82] In this respect, I have always regretted that some of the guidelines adopted by the Commission includes the phrase 'unless the treaty otherwise provides' (or an equivalent formula) (see: Guidelines 2.1.6 (Procedure for communication of reservations, 2.3 (Late formulation of reservations); 2.3.1 (Acceptance of the late formulation of a reservation), 2.4.8 (Modification of an interpretative declaration), 2.5.1 (Withdrawal of reservations), 2.5.8 (Effective date of withdrawal of a reservation), 2.6.12 (Time period for formulating objections), 2.7.1 (Withdrawal of objections to reservations), 2.7.5 (Effective date of withdrawal of an objection), 2.7.7 (Partial withdrawal of an objection), 2.8.2 (Tacit acceptance of reservations), 2.8.8 (Acceptance of a reservation to the constituent instrument of an international organization), 3.1 (Permissible reservations), 3.5 (Permissibility of an interpretative declaration), 4.1.1 (Establishment of a reservation expressly authorized by a treaty)): *all* the directives in the Guide to Practice as well as all the rules relating to reservations in the Vienna Convention are derogable. It is true that the Vienna Conventions themselves have given the bad example in this respect (see Articles 19 a) and b); 20 (1), 20 (3), 20 (4), 20 (5), 22 (1), 22 (2), 22 (3)**)**.

[83] For more developments on this mechanism, see Sir Michael Wood's contribution in this Journal, 'Institutional aspects of the Guide to Practice on Reservations'.

[84] See Seventeenth Report on Reservations to Treaties, doc. A/CN.4/647, para. 1.

the modification or withdrawal of the reservation.'[85] As I tried to explain during the 2011 session, this expression alludes to the fact that, independently of the substantive and procedural rules applicable to reservations, contracting States and contracting international organizations could, and in many cases did, engage in an informal dialogue concerning the permissibility, scope and meaning of reservations or objections to reservations formulated by a contracting State or a contracting organization. Such a dialogue, which could take place before as well as after a reservation was formulated, can take many forms and employ a wide variety of methods.[86] As I stressed, the reservations dialogue had the advantages to prevent positions from becoming fixed, to allow the author of the reservation to explain its reasons and to facilitate better understanding among the parties concerned. [87] The Commission was convinced and decided to attach, as an Annex to the Guide, the text of 'Conclusions' on the subject ending up with a recommendation asking the General Assembly to 'call upon States and international organizations, as well as monitoring bodies, to initiate and pursue such a reservations dialogue in a pragmatic and transparent manner.'[88]

Although partly followed, my proposition to adopt another resolution, this time conceived as a recommendation to the General Assembly concerning technical assistance and assistance in the settlement of disputes concerning reservations, was less successful. The recommendation is finally more ambiguous than I would have wished in respect to the settlement of disputes and, instead of being included in the Guide itself, it is lost in the Report of the Commission where it has neither a clear status nor any visibility.[89] The idea is that the General Assembly:

[85] Eighth Report on Reservations to Treaties, doc. A/CN.4/535/Add. 1, para. 87.
[86] See ILC Report (2011), supra fn. 73, pp. 14-15, para. 66; see also: Seventeenth Report on Reservations to Treaties, doc. A/CN.4/647, paras. 2-68 and the discussion within the ILC reported in the Provisional Summary Record of the 3099th meeting, 6 July 2011, doc. A/CN.4/SR.3099.
[87] See *ibid*.
[88] Guide to Practice, p. 602. To be noted: once again, the Commission refused – for obscure reasons – to adopt a resolution of its own and only adopted 'Conclusions' which it recommended the General Assembly to follow up; this shyness is regrettable: nothing impedes the ILC to direct recommendations directly to States and international organisations.
[89] ILC Report (2011), supra fn. 73, pp. 18-19, para. 73.

1. Consider establishing a reservations assistance mechanism, which could take the form described in the annex to this recommendation;

2. Consider establishing within its Sixth Committee an 'observatory' on reservations to treaties, and also recommend that States consider establishing similar 'observatories' at the regional and subregional levels.[90]

II. THE MAIN ISSUES – SOLUTIONS AND DEADLOCKS

The first report of the Special Rapporteur had offered a 'Brief Inventory of the Problems of the Topic';[91] it was, indeed, anything but brief...; nor was it comprehensive as further discussions have shown. But it remains a good starting point to evaluate the difficulties of the topic. Some are general in nature, others are more specific – not much easier to solve however. Going into all these difficulties would go far beyond the scope of the present paper. But it can be noted that many aspects which seem secondary in an overall perspective, are sources of difficulties in the day-to-day practice of legal divisions of ministries of Foreign Affairs or international organisations and give serious problems to practitioners, whether they are advocates or judges. The Guide to Practice ambition is to help them solving these problems.

Besides a general Introduction explaining its object and scope, the Guide to Practice on Reservations to Treaties is comprised of five different parts:[92]

- Part 1 is devoted to 'Definitions' of reservations and interpretative declarations (including conditional interpretative declarations) and attempts to distinguish both from other unilateral statements, including from 'alternatives' to reservations and interpretative declarations;

[90] The Annex to this recommendation briefly exposes some principles which could inspire the creation of the assistance mechanism.
[91] First Report on Reservations to Treaties, supra fn. 18, pp. 141-150, paras. 91-149.
[92] Each Part is divided in Sections, then in guidelines – which are numbered accordingly. Thus guideline 3.3.1 ('Irrelevance of distinction among the grounds for non-permissibility') is part of Section 3.3 ('Consequences of the non-permissibility of a reservation'), itself included in Part 3 ('Permissibility of reservations and interpretative declarations'). In rare cases, guidelines are numbered with four digits (those of the series 3.1.5 ('Incompatibility of a reservation with the object and purpose of the treaty'), namely from guideline 3.1.5.1 to guideline 3.1.5.7).

- Part 2 describes the 'Procedure' applicable to the formulation of reservations and interpretative declarations, their withdrawal, acceptances and objections to reservations (and equivalent reactions to interpretative declarations), including the difficult issues raised by the late formulation of reservations;

- Part 3 focuses on the permissibility of reservations (of the reactions to reservations and of interpretative declarations), that is mainly on a clarification of the criteria set out in article 19 of the Vienna Conventions, their assessment and the consequences of the non-permissibility of a reservation;

- Part 4 probably raises the most difficult issues; it deals with the 'Legal effects of reservations and interpretative declarations', by distinguishing between 'established' valid reservations on the one hand and invalid reservations;

- finally, Part 5 introduces the rules applicable to 'Reservations, acceptances of reservations, objections to reservations, and interpretative declarations in cases of succession of States'.[93]

Each of these rubrics has raised unequally difficult issues. But it is worth noting that, if the ILC has promoted a single legal regime for all kind of reservations,[94] this was only possible after it had taken a clear position on the necessary unity of the Vienna regime.

The Preliminary Issue: Unity or Diversity?

As explained above, at the very beginning of the study, I deemed it indispensable to discuss a preliminary general issue: are the rules applicable to reservations to treaties, whether codified in articles 19 to 23 of the 1969 and 1986 Vienna Conventions, or customary, applicable to all treaties, whatever their object. Although the question could be asked for several kinds of treaties, it is raised with particular insistence in respect to

[93] Given the highly technical content of this Part, it is not further discussed in the present general paper.

[94] With the sole exceptions of particular rules concerning reservations to treaties which must be applied in their entirety (4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety)) or to a constituent instrument of an international organisation (2.8.8 (Acceptance of a reservation to the constituent instrument of an international organization); 2.8.9 (Organ competent to accept a reservation to a constituent instrument); 2.8.10 (Modalities of the acceptance of a reservation to a constituent instrument); 2.8.11 (Acceptance of a reservation to a constituent instrument that has not yet entered into force); 2.8.12 (Reaction by a member of an international organization to a reservation to its constituent instrument); 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization)).

human rights treaties. Since the answer to this question conditioned the drafting of several parts of the future Guide to Practice, it was dealt with in the second report on reservations to treaties.[95]

In a large part, the issue is artificial in that, even the 'hardest' rules contained in the Vienna Conventions are residuary in nature; none is imperative or peremptory.[96] The Vienna regime merely supplements the will of the parties, which can always derogate to them by introducing in their treaty special provisions concerning reservations if they consider that the Vienna regime is inappropriate. And it could happen that a general practice of promoting special rules on reservations concerning certain types of treaties be at the origin of a new customary regime, specific to those treaties. But, interestingly, this has not happened: no category of treaties – and certainly not human rights treaties – has generated a particular practice concerning reservations clauses. This is probably a sign that the negotiators of the treaties at least find the Vienna regime satisfactory and suitable.

And the issue was discussed at some length during the elaboration of the Vienna Conventions. However, after some rather heated exchanges,[97] the Commission

> decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained.[98]

[95] Second Report on Reservations to Treaties, fn. supra 13, pp. 67-82, paras. 164-252.
[96] See supra fn. 82 and the accompanying text.
[97] See *e.g.*: [1951] ILC YB, vol. II, pp. 3–4, paras. 11–16; [1954] ILC YB, vol. II, pp. 131–133; [1956] ILC YB, vol. II, pp. 126-127, paras. 92-98; [1962] ILC YB, vol. II, pp. 178-181. See also: Second Report on Reservations to Treaties, supra fn. 13, pp. 57-59, paras. 99-111.
[98] Reports of the ILC on the Second Part of its Seventeenth session and on its Eighteenth Session,[1966] ILC YB, vol. II, doc. A/6309/Rev.1, p. 206, para. (14) of the commentary of draft article 16 (Formulation of reservations); see also (almost word by word): [1962] ILC YB, vol. II, p. 181, para. (23) of the commentary of draft article 20.

And indeed these treaties which have to be applied in their entirety and the constituent instruments of international organisations are the only kind of treaties for which the Vienna Conventions contain partially derogatory rules.[99]

Moreover, concerning more specifically human rights treaties,[100] it can be recalled that the flexible regime adopted at Vienna has its (at least immediate) origin in the 1951 Advisory Opinion of the ICJ which was precisely given in relation with the fundamental and pioneering universal human rights instrument: the 1948 Genocide Convention.[101] Moreover, not only the now universal Vienna regime directly originated from considerations concerning first human rights instruments, but also this set of rules (or the most important of them: the compatibility of the reservations with the object and purpose of the treaty) has also expressly been referred to in the reservations provisions of human rights treaties as well as in recommendations of human rights treaty bodies themselves.[102]

This is justified: the Vienna regime is well-balanced, flexible and adaptable. It strikes the right balance between the need for universality and the preservation of the integrity of the treaty – a balance which is sought for all kinds of treaties and which inspired both

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[99] Cf. article 20, paras. 2 (Treaties which have to be applied in their entirety) and 3 (Constituent instruments of international organizations).

[100] For a more exhaustive presentation of the problematic and of the substantive solutions proposed in this respect see in this Journal the article by I. Ziemele and L. Liede, 'Reservations to Human Rights Treaties'.

[101] 'The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. (...)
The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and au, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.' (ICJ, Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 22, at 23).

[102] For more details, see Pellet and Müller, supra fn. 47, at 531-533.

the majority and the minority in the case concerning *Reservations to the Genocide Convention*.[103] The traditional unanimity rule – according to which a State formulating a reservation could become a party to the treaty only if and when all other parties had accepted the reservation – would be extremely crippling in a world where nearly 200 States very different from one another can be concerned by a treaty. The new rule is well-tailored to the new conditions of international relations: it facilitates the participation to the treaty of all interested States while guaranteeing that the object and purpose of the treaty – that is its core content – will be safeguarded.

And it is difficult to perceive why this would not cope with the 'special needs' of human rights treaties – except if one accepts the intellectual terrorism exercised by some

human rights extremists.[104] According to the 'human rightist' approach,[105] human rights treaties would be characterized by three main traits which would impede the application of the Vienna regime on reservations:

- they would be essentially non-reciprocal;[106]

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[103] For the majority of the Court, '[t]he object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which voted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.'(*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, supra fn. 22, at 24). The judges in the minority considered that '[i]t is [...] not universality at any price that forms the first consideration. It is rather the acceptance of common obligations – keeping step with like-minded States – in order to attain a high objective for all humanity, that is of paramount importance. [...] In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.' (Joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, *ibid.*, at 47. See also Dissenting opinion of Judge Alvarez, *ibid.*, at 51 and 53).

[104] Even though these authors do not always entirely share these extreme views, see Coccia, 'Reservations to Multilateral Treaties on Human Rights', 15 *California Western International Law Journal* (1985) 1, at 1; Coulée, 'A propos d'une controverse autour d'une codification en cours: les réactions aux réserves incompatibles avec l'objet et le but des traités de protection des droits de l'homme', in *Mélanges offerts à Gérard Cohen-Jonathan* (2004) 501, at 501–521; Imbert, 'Reservations and Human Rights Conventions', 6 *Human Rights Review* (1981) 28, at 28-60; L. Lijnzaad, *Reservations to U.N. Human Rights Treaties: Ratify and Ruin?* (1995) 468 p., *passim*; Ouguergouz, 'L'absence de clauses de dérogation dans certains traités relatifs aux droits de l'homme', 98 *RGDIP* (1994) 289, at 289–335. On the origins of the debate, see Second Report on Reservations to Treaties, supra fn. 13, pp. 52-53, paras. 56-63.

[105] On the notion of 'human-rightism', see Pellet, "'Human Rightism' and International Law' 10 *Italian Ybk of Intl L* (2000) 3, at 3-16.

- they would require a full application since, by nature, they lend themselves to no reservation whatsoever;[107]

- contrary to what happens for 'ordinary treaties' their integrity is guaranteed by special bodies.[108]

The non-reciprocity objection, usual as it is, is simply non-sensical:

- human rights treaties are largely (but not entirely) non-reciprocal; but this is also true of treaties concluded in other fields like the protection of the environment or the maintenance of the peace, or for treaties providing uniform law;

- it is precisely on basing itself on this character that the ICJ sanctioned the flexible system by opposition to the previous rule of the unanimity; and, in any case,

- the reciprocity element is not indispensable for the correct operation of the Vienna rules; any rule of law applies only when it is ... applicable, and the same is true for the reciprocity principle: if and when a valid reservation is made to a non-reciprocal

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[106] ECHR, *Loizidou v Turkey* (preliminary objections) (app no 15318/89) (1995) Series A no 310, para. 70, quoting *Ireland v United Kingdom* (app no 5310/71) (1978) Series A no 25, para. 239; UNHRC 'General Comment No 24', supra fn. 44, p. 123, para. 17. See also Coulée, supra fn. 104, at 502; Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women', 85 *American Journal of International Law* (1991) 281, at 296; Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women', 30 *Virginia Journal of International Law* (1990) 643, at 646; P.-H. Imbert, *Les réserves aux traités multilatéraux: évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (1978), at 258. On the irrelevance of the question of reciprocity in relation to the law of reservations, see also Pellet and Müller, supra fn. 47, at 533-535.

[107] McBride, 'Reservations and the Capacity to Implement Human Rights Treaties', in J. P. Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997), at 120-184; Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *British Year Book of International Law* (1993)245, at 245-282. See also Second Report on Reservations to Treaties, supra fn. 13, pp. 56-57, paras. 90-98 and pp. 63-65, paras. 137-147.

[108] *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma, ICJ Reports 2006, pp. 68-71, paras. 12-23; see also Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?', 11 *EJIL* (2000) 413, at 415-416; Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', 13 *EJIL* (2002) 437, at 442.

provision, article 21 (1) (b) or article 21 (3) of the Vienna Convention simply do not operate for the accepting or the objecting party,[109] as made clear by guideline 4.2.5.[110]

Except for purely ideological reasons, there is no more ground for the allegation that by essence human rights treaties are not open to reservations. In its (most debatable) General Comment No. 24, the Human Rights Committee stated:

> In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.[111]

Taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant. However, the Committee itself does not go that far and recognizes that reservations may usefully encourage a wider acceptance of the Covenant.[112]

It remains that reservations to general human rights treaties raise specific difficulties. But this is caused not by their human rights object but by their global character. This is why the ILC which, in a first move had envisaged devoting a particular guideline to the specific issues concerning the determination of the object and purpose of 'general

[109] Exactly as reservations purporting to limit the territorial application of a treaty are, by definition, deprived of any possible reciprocal application; in such a case, the reciprocal effect of the reservation has "nothing on which it can "bite" or operate.' (G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), at 412). See Guide to Practice, para. (11) of the commentary to guideline 4.2.5..

[110] Guideline 4.2.5 (Non-reciprocal application of obligations to which a reservation relates): 'Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.'

[111] General Comment No. 24, supra fn. 44, at 120, para 7.

[112] *Ibid*., para. 4.

human rights treaties',[113] realizing that there was no reason to individualize human rights treaties since the same considerations came into play for all treaties containing numerous interdependent rights and obligations[114], eventually adopted guideline 3.1.5.6[115], which attempts to strike a particularly delicate balance between these different considerations by combining three elements:

- The interdependence of the rights and obligations;
- The importance that the provision to which the reservation relates has within the general tenour of the treaty; and
- The extent of the impact that the reservation has on the treaty.[116]

But, again, as the title of this guideline makes clear these directives are not specific to reservations to human rights treaties; they apply to 'reservations to treaties containing numerous interdependent rights and obligations' in general.

Similarly, it is certainly desirable that 'the compatibility of a reservation with the object and purpose of the Covenant [...] be established objectively, by reference to legal principles'.[117] But this holds true for all kinds of multilateral treaties, and is by no means limited to human rights treaties. Whereas the existence of monitoring bodies is certainly a particularity of human rights treaties, it is neither a necessary element of these instruments, nor an 'exclusive' particularity,[118] and indeed not an argument to modify the generally applicable reservations regime which bears upon the substantive principles to be applied by the competent authority to assess the validity of the

[113] Draft guideline 3.1.5.5 ('To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.' (Report of the ILC on the Work of its 62nd Session, General Assembly, Official Records, Supplement No. 10, doc. A/62/10, paras. 113-116).
[114] The ILC thus confirms the unity of the reservations regime.
[115] Guideline 3.1.5.6 (Reservations to treaties containing numerous interdependent rights and obligations): 'To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.'
[116] See guideline 3.1.5.6.
[117] General Comment No 24, supra fn. 44, p. 124, para 18.
[118] Disarmament or environment treaties also create quite often other kinds of monitoring bodies although they operate differently.

reservation – whether a State, an international organisation, a judge or a monitoring body. The control of the compatibility of a reservation with the object and purpose of the treaty by independent bodies constitutes a guarantee of a more objective assessment of this rather subjective test. Monitoring constitutes consequently a clear progress in the application of the Vienna rules and therefore contributes to ensuring the integrity of the treaty in question by permitting an objective assessment of the compatibility of a given reservation with the object and purpose of the treaty – whether a human rights treaty or not.[119]

After lengthy and difficult discussions, between its members, between the ILC and the human rights bodies, and within the Sixth Committee, the Commission's conclusion is without ambiguity: the Vienna regime of reservations to treaties, as completed and specified in the Guide to practice, is single and applies to reservations to all kind of reservations to all kind of treaties.[120] In so deciding, the 2011 Commission confirmed the good sense solution adopted by the Commission in the 1960s.

Part 1 – Definitions

Part 1 may look the least problematic since the three Vienna Conventions give a similar definition of reservations. However, it is an important topic since the application (or not) of the reservations regime depends upon it – and, the ILC devoted quite a long time to the related issues.[121]

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[119] See guideline 3.2.1 concerning the 'Competence of the treaty monitoring bodies to assess the permissibility of reservations' and its commentary. This guideline originates in paragraphs 5 and 8 of the Preliminary Conclusions of the Commission adopted in 1997. At the time, these provisions where extremely controversial and gave rise to passionate debates (see *e.g.*: Report of the ILC on the Work of its 48th Session, [1996] ILC YB, vol. II(2), p. 82, paras. 126-131 and Report of the ILC on the Work of its 49th Session, supra fn. 50, pp. 48-50, paras. 78-9). Following the lengthy discussions between the ILC and the human rights bodies, Section 3.2 of the Guide on the 'Assessment of the Permissibility of Reservations' was adopted in 2009 with much less reluctance than could have been expected in view of the previous debates on this matter (see Second Report on Reservations to Treaties, supra fn. 13, pp. 70-82, paras. 179-252 and ILC, Summary Records of the Meetings of the 48th Session, [1996] ILC YB, vol. I, pp. 200-202, paras. 26-47; also and in particular Summary Records of the Meetings of the 49th Session, [1997] ILC YB, vol. I, pp. 179-212).

[120] With the only and limited exceptions provided for in article 20 (2) and (3) of the Vienna.

[121] See the Third Report on Reservations to Treaties, supra fn. 54, pp. 236-284, paras. 47-413; Fifth Report on Reservations to Treaties, [2000] ILC YB, vol. II(2), pp. 159-180, paras. 66-213; discussions in plenary: 2541st meeting, 4 June 1998, doc. A/CN.4/SR.2541, 2542nd meeting, 5 June 1998, doc. A/CN.4/SR.2542, 2545th meeting, 10 June 1998, doc. A/CN.4/SR.2545; 2548th, 12 June 1998, doc. A/CN.4/SR.2548, 2549th meeting, 27 July 1998, doc. A/CN.4/SR.2548, 2550th meeting, 28 July 1998, doc. A/CN.4/SR.2550.

The main point probably was to make the distinction between reservations on the one hand and interpretative declarations as 'operational' as possible.[122] It was all the more important that the Vienna Conventions do not mention the latter – a quite noticeable lacuna in the Conventions, which the Guide to practice attempts to fill up as much as possible, not only by giving a definition and tools for distinguishing interpretative declarations from reservations, but also by defining the full legal regime of the formers.[123]

One of the major difficulties was the fate to be reserved to the 'conditional interpretative declarations' defined in guideline 1.4.[124] There is no doubt that such unilateral statements do not correspond to the definition of reservations since they do not purport 'to exclude or to modify the legal effect of certain provisions of the treaty'.[125] Nevertheless, by formulating such a declaration, States commit themselves only conditionally, just as they do when they formulate reservations. Given the dissimilarity in the definitions, I had systematically proposed draft guidelines dealing with the legal regime of these specific interpretation declarations.[126] However, it rather quickly appeared that, in spite of the variance in the definition, conditional interpretative declarations 'behave' exactly as reservations; this is why, in 2001, the Commission decided that '[s]hould this assimilation be confirmed in regard to the effects of

[122] See guidelines 1.2 (Definition of interpretative declarations), 1.2.1 (Interpretative declarations formulated jointly); 1.3 (Distinction between reservations and interpretative declarations), 1.3.1 (Method of determining the distinction between reservations and interpretative declarations).
[123] Each Part of the Guide includes sections on the rules applicable to interpretative declarations.
[124] '1. A conditional interpretative declaration is a unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof.'
[125] Cf. article 2 (1) (d) of the 1969 Vienna Convention (and guideline 1.1 (1)).
[126] See draft guidelines 2.5.13 (Withdrawal of a conditional interpretative declaration), 2.4.10 (Modification of a conditional interpretative declaration), 2.4.8 (Late formulation or modification of a conditional interpretative declaration) (in the Eighth Report on Reservations to Treaties, doc. A/CN.4/535, paras. 56, 61 and 62); 2.6.14 (Conditional objections), 2.9.10 (Reactions to conditional interpretative declarations) (in the Thirteenth Report on Reservations to Treaties, doc. A/CN.4/600, para. 330); 3.5.2 (Conditions for the permissibility of a conditional interpretative declaration), 3.5.3 (Competence to assess the permissibility of a conditional interpretative declaration) (in the Fourteenth Report on Reservations to Treaties, doc. A/CN.4/614/Add.1, paras. 177 and 178).

reservations and of conditional interpretative declarations respectively, the Commission is considering the possibility of not including in its draft Guide to Practice guidelines specifically relating to conditional interpretative declarations.'[127] It was only in 2010, when it had become clear that these declarations followed the same legal regime as reservations,[128] that the Commission dropped all the draft guidelines already adopted in this respect and adopted paragraph 2 of guideline 1.4 according to which: 'Conditional interpretative declarations are subject to the rules applicable to reservations.'

Concerning the definition of reservations properly said, three main points can be made.

First, I had – and from the very beginning of the research –, deliberately envisaged to clearly distinguish between the definition of reservations and the issue of their validity. Going even further, I was – and am still – convinced that you can decide whether a reservation is valid or not, only if you define the controversial statement as a reservation; in other terms, the definition must cover valid as well as invalid reservations. 'It is only once a particular instrument has been defined as a reservation (or an interpretative declaration, either simple or conditional) that one can decide whether it is valid, evaluate its legal scope and determine its effect. However, this validity and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.'[129] I must say that, although I considered this point as self-evident, I had to battle hard against several colleagues who had difficulties in accepting this, for me elementary, reasoning.[130]

It is true – and this is the *second* issue – that the Vienna definition itself is confusing, since it includes a temporal element which comes closer to a condition for its admissibility than to a definitional component. Nevertheless it has been included in the

[127] Report of the ILC on the Work of its 53rd Session, [2001] ILC YB, vol. II(2), p. 18, para. 20.
[128] See the Report of the ILC on the Work of its 62nd session, Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10, doc. A/65/10, p. 46, fn. 145.
[129] See Guide to Practice, para. 2 of the commentary to guideline 1.8.
[130] See Report of the ILC on the work of its 50th Session, [1998] ILC YB, vol. II(2), p. 99, para. 540. For a similar misunderstanding, see Zemanek, 'Alain Pellet's Definition of a Reservation', 3 *Austrian Review of International and European Law* (1998) 295, at 295-299.

definition of reservations given in the Vienna Conventions; and this is why I hesitated for a long time on the position to be adopted for confronting the phenomenon of 'late reservations'. I concede that, *a priori*, they do not enter within the meaning of 'reservation' as defined in the Convention. On the other hand, this is a very formal view and it is logical (and, I would think, easily acceptable) to consider the time factor[131] as a condition of validity of a reservation. But this approach does not solve the problem: if the Vienna definition were to be taken literally, all reservations formulated lately should be considered as invalid and without any affect whatsoever. This might be so in abstract law, but not in the real life where examples can easily be found of reservations formulated lately and producing all the consequences attached to a valid reservation with the approval of all the parties to the treaty.[132] This is why I have advocated a prudent recognition of this fact of the legal life and maintained it, in spite of strong opposition within[133] and outside[134] the ILC. Finally, the Commission has endorsed – but not in Part 1 on definitions – a series of guidelines on the 'late formulation of reservations',[135] which reintroduce for these reservations the unanimity principle. This reasonable solution coincides with the dominant practice and integrally preserves the

[131] For a broader presentation of the relations between reservations and time, see in this Journal the article by Daniel Müller.

[132] See Third Report on Reservations to Treaties, [1998] ILC YB , vol. II(2), pp. 247-248, paras. 135-143; Fifth Report on Reservations to Treaties, [2000] ILC YB, vol. II(1), pp. 191-197, paras. 279–325; Eigth Report on Reservations to Treaties, doc. A/CN.4/535, paras. 34-48 and doc. A/CN.4/535/Add.1, para. 101; Ninth Report on Reservations to Treaties, doc. A/CN.4/544, paras. 27-29; see also the commentaries of guidelines 2.3 and 2.3.1.

[133] See ILC, Documents of the 53rd Session, [2001] ILC YB, vol. I(1), pp. 74-86, *passim*.

[134] R. Baratta, *Gli effetti delle riserve ai trattati* (1999), at 27, note 65; Coulée, 'La codification du droit international. Le cas des réserves aux traités internationaux', in M. P. de Brichambaut, *Leçons de droit international public*, 2nd ed. (2011), at 307-324; Gaja, 'Unruly Treaty Reservations', in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (1987) 307, at 310; Edwards, 'Reservations to Treaties', 10 *Michigan Journal of International Law* (1989) 362, at 383; Polakiewicz, 'Reservations and Declarations', in *Treaty-Making in the Council of Europe* (1999) 77, at 94. For opposition from States, see the examples provided in the Sixth Report, doc. A/CN.4/518, fns. 22-24 and Seventh Report, A/CN.4/526, fns. 70-72.

[135] See guidelines 2.3 to 2.3.4, 4.3.2 and 5.1.8. See also guideline 2.4.7 (Late formulation of an interpretative declaration). For examples as such types of reservations, see the reservations of Canada, the United States of America, Laos, Thailand and Turkey to the Convention on the Privileges and Immunities of the United Nations (*Multilateral Treaties deposited with the Secretary-General*, chap. III.I), that of Malta to the 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring (*ibid.*, chap. XI.A.7) or that of the European Community to articles 6 and 7 of the 1994 Convention on Customs Treatment of Pool Containers (*ibid.*, chap. XI.A.18).

consent principle. It might not be entirely orthodox, but 'ayatollah's law' leads to deadlocks...

The *third* troubling issue concerning reservations is of the same nature, but less difficult – and it has given rise to less controversies.[136] It bears upon 'across-the-board' or 'transversal' reservations, that is 'reservations which purport to exclude or to modify the legal effect of certain provisions of a treaty, or of the treaty as a whole with respect to certain specific aspects, in their application to the State or to the international organization which formulates the reservation.'[137] This kind of statements is not mentioned in the Vienna definition; however, '[t]he abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a practical need that it would be absurd to challenge in the name of abstract legal logic.'[138]

As for the rest, Part 1 of the Guide to practice brings various clarifications to the definitions of reservations and interpretative declarations, the method to discriminate between the two, other unilateral statements and various alternatives to reservations and interpretative declarations.[139] It also deals with "'Reservations' to bilateral treaties';[140] the fact that the word 'reservations' is, unusually, written between inverted brackets is telling: such statements, while quite currently called 'reservations', do not constitute reservations within the meaning of the Guide;[141] such a statement 'appears to

[136] See however the examples of opposition from States and some authors provided in the ILC Report on the work of its 51st session, [1999], vol. II(2), pp. 93-95; for the discussions in the Commission, see [1999] ILC YB, vol. I, pp. 221-224 and pp. 299-300.
[137] Guideline 1.1 (2).
[138] See para. 21 of the commentary of guideline 1.1, in Guide to Practice.
[139] On these two last points, the Special Rapporteur's Fifth Report (in [2000] ILC YB, vol. II(1), pp. 159-180, paras. 66–213) was more detailed than the commentaries of the Commission on guidelines 1.5 to 1.5.3 (Unilateral statements other than reservations and interpretative declarations) and 1.7 to 1.7.2 (Alternative to reservations and interpretative declarations).
[140] Guidelines 1.6 to 1.6.3.
[141] Cf. guideline 1.6.

be a proposal to amend the treaty in question or an offer to renegotiate it'[142]; if accepted, it 'becomes an amendment to the treaty'.[143]

Part 2 – Procedure

Of all five parts, part 2 raised the least controversial issues[144] except for the question of the late formulation of reservations. The guidelines composing it were however carefully drafted and commented given the considerable practical importance of the issues concerned. There is not much to be said on sections 2.1 (Form and notification of reservations), 2.2 (Confirmation of reservations) or 2.4 (Procedure for interpretative declarations).[145] Section 2.5 gives useful clarifications on the 'Withdrawal and modification of reservations and interpretative declarations' on which the Vienna Conventions are largely mute[146]. Besides a too circumspect encouragement to periodically review the usefulness of reservations,[147] guidelines 2.5.7 to 2.5.11 elucidate the effects of the withdrawal of a reservation, whether full of partial, and the date of said effects. Section 2.9 deals with the Formulation of reactions to interpretative declarations.[148]

More interesting, at least from an academic perspective, are sections 2.6 and 2.7 on objections to reservations and their withdrawal or modification and 2.8 on the Formulation of acceptances of reservations.

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[142] Guide to Practice, Commentary of guideline 1.6, para. (17).
[143] *Ibid.*, para. (20).
[144] However, my colleagues could get extremely excited on the most fundamental question of knowing whether or not the communication of a reservation could be made by an electronic mail or facsimile... This interesting (?) issue kept the Commission and its Drafting Committee busy for hours (see [2002] ILC YB, vol. I, p. 150, para. 23, p. 152, paras. 42-43; p. 153, para. 4; and the discussion during the 59th session of the ILC (2007), in Provisional Summary Record of the 2917th meeting, 10 May 2007, doc. A/CN.4/SR.2917, pp. 6-7 and p. 12; also Provisional Summary Record of the 2918th meeting, 11 May 2007, doc. A/CN.4/SR.2918, pp. 3, 5, 8; and Provisional Summary Record of the 2919th meeting, 12 May 2007, doc. A/CN.4/SR.2919, p. 6). See guideline 2.1.6 (3).
[145] Section 2.3 concerns the late formulation of reservations (*ibid.*).
[146] See however articles 22 (1) and 23 (4), the texts of which are reproduced respectively in guidelines 2.5.1 and 2.5.2.
[147] Guideline 2.5.3.
[148] Note the care taken by the ILC to differentiate the terminology applicable to those reactions compared to that which is usual concerning reactions to reservations: 'approval' (*approbation*) instead of 'acceptance' (*acceptation*); 'opposition' (*opposition*) instead of 'objection' (*objection*); to this must be added the specific operation of 'recharacterization' (*requalification*) of an interpretative declaration, by which the reacting State purports to treat the declaration as a reservation (guideline 2.9.3).

Guideline 2.6.1 gives a definition of objections to reservations, which is missing in the Vienna Conventions.[149] This definition is, so to speak, the 'negative' carbon copy of that of reservations themselves in that it characterizes an objection – exactly as guideline 1.1 copied from the Vienna Conventions does for reservations – not by its effects by but its 'purported' effects.[150] Moreover, the most important guideline 2.6.2 establishes the *right* of States and international organisations[151] to formulate an objection 'irrespective of the permissibility of the reservation'. This is a prominent element of the essentially consensual nature of the law of reservations: States have a right to formulate reservations; the other parties (or future possible parties) have their own right not to be bound with partners which do not accept the negotiated texts in its entirety – whatever the reasons,[152] including by opposing the entry into force of the treaty as between the objecting State and the author of the reservation.[153]

Nothing special deserves to be discussed in respect to the formulation of acceptances of reservations.[154] The Guide to practice of course maintains the principle enunciated in article 20 (5) of the Vienna Conventions according to which, unless the treaty otherwise

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[149] '"Objection" means a unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation formulated by another State or international organization, whereby the former State or organization purports to preclude the reservation from having its intended effects or otherwise opposes the reservation.'

[150] See Guide to Practice, the commentary of guideline 2.6.1, paras. (1) and (2); see also para. (25). However, the definition of objections – contrary to that of reservations – does not include a mention of the time at which an objection must be made (but see guidelines 2.6.12 (Time period for formulating objections) and 2.6.13 (Objections formulated late)).

[151] Guideline 2.6.3 specifies that '[a]n objection to a reservation may be formulated by: (i) any contracting State or contracting organization; and (ii) any State or international organization that is entitled to become a party to the treaty, in which case the objection does not produce any legal effect until the State or international organization has expressed its consent to be bound by the treaty'; this last expression reproduces the formula in article 23 (1) of the Vienna Conventions concerning the notification of reservations, express acceptances and objections and, as the ILC rightly notes, '[s]uch a notification has meaning only if these other States and international organizations can in fact react to the reservation by way of an express acceptance or an objection.' (Guide to Practice, para. (4) of the commentary of the guideline 2.6.3). In spite of this common sense remark, para. (ii) was strongly opposed by several members of the ILC.

[152] Guideline 2.6.9 encourages States and international organisations to state the reasons why they formulate objections; but this is by no means a legally binding obligation.

[153] See guideline 2.6.6.

[154] Note however, the five guidelines devoted to the procedure of acceptance of a reservation to the constituent instrument of an international organisation (guidelines 2.8.8 to 2.8.12).

provides, an acceptance results from a twelve months silence kept by another State after the notification of the reservation.[155] The most noticeable clarification resulting from Section 2.8 is given by guideline 2.8.13 according to which '[t]he acceptance of a reservation cannot be withdrawn or amended.'[156]

Part 3 – Permissibility of reservations and interpretative declarations

The main difficulties are concentrated in Parts 3 and 4 – one of them being specific to the English version since English speaking ILC members and the UK delegation in the Sixth Committee obstinately opposed the use of the word 'validity' to designate the fact that a reservation could produce its purported effects.[157] Hence the use of the word 'permissibility' in the title of Part 3 of the Guide to Practice (corresponding to *validité substantielle* in the French text)[158] – an expression which I disapprove since it seems to support the 'permissibility school' (by opposition to the 'opposability school'), while the Commission and the Special Rapporteur have tried to keep aside from any ready-made position.[159]

Part 3 of the Guide starts with guideline 3.1 which simply reproduces article 19 of the 1986 Vienna Convention, so seminal in the law of reservations.[160] This induced the Commission to try to specify as much as possible the impenetrable notion of 'object and purpose' which is at the heart of any assessment of the permissibility of reservations. To this aim, guideline 3.1.4 gives a general idea of the meaning of the expression[161] and guideline 3.1.5.1 suggests a method in order to determine the object and purpose of the

[155] See guidelines 2.8.1 and 2.8.2.

[156] Guidelines 2.8.7 and 2.8.11 echo guideline 2.8.13 by stating that once obtained unanimous acceptances, when required, are final.

[157] See Tenth Report, fn 166, paras. 4-5. For other positions on this terminological issue, see Eleventh Report, fn 61, paras. 18-23.

[158] I have persuaded my English speaking colleagues (and apparently the UK Government) to accept the use of the terms 'valid' and 'validity' in Part 4 of the Guide in order to refer to the conformity of a reservation to the conditions of form and substance imposed by the law of reservations.

[159] This said, I must admit that, while I was entirely in a neutral frame of mind when I was designated as the Special Rapporteur on the topic, I now tend to tip in favour of the 'permissibility' way of thinking, which I think reasonably reconcile articles 19 and 20 of the Vienna Conventions and is more realistic and reasonable than the 'hyper-sovereignist' reasoning inspiring the advocates of the opposability school.

[160] See Pellet, commentary of article 19 in O. Corten and P. Klein (eds) *The Vienna Conventions on the Law of Treaties: A Commentary* (2011) 405, at 405-488.

[161] Guideline 3.1.5: 'A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenour, in such a way that the reservation impairs the raison d'être of the treaty.'

treaty.[162] These crucial provisions are completed by guidelines 3.1.5.2 to 3.1.5.7 which give a series of examples bearing upon the most usual difficulties met for making this determination:[163]

- vague or general reservations (guideline 3.1.5.2),

- reservations to a provision reflecting a customary rule (guideline 3.1.5.3);

- reservations to provisions concerning rights from which no derogation is permissible under any circumstances (guideline 3.1.5.4);

- reservations relating to internal law (including specific rules of an international organisation) (guideline 3.1.5.5);

- reservations to treaties containing numerous interdependent rights and obligations (guideline 3.1.5.6); and

- reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty (guideline 3.1.5.7).

This article is not the place to comment on each of these points, which are the object of abundant commentaries.[164] However, two questions, not expressly dealt with in the guidelines, deserve some explanations:

- the problems linked to the so-called 'sharia reservation'; and

- those concerning reservations on provisions reflecting a peremptory norm (*jus cogens*).

I was prepared to meet huge difficulties in respect to the former, but I did not expect tricky discussions on the latter. The religious war did not come were it was anticipated: the exact opposite happened.

I must admit that, when reflecting upon my topic, I was apprehensive of the reactions Islamic States within the Sixth Committee or my Moslem colleagues could have

[162] Guideline 3.1.5.1: 'The object and purpose of the treaty is to be determined in good faith, taking account of the terms of the treaty in their context, in particular the title and the preamble of the treaty. Recourse may also be had to the preparatory work of the treaty and the circumstances of its conclusion and, where appropriate, the subsequent practice of the parties.'

[163] More widely, these guidelines concern the most controversial issues concerning the permissibility of reservations and are not all related to the object and purpose of the treaty *stricto sensu*.

[164] Guide to Practice, pp. 363-399.

regarding the 'sharia reservation', which I would have found dishonest not to discuss. At the same time, I was (and still am) sincerely convinced that the issue was by no means the sharia by itself but the inacceptable specificities of *certain* reservations based on the sharia, specificities which can be found also in other reservations having no relation with the sharia or with Islam. Contrary to my fears, this view was endorsed without any difficulty by the Commission and, to my knowledge, did not lead to protests in the Sixth Committee. As the ILC notes in its commentary of guideline 2.1.5.2 in relation to a most objected reservation:[165]

> the problem lies not in the fact that Mauritania is invoking a law of religious origin which it applies,[fn omitted] but, rather that, as Denmark noted, "the general reservations with reference to the provisions of Islamic law are of unlimited scope and undefined character"[*Multilateral treaties* ..., chap. IV.8.].[166]

The reason why such reservations are not admissible has nothing to do with their religious origin; it lies in the fact that their vagueness makes it impossible 'to assess its compatibility with the object and purpose of the treaty'[167] and, therefore, deprives the other parties of their right to react (by accepting or objecting to the reservation) with full knowledge of its meaning and scope.[168] The problems raised by reservations based on internal law are similar: 'a reservation is not invalid solely because it aims to preserve the integrity of specific rules of internal law';[169] but it can be inadmissible either because the author of the reservation invokes its domestic law 'without identifying the provisions in question or specifying whether they are to be found in its constitution or its civil or criminal code.'[170]

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[165] *I.e.* he reservation by which Mauritania approved the 1979 Convention on the Elimination of All Forms of Discrimination against Women 'in each and every one of its parts which are not contrary to Islamic sharia' (*Multilateral Treaties deposited with the Secretary General*, available from http://treaties.un.org/; chap. IV.8.)
[166] Guide to Practice, commentary to guideline 3.5.2, para. (7).
[167] Guideline 3.1.5.2.
[168] See Guide to Practice, commentary to guideline 3.5.1.2, para. (3).
[169] *Ibid*., para. (7).
[170] *Ibid*., para. (4).

As for the admissibility of reservations to treaty provisions reflecting a norm of *jus cogens*, I had, with hesitation,[171] proposed a draft guideline lying on a different assumption than the guideline relating to reservations to provisions reflecting a customary rule: draft guideline 3.1.9 accepted that the peremptory nature of the norms enunciated in the provision rendered the reservation impermissible.[172] However, this proposal met serious objections during the debates in the Drafting Committee where it gave rise to a most passionate debate reflecting the sensitivity of my colleagues on all matters pertaining to *jus cogens*; this very lengthy discussion provisionally ended with a meaningless 'compromise solution'[173] which was abandoned in 2011 in favour of another unfortunate compromise:

- no guideline would be adopted in Part 3 of the Guide on reservations to a provision reflecting a peremptory norms;

- the pros and the cons for both views would be explained in the commentary of guideline 3.1.5.3 (Reservations to a provision reflecting a customary rule); however,

- by way of conclusion to this commentary it would be mentioned that the Commission 'is of the view that the principle stated in guideline 3.1.5.3 applies to reservations to treaty provisions reflecting a customary peremptory norm,'[174] and

- guideline 4.4.3 (Absence of effect on a peremptory norm of general international law (*jus cogens*)) would read as follows:

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[171] See Tenth Report, supra fn. 166, paras. 131-137.

[172] Draft guideline 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*): 'A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law.' (Tenth Report on Reservations to Treaties, supra fn. 166, para. 146).

[173] Guideline 3.1.9 as adopted by the Drafting Committee and endorsed by the Commission in 2007 provided as follows: 'Reservations contrary to a rule of *jus cogens* - A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law' (Report of the ILC on the Work of its 59th session, Official Records of the General Assembly, Sixty-second Session, Supplement No. 10, doc. A/62/10, para. 47); for an hopeless justification see the Statement of the Chairman of the Drafting Committee, Mr. Chusei Yamada, 4 May 2007, p. 6, available from : http://untreaty.un.org/ilc/sessions/59/Drafting%20Committee%20Chair%20Statement%20-%20Reservations.pdf.

[174] Guide to Practice, commentary to guideline 3.5.1.3, para. (22). In this same commentary, the Commission notes that it 'considers that States and international organizations should refrain from formulating such reservations and, when they deem it indispensable, should instead formulate reservations to the provisions concerning the treaty regime governing the rules in question.' (*ibid.*).

> 1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.
>
> 2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.[175]

This formulation implicitly recognizes that reservations to provisions reflecting a peremptory norm are subject to the same rules as reservations to provisions which reflect customary rules. It would have been simpler and franker to say it expressly but some measure of hypocrisy sometimes makes consensus easier...

The other sections of Part 3 of the Guide to practice are devoted to the assessment of permissibility of reservations (3.2), the consequences of the non-permissibility of a reservation (3.3) – a somehow misleading title in that the main consequences are detailed in Part 4,[176] – the permissibility of reactions to reservations (on which the Commission had little to say since it considered that '[a]cceptance of a reservation is not subject to any condition of permissibility'[177] and that only the permissibility of objections with 'intermediate effects' was subject to limitations.[178] According to the general scheme of the various parts of the Guide, Part 3 ends with two sections on the permissibility of an interpretative declaration (3.5) and of reactions to such declaration (3.6).

Part 4 – Legal Effect of Reservations and Interpretative Declarations

[175] Paragraph 2 of guideline 4.4.3 reproduces the incongruous text of the 2007 guideline 3.1.9.
[176] The three guidelines of this part respectively concern the irrelevance of distinction between the grounds for non-permissibility (3.3.1), the position that the non-permissibility of reservation does not engage the international responsibility of its author (3.3.2), and the absence of effect of individual acceptance of a reservation on the permissibility of the reservation (3.3.3).
[177] Guideline 3.4.1.
[178] Guideline 3.4.2 (Permissibility of an objection to a reservation): 'An objection to a reservation by which a State or an international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty to which the reservation does not relate is only permissible if: (1) the provisions thus excluded have a sufficient link with the provisions to which the reservation relates; and (2) the objection would not defeat the object and purpose of the treaty in the relations between the author of the reservation and the author of the objection.'

Article 21 of the Vienna Conventions deals with the 'Legal effects of reservations and objections to reservations'.[179] But, in reality, it says little on these effects, on which it sheds little light, and nothing on the effects of an invalid reservation.

In effect, as results from the first phrase of paragraph 1 of article 21, it is limited to the legal effects of reservations '*established* with regard to another party *in accordance with* articles 19, 20 and 23'. Although some members of the ILC rather vigorously opposed sanctioning the concept of 'established reservations' in order not to create a new category of reservations,[180] the Commission considered it indispensable to clarify this notion from the outset; this is done in Section 4.1 (guidelines 4.1 to 4.1.3). The general idea is that three conditions must be met:

(i) it must be formulated in accordance with the required form and procedure;

(ii) it must be permissible;[181] and

(iii) it must be accepted by the required number of contracting States or international organisations.[182]

When a reservation is thus established, it produces the effects described in section 4.2:

- its author becomes a contracting State or organisation to the treaty (guideline 4.2.1) and a party if and when the treaty is in force[183] (guideline 4.2.3);

- if the treaty is not yet in force, the author of the established reservation can be taken into account for the calculation of the number of States (or organisations) necessary for the entry into force (guideline 4.2.2); and

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[179] See D. Müller's commentary of this provision in O. Corten and P. Klein (eds), supra fn. 160, at 538-567.

[180] See Guide to Practice, commentary to guideline 4.1, para. (3). See also: Provisional Summary Record of the 3042nd Meeting, 11 May 2010, doc. A/CN.4/SR.3042, pp. 3-9.

[181] The combination of these two first conditions makes the reservation 'valid'.

[182] One at least in the basic case (article 20 (4) of the Vienna Conventions and guideline 4.1); none when the reservation has been expressly authorized by the treaty (article 20 (1) and guideline 4.1.2); all contracting States or international organisations if the treaty has to be applied in its entirety (article 20 (2) and guideline 4.1.3) and by the competent organ of the organisation if the treaty is a constituent instrument of an international organisation (article 20 (3) and see guideline 4.1.3.

[183] As a reminder: "'contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force' (1969 Vienna Convention, article 2 (1) (f)); "'party" means a State which has consented to be bound by the treaty and for which the treaty is in force' (article 2 (1) (g)).

- it produces the effects purported by the reservation[184] (see guideline 4.2.4).

Of course, these effects are partly paralyzed when another State makes an objection to a valid reservation, as rather extensively developed in Section 4.3 of the Guide to practice. The important point is the variations of the consequences of an objection, depending on the will of the objecting State. In this respect, without contradicting the Vienna Conventions, the Guide goes beyond their provisions, which only envisage two hypotheses: what is currently named objections with maximum effect (by which a State excludes the entry into force of the treaty between itself and the reserving State)[185], or with 'normal effect'.[186] Guideline 4.3.7 for its part sanctions, although with caution, the existence of objections with intermediate effects,[187]by which an objecting State purports to exclude the application of '[a] provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate'. However, 'in order to restore what could be referred to as the "consensual balance" between the author of the reservation and the author of the objection[188], paragraph 2 of guideline 4.3.7 treats such an objection as a kind of "counter-reservation" to which the reserving State can make "counter-objections'"[189].

Indirectly guideline 4.3.8 (Right of the author of a valid reservation not to comply with the treaty without the benefit of its reservation) alludes to what is now usually called an

[184] As a reminder too: a reservation is defined not by its effects but by its *purported* effects (see supra fn. 157 and the accompanying text).
[185] See Vienna Conventions, articles 20 (4) (b) and 21 (3) or guidelines 4.3.1 and 4.3.5. When an objection is made to a reservation to a treaty requiring unanimous acceptance, it of course precludes the entry into force of the treaty for the author of the reservation (guideline 4.3.4).
[186] See Vienna Conventions, article 21 (1) and guidelines 4.3 and 4.3.1 and the rather complex guideline 4.3.6. Contrary to a frequently alleged idea, a 'simple' objection does not amount to an acceptance (see Pellet and Müller, 'Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance', in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention (in Honour of Giorgio Gaja)* (2011) 37, at 37-59).
[187] See supra fn. 178 and the accompanying text.
[188] Guide to Practice, commentary to guideline 4.3.7, para. (10).
[189] '2. The reserving State or international organization may, within a period of twelve months following the notification of an objection which has the effect referred to in paragraph 1, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.'

objection with 'super-maximum' effect (at least purporting to produce such an effect) by stating:

> The author of a valid reservation is not required to comply with the provisions of the treaty without the benefit of its reservation.

Thus, the ILC takes a clear-cut position – which was unanimously accepted –[190] on the question of the objections 'whereby the author of the objection affirms that the treaty enters into force in its relations with the author of the reservation without the latter being able to benefit from its reservation':[191] they do not produce the effect purported by their author when the reservation is valid – such a consequence would be eminently contrary to the principle of consent.

But the question of the effects of objections is a different matter when they react to an invalid reservation. Section 4.5, which probably is the most innovative (since the Vienna Conventions are mute) and the most delicate portion of the Guide, sets out the Consequences of an invalid reservation. The principle is that an invalid reservation 'is null and void',[192] independently of the reactions of the other contracting States.[193] But this only partially solves the question of the status of the author of an invalid reservation in relation to the treaty. The ILC's more complete answer is given in guideline 4.5.3, which deserves to be reproduced in full:

> 1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty.

[190] See Provisional Summary Record of the 3047th Meeting, 19 May 2010, doc. A/CN.4/SR.3047, p. 9.
[191] Guide to Practice, commentary to guideline 4.3.7, para. (1).
[192] Guideline 4.5.1.
[193] Guideline 4.5.2.

> 2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation.
>
> 3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation.
>
> 4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.

Guideline 4.5.3 is the final outcome of a long and painful process, which, in fact, began with the 'confrontational dialogue' between the ILC and the human rights bodies following the adoption by the Human Rights Committee of its General Comment No. 24 and by the Commission of its Preliminary Conclusions on Reservations to Normative Multilateral Treaties Including Human Rights Treaties.[194] The HRC had declared that:

> The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.[195]

For its part, the Commission had concluded in 1997 that

> in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the

[194] See supra fn. 51 and the accompanying text. On the appreciation of the role of the monitoring bodies in respect to reservations, see Sir Michael Wood's contribution in this Journal, 'Institutional aspects of the Guide to Practice on Reservations'.
[195] General Comment No. 24, supra fn. 44, p. 124, para. 18.

> State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.[196]

Both texts left open the way for less drastic and general solutions and, in effect, guideline 4.5.3 as finally adopted is midway between both extreme positions: the Commission has maintained that, in conformity with its initial view, it was in principle for the reserving State to express its intention. On the other hand, it has taken an important step toward the position of the human rights bodies in that it accepts the principle of a (rebuttable) presumption in favour of the severability of the reservation (that is of the super-maximum effect of the reservation). However, several remarks can be made:

- this middle way solution could only be adopted after years of discussions, during which the points of view slowly moved closer together;

- however, this move is more true concerning the members of the ILC and of the human rights bodies; as for the States, the 2010 debate in the Sixth Committee showed quite rigidly stubborn and rather discouraging positions;[197]

- the draft guideline adopted that year by the Commission was certainly less unsatisfactory than the final text of guideline 4.5.3; it read thus:

> When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.
>
> The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

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[196] Report of the ILC on the Work of its 49th Session, supra fn. 50, p. 57, para. 10 of the preliminary conclusions.

[197] The views expressed were very exactly equivalent in number in favour of one or the other extreme position See Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its 65th Session (doc. A/CN.4/638, paras. 19-24; for the reactions within the Sixth Committee, see in particular doc. A/C.6/65/SR.21; see also the comments received from Governments, doc. A/CN.4/639, supra fn. 67, paras. 131-182) - there were, however some bright exceptions of rare States trying to propose a compromise position, in particular Austria (see doc. A/CN.4/639, paras. 133), Finland (*ibid*., paras. 137-145) or Switzerland (*ibid*; 167-169).

• The wording of the reservation
• Statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty
• Subsequent conduct of the author of the reservation
• Reactions of other contracting States and contracting organizations
• The provision or provisions to which the reservation relates
• The object and purpose of the treaty.[198]

- it had the merit to opt for a clear presumption in favour of the severability, while the new text is ambiguous and largely impracticable in that it leaves the author of the invalid reservation free to 'express *at any time* its intention not to be bound by the treaty without the benefit of the reservation'; this is difficult to reconcile with the temporal element in the definition of reservations or in the *chapeau* of article 19 of the Vienna Conventions; more critically it creates uncertainties on the principle of treaty commitment itself.

This shaky solution was probably the 'least worse possible' if one wanted to take into account the deep division between States on this quite crucial issue. And, unfortunately, it is unlikely that they will try to find any better compromise solution when the Guide to practice will be discussed again in 2012. According to my experience, States are not much inclined to 'naturally' compromise when what they consider (often erroneously) as being 'questions of principle' are at stake, even when a compromise would clearly be in the common interest. And concerning guideline 4.5.3, the risk that they do not move an iota is all the more likely that 'the harm is done': except by summoning a diplomatic conference (which would be absurd) or clearly rejecting the whole Guide to practice (which is unlikely since it would be throwing the baby with the bath for one or two guidelines some States disapprove), the Guide exists; it is published as an official document of the General Assembly and it is probable that delegations in the Sixth Committee will consider that there only means of influence is to rigidly stick to their position with the hope that it will be taken into consideration in the future

[198] Report of the ILC on the Work of its 62nd session, supra fn. 128, p. 192.

'implementation' of this non-binding document. And the views expressed by the States in the Sixth Committee or outside should indeed be taken into consideration.

However – and quite unfortunately, the chances are better than not that, instead of trying to define a common (reasonable and consensual) position on the most difficult issues, the delegates in the Sixth Committee will, as usual, give so cacophonic speeches that the message will be inaudible. Therefore whether the General Assembly takes note of the Guide to Practice[199] or not, it will live its own life; practice only will be judge of its adaptation to the needs of the international community of States (and international organisations) or whether it is desirable to adapt some of the rules it recommends to follow, to let some aside or to adopt or progressively develop others. The non-binding nature of the Guide fits in this process of continuous adaptation.

Annex I
TABLE OF CORRELATION BETWEEN GUIDELINES AND ARTICLES OF THE VIENNA CONVENTIONS

Guidelines in the Guide to Practice	Corresponding Articles in the Vienna Conventions[200]
Guideline 1.1 (Definition of reservations)	Article 2, paragraph 1 (d)
Guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty)	Article 23, paragraph 2
Guideline 2.1.1 (Form of reservations)	Article 23, paragraph 1

[199] As the ILC recommended.
[200] Unless otherwise mentioned, the numbering of the articles is that of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

Guideline 2.1.5 (Communication of reservations)	Article 23, paragraph 1
Guideline 2.1.6 (Procedure for communication of reservations)	Article 23, paragraph 1
Guideline 2.2.1 (Formal confirmation of reservations formulated when signing a treaty)	Article 23, paragraph 2
Guideline 2.5.1 (Withdrawal of reservations)	Article 22, paragraph 1
Guideline 2.5.2 (Form of withdrawal)	Article 23, paragraph 4
Guideline 2.5.8 (Effective date of withdrawal of a reservation)	Article 22, the *chapeau* and the subparagraph (a) of paragraph 3
Guideline 2.6.5 (Form of objections)	Article 23, paragraph 1
Guideline 2.6.6 (Right to oppose the entry into force of the treaty *vis-à-vis* the author of the reservation)	Article 20, paragraph 4 (b), and Article 21, paragraph 3
Guideline 2.6.7 (Expression of intention to preclude the entry into force of the treaty)	Article 20, paragraph 4 (b)
Guideline 2.6.10 (Non-requirement of confirmation of an objection formulated prior to formal confirmation of a reservation)	Article 23, paragraph 3
Guideline 2.6.12 (Time period for formulating objections)	Article 20, paragraph 5
Guideline 2.7.1 (Withdrawal of objections to reservations)	Article 22, paragraph 2
Guideline 2.7.2 (Form of withdrawal of objections to reservations)	Article 23, paragraph 4
Guideline 2.7.5 (Effective date of withdrawal of an objection)	Article 22, paragraph 3 (b)
Guideline 2.8.1 (Forms of acceptance of reservations)	Article 20, paragraph 5

Guideline 2.8.2 (Tacit acceptance of reservations)	Article 20, paragraph 5
Guideline 2.8.6 (Non-requirement of confirmation of an acceptance formulated prior to formal confirmation of a reservation)	Article 23, paragraph 3
Guideline 2.8.7 (Unanimous acceptance of reservations)	Article 20, paragraph 3
Guideline 2.8.8 (Acceptance of a reservation to the constituent instrument of an international organization)	Article 20, paragraph 3
Guideline 3.1 (Permissible reservations)	Article 19
Guidelines 3.1.3 (Permissibility of reservations not prohibited by the treaty)	Article 19, subparagraph (a)
Guideline 3.1.4 (Permissibility of specified reservations)	Article 19, subparagraph (b)
Guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)	Article 19, subparagraph (c)
Guideline 4.1.1 (Establishment of a reservation expressly authorized by a treaty)	Article 20, paragraph 1
Guideline 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety)	Article 20, paragraph 2
Guideline 4.2.3 (Effect of the establishment of a reservation on the status of the author as a party to the treaty)	Article 20, paragraph 4 (a)
Guideline 4.2.4 (Effect of an established reservation on treaty relations)	Article 21, paragraph 3
Guideline 4.3 (Effect of an objection to a valid reservation)	Article 21, paragraph 3

Guideline 4.3.1 (Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation)	Article 20, paragraph 4 (b)
Guideline 4.3.5 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect)	Article 20, paragraph 4 (b)
Guideline 4.3.6 (Effect of an objection on treaty relations)	Article 21, paragraph 3
Guideline 4.6 (Absence of effect of a reservation on the relations between the other parties to the treaty)	Article 21, paragraph 2
Guideline 5.1.1 (Newly independent States)	Article 20, paragraphs 1 to 3, of the 1978 Vienna Convention

Annex II
REPORTS OF THE SPECIAL RAPPORTEUR ON 'RESERVATIONS TO TREATIES' AND OTHER RELEVANT DOCUMENTS

YEAR	REPORT	ILC SESSION	ILC *YEARBOOK*
1995	*First Report* (Doc. A/CN.4/470 and Corr. 1	47th session	[1995] ILC YB, vol. II (1), at 121-155
1996	*Second Report* (Doc. A/CN.4/477 and Add.1) *Annex I*	48th session	[1996] ILC YB, vol. II (1), at 37-117

	(Bibliography); *Annex II* (Questionnaire on the topic of reservations to treaties addressed to States Members of the United Nations or of a specialized agency or parties to the ICJ Statute) and *Annex III* (Questionnaire on the topic of reservations to treaties addressed to international organizations)		
1998	*Third Report* (doc. A/CN.4/491 and Add.1–6)	50th session	[1998] ILC YB, vol. II (1), at 221-300
1999	*Fourth Report* (doc. A/CN.4/499) and *Annex* (Bibliography)	51st session	[1999] ILC YB, vol. II (1), at 127-150.
2000	*Fifth Report* (doc. A/CN.4/508 and Add.1–4)	52nd session	[2000] ILC YB, vol. II (1), at 139-204.
2001	*Sixth Report* (doc. A/CN.4/518 and	53rd session	[2001] ILC YB, vol. II (1), at 137-168

	Add.1–3)		
2002	*Seventh Report* (doc. A/CN.4/526 and Add.1–3)	54th session	[2002] ILC YB, vol. II (1), at3-48.
2003	*Eighth Report* (doc. A/CN.4/535 and Add. 1)	55th session	Paper version Not issued[201]
2004	*Ninth Report* (doc. A/CN.4/544)	56th session	*id.*
2005	*Tenth Report* (doc. A/CN.4/558 and Add. 1-2)	57th session	*id.*
2006	*Note by the Special Rapporteur on draft guideline 2.1.9, 'Statement of reasons for reservations'* (doc. A/CN.4/586)	58th session	*id.*
2007	*Eleventh Report* (doc. A/CN.4/574) *Twelfth Report* (doc. A/CN.4/584)	59th session	*id.*
2008	*Thirteenth Report* (doc. A/CN.4/600)	60th session	*id.*
2009	*Fourteenth Report* (doc. A/CN.4/614 and Add. 1-2)	61st session	*id.*

[201] All the documents are available on the Website of the Commission: http://www.un.org/law/ilc/.

	Memorandum by the Secretariat on reservations to treaties in the context of succession of States (doc. A/CN.4/616)		
2010	*Fifteenth Report* (doc. A/CN.4/624 AND Add. 1) *Sixteenth Report* (doc. A/CN.4/626 and Add. 1)	62nd session	*id.*
2011	*Seventeenth Report* (doc. A/CN.4/647 and Add. 1)	63rd session	*id.*