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Seventeenth report on reservations to treaties

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I. Introduction*

1. The present report comprises three sections. The first is devoted to the reservations dialogue and concludes with a draft annex to the Guide to Practice on Reservations to Treaties, which could take the form of "conclusions" or of a recommendation of the Commission on this important topic. The second deals with dispute settlement and traces the broad outline of a consultative mechanism designed to help States settle any differences in assessment that may arise with regard to reservations. If the Commission approves the principle of such a mechanism, the outline could be submitted to the General Assembly as a second annex to the Guide. Lastly, the third attempts to clarify a number of points concerning the purpose and legal scope of the Guide to Practice and could lead to the adoption of an explanatory note that would be placed at the end or, preferably, the beginning, of the Guide to Practice.

II. The reservations dialogue

2. The reservations regime instituted by the Vienna Conventions does not impose static solutions on contracting States or contracting organizations; rather, it leaves room for dialogue among the key players, namely, the author of the reservation, on the one hand, and the other contracting States or contracting organizations and any monitoring bodies established by the treaty, on the other. The possibility of this "reservations dialogue" is confirmed by the *travaux préparatoires* of the 1969 Vienna Convention and is reflected in the treaty practice of States (see section II (A)).

3. Nonetheless, no provision of the Vienna Conventions overtly concerns — or prohibits — the reservations dialogue, much less establishes a legal framework for it. For this reason, the present report includes a few reflections that may result in the adoption of flexible normative suggestions that would help guide the practice of States and international organizations on the topic (see section B).

A. The reservations dialogue in practice

1. Forms of the reservations dialogue under the unanimity regime

4. While it might appear that the traditional regime of unanimous acceptance of reservations by all contracting States left no room for dialogue with the author of a reservation, that was not the case; the latter still had to convince the other contracting States that the reservation was in keeping with the spirit of the treaty and to convince them to accept it. However, dialogue among the key players was limited to the establishment or ultimate rejection of the reservation. If a State had doubts in that regard, it could block the entry into force of the treaty for the author of the reservation.

* The Special Rapporteur wishes to thank Daniel Müller, researcher at the Centre de droit international de Nanterre (CEDIN), for his invaluable assistance with the drafting of this report, especially the section on the reservations dialogue. I would also like to thank Céline Folsché and Pablo Sandonato de Leon, who assembled all the necessary material for the drafting of an introduction comparable to that of the previous reports, which unfortunately could not be used, as they would have made this seventeenth and final report overly long.

5. This "upstream" dialogue is, moreover, reflected in practice in the context of the Vienna regime, particularly where the unanimous or collective acceptance of the contracting States or contracting international organizations is needed for the establishment of a reservation (article 20, paragraphs 2 and 3, of the Vienna Conventions).[1] Where a State purports to formulate a reservation to a constituent instrument of an international organization, some dialogue must take place within the framework of the competent organ upstream of the acceptance, or refusal of acceptance, of the reservation.[2] The sometimes lively and confrontational nature of this dialogue was particularly clear in the case of the reservation that India sought to formulate when acceding to the Convention on the Inter-Governmental Maritime Consultative Organization (IMCO), now the International Maritime Organization.[3] Although the problem raised by India's reservation had more to do with procedure than with the content of the reservation, it is nonetheless interesting to note that it was resolved after the Indian representative assured the Sixth Committee of the United Nations General Assembly that the Indian declaration was not a reservation, but merely a declaration of policy.[4] It was only following this declaration, and referring to it expressly, that the IMCO Council, in a resolution adopted on 1 March 1960, stated that it considered India a member of the Organization.[5]

6. Today, such upstream dialogue is still commonplace and fruitful, particularly in the context of regional organizations. The introduction of a more flexible reservations regime that makes it possible to break down a treaty into a multitude of different treaty relationships has made this dialogue among contracting States and the author of a reservation necessary, as seen quite remarkably in the context of the Pan American Union. In resolution XXIX, "Methods of Preparation of Multilateral Treaties", the Eighth International Conference of American States (1938) resolved that:

> 2. In the event of adherence or ratification with reservations, the adhering or ratifying State shall transmit to the Pan American Union, prior to the deposit of the respective instrument, the text of the reservation which it proposes to formulate, so that the Pan American Union may inform the signatory States thereof and ascertain whether they accept it or not. The State which proposes to adhere to or ratify the treaty, may do it or not, taking into account the

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[1] See, in particular, draft guidelines 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety) and 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), pp. 121-125.

[2] See, for example, Switzerland's reservation to the Covenant of the League of Nations, which was accepted by the Council, whereas comparable reservations made by Liechtenstein and Germany were not accepted and had to be withdrawn (Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations", *British Yearbook of International Law*, vol. 45 (1971), pp. 140-141). See also Argentina's efforts to justify the reservation formulated in its instrument of accession to the International Atomic Energy Agency (ibid., p. 160).

[3] *British Yearbook of International Law*, vol. 45 (1971), pp. 163-165.

[4] In its resolution 1452 (XIV), adopted on 7 December 1959, the General Assembly took note of "the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation" and "express[ed] the hope that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India".

[5] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XII, 1).

observations which may be made with regard to its reservations by the signatory States.[6]

For example, Guatemala clarified the scope of the reservations that it intended to formulate in respect of the Inter-American Treaty of Reciprocal Assistance (Rio de Janeiro, Brazil, 1947)[7] and the Charter of the Organization of American States[8] when it saw that a number of States were not prepared to accept them.

7. Such forms of dialogue are ongoing in other forums, such as the Council of Europe.[9]

2. The reservations dialogue in the context of and through the Vienna regime

8. In the context of the Vienna regime, the dialogue between the author of a reservation and the other States or international organizations entitled to become parties to the treaty in question is conducted primarily through the two reactions to reservations envisaged in the Vienna Conventions: acceptance and objection.[10] In this regard, the Vienna regime is clearly different from the traditional regime of unanimity, in which an objection, in itself, puts an end to the dialogue.[11]

9. The consequences of objections — and, to a lesser extent, acceptances — are not necessarily limited to the legal effects which they produce in respect of

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[6] *Eighth International Conference of American States, Final Act*, Lima, 1938, p. 52, reproduced in Depositary practice in relation to reservations: Report by the Secretary-General, A/5687, *Yearbook ... 1965*, vol. II, p. 80. See the comments made by the Organization of American States (OAS), ibid., p. 87.

[7] See http://www.oas.org/juridico/english/sigs/b-29.html ("With respect to [Guatemala's] reservation, the Pan American Union consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. A number of replies being unfavourable, a second consultation was made accompanied, at the request of the Government of Guatemala, by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Inter-American Treaty of Reciprocal Assistance, and that Guatemala was ready to act at all times within the bounds of international agreements to which it was a party. In view of this declaration, the States that previously had not found the reservation acceptable now expressed their acceptance").

[8] See http://www.oas.org/dil/treaties_A41_Charter_of_the_Organization_of_American_States_sign.htm ("With respect to [Guatemala's] reservation, the General Secretariat consulted the signatory governments, in accordance with the procedure established by paragraph 2 of Resolution XXIX of the Eighth International Conference of American States, to ascertain whether they found it acceptable or not. At the request of the Government of Guatemala, this consultation was accompanied by a formal declaration of that Government to the effect that its reservation did not imply any alteration in the Charter of the Organization of American States, and that Guatemala is ready to act at all times within the bounds of international agreements to which it is a party. In view of this declaration, the States that previously did not find the reservation acceptable expressed their acceptance").

[9] See Sia Spiliopoulou Åkermark, "Reservations: Breaking New Ground in the Council of Europe", *European Law Review*, vol. 24, 1999, pp. 499-515.

[10] See, inter alia, the commentaries to draft guidelines 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186-202, 2.8.0 (Forms of acceptance of reservations), ibid., *Sixty-third Session* (A/63/10), pp. 243-248 and 4.3 (Effect of an objection to a valid reservation), ibid., *Sixty-fifth Session, Supplement No. 10* (A/65/10), p. 147, para. 2.

[11] See para. 4 above. See also Yogesh Tyagi, "The Conflict of Law and Policy on Reservations to Human Rights Treaties", *British Yearbook of International Law*, vol. 71, 2000, p. 216.

permissible reservations and which are more or less clearly established by the Vienna Conventions. They do not necessarily constitute the end of a process; rather, they may mark the beginning of cooperation between the key players. More and more frequently, the author of an objection not only draws the reserving State's attention to its reasons for considering the reservation as formulated to be impermissible, but also suggests that the author of the reservation should reconsider it. Thus, Finland made an objection to the reservation formulated by Malaysia when acceding to the 1989 Convention on the Rights of the Child by pointing out that the reservation

> … is subject to the general principle of the observance of the treaties according to which a party may not invoke its internal law, much less its national policies, as justification for its failure to perform its treaty obligations. [...]
>
> In its present formulation the reservation is clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 51, paragraph 2, of the [said Convention]. Therefore the Government of Finland objects to such reservation. The Government of Finland further notes that the reservation made by the Government of Malaysia is devoid of legal effect.
>
> The Government of Finland recommends the Government of Malaysia to reconsider its reservation to the [said Convention].[12]

Although the link cannot been clearly established, it is interesting to note that in 1999, the Malaysian Government informed the Secretary-General of its decision to partially withdraw its reservations.[13]

10. Under the flexible system, even an objection, whether it has minimum, intermediate[14] or maximum effect,[15] does not exclude any form of dialogue between the author of the reservation and the author of the objection. On the contrary, a dialogue between the parties is necessary, if only to determine the content of their treaty relationship in accordance with article 21, paragraph 3, of the

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[12] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 11). See also Finland's identical objection to the reservation formulated by Qatar upon ratification (ibid.); the Danish Government's objections to the reservations formulated by Mauritania and the United Arab Emirates in respect of the Convention on the Elimination of All Forms of Discrimination against Women; and the (late) objections formulated by the Government of Denmark in respect of the reservations to the same Convention formulated by Kuwait and Lebanon (ibid., chap. IV, 8); and the "general" objection made by Denmark in respect of the reservations formulated by Djibouti, the Islamic Republic of Iran, Pakistan and the Syrian Arab Republic, on the one hand, and by Botswana and Qatar, on the other, to the Convention on the Rights of the Child (ibid., chap. IV, 11). By contrast, Denmark also suggested to Brunei Darussalam, Saudi Arabia and Malaysia that they should reconsider their reservations to the Convention on the Rights of the Child, although their declarations could not be considered true objections (ibid.). In that regard, see also para. 32 below.

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

[14] The Commission has, moreover, insisted on the need for some dialogue between the author of the reservation and the author of an objection with intermediate effect in draft guideline 4.3.6 (Effect of an objection on provisions other than those to which the reservation relates), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), pp. 166-168.

[15] See para. 12 below.

Vienna Conventions, the wording of which leaves the reader "rather puzzled" and the application of which remains difficult in practice.[16]

11. Furthermore, the International Court of Justice, in its 1951 advisory opinion, pointed out on the issue of reservations with minimum effect that such dialogue was inherent in the flexible system and was the corollary of the very principle of consensus:

> … 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 the 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.[17]

12. Furthermore, practice shows that an objection with maximum effect, too, does not simply constitute refusal within the framework of the flexible system; it leaves open the possibility of a dialogue between the key players. The response of the United States of America — termed an objection by the Secretary-General of the United Nations — to the objections made by France and Italy in respect of the United States declaration regarding the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (the "ATP Agreement") provides a particularly telling example. France and Italy, which considered that only European States could make a declaration such as that formulated by the United States, made objections with maximum effect by declaring that they would "not be bound by the ATP Agreement in [their] relations with the United States of America". The United States, in turn, stated that

> [...] under the clear language of article 10 [of the Agreement], as confirmed by the negotiating history, any State party to the Agreement may file a declaration under that article. The United States therefore considers that the objections of Italy and France and the declarations that those nations will not be bound by the Agreement in their relations with the United States are unwarranted and regrettable. The United States reserves its rights with regard to this matter and proposes that the parties continue to attempt cooperatively to resolve the issue.[18]

This United States reaction clearly shows that despite the maximum-effect objections of France and Italy, the reserving State may endeavour to pursue dialogue — an attitude which is, moreover, highly desirable.

13. This dialogue — which is framed and, in fact, encouraged by the Vienna rules through the reactions, whether acceptances or objections, that are regulated by the

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[16] In that regard, see the commentary to draft guideline 4.3.5 (Effect of an objection on treaty relations), *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 23-31.

[17] International Court of Justice, advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 27 (emphasis added). See also the wording of article 21, paragraph 3, proposed by Sir Humphrey Waldock in 1965: "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". (*Yearbook … 1965*, vol. II, p. 55).

[18] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XI, B, 22).

1969 and 1986 Conventions — must not conceal the development, in the margins of those instruments, of modalities for a reservations dialogue which, while borrowing the system set out in articles 19 to 23, is not envisaged by them.

14. This is true for, inter alia, some categories of reactions that resemble objections but do not produce all their effects. These include:

- Objections formulated by non-contracting States (or organizations): while meeting the definition of objections contained in draft guideline 2.6.1,[19] they do not immediately produce the legal effects envisaged in articles 20 and 21 of the Vienna Conventions.[20] Nonetheless, in this manner,

  > [t]he reserving State would be given notice that as soon as the constitutional or other processes, which cause the lapse of time before [ratification by the author of the reservation], have been completed, it would be confronted with a valid objection which carries full legal effect and consequently, it would have to decide, when the objection is stated, whether it wishes to maintain or withdraw its reservation;[21]

- Conditional objections[22] to specified, but potential or future reservations[23] that are formulated in advance for preventive purposes; while draft guideline 2.6.14 specifies that such an objection "does not produce the legal effects of an objection",[24] it nevertheless constitutes its author's warning that it will not accept certain reservations; thus, it plays the same warning function as an objection formulated by a non-contracting State or organization;[25]

- Late objections formulated after the end of the time period set out in draft guideline 2.6.13:[26] these objections also correspond to the definition contained in draft guideline 2.6.1[27] since they purport "to exclude or to modify the legal effects of the reservation or to exclude the application of the treaty as a whole"; however, owing to their lateness, they can no longer produce the legal effects of an objection as envisaged in the Vienna Conventions even though

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[19] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 186-202.

[20] See the commentary to draft guideline 2.6.5 (Author), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 189-193, paras. 4-10.

[21] International Court of Justice, advisory opinion of 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 29. See also ibid., p. 30, "On Question III".

[22] Concerning the language adopted by the Commission to designate these objections, see the commentary to draft guideline 2.6.14 (Conditional objections), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 220, para. 7.

[23] For an overview of State practice concerning conditional objections, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 218-220, paras. 2 to 5.

[24] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 218. See also para. 6 of the commentary (ibid., p. 220).

[25] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 220.

[26] See draft guideline 2.6.15 (Late objections) and the commentary thereto, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 221-225.

[27] See note 19 above.

they retain their primary purpose of notifying the author of the reservation of the author of the objection's disagreement.[28]

15. Also noteworthy in that connection are objections to an invalid reservation, which constitute the vast majority of objections in State practice. Draft guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation) stresses that

> The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.
>
> Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.[29]

An objection to an invalid reservation does not, in itself, produce any of the legal effects envisaged in the Vienna Conventions, which deal only with reservations that meet the criteria for permissibility and validity established therein. Under the Conventions, in such situations, acceptances and objections have a very specific function: determining the opposability of the reservation. They are also very important in determining the validity of a reservation.[30]

16. All these objections — and they are indeed objections, even though they cannot produce all the legal effects envisaged in the Vienna Conventions — draw the attention of the author of the reservation to the latter's invalidity, or at least to the disagreement of the author of the objection with the proposed reservation. As such, they are part of a dialogue concerning the validity or appropriateness of the reservation. Even though, or precisely because, the Vienna Conventions did not establish mechanisms for assessing the validity of a reservation — that is, whether a reservation meets the criteria for permissibility set out in article 19 and the conditions for validity — each State and each international organization, individually and from its own standpoint, is responsible for assessing the validity of a reservation.[31]

17. An excellent example is provided by the (frequent) objections made by some States with respect to the general nature or impreciseness of a given reservation, explaining that these objections have been made in the absence of further clarification of the scope of the reservation in question. For example, Sweden made the following objection to a declaration made by Turkey in respect of the ... Covenant ...

> The Government of Sweden has examined the declarations and reservation made by the Republic of Turkey upon ratifying the International Covenant on Economic, Social and Cultural Rights.
>
> The Republic of Turkey declares that it will implement the provisions of the Covenant only to the State Parties with which it has diplomatic relations. This statement in fact amounts, in the view of the Government of Sweden, to a

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[28] See also the commentary to draft guideline 2.6.13 (Late objections), *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), p. 222, para. 3.

[29] For the text of the draft guideline and the commentary thereto, see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), pp. 209-214.

[30] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), pp. 212-213, paras. 10 and 11. See also Tyagi (note 11 above), p. 216.

[31] Advisory opinion (see note 17 above), p. 24.

reservation. The reservation of the Republic of Turkey makes it unclear to what extent the Republic of Turkey considers itself bound by the obligations of the Covenant. In absence of further clarification, therefore, the reservation raises doubt as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

The Government of Sweden notes that the interpretation and application of paragraphs 3 and 4 of article 13 of the Covenant is being made subject to a reservation referring to certain provisions of the Constitution of the Republic of Turkey without specifying their contents. The Government of Sweden is of the view that in the absence of further clarification, this reservation, which does not clearly specify the extent of the Republic of Turkey's derogation from the provisions in question, raises serious doubts as to the commitment of the Republic of Turkey to the object and purpose of the Covenant.

According to established customary law as codified by 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.

The Government of Sweden therefore objects to the aforesaid reservations made by the Republic of Turkey to the International Covenant on Economic, Social and Cultural Rights.

This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations.[32]

Similarly, the Danish Government expressed its doubts regarding the interpretation of the reservation formulated by the United States of America when consenting to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use

[32] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 3). For other examples, see Sweden's objections to Turkey's declaration in respect of the International Convention on the Elimination of All Forms of Racial Discrimination (ibid., chap. IV, 2), Bangladesh's declaration in respect of the International Covenant on Economic, Social and Cultural Rights (ibid., chap. IV, 3), Botswana's and Turkey's reservations to the International Covenant on Civil and Political Rights (ibid., chap. IV, 4), Bangladesh's declaration in respect of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (ibid., chap. IV, 9), San Marino's declaration in respect of the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (ibid., chap. VI,19), Bangladesh's declaration in respect of the Convention on the Political Rights of Women (ibid., chap. XVI,1), Turkey's and Israel's reservations to the International Convention for the Suppression of Terrorist Bombings (ibid., chap. XVIII, 9) and Israel's declaration in respect of the International Convention for the Suppression of the Financing of Terrorism (ibid., chap. XVIII, 11). See also Austria's objection to the reservation formulated by Botswana in respect of the International Covenant on Civil and Political Rights (ibid., chap. IV, 4), Estonia's objection to the Syrian Arab Republic's reservation to the Convention on the Elimination of All Forms of Discrimination against Women (ibid., chap. IV, 8) and the objections of the Netherlands and Sweden to the reservation formulated by Peru in respect of the Vienna Convention on the Law of Treaties (ibid., chap. XXIII, 1).

of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Consequently, Denmark made an objection while expressly proposing the initiation of a dialogue:

> The Kingdom of Denmark notes the reservation made by the United States of America upon its consent to be bound by Protocol III. The reservation appears — with its broad and general formulation — to be contrary to the object and purpose of the Protocol. On this basis, the Kingdom of Denmark objects to the reservation.
>
> The United States has represented that the reservation is intended to only address the highly specific circumstances such as where the use of incendiary weapons is a necessary and proportionate means of destroying counter-proliferation targets, such as biological weapon facilities requiring high heat to eliminate biotoxins, and where the use of incendiary weapons would provide greater protection for the civilian population than the use of other types of weapons.
>
> The Kingdom of Denmark welcomes this narrowing of the scope of the reservation and the humanitarian considerations underlying the reservation of the United States of America. The Kingdom of Denmark further expresses its willingness to engage in any further dialogue, which may serve to settle differences in interpretation.[33]

While these reactions do indeed constitute objections, they clearly invite the author of the reservation to modify or clarify its reservation in order to bring it into line with what the author of the objection considers to be the requirements of treaty law.

18. Of course, such dialogue does not always ensue[34] and is often prevented by silence on the part of the author of the reservation. State practice shows, however, that initiation of the reservations dialogue in cases where States or international organizations deem a reservation to be invalid can be useful and that the author of the reservation often takes the warnings of other contracting States or contracting organizations into account.

19. For example, in ratifying the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Government of Chile formulated a reservation to article 2, paragraph 3, of the Convention. Australia, Austria, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Norway, New Zealand, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom of Great Britain and

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[33] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XXVI, 2).

[34] See, for example, the reservation to the Convention on Environmental Impact Assessment in a Transboundary Context (the "Espoo Convention") formulated by Canada (*Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XXVII, 4)). In a note received by the Secretary-General on 21 January 2001, faced with several objections by European States, Canada reaffirmed its position, stating that "Canada's reservation to the Espoo Convention is an integral part of Canada's ratification of the Convention and is not severable therefrom. Canada can only accept treaty relations with other states on the basis of the reservation as formulated and in conformity with Article 21 of the Vienna Convention on the Law of Treaties" (ibid.).

Northern Ireland objected to Chile's reservation; all these objections[35] were made on the grounds that the reservation was "impermissible" with respect to the object and purpose of the 1984 Convention.[36] On 7 September 1990, less than two years after ratification with the disputed reservation, Chile notified the depositary of its decision to withdraw the reservation. While the many objections to the reservation are certainly not the only reason for its withdrawal,[37] they certainly drew the reserving State's attention to the impermissibility of the reservation and thus played a significant role in the reservations dialogue and in restoration of the integrity of the 1984 Convention.

20. The interpretative declaration made by Uruguay when acceding to the Rome Statute of the International Criminal Court,[38] for its part, was the subject of objections by Denmark, Finland, Germany, Ireland, Norway, the Netherlands, Sweden and the United Kingdom. All these States stressed that the objection was, in reality, a reservation prohibited under article 120 of the Rome Statute. Uruguay, in turn, justified its position in a communication sent to the Secretary-General:

> The Eastern Republic of Uruguay, by Act No. 17.510 of 27 June 2002 ratified by the legislative branch, gave its approval to the Rome Statute in terms fully compatible with Uruguay's constitutional order. While the Constitution is a law of higher rank to which all other laws are subject, this does not in any way constitute a reservation to any of the provisions of that international instrument.
>
> It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and

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[35] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 9). Australia, Austria, Bulgaria, Canada, Finland, Greece, the Netherlands, Portugal, Switzerland, Turkey and the United Kingdom made their objections after the end of the time period established in article 20, paragraph 5, of the Vienna Convention.

[36] Despite this agreement among the authors of the objections concerning the impermissibility of the reservation, the effects that these States attached to their objection vary widely. While some of them simply stated that the reservation was impermissible while explaining that their objections were not an obstacle to the entry into force of the 1984 Convention with regard to Chile, others, including Sweden, deemed it appropriate to state that their objections "cannot alter or modify, in any respect, the obligations arising from the Convention" (an objection with "super-maximum effect", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 9); see also the objections made by Australia and Austria).

[37] In 1989, when considering the initial report of Chile (CAT/C/7/Add.2), the members of the Committee against Torture also expressed concern regarding the reservation to article 2, paragraph 3, and requested clarification of the relevant provisions of Chilean law, which, according to the Committee, "appeared to be incompatible with the Convention", *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 44* (A/45/44), p. 64, para. 349; see also ibid., p. 59, para. 375. The political changes that took place in Chile in the early 1990s probably encouraged withdrawal of the reservation formulated in 1988, see *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 46* (A/46/46), p. 44, para. 239.

[38] This interpretative declaration read: "As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic. Pursuant to the provisions of part 9 of the Statute entitled 'International cooperation and judicial assistance', the Executive shall within six months refer to the Legislature a bill establishing the procedures for ensuring the application of the Statute", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XVIII, 10).

that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction.

Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the Statute.

The interpretative declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind.

Lastly, mention should be made of the significance that Uruguay attaches to the Rome Statute as a notable expression of the progressive development of international law on a highly sensitive issue.[39]

Uruguay withdrew this interpretative declaration in 2008, having taken the necessary legislative steps.[40]

21. Other reservations have also given rise to numerous objections and have ultimately — often much later — been withdrawn or modified by their authors. Such is the case, for example, of several reservations to the Convention on the Elimination of All Forms of Discrimination against Women. One such reservation, made by the Libyan Arab Jamahiriya,[41] was the subject of seven objections owing to its general and imprecise nature.[42] On 5 July 1995, five years after that country's accession to the Convention, its Government informed the Secretary-General that it had decided "to modify, making it more specific, the general reservation it had made upon accession".[43] While this "new" reservation is not above reproach,[44] it is

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[39] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XVIII, 10).

[40] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XVIII, 10).

[41] The reservation formulated by the Libyan Arab Jamahiriya upon accession read: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shariah*", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

[42] Objections were made by Denmark, Finland, Germany, Mexico, the Netherlands, Norway and Sweden, *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8). On the question of vague or general reservations, see draft guideline 3.1.7 and the commentary thereto, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), pp. 82-88.

[43] The Libyan Arab Jamahiriya's "new" reservation reads: "1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male. 2. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic *Shariah*", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

[44] Finland made an objection to the reservation modified by the Libyan Arab Jamahiriya: "A reservation which consists of a general reference to religious law without specifying its contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of its internal law as justification for failure to perform a treaty", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

nevertheless true that the Government of the Libyan Arab Jamahiriya obviously took the criticisms expressed by other States parties with regard to the wording of the initial reservation into account. Similarly, it is probable that Bangladesh, Egypt, Malaysia, the Maldives and Mauritania modified, or even withdrew in whole or in part, their initially formulated reservations in light of the objections made by other States parties.[45]

22. While an objection might in itself be deemed to constitute one aspect of the reservations dialogue, the number and consistency of the objections also play a significant role: the author of the reservation, any other interested State and any interpreter whatsoever certainly pay more attention to a large number of objections than to an isolated objection.[46] The more consistent the practice of objections to certain reservations, the greater their impact on assessment and determination of the validity of these reservations and of any other comparable reservation, including in the future. In 1996, China, having formulated two reservations when acceding to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment without giving rise to any objection, informed the Committee against Torture that "several government departments were currently undertaking a comprehensive review of the issue, with particular attention to the views of the other States parties concerning reservations and the impact of reservations on the Committee's work".[47]

23. In the same spirit, in *Loizidou v. Turkey*, the European Court of Human Rights noted:

> The subsequent reaction of various Contracting Parties to the Turkish declarations [...][48] lends convincing support to the above observation concerning Turkey's awareness of the legal position. That she, against this background, subsequently filed declarations under both Articles 25 and 46 (art. 25, art. 46) — the latter subsequent to the statements by the Contracting Parties referred to above — indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves.[49]

24. It has also been suggested that in light of the history of the objections already made in the context of a given treaty, some States refrain from acceding to the

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[45] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

[46] See Tyagi (note 11 above), p. 216.

[47] Committee against Torture, CAT/C/SR.252/Add.1, 8 May 1996, para. 12. To date, however, China has neither withdrawn nor modified its reservations.

[48] Turkey's first declaration, made on 28 January 1987 in respect of article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, had been the subject of an exchange of views between Turkey and the Secretary General of the Council of Europe in its capacity as depositary (see *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A, No. 310, paras. 16 and 17) of an objection made by Greece and of a reaction highlighting various issues of a legal nature concerning the scope of Turkey's recognition, made by Sweden, Luxembourg, Denmark, Norway and Belgium (ibid., paras. 18-24). For its part, Turkey stated, in a letter addressed to the Secretary General of the Council of Europe that its declaration was not to be considered a reservation.

[49] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A, No. 310, para. 95. See also ibid., para. 81.

instrument owing to the high risk that the reservations they consider necessary will give rise to numerous objections.[50]

25. Furthermore, even if the objection is a unilateral statement,[51] there is nothing to prevent several States or international organizations from making their objections collectively[52] or, at least, in a concerted manner in order to give them greater weight. There has not, of course, been a great deal of practice in this area as yet. Nonetheless, efforts made within the framework of European regional organizations, including the European Union and the Council of Europe, are beginning to bear fruit and the States members of these organizations are coordinating their reactions to reservations with increasing frequency.[53]

26. Within the framework of the European Union, cooperation on reservations has emerged within the Council of the European Union Working Party on International Public Law (COJUR), which is composed of the legal counsels of member States and meets periodically. The purpose of this cooperation is, inter alia, to establish a forum for a pragmatic exchange of views concerning reservations that present legal or political problems. The goal of COJUR activity is to coordinate the national positions of States members of the European Union and, if necessary, to take a common position so that these States can act in the same manner and make concerted diplomatic efforts to convince the author of the reservation to reconsider it.[54] More often, however, the exchange of views leads to a harmonization of the objections that the States members remain free to make in respect of a reservation that is considered impermissible.[55]

27. With respect to the Council of Europe, the Special Rapporteur has, on several occasions, drawn the Commission's attention to the initiatives taken and results achieved within the framework of this regional organization in cooperation on reservations-related matters.[56] In its recommendation No. R (99) 13 on responses to

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[50] Tyagi believes that the Islamic Republic of Iran has yet to accede to the Convention on the Elimination of All Forms of Discrimination against Women because it fears that the large number of reservations needed in order to bring the Convention into line with domestic and Islamic law would prompt a particularly negative response from the international community (Tyagi (see note 11 above), p. 199, note 65).

[51] See the commentary to draft guideline 2.6.1 (Definition of objections to reservations), *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), pp. 187-188, para. 5.

[52] See draft guideline 2.6.6 (Joint formulation) and the commentary thereto, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 193-195.

[53] For a recent example, see the objections made by the Czech Republic, Estonia, France, Hungary, Ireland, Italy, Lithuania, Slovakia, Spain and the United Kingdom in respect of the reservation formulated by Yemen when acceding to the 1999 International Convention for the Suppression of the Financing of Terrorism, *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XVIII, 11).

[54] See also para. 51 above.

[55] See Franz Cede, "European Responses to Questionable Reservations" in Wolfgang Benedek, Hubert Isak and Renate Kicker, eds., Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of His 65th Birthday (Frankfurt am Main and New York, Peter Lang Verlag, 1999), p. 30.

[56] Third report on reservations to treaties (A/CN.4/491), paras. 28 and 29; fourth report on reservations to treaties (A/CN.4/499), paras. 42 and 43; eighth report on reservations to treaties (A/CN.4/535), para. 23; eleventh report on reservations to treaties (A/CN.4/574), para. 56; and fourteenth report on reservations to treaties (A/CN.4/614), para. 64. On measures taken within the Council of Europe, see also Åkermark (note 9 above), particularly pp. 511-515.

inadmissible reservations to international treaties, adopted on 18 May 1999, the Council of Europe Committee of Ministers stated that it was "[c]oncerned by the increasing number of inadmissible reservations to international treaties, especially reservations of a general character" and "[a]ware that ... a common approach on the part of the member States as regards such reservations may be a means to improve that situation". In order to assist member States and encourage them to exchange views concerning reservations formulated in respect of multilateral treaties drafted within the Council of Europe, a European Observatory of Reservations to International Treaties was established by the Ad hoc Committee of Legal Advisers on Public International Law (CAHDI). Since 2002, the Observatory's functions have been expanded to include multilateral counter-terrorism treaties concluded outside the Council of Europe.[57] In its work, the Observatory attempts, inter alia, to draw member States' attention to reservations that are likely to give rise to objections, a list of which is prepared by its secretariat, and to encourage exchanges of views among member States in order to examine the possibility of making objections in a concerted manner. In that regard, it is interesting to note that the Observatory considers not only reservations formulated by third States, but also those made by Council of Europe member States. In many cases, the latter do not hesitate to provide the necessary explanation or justification so that their reservations can be removed from the list.[58]

3. The reservations dialogue outside the Vienna system

28. In his eighth report, which is devoted to the definition of objections to reservations, the Special Rapporteur has already noted the diversity of States' reactions to a reservation formulated by a State or another international organization.[59] In many cases, States do not simply purport to "exclude or to modify the legal effects of the reservation, or to exclude the application of the treaty as a whole, in [their] relations with the reserving State or organization", where their reactions cannot be considered equivalent to either an acceptance or an objection *stricto sensu*. These reactions nevertheless purport to establish a reservations dialogue (see section 3 (a)).

29. Moreover, the reservations dialogue is not limited to exchanges between the States and international organizations that are parties to the treaty in question or have the right to accede to it. Of course, the Vienna Conventions deal only with acceptances and objections by contracting States or contracting organizations (or, in the very specific context of article 20, paragraph 3, of the competent organ of the

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[57] Eighth report on reservations to treaties (A/CN.4/535), para. 23; see also Council of Ministers of the Council of Europe decision CM/Del/Dec (2001) 765bis of 21 September 2001, item 2.1.

[58] See, for example, the delegation of Monaco's explanation of the interpretative declaration that the country had formulated when acceding to the Convention on the Rights of Persons with Disabilities, provided at the 39th meeting of the Ad hoc Committee of Legal Advisers on Public International Law, held in Strasbourg on 18 and 19 March 2010 (Ad hoc Committee of Legal Advisers on Public International Law (2010) 14, para. 87), as well as the explanation provided by the observer for Israel when ratifying the Additional Protocol to the Geneva Conventions of 1949 and relating to the adoption of an additional distinctive emblem (Protocol III), and the reaction by the representative of Switzerland at the 35th meeting of the Ad hoc Committee of Legal Advisers on Public International Law, held in Strasbourg on 6 and 7 March 2008 (Ad hoc Committee of Legal Advisers on Public International Law (2008) 15, paras. 93-94). See also para. 49 below.

[59] A/CN.4/535/Add.1, paras. 85-89.

international organization). But the circle of participants in the reservations dialogue is wider and includes all the monitoring bodies of the treaty in question and international organizations that are not entitled to become parties to the treaty (see section 3 (b)).

a. Reactions, other than objections and acceptances, of contracting States and contracting organizations

30. In the dispute between France and the United Kingdom concerning the delimitation of the continental shelf, the arbitral tribunal noted, concerning article 12 of the 1958 Convention on the Continental Shelf, that

> [a]rticle 12, as the practice of a number of States ... confirms, leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such action amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.[60]

States and international organizations are thus free to comment on, and even criticize, a reservation formulated by another State or another international organization without making objections within the meaning of the Vienna Conventions. Since these reactions, however well founded, are not objections, they cannot rebut the presumption established in article 20, paragraph 5, of the Vienna Conventions: in the absence of an objection per se made within the specified time limit, the author of a reaction, even a critical one, shall be deemed to have accepted the reservation even though the majority of its reactions express doubt as to its validity.[61] It is true that if the reservation is impermissible, the presumption established in article 20, paragraph 5, has no practical effect.

31. Undefined reactions that do not reveal their purpose and complaints about reservations serve little purpose. For example, the legal regime of a reservation was not specified when the Government of the Netherlands "reserve[d] all rights regarding the reservations made by the Government of Venezuela on ratifying" the Geneva Convention on the Territorial Sea and the Contiguous Zone and the Geneva Convention on the Continental Shelf.[62] It is doubtful that such a reaction, which purports to be neither an objection nor an acceptance, would lead the author of the reservation to reconsider, withdraw or modify it. But State practice has changed a great deal in recent years and reactions other than acceptances or objections have a real place in the reservations dialogue without, however, producing a legal effect as such.

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[60] Arbitral award of 30 June 1977, *Reports of International Arbitral Awards*, vol. XVIII, pp. 161-162, para. 39.

[61] See draft guideline 4.5.3 [4.5.4] (Reactions to an invalid reservation), the first paragraph of which provides clarification: "The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization", *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), p. 192.

[62] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XXI, 1 and 4).

32. A particularly telling example is Mexico's declaration in respect of the reservation to the Convention on the Elimination of All Forms of Discrimination against Women formulated by the Government of Malawi:[63]

> The Government of the United Mexican States hopes that the process of eradication of traditional customs and practices referred to in the first reservation of the Republic of Malawi will not be so protracted as to impair fulfilment of the purpose and intent of the Convention.[64]

Mexico's declaration does not constitute an objection to Malawi's reservation; on the contrary, it demonstrates an understanding of it. It nevertheless focuses on the necessarily transitory nature of the reservation and on the need to reconsider and withdraw it in a timely manner. This is an excellent example of "soft diplomacy"; moreover, Malawi withdrew its reservation in 1991, slightly more than four years after acceding to the Convention.

33. Full or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue. Some States do not hesitate to draw the author of the reservation's attention, through declarations that are often well reasoned, to the legal problems that the reservation raises in order to request the author to take the necessary steps. Denmark's reaction to the reservations to the Convention on the Rights of the Child formulated by Brunei Darussalam, Malaysia and Saudi Arabia are examples of this:

> The Government of Denmark finds that the general reservation with reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islamic law is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purposes of the Convention and accordingly inadmissible and without effect under international law. Furthermore, it is a general principle of international law that national law may not be invoked as justification for failure to perform treaty obligations.
>
> The Convention remains in force in its entirety between Brunei Darussalam and Denmark.
>
> [...] The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservation to the Convention. ...[65]

34. The Austrian Government reacted to the same reservations and to those formulated by Kiribati and the Islamic Republic of Iran. While these reactions cannot be termed objections within the meaning of the Vienna Conventions, they cast doubt on the admissibility of the reservations in question without claiming to have any particular legal effect:

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[63] The reservation stated: "Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

[64] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 8).

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

> Under article 19 of the Vienna Convention on the Law of Treaties, which is reflected in article 51 of the [Convention on the Rights of the Child], a reservation, in order to be admissible under international law, has to be compatible with the object and purpose of the treaty concerned. A reservation is incompatible with the object and purpose of a treaty if it intends to derogate from provisions the implementation of which is essential to fulfilling its object and purpose.
>
> The Government of Austria has examined the reservation made by Malaysia to the [Convention]. Given the general character of these reservations a final assessment as to its admissibility under international law cannot be made without further clarification.
>
> Until the scope of the legal effects of this reservation is sufficiently specified by Malaysia, the Republic of Austria considers these reservations as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the [Convention].
>
> Austria, however, objects to the admissibility of the reservations in question if the application of this reservation negatively affects the compliance of Malaysia … with its obligations under the [Convention] essential for the fulfilment of its object and purpose.
>
> Austria could not consider the reservation made by Malaysia ... as admissible under the regime of article 51 of the [Convention] and article 19 of the Vienna Convention on the Law of Treaties unless Malaysia …, by providing additional information or through subsequent practice, ensure[s] that the reservations are compatible with the provisions essential for the implementation of the object and purpose of the [Convention].[66]

Austria's reaction might conceivably be considered an objection or a conditional acceptance subject to the condition that the reservation be withdrawn, modified or, at a minimum, interpreted in a certain manner. However, in the absence of the information needed to determine the permissibility of the reservations, Austria did not make a formal objection;[67] it chose to give the reserving States the option of reassuring it as to the permissibility of their reservations.[68]

35. Of course, some States do not hesitate to propose an interpretation of the reservation that, in their view, would make it acceptable. The United Kingdom's position concerning the reservation formulated by the United States of America upon consenting to be bound by Protocol III to the Geneva Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects is an

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[66] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 11). See also Belgium's reaction to the reservation formulated by Pakistan upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women (ibid., chap. IV, 8).

[67] This is quite a common practice; see para. 17 above.

[68] See also the reaction of the United Kingdom to the reservation to the International Covenant on Civil and Political Rights formulated by the Republic of Korea, in which the former stated that it "reserve[d its] rights under the Covenant in their entirety" pending "a sufficient indication of [the] intended effect" of the reservation, *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 3).

example; the interpretation of the reservation seems potentially to change the objection into an acceptance:

> ... this reservation appears to be contrary to the object and purpose of the Protocol insofar as the object and purpose of the Protocol is to prohibit/restrict the use of incendiary weapons per se. On this reading, the United Kingdom objects to the reservation as contrary to the object and purpose of the Protocol.
>
> The United States has, however, publicly represented that the reservation is necessary because incendiary weapons are the only weapons that can effectively destroy certain counter-proliferation targets, such as biological weapons facilities, which require high heat to eliminate the biotoxins. The United States has also publicly represented that the reservation is not incompatible with the object and purpose of the Protocol, which is to protect civilians from the collateral damage associated with the use of incendiary weapons. The United States has additionally stated publicly that the reservation is consistent with a key underlying principle of international humanitarian law, which is to reduce risk to the civilian population and civilian objects from harms flowing from armed conflict.
>
> On the basis that (a) the United States reservation is correctly interpreted as a narrow reservation focused on the use of incendiary weapons against biological weapons, or similar counter-proliferation, facilities that require high heat to eliminate the biotoxins, in the interests of preventing potentially disastrous consequences for the civilian population, (b) the United States reservation is not otherwise intended to detract from the obligation to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising incidental loss of civilian life, injury to civilians and damage to civilian objects, and (c) the object and purpose of the Protocol can properly be said to be to protect civilians from the collateral damage associated with the use of incendiary weapons, the United Kingdom would not object to the reservation as contrary to the object and purpose of the Protocol.[69]

36. While recorded practice provides few examples, a genuine dialogue can indeed develop between the author of a reservation and the author of such a conditional objection/acceptance. Such a dialogue took place between the Netherlands and Yemen with respect to the reservation made by the latter State when acceding to the Vienna Convention on Consular Relations. The reservation states:

> The Yemen Arab Republic understands the words “members of their families forming part of their households” in article 46, paragraph 1, and article 49 as being restricted to members of the consular posts and their wives and minor children for the purpose of the privileges and immunities enjoyed by them.[70]

The Netherlands formulated what appears to be a conditional acceptance in the following language:

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[69] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. XXVI, 2).

[70] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 6).

> The Kingdom of the Netherlands accepts the reservation made by the Yemen Arab Republic concerning the articles 46, paragraph 1, and 49 of the Convention only in so far as it does not purport to exclude the husbands of female members of the consular posts from enjoying the same privileges and immunities under the present Convention.[71]

Several months after the deposit of the Netherlands' objection, Yemen sent the following communication to the Secretary-General:

> [The Government of Yemen] should like to make clear in this connection that it was our country's intention in making that reservation that the expression "family of a member of the consular post" should, for the purposes of enjoyment of the privileges and immunities specified in the Convention, be understood to mean the member of the consular post, his spouse and minor children only.
>
> [The Government of Yemen] should like to make it clear that this reservation is not intended to exclude the husbands of female members of the consular posts, as was suggested in the Netherlands interpretation, since it is natural that husbands should in such cases enjoy the same privileges and immunities.[72]

Thus, this dialogue allowed Yemen to explain the scope of its reservation and allowed the two other States to find common ground concerning the application of articles 46 and 49 of the 1963 Vienna Convention.

37. In much the same manner, the Netherlands formulated conditional acceptances of the reservations made by Bahrain[73] and Qatar[74] in respect of article 27, paragraph 3, to the Vienna Convention on Diplomatic Relations concerning the inviolability of the diplomatic bag. The Netherlands' reaction to Bahrain's reservation reads:

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[71] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 6). See also the well argued objection/acceptance made by the United States of America in respect of the same reservation (ibid.).

[72] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 6).

[73] Bahrain's reservation reads: "... the Government of the State of Bahrain reserves its right to open the diplomatic bag if there are serious grounds for presuming that it contains articles the import or export of which is prohibited by law", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 3).

[74] In its reservation, Qatar states: "The Government of the State of Qatar reserves its right to open a diplomatic bag in the following two situations:

1. The abuse, observed in *flagrante delicto*, of the diplomatic bag for unlawful purposes incompatible with the aims of the relevant rule of immunity, by putting therein items other than the diplomatic documents and articles for official use mentioned in para. 4 of the said article, in violation of the obligations prescribed by the Government and by international law and custom.

In such a case both the foreign Ministry and the Mission concerned will be notified. The bag will not be opened except with the approval by the Foreign Ministry. The contraband articles will be seized in the presence of a representative of the Ministry and the Mission.

2. The existence of strong indications or suspicions that the said violations have been perpetrated.

In such a case the bag will not be opened except with the approval of the Foreign Ministry and in the presence of a member of the Mission concerned. If permission to open the bag is denied it will be returned to its place of origin", *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 6).

> The Kingdom of the Netherlands does not accept the declaration by the State of Bahrain concerning article 27, paragraph 3 of the Convention. It takes the view that this provision remains in force in relations between it and the State of Bahrain in accordance with international customary law. The Kingdom of the Netherlands is nevertheless prepared to agree to the following arrangement on a basis of reciprocity: If the authorities of the receiving State have serious grounds for supposing that the diplomatic bag contains something which pursuant to article 27, paragraph 4 of the Convention may not be sent in the diplomatic bag, they may demand that the bag be opened in the presence of the representative of the diplomat mission concerned. If the authorities of the sending State refuse to comply with such a request, the diplomatic bag shall be sent back to the place of origin.[75]

While neither Bahrain nor Qatar appears to have reacted to the proposal made by the Netherlands, the latter's approach is clearly based on the desire to engage in dialogue regarding the content of the treaty relations between the States parties to the 1961 Convention. It must, however, be stressed that the Netherlands' reaction goes beyond a mere interpretation of Bahrain's reservation and — to a lesser extent — of Qatar's; it is, rather, a counter-proposal.[76] Regardless of the consequences of such a counter-proposal (and of its potential acceptance by the other party), these effects occur outside the reservations regime as established by the Vienna Conventions. Such a dialogue can, however, lead to a solution which is mutually acceptable to the key players and which, like the entire Vienna regime, makes it possible to find a balance between the goal of universality and the integrity of the treaty.

38. The Special Rapporteur is, moreover, convinced that the examples given constitute only a small part of this reservations dialogue, which extends beyond the formality of the Vienna regime and is conducted bilaterally through the diplomatic channel[77] rather than through the intermediary of the depositary.

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[75] *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. III, 6).

[76] See, inter alia, D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, vol. 16, 1995, pp. 42-45. Concerning the same example, the author suggests that "[s]uch a proposal would amount … to a standing offer to the reserving State to modify the treaty between the two parties concerned in accordance with Article 41 (1) (b) of the Vienna Convention".

[77] For example, the representative of Sweden informed the Ad hoc Committee of Legal Advisers on Public International Law that the Swedish authorities had contacted the authorities of Botswana with regard to the latter's reservation to the International Covenant on Civil and Political Rights in order to obtain further information on its scope given that the reservation referred to domestic legislation. As it had not received a satisfactory reply, the Swedish Government intended to object to the reservation. (21st meeting of the Ad hoc Committee of Legal Advisers on Public International Law, held in Strasbourg on 6 and 7 March 2001: Ad hoc Committee of Legal Advisers on Public International Law (2001) 4, para. 23); see also *Multilateral Treaties Deposited with the Secretary-General*, available from http://treaties.un.org (chap. IV, 4).

b. The reservations dialogue with treaty monitoring bodies and within international organizations

39. The essential role[78] played by monitoring bodies in assessing the permissibility of reservations has already been examined and confirmed by the Commission.[79] While not parties to treaties, they play an important role not only in assessing the permissibility of reservations, but also in fostering dialogue with the authors of reservations on the permissibility and appropriateness of their reservations.

40. Human rights treaty monitoring bodies have played a leading role in this regard and one that is growing over time.[80] Even though — or perhaps because — they do not have decision-making powers in that area, monitoring bodies do not hesitate to draw States parties' attention to reservations that they find dubious or outdated in order to encourage the reserving State to modify or withdraw the reservation in question. This reservations dialogue — which is often quite extensive — is conducted, for instance, during reviews of periodic reports.

41. The role of monitoring bodies in the reservations dialogue was fostered by the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, which urged States to "avoid, as far as possible, the resort to reservations"[81] to human rights instruments. The Conference also encouraged States

> […] to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and

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[78] The International Court of Justice has, moreover, stressed the importance of these monitoring bodies, particularly with regard to human rights treaties. In its judgment of 30 November 2010 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, it noted: "Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled" (para. 66 of the judgment).

[79] See draft guidelines 3.2 (Assessment of the permissibility of reservations), 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations), 3.2.2 (Specification of the competence of treaty monitoring bodies to assess the permissibility of reservations), 3.2.3 (Cooperation of States and international organizations with treaty monitoring bodies), and 3.2.4 (Bodies competent to assess the permissibility of reservations in the event of the establishment of a treaty monitoring body), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 283-301.

[80] See Alain Pellet and Daniel Müller, "Reservations to Human Rights Treaties: Not an Absolute Evil …" in Ulrich Fastenrath et al., eds., *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford University Press, 2011, pp. 542-544 and p. 551.

[81] A/CONF.157/24, Part I, chap. III, sect. I, para. 26.

> purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them.[82]

In particular, the Conference emphasized the role of the Committee on the Elimination of Discrimination against Women in this regard.[83]

42. In recent years, the various human rights treaty monitoring bodies[84] have largely harmonized their practices, notably by better coordinating their activities. The need for dialogue between States parties and monitoring bodies was stressed by the working group on reservations, established by the fourth inter-committee meeting and the seventeenth meeting of chairpersons of the human rights treaty monitoring bodies in order to examine the report on the practice of human rights treaty bodies with respect to reservations to such treaties. To that end, the working group noted in 2006 that States must include in their periodic reports information on reservations to the instruments in question in order to allow the monitoring bodies to take a position and initiate a dialogue with the States parties.[85] In order to enable States to benefit fully from this exchange:

> With regard to concluding observations and comments, members of the working group agreed on a certain number of recommendations which broadly reflect the current practice of all treaty bodies. Members of the working group felt that treaty bodies should explain to reserving States the nature of their concerns with respect to the effects of the reservations on the treaty. In particular, it is important for States to understand how treaty bodies read the provisions of the treaty concerned and the reasons why some reservations are incompatible with its object and purpose. So far, the practice of treaty bodies has been to recommend the withdrawal of reservations without necessarily providing reasons for such recommendations. There was disagreement as to whether the justifications for recommending the withdrawal of reservations should be provided in the concluding observations. Several members of the working group felt that this process did not have to be so formalised as long as treaty bodies explain their recommendations during the dialogue with the State. While all treaty bodies should encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations, it was not felt necessary to set a precise deadline for States to implement such recommendations since treaty bodies had different practices in this regard.[86]

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[82] A/CONF.157/24, Part I, chap. III, sect. II, para. 5.

[83] A/CONF.157/24, Part I, chap. III, sect. II, para. 39 ("Inter alia, the Committee on the Elimination of Discrimination against Women should continue its review of reservations to the [1979] Convention. States are urged to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law"). In its Decision No. 41/1, the Committee confirmed that "[…] determination of [the issue of the compatibility of reservations with the object and purpose of the Convention], and thus of the permissibility of reservations, not only falls within its function in relation to the reporting procedure under article 18 of the Convention, but also in relation to the individual communication and inquiry procedures under the Optional Protocol", *Official Records of the General Assembly, Sixty-third Session, Supplement No. 38* (A/63/38), p. 88.

[84] For a summary of the practice of the various monitoring bodies, see HRI/MC/2005/5, paras. 8-21. See also Tyagi (note 11 above), pp. 219-236.

[85] HRI/MC/2007/5, para. 16.

[86] HRI/MC/2007/5, para. 17.

43. In 2006, the working group adopted the following recommendation:

(a) Treaty bodies should request in their lists of issues information, especially when it is provided neither in the common core document (where available), nor in the treaty-specific report, about:

(i) The nature and scope of reservations or interpretative declarations;

(ii) The reason why such reservations were considered to be necessary and have been maintained;

(iii) The precise effects of each reservation in terms of national law and policy;

(iv) Any plans to limit the effects of reservations and ultimately withdraw them within a specific time frame.

(b) Treaty bodies should clarify to States parties their reasons for concern over particular reservations in light of the provisions of the treaty concerned and, as relevant, its object and purpose.

(c) Treaty bodies should in their concluding observations:

(i) Welcome the withdrawal, whether total or partial, of a reservation;

(ii) Acknowledge ongoing reviews of reservations or expressions of willingness to review;

(iii) Express concern for the maintenance of reservations;

(iv) Encourage the complete withdrawal of reservations, the review of the need for them or the progressive narrowing of scope through partial withdrawals of reservations.

(d) Treaty bodies should highlight the lack of consistency among reservations formulated to certain provisions protected in more than one treaty and encourage the withdrawal of a reservation on the basis of the availability of better protection in other international conventions resulting from the absence of a reservation to comparable provisions.[87]

44. Although practice is not necessarily uniform, it shows that monitoring bodies strive to engage in a constructive dialogue with States parties when reviewing periodic reports. The compilation of human rights treaty monitoring bodies' practices with regard to reservations to these instruments,[88] prepared by the working group on reservations, provides numerous examples. Monitoring bodies react critically to some reservations, without ever condemning them outright, and recommend that States parties should reconsider or withdraw them. For example, the Human Rights Committee, while welcoming with satisfaction the announcement by Italy that it was withdrawing some of its reservations to the International Covenant on Civil and Political Rights, expressed regret that the reservations to article 14, paragraph 3; article 15, paragraph 1; and article 19, paragraph 3, were not part of that process. The Committee therefore encouraged Italy to "pursue the in-

[87] HRI/MC/2007/5, Recommendations, point 9. See also the report of the chairpersons of the human rights treaty bodies on their nineteenth meeting (A/62/224), para. 48 (v).

[88] See HRI/MC/2009/5, Annex I; HRI/MC/2008/5, Annex I; HRI/MC/2007/5/Add.1, Annex 2; HRI/MC/2005/5, Annex 1; and HRI/MC/2005/Add.1, Annex 1.

depth review process it started in May 2005 to assess the status of its reservations to the Covenant, with a view to withdrawing them all".[89] For its part, the Committee on Economic, Social and Cultural Rights did not hesitate to recommend that the United Kingdom should withdraw its reservations to International Labour Organization Convention No. 102 on Social Security,[90] a treaty other than the one establishing the Committee. However, the idea is not just to criticize, but also to encourage and commend States that have stated their intention to withdraw their reservations or have already done so, as well as those that have acceded to human rights instruments without reservations.

45. At present, this pragmatic and non-confrontational dialogue on human rights instruments is undoubtedly the example *par excellence* of the reservations dialogue. It is interesting to note that here again, the dialogue is conducted outside the Vienna system. Rather than being "judged" by their peers, States report on their efforts and on the difficulties they face in withdrawing certain reservations. Rather than "condemning" reservations as impermissible and setting them aside, monitoring bodies try to better understand the reservations and the reasons for their formulation, and to convince their authors to modify or withdraw them.

46. The reservations dialogue concerning human rights instruments was, moreover, strengthened with the establishment of the Human Rights Council; its role is to "serve as a forum for dialogue on thematic issues on all human rights" and one of its tasks is to "promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits".[91] Apart from the Council's[92] and the General

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[89] Human Rights Committee, *Eighty-fifth Session, Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations*, Italy, CCPR/C/ITA/CO/5, 24 April 2006, para. 6.

[90] E/C.12/GBR/CO/5, para. 43.

[91] United Nations, General Assembly resolution 60/251, "Human Rights Council" (A/RES/60/251), 15 March 2006, paras. 5 (b) and (d).

[92] See, for example, Human Rights Council resolutions 4/1, "Question of the realization in all countries of economic, social and cultural rights", 23 March 2007, para. 3 (a) (A/62/53), p. 29; 6/21, "Elaboration of international complementary standards to the international Convention on the Elimination of All Forms of Racial Discrimination", 28 September 2007, sixth preambular paragraph (A/63/53), p. 36; 6/30, "Integrating the human rights of women throughout the United Nations system", 14 December 2007, para. 10 (ibid.), p. 57; 7/29, "Rights of the Child", 28 March 2008, para. 2 (ibid.), p. 151; 10/7, "Human rights of persons with disabilities: national frameworks for the promotion and protection of the human rights of persons with disabilities", 26 March 2009, para. 3 (A/64/53), p. 35; 10/14, "Implementation of the Convention on the Rights of the Child and the Optional Protocols thereto", 26 March 2009, para. 2, (ibid.), p. 57; 13/11, "Human rights of persons with disabilities: national implementation and monitoring and introducing as the theme for 2011 the role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities", 25 March 2010, para. 2 (A/65/53), p. 106; and 13/20, "Rights of the child: the fight against sexual violence against children", 26 March 2010, para. 14 (ibid.), p. 131.

Assembly's[93] appeals for States to withdraw reservations that are incompatible with the object and purpose of these instruments, the reservations dialogue has been established primarily through the universal periodic review, "an intergovernmental process, United Nations Member-driven and action-oriented".[94]

47. As a case in point, the report of the Working Group on the Universal Periodic Review on France refers to several requests for information concerning reservations formulated by France in respect of various international instruments, as well as the following recommendations addressed to France during the discussion:[95]

> To remove reservations and interpretative statements to the International Covenant on Civil and Political Rights (Russian Federation);
>
> To consider the possibility of withdrawing its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (Cuba);
>
> To withdraw the declaration under article 124 of the Rome Statute of the International Criminal Court (Mexico).[96]

The report also mentions the following voluntary commitment:

> To examine the possibility of withdrawing or modifying reservations made by the Government to article 14, paragraph 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women.[97]

48. In their replies, the governments of States under review respond quite scrupulously to these recommendations. For example, France replied to Cuba's recommendation concerning its reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination as follows:

> The Government agrees to review its interpretative statement concerning article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.
>
> *Comments*: This statement will be reviewed in the context of the current preparation of France's seventeenth and nineteenth periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination, due in October 2008.[98]

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[93] See, for example, General Assembly resolutions 61/143, "Intensification of efforts to eliminate all forms of violence against women", 19 December 2006, para. 8 (b); 63/243, "International Convention on the Elimination of All Forms of Racial Discrimination", 24 December 2008, para. 25; 64/141, "Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly", 18 December 2009, para. 5; and 64/152, "International Covenants on Human Rights", 18 December 2009, para. 8.

[94] See Human Rights Council resolution 5/1, 18 June 2007, annex, para. 3 (d), endorsed by General Assembly resolution 62/219 (A/RES/62/219), 22 December 2007.

[95] In some cases, the recommendations concerning reservations are more substantial. For example, the report of the Working Group on the United States of America (A/HRC/16/11) contains 12 recommendations concerning reservations.

[96] A/HRC/8/47, para. 60 (3), (4) and (5).

[97] A/HRC/8/47, para. 63 (9).

[98] A/HRC/8/47/Add.1, paras. 15-16. To date, France has not withdrawn its declaration in respect of article 4 of the Convention.

49. This informal dialogue concerning reservations is not limited to human rights treaty monitoring bodies and to the Human Rights Council. Within the framework of COJUR and CAHDI, States strive not only to exchange views on the permissibility of certain reservations, but also to harmonize their objections thereto;[99] these bodies also encourage constructive dialogue with authors of reservations.

50. With regard to reservations formulated by States represented in CAHDI,[100] for example, there is real discussion of the difficulties that some delegations have with the interpretation or permissibility of a reservation. Often, a solution can be found once the author of the reservations provides explanations and clarifications.[101] For example, at the 26th meeting of CAHDI, the Austrian and Swiss delegations asked about the admissibility of the United Kingdom's declaration in respect of the Optional Protocol to the Convention on the Rights of the Child.[102] The United Kingdom delegation provided explanations and emphasized the admissibility and legitimacy of its declaration. At the 27th meeting of CAHDI,

> [t]he delegation of Austria expressed reservations concerning the interpretative declaration of the United Kingdom […], although it had no objection. It understood the reasons, stated in explicit detail at the previous meeting, which had prompted the United Kingdom to make the declaration, but had not been convinced and thus considered the declaration problematic. On this point, the

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[99] See paras. 25-27 above.

[100] This does not mean that the Ad hoc Committee of Legal Advisers on Public International Law, through its members, does not engage in dialogue with non-member States.

[101] This is, moreover, one of the reasons that the Ad hoc Committee of Legal Advisers on Public International Law decided to fulfil its responsibilities concerning the European Observatory on its own and to stop discussing reservations only within the group of experts on reservations. The absence of certain delegations from the group made discussion much more difficult. See Ad hoc Committee of Legal Advisers on Public International Law, 19th meeting, held in Berlin on 13 and 14 March 2000 (Ad hoc Committee of Legal Advisers on Public International Law (2000) 12 rev., paras. 73-76 and 82); and 20th meeting, held in Strasbourg on 12 and 13 September 2000 (Ad hoc Committee of Legal Advisers on Public International Law (2000) 21, para. 27). At the 27th meeting, the Chair of the Ad hoc Committee of Legal Advisers on Public International Law drew the attention of delegations to the importance of this exercise and the need to participate in it: "Moving to a more general matter, the Chair asked the Ad hoc Committee of Legal Advisers on Public International Law members what they considered the most appropriate way to increase the effectiveness of the Committee's work as a European observatory. He drew attention to a number of states to the importance of going through the whole document prepared by the Secretariat and of not restricting their discussion to reservations or declarations against which an objection might be raised. The delegations might change their approach and their policy with regard to treaties as a result of the Ad hoc Committee of Legal Advisers on Public International Law's discussions. Failure to respond should therefore not be interpreted as a lack of interest." (Ad hoc Committee of Legal Advisers on Public International Law, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (Ad hoc Committee of Legal Advisers on Public International Law (2004) 11, para. 42)).

[102] Ad hoc Committee of Legal Advisers on Public International Law, 26th meeting, held in Strasbourg on 18 and 19 September 2003 (Ad hoc Committee of Legal Advisers on Public International Law (2003) 14, paras 26-28).

delegation of Switzerland notified that it had been convinced by the arguments which the United Kingdom had adduced at the previous meeting.[103]

The European States do not hesitate to explain the reasons for formulating a given reservation[104] and, where applicable, to withdraw reservations.[105]

51. Through its members, CAHDI also pursues dialogue with third States. For example, the report on the 38th meeting indicates that CAHDI was engaged in a dialogue with the Bahamas regarding its reservation to the International Covenant on Civil and Political Rights.[106]

52. Within COJUR, the member States of the European Union also endeavour not only to coordinate any objections that they make but, above all, to enter into a dialogue with the author of a reservation, including through the traditional diplomatic channels, in order to obtain additional information on the reservation.[107]

53. The Vienna Conventions — with their well-known gaps that the Guide to Practice has endeavoured to fill — are only the tip of the iceberg of the reservations dialogue; it has become an undisputed practical reality and an integral part of the reservations regime, to which it brings a degree of flexibility while increasing its effectiveness.

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[103] (Ad hoc Committee of Legal Advisers on Public International Law, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (Ad hoc Committee of Legal Advisers on Public International Law (2004) 11, para. 21). For another example, see the discussion on the reservation to the Convention on the Transfer of Sentenced Persons (STE No. 112), Ad hoc Committee of Legal Advisers on Public International Law, 22nd meeting, held in Strasbourg on 11 and 12 September 2001 (Ad hoc Committee of Legal Advisers on Public International Law (2001) 10, paras. 51-54); and 23rd meeting, held in Strasbourg on 4 and 5 March 2002 (Ad hoc Committee of Legal Advisers on Public International Law (2002) 8, para. 27).

[104] See the examples given in note 58 above. See also the explanations provided by Georgia concerning its reservation to Protocol No. 12 to the European Human Rights Convention (STE No. 177) (ibid., para. 30 and note 10).

[105] See the explanations provided the delegation of the Netherlands concerning the Netherlands' reservation to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents: "The Netherlands delegation informed the Committee that its authorities intended to withdraw the reservation in respect of the 1973 Convention because it was in fact incompatible with the object and purpose of the treaty" (Ad hoc Committee of Legal Advisers on Public International Law, 27th meeting, held in Strasbourg on 18 and 19 March 2004 (Ad hoc Committee of Legal Advisers on Public International Law (2004) 11, para. 39)).

[106] Ad hoc Committee of Legal Advisers on Public International Law, 38th meeting, Strasbourg from 10 to 11 September 2009 (Ad hoc Committee of Legal Advisers on Public International Law (2009) 16, para. 74)).

[107] Thus, the Swedish delegation to the Ad hoc Committee of Legal Advisers on Public International Law informed the Committee that the declarations and reservations made by the Republic of Moldova in respect of the 1951 Convention relating to the Status of Refugees had been considered by COJUR, which had decided to enter into a dialogue with the author of the reservation (Ad hoc Committee of Legal Advisers on Public International Law, 24th meeting, held in Bratislava from 9 to 10 September 2002 (Ad hoc Committee of Legal Advisers on Public International Law (2002) 16, para. 18).

B. A legal framework for the reservations dialogue?

54. Articles 19 to 23 of the Vienna Conventions establish the conditions for the validity of reservations and their legal effects on treaties by seeking to strike a satisfactory balance between the capacity of States to formulate reservations to a treaty, on the one hand, and the possibility of other States to accept or reject the proposed modification of the effects of the treaty in their relations with the author of the reservation. In this specific legal context, acceptances and objections do not appear to be elements of a dialogue between the authors of the acceptance or objection and the author of the reservation.

55. Furthermore, the Vienna Conventions completely ignore all other forms of the reservations dialogue, as is logical in a treaty that is binding on States and international organizations.

56. The reservations dialogue, for its part, does not purport to produce a legal effect in the strict sense of the word. It does not seek to modify, as such, the content of the treaty relationship that has — or has not — been established between the author of a reservation and the author of an objection. On the contrary, although it is designed to encourage States to formulate only permissible reservations and to reconsider and withdraw reservations (and even objections) that are impermissible or that have simply become useless or inappropriate, the reservations dialogue in itself never produces these results. In order for these results to be achieved, the reserving State must formally withdraw its reservation or modify it in accordance with the rules of the Vienna Convention, and the author of an objection must withdraw its objection according to the procedures prescribed by the Vienna rules. The reservations dialogue accompanies implementation of the legal regime of reservations, without being a part of it and operates largely outside the Vienna law.

57. The reservations dialogue can nonetheless contribute to the smooth functioning of the Vienna regime, which is itself based on the principle of dialogue and discussion.[108] Moreover, the Commission has confirmed this on many occasions in its work on the Guide to Practice and has established the consequences thereof in several draft guidelines that recommend to States and international organizations certain practices that are not required under the Vienna regime but are very useful in ensuring harmonious application of the rules relating to reservations. These are, in fact, part of the reservations dialogue.

58. One example is draft guideline 2.1.9:

> **2.1.9 Statement of reasons**[109]
>
> A reservation should to the extent possible indicate the reasons why it is being made.

No provision of the Vienna Conventions requires States to indicate the reasons for their objection to a reservation. Nonetheless, in order to allow other States to determine whether a reservation is valid and whether they are prepared to accept it, it is essential for them to know the reasons why the author formulated it. Moreover, practice shows that a reservations dialogue with the author of a reservation is often

[108] See para. 11 above.

[109] For the commentary to this draft guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 184-189.

pursued precisely in order to clarify the meaning of a reservation and to understand the reasons why the reservation is, in the eyes of its author,[110] necessary.

59. Similarly, draft guideline 2.6.10 concerning the reasons for objections is an important element of a properly functioning reservations dialogue, even though it cannot be considered a mandatory legal rule for States and organizations:

> **2.6.10 Statement of reasons**[111]
>
> An objection should to the extent possible indicate the reasons why it is being made.

Although an objection that is not reasoned is perfectly capable of producing the legal effect ascribed to it by the Vienna Conventions, without a statement of reasons it loses its impact as an element of the reservations dialogue.[112] If the reasons are not given, it is difficult for the author of a reservation, the other contracting States and contracting organizations or the judge who has to rule on the reservation to benefit from the assessment made by the author of the objection. It is practically impossible to know whether the author of an objection considers the reservation incompatible with the object and purpose of the treaty, or whether it simply deems the reservation inappropriate. If the reasons are not given, the author of an objection has no basis for urging the author of the reservation to withdraw or modify it.[113]

60. Draft guideline 4.5.3 shows even more clearly the relationship between the legal regime of reservations and the reservations dialogue:

> **4.5.3 Reactions to an invalid reservation**[114]
>
> The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.
>
> Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible.

Although an objection to a valid reservation is, as such, not covered in the Vienna regime, which ascribes no concrete legal effect to it, it nevertheless has an important role to play in implementation of the Vienna rules, including in assessment of the validity of a reservation, and is therefore part of the reservations dialogue. The fact that the Vienna Conventions are silent on the subject does not mean that States should not make such objections, which are still relevant.

61. Lastly, draft guideline 2.5.3 captures perfectly the ultimate goal of the reservations dialogue:

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[110] See, for example, the position of the human rights treaty bodies on this topic (para. 42 above) and the recommendations adopted in 2006, cited in para. 43 (in particular para. (a)) above.

[111] For the commentary to this draft guideline, see *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 203-206.

[112] See also paras. 42 and 43 above, and particularly para. (b) of the recommendation quoted in para. 43.

[113] See also draft guideline 2.9.6 (Statement of reasons for approval, opposition and recharacterization), *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), pp. 272-273.

[114] For the commentary to this draft guideline, see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), pp. 209-214.

2.5.3 Periodic review of the usefulness of reservations[115]

States or international organizations which have made one or more reservations to a treaty should undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.

In such a review, States and international organizations should devote special attention to the aim of preserving the integrity of multilateral treaties and, where relevant, give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law since the reservations were formulated.

62. However, the Special Rapporteur does not believe that the Commission should endeavour to establish a specific legal regime for the reservations dialogue, even as part of a non-binding legal instrument such as the Guide to Practice. Any attempt to systematize practice in this field — which while quite abundant, is extremely diverse — is bound to fail and will undermine the flexibility of the modalities of the reservations dialogue. It does not appear desirable to favour one form of dialogue over another or to shut the door on new practices that might develop over time and might produce results beneficial to implementation of the Vienna rules. The Commission should encourage all forms of reservations dialogue.

63. One of the major advantages of the reservations dialogue is precisely its highly pragmatic nature. It is intended to influence the decisions and actions of players in the field of reservations without hamstringing them. Thus, the practice will clearly not be enhanced by being locked into procedural rules that would reduce its effectiveness by making it more cumbersome.

64. It is nonetheless useful to recommend that States and international organizations should, to the extent possible, not only engage in some form of dialogue with the authors of reservations and, more generally, with all the key players and stakeholders, but also adopt certain practices and attempt to follow certain basic principles which, without constituting legal obligations under the Vienna regime, are factors in making the dialogue useful and effective. To that end, the Special Rapporteur suggests not only that the Commission should establish guidelines — even if they are merely recommendations (as it has already done) — but that it should also adopt a recommendation or general conclusions on the reservations dialogue.

65. The draft proposed by the Special Rapporteur and reproduced in paragraph 68 of the present report stems in part from the recommendations of the working group on reservations established to examine the report on the practice of human rights treaty bodies, adopted in 2006, while supplementing them in order to reflect other forms of reservations dialogue found in State practice. Although this instrument concerns a specific form of the reservations dialogue, the principles that it establishes can easily be applied to the phenomenon as a whole, regardless of the context in which the dialogue unfolds.

66. Those recommendations, which are intended to increase the effectiveness and transparency of the reservations dialogue during the review of periodic reports, nonetheless pertain to the reservations dialogue conducted directly with the author

[115] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 207-209.

of a reservation, as practised by human rights treaty bodies. They do not cover the fruitful practices of exchange of views, cooperation and coordination that may develop between other contracting States and contracting organizations in order to make reactions to problematic reservations more consistent and more effective. It is therefore appropriate to supplement the recommendations in order to encourage States and international organizations to adopt these practices.

67. The Special Rapporteur also proposes to incorporate into the draft recommendation or conclusions other elements of the reservations dialogue which, although originally developed in order to address an issue that was wrongly depicted as specific to reservations to human rights treaties, are useful and relevant to all other categories of reservations to all types of treaties. This is the case, for example, of the 1993 World Conference on Human Rights appeal for States to make reasonable and reasoned use of reservations.[116]

68. In light of these observations, the draft recommendation or conclusions that the Commission is invited to adopt might be worded as follows:

Draft recommendation or conclusions of the International Law Commission on the reservations dialogue

The International Law Commission,

Recalling the provisions on reservations to treaties contained in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations,

Bearing in mind the need to safeguard the integrity of multilateral treaties while ensuring the universality of those for which universal accession is envisaged,

Recognizing the usefulness of reservations to treaties formulated within the limits imposed by the law of treaties, including article 19 of the Vienna Conventions and concerned at the large number of reservations that appear incompatible with these requirements,

Aware of the difficulties that States and international organizations face in assessing the validity of reservations,

Convinced of the usefulness of a pragmatic dialogue with the author of a reservation and of cooperation among all reservations stakeholders,

Welcoming the efforts made in recent years, including within the framework of human rights treaty bodies and certain regional organizations,

1. *Calls upon* States and international organizations wishing to formulate reservations to ensure that they are not incompatible with the object and purpose of the treaty to which they relate, to consider limiting their scope, to formulate them as clearly and concisely as possible, and to review them periodically with a view to withdraw them if appropriate;

2. *Recommends* that in formulating a reservation, States and international organizations should indicate, to the extent possible, the nature

[116] See para. 41 above.

and scope of the reservation, why the reservation is deemed necessary, the effects of the reservation on fulfilment by the author of the reservation of its treaty obligations arising from the instrument in question, and whether it plans to limit the reservation's effects, modify it or withdraw it according to a specific schedule and modalities;

3. *Recommends also* that States and international organizations should state the reason for any modification or withdrawal of a reservation;

4. *Recalls* that States, international organizations and monitoring bodies may express their concerns about a reservation and stresses the usefulness of such reactions for assessment of the validity of a reservation by all the key players;

5. *Encourages* States, international organizations and monitoring bodies to explain to the author of a reservation the reasons for their concerns about the reservation and, where appropriate, to request any clarification that they deem useful;

6. *Recommends* that States, international organizations and monitoring bodies should, if they deem it useful, call for the full withdrawal of reservations, reconsideration of the need for a reservation and gradual reduction of the scope of a reservation through partial withdrawals, and should encourage States and international organizations that formulate reservations to do so;

7. *Encourages* States and international organizations to welcome the concerns and reactions of other States, international organizations and monitoring bodies and to address those concerns and take them duly into account, to the extent possible, with a view to reconsidering, modifying or withdrawing a reservation;

8. *Calls on* all States, international organizations and monitoring bodies to cooperate as closely as possible in order to exchange views on problematic reservations and to coordinate the measures to be taken; and

9. *Expresses* the hope that States, international organizations and monitoring bodies will initiate, undertake and pursue such dialogue in a pragmatic and transparent manner.