

Forum:
**The GDR Declaration on the UN Convention
against Torture**

**A Controversial Declaration on the U.N.
Convention Against Torture**

*Massimo Cocchia **

I. Introduction

On 10 December 1984, after a seven-year drafting endeavour by an *ad hoc* working group, the General Assembly of the United Nations, by consensus, adopted Resolution no. 39/46 embodying the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention"), thus opening it for signature or ratification.¹ In accordance with Article 27(1), the Convention entered into force on 26 June 1987, one month after the twentieth ratification. By 31 May 1989, forty-two states had become parties to the Convention.²

On 9 September 1987, the German Democratic Republic deposited with the U.N. Secretary-General an instrument of ratification containing two reservations and a statement formally defined as a "declaration."³ With the first reservation, made in accordance with Article 28(1) of the Convention, the German Democratic Republic refuses to recognize

* Libera Università Internazionale degli Studi Sociali (LUISS), Rome.

1 United Nations, Official Records of the General Assembly, Thirty-ninth session, Supplement No. 51 (A/39/51) at 197.

2 This and other factual information courtesy of the Legal and Treaty Service of the Italian Ministry of Foreign Affairs.

3 United Nations, *Multilateral Treaties Deposited with the Secretary-General*, Status as of 31 December 1987, at 174-275 [hereinafter *Multilateral Treaties*]. The question of the true nature of the German Democratic Republic statement (i.e., whether it should be seen as a reservation or a declaration) will be dealt with *infra*; given the inherent uncertainty of either characterization, in this paper a neutral term such as "statement" will be generally preferred.

U.N. Convention Against Torture

the competence of the Committee against Torture (the "Committee") provided for in Article 20 of the Convention.⁴ The second reservation, made in accordance with Article 30(2) of the Convention, exempts the German Democratic Republic from being bound by the dispute settlement procedure provided for in Article 30(1) and involving a possible resort to arbitration or to the International Court of Justice by unilateral application.⁵ The third statement contained in the instrument of ratification is not made under any specific reservation clause of the Convention and reads as follows:

The German Democratic Republic declares that it will bear its share only of those expenses in accordance with Article 17, Paragraph 7, and Article 18, Paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic.⁶

Several parties to the Convention (thirteen states as of 31 May 1989) subsequently deposited with the U.N. Secretary-General their objections to this statement, using various formulations. The first group of objecting states⁷ considers the German Democratic Republic statement inadmissible since it is implicitly prohibited by the Convention, due to Article 19(b) of the Vienna Convention on the Law of Treaties (the "Vienna Convention"). Another group of states⁸ considers it to be inadmissible as it is incompatible with the object and purpose of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment in terms of Article 19(c) of the Vienna Convention. Still other

- 4 Article 28 reads as follows:
1. Each state may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in Article 20.
 2. Any State Party having made a reservation in accordance with Paragraph 1 of this Article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.
- 5 Article 30 reads as follows:
1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
 2. Each state may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound under Paragraph 1 of this Article. The other States Parties shall not be bound by Paragraph 1 of this Article with respect to any State Party having made such a reservation.
 3. Any State Party having made a reservation in accordance with Paragraph 2 of this Article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.
- 6 *Multilateral Treaties, supra* note 3, at 175. The French text is perhaps slightly clearer, reading as follows: "La République démocratique allemande déclare qu'elle ne participera à la prise en charge des dépenses visées au paragraphe 7 de l'article 17 et au paragraphe 5 de l'article 18 de la Convention que dans la mesure où elles résultent d'activités correspondants à la compétence que la République démocratique allemande reconnaît au Comité"; Nations Unies, *Traité multilatéraux déposés auprès du Secrétaire Général, état au 31 décembre 1988*, at 189 [hereinafter *Traité multilatéraux*].
- 7 Greece and Spain (see *id.* at 192-293) and Italy (see *infra* note 25).
- 8 France, Luxembourg, Sweden, Canada and Switzerland; see *Traité multilatéraux, supra* note 6, at 192-93.

states⁹ have objected to the German Democratic Republic statement without making explicit reference to either of the aforementioned rationales. None of the objections was formulated in such a way as to preclude, in terms of Article 20(4)(b) of the Vienna Convention, the entry into force of the Convention between the German Democratic Republic and the objecting states.

II. The Implementation System of the Convention

In order to assess the scope of the German Democratic Republic statement, it is appropriate to outline briefly the Convention's structure and the Committee's implementation functions.¹⁰

The Convention is divided into three parts, in addition to a five-paragraph preamble. Part I (Articles 1-16) deals with the substantive provisions, including *inter alia* a comprehensive definition of torture, the provision of universal criminal jurisdiction over torturers, and the espousal of the extradition principle *aut punire aut dedere*. Part II (Articles 17-24) covers the implementation provisions establishing the Committee – a supervisory body consisting of ten independent experts appointed by the Parties and acting in their individual capacity – and providing for its competences. Part III (Articles 25-33) contains the usual final clauses concerning ratification, entry into force, amendments and the like; in particular, it includes the two aforementioned reservation clauses concerning the competence of the Committee and the judicial settlement of disputes.

Under Part II of the Convention, the Committee has been granted the authority to exercise four kinds of monitoring and implementing functions.¹¹ First of all, in accordance with Article 19, the Committee is to receive and consider periodical state reports – one every four years – concerning the internal measures that have been taken to implement the Convention. The Committee may make comments on individual reports and forward them to the states concerned, which in turn may reply. The Committee can include its comments and the states' counter-observations in its annual report to the General Assembly.¹²

Secondly, in accordance with Article 20, if the Committee receives reliable information about systematic torture practices within a State Party, it may institute confidential proceedings (if possible, in cooperation with the state under scrutiny) involving consultation, requests for information, inquiries and, with the agreement of the state concerned, a fact-finding mission to its territory. A brief account of these proceedings may be inserted in the annual report to the General Assembly.

⁹ Austria, Denmark, Netherlands, Norway and United Kingdom; in fact, the United Kingdom has not made a formal objection but rather a declaration of rejection of any legal effect possibly arising from the German Democratic Republic statement. See *id.* at 192-294.

¹⁰ For a thorough overview of the Convention and of its *travaux préparatoires* see Burgers & Danelius, *The United Nations Convention against Torture* (1988). See also Chanet, 'La Convention des Nations Unies contre la torture et autres peines ou traitements cruels, inhumains ou dégradants', 30 *Annuaire français de droit international* (1984) 625; Donnelly, 'The Emerging International Regime against Torture', 33 *Netherlands International Law Review* (1986) 1.

¹¹ See Nowak, 'The Implementation Functions of the UN Committee against Torture', in Nowak, Steurer, Tretter (eds.), *Fortschritt im Bewußtsein der Grund- und Menschenrechte. Festschrift für Felix Ermacora* (1988) 493.

¹² See the first report of the Committee against Torture, United Nations, *Official Records of the General Assembly*, Forty-third session, Supplement No. 46 (A/43/46).

U.N. Convention Against Torture

Thirdly, in accordance with Article 21, the Committee may examine a written communication from a Party alleging that another Party is not fulfilling its obligations under the Convention. Following such a communication, if the interested states do not settle the matter through direct negotiations, the Committee makes available its good offices or, when appropriate, sets up an *ad hoc* conciliation commission.

Finally, in accordance with Article 22, the Committee may consider communications from individuals (who have exhausted all local remedies which are not unreasonably long or ineffective) claiming to be victims of a Party's violation of an obligation under the Convention. The Committee examines such individual communications in closed meetings and the state concerned is required to submit explanations on the matter.

Of these four implementation procedures, only the first one – the reporting system under Article 19 – is mandatory for all States Parties. Resort to the procedure under Article 20 may be excluded by an *ad hoc* reservation, while the competence of the Committee to receive complaints by states and by individuals under Articles 21 and 22 must be explicitly accepted.

As the German Democratic Republic made the aforementioned reservation to the procedure under Article 20 and did not submit to the procedures under Articles 21 and 22, the only competence of the Committee that the German Democratic Republic has actually recognized is the one under Article 19.

III. The Financial Provisions

Under Articles 17(7) and 18(5) of the Convention, the Parties are bound to pay directly for all meetings of the States Parties and for all the expenses of the Committee, and to reimburse the United Nations for the expenses incurred in providing (in accordance with Article 18(3)) the Committee with the necessary staff and facilities.¹³

As to the apportionment of the contributions, the Parties decided at their first meeting after the entry into force of the Convention¹⁴ that the annual expenses were to be shared among the Parties in proportion to the general contributions to the United Nations, provided that no state would have to pay more than 25% of the total budget. Taking into account the well-known financial crisis of the United Nations, the Parties also decided that activities under the Convention, such as meetings of the Committee, would not take place until adequate funding was actually provided for by the Parties.¹⁵ It should be noted *prima facie* that the concept itself of a global assessment of the annual expenses logically excludes any distinction implying the attribution of a given expense or contribution to a specific function of the Committee.

¹³ Article 17(7) reads as follows:
States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18(5) which derives from an amendment proposed by the United States and supported, among others, by the USSR (Burgers & Danelius, *supra* note 10, at 87), reads as follows:
The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to Paragraph 3 of this Article.

¹⁴ Meeting of 26 November 1987, Summary Records (U.N. Doc. CAT/SP/SR.1).

¹⁵ See *id.*; see also Burgers & Danelius, *supra* note 10, at 112-213. It should be noted that the expected amount of annual expenses for the coming years is not less than one million dollars.

IV. The Scope and Nature of the German Democratic Republic Statement

In practical terms, the quoted statement would appear to mean that the German Democratic Republic is willing to contribute only to the expenses incurred in connection with the Parties' meetings and with the Committee's functions under Article 19. The expenses related to any of the other aforementioned Committee's competences (such as, for example, fact-finding missions under Article 20) would thus have to be apportioned without taking into account the German Democratic Republic share. This would obviously imply that all of the other Parties to the Convention would have to pay an additional amount to replace the portion of contribution not paid by the German Democratic Republic. There is no doubt that this is the result that the German Democratic Republic eventually hopes to achieve by means of its statement. However, the legal effect and admissibility of the German Democratic Republic statement vary depending on whether it is considered a mere declaration of intention or a true reservation.¹⁶

In the first case, that is, if the German Democratic Republic statement is regarded as a declaration, the declaration would simply serve notice to the other Parties that the German Democratic Republic might not meet all of its financial obligations once they become due. This position would obviously herald a possible dispute between the German Democratic Republic and the other Parties but, for the time being, it would not affect any rights or obligations arising from the Convention. By definition, the rules on reservations codified in the Vienna Convention would not apply and the objections of the other Parties would do no more than warn the German Democratic Republic of the position that they might take in any potential dispute. In any event, the other Parties would not need to make formal objections to preserve their rights, since even a complete lack of reaction could not be taken as implying their acquiescence. The United Kingdom has in fact taken a position of this kind, declaring upon ratification that it does not regard the German Democratic Republic declaration "as affecting in any way the obligations of the German Democratic Republic as a State Party to the Convention . . . and do[es] not accordingly raise objections to it." The U.K. "reserve[d] the rights of the United Kingdom in their entirety in the event that the said declaration should at any future time be claimed to affect the obligations of the German Democratic Republic as aforesaid."

In the second case, that is, if the German Democratic Republic statement is regarded as a true reservation, the making of the statement alters the legal relationship between the German Democratic Republic and the other Parties to the Convention. The relevant rules of the Vienna Convention and of general international law would certainly apply,¹⁷

¹⁶ The distinction between mere declarations (of interpretation, intention or policy) and reservations has been widely accepted in state practice and, as Professor Bowett puts it, "[h]owever elusive the distinction may be in certain cases, the consequences of the distinction are important." Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 48 *British Yearbook of International Law* (1976-77) 69. This distinction has been implicitly accepted in the Vienna Convention through the definition of reservation contained in Article 2(1)(d). As the special rapporteur Waldock noted in his first report to the International Law Commission, "[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty which does not amount to a variation in the legal effect of the treaty does not amount to a reservation"; United Nations, 2 *Yearbook of the International Law Commission* (1962) 31.

¹⁷ The German Democratic Republic acceded to the Vienna Convention on the Law of Treaties on 20 October 1986; United Nations, *Multilateral Treaties Deposited with the Secretary-General*,

U.N. Convention Against Torture

and the rights and obligations of the German Democratic Republic and the other Parties, or prospective Parties, would then be modified by the interplay between the reservation and the objections or acceptances.

In order to determine whether the German Democratic Republic statement is a mere declaration or a true reservation, both the objective element of the text of the statement and the subjective element of the German Democratic Republic's intention should be considered.¹⁸ A *bona fide* reading of the actual language used by the German Democratic Republic would lead one to conclude that the statement is indeed an attempt to unilaterally "modify the legal effect" of the financial provisions of the Convention and should thus be regarded as a true reservation in accordance with Article 2(1)(d) of the Vienna Convention.¹⁹ Moreover, both the wording of the statement and the attitude taken by the German Democratic Republic during discussions within various U.N. bodies²⁰ seem to indicate that the German Democratic Republic considers its statement to be a specific condition on which its acceptance of the Convention is based, rather than just a way of recording an advance warning of a potential future claim.

However, the German Democratic Republic deliberately inserted an element of deliberate ambiguity in its statement²¹ by labeling it a "declaration", probably because of the dubious admissibility of a reservation of that kind (as will be seen *infra*). In accordance with Article 2(1)(d) of the Vienna Convention the label should normally be disregarded, since a statement "however phrased or named" should be considered as a reservation depending only on its content. Still, in the absence of a specific clarification by the German Democratic Republic as to its true intention (and in light of the relevance of the subjective element of the statement), any legal characterization of its statement cannot be considered conclusive.²²

Status as to 31 December 1987, at 767. The bulk of the Vienna Convention rules on reservations is often regarded by states as substantially corresponding to general international law. As Professor Gaja notes, however, state practice has also developed some rules which are integrative of the Vienna Convention system and others which deviate from it. See Gaja, 'Unruly Treaty Reservations', 1 *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (1987) 307.

18 See McRae, 'The Legal Effect of Interpretative Declarations', 49 *British Yearbook of International Law* (1978) 161-62.

19 As an example of application in international practice of the Vienna Convention definition of reservation see the arbitration case concerning the *Delimitation of the Continental Shelf (U.K. v. France)*, in 18 *United Nations Reports of International Arbitral Awards* (1977), paras. 38, 55, 58, 61.

20 See, for example, the position taken by the German Democratic Republic before the U.N. Commission on Human Rights on 29 February 1988 (E/CN.4/1988/SR.52, at 25).

21 As Professor Gaja remarks: "One of the difficulties in ascertaining the effects of interpretative or other statements is that there often is a *deliberate ambiguity* in the intention of the states that make them." Gaja, *supra* note 17, at 319 (emphasis added).

22 In the recent *Belilos* case the European Court of Human Rights recognized "la nécessité de rechercher quelle était l'intention de l'auteur de la déclaration" in order to determine whether a Swiss statement styled as an interpretative declaration was in law a reservation.

V. The Admissibility of the German Democratic Republic Statement

No question of admissibility can logically be raised if the German Democratic Republic statement is deemed to be a mere declaration of intention. States can always express their policy views without affecting their or other states' rights and obligations, even though policy statements can sometimes produce legal effects, such as that of estoppel.

If, on the contrary, the German Democratic Republic statement is regarded as a reservation, the issue of its admissibility ought to be taken into account. It should be considered, first, whether this kind of reservation is allowed by the Convention and, second, whether it is compatible with the Convention's object and purpose.

The first question is, in other words, whether the Convention implicitly prohibits reservations differing from those expressly authorized by Articles 28(1) and 30(2). Under Article 19(b) of the Vienna Convention a state may not formulate a reservation when a treaty "provides that only specified reservations, which do not include the reservation in question, may be made."

It must be acknowledged that the Convention does not include a provision explicitly stating that only those two reservations which are specified are allowed.²³ Therefore, it could be argued that all kinds of reservations are allowed by the Convention in addition to those expressly mentioned (the only limitation being that of the "compatibility rule" of Article 19(c) of the Vienna Convention). However, if all of the provisions of the Convention were subject to reservations, the insertion of the two mentioned reservation clauses would be of little use and would make little sense.²⁴ As an illustration, if states were free to make additional reservations, even the reporting system of Article 19 of the Convention (the lightest of the four implementation procedures) would in fact lose its mandatory character. Given the unreasonableness of such a result, it would seem perhaps more appropriate to interpret the Convention's authorization of two specific reservations as an implicit prohibition of reservations of any other kind. The governments of Greece, Italy and Spain have in fact taken this stand and have objected to the German Democratic Republic statement as being a reservation inadmissible under Article 19(b) of the Vienna Convention.²⁵

23 The word "only" in Article 19(b) of the Vienna Convention was not included in the corresponding Article 16(b) of the final draft of the International Law Commission; see United Nations, *Yearbook of the International Law Commission* (Vol. II) (1966) 202. It was added at the Vienna Conference through an amendment proposed by the Polish delegation in order to restrict the scope of such prohibition by implication; United Nations, *Conference on the Law of Treaties*, 1st Session, Summary Records of the Meetings of the Committee of the Whole, at 110.

24 The only reason for inserting the reservation clauses (while leaving states free to add any other reservations they wish) would be that whereas reservations not specified in the Convention require subsequent acceptance by the other Parties, the two reservations authorized by the Convention require no such acceptance under Article 20(1) of the Vienna Convention.

25 See the Greek and Spanish objections, *supra* note 7. The original text of the Italian objection, which was deposited with the U.N. Secretary-General on 12 January 1989, reads as follows: "Le Gouvernement de l'Italie déclare qu'il fait objection à la réserve faite par la République démocratique d'Allemagne . . . La Convention n'autorise que les réserves indiquées aux articles 28(1) et 30(2). La réserve de la République démocratique d'Allemagne n'est pas, par conséquent, admissible aux termes de l'article 19(b) de la Convention de Vienne sur le droit des traités de 1969."

U.N. Convention Against Torture

Even assuming that the German Democratic Republic statement is not implicitly prohibited by the Convention, its admissibility might perhaps be questioned as a result of the compatibility rule contained in Article 19(c) of the Vienna Convention. In order to determine the object and purpose of the U.N. Convention against Torture, it cannot be overlooked that a rule of general international law forbidding torture and other cruel or inhuman treatments can be safely assumed to exist.²⁶ Several instances of international practice show that resort to torture has long been considered by states as one of the most hideous human rights violations.

One instance of such international practice is the fact that not only are provisions forbidding torture inserted in all human rights instruments of a general character,²⁷ but this kind of provision is one of the few to which no derogation is permitted in time of emergency (Article 4 of the Covenant on Civil and Political Rights and Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Reference may also be made to the law of war, where torture and inhuman treatment are included among the specially sanctioned "serious violations" in the four 1949 Geneva Conventions on humanitarian law.²⁸ It may also be recalled that Article 6 of the Charter of the Nürnberg Tribunal characterizes as a war crime the "ill-treatment" of the civilian population or prisoners of war and that the U.N. General Assembly in 1946 unanimously adopted a Resolution solemnly affirming as principles of international law the norms recognized by that Charter.²⁹

Moreover, on 9 December 1975 the U.N. General Assembly adopted by consensus the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁰ formulating a detailed set of principles to be respected and measures to be taken and stating explicitly that "[a]ny act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations." It may also be recalled that the thirty-five states participating in the Conference on Security and Cooperation in Europe have quite recently inserted in the Concluding Document of the Vienna Meeting a strong political commitment against torture and other cruel, inhuman or degrading treatments, thus closing a serious gap in the 1975 Helsinki Final Act.³¹

²⁶ Many observers share this view. See, e.g., A. Cassese, *International Law in a Divided World* (1986) 182, 314; Meron, 'On a Hierarchy of International Human Rights', 80 *American Journal of International Law* (1986) 4, 11, 15; Donnelly, *supra* note 10, at 3, 21-23.

²⁷ See Article 5 of the Universal Declaration of Human Rights, Article 7 of the Covenant on Civil and Political Rights, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5 of the American Convention on Human Rights, and Article 5 of the African Charter on Human and Peoples' Rights.

²⁸ See Article 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick Shipwrecked Members of the Armed Forces at Sea, Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War and Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

²⁹ See Resolution No. 95 of 11 December 1946, United Nations, *Official Records of the General Assembly*, First Session, Doc. A/64/Add. 1, at 188.

³⁰ United Nations, *General Assembly Resolution No. 3452 (XXX)*.

³¹ See Paragraph 23 of the subchapter devoted to principles in the *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relat-*

Finally, not only do all states have domestic provisions, usually of a constitutional character, forbidding torture and other cruel or inhuman treatments, but they constantly reassert in public their condemnation of such actions as wrongful and unjustifiable.³² Even when states have been directly accused of torture practices, they have always denied the allegations and usually stressed their belief in the illegality of torture and emphasized their national laws banning torture.³³ It has even been affirmed by some states that the prohibition of torture has acquired the status of *jus cogens*.³⁴ There have also been some instances of domestic courts recognizing that torture is forbidden by general international law, as in the well-known United States case of *Filartiga v. Pena-Irala*.³⁵

In light of the extensive practice showing that states regard the prohibition of torture as pertaining to general international law, the object and purpose of the U.N. Convention against Torture can be better identified. Whereas the object of the Convention appears to be quite simply protection against torture and other cruel or inhuman treatments, the purpose seems to be twofold. On the one hand, the Convention refines and brings more clarity and certainty to the already existing substantive rules of international law. On the other hand, as its primary aim, the Convention adds strength to the existing rules by means of a specific implementation system, in order to ensure their practical application and true respect.

This main purpose of the Convention has been correctly identified by several authors³⁶ and appears to be decisively confirmed both by General Assembly Resolution no. 39/46 which adopts the Convention, and by the Convention itself. The General Assembly adopted the Convention, being "[d]esirous of achieving a more effective im-

ing to the Follow-up to the Conference, (1989), at 81-82. See Arangio-Ruiz, 'Human Rights and Non-Intervention in the Helsinki Final Act', 157 *Recueil des Cours de l'Académie de Droit International* (1977) 195-331.

32 See, for example, the statements recently rendered before the U.N. Commission on Human Rights by the following states: Bulgaria (E/CN.4/1988/SR.30/Add.1, at 8), Egypt (*id.* at 11), Byelorussia (*id.* at 7), Norway (E/CN.4/1988/SR.31, at 2), German Democratic Republic (*id.* at 4), USSR (*id.*), Cyprus (*id.* at 5), Zaire (*id.* at 14), Venezuela (E/CN.4/1988/SR.32, at 17), Philippines (*id.* at 19), Italy (*id.* at 22), Turkey (*id.* at 24), Cuba (*id.* at 25), Afghanistan (E/CN.4/1989/SR.29, at 12) and Portugal (E/CN.4/1988/SR.30, at 15).

33 See, for example, the response dated 27 April 1981 given to Amnesty International by Iraq through its London ambassador, *Amnesty International, Annual Report 1981* (1982) 360; the letter dated 7 March 1974 addressed to the Chairman of the U.N. Commission on Human Rights from the permanent representative of Chile to the U.N., reprinted in Lillich & Newman (eds.), *International Human Rights: Problems of Law and Policy* (1979) 294-96; and the letter dated 12 August 1973 addressed to the U.N. Secretary-General from the permanent representative of Greece to the U.N., *id.* at 354-57.

34 For instance, the Cyprus representative made the following remark on 28 February 1989 before the U.N. Commission on Human Rights: "Torture, which essentially amounted to the total denial of the most basic and fundamental human rights, was generally and unequivocally condemned and absolutely prohibited under contemporary international law. The prohibition of torture should thus be regarded as belonging to the rule of *jus cogens*, as an international obligation of states *erga omnes*, a rule from which no derogation could be accepted" (E/CN.4/1989/SR.30, at 13).

35 630 F.2d 876 (2nd Cir. 1980).

36 See, for example, Burgers & Danelius, *supra* note 10, at 1 ("Many people assume that the *Convention's* principal aim is to outlaw torture and other cruel, inhuman or degrading treatment or punishment... On the contrary, the *Convention* is based upon the recognition that the above-mentioned practices are already outlawed under international law. The principal aim of the

U.N. Convention Against Torture

plementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment.”³⁷ In addition, the Preamble to the Convention explicitly refers to the fact that the States Parties have agreed on the Convention “[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”³⁸

It thus seems clear that this Convention has been drafted keeping in mind, on the one hand, the already existing rule of general international law forbidding torture and, on the other hand, the persisting widespread violations of this basic human right by states of all geographical areas, political systems and economic levels.³⁹ After four decades of drafting and refining substantive rules on human rights, the international community is bound to pursue an approach focused on dissuasion through procedural mechanisms in order to bring about a more effective protection of human rights.⁴⁰ This would appear to be the course taken recently, with reference to torture, both by the U.N. Convention and by the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which, significantly enough, contains only a control system with no substantive rules at all.⁴¹ The importance of the effective functioning of the bodies established to supervise the implementation of international human rights instruments has been recently stressed by several states,⁴² including some states which have been notoriously reluctant to submit to international scrutiny in the field of human rights.⁴³

Given the increasing importance attributed to implementation machinery by various components of the international community⁴⁴ and the related primary purpose of the U.N. Convention against Torture, a reservation directed at impairing the Convention's

Convention is to strengthen the existing prohibition of such practices by a number of supportive measures”; see also, Donnelly, *supra* note 10, at 1, 23.

³⁷ See *supra* note 1 (emphasis added).

³⁸ *Id.* (emphasis added).

³⁹ See *Amnesty International, Torture in the Eighties* (1984).

⁴⁰ See Capotorti, 'Human Rights: The Hard Road Towards Universality', in McDonald & Johnston (eds.), *The Structure and Process of International Law* (1983) 977-1000 ("An effective body of international rules regarding human rights cannot do without international measures of implementation; in other words, without control machineries").

⁴¹ See the text of the 1987 European Convention in 9 *European Human Rights Reports* (1987) 161-68. For a comment on this new approach to human rights based merely on prevention and procedural mechanisms, see Cassese, 'A New Approach to Human Rights: The European Convention for the Prevention of Torture', 83 *American Journal of International Law* (1989) 128.

⁴² See, for example, the statement recently made before the U.N. Commission on Human Rights by the following states: Federal Republic of Germany (E/CN.4/1988/SR.22, at 11), United Kingdom (E/CN.4/1989/SR.15, at 4-6), Yugoslavia (E/CN.4/1989/SR.20, at 13), Austria (E/CN.4/1989/SR.31, at 16).

⁴³ See, for instance, the significant declarations made by the USSR and Hungarian representatives on 20 February 1989 before the U.N. Commission on Human Rights (E/CN.4/1989/SR.19, at 11 and 15). The USSR has even recently accepted the jurisdiction of the International Court of Justice with reference to six human rights treaties (including the U.N. Convention against Torture); see the letter dated 28 February 1989 from the Soviet Minister for Foreign Affairs to the U.N. Secretary-General, reprinted in 83 *American Journal of International Law* (1989) 457.

⁴⁴ The U.N. Under-Secretary-General for Human Rights recently stated before the U.N. Commission on Human Rights: "The implementation of human rights instruments and norms lay at the heart of the international community's human rights programme" (E/CN.4/1989/SR.1, at 7).

implementation system could perhaps be considered inadmissible under Article 19(c) of the Vienna Convention. In fact, the German Democratic Republic's attempt to limit its financial obligations could, as other states remarked, "undermine the efficient functioning of the monitoring machinery established by the Convention"⁴⁵ or even "jeopardize the existence and operation of the Committee and the effectiveness of the Convention itself."⁴⁶ Although the amount of contributions potentially withheld by the German Democratic Republic would probably not in itself prevent the functioning of the Committee altogether, the recognition of a right to withhold contributions in this manner could lead to grave and unmanageable consequences since the same right would obviously accrue to any other state acceding to the Convention.

Moreover, as observed earlier, Articles 17(7) and 18(5) of the Convention refer to "expenses" without providing any further qualification of such expenses or any distinction between different competences of the Committee. The financial system of the Convention is based on the concept of a global amount of expenses incurred every year by the States Parties in their meetings and by the Committee in its activities, without implying any causal link between given expenses or contributions and specific functions of the Committee.⁴⁷ The States Parties in fact decided that all activities envisaged under the Convention would not take place until sufficient funds were made available.⁴⁸ Therefore, any reduction of the contributions could not be actually aimed at specific implementation functions and would result in financial difficulties of the Committee in connection with all of its activities.

The German Democratic Republic has justified its controversial statement as "a logical consequence of the reservations it had entered with respect to certain functions of the Committee established under the Convention."⁴⁹ This justification seems to be misplaced, since the German Democratic Republic did not refuse to acknowledge that the Committee can perform certain functions *vis-à-vis* the Parties that accept the pertinent competences. It is one matter for a State Party not to recognize certain competences of the Committee towards itself (which is an attitude allowed by the Convention), but quite another matter not to recognize these competences with respect to the other States Parties (which is something that those other Parties determine for themselves). The G.D.R. statement (by which the German Democratic Republic would end up not paying for expenses deriving from procedures related to other Parties) would be a "logical consequence" of the second kind of non-recognition rather than of the first. The only legiti-

45 Statement made on 17 February 1989 by the representative of Sweden before the U.N. Commission on Human Rights; E/CN.4/1989/SR.28, at 3.

46 Statement made on 23 February 1988 by the representative of Belgium before the U.N. Commission on Human Rights; E/CN.4/1989/SR.31, at 8.

47 The International Court of Justice addressed an analogous issue in its advisory opinion on 'Certain Expenses of the United Nations', *ICJ Reports* (1962) 151-80. The Court noted that Article 17 of the U.N. Charter referred to "budget" and "expenses" without any further explicit qualification and asserted that "[s]ince no such qualification is expressed on the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter." If one applies such a test to the Convention, there would appear to be no justification for reading into the text of the Convention any distinction or qualification related to the word "expenses."

48 See *supra* notes 14 and 15.

49 Statement made on 23 February 1988 before the U.N. Commission on Human Rights, E/CN.4/1988/SR.31, at 4; see also the analogous statement of 8 March 1988, E/CN.4/1988/SR.52, at 25.

U.N. Convention Against Torture

mate way not to recognize certain functions of the Committee towards all the other States Parties and, consequently, not to pay for the related expenses, would seem to be not to participate in the Convention at all. Since the German Democratic Republic did become a Party, its financial attitude might perhaps be regarded as not wholly compatible with the object and purpose of the Convention, as several Parties have explicitly or implicitly pointed out in formulating their objections.⁵⁰

VI. The Effects of the German Democratic Republic Statement and of the Related Objections

Since the Committee has not yet exercised any of its implementation functions under Articles 20, 21 and 22 of the Convention, the German Democratic Republic has so far regularly paid its dues. Nevertheless, it is likely that the States Parties will sooner or later be confronted with the legal and financial problems raised by the German Democratic Republic's attitude.

None of the objecting states has indicated that it regards the German Democratic Republic as not having become a party to the Convention as a result of its inadmissible reservation. This is not surprising with respect to the states that have objected to the German Democratic Republic reservation by making reference to the compatibility rule of Article 19(c) of the Vienna Convention, for it is generally maintained that "incompatible" reservations do not nullify the act of ratification of the reserving state and are instead subject (just like admissible reservations) to the rules on acceptance or rejection of Article 20 of the Vienna Convention.⁵¹ Interestingly, even the three states that consider the German Democratic Republic statement as a reservation prohibited under Article 19(b) of the Vienna Convention have explicitly (Greece) or implicitly (Italy and Spain) accepted the establishment of treaty relations *vis-à-vis* the German Democratic Republic. This implies that they regard the German Democratic Republic's consent to be bound by the Convention as legally effective in spite of the prevalent theory that reservations prohibited by the treaty itself render ineffective the act of ratification to which they are attached.⁵²

It might be assumed that the objecting states' attitude derives from the humanitarian character of the Convention and the consequent little purpose of opposing the establishment of treaty relations with the German Democratic Republic. In any event, given the entry into force of the Convention between all States Parties, the legal and practical effects of acquiescence to, or rejection of, the German Democratic Republic reservation should be ascertained in accordance with Article 21 of the Vienna Convention.

⁵⁰ See *supra* notes 8 and 9. According to Edwards, 'Reservations to Treaties', 10 *Michigan Journal of International Law* (1989) 362, since the "concept of a multi-lateral treaty as a matrix of bilateral relations, embodied in Articles 20(4) and 21 of the Vienna Convention, is inappropriate to ... treaty provisions ... relating to the ... financing of shared central institutions", the German Democratic Republic declaration is "incompatible with the object and purpose of the treaty under the rule stated in Article 19(c) and [is] inadmissible with respect to all parties." He also remarks that "[i]f the financial burdens are to be redistributed, it should be done by an amendment of the Convention, not through a reservation."

⁵¹ See P.-H. Imbert, *Les réserves aux traités multilatéraux* (1979) 137-40; Ruda, 'Reservations to Treaties', 146 *Recueil des Cours de l'Académie de Droit International* (1975) 182; Gaja, *supra* note 17, at 314-18. But see Bowett, *supra* note 16, at 77, 83.

⁵² See Capotorti, 'Il diritto dei Trattati secondo la Convenzione di Vienna', in *Convenzione di Vienna sul diritto dei trattati* (1969) 27; Gaja, *supra* note 17, at 314.

As to the Parties that have not objected or will not object to the German Democratic Republic reservation, after a certain period – not necessarily the twelve months of Article 20(5) of the Vienna Convention⁵³ – they should be deemed to have acquiesced in the German Democratic Republic's modification of the financial provisions of the Convention, in accordance with Article 21(2) of the Vienna Convention. In practical terms, the acquiescing Parties will have to pay an additional contribution deriving from the apportionment among themselves of the amount withheld by the German Democratic Republic.⁵⁴

As to the Parties that did, or will, object to the German Democratic Republic reservation, such a rejection will certainly prevent their acquiescence and preclude them from having to pay any additional amounts besides their regular contributions. In fact, according to Article 21(3) of the Vienna Convention, the reserved financial provisions of the Convention "do not apply as between the [German Democratic Republic and the objecting] states to the extent of the reservation." This may only be taken to mean that no agreement has truly been reached between the German Democratic Republic and the objecting Parties on how to assess the contributions for some of the Committee's expenses. Accordingly, both the German Democratic Republic and the objecting states might legitimately decline to pay more than the amount they consented to, and no claims for payment could be reciprocally raised. In other words, the German Democratic Republic reservation would fully attain its financial goal, whereas the objecting states would merely avoid any direct detriment to their financial duties under the Convention. In practical terms, as previously mentioned, the deficit would have to be covered by the Parties that, not having formulated any objections, have acquiesced to such a budgetary rearrangement.

However, this does not seem to be the outcome pursued by the objecting states. It is not difficult to infer from the language of several objections that the objecting states have attempted not only to render the German Democratic Republic reservation unopposable to them, but also, because of its inadmissibility, to render it "without legal effect"⁵⁵ towards any other Party to the Convention. In other words, the objecting states appear to claim that "the assessment of the financial contributions of the States Parties ... must be drawn up in disregard of the declaration of the German Democratic Republic."⁵⁶ Such an intended effect of the objections would actually be equivalent to the withdrawal of the reservation by the German Democratic Republic. Yet unless the German Democratic Republic acquiesces to such a claim, it does not seem that this outcome could be based on the Vienna Convention rules on reservations.

There seems to be little evidence in practice to support the position that under either the Vienna Convention or general international law an inadmissible reservation is to be regarded as a nullity and that the provision subject to the reservation is to be wholly ap-

⁵³ See Gaja, *supra* note 17, at 424, 330 ("under general international law, acquiescence to a reservation cannot be safely related to silence over a precisely defined period such as the one indicated in Article 20(5)").

⁵⁴ It may be noted that if one is to regard the German Democratic Republic reservation as implicitly prohibited by the Convention, in order to overcome such a prohibition an agreement amending the Convention would be needed and mere silence would probably not be enough to deem the modification accepted by the non-objecting Parties. See Gaja, *supra* note 17, at 319-20.

⁵⁵ Objection by Norway, *Traité multilatéraux*, *supra* note 9, at 193.

⁵⁶ Objection by the Netherlands, *id.*

U.N. Convention Against Torture

plied to the reserving state regardless of the other Parties' acquiescence.⁵⁷ On the contrary, it is generally held that the compatibility criterion is merely, as the International Court of Justice stated in its advisory opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, "a rule of conduct which must guide every state in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation."⁵⁸

It would appear, as a result, that as long as the non-objecting states actually accept to pay an additional amount to compensate for the German Democratic Republic's reduced contributions, the German Democratic Republic might be able to succeed in its attempt, regardless of the supposed inadmissibility of its reservation.⁵⁹ However, since acquiescence to this kind of reservation should not be presumed to have taken place until the German Democratic Republic actually begins to withhold its contributions, the silent Parties might still change their attitude and speak up. If this happens, that is if most of the other Parties refuse to pay in lieu of the German Democratic Republic, it is likely that the German Democratic Republic will be forced to reckon with its declaration, either by withdrawing it or facing a legally and politically uncomfortable dispute with the other Parties to the Convention.

Since, as a German Democratic Republic representative has declared before the U.N. Commission on Human Rights, "torture [is] inconsistent with the concept of law and morality under socialism",⁶⁰ it seems rather odd that the German Democratic Republic would really place its financial needs before its legal and moral principles. Even though Article 18(5) of the Convention actually places a heavier than usual financial burden on States Parties,⁶¹ and even though the practice of withholding contributions is certainly not unknown to international bodies or institutions,⁶² it would be a bitter and frustrating disappointment if the effectiveness of a treaty protecting such a fundamental human right was hindered by financial problems.

⁵⁷ The European Court of Human Rights recently held in the *Belilos* case that a Swiss reservation (formally styled as an interpretative declaration) was invalid because it did not satisfy all the requirements for reservations provided for in Article 64 of the European Human Rights Convention and applied the relevant part of the Convention as if Switzerland had never made its reservation. Arrêt du 29 avril 1988, *supra* note 22, para. 60. As noted by Edwards, *supra* note 49, at 376-79, this appears to be the first instance in international practice of a judicial body holding a reservation to be invalid and wholly applying the provision subject to the reservation regardless of the other Parties' lack of objections. However, it should be taken into account that the Court did not consider the Swiss reservation as inadmissible in terms of Article 19 of the Vienna Convention but rather as not formulated in compliance with all requirements of Article 64 of the European Human Rights Convention. Furthermore, in light of the fact that the Court did not provide any explicit reasoning or explanation for its conclusion, it is questionable whether one should perceive this judgement as a turning point in the law governing treaty reservations. But see Edwards, *supra* note 49, who considers it a "landmark decision."

⁵⁸ *ICJ Reports* (1951) 24.

⁵⁹ This situation shows once more the ambiguity and inadequacy of the Vienna Convention rules on objections to reservations; see Ruda, *supra* note 51, at 199-200.

⁶⁰ E/CN.4/1988/SR.31, at 4.

⁶¹ See *supra* notes 13-15. See Nowak, *supra* note 11, at 495.

⁶² See Zoller, "The 'Cooperate Will' Of the United Nations and the Rights of the Minority", 81 *American Journal of International Law* (1987) 614.