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Sixteenth report on reservations to treaties

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Status of reservations, acceptances of and objections to reservations and interpretative declarations in the case of succession of States

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1. In accordance with the intention announced by the Special Rapporteur in his fourteenth report on reservations to treaties,[1] the present report addresses the issue of reservations to treaties and objections to reservations in relation to the succession of States. In line with the general plan of the study which the Special Rapporteur proposed in his second report[2] and has followed consistently ever since, the relevant guidelines should constitute the fifth and final chapter[3] of the Guide to Practice.

2. The present report closely reflects the line of reasoning set forth in the Secretariat's very valuable memorandum of 2009 on reservations to treaties in the context of succession of States.[4] It was impossible to refer systematically in footnotes to this Secretariat study, which in a manner of speaking is the original report on which the present text is based.

3. Taking into account the (few) rules on reservations contained in the 23 August 1978 Vienna Convention on Succession of States in respect of Treaties, the elements of practice identified in the aforementioned memorandum by the Secretariat[5] and the considerations set forth therein, it seems appropriate to consider including, in the Guide to Practice, some guidelines concerning the problems posed by reservations, acceptances of reservations and objections to reservations in the context of succession of States.

4. The adoption of guidelines in this area is all the more important given that:

– The Vienna Conventions of 1969 and 1986 have no provisions on this subject except a safeguard clause, which, by definition, gives no indication as to the applicable rules;[6]

– The 1978 Vienna Convention on Succession of States in respect of Treaties contains only one provision on reservations (article 20), which is worded as follows:

> "*Article 20. Reservations*
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> "1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it

[1] A/CN.4/614, para. 65.

[2] *Yearbook of the International Law Commission, 1996*, vol. II, Part One (United Nations publication, Sales No. E.98.V.9 (Part 1)), document A/CN.4/477, pp. 48 -49, para. 37.

[3] With the exception of two annexes concerning the reservations dialogue and the settlement of disputes, respectively.

[4] Document A/CN.4/616 of 6 May 2009. The Special Rapporteur is grateful to the Secretariat staff who contributed to the preparation of this excellent study under the supervision of Mr. Václav Mikulka, Mr. George Korontzis and Mr. Gionata Buzzini.

[5] A/CN.4/616; see footnote 4 above.

[6] Article 73 of the 1969 Vienna Convention is worded thus: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States ...". A similar safeguard clause appears in article 74, para. 1, of the 21 March 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

"2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (*a*), (*b*) or (*c*) of article 19 of the Vienna Convention on the Law of Treaties.

"3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation".

– and, as noted in the first report on reservations:[7]

"132. Article 20 of the 1978 Vienna Convention scarcely deals with, much less solves, potential problems arising in connection with reservations in the case of succession of States.

"133. First, it should be noted that the article is contained in Part III of the Convention, which deals with 'newly independent States'; it therefore applies in the case of the decolonization or dissolution of States,[8] whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. (...)

"134. Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. (...)

"135. Lastly, and this is a serious lacuna, article 20 of the 1978 Vienna Convention makes no reference whatever to succession in respect of objections to reservations — whereas the initial proposals of Sir Humphrey Waldock did deal with this point — and the reasons for this omission are not clear.[172]

[172] See Imbert, *Les réserves aux traités multilatéraux* … [see footnote 31 below], pp. 318-322."

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[7] *Yearbook of the International Law Commission, 1995*, vol. II, Part One (United Nations publication, Sales No. E.97.V.2 (Part 1)), document A/CN.4/470, pp. 147 -148, paras. 132-135; see also pp. 136-137, paras. 62-71, and the second report, *Yearbook ... 1996*, vol. II, Part One, p. 50, para. 46, as well as the memorandum by the Secretariat (A/CN.4/616; see footnote 4 above), p. 3, paras. 1 and 2.

[8] As the 1978 Vienna Convention — unlike the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, article 31 — does not address the "dissolution of a State", and the present report does not explore particular forms of succession, it would probably be of little use to discuss whether States resulting from dissolution — which are "new States" but not "newly independent States" within the meaning of the 1978 Convention — may be likened to newly independent States.

5. In consequence, some of the draft guidelines proposed herein reflect the current state of positive international law on the subject, while others represent the progressive development of international law or are intended to offer logical solutions to problems to which neither the 1978 Vienna Convention nor the relevant practice seems to have provided clear answers thus far. In any event, as is generally the case, it is often difficult if not impossible to make a clear distinction between proposals that come under the heading of codification *stricto sensu*, on the one hand, and proposals aimed at progressive development, on the other.

6. At the same time, no attempt is made in the present report to call into question the rules and principles set out in the 1978 Vienna Convention. In particular, it relies on the definition of succession of States given in that instrument.[9] More generally, the draft guidelines proposed herein use the same terminology as the 1978 Vienna Convention, attribute the same meaning to the terms and expressions used in that Convention and defined in its article 2 and are based, where applicable, on the distinctions made in that instrument among the various forms of succession of States:

– "succession in respect of part of territory" (art. 15);

– "newly independent States" (art. 2, para. 1 (*f*), and arts. 16 ff.);

– "newly independent States formed from two or more territories" (art. 30);

– "uniting of States" (arts. 31-33); and

– "separation of parts of a State" (arts. 34-37).

7. Furthermore, the Special Rapporteur has started from the initial premise that the question of a State's succession to a treaty has been settled as a preliminary issue. This is the implication of the word "when", which begins several of the draft guidelines proposed herein and refers to concepts that are considered settled and need not be revisited by the Commission in the context of the present exercise. By this logic, then, the point of departure is that a successor State has the status of a contracting State or State party to a treaty as a consequence of the succession of States, not because it has expressed its consent to be bound by the treaty within the meaning of article 11 of the 23 May 1969 Vienna Convention on the Law of Treaties,[10] with no need to ascertain whether this situation has arisen by virtue of and in accordance with the rules laid down in the 1978 Vienna Convention or other rules of international law.

8. Lastly, like the 1978 Vienna Convention,[11] these draft guidelines concern only reservations formulated by a predecessor State that was a *contracting State or State party* to the treaty in question as of the date of the succession of States. They do not deal with reservations formulated by a predecessor State that had only signed the treaty subject to ratification, acceptance or approval, without having completed the

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[9] Art. 2, para. 1 (*b*): "'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory "; see also art. 2, para. 1 (*a*), of the 8 April 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, or art. 2 (*a*) of the articles on the nationality of natural persons in relation to the succession of States annexed to General Assembly resolution 55/153 of 12 December 2000.

[10] "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any oth er means if so agreed."

[11] See art. 20.

relevant action prior to the date of the succession of States. Reservations of this second kind cannot be considered as being maintained by the successor State because they did not, at the date of the succession of States, produce any legal effects, not having been formally confirmed by the State in question when expressing its consent to be bound by the treaty, as required by article 23, paragraph 2, of the 23 May 1969 Vienna Convention on the Law of Treaties.[12]

9. In light of these general remarks, the following issues should be considered in turn:

– The status of reservations in the case of succession of States;

– The status of acceptances of and objections to reservations in the case of succession of States; and

– The status of interpretative declarations.

I. Status of reservations to treaties in the case of succession of States

10. As indicated above, article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties deals only with situations in which a newly independent State wishes to establish its status as a party or as a contracting State to a multilateral treaty. The term "newly independent State", according to the definition set out in article 2, paragraph 1 (*f*), of the Convention, means "… a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". Thus, the rules on reservations provided for in the 1978 Vienna Convention cover only cases of succession in which a State gains independence as a result of a decolonization process.[13] This provision, which appears in part III of the Convention, entitled "Newly independent States", not only leaves situations involving the uniting and separation of States (the subject of part IV) unaddressed, but also requires clarification as to the territorial and temporal scope of the reservations in question.

A. General principles

11. The origin of article 20 of the 1978 Convention[14] dates back to a proposal put forward in the third report of Sir Humphrey Waldock.[15] The report contained a draft article 9 on "Succession in respect of reservations to multilateral treaties", its purpose being to determine the position of the successor State in regard to

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[12] See draft guideline 2.2.1 and the commentary thereto in *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), pp. 464-472.

[13] See para. 4 above or the memorandum by the Secretariat (A/CN.4/616; see footnote 4 above), para. 2.

[14] The discussion that follows is largely a synthesis of the considerations contained in the first report of the Special Rapporteur on reservations (*Yearbook … 1995*, vol. II, Part One, document A/CN.4/470, pp. 136-137, paras. 62-71) and the above-mentioned Secretariat study (see footnote 4 above), paras. 9-27.

[15] *Yearbook of the International Law Commission, 1970*, vol. II (United Nations publication, Sales No. E.71.V.7), document A/CN.4/224 and Add.1, p. 25.

reservations, acceptances and objections. After referring to certain "logical principles" and noting that the — still developing — practice of depositaries was not wholly consistent with them, the Special Rapporteur concluded "that a flexible and pragmatic approach to the problem of succession in respect of reservations is to be preferred".[16] Accordingly, he proposed that rules should be adopted to reflect:

– A presumption in favour of succession to the reservations of the predecessor State unless the successor State has expressed a contrary intention or unless, by reason of its object and purpose, the reservation is appropriate only to the predecessor State (art. 9, para. 1);

– The possibility for the successor State to formulate new reservations, in which case (i) the successor State is considered to have withdrawn any different reservations made by the predecessor State; and (ii) the provisions of the treaty itself and of the 1969 Vienna Convention apply to the reservations of the successor State (para. 2);

– The application of these rules, mutatis mutandis, to objections to reservations (para. 3 (*a*)), although, "in cases falling under Article 20, paragraph 2, of the Vienna Convention no objection may be formulated by a successor State to a reservation which has been accepted by all the parties" (para. 3 (*b*)).[17]

12. The proposals were examined only in 1972 and did not give rise to very lively discussions.[18] The Commission endorsed the pragmatic and flexible approach to the treatment of reservations and objections recommended by its Special Rapporteur. Apart from drafting changes, it made only one really substantive amendment to his draft: draft article 15 (which replaced draft article 9), paragraph 1 (*a*), stipulated that only a reservation "incompatible" with that of the predecessor State on the same subject (and no longer a "different" reservation) replaced it.[19]

13. However, in his first report in 1974, Sir Francis Vallat, who had been appointed Special Rapporteur, endorsed a proposal made by Zambia and the United Kingdom and returned if not to the letter at least to the spirit of Sir Humphrey Waldock's proposal, though he described the change in question as minor, by removing the "incompatibility" test and providing only that a reservation of the predecessor State is not maintained if the successor State formulates a reservation relating to the same subject matter.[20] Subject to a further drafting change, the Commission agreed with him on that point.[21] However, the text emerged from its consideration in the Drafting Committee somewhat "pruned".[22] In particular, paragraph 3 (*b*) of draft article 9,[23] which, it was rightly said, dealt with the general

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[16] Ibid., pp. 47 and 50, commentary, paras. (2) and (11).

[17] Ibid., p. 47.

[18] See *Yearbook of the International Law Commission, 1972*, vol. I (United Nations publication, Sales No. E.73.V.4), 1166th, 1167th and 1187th meetings, pp. 86 -99 and 211-217.

[19] See *Yearbook ... 1972*, vol. II (United Nations publication, Sales No. E.73.V.5), p. 260.

[20] *Yearbook of the International Law Commission, 1974*, vol. II, Part One (United Nations publication, Sales No. E.75.V.7 (Part 1)), document A/CN.4/278 and Ad d.1-6, particularly p. 54, para. 287.

[21] Ibid., p. 222 (art. 19).

[22] *Yearbook ... 1974*, vol. I (United Nations publication, Sales No. E.75.V.6), pp. 112 -118, 1272nd meeting, and pp. 238-245, 1293rd meeting.

[23] See para. 11 above.

law applicable to reservations and was not concerned with a problem specific to State succession, was deleted.

14. On the other hand, it is interesting to note that the Special Rapporteur did not take up two other sets of proposals put forward with some insistence by a few States, namely, proposals made, inter alia, by the Australian, Belgian, Canadian and Polish Governments to reverse the presumption (of continuity) in paragraph 1, and the wish expressed by the Polish Government for an express provision that the successor State would not automatically succeed to the objections of the predecessor State to reservations formulated by third States.[24] The Commission did not endorse those suggestions either.[25]

15. This provision gave rise to little discussion at the United Nations Conference on Succession of States in Respect of Treaties, which met in Vienna from 4 April to 6 May 1977 and from 31 July to 23 August 1978. Even though some States again proposed that the presumption in draft article 19, paragraph 1, should be reversed having regard to the "clean slate" principle,[26] the Committee of the Whole, and then the Conference itself, approved the article on reservations (which had become article 20) as proposed by the International Law Commission, apart from some very minor drafting adjustments,[27] and the presumption in favour of the maintenance of reservations was reflected in the final text of article 20 as adopted at the Vienna Conference.

16. The presumption in favour of the maintenance of reservations formulated by the predecessor State had been proposed by Professor D. P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors",[28] one

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[24] *Yearbook ... 1974*, vol. II, Part One, pp. 52-54, paras. 278-286, and p. 54, para. 289, respectively.

[25] *Yearbook ... 1974*, vol. I, p. 117, and vol. II, Part One, p. 226.

[26] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties. Vienna, 4 April-6 May 1977 and 31 July-23 August 1978*, vol. III, *Documents of the Conference* (United Nations publication, Sales No. E.79.V.10), pp. 115-116. See also the analytical compilation of comments of Governments on the final draft articles on succession of States in respect of treaties, prepared by the Secretariat (A/CONF.80/5 and Corr.1, pp. 227-230). Thus, for example, at the 1977-1978 Vienna Conference, the representative of the United Republic of Tanzania proposed an amendment reversing the presumption in favour of the maintenance of reservations formulated by the predecessor State and providing that the successor State was considered to have withdrawn reservations formulated by the predecessor State unless it expressed a contrary intention. That amendment was rejected by 26 votes to 14, with 41 abstentions.

[27] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), 28th meeting of the Committee of the Whole, para. 41.

[28] "Additional point" No. 10 proposed by the Rapporteur of the Committee on "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, cited in Sir Humphrey Waldock's second report on succession in respect of treaties, *Yearbook of the International Law Commission, 1969*, vol. II (United Nations publication, Sales No. E.70.V.8), document A/CN.4/214 and Add.1-2, p. 49, para. 17: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation".

year before Sir Humphrey Waldock endorsed the concept.[29] It is based on a concern for respecting the actual intention of the successor State by avoiding the creation of an irreversible situation: "... if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations".[30]

17. This solution is not self-evident and has been criticized in the literature. For example, according to Professor Pierre-Henri Imbert, "… there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate".[31] This author cast doubt in particular on the assumption that the predecessor State's reservations would be "necessarily advantageous to the newly independent State.... since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole".[32]

18. The commentary to draft article 19 as finally adopted by the Commission nonetheless puts forward some convincing arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

> "First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations".[33]

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[29] See para. 11 above.

[30] Third report (see footnote 15 above), *Yearbook ... 1970*, vol. II, p. 50; see also the elements of practice invoked in support of this solution, ibid., pp. 47-49.

[31] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux. Évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951* (Paris, Pedone, 1979), p. 309.

[32] Ibid., p. 310. Imbert thus echoes the criticisms (see footnote 26 above) put forward at the 1977-1978 Vienna Conference by the representative of the United Republic of Tanzania, who expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State. *Official Records of the United Nations Conference on Succession of States in Respect of Treaties* ..., vol. I (see footnote 27 above), 27th meeting of the Committee of the Whole, para. 79; see also 28th meeting of the Committee of the Whole, para. 37, and document A/CONF.80/14 (reproduced in vol. III; see footnote 26 above), para. 118 (c). A preference for the opposite presumption had also been expressed by other delegations; see vol. I, 28th meeting of the Committee of the Whole, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

[33] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (17) of the commentary to article 19.

19. This seems to be the majority position in the literature, tending to support the presumption in favour of the maintenance of the predecessor State's reservations. Thus, explains D. P. O'Connell, "Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly".[34] Similarly, Professor Giorgio Gaja takes the view that "The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence".[35]

20. This presumption is inferred logically, since succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

21. However, the presumption in favour of the maintenance of reservations formulated by the predecessor State is reversed, under article 20, paragraph 1, of the 1978 Vienna Convention, not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the International Law Commission when this provision was being drafted.

22. Sir Humphrey Waldock had proposed, in his third report, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable at the date of succession".[36] In its draft article 15 adopted on first reading in 1972, the Commission settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".[37]

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[34] Daniel Patrick O'Connell, *State Succession in Municipal Law and International Law*, Cambridge Studies in International and Comparative Law, No. 7, vol. II: International Relations (Cambridge, Cambridge University Press, 1967), p. 229 (footnote omitted).

[35] Giorgio Gaja, "Reservations to treaties and the newly independent States", *Italian Yearbook of International Law*, 1975, p. 55. See also José María Ruda, "Reservations to treaties", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 146 (1975-III), p. 206; also Padmanabhan K. Menon, "The newly independent States and succession in respect of treaties", *Korean Journal of Comparative Law*, vol. 18 (1990), p. 152.

[36] Third report (see footnote 15 above), *Yearbook ... 1970*, vol. II, p. 46.

[37] *Yearbook ... 1972*, vol. II, p. 260.

23. The wording that was finally adopted by the International Law Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.[38] Nonetheless, in accordance with Sir Francis Vallat's proposal,[39] the Commission finally deleted this requirement from the final draft article for pragmatic reasons, which it explains in the commentary to the corresponding article adopted on second reading in 1974:

> "... the test of incompatibility for which the paragraph provided might be difficult to apply and ... if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation".[40]

24. While it may maintain — expressly or tacitly — reservations made by the predecessor State, a newly independent successor State is also empowered, under article 20, paragraph 2, of the 1978 Vienna Convention, to formulate reservations when making a notification of succession. This power is subject only to the general conditions laid down in article 19, subparagraphs (*a*), (*b*) and (*c*), of the 1969 Vienna Convention on the Law of Treaties. Article 20, paragraph 3, of the 1978 Vienna Convention provides, further, that the rules set out in articles 20-23 of the 1969 Vienna Convention on the Law of Treaties apply in respect of reservations formulated by a newly independent State when making a notification of succession.

25. In its commentary to draft article 19, the Commission noted that this power seemed to have been confirmed in practice.[41] In support of this solution, Sir Humphrey Waldock, in his third report, based his views inter alia on the practice of the Secretary-General of the United Nations, who, on several occasions, had acknowledged that newly independent States have this power, without prompting any objections from States to this assumption.[42] The second Special Rapporteur was also in favour, for "practical" reasons, of acknowledging the right of a newly independent State to make new reservations when notifying its succession.[43]

26. The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives: "(*a*) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (*b*) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty". Drawing upon the practice of the Secretary-General and wishing to take a "flexible" approach in this regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, "... for technical reasons, open to its participation by any other procedure than succession".[44]

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[38] See Gaja, op. cit. (footnote 35), pp. 59-60.
[39] First report, *Yearbook ... 1974*, vol. II, Part One, p. 54.
[40] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (18) of the commentary to article 19.
[41] Ibid., pp. 224-225, paras. (7)-(12).
[42] Third report (see footnote 15 above), pp. 48-50.
[43] Sir Francis Vallat, first report, *Yearbook ... 1974*, vol. II, Part One, p. 54, paras. 291-294.
[44] Commentary to draft article 19, *Yearbook ... 1974*, vol. II, Part One, p. 227, para. (20).

27. At the 1977-1978 Vienna Conference, the Austrian delegation challenged this solution — which, in purely logical terms, was somewhat incompatible with the preceding paragraph — and proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Convention.[45] Austria contended that recognizing the capacity of a newly independent State to formulate new reservations when notifying its succession "seemed to be based on an erroneous concept of succession"[46] and that "[i]f a newly independent State wished to make reservations, it should use the ratification or accession procedure provided for becoming a party to a multilateral treaty".[47] However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.[48]

28. Those States opposing the Austrian amendment at the Vienna Conference put forth various arguments, including the desirability of ensuring that the newly independent State would "not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission",[49] the alleged incompatibility of the Austrian amendment with the principle of self-determination[50] or the principle of the "clean slate", [51] the need to be "realistic" rather than "puristic", [52] and the fact that a succession of States was not a "legal inheritance or a transmission of rights and obligations".[53] Some authors have echoed these criticisms,[54] while others take the view that "the right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States" and that "the formal recognition of this capacity [on the part of a newly independent State] represents a 'pragmatic' solution that takes account of the 'non-automatic', i.e. voluntary, nature of succession to treaties on the part of newly independent States".[55]

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[45] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 27 above), 27th meeting of the Committee of the Whole, paras. 59-64.

[46] Ibid., 27th meeting of the Committee of the Whole, para. 60.

[47] Ibid., 27th meeting of the Committee of the Whole, para. 60. See also ibid., 28th meeting of the Committee of the Whole, para. 30.

[48] Ibid., 28th meeting of the Committee of the Whole, para. 40.

[49] Ibid., 27th meeting of the Committee of the Whole, para. 71 (Netherlands).

[50] Ibid., 27th meeting of the Committee of the Whole, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

[51] Ibid., 27th meeting of the Committee of the Whole, para. 86 (Madagascar).

[52] Ibid., 27th meeting of the Committee of the Whole, para. 77 (Poland).

[53] Ibid., 28th meeting of the Committee of the Whole, para. 7 (Israel). According to the representative of Israel, "[A] newly independent State […] would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor's shoes. The significance of article 19 was that a newly independent State should be 'considered' as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State's own volition".

[54] See Karl Zemanek, "State succession after decolonization", *Recueil des cours: Collected Courses of The Hague Academy of International Law*, vol. 116 (1965-III), pp. 234-235; André Gonçalves Pereira, *La succession d'États en matière de traités* (Paris, Pedone, 1969), pp. 175-176, note 50; and Hanna Bokor-Szegö, *New States and International Law* (Budapest, Akadémiai Kiadó, 1970), p. 100, cited by Gaja, op. cit. (footnote 35), p. 61, note 39.

[55] Marco G. Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux* (Fribourg, Éditions universitaires, 1969), p. 346.

29. In fact, the principles laid down in article 20 of the 1978 Convention are not overly rigid and are flexible enough to accommodate a wide variety of practices, as shown by a number of cases of succession to treaties deposited with the Secretary-General of the United Nations:

(i) In many cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations; in such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgement upon the status of reservations formulated by the predecessor State;[56]

(ii) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;[57]

(iii) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;[58]

(iv) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;[59]

(v) There have also been cases in which the newly independent State has "reworked" reservations made by the predecessor State;[60]

(vi) In a few cases, the newly independent State has withdrawn the predecessor State's reservations while formulating new reservations.[61]

All these possibilities are acceptable under the terms of article 20, whose flexibility is unquestionably one of its greatest virtues.

30. Thus, notwithstanding the less-than-Cartesian logic of article 20 of the 1978 Vienna Convention, whose rules are based on considerations of principle that are hard to reconcile or in any case different (succession and/but sovereignty), and despite the criticisms that may be levelled against the specific wording of this provision, there is no good reason not to include it — as a guideline — in the Guide to Practice. As far back as 1995, following the discussion of the first report on reservations, the Commission decided that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[62] Since then, it has

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[56] See, for example, *Multilateral treaties deposited with the Secretary-General* (http://treaties.un.org/Pages/ParticipationStatus.aspx), chap. IV.2: the Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same is true in the case of Senegal's and Tunisia's succession to the 1951 Convention relating to the Status of Refugees (ibid., chap. V.2).

[57] Cyprus, Gambia and Tuvalu (ibid., chap. V.2, 1951 Convention relating to the Status of Refugees).

[58] Fiji and Jamaica (ibid.).

[59] Botswana and Lesotho (ibid., chap. V.3, Convention relating to the Status of Stateless Persons).

[60] Fiji (ibid., chap. V.3, Convention relating to the Status of Stateless Persons).

[61] Zambia (ibid., chap. V.3, Convention relating to the Status of Stateless Persons); Zimbabwe (ibid., chap. V.2, Convention relating to the Status of Refugees).

[62] *Yearbook ... 1995*, vol. II, Part Two (United Nations publication, Sales No. E.97.V.2 (Part 2)), p. 108, para. 487.

been the consistent practice of the Commission to reflect systematically, to the extent possible, the wording of the relevant provisions of the 1969 and 1986 Vienna Conventions. The reasons for this practice have been sufficiently explained in the commentary to draft guideline 1.1, "Definition of reservations".[63] There is no reason not to extend the practice to the relevant provision — the only one, apart from the definition of reservations — of the 1978 Convention, placing it at the beginning of the fifth part of the Guide to Practice. The Commission may therefore wish to include the text of article 20 of the 1978 Convention as draft guideline 5.1.

31. Although article 20 of that Convention applies only to reservations formulated in respect of treaties between States, draft guideline 5.1 will also, like the other guidelines in the Guide to Practice, cover reservations to treaties between States and international organizations. Further adaptations are also necessary.[64]

32. As indicated in the first report on reservations,[65] this provision concerns only the status of reservations in cases where a newly independent State makes a notification of succession — in other words, it applies only to cases of decolonization. Accordingly, it is necessary, first, to mention this limitation in the title of the draft guideline and, second, to consider whether this solution should be extended to other modalities of State succession in other draft guidelines.

33. Further, article 20[66] expressly refers, in paragraphs 1 and 2, to articles 17 and 18 of the 1978 Convention itself and, in paragraphs 2 and 3, to all the provisions of the Vienna Convention on the Law of Treaties that concern reservations.[67] Given that the Guide to Practice reproduces the text of the articles on reservations contained in the 1969 and 1986 Vienna Conventions, this second problem could easily be solved by the simple substitution of the draft guidelines corresponding to articles 19-23. This is perfectly feasible in relation to paragraph 2, which refers only to article 19 of the Vienna Convention on the Law of Treaties, the text of which is reproduced in full in draft guideline 3.1 of the Guide to Practice. Conversely, it is not practical in relation to the reference in article 20, paragraph 3, to articles 20-23 of that Convention: while those articles are reflected in the Guide (often with formal modifications to adapt them to the structure and nature of the Guide), they are

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[63] *Yearbook of the International Law Commission, 1998*, vol. II, Part Two (United Nations publication, Sales No. E.00.V.11 (Part 2)), p. 99, para. (1) (which expressly refers to the 1978 Convention) and para. (2) of the commentary.

[64] A matter of substance that is also open to criticism is the expression, in article 20, para. 1, "... any reservation to that treaty which was *applicable* at the date of the succession of States *in respect of the territory* to which the succession of States relates ...", as a reservation is not "applicable" but "established" in respect of a territory. In fact, a reservation is only applicable, and only produces effects, within the treaty relationship between the author of the reservation and the party in respect of which the reservation is established. Nonetheless, the Special Rapporteur, in line with his long-held position and the Commission's consistent practice, is of the view that it would not be appropriate to "retouch" the text of one of the Vienna Conventions.

[65] *Yearbook … 1995*, vol. II, Part One, document A/CN.4/470, p. 148, para. 133; see also footnote 4 above.

[66] Cited above (para. 4).

[67] Arts. 19-23.

scattered in various parts of the text[68] and it would be very impractical to spell them all out in draft guideline 5.1. It seems sufficient to refer in general to the relevant rules of procedure set out in the second part (Procedure) of the Guide to Practice, and the draft guidelines concerned can always be specified in the commentary.

34. At first glance, the question of how to refer to articles 17 and 18 of the 1978 Convention seems more problematic: these long, detailed provisions[69] obviously have no counterpart in the Guide to Practice. However, as noted above,[70] the basic principle — the modus operandi — of the present report consists of postulating that

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[68] The correspondences are as follows:
1969 Convention, art. 20: para. 1 = draft guidelines 2.8.0 and 2.8.1 (with drafting changes); para. 2 = draft guideline 2.8.2 (idem); para. 3 = draft guideline 2.8.7 (idem); para. 4 (a): the Commission has not yet adopted a corresponding draft guideline; para. 4 (b) = draft guideline 2.6.8 (with drafting changes); para. 5 = draft guideline 2.8.1 (with drafting changes).
Art. 21: the Commission has not yet adopted a corresponding draft guideline.
Art. 22: para. 1 = draft guideline 2.5.1 (idem); para. 2 = draft guideline 2.7.1 (idem); para. 3 (a) = draft guidelines 2.5.8 and 2.5.9 (with drafting changes); para. 3 (b) = draft guideline 2.7.5 (idem).
Art. 23: para. 1 = draft guidelines 2.1.1, 2.6.7 and 2.8.4 (with drafting changes); para. 2 = draft guideline 2.2.1 (idem); para. 3 = draft guideline 2.8.6 (with drafting changes); para. 4 = draft guidelines 2.5.2 and 2.5.7 (with drafting changes).

[69] These provisions are worded as follows:
Article 17 — Participation in treaties in force at the date of the succession of States
1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.
2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.
3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.
Article 18 — Participation in treaties not in force at the date of the succession of States
1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.
2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.
3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.
4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.
5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be counted as a contracting State for the purpose of that provision unless a different intention appears from the treaty, or is otherwise established.

[70] Para. 7.

the relevant rules of the 1978 Convention apply; thus, it simply seems unnecessary to refer to (or to reproduce) specific provisions of that instrument in draft guideline 5.1.

35. In light of these remarks, draft guideline 5.1 could read as follows:

5.1 Newly independent States

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty, a newly independent State may formulate a reservation unless the reservation is one the formulation of which is excluded by the provisions of subparagraph (a), (b) or (c) of guideline 3.1 of the Guide to Practice.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.

36. As the rules established by this guideline relate only to newly independent States, as defined in article 2, paragraph 1 (*f*), of the 1978 Convention,[71] the question arises as to whether they can be transposed as is to other forms of State succession or whether adaptations are needed.

37. At the 1977-1978 Vienna Conference, it was suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included. The delegation of India, for example, pointed out that there was a gap in the Convention in that respect and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States.[72] Meanwhile, the delegation of the Federal Republic of Germany proposed a new article 36 bis[73] that provided in particular for the transposition, to the cases of succession referred to in part IV of the Convention, of the rules on reservations applicable to newly independent States:

> "1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:

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[71] For the text of this definition see para. 10 above.

[72] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 27 above), 28th meeting of the Committee of the Whole, para. 17.

[73] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.79.V.9), 43rd meeting of the Committee of the Whole, paras. 9-12.

(*a*) Any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;

...

"2. Notwithstanding paragraph 1, the successor State may however:

(a) Withdraw or modify, wholly or partly, the reservation (paragraph 1, subparagraph (*a*)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties ...".[74]

That delegation considered that "… the situation with respect to succession, as distinct from accession, was identical for the States to which Parts III [Newly independent States] and IV [Uniting and separation of States] of the draft referred".[75]

38. The delegation of the Federal Republic of Germany nonetheless withdrew its proposed amendment after a number of delegations objected to it.[76] Those delegations considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States.[77] On the other hand, regarding the presumption in favour of the maintenance of reservations formulated by the predecessor State, various delegations believed that that presumption was obvious in cases involving the uniting or separation of States, bearing in mind this same principle of continuity, which had been reflected in the Convention in relation to these kinds of succession.[78]

39. A distinction should thus be made between the presumption in favour of the maintenance of reservations (a principle established, for newly independent States, by article 20, paragraph 1, of the 1978 Convention) and the question of whether the power to formulate new reservations, recognized in paragraph 2 in the case of newly independent States, can be extended to cases involving the uniting or separation of States.

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[74] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties* ..., vol. III (see footnote 26 above), document A/CONF.80/30, para. 118.

[75] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties* ..., vol. II (see footnote 73 above), 43rd meeting of the Committee of the Whole, para. 11.

[76] A/CONF.80/30 (see footnote 74 above), para. 119.

[77] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties* ..., vol. II (see footnote 73 above), 43rd meeting of the Committee of the Whole, para. 14 (Poland), para. 15 (United States of America), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms).

[78] See, in this regard, the statements made by the delegations of Poland (ibid., 43rd meeting of the Committee of the Whole, para. 13), France (ibid., para. 16), Cyprus (ibid., para. 20), Yugoslavia (ibid., para. 21) and Australia (ibid., para. 22).

40. In fact, at least in principle, the extension of the presumption of continuity, which is explicitly provided for in article 20, paragraph 1, of the 1978 Convention for newly independent States in the context of a notification of succession, and is reproduced in draft guideline 5.1 above, is indubitable. It seems to be even more justified in the case of successor States other than newly independent States. Under part IV of the 1978 Convention, the principle of continuity applies to treaties in force for the predecessor State at the date of a uniting or separation of States.[79] The practice in this regard, though relatively scarce and sometimes ambiguous, tends to confirm this solution.

41. The Secretary-General of the United Nations, in the exercise of his functions as depositary, generally avoids taking a position on the status of reservations formulated by the predecessor State. However, some elements of the practice of other depositaries show a clear tendency to extend the presumption set out in article 20, paragraph 1, of the 1978 Convention to cases of State succession other than those arising from decolonization. In practice, in cases involving the separation of States, in particular those of the States that emerged from the former Yugoslavia and Czechoslovakia,[80] the predecessor State's reservations have been maintained. It should be noted, in this regard, that the Czech Republic,[81] Slovakia,[82] the Federal

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[79] See articles 31 and 34 of the Convention, which indicate that, apart from exceptions concerning the express or tacit agreement of the parties, when two or more States unite and so form one successor State or when a part or parts of the territory of an existing State separate to form one or more States, any treaty in force prior to the succession of States continues in force in respect of each successor State so formed.

[80] There appears to be virtually no relevant practice in relation to the successor States of the former Soviet Union.

[81] In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Czech Republic communicated the following: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multinational international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic. The Government of the Czech Republic has examined multilateral treaties the list of which is attached to this letter. [The Government of the Czech Republic] considers to be bound by these treaties as well as by all reservations and declarations to them by virtue of succession as of 1 January 1993. The Czech Republic, in accordance with the well-established principles of international law, recognizes signatures made by the Czech and Slovak Federal Republic in respect of all signed treaties as if they were made by itself", in *Multilateral treaties deposited with the Secretary-General*, http://treaties.un.org/Pages/ParticipationStatus.aspx, "Historical Information", under "Czech Republic".

[82] In a letter dated 19 May 1993 and also accompanied by a list of multilateral treaties deposited with the Secretary-General, the Government of the Slovak Republic communicated the following: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties" (ibid., "Historical Information", under "Slovakia").

Republic of Yugoslavia[83] and, subsequently, Montenegro[84] formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.[85] In addition, in some cases the predecessor State's reservations have been expressly confirmed[86] or reformulated[87] by the successor State in relation to a particular treaty. In the case of the Republic of Yemen (united), there was also a repetition of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

> "As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation 'Yemen' the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote".[88]

42. The practice in relation to treaties deposited with depositaries other than the Secretary-General of the United Nations provides little guidance on the question of reservations in the context of succession of States. However, the few elements that can be identified do not tend to contradict the lessons that can be drawn from the practice in relation to treaties for which the United Nations Secretary-General serves as depositary; on the contrary, the practice of these various depositaries seems to

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[83] By a notification dated 8 March 2001, the Government of the Federal Republic of Yugoslavia deposited an instrument, inter alia, communicating its intent to succeed to various multilateral treaties deposited with the Secretary-General and confirming certain actions relating to such treaties: "[T]he Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations" (ibid., "Historical Information", under "Yugoslavia").

[84] On 23 October 2006 the Secretary-General received a letter dated 10 October 2006 from the Government of Montenegro, accompanied by a list of multilateral treaties deposited with the Secretary-General, informing him that: "[The Government of] … the Republic of Montenegro does maintain the reservations, declarations and objections made by Serbia and Montenegro, as indicated in the Annex to this instrument, prior to the date on which the Republic of Montenegro assumed responsibility for its international relations" (ibid., "Historical Information", under "Montenegro").

[85] Cf. also the case of other successors to the former Yugoslavia (apart from the Federal Republic of Yugoslavia), which appear in the list of successor States for a number of treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia (see, for example, Bosnia and Herzegovina, Croatia, Serbia and the former Yugoslav Republic of Macedonia in relation to the Convention on the Privileges and Immunities of the United Nations (ibid., chap. III.1, note 2); the Protocol relating to the Status of Refugees (chap. V.5, note 5) and the Convention relating to the Status of Stateless Persons (chap. V.3, note 2).

[86] Convention on the Prevention and Punishment of the Crime of Genocide, reservation formulated by the Federal Republic of Yugoslavia (ibid., chap. IV).

[87] Convention on the Rights of the Child (ibid., chap. IV.11, under "Slovenia").

[88] Ibid., "Historical Information", under "Yemen".

confirm the general presumption in favour of the maintenance of the predecessor State's reservations.

43. Accordingly, the Czech Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the United Nations Secretary-General and providing for the maintenance of reservations formulated by the predecessor State.[89] Neither the depositaries in question nor the other States parties to the treaties concerned raised any objections to this practice.

44. The Universal Postal Union's reply to the Special Rapporteur's questionnaire is also worthy of note.[90] That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State.

45. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the 1978 Vienna Convention, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".[91] That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations, as adapted by the depositary.

46. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not reveal any fundamental contradiction with that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.[92]

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[89] See Václav Mikulka, "The Dissolution of Czechoslovakia and Succession in Respect of Treaties", in Mojmir Mrak (ed.), *Succession of States* (The Hague/Boston/London, M. Nijhoff, 1999), pp. 111-112.

[90] Questionnaire prepared by the Special Rapporteur pursuant to a decision of the Commission reflected in paragraph 489 of its report on the work of its forty-seventh session (2 May-21 July 1995), *Yearbook … 1995*, vol. II, Part Two, document A/50/10, p. 108.

[91] JJ55/2006, PJD/EC (A/CN.4/616 (see footnote 4 above), p. 23, para. 67).

[92] See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing changes in the practice of Switzerland as depositary State for the Conventions of 12 August 1949 for the protection of victims of war, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, pp. 683-685, in particular p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'État dépositaire. Réserves aux traités dans le contexte de la succession d'États", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007, pp. 328-330, in particular p. 330 (available at www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

47. The principle of the presumption in favour of the maintenance of the predecessor State's reservations — a presumption which, in any event, may be reversed by the simple expression of a contrary intention on the part of the successor State — seems to be a common-sense approach that is sufficiently well established in practice to warrant inclusion in the text as draft guideline 5.2, paragraph 1, as proposed below. While this provision establishes a general presumption in favour of the maintenance of reservations, there are nonetheless exceptions to this presumption in certain cases involving the uniting of two or more States; these are dealt with in draft guideline 5.3, to which reference is made in draft guideline 5.2, paragraph 1.

48. As shown by the opposition to the amendment proposed by the German delegation at the 1977-1978 Vienna Conference,[93] there are serious doubts as to whether a successor State other than a newly independent State may formulate reservations. These doubts are echoed in the separate opinion annexed by Judge Tomka to the judgment of the International Court of Justice of 26 February 2007 in the *Genocide* case:

> "35. There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and *not succession (where no reservation is allowed)* was motivated by the considerations relating to the present case. (…)
>
> "*That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia* — notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention — *to the Vienna Convention on Succession of States in Respect of Treaties*, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991-1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, *one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule*. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the

[93] See paras. 37-38 above.

basis of the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State".[94]

49. Indeed, if succession is considered to take place *ipso jure* in cases involving the uniting or separation of States, it is difficult to contend that a successor State may avoid or alleviate its obligations by formulating reservations.[95]

50. Also worth mentioning in this regard, in addition to the arguments made against this possibility during the drafting of the 1978 Convention, is the position taken by the Council of Europe in its letter of 28 June 2006 to Montenegro,[96] to the effect that that State did "not have the possibility, at this stage, to make new reservations to the treaties already ratified" and to which it had notified its succession.[97] This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Convention for cases involving the uniting or separation of States. In such situations, succession to a treaty does not depend on an expression of intention by the successor State, which may legitimately be considered to have inherited all of the predecessor State's rights and obligations under the treaty, without the possibility of avoiding or alleviating those obligations by formulating reservations. This solution also seems to have been confirmed in practice, as successor States other than newly independent States do not seem to have formulated new reservations upon succeeding to treaties.

51. The situation thus differs from that of newly independent States, for which a *notification of succession* is provided, whereas in principle this is not the case in situations involving the uniting or separation of States. By its notification of succession, a newly independent State *establishes*, in exercise of its freedom to choose whether or not to maintain the treaties of the predecessor State, its status as a party or as a contracting State to the treaty in question.[98] In these circumstances, the notification of succession becomes a constitutive method of maintaining the treaties that were in force for the predecessor State at the date of the succession of States, along with other treaties to which that State was a contracting State. On the other hand, the 1978 Vienna Convention provides for a different regime for successor States other than newly independent States. Under part IV of the Convention, treaties in force at the date of the succession of States in respect of any of the

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[94] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, separate opinion of Judge Tomka, para. 35 (italics added). This opinion, available on the Court 's website, unfortunately has not yet been published in French.

[95] *Contra*: Gaja, op. cit. (note 35), pp. 64-65. According to this expert, the reasoning applicable to newly independent States can be extended to other cases of succession: even if a newly independent State were considered not to be entitled to make a reservation when notifying it s succession, one should take the view that such a State may achieve practically the same result by making a partial withdrawal (if such a withdrawal is permitted) to the same extent that may be covered by a reservation; these considerations also apply to cases in which succession is considered not to depend on the acceptance of the treaty by the successor State. In terms of the outcome, this reasoning is probably correct; however, it underestimates the fact that a withdrawal (albeit partial) from a treaty and a reservation are two different institutions governed by different legal regimes and by conditions that are not necessarily the same. Partial withdrawal is not covered by the Guide to Practice (see draft guideline 1.4 on "Unilateral statements other than reservations and interpretative declarations").

[96] See footnote 91 above.

[97] A/CN.4/616 (see footnote 4 above), p. 23, para. 69.

[98] See arts. 17 and 18 of the 1978 Vienna Convention, cited in footnote 69 above.

predecessor States continue in force in respect of a State formed from the uniting of two or more States.[99] The same solution is provided for, in the case of a State formed from the separation of parts of a State, with respect to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, and also treaties in force in respect only of that part of the territory of the predecessor State which has become a successor State.[100] Under the 1978 Vienna Convention, it is only in relation to treaties not in force for the predecessor State at the date of the succession of States, even though that State was a contracting State to the treaty, that a successor State (other than a newly independent State) may, if it so desires, establish by a *notification* its status as a party or as a contracting State to the treaty in question.[101] In this regard, then, it is appropriate to treat successor States other than newly independent States in the same way as newly independent States, given that, in both cases, succession to the treaty involves an expression of intention on the part of the State concerned.

52. But it is only in these circumstances that successor States formed from a uniting or separation of States should be deemed capable of making new reservations when notifying their intention to become parties. In all other cases, it does not seem that the capacity to formulate new reservations should be recognized in respect of treaties that remain in force following a succession of States. Draft guideline 5.2, paragraph 2, as proposed below, establishes this principle (which contrasts with the one applicable to newly independent States)[102] and this exception (i.e., acknowledgement of such capacity when the successor State establishes its status as a party or as a contracting State to a treaty by a notification). In other cases, the formulation of reservations by a successor State formed from a uniting or separation of States should be likened to the late formulation of a reservation, as proposed in draft guideline 5.9.[103]

53. Thus, draft guideline 5.2, paragraph 2, is intended to fill a gap in the 1978 Vienna Convention. Given the general scope of this paragraph, which covers both cases involving the separation of parts of a State and cases involving the uniting of two or more States, the term “predecessor State” should be understood, in cases involving the uniting of States, to mean one or more of the predecessor States.

54. Draft guideline 5.2, which should be the “counterpart” of draft guideline 5.1 for cases involving the uniting or separation of States, could be worded as follows:

5.2 Uniting or separation of States

1. Subject to the provisions of guideline 5.3, a successor State formed from a uniting or separation of States shall be considered as maintaining any reservation to a treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless it expresses a contrary intention at the time of the succession or formulates a reservation which relates to the same subject matter as that reservation.

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[99] See art. 31 of the Convention.

[100] See art. 34 of the Convention.

[101] See arts. 32 and 36 of the Convention.

[102] See art. 20, para. 2, of the Convention and draft guideline 5.1, para. 2, proposed above.

[103] See para. 98 below.

2. A successor State may not formulate a new reservation at the time of a uniting or separation of States unless it makes a notification whereby it establishes its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but to which the predecessor State was a contracting State.

3. When a successor State formulates a reservation in conformity with paragraph 2, the relevant rules set out in the second part (Procedure) of the Guide to Practice apply in respect of that reservation.

55. Unlike the separation of parts of a State, where succession to a treaty results in the application of a single reservations regime to that treaty, a uniting of States entails a risk that two or more reservations regimes that may be different or even contradictory will apply to the same treaty. Such cases are not merely hypothetical. Nonetheless, the relevant practice does not seem to provide satisfactory answers to the many questions raised by this situation. For example, the aforementioned letter[104] of 19 May 1990 from the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen to the Secretary-General, in suggesting a solution to the technical problem of how the actions of the two predecessor States in relation to the same treaty should be recorded, referred to a time test whose legal scope appears uncertain in many respects and leaves unanswered the possible future question of the status of reservations formulated by the States concerned prior to the date of their union.

56. In the case of a treaty which, at the date of a uniting of States, was in force in respect of any of the uniting States and continues in force in respect of the State so formed,[105] draft guideline 5.2, paragraph 1, establishes the principle that any reservations to such a treaty that were formulated by any of the uniting States continue in force in respect of the unified State unless the latter expresses a contrary intention. The application of this presumption raises no difficulty provided that the uniting States were either parties or contracting States to the treaty. However, the situation is more complicated if one of those States was a party to the treaty and the other was a contracting State in respect of which the treaty was not in force.

57. It is this situation that draft guideline 5.3, proposed below, is intended to address: it provides for the exclusive maintenance of reservations formulated by the State that was a party to the treaty. This solution is based on the fact that a State — in this case a State formed from a uniting of States — can have only one status in respect of a single treaty: in this case that of a State party to the treaty (principle of *ipso jure* continuity). Thus, for a treaty that continues in force in respect of a State formed from a uniting of States, it seems logical to consider that only those reservations formulated by the State or States in respect of which the treaty was in force at the date of the union may be maintained. Any reservations formulated by a contracting State in respect of which the treaty was not in force become invalid.

58. Such is the purpose of draft guideline 5.3:

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[104] Para. 41.

[105] See art. 31 of the 1978 Convention.

5.3 Irrelevance of certain reservations in cases involving a uniting of States

When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such reservations as may have been formulated by any such State which, at the date of the succession of States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

59. Draft guideline 5.3[106] is worded so as to cover both the cases referred to in articles 31-33 of the 1978 Convention and other cases involving the uniting of States in which one of the uniting States retains its international legal personality (a situation not covered by these provisions of the 1978 Convention).

B. Territorial scope of reservations in the context of a succession of States

60. It seems self-evident that a reservation considered as being maintained following a succession of States retains the territorial scope that it had at the date of the succession of States. This is a logical consequence of the continuity inherent in the concept of succession to a treaty, whether it occurs *ipso jure* or by virtue of a notification of succession made by a newly independent State.

61. There are nevertheless exceptions to this principle in certain cases involving the uniting of two or more States. These exceptions, which raise rather complex issues, are dealt with in draft guideline 5.5 and are excluded from the scope of draft guideline 5.4 by the expression “subject to the provisions of guideline 5.5”.

62. In addition, there is a need to address separately the problems that arise in relation to reservations in cases of succession involving part of a territory. While these cases do not constitute an exception to the principle established in draft guideline 5.4, they nonetheless require more specific treatment, which draft guideline 5.6 is intended to afford.

63. In light of these considerations, draft guideline 5.4 could be worded as follows:

5.4 Maintenance of the territorial scope of reservations formu lated by the predecessor State

A reservation considered as being maintained in conformity with guideline 5.1, paragraph 1, or guideline 5.2, paragraph 1, shall retain the territorial scope that it had at the date of the succession of States, subject to the provisions of guideline 5.5.

64. The principle set out in draft guideline 5.4, to the effect that the territorial scope of a reservation considered as being maintained following a succession of States remains unchanged, also applies to cases involving the uniting of two or more States, albeit with certain exceptions. As indicated earlier,[107] specific problems can arise with respect to the territorial scope of reservations considered as being maintained following a uniting of two or more States. Such exceptions can occur when, following a uniting of two or more States, a treaty becomes applicable to a

[106] The same is true of draft guidelines 5.5 and 5.11.

[107] See para. 61 above.

part of the territory of the unified State to which it did not apply at the date of the succession of States.

65. Two possible situations should be distinguished in this connection:

(i) Where, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply previously; and

(ii) Where a treaty in force at the date of the succession of States in respect of two or more of the uniting States — but not of the whole of what will become the territory of the successor State — becomes applicable to a part of the territory of the successor State to which it did not apply previously.

66. In the first of these cases, where a treaty in force, with reservations, at the date of the succession of States for *only one* of the States that unite to form the successor State becomes applicable to a part of the latter's territory to which it did not apply at the date of the succession of States, the reservations in question may be extended to the whole of the territory of the unified State to which the treaty becomes applicable if that State so consents, either by a notification to that effect or by agreement with the other States parties.[108] In these circumstances, there is every reason to believe that this extension concerns the treaty relationship as modified by the reservations formulated by the State in respect of which the treaty was in force at the date of the union. But there is in principle nothing to prevent the State so formed from expressing a contrary intention in this regard and electing not to extend the territorial scope of those reservations. In any event, whatever the successor State may decide, the other contracting parties would not be adversely affected because the treaty was not previously applicable to the territory thus excluded from the scope of the reservation. Draft guideline 5.5, paragraph 1 (*a*), establishes this possibility.

67. On the other hand, the reservation's nature or purpose may rule out its extension beyond the territory to which it was applicable at the date of the succession of States. This could be the case, in particular, of a reservation whose application was already limited to a part of the territory of the State that formulated it, or a reservation that specifically concerns certain institutions belonging only to that State. Draft guideline 5.5, paragraph 1 (*b*), refers to this circumstance.

68. The second case in which the territorial scope of a prior reservation can be extended beyond the limits it had had before the succession of States may seem similar, but is in fact different. Whereas, in the situation described above, only one of the uniting States was bound by the treaty, in this case the treaty was in force, at the date of the succession of States, in respect of at least two of the uniting States but was not at that time applicable to the whole of what will become the territory of the unified State. The question, then, is whether reservations made by any of those States also become applicable to the parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. In the absence of specific information from the successor State, it may be unclear whether and to what extent that State, in extending the territorial scope of the treaty, meant to extend the territorial scope of the reservations formulated by any or all of the

[108] See art. 31, para. 2, of the 1978 Vienna Convention.

States in respect of which the treaty was in force at the date of the succession of States.

69. Unless there are indications to the contrary, there seems to be no reason not to accept the presumption that such a reservation does not extend to the part or parts of the territory of the unified State to which the treaty was not applicable at the date of the succession of States. Nor, however, is there any reason to regard this presumption as absolute. Different approaches should be taken in different cases:

– When an identical reservation has been formulated by each of the States concerned, it should on the contrary be presumed that the unified State intends to maintain a reservation that is common to all its predecessors, and the logic reflected in draft guideline 5.5, paragraph 1, should be followed;

– In addition, in some cases it may become apparent from the circumstances that a State formed from a uniting of States intends to maintain reservations formulated by one of the States in particular; this is the case, for example, when a unified State, upon extending the territorial scope of a treaty, refers specifically to actions carried out in respect of the treaty, prior to the date of the union, by one of the States concerned;

– This becomes still more apparent if a State formed from a uniting of States, when it agrees to extend the territorial scope of a treaty, expresses a contrary intention by specifying the reservations that will apply to the territory to which the treaty has been extended.

70. In this last circumstance, however, the decision of a unified State to extend the scope of various reservations to the territory concerned is not acceptable unless such reservations, formulated by two or more of the uniting States, are compatible with each other. They may, after all, be contradictory. In this situation, such a notification cannot be regarded as having any effect if it would give rise to the application of mutually incompatible reservations.

71. The rules proposed above concern situations in which the treaty to which the predecessor States' reservation or reservations relate was in force in respect of at least one of them at the date of the succession of States. In the Special Rapporteur's view, they should apply mutatis mutandis to reservations considered as being maintained by a unified State that extends the territorial scope of a treaty to which, following the succession of States, it is a contracting State when the treaty was not in force, at the date of the succession of States, in respect of any of the predecessor States even though one or more of them had the status of a contracting party.[109]

72. In the same vein, this solution should apply to situations — undoubtedly rare, but provided for in article 32, paragraph 2, of the 1978 Vienna Convention — in which a treaty to which one or more of the uniting States were contracting States at the date of the succession of States enters into force after that date because the conditions provided for in the relevant clauses of the treaty have been met; in such a case, the successor State would become a State *party* to the treaty.

73. It should also be recalled that the issue of the territorial scope of reservations formulated by such a contracting State in respect of which the treaty was not in force at the date of the succession of States does not arise unless the treaty was not

[109] See art. 32 of the 1978 Vienna Convention.

in force, on that date, for any of the uniting States; otherwise, the reservations formulated by that contracting State are not considered as being maintained.[110]

74. In light of these observations, the Commission could adopt the following draft guideline 5.5:

5.5 Territorial scope of reservations in cases involving a uniting of States

1. When, as a result of the uniting of two or more States, a treaty in force at the date of the succession of States in respect of only one of the States forming the successor State becomes applicable to a part of the territory of that State to which it did not apply previously, any reservation considered as being maintained by the successor State shall apply to that territory unless:

(a) the successor State expresses a contrary intention at the time of the extension of the territorial scope of the treaty; or

(b) the nature or purpose of the reservation is such that the reservation cannot be extended beyond the territory to which it was applicable at the date of the succession of States.

2. When, as a result of a uniting of two or more States, a treaty in force at the date of the succession of States in respect of two or more of the uniting States becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States, no reservation shall extend to that territory unless:

(a) an identical reservation has been formulated by each of those States in respect of which the treaty was in force at the date of the succession of States;

(b) the successor State expresses a different intention at the time of the extension of the territorial scope of the treaty; or

(c) a contrary intention otherwise becomes apparent from the circumstances surrounding that State's succession to the treaty.

3. A notification purporting to extend the territorial scope of reservations within the meaning of paragraph 2 (b) shall be without effect if such an extension would give rise to the application of contradictory reservations to the same territory.

4. The provisions of the foregoing paragraphs shall apply mutatis mutandis to reservations considered as being maintained by a successor State that is a contracting State, as a result of a uniting of States, to a treaty which was not in force for any of the uniting States at the date of the succession of States but to which one or more of those States were contracting States at that date, when the treaty becomes applicable to a part of the territory of the successor State to which it did not apply at the date of the succession of States.

75. Article 15, "Succession in respect of part of territory", of the 1978 Vienna Convention concerns cases involving the cession of territory or other territorial changes. It provides that, as from the date of the succession of States, treaties of the successor State are in force in respect of the territory to which the succession of

[110] See draft guideline 5.3.

States relates, while treaties of the predecessor State cease to be in force in respect of that territory. This provision represents an extension of the rule, established in article 29 of the 1969 Vienna Convention on the Law of Treaties, concerning flexibility in the territorial scope of treaties. Accordingly, draft guidelines 5.1 and 5.2 would not apply to situations falling under article 15 of the Convention because, in these cases, there is in principle no *succession* to treaties as such. While the State in question is referred to as a "successor State" within the meaning of article 2, paragraph 1 (*d*), of the 1978 Convention, in a manner of speaking it "succeeds" itself, and its status as a party or as a contracting State to the treaty remains as it was when that State acquired it by expressing its own consent to be bound by the treaty in accordance with article 11 of the 1969 Vienna Convention.

76. When this situation arises as a result of a succession involving part of a territory, the treaty *of the successor State* is extended to the territory in question. In this case, it seems logical to consider that the treaty's application to that territory is subject, in principle, to the reservations which the successor State itself had formulated to the treaty.

77. Here again, however, this principle should be qualified by two exceptions, also based on the principle of consent so prevalent in the law of treaties in general and of reservations in particular. Accordingly, a reservation should not extend to the territory to which the succession relates:

– When the successor State expresses a contrary intention, as this case can be likened to a partial withdrawal of the reservation, limited to the territory to which the succession of States relates;[111] or

– When it appears from the reservation itself that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

78. These considerations could lead to the adoption of a draft guideline 5.6 worded as follows:

5.6 Territorial scope of reservations of the successor State in cases of succession involving part of a territory

When, as a result of a succession of States involving part of a territory, a treaty to which the successor State is a party or a contracting State becomes applicable to that territory, any reservations to the treaty formulated previously by that State shall also apply to that territory as from the date of the succession of States unless:

(*a*) *the successor State expresses a contrary intention; or*

(b) it appears from the reservation that its scope was limited to the territory of the successor State that was within its borders prior to the date of the succession of States, or to a specific territory.

79. Draft guideline 5.6 is worded so as to cover not only treaties that are in force for the successor State at the time of the succession of States, but also treaties that

[111] On the partial withdrawal of a reservation, see draft guidelines 2.5.10 and 2.5.11 and the commentary thereto (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 244-259).

are not in force for the successor State on that date but to which it is a contracting State, a situation not covered by article 15 of the 1978 Vienna Convention. The verb "apply" in relation to such a treaty should be understood as encompassing both situations, which need not be distinguished from one another in relation to the issue of reservations.

80. This draft guideline also covers situations in which the predecessor State and the successor State are parties or contracting States — or one is a party and the other is a contracting State — to the same treaty, albeit with different reservations.

81. However, draft guideline 5.6 does not apply to "territorial treaties" (concerning a border regime or other regime relating to the use of a specific territory). If a succession occurs in relation to such a treaty,[112] the solutions provided for in draft guideline 5.2 concerning the uniting or separation of States apply mutatis mutandis to reservations formulated in respect of that treaty.

C. Timing of the effects of a reservation in the context of a succession of States

82. Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State; much less does it clarify the issue in the context of a succession of States resulting from a uniting or separation of States, as the 1978 Convention does not specify the status of the predecessor State's reservations in this context. Neither practice nor the literature seems to provide a clear answer to this question, which could nonetheless be of some practical importance.

83. Whether resulting from the expression of a "contrary intention" or from the successor State's formulation of a reservation that "relates to the same subject matter" as a reservation formulated by the predecessor State,[113] it seems reasonable, in relation to its effects *ratione temporis*, to treat the non-maintenance of a reservation following a succession of States as a withdrawal of the reservation in question and to consider it subject, as such, to the ordinary rules of the law of treaties, codified in article 22 of the 1969 Vienna Convention. Under paragraph 3 (*a*) of that article, which is reproduced in draft guideline 2.5.8 of the Guide to Practice, "[u]nless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State".

84. This solution, which is particularly fitting when succession to the treaty (and to the reservation) takes place *ipso jure*, seems to lend itself to all types of

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[112] Regarding international practice, see inter alia the Permanent Court of Internationa l Justice order of 6 December 1930 in *Free zones of Upper Savoy and the District of Gex,* Publications of the Permanent Court of International Justice, *Collection of Judgments,* Series A, No. 24, p. 17, and the judgment of 7 June 1932 in the same case, Series A/B, No. 46, p. 145.

[113] See para. 1 of draft guidelines 5.1 and 5.2 respectively.

succession: not until they are aware of the successor State's intention (by means of a written notification)[114] can the other parties take the withdrawal into account.

85. The draft guideline below thus reproduces mutatis mutandis the rule set out in article 22, paragraph 3 (*a*), of the 1969 Vienna Convention and reflected in draft guideline 2.5.8 concerning the effects *ratione temporis* of the withdrawal of a reservation:

5.7 Timing of the effects of non-maintenance by a successor State of a reservation formulated by the predecessor State

The non-maintenance[, in conformity with guideline 5.1 or 5.2,] by the successor State of a reservation formulated by the predecessor State becomes operative in relation to another contracting State or contracting international organization or another State or international organization party to the treaty when notice of it has been received by that State or international organization.

86. The phrase in square brackets introduces a detail that is not strictly necessary. It would perhaps be sufficient to link paragraph 2 of draft guidelines 5.1 and 5.2 respectively, on the one hand, to draft guideline 5.7, on the other, in the commentary to the latter.

87. Just as it does not address the effects *ratione temporis* of the non-maintenance of a predecessor State's reservation, the 1978 Vienna Convention makes no mention of the effects *ratione temporis* of a reservation formulated by a successor State at the time of the succession of States.

88. For reasons comparable to those put forward above in support of the rule set out in draft guideline 5.7 for the non-maintenance of a reservation to become operative, it seems reasonable to provide that a reservation formulated by a successor State does not become operative until the date on which the other States or international organizations parties or contracting States or contracting international organizations have received notice of it, i.e. the date of the notification whereby the successor State establishes its status as a party or as a contracting State to the treaty.

89. It is true that this solution could give rise, in retrospect, to the establishment of two different legal regimes. The first would cover the period between the date of the succession of States and the date of the notification whereby the successor State establishes its status as a party or as a contracting State to a treaty, during which the successor State would be considered as bound by the treaty in the same way as the predecessor State, i.e. without the benefit of the new reservation. The second regime, in turn, would cover the period after the date of that notification, during which the successor State would have the benefit of the reservation.

90. It nonetheless seems preferable to abide by the principle to which the Commission itself referred in the commentary to its draft article 19 (which became article 20 of the 1978 Convention): while it decided not to refer explicitly to that

[114] Cf. draft guideline 2.5.2 on the form of withdrawal of a reservation and the commentary thereto (*Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), pp. 201-207).

point in the text of the draft itself, as had been proposed by Sir Francis Vallat,[115] it nevertheless referred to "the general position that a reservation can only be effective at the earliest from the date when it is made".[116]

91. This solution takes account of the other States' legitimate interest in having a basic level of legal certainty and ensures that they will not be surprised by the formulation — possibly long after the date of the succession of States — of reservations to which the successor State intends to give retroactive effect. Conversely, there do not seem to be any grounds for delaying the effects of the reservation beyond the date of the notification whereby the successor State establishes its status as a party or as a contracting State to the treaty.[117]

92. Draft guideline 5.8, which is necessary in order to fill a gap in the 1978 Vienna Convention, could be worded as follows:

5.8 Timing of the effects of a reservation formulated by a successor State

A reservation formulated by a successor State[, in conformity with guideline 5.1 or 5.2,] when notifying its status as a party or as a contracting State to a treaty becomes operative as from the date of such notification.

93. Here again,[118] the phrase in square brackets would probably best be transposed to and explained in the commentary.

94. Even though a newly independent State's capacity to formulate reservations to a treaty to which it intends to succeed is not in doubt,[119] it ought not to be unlimited over time.

95. In this connection, it seems reasonable to consider that a newly independent State should exercise this capacity when notifying its succession. This is moreover clearly implied by the very definition of reservations contained in draft guideline 1.1 of the Guide to Practice, which, like article 2 (*j*) of the 1978 Vienna Convention — and unlike article 2 (*d*) of the 1969 Convention on the Law of Treaties — mentions among the temporal elements included in the definition of reservations the time "when [a State is] making a notification of succession to a treaty".[120] It seems legitimate to conclude from this that reservations formulated by a newly

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[115] The provision proposed by Sir Francis, which reflected a request to that effect by the United States of America (reproduced in Sir Francis Vallat 's first report, *Yearbook ... 1974*, vol. II, Part One, p. 52), was worded as follows: "A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession" (ibid., p. 55, para. 298).

[116] Commentary to article 19, *Yearbook … 1974*, vol. II (Part One), p. 227, para. (22).

[117] See, in this regard, Gaja, op. cit. (note 35), p. 68.

[118] See para. 86 above concerning a similar bracketed phrase in draft guideline 5.7.

[119] See paras. 24-28 and 35 above.

[120] The full definition of reservations in draft guideline 1.1 reads as follows: "'Reservation' means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty *or by a State when making a notification of succession to a treaty*, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization ". On the reasons for the inclusion of this reference to the succession of States in draft guideline 1.1, see the commentary to that draft guideline in *Yearbook ... 1998*, vol. II, Part Two, p. 100, paras. (5) and (6) of the commentary.

independent State after that date should be subject to the legal regime for late reservations, as set out in draft guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.5 provisionally adopted by the Commission.[121]

96. For similar reasons, it seems that the regime for late reservations should apply to reservations formulated by a successor State other than a newly independent State after the date on which it has established, by a notification to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State, in line with the conditions stipulated in draft guideline 5.2, paragraph 2. As in that provision, the term "predecessor State" should be understood, in cases involving a uniting of States, to mean one or more of the predecessor States.

97. In fact, the same solution should also apply to any reservation formulated by a successor State other than a newly independent State to a treaty which, following the succession of States, continues in force for that State. Granted, in such a case, draft guideline 5.2 does not acknowledge a capacity on the part of the successor State to formulate reservations that had not been formulated by the predecessor State. Nonetheless, should the successor State formulate a new reservation to the treaty in question, there are no grounds for denying that that State has the same capacity as any other State or for refusing it the benefit of the legal regime for late reservations.[122] Draft guideline 2.3.1, it should be recalled, provides that the late formulation of a reservation is permitted only if *none* of the other contracting parties objects, thereby fully upholding the principle of consent.

98. Accordingly, draft guideline 5.9 could be formulated as follows:

5.9 Reservations formulated by a successor State subject to the legal regime for late reservations

A reservation shall be considered as late if it is formulated:

(a) by a newly independent State after it has made a notification of succession to the treaty;

(b) by a successor State other than a newly independent State after it has made a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State; or

(c) by a successor State other than a newly independent State in respect of a treaty which, following the succession of States, continues in force for that State.

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[121] See the report of the International Law Commission on the work of its sixtieth session, 5 May - 6 June and 7 July-8 August 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 123, pp. 160-161.

[122] See, in this regard, para. 50 above.

II. Status of acceptances of and objections to reservations in the case of succession of States

99. The 1978 Vienna Convention does not deal with the status of objections to or acceptances of reservations in the context of the succession of States. Apparently no mention was made of acceptances in the *travaux préparatoires*.[123] Regarding objections, the Commission decided to leave the issue open despite a partial proposal by Sir Humphrey Waldock.[124] Notwithstanding a request to that effect from the representative of the Netherlands[125] and the concerns expressed at the Vienna Conference about this gap in the Convention,[126] the gap was allowed to remain.

100. That was a deliberate stance, as explained at the Conference by Mustafa Kamil Yasseen, Chairman of the Drafting Committee: "The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the International Law Commission's commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66),[127] the article did not deal with that matter, which was left to be regulated by general international law".[128]

101. In fact, the status of objections to reservations in relation to a succession of States raises four very different sets of questions:

– First, the question of what happens to objections made by the predecessor State to reservations formulated by other States or international organizations that are parties or contracting States or contracting organizations;

– Second, questions related to objections made by such other States or international organizations to reservations of the predecessor State;

– Third, the question of whether the successor State itself can object to existing reservations at the time of the succession;

– Fourth, the question of whether and in what conditions the other States and international organizations can object to reservations formulated by a successor State at the time of the succession.

A. Status of objections formulated by the predecessor State

102. Draft article 19 (the forerunner of article 20 of the 1978 Convention), adopted by the Commission on second reading in 1974, also did not address the question of objections to reservations in the context of succession of States. Here again, this omission was deliberate; in the commentary to this provision, the Commission noted

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[123] With the exception of some passing references in Sir Humphrey Waldock's third report; see para. 124 below.

[124] See para. 104 below.

[125] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 27 above), 27th meeting of the Committee of the Whole, para. 70; 28th meeting of the Committee of the Whole, para. 32; and 35th meeting of the Committee of the Whole, para. 19.

[126] See ibid., 27th meeting of the Committee of the Whole, para. 85 (Madagascar).

[127] See para. 102 below.

[128] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 27 above), 35th meeting of the Committee of the Whole, para. 17.

> "… that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would 'step into the shoes of the predecessor State'".[129]

These last words could imply that the Commission considered that the transmission of objections should be the rule.[130]

103. In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on their legal effects: it noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is "much the same as if no objection had been lodged";[131] and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.[132] This also implies that the Commission considered that the previous (maximum-effect) objections of the predecessor State continued to apply.

104. This was moreover the position of Sir Humphrey Waldock, who, while highlighting the scarcity of practice in this regard, had suggested, again along the lines of the proposals put forward by D. P. O'Connell to the International Law Association,[133] that the rules regarding reservations should apply mutatis mutandis to objections.[134] In particular, this meant that the same presumption that the Commission would later make with respect to reservations formulated by newly independent States, in its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.[135] The second Special Rapporteur on the subject, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by

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[129] *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (15) of the commentary; see also para. (23) (p. 227). This explanation was recalled at the 1977-1978 Vienna Conference by Sir Francis Vallat, acting as an expert consultant; see *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...*, vol. I (see footnote 27 above), 27th meeting of the Committee of the Whole, para. 83.

[130] In this regard, see Imbert, op. cit. (footnote 31), p. 320, note 126.

[131] This statement is a little reductive; see the Special Rapporteur's fifteenth report for a discussion of the effects of a minimum-effect objection on the treaty relationship.

[132] Commentary to article 19, *Yearbook ... 1974*, vol. II, Part One, p. 226, para. (14). This reasoning is supported by Ruda, op. cit. (footnote 35), pp. 207-208. See, however, the critical remarks of Jan Klabbers, "State succession and reservations to treaties", in Jan Klabbers and René Lefeber (eds.), *Essays on the Law of Treaties. A Collection of Essays in Honour of Bert Vierdag* (The Hague/Boston/London, Nijhoff, 1998), pp. 109-110.

[133] Op. cit. (footnote 28), "additional point" No. 13: "Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor 's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection", quoted in the second report of Sir Humphrey Waldock, *Yearbook ... 1969*, vol. II, p. 49, para. 17.

[134] Cf. draft article 9, para. 3 (*a*), contained in his third report: "The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations"; *Yearbook ... 1970*, vol. II, p. 47.

[135] See draft guideline 5.1, para. 1, above.

the predecessor State: "... on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft", especially, he stressed, given that in any event it would "... always be open to the successor State to withdraw the objection if it wishes to do so". Nonetheless, Sir Francis considered that there seemed to be "no need to complicate the draft by making express provisions with respect to objections".[136]

105. Already noted 35 years ago by Professor Giorgio Gaja,[137] the dearth of practice in this area is still apparent. It should be noted, however, that certain elements of recent practice also seem to support the maintenance of objections.[138] Mention should be made, in particular, of a number of cases in which a newly independent State confirmed, in notifying its succession, the objections made by the predecessor State to reservations formulated by States parties to the treaty.[139] There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.[140] With respect to successor States other than newly independent States, it may be noted, for example, that Slovakia explicitly maintained the objections made by Czechoslovakia to reservations formulated by other States parties to the treaties to which it succeeded.[141] Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,[142] and Montenegro stated that it maintained the objections made by Serbia and Montenegro.[143]

106. It is not immediately clear how this recent practice should be interpreted: it leans in the direction of continuity but could also reflect the absence of a set rule; otherwise, such statements would have been unnecessary.[144]

107. It nevertheless seems wise and logical to revert to the solution proposed by Sir Humphrey Waldock, who suggested that the rules regarding reservations should apply mutatis mutandis to objections,[145] bearing in mind that, even though the

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[136] First report, *Yearbook ... 1974*, vol. II, Part One, p. 54, para. 289.

[137] Op. cit. (footnote 35), p. 56.

[138] See, on this subject, Renata Szafarz, "Vienna Convention on Succession of States in respe ct of Treaties: a general analysis", *Polish Yearbook of International Law*, vol. X (1980), p. 96. Gaja, meanwhile, takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor Stat e, but also does not suffice to support this presumption (op. cit. (footnote 35), p. 57).

[139] *Multilateral treaties deposited with the Secretary-General* (http://treaties.un.org/Pages/ Participation Status.aspx), chap. III.3, Vienna Convention on Diplomatic Relations: Malta repeated, upon succession, some of the objections formulated by the United Kingdom, and Tonga indicated that it "adopted" the objections made by the United Kingdom respecting the reservations and statements made by Egypt; chap. XXI.1, Con vention on the Territorial Sea and the Contiguous Zone, and chap. XXI.2, Convention on the High Seas (Fiji); chap. XXI.4, Convention on the Continental Shelf (Tonga).

[140] Ibid., chap. XXI.2, Convention on the High Seas (Fiji).

[141] See footnote 82 above.

[142] See footnote 83 above.

[143] See footnote 84 above.

[144] The same could be said of a number of the clarifications proposed under the fifth chapter of the Guide to Practice, but the case at hand is especially striking, owing to the extreme scarcity of precedents.

[145] See para. 104 above.

Commission ultimately opted not to include in its draft articles a provision dealing specifically with objections to reservations, the solution proposed by the Special Rapporteur did not give rise to any substantive objections from the Commission.[146]

108. Like the presumption in favour of the maintenance of reservations, established in article 20, paragraph 1, of the 1978 Vienna Convention, the presumption in favour of the maintenance of objections is warranted for both newly independent States and other successor States. However, there are exceptions to the presumption in favour of the maintenance of objections in certain cases involving the uniting of two or more States, which are referred to in draft guideline 5.11.

109. Echoing paragraph 1 of draft guidelines 5.1 and 5.2 respectively,[147] draft guideline 5.10 could be worded as follows:

5.10 Maintenance by the successor State of objections formulated by the predecessor State

Subject to the provisions of guideline 5.11, a successor State shall be considered as maintaining any objection formulated by the predecessor State to a reservation formulated by a contracting State or contracting international organization or by a State party or international organization party to a treaty unless it expresses a contrary intention at the time of the succession.

110. Draft guideline 5.3, "Irrelevance of certain reservations in cases involving a uniting of States", sets out the exceptions that must qualify the principle of the maintenance of the predecessor State's reservations in certain situations that may arise in connection with the uniting of two or more States.[148] As the same causes produce the same effects, draft guideline 5.10, which sets out the principle that the successor State is presumed to maintain the predecessor State's objections to reservations formulated by other contracting States or contracting international organizations or parties to a treaty to which it has succeeded, should for the same reasons also be qualified by an exception when these situations arise.

111. Provision should also be made for another situation, one that is specific to objections, by establishing a second exception to the principle laid down in draft guideline 5.10. This exception, which is justified on logical grounds, relates to the fact that a successor State cannot maintain both a reservation formulated by one of the uniting States and, at the same time, objections made by another such State to an identical or equivalent reservation formulated by a party or contracting State to the treaty that is a third State in relation to the succession of States.

112. Draft guideline 5.11 sets out these two exceptions, which are specific to successions resulting from a uniting of two or more States.

5.11 Irrelevance of certain objections in cases involving a uniting of States

1. When, following a uniting of two or more States, a treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the State so formed, such objections to a reservation as may have been formulated by any such State which, at the date of the succession of

[146] See para. 104 above.
[147] See paras. 35 and 54 above.
[148] See para. 58 above.

States, was a contracting State in respect of which the treaty was not in force shall not be maintained.

2. When, following a uniting of two or more States, the successor State is a party or a contracting State to a treaty to which it has maintained reservations [in conformity with guidelines 5.1 or 5.2], objections to a reservation made by another contracting State or contracting international organization or by a State or international organization party to the treaty shall not be maintained if the reservation is identical or equivalent to a reservation which the successor State itself has maintained.

113. The phrase in square brackets introduces a detail that is not strictly necessary. It would perhaps be sufficient to link paragraph 1 of draft guidelines 5.1 and 5.2 respectively, on the one hand, to draft guideline 5.11, on the other, in the commentary to the latter.

B. Status of objections to reservations of the predecessor State

114. It would be difficult to explain why a party or a contracting State to a treaty should have to reiterate an objection it has already formulated with respect to a reservation of the predecessor State that applied to the territory to which the succession of States relates. Accordingly, the presumption in favour of the maintenance of objections formulated by a party or a contracting State to the treaty in relation to reservations of the predecessor State that are considered as being maintained by the successor State in conformity with paragraph 1 of draft guidelines 5.1 and 5.2 respectively seems to be called for.[149]

115. The presumption in favour of the maintenance of objections to reservations of the predecessor State that are maintained by the successor State also finds support in the views expressed by certain delegations at the 1977-1978 Vienna Conference.[150] For example, the representative of Japan indicated that it could go along with the International Law Commission's text of draft article 19 on the understanding that "… a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".[151] A similar view was expressed by the representative of the Federal Republic of Germany, who said, with respect to both newly independent States and other successor States, that "[t]he successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the

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[149] In this regard, see Gaja, op. cit. (footnote 35), p. 67.

[150] See the statements made by the representatives of Japan (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties …,* vol. I (see footnote 27 above), 28th meeting of the Committee of the Whole, paras. 15 and 16) and the Federal Republic of Germany (*Official Records of the United Nations Conference on Succession of States in Respect of Treaties …,* vol. II (see footnote 73 above), 43rd meeting of the Committee of the Whole, para. 11).

[151] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties …,* vol. I (see footnote 27 above), 28th meeting of the Committee of the Whole, paras. 15 and 16.

reservations and other declarations made by that State *and the objections thereto entered by its treaty partners*".[152]

116. This perfectly reasonable presumption could be dealt with in draft guideline 5.12:

5.12 Maintenance of objections formulated by another State or international organization to reservations of the predecessor State

When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], any objection to that reservation formulated by another contracting State or State party or by a contracting international organization or international organization party to the treaty shall be considered as being maintained in respect of the successor State.

117. Once again,[153] the bracketed phrase would probably best be transposed to and explained in the commentary.

C. Reservations of the predecessor State to which no objections have been made prior to the date of the succession of States

118. Another case that should be considered is that of a party or contracting State to a treaty that has not objected in time to a reservation formulated by a predecessor State and considered as being maintained by the successor State after the succession of States. In these circumstances, it would be difficult to explain why such a tacit acceptance of the reservation could be called into question merely because a succession of States has taken place. Accordingly, the capacity of a party or contracting State to a treaty to object, in respect of a successor State, to a reservation to which it had not objected in respect of the predecessor State should in principle be ruled out.

119. An exception should be made, however, for cases in which the succession of States takes place prior to the expiry of the period during which a party or contracting State to a treaty could have objected to a reservation formulated by the predecessor State.[154] In such a situation, the capacity of a contracting State or contracting international organization or of a State or international organization party to formulate an objection up until the expiry of that period should certainly be acknowledged.

120. The Commission could thus adopt the following draft guideline:

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[152] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties ...,* vol. II (see footnote 73 above), 43rd meeting of the Committe e of the Whole, para. 11 (italics added).

[153] See para. 113 above on a similar bracketed phrase in draft guideline 5.11.

[154] See draft guideline 2.6.13 and the commentary thereto, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), pp. 213-217.

5.13 Reservations of the predecessor State to which no objections have been made

When a reservation formulated by the predecessor State is considered as being maintained by the successor State [in conformity with guideline 5.1 or 5.2], a contracting State or State party or a contracting international organization or international organization party to the treaty that had not objected to the reservation in respect of the predecessor State shall not have capacity to object to it in respect of the successor State unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

121. As in the case of the foregoing draft guidelines, the bracketed phrase would probably best be transposed to and explained in the commentary.

D. Capacity of the successor State to object to prior reservations

122. The problem is more complex if the focus is shifted from the status of objections made prior to the succession of States to the question of whether *the successor State* may formulate objections to reservations made in respect of a treaty to which it becomes a party as a result of the succession of States. In this regard, it is once again necessary to distinguish between two different situations that call for different solutions:

– On the one hand, cases where a successor State is free to decide whether or not to succeed to a treaty and establishes its status as a contracting State or, where applicable, a State party to the treaty when notifying its succession; and

– On the other hand, cases of "automatic succession" in which the successor State "inherits" an existing treaty without being called upon to give its express consent.

123. The first situation, in turn, encompasses two different cases: that of a newly independent State that makes a notification of succession[155] and that of a successor State other than a newly independent State that establishes, "by making a notification" to that effect, its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State.[156] What these two scenarios have in common, and what allows them to be considered together, is that the successor State has a choice as to whether or not to become a party to the treaty.

124. Sir Humphrey Waldock had briefly considered this issue in his third report and took the view that, "whenever a successor State becomes a party not by inheritance but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty".[157] It does indeed seem logical to apply to objections the same reasoning that underlies

[155] See arts. 17 and 18 of the 1978 Vienna Convention.

[156] See arts. 32 and 36 of the 1978 Vienna Convention.

[157] *Yearbook ... 1970*, vol. II, p. 47, para. (2) of the commentary to draft article 9; see also para. 104 above.

draft guidelines 5.1, paragraph 2, or 5.2, paragraph 2, governing the formulation of reservations by a successor State: since, in the cases considered here, succession to a treaty takes place only by virtue of a deliberate act on the part of the successor State (a "notification of succession" or, in the case of successor States other than newly independent States, a "notification"), the successor State must be free to modify its treaty obligations, not only by formulating reservations but also, if it so desires, by objecting to reservations formulated by other States even before the date of its succession to the treaty.[158]

125. While the practice in this area is scarce, there have been cases in which newly independent States have formulated new objections when notifying their succession to a treaty. For example, Fiji withdrew objections made by the predecessor State and formulated new objections upon notifying its succession to the 1958 Geneva Convention on the High Seas.[159]

126. There is thus no reason why a newly independent State or other successor State cannot formulate new objections in respect of a treaty that was not in force for the predecessor State or States[160] upon establishing, by a notification within the meaning of draft guideline 5.1 or 5.2, paragraph 2, its status as a party or as a contracting State to the treaty.

127. As proposed by Sir Humphrey Waldock in his third report, this capacity must nonetheless be limited; draft article 9, paragraph 3, which established the principle that the same rules should apply to both objections and reservations, included a subparagraph (*b*) worded as follows:

> "(*b*) However, in the case of a treaty falling under Article 20, paragraph 2, of the Vienna Convention, no objection may be formulated by a new State to a reservation which has been accepted by all the parties to the treaty".[161]

128. This exception is intended to ensure that a successor State cannot, by formulating an objection, compel the reserving State to withdraw from such a treaty. It is also consistent with draft guideline 2.8.2, "Unanimous acceptance of reservations":

> "In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final".[162]

129. This exception is set out in draft guideline 5.14, paragraph 3, for which the following wording is proposed:

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[158] In this regard, in the case of newly independent States, see Gaja, op. cit. (footnote 35), p. 66.

[159] See footnote 140 above.

[160] As in the situations covered by draft guidelines 5.2, paragraph 2, and 5.8 (see paras. 53 and 96 above), the term "predecessor State" should be understood, in cases involving the uniting of two or more States, to mean one or more of the predecessor States.

[161] *Yearbook ... 1970*, vol. II, p. 47; see also the explanation of the grounds for this proposal, ibid., p. 52, para. (17) of the commentary to draft article 9.

[162] See the report of the International Law Commission on the work of its sixty-first session, 4 May-5 June and 6 July-7 August 2009, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 217 (commentary, pp. 235-237).

5.14 Capacity of a successor State to formulate objections to reservations

1. When making a notification of succession establishing its status as a party or as a contracting State to a treaty, a newly independent State may, in the conditions laid down in the relevant guidelines of the Guide to Practice and subject to paragraph 3 of the present guideline, object to reservations formulated by a contracting State or State party or by a contracting international organization or international organization party to the treaty, even if the predecessor State made no such objection.

2. A successor State other than a newly independent State shall also have the capacity provided for in paragraph 1 when making a notification establishing its status as a party or as a contracting State to a treaty which, at the date of the succession of States, was not in force for the predecessor State but in respect of which the predecessor State was a contracting State.

3. The capacity referred to in the foregoing paragraphs shall nonetheless not be recognized in the case of treaties falling under guidelines 2.8.2 and [4.X.X].[163]

130. The summary reference, in paragraph 1 of this draft guideline, to "the conditions laid down in the relevant guidelines of the Guide to Practice" is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the draft guideline itself of all the guidelines applicable to the formulation of objections; this could, however, be done in the commentary.

131. Draft guideline 5.14 does not apply to a successor State other than a newly independent State when, following a uniting or separation of States, a treaty continues in force in respect of that State in the context of a succession that can be termed "automatic", i.e. when a treaty *continues in force*, following a succession of States, in respect of a successor State other than a newly independent State even though there has been no expression of consent by that State. Under part IV of the 1978 Vienna Convention, such a situation arises, in principle, in the case of a State formed from a uniting of two or more States in relation to treaties in force at the date of the succession of States in respect of any of the predecessor States.[164] The same is true of a State formed from the separation of parts of a State in relation to treaties in force at the date of the succession of States in respect of the entire territory of the predecessor State, as well as treaties in force in respect only of that part of the territory of the predecessor State that corresponds to the territory of the successor State.[165] In these circumstances, as succession to the treaty does not depend on an expression of volition on the part of the State formed from the uniting or separation of States, that State inherits all of the predecessor State's rights and obligations under the treaty,[166] including objections (or the lack thereof) that the predecessor State had (or had not) formulated in respect of a reservation to the

[163] The number of the guideline in the Guide to Practice that reproduces article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions should be inserted in place of the brackets.

[164] See art. 31 of the Convention.

[165] See art. 34 of the Convention.

[166] See para. 49 above.

treaty. In any event, it does not seem that successor States other than newly independent States have laid claim to such a capacity.[167]

132. As one author has written, "When … succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out … If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor".[168]

133. As in the case of draft guideline 5.13, "Reservations of the predecessor State to which no objections have been made", an exception should nonetheless be made for cases in which a succession of States takes place prior to the expiry of the time period during which the predecessor State could have objected to a reservation formulated by another party or contracting State to the treaty. In such a situation, acknowledging the successor State's capacity to formulate an objection to such a reservation up until the expiry of that period seems warranted.[169]

134. In view of the foregoing considerations, the Special Rapporteur proposes that the Commission adopt the following draft guideline 5.15:

5.15 Objections by a successor State other than a newly independent State in respect of which a treaty continues in force

A successor State other than a newly independent State in respect of which a treaty continues in force following a succession of States shall not have capacity to formulate an objection to a reservation to which the predecessor State had not objected unless the time period for formulating an objection has not yet expired at the date of the succession of States and the objection is made within that time period.

E. Objections to reservations formulated by the successor State

135. While it is probably self-evident, it may also be desirable, in the interest of completeness, for the Commission to adopt a final draft guideline on objections to reservations in the context of a succession of States, in light of the evidence showing that, when a successor State formulates a reservation at the time of the succession of States, contracting States and contracting international organizations may object to it in the conditions laid down in articles 20-23 of the 1969 and 1986 Vienna Conventions, which are reflected and elaborated upon in the Guide to Practice.[170]

136. This draft guideline could be worded as follows:

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[167] The above-cited memorandum by the Secretariat (footnote 4) does not mention any cases in which a successor State formed from a uniting or separation of States has formulated objections to reservations to which the predecessor State had not objected.

[168] Gaja, op. cit. (footnote 35), p. 67.

[169] See footnote 154 above.

[170] See Gaja, op. cit. (footnote 35), p. 67.

5.16 Objections to reservations of the successor State

Any contracting State or contracting international organization may formulate objections to any reservation formulated by the successor State in the conditions laid down in the relevant guidelines of the Guide to Practice.

137. It should be noted that the term "any contracting State" included in this draft guideline also includes, where applicable, the predecessor State if it continues to exist.

138. As in draft guideline 5.14, the summary reference to "the conditions laid down in the relevant guidelines of the Guide to Practice" is warranted by the fact that it would be difficult if not impossible to give an exhaustive list in the draft guideline itself of all the guidelines applicable to the formulation of objections; this could, however, be done in the commentary.