United Nations A/CN.4/624

General Assembly

Distr.: General
31 March 2010
English
Original: French

International Law Commission
Sixty-second session
Geneva, 3 May-4 June and 5 July-6 August 2010

Fifteenth report on reservations to treaties

By Alain Pellet, Special Rapporteur

Continuation of the fourteenth report (section III)

Contents

10-30194 (E) 270410 220610

For technical reasons (which the Special Rapporteur considers unduly rigid), the symbol assigned to this report is different from that of the fourteenth report (A/CN.4/614 and Adds. 1 and 2), of which this is, in reality, simply a continuation.[455]

III. Effects of reservations and interpretative declarations (*continued*)

A. Effects of reservations, acceptances and objections (*continued*)

2. Valid reservations* (*continued*)

(b) Effects of an objection to a valid reservation

291. Unlike acceptance of a valid reservation, an objection to a reservation may produce a variety of effects as between the author of the reservation and the author of the objection. The choice is left to a great extent (but not entirely) to the latter, which can vary the potential legal effects of the reservation-objection pair. For example, it may choose, in accordance with article 20, paragraph 4 (b), of the Vienna Conventions on the Law of Treaties, to have the treaty not enter into force as between itself and the reserving State by "definitely" expressing that intention. But the author of the objection may also elect not to oppose the entry into force of the treaty as between itself and the author of the reservation or, to put it more accurately, may refrain from expressing a contrary intention. In that case, if the treaty does, in fact, enter into force for the two parties,[456] the treaty relations between the author of the reservation and the author of the objection are modified in accordance with article 21, paragraph 3, of the Vienna Conventions. Thus, objections to a valid reservation may have a number of effects on the very existence of treaty relations or on their content, and those effects may vary with regard to one and the same treaty.

292. The primary function and the basic effect of every objection are, however, very simple. Unlike acceptance, an objection constitutes its author's rejection of the

---

[455] The paragraphs are numbered accordingly.

* In the French text of the report, the terms "*validité*" or "*valide*" are used in almost all instances, in the following paragraphs and in the draft guidelines proposed hereinafter, to refer both to the formal requirements for the formulation of a reservation and to the substantive requirements for its permissibility under article 19 of the Vienna Conventions. In this context, the terms "validity" or "valid" are used in the English text. This solution appears to be consistent with the approach taken by the Commission at its fifty-eighth session, whereby the term "permissibility" (in French "*validité substantielle*") was retained "to denote the substantive validity of reservations that fulfilled the requirements of article 19 of the Vienna Conventions" (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), p. 327, para. (7) of the general commentary to sect. 3 of the Guide to Practice), while the expression "validity of reservations" was assigned a more general meaning in order "to describe the intellectual operation consisting in determining whether a unilateral statement made by a State or an international organization and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State or organization was capable of producing the effects attached in principle to the formulation of a reservation" (footnotes omitted) (ibid., p. 324, para. (2) of the general commentary to sect. 3 of the Guide to Practice).

[456] On the issue of when the treaty enters into force for the author of the reservation, see draft guideline 4.2.1 in the fourth report on reservations to treaties (A/CN.4/614/Add.2), para. 250 and paras. 297-319 below.

reservation. As the International Court of Justice clearly stated in its 1951 advisory opinion, "no State can be bound by a reservation to which it has not consented".[457] This is the fundamental effect of the same principle of consent that underlies all treaty law and, in particular, the reservations regime: the treaty is the consensual instrument par excellence, drawing its strength from the *will* of States. Reservations are "consubstantial" with the State's consent to be bound by the treaty.[458]

293. Thus, objections may be analysed first and foremost as the objecting State's refusal to consent to the reservation and, as such, they prevent the establishment of the reservation with respect to the objecting State or international organization within the meaning of article 21, paragraph 1, of the Vienna Conventions and of draft guideline 4.1.[459] As the Commission stressed in its commentary to guideline 2.6.1 (Definition of objections to reservations): "The refusal to accept a reservation is precisely the purpose of an objection in the full sense of the word in its ordinary meaning".[460]

294. Unlike acceptance, an objection makes the reservation inapplicable as against the author of the objection. Clearly, this effect can be produced only where the reservation has not already been accepted (explicitly or tacitly) by the author of the objection. Acceptance and objection are mutually exclusive, definitively so, at least insofar as the effects of acceptance are concerned. In that regard, guideline 2.8.12 states: "Acceptance of a reservation cannot be withdrawn or amended".[461]

295. In order to highlight this function of objections, which is both primary and fundamental, draft guideline 4.3, which begins the section of the Guide to Practice on the effects of an objection to a valid reservation, might reaffirm, on the one hand, that acceptance of a reservation is irrevocable and, on the other, that an objection makes the reservation inapplicable as against the objecting State:

4.3 Effect of an objection to a valid reservation

The formulation of an objection to a valid reservation renders the reservation inapplicable as against the objecting State or international organization unless the reservation has been established with regard to that State or international organization.

296. However, the inapplicability of the reservation as against the objecting State or international organization is far from resolving the entire question of the effect of an objection. Inapplicability can have several different effects, both with respect to the entry into force of the treaty (i) and, once the treaty has entered into force for the author of the reservation and the author of the objection, with respect to the actual content of the treaty relations thus established (ii).

---

[457] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 26.

[458] See, for example, *Yearbook of the International Law Commission, 1997*, vol. II, Part Two, p. 49, para. 83.

[459] Fourteenth report on reservations to treaties (A/CN.4/614/Add.2), paras. 199-206.

[460] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 191, para. (13) of the commentary.

[461] Ibid., *Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 214.

(i) Entry into force of the treaty

a. Presumption of entry into force of the treaty as between the reserving State and the objecting State

297. It is clear from article 20, paragraph 4 (b), of the 1986 Vienna Convention — which except for its references to a contracting international organization is identical to the corresponding provision of the 1969 Convention — that, in general, an objection to a reservation results in the entry into force of the treaty as between the objecting State and the reserving State:

> An objection by a contracting State or by a contracting organization to a reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization.

While such a "simple" or "minimum-effect" objection[462] does not have as its immediate effect the entry into force of the treaty in relations between the two States, as is the case with an acceptance,[463] it does not preclude it.

298. That is not, however, a presumption that can be reversed by the author of the objection. Article 20, paragraph 4 (b), of the 1986 Vienna Convention continues: "... unless a contrary intention is definitely expressed by the objecting State or organization". Thus, the author of the objection may also elect to have no treaty relations with the author of the reservation, provided that it does so "definitely".

299. The system established by the Vienna Conventions corresponds to the approach taken by the International Court of Justice in 1951: "... each State objecting to it will or will not... consider the reserving State to be a party to the Convention".[464]

300. The nature of the presumption is surprising. Traditionally, in keeping with the principle of consent, the immediate effect of an objection was that the reserving State could not claim to be a State party to the treaty;[465] this is what is commonly called the "maximum" effect of an objection. That outcome was necessary under the system of unanimity, in which even a single objection compromised the unanimous consent of the other contracting States; no derogation was possible. The reserving State was required either to withdraw or to modify its reservation in order to become a party to the treaty. This rule was so self-evident that the Commission's first special rapporteurs, who held to the system of unanimity, did not even formulate it in any of their reports.

---

[462] Eighth report on reservations to treaties (A/CN.4/535/Add.1), para. 95. See also Rosa Riquelme Cortado, *Las reservas a los tratados: Zagunas y ambigüedades del regimen de Viena* (Murcia, Universidad de Murcia, 2004), pp. 279-280; and Frank Horn, *Reservations and Interpretive Declarations to Multilateral Treaties* (T.M.C. Asser Instituut, Studies in International Law, The Hague, 1988), pp. 170-72.

[463] Provided that the treaty itself is in force or becomes so as a result of accession by the accepting State (see draft guidelines 4.2.1 to 4.2.3 and paras. 239 to 252 of the fourteenth report on reservations to treaties (A/CN.4/614/Add.2)).

[464] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 26.

[465] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, A. Pedone, 1979), pp. 155 and 260.

301. The "revolution" introduced by the "flexible" system advocated by Sir Humphrey Waldock[466] did not, however, lead to a rejection of the traditional principle whereby "the objections shall preclude the entry into force of the treaty".[467] The Special Rapporteur did, however, allow for one major difference as compared with the traditional system since he considered that objections had only a relative effect; rather than preventing the reserving State from becoming a party to the treaty, an objection came into play only in relations between the reserving State and the objecting State.[468]

302. Nonetheless, to align the draft with the solution proposed in the 1951 advisory opinion of the International Court of Justice,[469] and in response to the criticisms and misgivings expressed by many Commission members,[470] the radical solution proposed by Waldock was abandoned in favour of a simple presumption of maximum effect, leaving minimum effect available as an option. Draft article 20, paragraph 2 (b), as adopted on first reading, provided:

> An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.[471]

303. However, during the debate on the Commission's draft in the Sixth Committee of the General Assembly, the Czechoslovak and Romanian delegations argued that the presumption should be reversed, so that the rule would "be more likely to broaden treaty relations among States and to prevent the formation of an undesirable vacuum in the legal ties between States".[472] Nonetheless, despite the favourable comments of some Commission members during the second reading of the draft,[473] this position was not retained in the Commission's final draft.

304. The issue arose again, however, during the Vienna Conference. The proposals of Czechoslovakia,[474] Syria[475] and the Union of Soviet Socialist Republics[476] were

---

[466] Alain Pellet, "Article 19 (1969)", in Olivier Corten and Pierre Klein (eds.), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Brussels, Bruylant, 2006, pp. 664-668), paras. 44-55.

[467] See draft article 19, para. 4 (c), presented by Sir Humphrey in 1962 in his first report on the law of treaties (A/CN.4/144; *Yearbook ... 1962*, vol. II, p. 62). This solution is, moreover, frequently offered as the only one that makes sense. See, for example, Paul Reuter, *Introduction au droit des traités*, 2nd ed. (Paris, Presses Universitaires de France, 1985), p. 75, para. 132.

[468] On this point, see also the International Law Commission's commentary to draft article 20, paragraph 2 (b) (*Yearbook ... 1962*, vol. II, p. 181, para. 23).

[469] See note 464 above.

[470] See, for example, Grigory I. Tunkin (*Yearbook … 1962*, vol. I, 653rd meeting, 29 May 1962, p. 156, para. 26 and 654th meeting, 30 May 1962, p. 161, para. 11), Shabtai Rosenne (ibid., 653rd meeting, 29 May 1962, para. 30), Eduardo Jiménez de Aréchaga (ibid., p. 158, para. 48), Antonio de Luna (ibid., p. 160, para. 66), Mustafa Kamil Yasseen (ibid., 654th meeting, 30 May 1962, p. 161, para. 6). The Special Rapporteur was also in favour of introducing the presumption (ibid., pp. 162, paras. 17 and 20).

[471] *Yearbook ... 1962*, vol. II, p. 175 and p. 181, para. 23.

[472] See the summary of the Czechoslovak and Romanian observations in the fourth report on the law of treaties, A/CN.4/177 and Add.1 and 2, *Yearbook … 1965*, vol. II, p. 48.

[473] See comments by Grigory I. Tunkin (*Yearbook … 1965*, vol. I, 799th meeting, 10 June 1965, p. 167, para. 39) and Manfred Lachs (ibid., 813th meeting, 29 June 1965, p. 268, para. 62).

[474] A/CONF.39/C.1/L.85, in *Official Records of the United Nations Conference on the Law of Treaties*, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference (A/CONF.39/11/Add.2), p. 135.

aimed at reversing the presumption adopted by the Commission. Although it was characterized by some delegations[477] as innocuous, reversal of the presumption constituted a major shift in the logic of the mechanism of acceptances and objections.[478] That was why the notion of reversing the presumption had been rejected in 1968.[479] During the second session of the Conference, the Union of Soviet Socialist Republics once again submitted a similar amendment,[480] debated at length, insisting on the sovereign right of each State to formulate a reservation and relying on the Court's 1951 advisory opinion.[481] That amendment was finally adopted[482] and the presumption of article 20, paragraph 4 (b), of the Convention, as proposed by the Commission, was reversed.

305. The difficulties that the Conference encountered in adopting the amendment of the Union of Soviet Socialist Republics show clearly that reversal of the presumption was not as innocuous as Sir Humphrey Waldock, then Expert Consultant to the Conference, indicated. The problem is not merely that of "formulating a rule one way or the other":[483] this new formula, in particular, is at the root of the doubts often expressed about the function of an objection and the real differences that exist between acceptance and objection.[484]

306. Nonetheless, the presumption has never been called into question since the adoption of the 1969 Vienna Convention. It was simply transposed by the Commission during the drafting of the 1986 Convention. In the *travaux* on reservations to treaties, it seemed neither possible nor truly necessary to undo the last-minute compromise that had been struck at the 1969 Vienna Conference — however odd it might be. According to the presumption that is now part of positive international law, the rule remains that an objection does not preclude the entry into force of a treaty (c.) except for cases where there is no treaty relationship between the author of the objection and the author of the reservation (b.).

---

[475] A/CONF.39/C.1/L.94, ibid.

[476] A/CONF.39/C.1/L.115, ibid., p. 133.

[477] The United Arab Republic considered, for example, that those amendments were purely drafting amendments (*Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole*) (A/CONF.39/11), 24th meeting, 16 April 1968, p. 127, para. 24).

[478] See comments of the Swedish representative on this subject, who noted that "the International Law Commission's formula might have the advantage of dissuading States from formulating reservations" (ibid., 22nd meeting, 11 April 1968, p. 117, para. 35). The Polish representative supported the amendments precisely because they favoured the acceptance of reservations and the establishment of a contractual relationship (ibid.), which for Argentina "would be going too far in applying the principle of flexibility" (ibid., 24th meeting, 16 April 1968, p. 129, para. 43).

[479] Ibid., 25th meeting, 16 April 1968, p. 135, paras. 35 ff.

[480] A/CONF.39/L.3, *Documents of the Conference* (A/CONF.39/11/Add.2), note 474 above, pp. 265-266.

[481] Notably the answer to the second question, in which the Court held that the State that has formulated an objection "can in fact consider that the reserving State is not party to the Convention" (see note 464 above).

[482] By 49 votes to 21, with 30 abstentions (*Official Records of the United Nations Conference on the Law of Treaties, Second Session*, Vienna, 9 April-22 May 1969, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1), 10th plenary meeting, 29 April 1969, p. 35, para. 79.

[483] Ibid., p. 34, para. 74. See also Pierre-Henri Imbert, op. cit., note 465 above, pp. 156-157.

[484] Frank Horn, op. cit., note 462 above, pp. 172 and 173.

b. Effect of an objection with maximum effect: exclusion of treaty relations between the author of the objection and the author of the reservation

307. Article 20, paragraph 4 (b), of the Vienna Conventions leaves no doubt as to the effect of an objection accompanied by the definitely expressed intention not to apply the treaty as between the author of the objection and the author of the reservation, in accordance with guideline 2.6.8 (Expression of intention to preclude the entry into force of the treaty).[485] In this case, the objection produces its "maximum effect".

308. This rule is the subject of draft guideline 4.3.4, which basically echoes the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

> **4.3.3 Non-entry into force of the treaty as between the author of the reservation and the author of an objection with maximum effect**
>
> An objection by a contracting State or by a contracting international organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, unless a contrary intention has been definitely expressed by the objecting State or organization [in accordance with guideline 2.6.8].

309. The purpose of the phrase in square brackets is to refer to a guideline that is closely related to this one. However, this clarification may perhaps be relegated to the commentary.

310. As the Commission has indicated in the commentary to guideline 2.6.8, the Vienna Conventions do not give any indication regarding the time at which the objecting State or international organization must definitely express its intention to oppose the entry into force of the treaty.[486] The Commission has concluded, however, that according to the presumption of article 20, paragraph 4 (b), of the Vienna Conventions, an objection not accompanied by a clear expression of that intention does not preclude the entry into force of the treaty as between the author of the objection and the author of the reservation and, in certain cases, the entry into force of the treaty itself. This legal effect cannot be called into question by the subsequent expression of a contrary intention. The same idea has already been expressed in guideline 2.6.8, which states that the intention to oppose the entry into force of the treaty must have been expressed "before the treaty would otherwise enter into force" between [the author of the objection and the author of the reservation]".[487] However, the latter guideline concerns the procedure for formulating the required intention and not its effects. It may be useful to reiterate this principle in the part of the Guide to Practice concerning the legal effect of a maximum-effect objection. Nonetheless, draft guideline 4.3.4 uses the expression "does not preclude the entry into force", which implies that the treaty is not in force

---

[485] This guideline reads as follows: "When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them." (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 168).

[486] Ibid., p. 199, para. (4) of the commentary.

[487] See note 485 above and ibid., p. 199, para. (5) of the commentary to guideline 2.6.8.

as between the author of the objection and the author of the reservation when the objection is formulated.

311. Concretely, the consequence of the non-entry into force of the treaty as between the author of the reservation and the author of the objection is that no treaty relationship exists between them even if, as is often the case, both parties could be considered contracting parties to the treaty within the meaning of the Vienna Conventions. The mere fact that one party rejects the reservation and does not wish to be bound by the provisions of the treaty in its relations with the author of the reservation does not necessarily mean that the latter cannot become a contracting party in accordance with draft guideline 4.2.1. It is sufficient, under the general regime, for another State or another international organization to accept the reservation expressly or tacitly for the author of the reservation to be considered a contracting party to the treaty. The absence of a treaty relationship between the author of the maximum-effect objection and the author of the reservation does not a priori produce any effect except between them.[488]

c. Effect of other objections on the entry into force of the treaty

312. In the absence of a definite expression of the contrary intention, an objection — which can be termed "simple" — to a valid reservation does not ipso facto result in the entry into force of the treaty as between the author of the reservation and the author of the objection, as is the case for acceptance. This, in fact, is one of the fundamental differences between objection and acceptance, one which, along with other considerations, makes an objection not "tantamount to acceptance", contrary to what has often been asserted.[489] Pursuant to article 20, paragraph 4 (b), of the Vienna Conventions, reproduced in draft guideline 4.3.4, such an objection "does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or international organization". But, while such an objection does not preclude the entry into force of the treaty, it remains neutral on the question as to whether or not the reserving State or organization becomes a contracting party to the treaty, and does not necessarily

---

[488] The International Court of Justice recognized in 1951 that "such a decision will only affect the relationship between the State making the reservation and the objecting State". (I.C.J. Reports 1951, p. 26). See, however, para. 317 below.

[489] See comments by Mustafa Kamil Yasseen (*Yearbook ... 1965*, vol. I, 814th meeting, 29 June 1965, p. 271, para. 5) and the doubts expressed by Senjin Tsuruoka (ibid., 800th meeting, 11 June 1965, p. 174, para. 40); Jean Kyongun Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision", *Harvard International Law Journal*, vol. 23, 1982, p. 102; Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, 1985, No. 1, p. 35; Giorgio Gaja, "Unruly Treaty Reservations" in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Milan, Giuffré, 1987), vol. I, pp. 326-329; Jan Klabbers, "Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties", *Nordic Journal of International Law*, vol. 69, 2000, p. 181; Jean-Marie Ruda, "Reservations to Treaties", *Recueil des cours de l'Académie de droit international*, vol. 146, 1975-III, p. 198-199; Lilly Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", *Austrian Review of International and European Law*, 1996, p. 74; Karl Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties", *Études en droit international en l'honneur du juge Manfred Lachs* (The Hague/Boston/Lancaster, Martinus Nijhoff Publishers, 1984), pp. 332-333. See also the first report on the law and practice relating to reservations to treaties (A/CN.4/470), *Yearbook … 1995*, vol. II, Part Two, p. 31, para. 123.

result in the entry into force of the treaty as between the author of the objection and the author of the reservation.

313. This effect — or rather the lack of an effect — of a simple objection on the establishment or existence of a treaty relationship between the author of the objection and the author of the reservation derives directly from the wording of article 20, paragraph 4 (b), of the Vienna Conventions, as States sometimes point out when formulating an objection. The objection by the Netherlands to the reservation formulated by the United States of America to the International Covenant on Civil and Political Rights is a particularly eloquent example:

> Subject to the proviso of article 21, paragraph 3 of the Vienna Convention on the Law of Treaties, these objections do not constitute an *obstacle* to the entry into force of the Covenant between the Kingdom of the Netherlands and the United States.[490]

The Netherlands deemed it useful to reiterate that its objection did not constitute an "obstacle" to the entry into force of the treaty with the United States, and that if the treaty came into force, their treaty relationship would have to be determined in accordance with article 21, paragraph 3, of the Vienna Convention.

314. This effect — or lack of an effect — of a simple objection on the entry into force of the treaty could be spelled out in draft guideline 4.3.1 which, apart from a few minor changes, faithfully reproduces the language of article 20, paragraph 4 (b), of the 1986 Vienna Convention:

> **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 the reservation**
>
> An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or international organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

315. For the treaty effectively to enter into force as between the author of the objection and the author of the reservation, it is both necessary and sufficient for the treaty to enter into force and for both the author of the reservation and the author of the objection to be contracting parties thereto. In other words, the reservation must be established by the acceptance of another State or international organization, within the meaning of draft guideline 4.2.1. Hence, apart from the scenario envisaged in draft guideline 4.3.2, the effective entry into force of the treaty as between the author of the objection and the author of the reservation is in no way dependent on the objection itself, but rather on the establishment of the reservation, which is completely beyond the control of the author of the objection.

316. In concrete terms, a treaty that is subject to the general regime of consent as established in article 20, paragraph 4, of the Vienna Conventions enters into force for the reserving State or international organization only if the reservation has been accepted by at least one other contracting party (in accordance with article 20, paragraph 4 (c) of the Vienna Conventions). Only if the reservation is thus established may treaty relations be established between the author of the reservation

---

[490] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 4, available from http://www.treaties.un.org (Status of Treaties); emphasis added.

and the author of a simple objection. Their treaty relations are, however, restricted in accordance with article 21, paragraph 3, of the Vienna Conventions.[491] Draft guideline 4.3.2 seeks to clarify the point at which the treaty effectively enters into force between the author of the objection and the author of the reservation:

> **4.3.2 Entry into force of the treaty as between the author of the reservation and the author of the objection**
>
> The treaty enters into force as between the author of the reservation and the objecting contracting State or contracting organization as soon as the treaty has entered into force and the author of the reservation has become a contracting party in accordance with guideline 4.2.1.

317. The situation is however different in cases where, for one reason or another, unanimous acceptance by the contracting parties is required in order to "establish" the reservation, as in the case of treaties with limited participation,[492] for example. In that case, any objection — simple or qualified — has a much more significant effect with regard to the entry into force of the treaty as between all the contracting parties, on the one hand, and the author of the reservation, on the other. The objection, in fact, prevents the reservation from being established as such. Even if article 20, paragraph 4 (b), of the Vienna Conventions were to apply to this specific case — which is far from certain in view of the chapeau of the paragraph[493] — the reservation could not be established and, consequently, the author of the reservation could never become a contracting party. The objection — whether simple or qualified — in this case constitutes an insurmountable obstacle both for the author of the reservation and for all the contracting parties in relation to the establishment of treaty relations with the author of the reservation. Only the withdrawal of the reservation or the objection would resolve the situation.

318. Although such a solution is already implied by draft guidelines 4.1.2 and 4.2.1, it is worth recalling this significant effect of an objection to a reservation that requires unanimous acceptance:

> **4.3.3 Non-entry into force of the treaty for the author of the reservation when unanimous acceptance is required**
>
> If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

319. The situation can be envisaged where a State or organization member of an international organization formulates an objection to a reservation formulated by another State or another international organization to the constituent instrument of the organization. However, such an objection, regardless of its content, would be devoid of legal effects. The Commission has already adopted guideline 2.8.11, according to which: "Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the permissibility or appropriateness of a reservation to a constituent

---

[491] See paras. 321-354 below.

[492] "In cases not falling under the preceding paragraphs and unless the treaty otherwise provides..."; see the fourteenth report on reservations to treaties (A/CN.4/614/Add.2), paras. 223-233.

[493] "In cases not falling under the preceding paragraphs and unless the treaty otherwise provides..."

instrument of the organization. Such an opinion is in itself devoid of legal effects.[494]

(ii) Content of treaty relations between the author of the reservation and the author of the objection

320. The potential effects of an objection are quite diverse.[495] The outright non-application of the treaty between the author of the reservation and the author of the objection is the most straightforward hypothesis (objection with maximum effect (d)) but it is now infrequent, owing in particular to the reversal of the presumption in article 20, paragraph 4 (b), of the Vienna Conventions.[496] The vast majority of objections are now intended to produce a very different effect: rather than opposing the entry into force of the treaty vis-à-vis the author of the reservation, the objecting State seeks to modify the treaty relations by adapting them to its own position. Under article 21, paragraph 3, of the Vienna Conventions, bilateral relations in such cases are characterized in theory by the partial non-application of the treaty (objection with minimum effect (a)). State practice, however, has developed other types of objections with effects other than those envisaged by article 21, paragraph 3, of the Vienna Conventions, either by excluding the application of certain provisions of the treaty that are not (specifically) related to the reservation (objection with intermediate effect (b)), or by claiming that the treaty applies without any modification (objection with "super-maximum" effect (c)).

a. Effect of an objection with minimum effect on treaty relations

321. Under the traditional system of unanimity, it was unimaginable that an objection could produce an effect other than non-participation by the author of the reservation in the treaty:[497] the objection undermined unanimity and prevented the reserving State from becoming a party to the treaty. Since at the time that notion seemed self-evident, neither James Brierly nor Sir Gerald Fitzmaurice discussed the effects of objections to reservations, while Hersch Lauchterpacht touched on them only briefly in his proposals *de lege ferenda*.[498]

322. Nor did Sir Humphrey Waldock find it necessary in his first report to address the effects of an objection to a reservation. This is explained by the fact that, according to his draft article 19, paragraph 4 (c), the objection precluded the entry into force of the treaty in the bilateral relations between the reserving State and the objecting State.[499] Despite the shift away from this categorical approach in favour of a mere presumption, the draft articles adopted on first reading said nothing about the specific effect of an objection that did not preclude the entry into force of the

---

[494] For the commentary to this guideline, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 255-256. Guideline 2.8.7 reads "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization".

[495] See above, para. 291.

[496] See the fourteenth report on reservations to treaties (A/CN.4/614/Add.2), para. 192, and above, paras. 297-306.

[497] See Don W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Year Book of International Law*, vol. 16, 1995, p. 146; Frank Horn, op. cit. note 462, p. 170.

[498] Alternative drafts C and D of article 9, in his first report on the law of treaties (A/CN.4/63), *Yearbook ... 1953*, vol. II, p. 92.

[499] See para. 301 above.

treaty as between the author of the objection and the reserving State. Few States, however, expressed concern at that silence.[500]

323. Nevertheless, a comment by the United States of America[501] drew the problem to the attention of the Special Rapporteur and the Commission. Although a situation where treaty relations were established despite an objection was deemed "unusual",[502] which was certainly true at the time, the United States still considered it necessary to cover such a situation and suggested the addition of a new paragraph, as follows:

> Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States.[503]

324. The arguments put forward by the United States convinced Sir Humphrey of the "logical" need to include this situation in draft article 21. He proposed a new paragraph, the wording of which differed significantly from the United States proposal:

> Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States.[504]

The International Court of Justice expressed a similar view in its 1951 advisory opinion:

> Finally, it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.[505]

325. The Commission engaged in a very lively debate on the proposed text of paragraph 3. The view of Erik Castrén, who considered that the case of a reservation in respect of which a simple objection had been raised was already covered by draft article 21, paragraph 1 (b),[506] was not shared by the other Commission members. Most members[507] considered it necessary, if not "indispensable"[508] to introduce a provision "in order to forestall ambiguous situations".[509] However, members of the Commission had different opinions regarding how to explain the intended effect of

---

[500] Only two States explicitly raised the issue. See the comments of the Danish Government (Sir Humphrey Waldock, fourth report on the law of treaties (A/CN.4/177 and Add.1 and 2), *Yearbook ... 1965*, vol. II, p. 46) and the comments of the United States (ibid., p. 47 and p. 55).

[501] Ibid., p. 55.

[502] Ibid.

[503] Ibid.

[504] Ibid., Observations and proposals of the Special Rapporteur on article 21, para. 3.

[505] *Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 27.

[506] *Yearbook ... 1965*, vol. I, 800th meeting, 11 June 1965, p. 172, para. 15.

[507] José María Ruda (ibid., para. 13); Roberto Ago (ibid., 814th meeting, 29 June 1965, pp. 271 and 272, paras. 7 and 11); Grigory I. Tunkin (ibid., p. 271, para. 8) and Herbert W. Briggs (ibid., p. 272, para. 14).

[508] See the statement made by Roberto Ago (ibid., p. 271, para. 7).

[509] Ibid.

the new paragraph proposed by the United States and the Special Rapporteur. Whereas Sir Humphrey's proposal emphasized the consensual basis of the treaty relationship established despite the objection, the provision proposed by the United States seemed to imply that the intended effect originated only from the unilateral act of the objecting State, that is, from the objection, without the reserving State having a real choice. The two positions had their supporters within the Commission.[510]

326. The text that the Commission finally adopted on a unanimous basis,[511] however, was very neutral and clearly showed that the issue was left open by the Commission. The Special Rapporteur in fact stated that he was able to "agree with both currents of opinion about the additional paragraph" since "the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions".[512]

327. During the debate at the Vienna Conference on what would become article 21, paragraph 3, almost no problems were raised apart from a few unfortunate changes which the Conference fairly quickly reconsidered.

328. The episode is, however, relevant for understanding article 21, paragraph 3. The Conference Drafting Committee, chaired by Mustafa Kamil Yasseen — who, within the Commission, had expressed doubts regarding the difference between the respective effects of acceptance and objection on treaty relations[513] —, proposed an amended text for article 21, paragraph 3, in order to take account of the new presumption in favour of the minimum effect of an objection, which had been adopted following the Soviet amendment. The amended text stated that:

> When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, *the reservation has the effects provided for in paragraphs 1 and 2*.[514]

It would thus have been very clear that a simple objection was assumed to produce the same effect as an acceptance. Although the provision was adopted at one point by the Conference,[515] a joint amendment was submitted by India, Japan, the Netherlands and USSR[516] a few days before the end of the Conference, with a view to replacing the last part of the sentence by the words originally proposed by the Commission and thereby restoring the distinction between the effects of an objection and an acceptance.

---

[510] Mustafa Kamil Yasseen (ibid., 800th meeting, 11 June 1965, p. 171, para. 7, p. 172, paras. 21-23 and p. 173, para. 26), Grigory I. Tunkin (ibid., p. 172, para. 18) and Radhabinod Pal (ibid., p. 172-173, para. 24) expressed the same doubts as the Special Rapporteur (ibid., p. 173, para. 31); in contrast, Shabtai Rosenne, supported by José María Ruda (ibid., p. 172, para. 13) considered that "the United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission's provisions on reservations and preferable to the Special Rapporteur's reciprocal approach" (ibid., para. 10).

[511] Ibid., 816th meeting, 2 July 1965, p. 284.

[512] Ibid., 800th meeting, 11 June 1965, p. 173, para. 31.

[513] Ibid., 814th meeting, 29 June 1965, p. 271, para. 5.

[514] *Summary records* (A/CONF.39/11/Add.1), note 482 above, 11th plenary meeting, 30 April 1969, p. 36 (emphasis added).

[515] Ibid., para. 10 (94 votes to none).

[516] A/CONF.39/L.49, *Documents of the Conference* (A/CONF.39/11/Add.2), note 474 above, p. 273.

329. The joint amendment was incorporated into the text by the Drafting Committee and adopted by the Conference.[517] Mr. Yasseen explained that it was "necessary to distinguish between cases where a State objected to a reservation but agreed that the treaty should nevertheless come into force, and cases in which the reservation was accepted".[518]

330. The *travaux préparatoires* therefore leave no doubt that:

> The view that the institution of objections is in the end void of any special effect is discomforting as it was intended by the framers of the Vienna Convention to be the means by which the parties to a treaty safeguarded themselves against unwelcome reservations.[519]

The reinstatement of the text initially proposed by the Commission restores the true meaning and effects of objections and silences the doctrinal voices that question the distinctive nature of the institution of objections as opposed to acceptances.[520]

331. Paragraph 3 of article 21 of the 1969 Convention was not, however, an exercise in codification stricto sensu at the time of its adoption by the Commission, then by the Conference. It had been included by the Commission "for the sake of completeness",[521] but not as a rule of customary law.[522] Although the Commission had drafted paragraph 3 in something of a hurry and the paragraph had led to debate and proposed amendments right up to the final days of the 1969 Vienna Conference, during the *travaux préparatoires* for the draft that became the 1986 Vienna Convention, some members of the Commission nonetheless considered the provision clear[523] and acceptable.[524] That seems to have been the position of the Commission as a whole, since the paragraph was adopted on first reading with only the editorial changes necessary in 1977. That endorsement demonstrated the customary nature acquired by paragraph 3 of article 21,[525] which was confirmed by the decision of the Franco-British Court of Arbitration responsible for settling the dispute concerning the delimitation of the continental shelf in the *Mer d'Iroise* case which was rendered several days later.[526] The provision is part of the "flexible" system of reservations to treaties.

332. What was henceforth to be considered the "normal" effect of an objection to a valid reservation is therefore set forth in article 21, paragraph 3, of the Vienna Conventions. This provision, in its fuller 1986 version, provides:

> When a State or an international organization objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State

---

[517] *Summary records* (A/CONF.39/11/Add.1), note 482 above, 33rd plenary meeting, 21 May 1969, p. 181, para. 12.

[518] Ibid., para. 2.

[519] Frank Horn, op. cit., note 462 above, pp. 173-174.

[520] See the doctrinal references cited in note 489 above.

[521] *Yearbook ... 1966*, vol. II, p. 209, para. 2 of the commentary to draft article 19.

[522] Richard W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law*, vol. 10 (2), 1989, p. 398.

[523] Juan José Calle y Calle, *Yearbook ... 1977*, vol. I, 1434th meeting, 6 June 1977, p. 98, para. 8.

[524] Abdul Hakim Tabibi, ibid., para. 7.

[525] Richard W. Edwards, Jr., op. cit, note 522, p.398; Giorgio Gaja, op. cit, note 489, p.308.

[526] *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, decision of 30 June 1977, Reports of International Arbitral Awards, vol. XVIII, p. 130.

> or organization, the provisions to which the reservation relates do not apply as between the reserving State or organization and the objecting State or organization to the extent of the reservation.

333. Despite the apparent complexity of the wording, the sense of the provision is clear: as soon as the treaty has effectively entered into force in the bilateral relations between the author of the reservation and the author of the objection — a detail that article 21, paragraph 3, does not specify but which is self-evident — the provision or provisions to which the relates shall be excised from their treaty relations to the extent of the reservation. Article 21, paragraph 3, however, calls for three remarks.

334. First, the intended effect of an objection is, in fact, diametrically opposed to that of an acceptance. Acceptance has the effect of modifying the legal effect of the provisions to which the reservation relates to the extent of the reservation, whereas an objection excludes the application of those provisions to the same extent. Even though in certain specific cases the actual effect on the treaty relationship established despite the objection may be identical to that of an acceptance,[527] nonetheless the legal regimes of the reservation/acceptance pair and the reservation/objection pair are, in law, distinctly different.

335. Second, it is surprising — and regrettable — that paragraph 3 does not in any way limit its scope only to reservations that are "valid", that is, in accordance with articles 19 and 23, as is the case in paragraph 1.[528] It is nonetheless highly unlikely that an objection to an invalid reservation could produce the effect specified in paragraph 3, even though that seems to be allowed in State practice. States often object to reservations that they consider to be impermissible as being incompatible with the object and purpose of a treaty without opposing the entry into force of the treaty or indeed expressly state that their objection does not preclude the entry into force of the treaty in their relations with the reserving State.

336. A telling example is that of the objection of Germany to the reservation formulated by Myanmar to the Convention on the Rights of the Child:

> The Federal Republic of Germany considers that the reservations made by the Union of Myanmar regarding articles 15 and 37 of the Convention on the Rights of the Child are incompatible with the object and purpose of the Convention (article 51, paragraph 2) and therefore objects to them.
>
> This objection shall not preclude the entry into force of the Convention as between the Union of Myanmar and the Federal Republic of Germany.[529]

This example is far from isolated; there are numerous objections with "minimum effect" which, in spite of the conviction expressed by their authors as to the impermissibility of the reservation, do not oppose the entry into force of the treaty

---

[527] On this question, see para. 351 below.

[528] "1.A reservation established with regard to another party in accordance with articles 19, 20 and 23…"; see the fourteenth report on reservations to treaties (A/CN.4/614/Add.2), para. 205.

[529] *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 11, available from http://treaties.un.org/ (Status of Treaties).

and say so clearly.[530] Simple objections to reservations considered to be impermissible are therefore far from being just a matter of speculation.[531]

337. The Vienna Convention does not resolve this thorny issue and seems to treat the effects of the objection on the content of treaty relations independently from the issue of the validity of reservations. On this point, it can be said that the Commission went further than necessary in disconnecting the criteria for the validity of reservations and the effects of objections. It is one thing to allow States and international organizations to raise an objection to any reservation,[532] whether valid or invalid, and it is quite another to assign identical effects to all these objections. It is highly doubtful whether article 21, paragraph 3, of the Vienna Conventions is applicable to objections to reservations that do not satisfy the conditions of articles 19 and 23.[533] For the time being, however, it is not necessary to reach a final decision on this issue: at this stage of the analysis, it is sufficient to consider the effects of a valid reservation.[534]

338. Thirdly, although it is clear from article 21, paragraph 3, of the Vienna Conventions that the provisions to which the reservation relates do not apply vis-à-vis the author of the objection, the phrase "to the extent of the reservation" leaves one "rather puzzled"[535] and needs further clarification.

339. The decision of the Court of Arbitration in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*Mer d'Iroise* case)[536] clarifies the

---

[530] See also, among many examples, the objections of Belgium to the reservations of Egypt and Cambodia to the Vienna Convention on Diplomatic Relations (ibid. chap. III, 3) or the objections of Germany to several reservations to the same Convention (ibid.). It is, however, interesting to note with regard to Germany's objection, which considers certain reservations to be "incompatible with the letter and spirit of the Convention", that the Government of Germany has stated only for certain objections that they do not preclude the entry into force of the treaty between Germany and the respective States, without expressly taking a position in the other cases where it objected to a reservation for the same reasons. Numerous examples can be found in the objections to the reservations formulated to the International Covenant on Civil and Political Rights: in particular the objections raised to the reservation of the United States of America to article 6 of the Covenant by Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Portugal, Spain and Sweden (ibid.). All those States considered the reservation to be incompatible with the object and purpose of the Covenant, but nonetheless did not oppose the entry into force of the Covenant in their relations with the United States, unlike Germany, which did not stay silent on that point even though its objection was also motivated by the incompatibility of the United States reservation "with the text as well as the object and purpose of article 6" (ibid.). Nor is the phenomenon limited to human rights treaties: see also the objections of Austria, France, Germany and Italy to the reservation of Viet Nam to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (ibid., chapter VI, 19).

[531] Karl Zemanek, op. cit., n. 489, p. 331.

[532] See the fourteenth report on reservations to treaties, A/CN.4/614/Add.1, paras. 96-100.

[533] See, for example, Giorgio Gaja, "Il regime della Convenzione di Vienna consernente le riserve inammissibili", in *Studi in onore di Vincenzo Starace* (Naples, Ed. Scientifica, 2008), pp. 349-361.

[534] See the fourteenth report on reservations to treaties (A/CN.4/614/Add.1), para. 196.

[535] As the representative of the United States of America expressed it at the Vienna Conference, *Summary Records* (A/CONF.39/11/Add.1), see note 482 above, 33rd plenary meeting, 21 May 1969, p. 181, para. 9.

[536] See note 526 above.

meaning to be given to this phrase. The French Republic had, at the time of ratification, formulated a reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf, the relevant portion of which reads as follows:

> The Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:
>
> – if such boundary is calculated from baselines established after 29 April 1958;
>
> – if it extends beyond the 200-metre isobath;
>
> – if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.[537]

The Government of the United Kingdom objected to this part of the French reservation, stating only that: "The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic."[538]

Before the Court of Arbitration, France maintained that on account of the combined effect of its reservation and the objection by the United Kingdom, and in accordance with the principle of mutuality of consent, article 6 as a whole was not applicable in relations between the two parties.[539] The United Kingdom took the view that, in accordance with article 21, paragraph 3, of the Vienna Conventions — which had at the time not entered into force and had not even been signed by the French Republic — "the French reservations cannot render Article 6 inapplicable *in toto*, but at the most 'to the extent of the reservation'".[540]

340. The Court found that:

> The answer to the question of the legal effect of the French reservations lies partly in the contentions of the French Republic and partly in those of the United Kingdom. Clearly, the French Republic is correct in stating that the establishment of treaty relations between itself and the United Kingdom under the Convention depended on the consent of each State to be mutually bound by its provisions; and that when it formulated its reservations to Article 6 it made its consent to be bound by the provisions of that Article subject to the conditions embodied in the reservations. There is, on the other hand, much force in the United Kingdom's observation that its rejection was directed to the reservations alone and not to Article 6 as a whole. In short, the disagreement between the two countries was not one regarding the recognition of Article 6 as applicable in their mutual relations but one regarding the matters reserved by the French Republic from the application of Article 6. The effect of the

---

[537] *Multilateral Treaties Deposited with the Secretary-General*, chap. XXI, 4, available from http://treaties.un.org/ (Status of Treaties).

[538] Ibid.

[539] *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision of 30 June 1977, see note 526 above, p. 40, para. 57.

[540] Ibid. p. 41, para. 58.

> United Kingdom's rejection of the reservations is thus limited to the reservations themselves.[541]

The Court went on to say:

> However, the effect of the rejection may properly, in the view of the Court, be said to render the reservations non-opposable to the United Kingdom. Just as the effect of the French reservations is to prevent the United Kingdom from invoking the provisions of Article 6 except on the basis of the conditions stated in the reservations, so the effect of their rejection is to prevent the French Republic from imposing the reservations on the United Kingdom for the purpose of invoking against it as binding a delimitation made on the basis of the conditions contained in the reservations. Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable in toto, as the French Republic contends, nor to render it applicable in toto, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.[542]

341. This 1977 decision not only confirms the customary nature of article 21, paragraph 3,[543] but also shows that the objective of this provision — which derives from the same principle of mutuality of consent — is to safeguard as much as possible the agreement between the parties. One should not exclude the application of the entirety of the provision or provisions to which a reservation relates, but only of the parts of those provisions concerning which the parties have expressed disagreement.

342. In the case of France and the United Kingdom, that meant accepting that article 6 remained applicable as between the parties apart from the matters covered by the French reservation. This is what should be understood by "to the extent of the reservation". The effect sought by paragraph 3 is to preserve the agreement between the parties to the extent possible by reducing the application of the treaty to the provisions on which there is agreement and excluding the others, or, as Jean Kyongun Koh explains:

> Here the Vienna Convention seems to be overtly seeking to preserve as much of the treaty as possible even when parties disagree about a reservation. ... The Vienna Convention tries to salvage as much as is uncontroversial about the relations between reserving and opposing states.[544]

343. Although the principle of article 21, paragraph 3, is clearer than is sometimes suggested, it is still difficult to apply, as noted by Derek William Bowett:

> The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the

---

[541] Ibid., para. 59.
[542] Ibid., p. 42, para. 61.
[543] See para. 331 above.
[544] Op. cit., n. 489, p. 102.

> sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the 'provisions,' the words, to which the reservation relates.[545]

Moreover, as Frank Horn rightly notes:

> A reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An 'exclusion' of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms. A norm seldom exists in isolation but forms an integrated part in a system of norms. The extent of a reservation does not necessarily comprise only the provision directly affected but also those provisions the application of which is influenced by the 'exclusion' or the 'modification'.[546]

344. Consequently, only an interpretation of the reservation can help in determining the provisions of the treaty, or the parts of these provisions, whose legal effect the reserving State or international organization purports to exclude or modify. Those provisions or parts or provisions are, by virtue of an objection, not applicable in treaty relations between the author of the objection and the author of the reservation. All the provisions or parts of provisions not affected by the reservation remain applicable as between the parties.

345. What should be excluded from relations between the two parties can easily be determined by asking what the reservation actually modifies in the treaty relations of its author vis-à-vis a contracting party that has accepted it. All that is excluded in relations with a contracting party that has objected to the reservation.

346. Hence, draft guideline 4.3.5, which determines the content of treaty relations between the author of a simple objection and the author of the reservation, reproduces the language of article 21, paragraph 3, of the 1986 Vienna Convention, which addresses precisely that question, except that the draft guideline specifies that the rule applies only to objections to a valid reservation. Moreover, in order to clarify that the effect of the objection is not to exclude automatically the application of the entire provision to which the reservation relates — as the French Republic had contended in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (*Mer d'Iroise* case)[547] — it would be useful to point out that exclusion may concern only a part of a provision. The draft guideline could therefore read as follows:

> **4.3.5 Content of treaty relations**
>
> When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty as between itself and the reserving State or organization, the provisions or parts of provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

---

[545] Derek William Bowett, "Reservations to Non-Restricted Multilateral Treaties", *British Yearbook of International Law*, 1976-1977, p. 86.

[546] Frank Horn, note 462 above, p. 178

[547] See para. 339 above.

347. In order to clarify the content of treaty relations between the author of the reservation and the objecting State or international organization, it is useful to recall the distinction between "modifying reservations" and "excluding reservations" employed earlier to determine the effects of an established reservation.[548]

348. In the case of excluding reservations, the situation is particularly straightforward. The above-mentioned Egyptian reservation to the Vienna Convention on Diplomatic Relations is a case in point. That reservations reads: "Paragraph 2 of article 37 shall not apply.[549] The provision to which the reservation relates is clearly article 37, paragraph 2, of the Convention on Diplomatic Relations. In treaty relations between the author of the reservation and the author of a simple objection, therefore, the Vienna Convention on Diplomatic Relations will apply without paragraph 2 of article 37. This provision (or part of a provision) does not apply, to the extent of the reservation; that is, it does not apply at all. Its application is entirely excluded.

349. Cuba made a reservation purporting to exclude the application of article 25, paragraph 1, of the Convention on Special Missions:

> The Revolutionary Government of the Republic of Cuba enters an express reservation with regard to the third sentence of paragraph 1 of article 25 of the Convention, and consequently does not accept the assumption of consent to enter the premises of the special mission for any of the reasons mentioned in that paragraph or for any other reasons.[550]

In this case, too, a (simple) objection results in the exclusion of the application of the third sentence of paragraph 1 of article 25 of the Convention. The rest of the provision, however, remains in force as between the two parties.

350. Nevertheless, some types of excluding reservations are much more complex. This is the case, for instance, with across-the-board reservations, that is, reservations that purport to exclude the legal effect of the treaty as a whole with respect to certain specific aspects.[551] The reservation of Guatemala to the Customs Convention on the Temporary Importation of Private Road Vehicles of 1954 thus states:

> The Government of Guatemala reserves its right:
>
> (1) To consider that the provisions of the Convention apply only to natural persons, and not to legal persons and bodies corporate as provided in chapter 1, article 1.[552]

A purely mechanical application of article 21, paragraph 3, of the Vienna Conventions might suggest that the treaty relations established between the author of this reservation and an objecting State excludes the application of article 1 — the

---

[548] See the fourteenth report on reservations to treaties (A/CN.4/614/Add.2), para. 262.

[549] *Multilateral Treaties Deposited with the Secretary-General*, chap. III, 3, available from http://treaties.un.org (Statute of Treaties). See also the fourteenth report on reservations to treaties (A/CN.4/614/Add.2), para. 264.

[550] Multilateral Treaties ..., ibid., chap. III, 9.

[551] See guideline 1.1.1 (Object of reservations) and the commentary thereon (*Yearbook ... 1999*, vol. II, Part Two, pp. 93-95).

[552] *Multilateral Treaties Deposited with the Secretary-General*, chap. XI, A, 8, available from http://treaties.un.org (Statute of Treaties).

provision to which the reservation refers. But the fact that only article 1 is expressly referred to does not mean that the reservation applies only to that provision. In the practical example of Guatemala's reservation, it would be equally absurd to exclude only the application of article 1 of the Convention or to conclude that, because the reservation concerns all the provisions of the Convention (by excluding part of its scope of application *ratione personae*), a simple objection excludes all the provisions of the Convention. Only that which is effectively modified or excluded as a result of the reservation remains inapplicable in the treaty relations between the author of the reservation and the author of the simple objection: the application of the Convention as a whole to the extent that such application concerns legal persons.

351. In such cases, and only in such cases, an objection produces in concrete terms the same effects as an acceptance: the exclusion of the legal effect, or application, of the provision to which the reservation relates "to the extent of the reservation"; an acceptance and a simple objection therefore result in the same treaty relations between the author of the reservation and the author of the acceptance or of the simple objection. The literature agrees on this point.[553] The similarity in the effects of an acceptance and a minimum-effect objection does not mean, however, that the two reactions are identical and that the author of the reservation "would get what it desired".[554] Moreover, this similarity is observed only in the very specific case of excluding reservations, and never in the case of reservations by which an author purports to modify the legal effects of a treaty provision.[555] Furthermore, while an acceptance is tantamount to agreement, or at least to the absence of opposition to a reservation, an objection cannot be considered mere "wishful thinking";[556] it expresses disagreement and purports to protect the rights of its author much as a unilateral declaration (protest) does.[557]

352. In the light of these observations, it would seem useful to clarify the concrete effect of an objection to an excluding reservation. A comparison of the effect of the establishment of such a reservation, on the one hand, and of a simple objection to that reservation, on the other, shows that the same rights and obligations are excluded from the treaty relations between the respective parties. Draft guideline 4.3.6 clarifies the similarity between the treaty relations established in the two cases. It is in no way intended to replace draft guideline 4.3.5 but rather to provide clarification in regard to specific categories of reservations.

---

[553] See for example Belinda Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", *American Journal of International Law* 1991, vol. 85, No. 2, p. 308; Massimo Coccia, "Reservations to Multilateral Treaties on Human Rights", *California Western International Law Journal*, vol. 15, 1985, No. 1, p. 36; Giorgio Gaja, op. cit. note 489, p. 327; Pierre-Henri Imbert, op. cit. note 465, p. 157; José-María Ruda, op. cit. note 489, p. 199; Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press, 1984), p. 76. See also the explanations of the representative of the Netherlands in respect of the four-State amendment, *Summary records* (A/CONF.39/11/Add.1), cited in note 482 above, thirty-second plenary meeting, 20 May 1969, p. 179, para. 55; Frank Horn, op. cit. note 462, p. 173; Jan Klabbers, op. cit. note 489, pp. 186-187.

[554] Jan Klabbers, op. cit. note 489, p. 179.

[555] See para. 353 below.

[556] Pierre-Henri Imbert, op. cit. note 465, p. 157 quoting Jacques Dehaussy.

[557] Karl Zemanek, op. cit. note 489, p. 332.

4.3.6 Content of treaty relations in the case of a reservation purporting to exclude the legal effect of one or more provisions of the treaty

A contracting State or a contracting organization that has formulated a valid reservation purporting to exclude the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would not be applicable as between them if the reservation were established.

All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.

353. In the case of modifying reservations, however, the difference between an objection and an acceptance is very clear. Whereas the establishment of such a reservation modifies the legal obligations between the author of the reservation and the contracting parties with regard to which the reservation is established, article 21, paragraph 3, excludes the application of all the provisions that potentially would be modified by the reservation, to the extent of the reservation. If a State makes a reservation that purports to replace one treaty obligation with another, article 21, paragraph 3, requires that the obligation potentially to be replaced by the reservation shall be excised from the treaty relations between the author of the reservation and the author of the simple objection. Neither the initial obligation, nor the modified obligation proposed by the reservation, applies: the former because the author of the reservation has not agreed to it and the latter because the author of the objection has not agreed to it.

354. It is important to point out this difference between a modifying reservation that is accepted and one to which a simple objection is made. Like draft guideline 4.3.6, draft guideline 4.3.7 must be read in conjunction with draft guideline 4.3.5, which it is intended to clarify.

4.3.7 Content of treaty relations in the case of a reservation purporting to modify the legal effect of one or more provisions of the treaty

A contracting State or a contracting organization that has formulated a valid reservation purporting to modify the legal effect of one or more provisions of the treaty and a contracting State or a contracting organization that has raised an objection to it but has not opposed the entry into force of the treaty as between itself and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates to the extent that they would be modified as between them if the reservation were established.

All other treaty provisions that would be applicable if the reservation were established remain applicable as between the two parties.

b. Effect of an objection with intermediate effect on treaty relations

355. There is now a well-established practice of objections the effects of which extend beyond the framework of article 21, paragraph 3, of the Vienna Conventions:

objections with "intermediate effect".[558] The point here is not whether such objections may or may not be formulated; in 2009, the Special Rapporteur proposed a draft guideline that directly addresses this point,[559] and it has already been referred to the Drafting Committee.[560] Rather, the question here is to determine what effects such an objection can actually produce, irrespective of its author's original intent. How far can the author of an objection extend the effect of the objection, between a "simple" effect (article 21, paragraph 3, of the Vienna Conventions) and a "qualified" or "maximum" effect, which excludes the entry into force of the treaty as a whole in the relations between the author of the reservation and the author of the objection (article 20, paragraph 4 (b) of the Vienna Conventions)?

356. Clearly, the choice cannot be left entirely to the discretion of the author of the objection.[561] As the International Court of Justice emphasized in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*:

> It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and in its application.[562]

Therefore, an objection cannot under any circumstances exclude from the treaty relations between the objecting State or international organization and the author of the reservation provisions of the treaty that are essential for the realization of its object and purpose.[563] This clearly constitutes a limit not to be exceeded, and draft guideline 3.4.2 even makes it a criterion for the assessment of permissibility.[564]

357. On the other hand, it is important not to lose sight of the principle of mutual consent, which is the basis for the law of treaties as a whole and which, as the Court of Arbitration rightly stressed in the *Mer d'Iroise* case,[565] is essential for determining the effects of an objection and of a reservation. As has been recalled

---

[558] Fourteenth report on reservations to treaties (A/CN.4/614/Add.1), para. 107.

[559] Draft guideline 3.4.2 proposed by the Special Rapporteur during the discussion of Addendum 1 to the fourteenth report reads as follows:

> **3.4.2 Substantive validity of an objection to a reservation**
> An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:
> (1) The additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated;
> (2) The objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.
> (*Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 195, note 370.)

[560] Ibid., p. 182, para. 60; following an indicative vote, it was decided not to include in guideline 3.4.2 a provision concerning jus cogens in relation to the permissibility of objections to reservations (ibid.).

[561] Fourteenth report on reservations to treaties, A/CN.4/614/Add.1, para. 109.

[562] *I.C.J. Reports 1951*, p. 27.

[563] This fundamental observation provides a hint as to the solution to the problem posed by the transposition of article 21, paragraph 3, in the case of objections to impermissible reservations.

[564] See note 559 above.

[565] Decision of 30 June 1977, cited in note 526 above, p.42, para. 61.

many times during the Commission's work on reservations to treaties: "No State can be bound by contractual obligations it does not consider suitable".[566] This is true for both the reserving State (or international organization) and the objecting State (or international organization). However, in some situations, the effects attributed to objections by article 21, paragraph 3, of the Vienna Conventions may prove unsuited for the re-establishment of mutual consent between the author of the reservation and the author of the objection, even where the object and purpose of the treaty are not threatened by the reservation.

358. This is the case, for example, when the reservation purports to exclude or to modify a provision of the treaty which, based on the intention of the parties, is necessary to safeguard the balance between the rights and the obligations deriving from their consent to the entry into force of the treaty. This is also the case when the reservation not only undermines the consent of the parties to the provision to which the reservation directly refers, but also upsets the balance achieved during negotiations on a set of other provisions. A contracting party may then legitimately consider that being bound by one of the provisions in question without being able to benefit from one or more of the others constitutes a contractual obligation it does not consider suitable.

359. These are the types of situations that objections with intermediate effect are meant to address. The practice has been resorted to mainly, if not exclusively, in the case of reservations and objections to the provisions of part V of the 1969 Vienna Convention, and this example makes it clear why authors of objections seek to expand the effects they intend their objections to produce.

360. Article 66 of the Vienna Convention and the annex thereto relating to compulsory conciliation provide procedural guarantees which many States, at the time the Convention was adopted, considered essential in order to prevent abuse of other provisions of part V.[567] The reaction of several States to reservations to article 66 of the 1969 Vienna Convention was aimed at safeguarding the package deal, which some States had sought to undermine through reservations and which could only be restored through an objection that went beyond the "normal" effects of the reservations envisaged by the Vienna Conventions.[568]

361. Hence in order to restore what could be referred to as "consensual balance" between the author of the reservation and the author of the objection, the effect of the objection on treaty relations between the two parties should be allowed to extend to provisions of the treaty that have a specific link with the provisions to which the reservation refers.

362. In the light of these remarks, it would be useful to include in the Guide to Practice a draft guideline 4.3.8 stating that an objection may, under certain conditions, exclude the application of provisions to which the reservation does not refer.

---

[566] Christian Tomuschat, "Admissibility and legal effects of reservations to multilateral treaties", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 27, 1967, p. 466; see also the second report on reservations to treaties (A/CN.4/477/Add.1), *Yearbook…1996*, vol. II, Part One, p. 57, paras. 97 and 99; and Daniel Müller's commentary on article 20 (1969) in Olivier Corten and Pierre Klein (eds.), op. cit. note 466, pp. 809-811, paras. 20-24.

[567] Fourteenth report on reservations to treaties (A/CN.4/614/Add.1), para. 117.

[568] Daniel Müller, "Article 21 (1969)", in Olivier Corten and Pierre Klein (eds.), op. cit. note 466, pp. 927-928, para. 70.

4.3.8 Non-application of provisions other than those to which the reservation relates

In the case where a contracting State or a contracting organization which has raised an objection to a valid reservation has expressed the intention, any provision of the treaty to which the reservation does not refer directly but which has a sufficiently close link with the provision or provisions to which the reservation refers is not applicable in treaty relations between the author of the reservation and the author of the objection, provided the non-application of this provision does not undermine the object and purpose of the treaty.

363. The Special Rapporteur is aware that this draft guideline duplicates, to some extent, draft guideline 3.4.2.[569] However, draft guideline 3.4.2 addresses the issue only from the standpoint of the permissibility of such an objection, whereas draft guideline 4.3.8 deals more directly with the possible effect of an objection. Its goal is not to "sanction" a possibly impermissible objection with intermediate effect, but only to note that an objection accompanied by the corresponding intention of its author produces this effect. The effects of an objection with intermediate effect can be determined objectively by combining the effects provided for in draft guidelines 4.3.5 and 4.3.8, without the need to state that the author of an objection with intermediate effect that goes beyond what is admissible would still benefit from the "normal" effect of the objection.

c. Case of objections with "super-maximum" effect

364. The much more controversial question of objections with "super-maximum" effect whereby the author of the objection affirms that the treaty enters into force in relations between it and author of the reservation without the latter being able to benefit from its reservation,[570] can also be resolved logically by applying the principle of mutual consent.

365. It should be noted, however, that the practice of objections with super-maximum effect has developed not within the context of objections to valid reservations, but in reaction to reservations that are incompatible with the object and purpose of a treaty. A recent example is afforded by the Swedish objection to the reservation made by El Salvador to the 2006 Convention on the Rights of Persons with Disabilities:

> [T]he Government of Sweden has examined the reservation made by the Government of the Republic of El Salvador upon ratifying the Convention on the Rights of Persons with Disabilities.
>
> According to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a treaty shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

---

[569] See n. 559 above.

[570] See also the fourteenth report on reservations to treaties (A/CN.4/614/Add.1), para. 106.

> The Government of Sweden notes that El Salvador in its reservation gives precedence to its Constitution over the Convention. The Government of Sweden is of the view that such a reservation, which does not clearly specify the extent of the derogation, raises serious doubt as to the commitment of El Salvador to the object and purpose of the Convention.
>
> The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between
>
> El Salvador and Sweden, without El Salvador benefiting from its reservation.[571]

366. Regardless of the consequences of such an objection with super-maximum effect in the case of invalid reservation, it is quite clear that such an effect of an objection is not only not provided for in the Vienna Conventions — which is also true of an objection with intermediate effect — but is also clearly incompatible with the principle of mutual consent. Accordingly, a super-maximum effect is excluded in the case of a valid reservation: the author of an objection cannot force the author of the reservation to be bound by more than what it is prepared to accept. The objecting State or international organization cannot impose on a reserving State or international organization that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume.

367. It would therefore be appropriate to point out in the Guide to Practice that the author of a validly formulated reservation cannot be bound to comply with the provisions of the treaty without the benefit of its reservation. That is the thrust of draft guideline 4.3.9:

> **4.3.9 Right of the author of a valid reservation not to be bound by the treaty without the benefit of its reservation**
>
> The author of a reservation which meets the conditions for permissibility and which has been formulated in accordance with the relevant form and procedure can in no case be bound to comply with all the provisions of the treaty without the benefit of its reservation.

368. This does not mean, however, that an objection with super-maximum effect has no effect on the content of treaty relations between its author and the author of the reservation. As is the case with objections with intermediate effect that go beyond admissible effects, such objections are, above all, objections through which the author expresses its disagreement with the reservation. The application of draft guideline 4.3.5 is in no way limited to simple objections. It applies to all objections to a valid reservation, including objections with super-maximum effect.

d. Effect of objections with maximum effect on treaty relations (revisited)

369. In the case where the author of an objection has opposed the entry into force of a treaty in its relations with the author of a reservation — a right recognized by

[571] C.N.84.2009.TREATIES-4, available from http://treaties.un.org (Depositary Notification).

article 20, paragraph 4 (b), of the Vienna Conventions, the treaty is quite simply not in force as between the author of the objection and the author of the reservation.[572] No rule deriving from the treaty applies to their mutual relations. In that case, there is no point in discussing the issue of the content of treaty relations, because they are by definition non-existent.

(c) Effect of a valid reservation on extraconventional norms

370. The definition of a reservation contained in article 2, paragraph 1 (d), of the Vienna Conventions and reproduced in guideline 1.1 of the Guide to Practice clearly establishes that a reservation "purports to exclude or to modify the legal effect of certain provisions of the treaty." Likewise, article 21, paragraph 1, provides that an established reservation can only modify (or exclude) the "provisions of the treaty to which the reservation relates".[573] Although article 21, paragraph 3, is not as precise on this point, it refers to the "provisions to which the reservation relates", which, based on the definition of a reservation, can only mean "certain provisions of the treaty".

371. The text of the Vienna Conventions therefore leaves no room for doubt: a reservation can only modify or exclude the legal effects of the treaty or some of its provisions. A reservation remains a unilateral statement linked to a treaty, the legal effects of which it purports to modify. It does not constitute a unilateral, independent act capable of modifying the obligations, still less the rights, of its author. Furthermore, the combined effect of a reservation and an objection cannot exclude the application of norms external to the treaty.

372. Although technically not a reservation to a treaty, the arguments put forward by the French Republic on its reservation to its declaration of acceptance of the jurisdiction of the Court under article 36, paragraph 2, of the Statute of the International Court of Justice in the *Nuclear Tests* cases are quite instructive in this regard.[574] In order to establish that the Court had no jurisdiction in those cases, France contended that the reservation generally limited its consent to the jurisdiction of the Court, particularly the consent given in the General Act of Arbitration. In their joint dissenting opinion, several judges of the Court rejected the French thesis:

> Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon, or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations.[575]

---

[572] See paras. 307-311 above.

[573] On the differences between article 2, paragraph 1 (d), and article 21, paragraph 1, of the Vienna Conventions, see Daniel. Müller, "Article 21 (1969)", op. cit. note 568, pp. 896-898, paras. 25-26.

[574] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973*, I.C.J. Reports 1973, p. 101-102, para. 18; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I. C.J. Reports 1973*, p. 137-138, para. 16.

[575] *Nuclear Tests (Australia v. France)*, Joint dissenting opinion of Justices Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *I. C.J. Reports 1974*, p. 350, para. 83.

This opinion is expressed in sufficiently broad terms not to be applicable exclusively to the specific situation of reservations to declarations of acceptance of the compulsory jurisdiction of the Court under the optional clause, but to any reservation to an international treaty in general. This approach was later endorsed by the Court itself in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, where Honduras sought to have its reservation to its declaration of acceptance of the compulsory jurisdiction of the Court under the optional clause take precedence over its obligations by virtue of article XXXI of the Pact of Bogotá. The Court, however, held that such a reservation

> … cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted.[576]

373. This relative effect of the reservation and of the reactions to the reservation, in the sense that they can modify or exclude only the legal effects of the treaty in regard to which they were formulated and made, results from the *pacta sunt servanda* principle. A State or international organization cannot release itself through a reservation, acceptance of a reservation or objection to a reservation from obligations it has elsewhere.

374. The purpose of draft guideline 4.4.1 is to highlight the absence of effect of a reservation, or acceptance of or objection to it, on treaty obligations under another treaty. Only the legal effects of treaty provisions to which the reservation relates can be modified or excluded.

4.4 Effects of a reservation and extraconventional obligations

4.4.1 Absence of effect on the application of provisions of another treaty

> A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

375. Just as a reservation cannot influence pre-existing treaty relations of its author, it cannot have an impact on other obligations, of any nature, binding on the author of the reservation apart from the treaty. This is especially clear with regard to a reservation to a provision reflecting[577] a customary norm.[578] Certainly, as between the author of the reservation and the contracting parties with regard to which the reservation is established, the reservation has the "normal" effect provided for in article 21, paragraph 1, creating between those parties a specific regulatory system which may derogate from the customary norm concerned in the context of the treaty[579] — for example, by imposing less stringent obligations. Nonetheless, the

---

[576] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 88, para. 41.

[577] On the use of the word "reflect" see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 89, para. 1 of the commentary to guideline 3.1.8.

[578] On the question of the admissibility of such reservations, see the tenth report on reservations to treaties (A/CN.4/558/Add.1), paras. 116-130, and guideline 3.1.8, paragraph 1 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 88). See also Gérard Teboul, "Remarques sur les réserves aux conventions de codification", *Revue générale de droit international public*, 1982, pp. 679-717.

[579] Ibid., p. 708, para. 32.

reservation in no way affects the obligatory nature of the customary norm as such. It cannot release its author from compliance with the customary norm, if it is in effect with regard to the author, outside these specific regulatory systems.[580] The International Court of Justice has clearly stressed in this regard that:

> no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention.[581]

The reason for this is simple:

> The fact that the above-mentioned principles [of customary and general international law], recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.[582]

376. Modifying or excluding the application of a treaty provision that reflects a customary norm can indeed produce effects in the framework of treaty relations; however, it does not in any way affect the existence or obligatory nature of the customary norm per se.

377. Concretely, the effect of the reservation (and of the reactions to it — acceptance or objection) is to exclude application of the *treaty* rule that reflects a customary norm, which means that the author of the reservation is not bound vis-à-vis the other contracting parties to comply with the (treaty) rule within the framework of the treaty. For example, it is not required to have recourse to arbitration or an international judge for any matter of interpretation or application of the rule, despite a settlement clause contained in the treaty. Nonetheless, since the customary norm retains its full legal force, the author of the reservation is not, as such, free to violate the customary norm (identical by definition); it must comply with it as such. Compliance or the consequences of non-compliance with the customary norm are not, however, part of the legal regime created by the treaty but are covered by general international law and evolve along with it.

378. This approach moreover, is, shared by States, which do not hesitate to draw the attention of the author of the reservation to the fact that the customary norm remains in force in their mutual relations, their objection notwithstanding. See, for example, the Netherlands in its objection to several reservations to article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations:

> The Kingdom of the Netherlands does not accept the declarations by the People's Republic of Bulgaria, the German Democratic Republic, the Mongolian People's Republic, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist

---

[580] Prosper Weil has stated that "the will demonstrated by a State in regard to a particular convention is now of little significance … whether or not it makes reservations to some of its clauses … it will in any case be bound by those provisions of the convention which have been recognized as having the character of rules of customary or general international law" ("Vers une normativité relative en droit international?", *Revue générale de droit international public*, 1982, pp. 43-44).

[581] *North Sea Continental Shelf cases, Judgment, I.C.J., Reports 1969*, p. 40, para. 65.

[582] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, I.C.J Reports, 1984*, p. 424, para. 73.

Republic and the People's Democratic Republic of Yemen concerning article 11, paragraph 1, of the Convention. The Kingdom of the Netherlands takes the view that this provision remains in force in relations between it and the said States in accordance with international customary law.[583]

379. The Commission has already adopted a guideline on this matter in the third part of the Guide to Practice on the validity of reservations. The guideline in question is 3.1.8, which reads as follows:

3.1.8 Reservations to a provision reflecting a customary norm

1. The fact that a treaty provision reflects a customary norm is a pertinent factor in assessing the validity of a reservation although it does not in itself constitute an obstacle to the formulation of the reservation to that provision.

2. A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of that customary norm which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.[584]

380. It is the view of the Special Rapporteur that paragraph 2 of this guideline addresses this question satisfactorily. However, one could ask whether the paragraph has been placed in the appropriate section of the Guide. It has more to do with the effects than with the validity of the reservation. Perhaps it would make sense, in that case, to turn paragraph 2 of guideline 3.1.8 into a new draft guideline 4.4.2:

4.4.2 Absence of effect of a reservation on the application of customary norms

A reservation to a treaty provision which reflects a customary norm does not affect the binding nature of the customary norm, which shall continue to apply as between the reserving State or international organization and other States or international organizations which are bound by that norm.

381. The fundamental principle then, is, that a reservation and the reactions to it neither modify nor exclude the application of other treaty rules or customary norms that bind the parties. This principle applies a fortiori, of course, when the treaty rule reflects a peremptory norm of general international law (*jus cogens*). On this subject, following intense debate, the Commission adopted guideline 3.1.9, which is based in part upon this issue:

3.1.9 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.[585]

382. Without reopening a lengthy discussion on the problem (if indeed it is one), the Special Rapporteur is of the view that it would be desirable for a provision on

---

[583] *Multilateral Treaties Deposited with the Secretary-General*, chap. III, 3, available from http://treaties.un.org (Status of Treaties). In essence, the validity of the remark by the Netherlands is unquestionable. However, the way it is framed is highly debatable; it is not the treaty *provision* which remains in force between the reserving States and the Netherlands, but the customary norm that the provision reflects.

[584] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), p. 88.

[585] Ibid., p. 99.

the effects (or absence of effects) of a reservation on a *jus cogens* norm to be included in the fourth part of the Guide to Practice. In 2006, some members of the Commission expressed the view that guideline 3.1.9 had more to do with the effects of a reservation than it did with the question of its validity.[586]

383. However, unlike what was suggested above[587] with regard to reservations to a treaty provision reflecting a customary norm, the Special Rapporteur is not proposing simply to move guideline 3.1.9 to the fourth part of the Guide to Practice; as written, this guideline does not directly address the question of the effects of a reservation to a provision reflecting a peremptory norm of general international law.

384. As noted above,[588] there is no reason why the principle applicable to reservations to a provision reflecting a customary norm cannot to be transposed to reservations to a provision reflecting a peremptory norm. Draft guideline 4.4.3 could therefore be worded along the same lines as draft guideline 4.4.2, to read as follows:

> **4.4.3 Absence of effect of a reservation on the application of peremptory norms of general international law (*jus cogens*)**
>
> A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of the norm in question, which shall continue to apply as such between the reserving State or international organization and other States or international organizations which are bound by that norm.

385. In that case, the Special Rapporteur will leave it to the Commission to decide whether draft guideline 4.4.3 duplicates guideline 3.1.9 or whether the two guidelines could be retained in their respective parts of the Guide to Practice.

---

[586] Ibid., pp. 103-104, para. (12) of the commentary to guideline 3.1.9.
[587] Para. 380.
[588] Para. 382.