Admissibility and Legal Effects of Reservations to Multilateral Treaties

Comments on Arts. 16 and 17 of the ILC's 1966 Draft Articles on the Law of Treaties

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I. Introduction

(1) During the discussions held by the International Law Commission (hereinafter ILC) on the Law of Treaties, only few topics have given rise, until the adoption of the present draft, to such controversies as has the régime of reservations to multilateral treaties (arts. 16–20). Members of the ILC have repeatedly emphasised that a solution susceptible to general consent was only conceivable as a compromise[1]). In fact, a balance of a kind has been established. Neither has the unanimity rule, dominating in former State practice, prevailed; nor have those opinions been fully successful which advocated an unlimited right for States to propose reservations according to the model of the pan-american system[2]). Since on this fundamental issue, there have been exhaustive discussions within the ILC, and since the pros and cons of a decision in either direction have often been exposed, the controversy will not be fully reopened in this article. Instead, the focus will be upon the degree to which the option the ILC has taken in favour of a flexible system, modelled on the opinion of the I.C.J. in the Genocide case[3]), represents a coherent entirety capable of fulfilling the requirements of a general *pro-futuro* legislation, which

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[1]) See especially Tunkin, Yearbook of the International Law Commission (YBILC) 1965, vol. I, 797th meeting, para. 26; 813th meeting, para. 18; Rosenne, *ibid.*, 798th meeting, paras. 36 and 37; Waldock, *ibid.*, 813th meeting, para. 26.

[2]) For references see UN Doc. A/5687, pp. 15–31.

[3]) I.C.J. Reports 1951, p. 15.

requirements are essentially distinct from those governing the mere decision of a specific case. In correspondence with this aim the text of the draft will be the main subject of a closer consideration. Although such an investigation extending to the phraseological details may appear awkward at first glance, it is necessary in order to be sure that the Law of Treaties can perform the mission assigned to it by its authors, *i.e.*, warranting clarity and certainty of law.

II. The definition of reservations

(2) The basis of the régime of reservations set forth in arts. 16–20 is constituted by the definition of art. 2, para. 1 (d), which reads:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State".

Compared with the description frequently encountered in doctrine[4]) of the reservation as an agreed provision, the above definition has the great advantage of showing immediately by the confrontation of the two concepts of "unilateral statement" and "treaty" – the latter is specified as "agreement" in *lit.* (a) in the same paragraph – why special legal rules are necessary for reservations. If the characteristic feature of the reservation is to be the manifestation of an individual intention directed against the definitely established consensus, it is obvious that there is a need to regulate the conditions under which States can succeed in performing such a subsequent revision of the treaty.

(3) By designating as reservations any declaration which "purports to exclude or to vary the legal effect of certain provisions of the treaty", the definition furthermore draws a clear dividing line, which appropriately eliminates other declarations frequently made in connection with the acceptance of a treaty[5]). Seen from the point of legal systematic, especially welcomed must be the rejection of the formal criterium that a reservation is a statement which aims at a modification of the text[6]). Under the present

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[4]) Only recently D. R. Anderson, Reservations to Multilateral Conventions: A Re-Examination, The International and Comparative Law Quarterly, vol. 13 (1964), pp. 450, 453, has taken this view.

[5]) For a concise analysis of this issue see Waldock, Fourth Report on the Law of Treaties, UN Doc. A/CN. 4/177/Add. 1, arts. 18–20, paras. 1 and 2, and YBILC 1965, vol. I, 799th meeting, paras. 12–14.

[6]) See P. Gormley, The Influence of the United States and the Organization of American States on the International Law of Reservations, Inter-American Law Review, vol. 7 (1965), pp. 127, 131 *et seq.*

version it is clear that interpretative declarations will generally possess all the characteristics of a reservation. The binding choice of a certain interpretation out of a number of possible interpretations and the express changing of the formulation have the same legal effect and therefore cannot be treated differently. Evidence of this can also be found by an inquiry into the purpose of an interpretative declaration: either it corresponds with the real meaning of the stipulation in question as found by means of general methods of interpretation – then it is superfluous, or it is in contrast to this meaning – then it contains a deviation from the mutual consensus. Of course, no State would have recourse to an interpretative declaration if it could be sure that the first-mentioned case of concordance existed. However, unilateral formal statements as to the meaning of a certain treaty provision are normally made only in cases where the correct interpretation of this provision is doubtful, at least for the moment; and in this situation a clarification of its own views may be employed by a State as a means for eliminating any risk: particularly in the case where the interpretative declaration is finally found to be in contradiction to the norms of the treaty, this declaration should produce its full effect.

(4) The criterium of finality, however, is apt to promote results equally satisfying both in theory and in practice. If, on the occasion of the conclusion of a treaty, a State only intends to manifest its fundamental political views or to express its own interpretation of an obscure stipulation without purporting, however, to include these individual opinions in the treaty, a reservation in the specific sense of art. 2, para. 1 (d), will not be necessary. Although such statements form part of the context to be considered for the interpretation of the treaty, they constitute but one element among the great number of factors of interpretation and will never prevail over the clear and unambiguous text (art. 28 (a)). Only a statement accepted by the other contracting States in accordance with the provisions of arts. 16 *et seq.* has the same binding force as the stipulations of the treaty itself. Therefore, attaching a formal reservation is the only way for a State to be legally assured that a treaty norm has, at least for that State, the meaning which it supposes. Where this possibility is excluded, *e.g.*, where the treaty in question prohibits reservations to the articles to be restricted, a State may always have recourse to an interpretative declaration other than a reservation in order to convince the other parties to the treaty of its legal standpoint. Nevertheless, such a unilateral statement, not being within the framework of arts. 16–20, might subsequently be accepted, even by tacit consent. Such instances are essentially a matter of evidence. The rule that silence is deemed to be consent

(art. 17, para. 5) is only applicable to formal reservations. Consequently, general agreement to other declarations always requires specific proof and cannot be deduced from the mere fact that no protest was brought forward within one year's time.

III. The consensual principle as basis of the law of reservations

(5) In determining the legal effects of reservations, the ILC departs with good reason from the consensual principle. Reservations authorised by the treaty do not require any further acceptance by the other contracting States (art. 17, para. 1); reservations prohibited by the treaty are null and void together with the declaration of consent they refer to[7]); and where a treaty is silent, reservations will only take effect *vis-à-vis* the other contracting States which accept them (art. 17, para. 4). It is a well established rule of international law that contractual obligations can arise for a State only as far as it is willing to assume them[8]). Not only are States free to choose their contracting parties, but their sovereign right of treaty-making also comprehends the right to determine the contents of a treaty[9]). No State can be bound by contractual obligations it does not consider suitable. Therefore, it is only logical that art. 17, para. 4, grants the right to object to reservations on any grounds where the treaty is silent, thus empowering every contracting State to hinder contractual relations from coming into effect with any reserving State. Formulating a reservation is proposing a modification of the treaty stipulations. Although according to the reciprocity rule the obligations of the other parties would automatically be diminished to the same degree (art. 19, para. 1 (b)), it is, nevertheless, doubtful whether these other parties would be at all interested in the mitigated form of the treaty. Any limitation on the right to lodge objections would consequently mean a violation of the sovereign right of treaty-making. If, on the one hand, freedom to make reservations is granted, then, on the other hand, the right of objection must be given to the same broad extent. A solution according to which one of the parties to a convention would be able to impose its conditions on all the other parties could not be reconciled with the fundamental principle of equality

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[7]) For further details see *infra*, paras. (22) *et seq.*

[8]) See P.C.I.J., Series A, No. 1, The S. S. "Wimbledon", p. 25; Series B, No. 10, Exchange of greek and turkish populations, p. 21; I.C.J., International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950, pp. 128, 139; Reservations to the Convention on Genocide, Advisory Opinion, *op. cit. supra* note 3, pp. 15, 21.

[9]) See G. Dahm, Völkerrecht, vol. 3 (Stuttgart 1961), p. 57, and references quoted there.

of all States. Therefore, serious doubts could have been advanced against the provisions of the 1962 draft (art. 20, para. 2(b)) providing that objections were only admissible against reservations incompatible with the object and purpose of the treaty[10]).

IV. The admissibility rule of art. 16

(6) In art. 16 the general principle is established that, with the exception of three specifically mentioned situations, a State is free to formulate reservations. By virtue of this principle particularly those treaties in which the final clauses are silent on the subject of reservations will now be open to them. In this respect the ILC has closely followed the views that the I.C.J. had expressed in the Genocide case, restricting them, however, to this special convention[11]). It is easy to see that the rule of admissibility, even stated as a presumption, is intimately connected with the decision made in favour of a flexible system. Relative membership is an issue possible only with regard to treaties lacking reservation clauses: reservations admitted by a treaty become effective *ipso iure vis-à-vis* all parties and, on the other hand, acceptance of the treaty obligations does not take any effect at all if restricted by an illegal reservation[12]). In neither of these two contrary categories are the provisions of art. 17, para. 4, applicable. Only where a treaty fails to provide for reservations, does the draft leave it to the discretion of the parties to determine their legal relations with the reserving State, either by accepting the reservation or by objecting to it. Hence, the conclusion is inescapable that the flexible system can only work if under these conditions – *i.e.*, in the silence of a treaty – States are granted the right to submit their reservations to the parties concerned. If this way had been blocked, in particular by interpreting silence in

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[10]) This restriction of the right to object, as initially foreseen, was motivated by the Opinion of the I.C.J. in the Genocide case, *op. cit.*, pp. 24, 26 and 27. After Australia, Denmark and the U.S.A. in their observations on the 1962 draft, Annex to ILC Reports 1966, pp. 107, 115, 174, had taken a position against making objections dependent on any conditions, the ILC decided to revise its proposals. The new version has only been criticised by Tunkin, YBILC 1965, vol. I, 799th meeting, para. 37.

[11]) *Op. cit. supra* note 3, p. 22.

[12]) Members of the ILC have always been unanimous in recognising that existing reservation clauses have to be respected and cannot be unilaterally upset by single States, see the Commentary on arts. 16–17, para. 10, which reflects a general agreement: Ago, YBILC 1962, vol. I, 651st meeting, para. 33; 653rd meeting, para. 34; YBILC 1965, vol. I, 798th meeting, para. 70; 813th meeting, para. 15; Gros, YBILC 1962, vol. I, 654th meeting, paras. 41 and 44; Lachs, *ibid.*, 651st meeting, para. 51; Tunkin, *ibid.*, 651st meeting, para. 18; Verdross, *ibid.*, 652nd meeting, paras. 32 and 33; Waldock, *ibid.*, 653rd meeting, para. 57; Yasseen, *ibid.*, 654th meeting, para. 3.

the treaty as being a decision against the admissibility of reservations, the unanimity rule would in fact have been reintroduced through the back door.

(7) Although it is essentially out of the scope of the present study to question such fundamental issues of the draft, nevertheless, this point must be given brief consideration. Apparently the admissibility rule is not simply to be conceived as a mere rule of interpretation which may be employed for eliciting the intentions of the parties but which will be inapplicable as soon as it has been established that the solution to be given to the question of reservations was the subject of controversy between the parties. Rather, freedom to make reservations shall be granted whenever the parties have decided neither for nor against the admission of reservations[13]). In other words, an authentic rule of *ius dispositivum* is intended to be created[14]). However, one may well raise the question whether it would not suffice to draw up a rule of interpretation in the above restricted sense[15]). The predetermination of the contents of all future treaties on the substantive point of reservations, which might be characterised as a partial *capitis diminutio* of the international legislator, can hardly be appreciated accurately in its consequences and involves dangers not to be underestimated. Any residuary rule should, by its very nature, satisfy, at least under normal circumstances, all the interests concerned. However, clear criteria which are able to serve as a guideline for the necessary legislatory decision are not easily found in the field of reservations. Certainly it is worth considering that the universality of many treaties can only be attained if there is broad room for making reservations; as shown by the example of the Genocide convention, it may be preferable that some States accede to a treaty subject to reservations, instead of not acceding to it at all. An important argument in favour of the admissibility rule is also given by the consideration that the two thirds majority necessary for the adoption of the text at a State conference (art. 8) must be counter-balanced in order to avoid a majority government which would be in strict contradiction to the present state of international law. But equally disturbing would be the danger, not to be excluded within the system of the draft, of a minority government. If, in the future, differences

[13]) This point especially has been severely criticised during discussions within the ILC, see Ago, YBILC 1962, vol. I, 652nd meeting, paras. 80 and 81; 653rd meeting, para. 76; YBILC 1965, vol. I, 798th meeting, paras. 71–73; Gros, YBILC 1962, vol. I, 654th meeting, para. 42; Tsuruoka, *ibid.*, 652nd meeting, para. 68; YBILC 1965, vol. I, 798th meeting, para. 4.

[14]) de Luna, YBILC 1962, vol. I, 652nd meeting, para. 15.

[15]) See on this point Gros, YBILC 1962, vol. I, 654th meeting, para. 44.

concerning the régime of reservations arise at a State conference, a minority which slightly surpasses one third of the participating States will be legally assured the power to decide the admissibility of reservations since silence is meant to be an eloquent silence, *i.e.*, a declaration in favour of the right to make reservations. There is no need to underline the likeliness of this legal situation being abused[16]). A rule of interpretation expressly excluding from its scope of application the above case of controversy between the parties could prevent this danger; however, it would possibly be difficult to apply. In any case, taking the point of view of the ILC, greatest attention must be devoted to the provisions which are to prevent abuse of the freedom to make reservations. In this respect, art. 16 (c) is a main provision. The question whether the incompatibility rule laid down therein is able to fulfil efficiently the function assigned to it should, therefore, be carefully examined.

V. The prohibitions of art. 16 in general

(8) Besides the presumption of admissibility, the prohibitions contained in art. 16 also have to be taken into closer consideration. A main problem is the delimitation of *lits.* (a) and (c). Taking the text as the basis of interpretation, as prescribed by art. 27, one will come to the conclusion that *lit.* (a) also provides for an implied or implicit prohibition. Where the draft fails to give any indication to the contrary, there is no doubt that the intentions of the parties to a treaty have to be elicited by all possible means of interpretation without any consideration of the form in which these intentions have been expressed, which is to say that respect must be given to implied as well as to express stipulations. This result is confirmed both by the Commentary referring to art. 16 (a)[17]) and the origins of this provision[18]).

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[16]) The members of the ILC quoted *supra*, note 13, have laid emphasis on the warning example of what happened on the occasion of the adoption of the Convention on the Territorial Sea and the Contiguous Zone. See also Rosenne, YBILC 1965, vol. I, 798th meeting, para. 40.

[17]) Commentary on arts. 16–17, paras. 10 and 17.

[18]) In accordance with the propositions formulated by Waldock, (First report on the law of treaties, YBILC 1962, vol. II, p. 27, art. 17, para. 1) the 1962 draft in art. 18, para. 1, was referring to prohibitions expressly stated by the terms of the treaty. The new text prepared by Waldock for the 1965 session (YBILC 1965, vol. I, p. 145) for the first time failed to differentiate between express and other stipulations. The ILC on this point has followed its special rapporteur. However, discussions on this particular principle did not take place, and only very few observations are recorded: Tunkin, YBILC 1962, vol. I, 653rd meeting, para. 26; Verdross, *ibid.*, 652nd meeting, para. 32; Yasseen, *ibid.*, 651st meeting, para. 63, and 654th meeting, para. 4; YBILC 1965, vol. I, 797th meeting, paras. 18 and 19.

(9) However, what is the difference between cases of implied prohibitions and cases where the incompatibility rule of *lit.* (c) is relevant? In trying to answer this question, one will have to proceed from the fact that a treaty stipulation can only be qualified as "implied", in accordance with the natural meaning of that term, when the legal effects deduced from it were not the object directly regulated by the parties and when, compared with the normal situation, additional logical operations are necessary to discover the contractual intentions of the parties. The preciseness of a statement regarding these implied contractual intentions depends on whether treaties containing specific reservation clauses or treaties lacking such clauses are concerned[19]). If a treaty of the first-mentioned category prohibits reservations, this is the case of express prohibition under art. 16 (a) which does not raise any doubts; if, on the other hand, only a specified category of reservations is admitted, any other reservation will encounter the prohibitive norm under art. 16 (b), the basis of which is a general presumption. Other cases, where the prohibition of certain reservations might indirectly result from a reservation clause, are not imaginable since analogy and *argumentum a fortiori* cannot be employed as a means of interpretation. International agreements are generally elaborated with greatest care so that any enumeration of the articles allowing for reservations must be understood as being limitative.

(10) Consequently, the hypothesis of implied prohibition, as also provided for in art. 16 (a), will in general become effective only where a treaty is silent about the admissibility of reservations. Under these circumstances an implied decision against reservations can only be inferred from substantive treaty provisions other than the final clauses. Since a reservation is by its very nature directed at modifying the general content of the treaty in question, it can never be qualified as illegal solely because it contradicts the substantive provision concerned, this contradiction being supposed *per definitionem.* Therefore, the question is to measure the actual effects of a reservation and to examine whether or not it is detrimental to the operation of the treaty; clearly the borders of admissible reservations would be surpassed if the very substance of the treaty were destroyed. In order to ascertain the factors relevant in this view, it is necessary to proceed to an exact classification of the treaty provisions. Some of them will be absolutely hostile to reservations, others only relatively – in the case where a State accedes to a treaty subject to limitation in point of time, the length of the period for which it consents to be

[19]) See Waldock, YBILC 1962, vol. I, 653rd meeting, para. 59.

bound will possibly be decisive for the compatibility test, and there may still be a third group of provisions which, as rules of secondary importance, can be fundamentally restricted to any possible extent. Finally, the possibility must be taken into consideration that the acceptance of the legally binding force of a treaty might be deprived of all substantial effects because of the great number of reservations, each of which when considered individually would be supportable[20]).

(11) Obviously, the method just described is exactly the same as has to be employed under art. 16 (c). Details of what is meant by the phrase "object and purpose of the treaty" in that article were not discussed by the ILC, as far as can be seen; since, however, this concept of object and purpose was manifestly taken *tel quel* from the Opinion of the I.C.J. in the Genocide case, one can correctly draw information from the motives of this decision. There it is clearly stated that both a quantitative and qualitative evaluation has to be made. What must be preserved is the *raison d'être* of a treaty[21]) which, for its part, needs be clarified by means of all factors important in the process of interpretation [22]).

(12) Following closely the basic assumption, supported both by the wording of art. 16 (a) and the Commentary that there are cases of implied prohibitions even outside of art. 16 (b), the conclusion is inescapable that these other cases are identical to those provided for in art. 16 (c). This result appears all the more questionable since the legal effects of inadmissible reservations are regulated quite differently by the draft depending upon whether the prohibition of *lit.* (a) or *lit.* (c) applies[23]). Apparently, however, art. 16 (c) is intended to be *lex specialis* as far as grounds of inadmissibility derived from the substance of a treaty are concerned. Therefore, alone in the interest of clarity, referring solely to express prohibitions, *i. e.*, returning to the 1962 draft, would be highly advisable.

(13) As the concept "express" not only is opposed to "implied", but also to "tacit", the proposed alteration of the 1966 text would simultaneously mean that no tacit agreement could be the valid basis of a prohibition under art. 16 (a). Thus the draft would be modified in one more respect. In the

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[20]) Accordingly, there is not a simple alternative between essential clauses and clauses of minor importance as was generally assumed within the ILC following the dissenting vote of judges Guerrero, McNair, Read and Hsu Mo in the Genocide case, I.C.J. Reports 1951, pp. 42 and 43; see first statement of the ILC on reservations, YBILC 1951, vol. II, p. 128, para. 24; Ago, YBILC 1962, vol. I, 651st meeting, para. 35; Bartoš, *ibid.*, 651st meeting, para. 42.

[21]) *Op. cit. supra* note 3, p. 23.

[22]) See I.C.J., *ibid.*, pp. 22 and 23.

[23]) See *infra*, paras. (22) and (23).

absence of any contrary indication, by using the word "treaty" reference is normally made to the entire context as described in art. 27, para. 2, and consequently it must be inferred that under the present version a prohibition might also result from a tacit agreement accompanying the very treaty, *i. e.*, the mutual consent as reflected in the written document. Taking into account, however, that the provisions on reservations basically have a formal character, being intended to serve as a clear guideline for everyone concerned, it is questionable if the broad notion of treaty is not misplaced in this connection. The depositary in particular can only rely on the text of the treaty. His task cannot be to find out whether eventually tacit consent has been attained between the parties, alone for the very reason that this task would be impossible to fulfil *in praxi:* nobody can and will expect him to go into the jungle of preparatory works in search of evidence of a tacit understanding on the question of reservations[24]).

(14) The above considerations suggest the conclusion that, without any loss of substance, art. 16 (a) could be restricted to cases where a prohibition is expressly stated by the very terms of the treaty. This conclusion, however, is confronted with the query whether the order that an implied or tacit agreement concluded subsequently shall not take effect, can be validly laid down by contractual means. This is not the place for an examination of the relationship between the future Convention on the Law of Treaties and its object, all later treaties. Seen pragmatically, one will principally have to consider inconvenient any differentiation between express provisions, on the one hand, and implied or tacit provisions on the other hand. During the elaboration of a treaty the difficulties connected with its application can never be completely foreseen. If later a legal problem emerges which was either outside the range of view of the parties or was only considered peripherally, if at all, the greatest difficulties will always arise in answering the question as to the particular way in which the treaty has provided for this problem – expressly, impliedly or tacitly.

(15) However, the régime of reservations does not belong to this category of issues which cannot be foreseen. There is only the choice between either authorising or prohibiting reservations, and the manifold shades to be found in a problem of substantive law – dependent upon the question to

[24]) The UN Secretary-General in his practice as depositary of multilateral treaties proceeds on the assumption that he is only bound to refuse receipt of instruments which are in clear contradiction with any express reservation clause, see UN Doc. A/5687, p. 92, paras. 20 and 21; see also information given by the U.S.A., quoted *ibid.*, p. 33. – The intention of the ILC seems to deprive the depositary completely of his former function of adjudicating on the regularity of reservations, see the Commentary on art. 72, para. 4.

be answered – are completely lacking in the face of this clear alternative. On the other hand, it has been generally realised, at least from the moment where the I. C. J. gave its Opinion in the Genocide case, that rules on reservations form a necessary part of every multilateral treaty[25]). Consequently, a strong presumption exists against consent on reservations if the text is silent in this respect. Moreover, it cannot be stated seriously that the intentions of the parties are disregarded because any State thinking that a tacit agreement had existed on the exclusion of reservations may maintain its views in accordance with art. 17, para. 4, by refusing to enter into treaty relations with the reserving State.

VI. The incompatibility rule of art. 16 (c) and its restrictions

(16) Only treaties without reservation clauses shall be subject to the compatibility test of art. 16 (c). The suggestion made by the Canadian Government to drop this limitation, making the incompatibility rule a general principle[26]), was not agreed to by the ILC[27]). Certainly it is neither necessary nor possible to restrict the freedom of reservations in cases where the parties have expressly manifested a different intention. When specific reservations are permitted such a treaty provision is *lex specialis* anyway in relation to the incompatibility rule. Secondly, it is imaginable, at least in theory, that all provisions of a treaty, without exception, are declared subject to reservations. This second hypothesis, however, is most improbable, and as far as can be seen, there is not a single example for such a reservation clause admitting all possible unilateral modifications of a treaty. Only the third case where a treaty expressly prohibits reservations to specific provisions, presents a real problem. According to the ILC, the bounds set by art. 16 (c) will not be valid here; in other words, the insertion of a prohibition into the treaty text is considered an *argumentum e contrario* in favour of all other reservations being allowed. The correctness of this thought, however, is doubtful. If a treaty conference agrees on the prohibition of certain reservations, this by no means implies that the delegates

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[25]) Moreover, it would be difficult to assume that the recommendation to insert express reservation clauses into all multilateral treaties, contained in UN General Assembly resolution 598 (VI) adopted on january 12, 1952, could nowadays be overlooked at any treaty conference.

[26]) ILC Reports 1966, p. 111. The same opinion was expressed by Briggs, YBILC 1962, vol. I, 663rd meeting, para. 13; YBILC 1965, vol. I, 796th meeting, para. 37; 813th meeting, para. 10; Rosenne, *ibid.*, 797th meeting, para. 10. *Contra* Ago, *ibid.*, 813th meeting, para. 16.

[27]) For motives see Waldock, Fourth report on the law of treaties, UN Doc. A/CN. 4/177/Add. 1, arts. 18–20, para. 4.

accord unanimously on admitting all reservations other than those falling under the prohibition clause. On the contrary, it will frequently be the case that only a minimum of reservations, *i. e.*, those in flagrant contrast to the treaty, are excluded and that the parties are at variance with one another about the additional articles to be mentioned in the list of provisions hostile to reservations. If, for example, a convention on the protection of human rights prohibits in a "colonial clause" the exception of dependent territories from the territorial scope of the treaty, it would be absurd to suppose that consequently reservations of any kind, including those relating to the most elementary guarantees of individual freedom, are authorised, even if by these restrictions the treaty would be deprived of its very substance. The deplorable consequence of the ILC proposal would be to make it advisable for States to refrain from partial prohibitions even though such prohibitions are fundamentally welcome for reasons of legal clarity, because outside their scope they would lead to a freedom of reservations not hampered by any legal obstacle [28]).

VII. Legal effects[29]) *of authorised reservations*

(17) The rule laid down in art. 17, para. 1, that a reservation expressly or impliedly authorised does not need any further acceptance by the other contracting States seems logical and rather unproblematic. In fact, the necessary consent between a reserving State and the other States is given when the latter have agreed to reservations *ab initio* at the conclusion of the treaty. While this *prima facie* judgment need not be revised for expressly admitted reservations, the remaining cases of an implicit or tacit decision to admit reservations here also create considerable difficulties[30]).

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[28]) Proceeding upon the assumption that the I.C.J. in the Genocide case considered tacit agreement on the admission of reservations as having been established between the parties, which is suggested by the Court's statements on pp. 22 and 23, *op. cit. supra* note 3, this decision can also be advanced to support the view that a distinction should be made, with regard to the applicability of the compatibility test, between cases of global authorisation of reservations, on the one hand, and of specific authorisation on the other hand.

[29]) The term legal effects is employed here to cover the topics dealt with in art. 17.

[30]) The provision contained in art. 17, para. 1, has a very changing drafting history. The first project presented by Waldock, (First report on the law of treaties, YBILC 1962, vol. II, p. 27, art. 18, para. 2 (b)) apparently referred to the terms of the treaty, although there may be some doubt. The 1962 draft in art. 20, para. 1 (a), read as follows: "A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance", and the new version prepared by Waldock for the 1965 session, YBILC 1965, vol. I, p. 145, stated (art. 18, para. 1): "A reservation permitted by the terms of the treaty is effective without further acceptance . . .".

(18) First of all, with regard to tacit admission, one is confronted with the question whether, by referring to reservations not mentioned in the text, the ILC has extended art. 17, para. 1, too broadly to the detriment of art. 17, para. 4. According to the ILC, para. 4 guarantees freedom of decision to those States which fully accept the treaty, and is meant to be applicable particularly in the situations where the treaty is silent about the admissibility of reservations. However, will there be any room for such a "pure" silence when the presumption in favour of the admissibility of reservations has become positive law? In the future, after the proposed convention has come into force, all States participating in a treaty conference will see clearly that disregarding the question of reservations will constitute a vote for the admissibility of reservations. Any silence on this point will turn into an expressive silence.

(19) There are two ways to deal with this difficulty. First, one could distinguish between two sorts of "admission" of reservations, namely the pure and simple admission and the admission subject to the application of art. 17, para. 4. However, there is reason enough for maintaining that this solution would set too high a standard for the interpretation of intentions declared either tacitly or impliedly, particularly since the Commentary itself declares simply that a reservation made in accordance with the rule of admissibility of art. 16 is "permitted" [31]). Secondly, one could conceivably differentiate between cases where, disregarding the presumption of admissibility laid down in art. 16, the only basis for eliciting the intentions of the parties is the treaty itself, and cases where recourse to art. 16 is a necessary argument in reasoning. In so far as a dividing line can be seen here, it is so extremely fine that as a legal rule applicable in practice it seems scarcely suitable. Shall the decisive factor be whether, without any formal vote, agreement has been attained on reservations in the form that an express admission is not required, because the presumption given under art. 16 is the existing rule anyway? Such circumstances could certainly be qualified as a tacit admission since by virtue of art. 28 preparatory works may be taken into account if the text leaves a certain question obscure. On the other hand, if without debate or mutual agreement, the delegates felt that the admissibility of reservations need not be regulated because of art. 16, one would easily assume that there is a gap in the question of reservations. These examples are sufficient to show that a definite dividing line can hardly be found or would require such a fine distinction that clear results could be expected, if at all, only in theory.

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[31]) See the Commentary on arts. 16 and 17, para. 17.

(20) As far as instances of implied admission are concerned, the only situation where such an admission can be inferred from a treaty with a relatively high degree of certainty is the inverse of art. 16 (b), *i.e.*, the case where a treaty expressly prohibits certain reservations thereby implicitly authorising others. On the other hand, drawing arguments *ad analogiam* and *a fortiori* from any express clauses of admission will be excluded by art. 16 (b). Moreover, the substantive provisions of a treaty are highly inappropriate for giving any unambiguous results as to an implied authorisation of reservations.

(21) The suggestion, that art. 17, para. 1, should solely mention reservations expressly admitted by the terms of the treaty itself, at most excepting only the implied admission resulting from an explicit enumeration of the articles not subject to reservations[32]), obviously meets the same objections as already discussed in connection with the proposal to restrict art. 16 (a) to express prohibitions. Therefore, reference can be made to our foregoing observations[33]). Arts. 16–20 must be understood primarily as formal provisions, the main purpose of which is to serve the interests of legal clarity and certainty. Since the necessity of regulating the issue of reservations can no longer be overlooked, the silence of the text generally will indicate that in this respect consent has not been established among the parties. Also here the application of art. 17, para. 4, leads to a satisfactory solution.

VIII. Legal effects of inadmissible reservations in general

(22) The question of legal effects of reservations which are either clearly inadmissible or can be suspected of being covered by one of the prohibitive rules of art. 16 must be regarded as the central point of the entire régime of reservations. While authorised reservations are dealt with in a separate paragraph (art. 17, para. 1), inadmissible reservations are not directly mentioned. However, the text of para. 4 on acceptance of and objection to reservations generally relates to "cases not falling under the preceding paragraphs of this article". Since art. 17, para. 1, provides for allowed reservations, para. 2 for reservations to treaties concluded between a small group of States, and para. 3 for reservations to treaties establishing international organisations, the idea is not remote that para. 4 constitutes the general rule for all remaining cases and, consequently, even for prohibited reservations. This would mean that the system of relative membership is even valid for treaties unmistakably excluding reservations. Any State

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[32]) See *supra*, paras. (16) and (20).
[33]) See *supra*, paras. (13)–(15).

intending to ignore such a prohibition could do so if any other State accepted its reservation, this acceptance being most likely to occur because not all the States have a perfectly functioning Foreign Office which promptly objects to any attempt to disregard the treaty. Hence, the will of the parties could hardly be more flagrantly disrespected, all the more so as it is most doubtful that a future Convention on the Law of Treaties could in any case prevail over a subsequent treaty. According to the Commentary, the ILC does not want this result either[34]), at least as far as the prohibitions of art. 16 (a) and (b) are concerned. Consequently, it would be highly advisable to formulate the treaty more precisely on this point.

IX. Legal effects of reservations inadmissible under art. 16 (c)

(23) The Commentary indirectly indicates that with regard to art. 16 (c) a different solution shall apply[35]); nevertheless, this intention is also not expressed in the text of the draft itself since art. 17, para. 4, is confined to the already mentioned global formulation "cases not falling under the preceding paragraphs of this article". As, however, art. 17, para. 2, states with respect to "plurilateral" treaties that all contracting States must consent if a treaty requires integral application, it is inevitable to infer therefrom that in other cases of incompatibility a reserving State shall not be completely barred from access to the treaty. In other words, the category of inadmissible reservations under art. 16 (c) shall be governed by art. 17, para. 4; for otherwise it would be redundant to say specifically that the effect of a reservation incompatible with the object and purpose of a treaty is in the case of art. 17, para. 2, exceptionally conditioned upon the consent of all States concerned. To sum up, in the absence of a reservation clause the ILC wants to enable a single State to make a reserving State a party to the treaty, irrespective of the results of the compatibility test. So, the dividing line drawn by art. 16 (c) between admissible and inadmissible reservations would be removed not only in fact but also in law if the draft were adopted in its given form. Although art. 16 (c) appears

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[34]) See the Commentary on arts. 16–17, paras. 10 and 17. See also Waldock, Fourth report on the law of treaties, UN Doc. A/CN. 4/177/Add. 1, arts. 18–20, para. 4, and YBILC 1965, vol. I 798th meeting, para. 22, in reply to the criticism expressed by Denmark, ILC Reports 1966, p. 115.

[35]) The Commentary on arts. 16–17 states in para. 17, that art. 16 (c) has "to be read in close conjunction with the provisions of article 17 regarding acceptance of an objection to reservations".

as a peremptory rule, the true character of this provision is for the moment a void declamation.

(24) Thus the proposal of the ILC reaches far beyond the jurisdiction of the I.C.J. which, for its part, could already be qualified as revolutionary compared with former State practice. In its Opinion on the Reservations to the Convention on Genocide the Court indicates clearly (answer to question I)[36]) that any acceptance of a treaty which is restricted by a reservation incompatible with the object and purpose of this treaty takes no effect if the reservation is objected to by any party. The Court, it is true, immediately modifies this statement by adding (answer to question II)[37]) that it is left to every State to decide independently on the question of compatibility, either by approving the compatibility and entering into contractual relations with the reserving State, or by contesting such compatibility, thereby denying that any treaty relations exist. The difference between these merely pragmatic rules for appreciating the legal situation and the draft is that the latter contains actual rules of substantive law. While the Opinion of the I.C.J. solely declares that States accepting a reservation "can in fact consider that the reserving State is a party to the Convention"[38]), the proposal made by the ILC in clear contrast reads: "Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State . . .". Seen from the point of view of drafting, the different treatment of the prohibitions of art. 16 without any corresponding indication in the text itself can only be viewed as a failure, and the reactions of the governments consulted on the 1962 draft show clearly how misleadingly the ILC has formulated its intentions on this point[39]).

(25) The absence of objectivity in the compatibility test could arguably justify such an extreme extension of the right to attach reservations and was hence repeatedly alleged by those advocating the flexible system. It is true that contradictory opinions are likely to arise as to the result of applying the compatibility rule. Nevertheless, one should notice that the same could also be said for a great number of the remaining provisions of the draft. Elsewhere the ILC did not refrain from setting forth rules, the

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[36]) *Op. cit. supra* note 3, p. 29.

[37]) *Ibid.*, pp. 29 and 30.

[38]) *Ibid.*, p. 30 (emphasis added).

[39]) In its observations on the 1962 draft, Australia obviously considered the incompatibility rule an objective rule of law not subject to unilateral derogations, see ILC Reports 1966, p. 107. On the other hand, Canada and Japan, *ibid.*, pp. 111 resp. 129, criticised the lack of preciseness and concordance by which the draft was, and still is, characterised in this regard.

application of which must lead to an equal – if not greater – divergence of opinion because of the very complexity of the regulated matter. In this connection mention may be made of art. 49 declaring invalid treaties concluded by threat or use of force against the State victim of such illegal measures, art. 59 providing for a fundamental change of circumstances, and art. 70 excepting from the scope of the draft treaties which provide obligations for an aggressor State. One will hardly deny that in these latter cases, where a definite judgment is only possible if a mass of complex facts is known, the application will cause much greater difficulties than in the present connection where, in general, only texts have to be compared.

(26) Furthermore, the ILC is even more directly in contradiction with its own logic when in art. 17, para. 2, it declares necessary, in the case of a treaty between a small group of States, the consent of all parties if this is required by the object and purpose of the treaty. In a system based on the supposition that the object and purpose can hardly ever be determined exactly, such a provision is out of place. Would not art. 17, para. 4, have to be applied to "plurilateral" treaties if only one of the parties contends that the integrity of the treaty in question is not essential? All this tends to demonstrate that abandoning a necessary and important rule for the sole reason that the effects of its application are open to diverging interpretation is highly questionable[40]). If this argument were carried to its extreme, the end of all international law could be foreseen. Due to the absence of a general international jurisdiction having an obligatory character, other legal disputes between States at the present time also

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[40]) An animated discussion arose within the ILC when in 1962 a new proposal elaborated by the Drafting committee expressly stated (art. 18 *bis*, para. 1 (b), see YBILC 1962, vol. I, p. 225) that even reservations inadmissible under the incompatibility rule shall be subject to acceptance. Objection to this proposal was expressed – all opinions referred to being recorded in YBILC 1962, vol. I – by Ago, 663rd meeting, paras. 79 and 86, and 664th meeting, paras. 5 and 21; Castrén, 663rd meeting, para. 70; Gros, 664th meeting, paras. 8 and 40; Verdross, 663rd meeting, para. 63; supporters were Tunkin, 663rd meeting, para. 82, and de Luna, 663rd meeting, para. 84. During the 1965 session the issue was scarcely paid attention to, although Waldock asked for more guidance from the Commission, see YBILC 1965, vol. I, 799th meeting, para. 65, openly recognising the contradiction inherent in the projected system which expressly prohibits reservations incompatible with the object and purpose of a treaty but sees no obstacle to the admission of the acceptance of such reservations, see *ibid.*, 813th meeting, para. 44. There is even doubt if all the members of the ILC themselves were perfectly conscious about the state of law to be created by the draft, see Elias, YBILC 1965, vol. I, 798th meeting, para. 64, and Lachs, 813th meeting, para. 43. – Critical observations on the solution proposed by the ILC were also made by Great Britain and by the U.S.A., see ILC Reports 1966, pp. 168 resp. 174.

frequently remain unresolved. The ILC proposal is only understandable in connection with the decision of the I.C.J. in the Genocide case, where the unique situation has occurred that special rules were established for the appraisal of a difficult legal situation.

(27) To sum up, under the régime proposed by the ILC a minority of only slightly more than one third of the States participating in a State conference will in the future be able to block the insertion of a reservation clause into the treaty text; this minority vote will make the right to formulate reservations unlimited because even the reservation incompatible with the object and purpose of a treaty is intended to be subject to acceptance (art. 17, para. 4). This solution certainly has the merit of clarifying the legal situation; the price to be paid for it, however, appears rather high. If a solution primarly inspired by the idea of clarity is deemed necessary, one cannot help considering alternatively if it would not be better to make a collective vote of the contracting States the decisive factor.

(28) Conditioning reservations upon the consent of all contracting States is a proposal already rejected by the ILC[41]) and is hence beyond the scope of the present study. Nevertheless, arguments can be advanced in favour of adopting the principle of a collective decision in a modified form, namely, by changing the consent necessary for reservations to take effect from a positive into a negative condition[42]). Thus, the opposition coming from a certain part of the contracting States concerned would be the element of concern. Since according to art. 17, para. 5, silence is generally deemed to be consent, the realisation of this suggestion would certainly involve only minor differences compared with the propositions already rejected, only a formal disapproval producing the legal effects of an objection under art. 17, para. 4 (b). Yet, it would then be clear that the acceptance of a treaty, if restricted by a reservation, would at least provisionally be effective. Justification of such a provisional admission to the treaty could be drawn from the fact that, in general, reservations can be assumed to be in conformity with the treaty and that the discomfort alone connected with a formal protest efficiently prevents reservations being made for futile motives. Accordingly, access to the legal benefits resulting from a contractual régime would be barred to a reserving State only in exceptional cases of particular weight. However, obviously a time limit would have to be set for such objections which could lead to the total exclusion of a reserving State; for it is inadmissible to deprive a State

[41]) See the Commentary on arts. 16–17, paras. 11 and 12.
[42]) See Bartoš, YBILC 1962, vol. I, 654th meeting, para. 56.

of its contractual rights and obligations after it has already been a party to the treaty for many years.

(29) There should be even less hesitation against entrusting the contracting parties themselves with the decision on the admissibility of reservations since the collective disapproval of a reservation, as a rule, does not prevent a party, which is in disagreement with the majority, from initiating relations with the State author of the reservation at issue, by making the multilateral treaty in its modified form the rule of law for their mutual relationship. On the other hand, it is difficult to subscribe to the idea that even States declaring a reservation which does not pass the compatibility text should, by the mere consent of one single State, be the beneficiary of all legal advantages offered by the treaty[43]); one such advantage, for example, is the right to receive information material, statistics or scientific studies which are not unfrequently worked out in connection with the operation of a treaty. The greatest stumbling-block, however, is the right to decide over the life of the treaty, which right relative members also possess. Finally, the very purpose of treaty membership is certainly questionable when express objection to a reservation has been raised by a high percentage of the contracting States.

X. Conclusion

(30) The conclusions to be drawn from the preceding observations can be summarised as follows:

1. Art. 16 (a) should only refer to reservations expressly prohibited.

2. Likewise, art. 17, para. 1, should be restricted to reservations expressly authorised by the terms of the treaty. Special provision could then be made for treaties prohibiting specific reservations, if it is considered that such treaties impliedly admit other reservations.

3. The drafting of art. 17, para. 4, should be modified in order to make clear what are those "cases not falling under the preceding paragraphs". Simultaneously, due consideration must be given to the question whether art. 17, para. 4, should also apply to reservations prohibited under art. 16 (c) or whether a collective vote of the contracting States on the admissibility of reservations would be preferable.

4. If it is determined that the compatibility rule is subject to the pro-

[43]) Jiménez de Aréchaga, YBILC 1962, vol. I, 653rd meeting, paras. 43 and 44, contests the opinion that differences exist between a bilateral treaty relationship and a relative membership to a multilateral treaty. See also O. J. Lissitzyn, Efforts to Codify or Restate the Law of Treaties, Columbia Law Review, vol. 62 (1962), pp. 1166, 1203 *et seq.*

visions of art. 17, para. 4, then it would be preferable to eliminate the rule since under these circumstances it would be only a meaningless declamation. On the other hand, if it is determined that the compatibility rule is not subject to the provisions of art. 17, para. 4, then the restriction of art. 16 (c) to "cases where the treaty contains no provisions regarding reservations" should be dropped.