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Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6

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Abstract

This article addresses the issue of reservations to human rights treaties in the light of the work done by the International Law Commission and its Special Rapporteur, Mr Alain Pellet. Section 1 gives a short historical background for the topic. Section 2 provides a concise overview of the variety of arguments that have been raised in the debate on the character of human rights treaties and the permissibility of reservations to those treaties, as well as their relationship with the reservations regime established under the Vienna Convention on the Law of Treaties. Section 3 gives a number of specific examples of reservations permitted under the human rights treaties and describes the approach taken by some human rights treaty bodies in that respect. It also depicts the manner in which some of these bodies have dealt with the intricate issue of the consequences of impermissible reservations. Section 4 analyses the guidelines adopted by the ILC and offers some reflection on their contribution to the development of international treaty law on this topic. Section 5 concludes by praising the comprehensive work of the ILC on the subject.

1 Introduction

The International Law Commission (ILC) has concluded the work on reservations to treaties with the Guide to Practice on Reservations to Treaties[1] containing several particularly relevant guidelines to the issue of reservations to general human rights

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1 Guide to Practice on Reservations to Treaties. *Yrbk ILC* (2011), II, Part 2.

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treaties.[2] It should be seen as a landmark and a certain conclusion to the long, often heated, debate on reservations to treaties, including human rights treaties.[3]

In this short article we propose to look at the answer that the ILC gives to the main arguments that have been raised by some human rights treaty bodies, states, and some scholars as to the compatibility of the reservations regime in the international law of treaties with what is considered a special character of human rights treaties. For this purpose, we shall sum up the main elements of this debate. The position adopted by the ILC will be described and followed by some reflections.

2 Character of Human Rights Treaties and Impermissibility of Reservations

The Human Rights Committee in its General Comment No. 24 described the character of human rights treaties as follows: 'such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place [there].'[4] The European Commission and the Court of Human Rights also stressed that the European Convention on the Protection of Human Rights and Fundamental Freedoms was 'a constitutional instrument of European public order in the field of human rights' and that this prevented the application by analogy of state practice that related to 'mere reciprocal agreements between Contracting States'.[5] It should be noted that broadly speaking there has been for some time some unease in that reservations to human rights treaties might undermine the universality of human rights. Indeed, the Human Rights Committee's characterization of the International Covenant on Civil and Political Rights might lead one to think that the Vienna Convention on the Law of Treaties (VCLT) cannot provide solutions to reservations problems in relation to human rights treaties because 'many of its provisions are written to reflect the operation of a multilateral treaty between States in issues where States act in their

[2] For the purposes of this article we would highlight the following: 3.1.12 (reservations to general human rights treaties), as discussed during the 59th session, 3.1.5.6 (reservations to treaties containing interdependent rights and obligations), 3.2 (assessment of the permissibility of reservations), 3.3.3 (consequences of non-permissibility of reservations), and 4.5 (consequences of an invalid reservation).

[3] In the course of this debate long before the ILC took up the specific topic in 1993 a number of events could be mentioned that kept key questions on the agenda, and not surprisingly they relate to the practice in relation to human rights treaties. In this context one would point to the Advisory Opinion of the ICJ on *Reservations to the Genocide Convention* or to the *Temeltasch* or *Belilos* cases in the EComm and ECtHR as well as General Comment No. 24 of the Human Rights Committee. See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep. 24. Also: App. No. 10328/83, *Belilos v. Switzerland*, 29 Apr. 1988, Series A No. 132; App. No. 9116/80, *Temeltasch v. Switzerland*, Commission's report of 5 Mar. 1983, 31 DR 120.

[4] CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 Nov. 1994, CCPR/C/21/Rev. 1/Add. 6.

[5] App. Nos 15299/89, 15300/89, and 15318/89, *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, Commission decision of 4 Mar. 1991 on the admissibility of the application, 68 DR 242.

own interest in respect of other States, where there are no third parties with their own rights or obligations involved and where the treaty does not establish an independent international mechanism for its application and interpretation'.[6]

Eckart Klein noted, however, that 'looking at State practice it very soon becomes clear that no consensus on a general prohibition of reservations to human rights guarantees under a treaty has been established'.[7] The ICJ in the Advisory Opinion on *Reservations to the Genocide Convention* took the view in favour of a balance between interests of states and the purpose of the Genocide Convention. The Court referred to the object and purpose of the Genocide Convention and inferred that the General Assembly and the states had intended wide participation. It then concluded that it was the compatibility of a reservation with the object and purpose of the Genocide Convention that limited the state's freedom in making reservations and that of objecting to them.[8] It followed that '[t]he appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case'.[9] The Court has thus recognized that some treaties have special character and that they aim to achieve wide participation of the states therein. The Court took a pragmatic view in saying that for the purposes of such participation, the right to make a reservation is an important tool, and that not all reservations might offend the very purpose of the treaty. At the same time, this right should not lead to the destruction of the essence of the treaty. The Court indicated that reservations should not be contrary to the object and purpose of the treaty but did not propose any particular way of avoiding impermissible reservations.

At this point it is interesting to note that several judges of the Court independently took up the issue of the effects of impermissible reservations. In his separate opinion in the *Norwegian Loans* case[10] Judge Sir Hersch Lauterpacht examined the effects of such reservations, albeit in another context.[11] Having concluded that a self-judging provision ('as understood by us') contained in the declaration accepting the Court's jurisdiction under the optional clause of Article 36(2) of its Statute was invalid,[12] he

6 Scheinin, 'Reservations by States under the ICCPR and Its Optional Protocols', in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), at 44.

7 Klein, 'A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law' in *ibid.*, at 61.

8 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep. 24.

9 *Ibid.*, at 26.

10 *Case of Certain Norwegian Loans (France v. Norway), Judgement*, Separate Opinion of Judge Sir Hersch Lauterpacht [1957] ICJ Rep. 34.

11 See Commentaries to the Guide to Practice on Reservations to Treaties, where it is noted that this context – reservations to declarations formulated under the optional clause concerning the compulsory jurisdiction of the ICJ under Art. 36(2) of the Statute – is specific but comparable: GAOR, 66th Session, Supp. No. 10 (A/66/10), at para. 23, 534.

12 Throughout this article the words 'impermissible' and 'invalid' have been used to describe reservations that, depending on the context. either do not comply with the Vienna criteria for permissible reservations or any other treaty-specific criteria or are formally invalid (i.e., submitted too late). Where possible, we have kept the wording chosen by the relevant treaty body or author at the relevant time. See A. Pellet's contribution, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur', in this issue at 1061, providing the reasons for the ILC's choice of terms 'validity' in Part 4 and 'permissibility' in Part 3 of the Guide.

spelt out three possible legal effects.[13] He argued that in principle the clause in question could be severed from the rest of the text that constituted the acceptance of the Court's jurisdiction, but that it would depend on the will and intention of the accepting state. One might disagree whether in that particular case it was clear that the clause in question was an essential part of France's acceptance of the Court's jurisdiction under the optional clause,[14] but it follows from Lauterpacht's reasoning that the content of the state's consent plays a significant role in determining the effects of impermissible reservations. This view, to which Lauterpacht continued to adhere in the *Interhandel* case,[15] although never taken up by the Court itself, did find some echo in other judges' reasoning. President Klaestad in the *Interhandel* case also reflected on what the true intention of the US was when submitting itself to the Court's jurisdiction.[16] In the *Nicaragua* case Judge Schwebel, while adhering to Lauterpacht's view that self-judging reservations were invalid, also noted that over time this argument had become less convincing since for many years such reservations had been treated as valid.[17] These views show that the doctrine of the severability of impermissible reservations was part of legal thinking even before the European Commission and the Court of Human Rights applied this approach in practice.

The growing number of treaties and reservations thereto and of monitoring bodies in the field of international human rights law brought the question of impermissible reservations back into focus. The practice of human rights monitoring bodies gave rise to a critique in relation to their claim that they had the competence to sever impermissible reservations. The severability approach was seen to be contrary to the VCLT, which provided for the non-application of a reserved provision objected to (Article 21(3)) or of the treaty as a whole (Article 20(4)(b)). In the Second Report Alain Pellet pointed out that 'consensuality … is the very essence of any treaty commitment', but admitted that the question whether monitoring bodies have the competence to sever a reservation goes beyond the scope of the VCLT.[18] According to Martin Scheinin, General Comment No. 24 of the Human Rights Committee included two elements that are incompatible with the VCLT. These are: '(a) A human rights treaty body, established for the purpose of interpreting the treaty and monitoring the compliance by States with its provisions has the competence to address the permissibility of reservations made under the treaty in question; (b) The usual (but not automatic)

[13] See *supra* note 10, at 55 and 56.

[14] Compare with the same self-judging reservation made by the US, where arguably the available material on the state's intent was much stronger.

[15] *Interhandel Case (Switzerland v. the United States of America), Preliminary Objections,* Dissenting Opinion of Sir Hersch Lauterpacht [1959] ICJ Rep. 95.

[16] *Ibid.*, Dissenting Opinion of President Klaestad, at 75–82.

[17] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Jurisdiction and Admissibility, Judgement,* Dissenting Opinion of Judge Schwebel [1984] ICJ Rep. 602.

[18] 2nd Report on reservations to treaties, by Mr Alain Pellet, Special Rapporteur (1996). UN Docs A/CN.4/477 and Corrs 1 and 2 and Add. 1 and Corrs 1–4, at para. 228. See the discussion in T. Meron, *The Humanization of International Law* (2006), at 238.

consequences of an impermissible reservation will be its severability, i.e., the State in question is considered bound by the treaty but without the benefit of its reservation'.[19] For the purposes of our discussion, we would leave only the second element since it appears difficult to see a contradiction *per se* with the VCLT in anything that states may have agreed upon within the framework of another treaty, including a human rights treaty where they decide to create a special supervisory body. The question that may arise under human rights treaties as to the scope of the competence of these bodies is really a question of interpretation of those treaties in the first place.

The second alleged contradiction is more valid: what are impermissible reservations and what is their effect, and who decides on the consequences? These are exactly the questions the ILC has been trying to answer in general and in more specific situations, such as *jus cogens* rules, human rights treaties, etc., within the framework of the work undertaken in relation to reservations since 1993. The ILC's principal point of departure in the search for the answer is Article 19(c) of the VCLT, which provides that the compatibility of a reservation with the object and purpose of a treaty is the fundamental criterion for the permissibility of a reservation, and it remains a key criterion also for the purposes of human rights treaties. For the moment, no contradiction can be detected between the VCLT provisions and the special character of human rights treaties. It is perfectly appropriate to assess whether a reservation complies with the object and purpose of a particular human rights treaty, and it would be difficult to suggest that in the analysis of the object and purpose no account of the special character of that treaty would be taken. This line of reasoning can in fact already be deduced from the *travaux préparatoires* to the Vienna Convention, and in particular discussions which surrounded the drafting of the Articles relating to reservations to treaties.[20]

The permissibility and the role as such of reservations to treaties was the topic that generated considerable disagreement when the VCLT was drafted. Some members of the ILC feared that reservations would prejudice the integrity of the treaty, while others defended the position that there was a political need to allow reservations which could pave the way for more participants and that it was not contrary to the interests of non-reserving states. The relevant debate in the ILC has been eloquently summed up by Jan Klabbers, showing that what finally made the breakthrough possible after a long period during which different ideas and conflicting views were exchanged in the Commission was the realization that normally reservations are entered into in relation to minor issues and that if this assumption serves as a starting point then reservations should normally be allowed and should not be seen as *a priori* problematic from the point of view of the integrity of a treaty.[21] It could be noted that there was in fact nothing new in this discovery, since the ICJ in its Advisory Opinion also distinguished between reservations to so-called minor issues in the treaty and reservations that would upset the object and purpose of the treaty. This distinction was drawn in

[19] Scheinin, *supra* note 6, at 42.

[20] See Klabbers, 'On Human Rights Treaties, Contractual Conceptions and Reservations', in Ziemele (ed.), *supra* note 6, at 166.

[21] *Ibid.*, at 168–170.

discussing a normative treaty. The practice of submitting reservations, which comply with the object and purpose, especially if that helps to bring more parties into the treaty, which is equally important for human rights treaties, is not contrary to the consent rule or the very character of human rights treaties.

One might recall that Alain Pellet commented that the ICJ Advisory Opinion was the beginning of long years of 'the dialogue of the deaf' on the question whether or not reservations ought to be allowed.[22] Under the classical approach the consequences of any reservation were fairly clear: if any state objected to the reservation it had to be withdrawn or the reserving state could not become a party to the treaty at all.[23] Therefore, the issue of the consequences of reservations did not even arise. However, when it became apparent following the Advisory Opinion that a more flexible approach was possible and indeed desirable, various arguments were raised concerning the permissibility, legal effects, and consequences of reservations. In the Second Report Pellet provided an excellent summary of the arguments that were raised in the long years of the debate on whether or not reservations are compatible with the special character of normative treaties, and especially human rights treaties, and indeed narrowed down the question whether or not the VCLT, in the absence of any special rules between parties, 'can be adapted to any type of treaty'.[24]

When Klabbers summed up 'the irony' of the long discussion on the nature of human rights treaties, he observed the difference between the contractual perspective and the *ordre public* vision of the treaty. He concluded that, finally, it was easiest to assess reservations to treaties with the *ordre public* dimension within a contractual setting 'because in those settings States can always find a value-neutral argument which to object to a proposed reservation: in a contractual setting, reservations can simply be condemned for upsetting the balance of the bargain underlying the agreement'.[25] We will come back to this alleged confrontation between two perspectives below.

Remaining within the reservations regime as codified in the VCLT and applied to human rights treaties, we believe that it should be clear from the wording of the VCLT that this regime regulates only permissible reservations, i.e., reservations which are not prohibited by the treaty, which are specified by the treaty provisions, and which are compatible with the object and purpose of the treaty.[26] Indeed Article 21 VCLT provides legal effects only in respect of such reservations as are established in accordance with Articles 19, 20, and 23. The effects of impermissible reservations (those which do not comply with the VCTL criteria) have remained unclear and have been the reason for much misunderstanding over the years, with human rights bodies favouring the severability option. The ILC throughout its work has attempted to refer

[22] See 2nd Report, *supra* note 18, at para. 115, 60.

[23] Fitzmaurice, 'Reservations to Multilateral Conventions', 2 *ICLQ* (1953) 2; Pellet and Muller, 'Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance', in E. Cannizzaro (ed.), *The Law of Treaties beyond Vienna Convention* (2011), at 38.

[24] See 2nd Report, *supra* note 18, at para. 126.

[25] Klabbers, *supra* note 20, at 154 and 180.

[26] Art. 19(a), (b), and (c) VCLT.

to the examples of practice in relation to human rights and other normative treaties and to see what lessons could be learned for the purposes of its tasks.

3 The Approach Adopted within the Human Rights Treaty Context

As we saw in the previous section international law has developed to accept that reservations to multilateral treaties are, in principle, allowed. Human rights treaties are no exception. On the one hand, some of the early human rights treaties expressly provide for a right to make reservations to show clearly the shift towards the flexible approach as concerns the reservation regime.[27] On the other hand, there are treaties that do not include an express provision on making reservations.[28] Nonetheless, the Advisory Opinion on *Reservations to the Genocide Convention* and the reservations regime established under the VCTL recognize that states may make reservations to human rights treaties that are silent on that matter. Moreover, many subsequent human rights treaties do not include a specific provision authorizing reservations; it is considered unnecessary. Rather procedures for the circulation of reservations are established.[29]

This brings us to the next point – the scope of reservations permitted under human rights treaties. Some guidance can be drawn from the relevant texts and the interpretation given by the treaty bodies, if such have been established under the instrument in question. In accordance with the European Convention on the Protection of Human Rights and Fundamental Freedoms (the European Convention), a reservation (i) must be made at the moment it is signed or ratified; (ii) must relate to specific laws in force at the moment of ratification; (iii) must not be a reservation of a general character; (iv) must contain a brief statement of the law concerned.[30] These permissibility criteria seem to differ significantly from those established under other human rights treaties in view of their precision and the lack of reference to the object and purpose of the treaty. Indeed the text of Article 57 of the European Convention does not suggest that the evaluation of the permissibility of the reservation should be made as against its object and purpose. No further clarification can be found on this matter in the

[27] The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No. 5, Art. 57(1); the Convention Relating to the Status of Refugees (CRSR), 189 UNTS 137, Art. 42(1); the American Convention on Human Rights, OAS TS No. 36, Art. 75.

[28] The Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; ICESCR, 993 UNTS 3; ICCPR, 999 UNTS 171; the African Charter on Human and People's Rights, 1520 UNTS 363.

[29] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 UNTS 195, Art. 20(1); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13, Art. 28(1); the Convention on the Rights of the Child (CRC), 1577 UNTS 3, Art. 51(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, Art. 91(1).

[30] ECHR Art. 57. See also *Belilos v. Switzerland*, *supra* note 3, at paras 55 and 59, and, more recently, App. No. 37586/06, *Liepājnieks v. Latvia (dec.)*, 2 Nov. 2010, at para. 45, both available in HUDOC of the European Court of Human Rights.

case law of the convention organs. In the *Temeltasch*[31] and *Belilos*[32] cases neither the European Commission nor the Court of Human Rights addressed the argument raised by the Swiss Government that its interpretative declarations did not offend the object and purpose of the European Convention and that other states had tacitly accepted its declarations by raising no objections. Members of the European Commission of Human Rights Mr Kiernan and Mr Gözübüyük, however, in their dissenting opinion in the *Temeltasch* case argued for the need for precision concerning the reservations to the European Convention.

In other human rights treaties the issue of permissible reservations has been approached differently. Two groups can generally be distinguished. The first group contains treaties that expressly follow the approach taken by the VCLT and stipulate that reservations which are incompatible with the object and purpose of the treaty are impermissible.[33] The second group comprises treaties that contain examples of negative regulation – prohibiting reservations to some core provisions[34] or prohibiting any reservations whatsoever.[35]

The International Convention on the Elimination of All Forms of Racial Discrimination goes one step further. While, on the one hand, it follows the approach taken by the VCLT and specifies that reservations which are incompatible with the object and purpose of the treaty are impermissible, as are those which inhibit the operation of the bodies established under the treaty,[36] on the other hand, it establishes 'a different procedure for determining the compatibility of a reservation with the object and purpose of the Convention or its inhibitive effect; by the objections of two thirds of States parties. As a special rule, it is to be applied instead of the procedure described in the Vienna Convention.'[37]

We have pointed out that the Vienna regime deals with permissible reservations and that, in the absence of any particular regulation, Articles 20 and 21 apply to determine the legal effects of reservations and of objections to them.

The question concerning the consequences of impermissible reservations to human rights treaties is much more complex. First, there is no regulation in any international treaty on this issue. The existence of an international or regional custom in this regard is not easily detectable, even less so its content. Although some guidance can be found in the views expressed at the time by Judges Lauterpacht, Klaestad, and Schwebel, they were not supported by the majority of the ICJ. Secondly, human rights treaties are themselves silent on this matter, but some have entrusted to treaty bodies certain

[31] App. No. 9116/80, *Temeltasch v. Switzerland*, Commission's report of 5 Mar. 1983, 31 DR 120.

[32] *Belilos v. Switzerland*, *supra* note 3, at paras 50–60.

[33] See CEDAW, Art. 28(2) and CRC, Art. 51(2), both *supra* note 29, and the Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, Art. 46(1).

[34] See CRSR Art. 42(1), *supra* note 27.

[35] The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, Art. 21.

[36] See ICERD, Art. 20(2), *supra* note 29.

[37] CERD: Preliminary Opinion of the Committee for the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights, 13 Mar. 2003. CERD/C/62/Misc. 20/Rev. 3.

competences which may involve a determination of the scope of the rights guaranteed by the reserving state to individuals. Thirdly, it is our view that attaching the same legal effects to permissible and impermissible reservations would make no sense, even less so in the context of human rights.

Turning to the practice adopted by the human rights treaty bodies, one should note that the European Convention organs were among the first to examine the effects of impermissible reservations under the relevant treaty.[38] In the *Belilos* case the interpretative declaration submitted by the Swiss Government was in fact a reservation that did not comply with what are now the Article 57 criteria and was therefore invalid.[39] As regards the consequences of this, the European Court limited itself to declaring that there was no doubt that Switzerland was, and regarded herself as, bound by the Convention.[40] This statement expresses the European Court's take on the role of the state's consent to remain bound by the European Convention. The background to this case does not reveal from which facts or statements by the respondent government the European Court inferred its consent. The report of the European Commission, before the case was referred to the Court, is also silent on this matter. Although it discusses at length the intention of the government in making its declaration, it does so in order to determine the scope of that declaration and not its consequences if considered invalid.[41]

In the *Loizidou* case the European Court examined in detail the Turkish Government's declarations under (what were then) Articles 25 and 46 of the European Convention and her intention to remain bound by the optional clause accepting its jurisdiction.[42] Even though it refused to take into account the statements by her representatives that post-dated the declarations, the European Court had regard to the text of the declarations and concluded that the impermissible parts could be separated from Turkey's consent to accept (what was at the time) the optional clause under the European Convention.

In light of the above examples, one might argue that the criticism of the doctrine of severability as applied by the European Court, when directed against the alleged failure to have regard to the state's consent to be bound by the European Convention, is misplaced. While it is true that in the subsequent case law the European Court has not analysed in detail a state's consent to remain bound by the European Convention without the benefit of an invalid reservation and proceeded on the assumption of severability,[43] it is not within the scope of the present article to examine the possible reasons

[38] The Inter-American Court of Human Rights as early as in 1982 had expressed its views on the effects of reservations on the entry into force of the American Convention on Human Rights. However, it was done in the context of Art. 75 of that Convention, which includes a reference to the VCLT concerning the permissibility of reservations; it did not relate to the consequences of impermissible reservations: *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, 24 Sept. 1982, Inter-Am Ct HR (Ser. A) No. 2 (1982).

[39] See *supra* note 3, at para. 60.

[40] *Ibid.*

[41] See App. No. 10328/83, *Belilos v. Switzerland*, Commission's report of 7 May 1986.

[42] *Loizidou v. Turkey* (preliminary objections), 23 Mar. 1995, Series A no. 310.

[43] See, e.g., *Fischer v. Austria*, 26 Apr. 1995, Series A no. 312, at para. 42; App. No. 69966/01, *Dacosta Silva v. Spain*, ECHR 2006-XIII, at paras 37 and 38; App. No. 29477/95, *Eisenstecken v. Austria*, ECHR 2000-X, at para. 30.

behind it. It is sufficient to note that, to the present day, the *Belilos* and *Loizidou* case law still stands as the most relevant authority on this matter before the European Court.

Reliance on the text of the reservation and its 'ordinary meaning' was also used by the Inter-American Court of Human Rights in its Advisory Opinion on *Restrictions to the Death Penalty*, where it noted that otherwise the state might ultimately be considered 'the sole arbiter … of its international obligations'. [44]

The Human Rights Committee in its General Comment No. 24 adopted an approach which received considerable criticism at the time. It noted that '[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.[45] The criticisms expressed by France[46] and the US[47] appear to be based on the assumption that the Vienna regime is applicable also to impermissible reservations. At the current stage of development of international law it would seem, however, that these misunderstandings have been solved, and in this regard the work of the ILC has been invaluable.

4 Response of the International Law Commission 1997–2011

A *Character of Human Rights Treaties*

At its 48th session the International Law Commission discussed the Second Report by Special Rapporteur Alain Pellet on Reservations to Treaties, and in particular the question of reservations to normative multilateral treaties, including human rights treaties.[48] The Rapporteur had taken the position that the reservations regime established by the VCLT was flexible enough to accommodate the characteristics of such treaties. With the benefit of hindsight it could be said that it was at this moment that the dilemma referred to by Klabbers was solved, as the narrow contractual thinking that had often characterized the law of treaties, including its reservations regime, was abandoned. Indeed, the *ordre public* perspective was properly accepted as part of the ILC's efforts in drafting the guidelines on reservations.

During this debate it was recognized that the role that the human rights treaty bodies had come to play in relation to reservations was not envisaged at the time of the drafting of the VCLT. The Commission had to determine the effects of this development in international law practice in relation to the classical approach of the reservations regime, which accorded the assessment of consequences of a reservation to the states parties to the treaty. Here it is interesting to observe the response that the ILC provided

[44] Advisory Opinion OC-3/83, 8 Sept. 1983, Inter-Am Ct HR (Ser. A) No. 3 (1983).

[45] See *supra* note 4.

[46] Report of the Human Rights Committee. GAOR 51st Session, Supp. No. 40 (A/51/40), Annex VI, at 104.

[47] Report of the Human Rights Committee. GAOR 50th Session, Supp. No. 40 (A/50/40), Annex VI, at 130.

[48] See *supra* note 18. See for more details of the drafting history the contribution by A. Pellet *supra* note 12.

to the alleged confrontation between contractual and *ordre public* perspectives in relation to the problem of reservations.

During its 59th session the ILC provisionally adopted several guidelines which included a separate guideline under the heading 'Reservations to general human rights treaties'.[49] This guideline was part of the chapter dealing with the incompatibility of a reservation with the object and purpose of the treaty, in which the Commission addressed the question key to the reservations regime, i.e., what are permissible reservations which are governed by the Vienna Convention and what are the impermissible reservations thus, in principle, falling outside the scope of the relevant Convention rules. The ILC established the following test for determining the incompatibility of a reservation with the object and purpose of the treaty in guideline 3.1.5: (i) [if] it impairs an essential element, (ii) if it is necessary to the general thrust of the treaty, (iii) if it thereby compromises the *raison d'être* of the treaty.[50] General guidelines regarding the function of the object and purpose test in relation to reservations were accompanied by several specific ones, including the guideline on human rights treaties.

In guideline 3.1.12 at that stage the Commission stated as follows:

> To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the *indivisibility, interdependence and interrelatedness of the rights* set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.[51]

In the Commentary to this guideline the ILC explained that it had adopted a three element approach, where the first element of indivisibility, interdependence, and interrelatedness was taken from paragraph 5 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993.[52] The second element concerns the importance of the right for the treaty, and the last element is the gravity of impact of the reservation on the treaty. On the one hand, these elements follow the general formula that the ILC developed under a general guideline 3.1.5, mentioned above. On the other hand, it elaborated upon these elements in a more specific and human rights oriented manner.

For example, the fact that the ILC took direct inspiration from the Vienna Declaration is particularly interesting. Undoubtedly, this paragraph in the Declaration was an important step forward in international human rights law following the fall of the Berlin Wall, since at that moment there was the opportunity to abolish the human rights thinking which for political reasons had divided human rights and freedoms into three generations. At the same time, the paragraph in the Declaration is carefully worded and it does not abolish the argument

[49] 11th and 12th Reports by Mr Alain Pellet, Special Rapporteur. UN Docs. A/CN.4/574 and A/CN.4/584.

[50] International Law Commission, *Report on the Work of its Fifty-Ninth Session* (7 May to 5 June and 9 July to 10 Aug. 2007), GAOR 62nd Session, Supp. No. 10 (A/62/10), at 75.

[51] *Ibid.*, at 65 (emphasis added).

[52] See Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23.

on regional and national peculiarities.[53] It also has to be noted that the final version of paragraph 5 is stronger than the earlier drafts.[54] However, the paragraph really announced the end of the era of politically generated distinctions among human rights. The principle of the indivisibility, interdependence, and interrelatedness of human rights was not developed for the purposes of maintaining coherence within a treaty *per se*. It should be noted that the Vienna Declaration in the same breath addresses the interdependence of democracy, human rights, and development.[55] All in all, it is a document which set the basis and political direction, and goals for the development of substantive human rights for decades to come.

In our view, bringing the World Conference's thinking round to helping states and monitoring or dispute settlement bodies to assess reservations is, although unusual, nevertheless a positive development. One could even say that it exemplifies an integrationist approach by the ILC in relation to human rights law. As mentioned, it is interesting to see how a substantive principle of human rights law is turned into a somewhat technical tool in the law on reservations. Finally, this confirms the observation mentioned earlier that the ILC indeed gives an answer concerning the debate on the compatibility of reservations as such with human rights treaties. In addition to pointing out that the VCLT is flexible and can accommodate the special characteristics of human rights treaties, the ILC has also introduced the indivisibility of human

[53] Para. 5 reads: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'

[54] See relevant text: 'All human rights are universal indivisible [and interdependent] [and inter-related], and [their realization] must be addressed with equal emphasis and urgency [in an integrated and balanced manner] by the international community as a whole and by States. The universality of civil, cultural, economic, political and social rights requires that every State throughout the world recognize, protect, respect and promote internationally recognized human rights [standards] [universally recognized human rights]. Regional and national specificities must contribute to the strengthening [must be taken into account in efforts to strengthen] of the universality of human rights. The exercise of any human right must not be denied because the full enjoyment of other rights has not been achieved. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. [The implementation of human rights should be integrated in an evolutionary process, at the levels of legislation, institutions and change of attitudes.]': see World Conference on Human Rights Preparatory Committee, *Report of the Preparatory Committee*, UN Doc. A/CONF.157/PC/98, 24 May 1993.

[55] The UN has since repeated it on various occasions. 'The final document agreed to in Vienna, which was endorsed by the 48th session of the GA (Res. 48/121, of 1994), reaffirmed the principles that had evolved during the past 45 years and further strengthened the foundation for additional progress in the area of human rights. The recognition of interdependence between democracy, development and human rights, e.g., prepared the way for future cooperation by international organizations and national agencies in the promotion of all human rights, including the right to development.': available at www.ohchr.org/EN/AboutUs/Pages/ViennaWC.aspx (last accessed 16 Oct. 2013).

rights as a test for the permissibility of reservations.[56] In other words, between the two extreme positions of permissibility and impermissibility of reservations to human rights treaties there is a wide spectrum of thinking available that can meet all, or at least most, of the interests concerned.

In the final version of the Guide to Practice submitted to the General Assembly, guideline 3.1.5.6 entitled 'Reservations to treaties containing numerous interdependent rights and obligations' provides as follows:

> To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.[57]

As the ILC admits, it departed from the original approach to have a separate guideline in relation to human rights treaties. The original approach provided the basis for the most lively debate on the permissibility of reservations and their effects. Instead the Commission preferred a more general approach, accepting that in a number of other areas of international law a treaty may contain interdependent rights and obligations, and that a reservation in such a context might have particularly serious consequences for the treaty.[58] It is certainly true that there are law-making treaties other than human rights treaties. On this basis, the final approach of the ILC has its merits, since it recognizes the special character of normative treaties as providing elements of *ordre public* and thus going beyond the mere set of reciprocal rights and obligations in the international legal system. On the other hand, a question may be asked whether this is a sufficient or appropriate response to the human rights concerns, keeping in mind that when speaking of human rights treaties it has always been pointed out that they provide rights to individuals or groups and are the embodiment of a certain set of values.[59] It is true, as the ILC points out, that throughout the Guide whenever a specific issue had arisen in the context of human rights treaties the ILC has commented on that in the Commentary to the guidelines, and therefore guideline 3.1.5.6 is not the only relevant provision.

If, however, the alleged confrontation between reciprocal and *ordre public* perspectives on reservations is viewed differently, and if a more general value is seen also in the reservations mechanism *per se*, the abovementioned confrontation is more alleged than actual, for the procedural tool also has its value within a legal system, albeit relevant at a different level. In other words, unquestionably the indivisibility principle will be of great value and practical help to those entrusted with agreeing or disagreeing with a reservation lodged. In this respect, the human rights discourse has had a fundamental impact on clarifying approaches to the impermissibility of reservations. Above all, it seems, it has helped to clarify that the *ordre public* perspective that may

[56] See the contribution by A. Pellet, *supra* note 12, which considers the whole question of compatibility as 'artificial' since the VCLT regime is indeed sufficiently flexible.

[57] See *supra* note 1.

[58] See the ILC Commentaries to this guideline, *supra* note 11. See also A. Pellet's contribution, *supra* note 12.

[59] *Supra* note 6.

give rise to important multilateral conventions is not contrary to the manner in which treaties are traditionally drafted and enter into force, including through the acceptance or not of reservations.

In the end, we believe the Guide embodies an appropriate approach, since in matters of reservations relevant actors really needed a tool-box enabling them to have an appropriate reaction to a reservation. Policy statements on the nature of human rights as such without the next level of detail would not take solutions very far.

B *Competence of Human Rights Treaty Bodies*

It should be recalled that the practice of human rights treaty bodies in assessing the permissibility of reservations was mentioned as something that may not be compatible with the VCLT. We pointed out earlier in this article that one cannot draw such a wide conclusion from the Vienna Convention as the response was dependent in the first place on what the states agreed to in the context of a particular human rights treaty. In this respect attention should be drawn to the commentary that the ILC adopted in relation to draft guideline 3.2 on 'Assessment of permissibility' during its 61st Session. The view of the ILC merits full quotation in this article since it sums up the misunderstandings that had for years characterized the debate between human rights bodies and the ILC on the issue and the Commission's response to that. The ILC thus observed:

> In reality, the issue is unquestionably less complicated than is generally presented by commentators – which does not mean that the situation is entirely satisfactory. In the first place, there can be no doubt that the human rights treaty bodies are competent to assess the permissibility of a reservation, when the issue comes before them in the exercise of their functions, including the compatibility of the reservation with the object and purpose of the treaty. Indeed, it must be acknowledged that the treaty bodies could not carry out their mandated functions if they could not be sure of the exact extent of their jurisdiction *vis-à-vis* the States concerned, whether in their consideration of claims by States or individuals or of periodic reports, or in their exercise of an advisory function; it is therefore part of their functions to assess the permissibility of reservations made by the States parties to the treaties establishing them.
>
> Secondly, in so doing, they have neither more nor less authority than in any other area: the Human Rights Committee and the other international human rights treaty bodies which do not have decision-making power do not acquire it in the area of reservations; the regional courts which have the authority to issue binding decisions do have that power, but within certain limits. Thus, thirdly and lastly, while all the human rights treaty bodies (or dispute settlement bodies) may assess the permissibility of a contested reservation, they may not substitute their own judgment for the State's consent to be bound by the treaty. It goes without saying that the powers of the treaty bodies do not affect the power of States to accept reservations or object to them, as established and regulated under articles 20, 21 and 23 of the Vienna Convention.[60]

[60] See GAOR, 64th session, Supp. No. 10 (A/64/10), *Report of the International Law Commission 61st session* (4 May–5 June and 6 July–7 Aug. 2009), at 289–290. More specifically draft guideline 3.2.1 stated: 'A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization. The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.'

This issue falls within the larger context of what some states might see as the 'creeping' competence of treaty bodies to enlarge the scope of human rights by interpretation. Certainly, states prefer to define their legal obligations under international law themselves and not to have them superimposed by any treaty bodies that they have established, in the absence of a particularly specified competence to do so. Nevertheless, the fact remains that in addition to the right of a state to submit a reservation and the right of a state to object to such a reservation, relevant treaty monitoring bodies by virtue of their competence may pronounce on the permissibility or, by extension, impermissibility of a reservation. This is exactly what the ILC says, i.e., it is part of the exercise of their functions; nothing more, nothing less.

The guidelines adopted by the ILC confirm that the Vienna regime did not rule out that bodies other than states themselves could assess the permissibility of reservations; that had simply not been envisaged at the time of the drafting of the VCTL as we have noted above. Thus it can hardly be considered that the approach taken by various human rights treaty bodies as such contradicted the VCLT. We consider that the efforts to determine the scope of their competence in relation to the assessment of the permissibility of reservations could rather be seen from the perspective of the interpretation of the particular treaty and its terms. In such case, the dialogue between the states and any treaty monitoring bodies they have established could be seen as relating to various readings of one particular treaty, part of the process disclosing the proper object and purpose of that treaty, and not necessarily to an alleged contradiction between human rights treaties as such and other multilateral conventions in general.

C *Impermissible Reservations*

One of the greatest achievements of the ILC's work on reservations to treaties concern the consequences[61] of invalid (including impermissible[62]) reservations. These issues are dealt with in several guidelines, among which we would like to note the following.

First, guideline 3.3.1[63] clarifies that the consequences of impermissible reservations (i.e., those reservations which are prohibited by the treaty or incompatible with its object and purpose), including the ability to sever an impermissible reservation from the state's consent to be bound, do not depend on the ground of impermissibility. By doing so the ILC has reaffirmed that any reservations not complying with Article 19 of the VCLT – reproduced in guideline 3.1 – are not allowed, and in that

[61] According to the Commentaries to the Guide to Practice on Reservations to Treaties, 'consequences' was to be preferred to 'effects' because the main consequence of invalid reservation is, precisely, that they are devoid of legal effects. See *supra* note 11, at para. 19, 508.

[62] The ILC has adopted a broad definition of invalidity; reservations are invalid either 'because they do not meet the formal and procedural requirements prescribed in Part 2 or because they are deemed impermissible according to the provisions of Part 3'. See *supra* note 11, at para. 20, 508. See also A. Pellet's contribution *supra* note 12, on the use of the term 'validity'.

[63] Guideline 3.3.1 'Consequences of non-permissible reservation': 'A reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and the purpose of the treaty is impermissible, without there being any need to distinguish between the consequences of these grounds for non-permissibility.'

regard compliance with the object and purpose of the treaty is no more and no less important than compliance with an express or implied treaty requirement concerning reservations.

Secondly, brief mention should be made of guideline 3.3.3[64] which elucidates the fact that individual acceptance (expressed or implied) cannot cure an absence of permissibility of a reservation. Accordingly, the point made by the Swiss Government before the European Commission and the Court of Human Rights in the *Temeltasch* and *Belilos* cases to the effect that its interpretative declarations were tacitly accepted and, hence, did not offend the object and purpose of the treaty loses its relevance. For under the European Convention only specific reservations are allowed, and reservations which do not comply with the established criteria, even in the absence of objections from other states parties, are not permissible. Guideline 3.3.3 clarifies this matter and provides that compliance with the permissibility criteria does not depend on the will expressed by other states parties *ex post facto* by raising no objections, but rather on their initial will as expressed in the treaty itself.[65]

Thirdly, guideline 3.3.2[66] purports to establish that the formulation of an impermissible reservation does not engage the international responsibility of the state which formulated it. In our reading the guideline simply draws a distinction between primary and secondary rules of international law, i.e., between the obligations themselves and the consequences of a breach of any such obligation. For state responsibility to arise a breach of a primary rule needs to be established, which in the case under discussion would be a rule established under the law of treaties. The question, nevertheless, remains whether the state has duly complied with its obligations under international law if it formulates an impermissible reservation? Is it purely a matter of treaty law? While for the ILC the answer to this question is a positive one and it provides for a constructive solution to potentially end-less disagreements, in our view this matter will probably continue to generate further discussion.

Fourthly, and perhaps most importantly, the ILC has taken up the issue of the consequences of all types of reservations. Part Four of its Guidelines relate not only to impermissible reservations, to which Part Three and, in particular, guidelines 3.3.1 to 3.3.3 refer, but also to formally invalid reservations, according to Part Two of the Guidelines. It may be useful to recall that invalid reservations, in the sense of Part Four of the Guidelines, are those which are impermissible (i.e., those which are prohibited

[64] Guideline 3.3.3 'Absence of effect of individual acceptance of a reservation on the permissibility of the reservation': 'Acceptance of an impermissible reservation by a contracting State or by a contracting organisation shall not affect the impermissibility of the reservation.'

[65] See also guideline 3.1.5.1 according to which in determining the object and purpose of the treaty its terms in their context, in particular, the title and the preamble, and the preparatory work and the circumstances of its conclusion, should be taken into account and, where possible, also the subsequent practice of the parties.

[66] Guideline 3.3.2 'Non-permissibility of reservations and international responsibility': 'The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not engage the international responsibility of the State or international organisation which has formulated it.'

by the treaty or incompatible with its object and purpose) and also those which are formally invalid (i.e., those which have not been submitted in writing or not communicated to other parties, or were submitted too late). Guideline 4.5.1[67] is a step forward from the Vienna system and, for the first time, it clearly spells out that the consequences of invalid and impermissible reservations are that they are devoid of any legal effects, i.e., they are null and void. In drafting guideline 4.5.1 the ILC took into account not only the state practice of objecting to reservations under multilateral treaties, but also referred to the approach adopted by the European Court, the Inter-American Court of Human Rights, and the Human Rights Committee[68] in relation to human rights treaties. It is quite significant to note that in its commentary to guideline 4.5.1 the ILC dismisses any misunderstandings that might have existed for the last five or six decades and notes that 'guideline 4.5.1 aims to fill one of the major gaps in the Vienna Conventions, which, no doubt deliberately, left this question unanswered, despite its very great practical importance'.[69] The Committee noted the existence of a general agreement and concluded that 'the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.'[70]

Finally, the work of the ILC has, as always, included part of the progressive development of international law, which is reflected in guideline 4.5.3 entitled 'Status of the author of an invalid reservation in relation to the treaty'.[71] In our opinion this includes what we see as an acknowledgment that certain human rights treaty bodies have been moving in the right direction in applying the severability doctrine. It confirms the view expressed by Judges Higgins, Kooijmans, Elarbaby, Owada, and Simma in their Joint Separate Opinion:

> The Human Rights Committee in General Comment No. 24 (52) has sought to provide some answers to contemporary problems in the context of the International Covenant on Civil and Political Rights, with its analysis being very close to that of the European Court of Human Rights and the Inter-American Court. The practice of such bodies is not to be viewed as

[67] Guideline 4.5.1 'Nullity of an invalid reservation': 'A reservation that does not meet the conditions of formal validity and permissibility set out Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.'

[68] See *supra* note 11, at paras 24–27, 518 and 519.

[69] See *ibid.*, at para. 1, 509.

[70] See *ibid.*, at para. 28, 519.

[71] Guideline 4.5.3 'Status of the author of an invalid reservation to the treaty': '1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty without the benefit of the reservation or whether it considers that it is not bound by the treaty. 2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization without the benefit of the reservation. 3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty without the benefit of the reservation. 4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty without the benefit of the reservation, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.'

> 'making an exception' to the law as determined in 1951 by the International Court; we take the view that it is rather a development to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently.[72]

It respectfully explains the irreconcilable positions adopted by those who consider that the state which has submitted an invalid reservation should be considered a party to the treaty without the benefit of that reservation (the severability option) and those who consider that such a state should not be a party; the ILC, after having scrutinized in great detail the available practice, offers a middle ground solution based on a rebuttable presumption that in the end the state's intention is to be bound by a treaty, even if without the benefit of the reservation, unless the opposite is clearly stated. Although it may not be easy to establish any intention on the part of the reserving state, the case law to which we referred in the previous section and which the ILC has examined indeed provides some guidance for this exercise. It is equally important that the ILC clearly explains that impermissible reservations are not in force *ab initio* by the very nature of such reservations and not following objections from other parties.

5 Conclusions

Undoubtedly, the ILC and Special Rapporteur Alain Pellet have succeeded in addressing every possible argument which has been raised over several decades of debate on reservations to treaties, including human rights treaties. In our view the utmost has been done to reconcile various arguments and interests and preserve the underlying fundamental principle of state consent. The solutions to the various questions, such as the consequences of impermissible reservations or the role of human rights treaty bodies, were found by exploring the meaning of state consent and by acknowledging the important role that states ought to play in this area. This approach emanates logically from within the international legal system. At another level, however, there is nothing wrong with reminding states of their main role in international law and of raising awareness as to all the possibilities that they have where reservations and objections are only one example of the tools available. We see the Guide to Practice as it concerns human rights treaties as oriented towards engaging states in ongoing dialogue concerning the rights of individuals that states agree to protect universally. It is clear from the view taken by the ILC that there is no such thing as *ab initio* impermissibility of all reservations with human rights treaties by virtue of their special character. Impermissibility has to be assessed in the context of each specific treaty. States may, of course, decide to exclude the right to make reservations from the scope of a treaty by having resort to a specific prohibition to that effect.

[72] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment* [2006] ICJ Rep. 6, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, at para. 16, 69.