

RESERVATIONS TO HUMAN RIGHTS TREATIES: NOT AN ABSOLUTE EVIL . . .

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Besides the fact that the dedicatee of this work has written extensively on this topic,¹ a paper on reservations to human rights has its place in a volume devoted to the evolution of international law from bilateralism to community interest. It could even be said that it is at the very heart of the dialectic called by these two trends: on the one hand, reservations, in a way, ‘bilateralize’ the relations between the parties to multilateral treaties while, at the same time, facilitating a wider acceptance of the core elements of the treaties in question and, therefore, strengthening the global community interest.² This dialectic is vividly present with regard to human rights treaties even though, according to a dominant view among human rights activists, reservations to those treaties are seen as an absolute evil. They are not.

Judge Simma served, from 1997 to 2002, as a member of the International Law Commission (ILC), and in this capacity, he influenced intensely the work of the Commission. In particular with regard to the subject of reservations to treaties, Professor Simma, as he then was, advocated ‘for the voice of human rights law to be heard rather more loudly’.³ Though he agreed that ‘the Vienna regime had no alternative in *lex lata*’, he considered the unity of the Vienna regime—a question which has been the subject matter of the second report of the Special Rapporteur on Reservations to treaties, and has finally resulted in the adoption by the Commission of its Preliminary Conclusions⁴—‘to be a case of *faute de mieux*, the regime being, in his view, far from satisfactory, particularly with regard to

¹ B Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International* 217, 330 and 340–9; B Simma, ‘Reservations to Human Rights Treaties—Some Recent Developments’ in G Hafner et al (eds), *Liber-Amicorum Professor Seidl-Hohenveldern in Honour of his 80th Birthday* (Kluwer Law International, 1998) 659–82; B Simma and GI Hernández, ‘Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention, Essays in Honour of Professor Giorgio Gaja* (Oxford University Press, forthcoming).

² Simma, ‘From Bilateralism to Community Interest’ (n 1) 330.

³ 2500th meeting (26 June 1997) [1997] I ILC Ybk 183, para 43.

⁴ Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission [1997] II ILC Ybk 57, para 157.

human rights treaties'.⁵ Since then, he has maintained that the question of reservations to human rights treaties 'cried out for a better solution'⁶ and he has continuously pressed the Commission progressively to develop the law in that matter.⁷

The ILC has now adopted a first version of its Guide to Practice on Reservations to Treaties, which still contemplates a unitary regime, despite the 'voice of human rights' which did not stop to lure like the Sirens with their enchanting music. The members of the ILC, however, have not closed their ears to these voices—as did Odysseus' crew—but clearly took account and benefit of the important and quite well-established practice of States, monitoring bodies, and international human rights courts and tribunals in order to clarify and fill the uncontested gaps of the Vienna regime (Section II), while maintaining its unity, which fits human rights treaties better than a pure 'human rightist' approach⁸ would lead one to believe (Section I).

I. The Welcome and Necessary Unity of the Vienna Regime: Human Rights Treaties between Integrity and Universality

Curiously there are probably few subjects in classical general international law which ignite such impassioned debates as the apparently extremely technical subject of reservations to treaties. One is 'pro' or 'contra' reservations for reasons which clearly come closer to a 'religious war' than to rational considerations: for some, reservations are an absolute evil because they cause injury to the integrity of the treaty; for others, to the contrary, they facilitate a broader adhesion and, thus, universality. This debate—which has indeed surfaced with regard to human rights treaties—is fixed since the 1951 ICJ Advisory Opinion and its terms and scope are clearly represented by the opposition between the majority and the dissenting judges. For the former:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which voted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.⁹

For the judges of the minority, on the other hand:

It is . . . not universality at any price that forms the first consideration. It is rather the acceptance of common obligations—keeping step with like-minded States—in order

⁵ [1997] I ILC Ybk 183, para 44.

⁶ *Ibid*, para 48.

⁷ B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *Eur J Intl L* 265, 271.

⁸ On the notion of 'human rightism' in international law, see A Pellet, '“Human Rightism” and International Law' (2000) 10 *Italian Ybk Intl L* 3.

⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 24 (hereafter: *Reservations to the Genocide Convention*).

to attain a high objective for all humanity, that is of paramount importance... In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.¹⁰

In reality, everything is a matter of measure, equilibrium, and circumstances. The prerequisite of universality encourages opening up as broadly as possible the rights of States to formulate reservations which, evidently, facilitates universal participation in treaties. Nonetheless, the freedom of States to formulate reservations cannot be unlimited. It clashes with this other prerequisite, equally imperative: to preserve what forms the very essence of the treaty.

The rules applicable to reservations thus have to realize the best possible balance between the prerequisites of universality and of the integrity of the treaty. Undoubtedly, that is what the 'Vienna regime' strives for, irrespective of the particular nature or content of the treaty concerned (Section I(1)). The specificities of certain types of treaties put forward by the advocates of parochial approaches to specialized fields of international law and, singularly, by 'human rightists',¹¹ do not constitute a valid argument against the applicability of the general regime of reservations under the 1969 Vienna Convention on the Law of Treaties (VCLT),¹² which is flexible enough to provide the appropriate solutions in respect to human rights as well as for any other kind of treaties¹³ (Section I(2)).

¹⁰ Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo, *ibid*, 47. See also Dissenting Opinion of Judge Alvarez, *ibid*, 51 and 53.

¹¹ See Pellet, "Human Rightism" (n 8).

¹² The 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations is very similar to the 1969 Convention in most respects, including on the rules applicable to reservations. The ILC Special Rapporteur on the Question of treaties concluded between States and international organizations or between two or more international organizations, P Reuter, noted in his 4th report (UN Doc A/CN.4/285): 'Articles 19 to 23 of the 1969 Convention dealing with reservations, are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions.' [1975] II ILC Ybk 36 (para (1) of the general commentary on section 2).

¹³ It can be noted in passing that the VCLT takes account of the specificities of some kinds of treaties—eg in respect of treaties which are constituent instruments of international organizations (Art 20(3) VCLT) or treaties in respect of which it appears from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty (Art 20(2) VCLT; see also guideline 4.1.2 (Establishment of a reservation to a treaty which has to be applied in its entirety), GAOR 65th Session Supp 10 (UN Doc A/65/10 121–4); see also Art 60(5) VCLT relating to 'provisions relating to the protection of the human person contained in treaties of a humanitarian character'. This is not the case for human rights treaties.

1. The Vienna regime strikes the right balance¹⁴

The traditional unanimity principle¹⁵ was straightforward: if not all other contracting States accepted the reservation (at least tacitly), the reserving State could not become a party to the treaty. It is to be noted that such a principle did not preserve the integrity of the treaty since, when unanimously accepted, a derogatory regime originated from the reservation; it made, however, universality more unlikely. The flexible regime as initiated in the Americas during the first part of the nineteenth century, endorsed (with some changes) by the ICJ in 1951, accepted—although reluctantly—by the ILC in 1962, and finally established by the 1969 VCLT,¹⁶ certainly strikes a better balance by preserving the essential integrity of the treaty while, at the same time, encouraging a wider participation; such a balance is, no doubt, satisfactory for all kinds of treaties whatever their subject matter.

a) *Essential integrity of the treaty preserved*

It is undeniable that the Vienna regime does not guarantee an absolute integrity of treaties. The concept of reservations is incompatible with the very notion of integrity.¹⁷ By definition, a reservation ‘purports to exclude or to modify the legal effect of certain provisions of the treaty’.¹⁸ The only way to preserve this integrity completely is to prohibit any reservations whatsoever, a solution which is perfectly consistent with the Vienna regime.¹⁹

The Human Rights Committee nevertheless affirmed:

Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.²⁰

¹⁴ The present section is essentially inspired by the Second Report of the ILC Special Rapporteur A Pellet on Reservations to Treaties (UN Doc A/CN.4/477) and Add.1, [1996] II(1) ILC Ybk 37–83, and the commentary to Art 19 (1969) by A Pellet, in O Corten and P Klein, *Les Conventions de Vienne sur le Droit des Traités, Commentaire Article par Article* (Bruylant, 2006) 641–788, esp 673–96 (English edition forthcoming, OUP, 2011).

¹⁵ *Reservations to the Genocide Convention* (n 9) 21.

¹⁶ On this long saga, see the Preliminary Report on the Law and Practice Relating to Reservations to Treaties, Report by Special Rapporteur A Pellet (UN Doc A/CN.4/470) [1995] II(1) ILC Ybk 127–36, paras 10–61 and Pellet, ‘Commentary to Article 19’ (n 14) 645–73, paras 2–67.

¹⁷ As the ICJ noted, ‘[i]t does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law’. (*Reservations to the Genocide Convention* (n 9) 24).

¹⁸ Art 2(1)(d) VCLT. See also guideline 1.1.1 (Object of reservations) of the ILC Guide to Practice: ‘A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.’ [1999] II(2) ILC Ybk 93.

¹⁹ See Art 19(a) VCLT. See also guideline 3.1 (Permissible reservations) and 3.3.1 (Reservations expressly prohibited by the treaty), GAOR, 61st Session Supp 10 (UN Doc A/61/10) 327–40.

²⁰ UNHRC, ‘General Comment No 24’, in GAOR 50th Session Supp 40 (UN Doc A/50/40) 120, para 8.

In making this assumption, the Committee fails to acknowledge that these instruments, even though they are designed to protect individuals, are still treaties which are “built” like all other multilateral treaties:²¹ it is true that they benefit individuals directly, but only because—and after—States have expressed their willingness to be bound by them. The rights of the individual, under the treaty, derive from the State’s consent to be bound by such instruments.²² Reservations must be envisaged in that context, and the order of factors cannot be reversed by stating—as the Committee does—that the *treaty* rule exists as a matter of principle and is binding on any State if it has not consented to it. As the International Court of Justice clearly noted in 1951: ‘It is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto.’²³ If, as the Committee maintains, States can ‘reserve *inter se* application of rules of general international law’, there is no legal reason why the same should not be true of human rights treaties; in any event, the Committee does not give any such reason.

The fact remains that, where a treaty is silent—and most human rights treaties are silent on this issue—the rules set out in the VCLT, by not fully addressing the concerns of those who would defend the absolute integrity of normative treaties, guarantee, to all intents and purposes, that the very essence of the treaty is preserved since, according to Article 19(c):

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless... the reservation is incompatible with the object and purpose of the treaty.

This provision is much more than ‘a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations.’²⁴ Even if one must

²¹ Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1).

²² The rights in question may belong to individuals ‘inherently’ or by virtue of customary (including peremptory) principles—but this is quite a different issue. Thus, Dame Rosalyn Higgins might well be right in affirming that human rights treaties ‘reflect rights inherent in human beings, not dependent upon grant by the state’ (R Higgins, ‘Human Rights: Some Questions of Integrity’ (1989) 52 *Modern L Rev* 11; see also Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1)). However, this does not, as such, influence the nature of the binding force of the treaty instrument or the extent of consent to that instrument given by the parties including the reserving State.

²³ *Reservations to the Genocide Convention* (n 9) 21. See also *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (1977) 18 *RIAA* 42, paras 60–1; WW Bishop Jr, ‘Reservations to Treaties’ (1961) 103 *Recueil des Cours* 255; C Tomuschat, ‘Admissibility and Legal Effects of Reservations to Multilateral Treaties’ (1967) 27 *ZaöRV* 466; D Müller, ‘Commentary to Article 20’ in Corten and Klein, *Les Conventions de Vienne sur le Droit des Traités* (n 14) 809–11, paras 20–4 (English edition forthcoming, OUP, 2011).

²⁴ JM Ruda, ‘Reservations to Treaties’ (1975) 146 *Recueil des Cours* 190. For similar points of view, see J Combacau, *Le Droit des Traités* (Que sais-je?, No 2613, Presses Universitaires de France, 1991) 60 or ‘Logique de la Validité contre Logique de l’Opposabilité dans la Convention de Vienne sur le Droit des Traités’ in *Le Droit International au Service de la Paix, de la Justice et du Développement—Mélanges Michel Virally* (Pedone, 1991) 200; P-H Imbert, *Les réserves aux traités multilatéraux* (Pedone, 1979) 134–7; P Reuter, *Introduction au Droit des Traités* (3rd edn,

admit that ‘the object and purpose of a treaty are indeed something of an enigma’,²⁵ Article 19(c) constitutes nevertheless ‘the fundamental criterion for the permissibility of a reservation’,²⁶ and the linchpin of the flexible system laid out by the Vienna regime.²⁷ The ‘object and purpose’ criterion limits the sovereign freedom²⁸ of States to formulate reservations to a treaty. This has unmistakably been stated by the ICJ with regard to one of the most important and pioneering universal human rights instrument, the 1948 Genocide Convention:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the 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.²⁹

Article 19(c) VCLT is directly inspired by the Court’s finding, even if it no longer includes the application of the ‘object and purpose’ test to objections to reservations.³⁰ The ‘object and purpose’ test constitutes an objective criterion which is aimed at setting a uniform standard against which the validity of any reservation must be assessed, ie it constitutes the benchmark of the community interest—at least the interest of the community of the parties to the treaty—to be preserved. All reservations must pass this threshold; if they do not, they are impermissible and, consequently, null and void,³¹ irrespective of any acceptance or objection by the other contracting States.³² As Bowett noted:

Presses Universitaires de France, 1995) 74 or K Zemanek, ‘Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties’ in *Essays in International Law in Honour of Judge Manfred Lachs* (Nijhoff, 1984) 331–3.

²⁵ I Buffard and K Zemanek, ‘The Object and Purpose of a Treaty: An Enigma?’ (1998) 3 *Austrian Rev Intl & Eur L* 322. See also n 100.

²⁶ GAOR 62nd Session Supp 10 (UN Doc A/62/10) 66 (para (1) of the commentary to guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)).

²⁷ See Pellet, ‘Commentary to Article 19’ (n 14) 728, para 172.

²⁸ The ILC pointed out that ‘[i]t is probably excessive to speak of a “right to reservations”, even though the Convention proceeds from the principle that there is a presumption in favour of their validity. Some members contested the existence of such a presumption. This, moreover, is the significance of the very title of article 19 of the Vienna Conventions (“Formulation of reservations”), which is confirmed by its *chapeau*: “A State may (...) formulate a reservation unless ...”. Certainly, by using the verb “may”, the introductory clause of article 19 recognizes that States have a right; but it is only the right to “formulate” reservations.’ GAOR, 61st Session Supp 10 (UN Doc A/62/10) 330 (para (5) of the commentary to guideline 3.1 (Permissible reservations)).

²⁹ *Reservations to the Genocide Convention* (n 9) 24.

³⁰ On this issue, see, in particular, A Pellet, ‘Fourteenth Report of Reservations to Treaties (2009)’ UN Doc A/CN.4/614/Add.1, paras 99–102.

³¹ See pp 545–7 below.

³² Guideline 4.5.3 (Reactions to an invalid reservation): ‘The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.’ GAOR, 65th Session Supp 10 (UN Doc A/65/10) 209–34.

The issue of ‘permissibility’ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as matter of policy, other Parties find the reservations acceptable or not. The consequence of finding a reservation ‘impermissible’ may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.³³

The ILC has now made clear that a reservation is to be considered not in conformity with the object and purpose of a treaty ‘if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the *raison d’être* of the treaty’.³⁴ Of course, in the absence of any compulsory system of binding determination by a third-party—a shortcoming due to the still prevailing structure of the international society and international law,³⁵ which, in particular with regard to human rights treaties, has been smoothed over by monitoring bodies³⁶—the assessment of a reservation against the object and purpose of the treaty concerned will be effected in a ‘typically bilateralist and subjective way’;³⁷ but this is the unavoidable consequence of human rights treaties being treaties and, as such, ‘governed by international law’.³⁸ Nevertheless the regime is designed to preserve the essence of the collective will of the parties, ie the quintessence of the community interest embodied in the conventional instrument. As Professor Simma put it in his Hague lecture:

[C]ommunity interest at a second level, so to speak, sets in and maintains the integrity of at least the essence of the treaty obligations by stating the preconditions of the compatibility of the reservations made with the object and purpose of the treaty concerned.³⁹

b) Universality encouraged

On the other hand, the flexibility of the Vienna regime, and in particular the way it recognizes the freedom of a State to formulate valid reservations to a treaty, encourages the aim of universality of multilateral treaties much better than the traditional ‘unanimity’ system largely prevailing before the 1969 VCLT. This is clearly apparent when the Vienna regime is compared with a treaty demanding a

³³ DW Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976–77) 48 *British Ybk Intl L* 88.

³⁴ Guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty), GAOR, 62nd Session Supp 10 (UN Doc A/62/10) 66–77.

³⁵ P Daillier, M Forteau, and A Pellet, *Droit International Public (NgyenQuocDinh)* (8th edn, Librairie générale de droit et de jurisprudence, 2009) 959.

³⁶ See pp 542–4 below.

³⁷ Simma, ‘Reservations to Human Rights Treaties’ (n 1) 662–3. In their latest article, Simma and Hernández stressed that ‘the Vienna Convention regime proved difficult to operate in this regard, given that Article 19 sheds no light on how a treaty’s object and purpose is to be discerned and in fact borders on the self-referential.’ Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1).

³⁸ Art 2(1)(a) VCLT.

³⁹ Simma, ‘From Bilateralism to Community Interest’ (n 1) 340–1.

unanimous acceptance of reservations, whether because a specific clause prohibits any reservation or because, by its very nature, the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty.⁴⁰ In these specific cases, the universality of the treaty is sacrificed on the altar of the integrity of its application. A State cannot claim to become a party to such a treaty with a reservation if not all contracting States accept the reservation, whatever its importance and relevance in the pursuance of the interest of the community of States parties, and irrespective of its compatibility with the object and purpose of the Convention.

Most of the multilateral human rights instruments are nevertheless different in character and inherently yearn for universal application. This was recognized by the ICJ in its 1951 Advisory Opinion:

[A]s regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle. Among these circumstances may be noted the clearly universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention.⁴¹

And, the Court continued:

Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations—all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.⁴²

Universality militates indeed in favour of a flexible approach and a widely recognized (but limited) freedom of States to formulate reservations. And this also holds true for human rights: '[T]he possibility of formulating reservations may well be seen as a strength rather than a weakness of the treaty approach, in so far as it allows a more universal participation in human rights treaties.'⁴³ As Professor Simma recognized, even States 'firmly committed to the rule of law will frequently discover that treaty obligations in the field of human rights may assume a weight and a degree of nuisance which they never expected or, at least, grossly underestimated at

⁴⁰ Art 20(2) VCLT.

⁴¹ *Reservations to the Genocide Convention* (n 9) 21.

⁴² *Ibid*, 21–2.

⁴³ M Coccia, 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 *California Western Intl LJ* 3. The author refers to O Schachter, M Nawaz, and J Fried, *Toward Wider Acceptance of United Nations Treaties* (Arno Press, 1971) 148, and adds: 'This UNITAR study shows statistically that "the treaties... which permit reservations, or do not prohibit reservations, have received proportionally larger acceptance than the treaties which either do not permit reservations to a part or whole of the treaty, or which contain only one substantial clause, making reservations unlikely".'

the time of the conclusion of the treaty',⁴⁴ and that 'the lodging of carefully tailored reservations may also be taken as a sign that the reserving State takes the respective human rights treaty seriously'.⁴⁵

In this respect, Article 19(c) VCLT acts as the balancing factor in limiting the freedom to formulate reservations only to some degree, while leaving some room for States to modulate their consent with regard to secondary or accessory issues. As Ago argued during the debate in the Commission on draft Article 17 (Article 19 VCLT):

The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.⁴⁶

These 'less important clauses' quite often make the difference. A State might well be entirely committed to the substantial obligations and principles expressed in a treaty, but will nevertheless show reluctance to become a party because of one or some specific auxiliary rules to which these principal obligations are bound under the conventional regime.⁴⁷ The ICJ quite evidently struck a balance with regard to the 1948 Genocide Convention in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*:

Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.⁴⁸

⁴⁴ Simma, 'Reservations to Human Rights Treaties' (n 1) 660.

⁴⁵ Simma and Hernández, 'Legal Consequences of an Impermissible Reservation' (n 1).

⁴⁶ 651st meeting (25 May 1962) [1962] I ILC Ybk 141, para 35.

⁴⁷ This does not imply in itself that a reservation to a procedural obligation is always admissible. In their Joint Separate Opinion in *Armed Activities on the Territory of the Congo*, Judges Higgins, Kooijmans, Elaraby, Owada, and Simma pointed out: 'We believe it is now clear that it had not been intended to suggest that the fact that a reservation relates to jurisdiction rather than substance necessarily results in its compatibility with the object and purpose of a convention. Much will depend upon the particular convention concerned and the particular reservation. In some treaties not all reservations to specific substantive clauses will necessarily be contrary to the object and purpose of the treaty. Some such reservations to particular substantive clauses in, for example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, may be of this character. Conversely, a reservation to a specific "procedural" provision in a certain convention, could be contrary to the treaty's object and purpose.' *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Joint Separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma) [2006] ICJ Rep 70, para 21.

⁴⁸ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Judgment) [2006] ICJ Rep 32, para 67. See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Provisional Measures, Order of 10 July 2002) [2002] ICJ Rep 246, para 72.

It should also be taken into account that a reservation does not necessarily imply that its author does not agree with the targeted provision(s) of the treaty. Reservations are a useful means for States to become parties to a treaty even if they are not yet in a position of ‘keeping step with like-minded States’.⁴⁹ With regard to the Covenant, the Human Rights Committee also considered that:

The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant.⁵⁰

Once the reserving State feels able to assume the entirety of the treaty obligations, it can withdraw its reservation at any moment and rally more completely behind the community interest.⁵¹ In the meantime, however, the mere fact that the reserving State is a party puts it under scrutiny; it is much easier for the other States parties—and *a fortiori* the monitoring bodies if they exist—to convince a State to take the necessary steps in order to come closer to the integral respect of the treaty when it is a party than when it is excluded from the circle of the parties.

As far as the other parties having accepted the treaty obligations in their entirety are concerned, they are completely protected by the consent principle. Indeed, and this is one of the most striking innovations of the Vienna regime, they are still free to accept,⁵² or to object⁵³, a permissible reservation formulated by another State; and, if they feel the need, they can even go so far as to exclude the application of entire treaty with regard to the reserving State.⁵⁴

⁴⁹ *Reservations to the Genocide Convention* (Joint Dissenting Opinion) (n 10) 47.

⁵⁰ General Comment No 24 (n 20) 119–20, para 4. Similarly, in its 2007 recommendations, the working group on reservations, established by the human rights treaty monitoring bodies, underlined: ‘The working group considers that when reservations are permitted, whether explicitly or implicitly, they can contribute to the attainment of the objective of universal ratification’ (Report of the meeting of the working group on reservations to the nineteenth meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies, UN Doc HRI/MC/2007/5 (para 19, point 4 of the recommendations)).

⁵¹ Art 22(1) VCLT. See also guideline 2.5.1 (Withdrawal of reservations), GAOR 58th Session Supp 10 (UN Doc A/58/10) 190–201.

⁵² Acceptance is indeed necessary in order for the reservation to produce its effects. See Arts 20(4)(a) and (c) and 21(1) VCLT. See also the guidelines in sections 4.1 (Establishment of a reservation with regard to another State or organization) and 4.2 (Effects of an established reservation) of the ILC Guide to practice, GAOR 65th Session Supp 10 (UN Doc A/65/10) 112–47.

⁵³ Arts 20(4)(b) and 21(3) VCLT. See also guideline 2.6.3 (Freedom to formulate objections), and the relevant guidelines of section 4.3 (Effect of an objection to a valid reservation), GAOR 65th Session Supp 10 (UN Doc A/65/10) 147–70.

⁵⁴ Art 20(4)(b) VCLT. See also guidelines 2.6.4 (Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation) and 4.3.4 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect), GAOR 65th Session Supp 10 (UN Doc A/65/10) 151–4.

c) *Unity of the Vienna regime recognized*

The Vienna regime reconciles the quest for universality with only minimum concessions concerning the integrity of the treaty, thus fitting the necessities of any kind of treaties, including human rights instruments.

Moreover, one must not overlook that the 1951 Advisory Opinion, which marked the starting point of the radical transformation of the reservation regime⁵⁵ and influenced dramatically the work of the ILC in the 1960s, was given about reservations to the 1948 Convention on the Prevention and the Punishment of the Crime of Genocide. It is precisely the special nature of this treaty which led the Court to distance itself from what was undeniably the dominant⁵⁶ system at the time, namely unanimous acceptance of reservations, and to favour a more flexible system. In other words, it was difficulties connected with reservations to a highly 'normative' human rights treaty that gave rise to the definition of the present regime.⁵⁷ The Court expressly referred to the special character of that Convention,⁵⁸ ie its 'purely humanitarian and civilizing purpose' and the fact that States parties did 'not have any interests of their own',⁵⁹ arguments which have been constantly put forward by those who want to prove the inadaptability of the Vienna regime to human rights treaties. Were there particularities of human rights treaties with regard to reservations, they would consequently have been already incorporated into the regime of the Vienna Convention. The ILC questioned the possibility of exceptions to this general regime (other than the two which had been explicitly retained in Article 20(2) and (3)),⁶⁰ but did not deem it necessary to include any.⁶¹

⁵⁵ K Zemanek, 'Some Unresolved Questions in the Vienna Convention on the Law of Treaties' (n 24) 327.

⁵⁶ As is convincingly shown by the Joint Dissenting Opinion quoted above (n 10), [1951] ICJ Rep 32–42.

⁵⁷ The UK pointed out in this regard that: '[i]t was in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations.' GAOR 50th Session Supp 40 (UN Doc A/50/40) 152, para 4.

⁵⁸ *Reservations to the Genocide Convention* (n 9) 23.

⁵⁹ *Ibid.*

⁶⁰ It is noteworthy that, when it deemed it necessary, the ILC and the Vienna Conference did not hesitate to establish particular regimes for treaties relating to specific matters. See n 13.

⁶¹ The commentary to the 1966 ILC draft convention on the law of treaties clearly indicates that 'the Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of States for which the unanimity rule is retained'. [1966] II ILC Ybk 206 (para 14 of the commentary). The Vienna Conference did not adopt an amendment proposed by Spain (UN Doc A/CONF.39/C.1/L.147) in United Nations Conference on the Law of Treaties, *Official Records, Documents of the Conference*, 1st and 2nd session (Vienna 26 March–24 May 1968 and 9 April–22 May 1969), (UN Doc A/CONF.39/11/Add.2) (134, para 177(i)(c) and an amendment proposed by Colombia and the US (UN Doc A/CONF.39/C.1/L.126 and Add.1 in *ibid.*, 134, para 177(v)(b)) introducing to the 'object and purpose' criteria also the 'nature' or the 'character' of the treaty. See the reaction of the US after the rejection of its amendment, *ibid.*, *Summary Records of*

Moreover, the Human Rights Committee itself, in its General Comment No 24, considers that, in the absence of any express provision on the subject in the International Covenant on Civil and Political Rights (ICCPR), ‘the matter of reservations . . . is governed by international law’⁶² and makes an express reference to Article 19 VCLT. Admittedly, it considers this provision as providing only ‘relevant guidance’;⁶³ nevertheless it accepts the applicability of the VCLT to the Covenant as part of customary international law.⁶⁴ Finally, the Committee concludes:

Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.⁶⁵

It is thus apparent that the object and purpose test, the foundation of the Vienna regime concerning reservations, not only directly originated from the specific nature of human rights instruments—without, however, being limited to this kind of treaties—but has also expressly been referred to, in the reservations provisions of these instruments themselves,⁶⁶ by the recommendations of human rights treaty bodies,⁶⁷ and by States making objections to reservations deemed incompatible with the object and purpose of human rights instruments.⁶⁸ It is therefore undeniable that ‘there is a general agreement that the Vienna principle of “object and purpose” is the test’.⁶⁹

the Plenary Meetings and the Meetings of the Committee of the Whole 2nd session (Vienna 9 April–22 May 1969), UN Doc A/CONF.39/11/Add.1 11th plenary meeting (30 April 1969) 35, paras 2–3.

⁶² General Comment No 24 (n 20) 120, para 6.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, n (e).

⁶⁵ *Ibid.*

⁶⁶ See Art 75 of the American Convention on Human Rights. In its 1983 Advisory Opinion, the Inter-American Court of Human Rights considered that the reservations of Guatemala to paras 2 and 4 of Art 4 of the Convention were permissible in view of their compatibility with the object and purpose of the Convention. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982). See also Art 28(2) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (which repeats the wording of Art 20(2) of the 1966 Convention on the Elimination of All Forms of Racial Discrimination and hence predates the adoption of the 1969 Vienna Convention) (‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted . . .’); Art 51(2) of the 1989 Convention on the Rights of the Child; Art 91(2) of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Art 46(1) of the 2006 Convention on the Rights of Persons with Disabilities (‘Reservations incompatible with the object and purpose of the present Convention shall not be permitted’).

⁶⁷ See the Reports of the fourth and fifth meetings of persons chairing the human rights treaty bodies, UN Doc A/47/628, para 60 and UN Doc A/49/537, para 30. See also the Report of the meeting of the working group on reservations to the nineteenth meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies UN Doc HRI/MC/2007/5 (para 19, points 4 and 6 of the recommendations).

⁶⁸ See A Pellet, ‘2nd Report on Reservations to Treaties’ UN Doc A/CN.4/477 and Add.1, [1996] II(1) ILC Ybk 69, para 175.

⁶⁹ R Higgins, ‘Introduction’ in JP Gardner (ed), *Human Rights as General Norms and a State’s Right to Opt Out—Reservations and Objections to Human Rights Conventions* (BIICL, 1997) xxi.

During the joint meeting of 15–16 May 2007 of the ILC and representatives of human rights treaty bodies and regional human rights bodies, the unity of the Vienna regime was expressly recognized:

The special nature of human rights treaties was reflected in the test provided for in article 19 (c) of the Vienna Convention on the Law of Treaties, which concerned the incompatibility of a reservation with the object and purpose of the treaty. . . . The reason that human rights treaties were of special interest to the Commission was that they had treaty monitoring bodies. The representatives of the human rights bodies stressed the fact that it was not necessary to establish a separate regime governing reservations to human rights treaties. However, they did feel that the general regime should be applied in an appropriate and suitably adapted manner.⁷⁰

With all due respect, there is consequently no point in arguing that ‘the Vienna Convention regime on the effects of reservations is to operate differently with respect to them’.⁷¹ The Vienna regime is not only not ‘incompatible with the particular structure of performance of human rights treaties’,⁷² but it is designed to work perfectly well with regard to these very human rights treaties, too.

2. Specificity of human rights treaties?

The developments in Section 1 above do not mean that human rights treaties have no special characteristics, but simply show that, despite their claimed specificity—which we intend neither to deny nor to support in the present paper—the Vienna rules apply to reservations to those treaties. Even more, these rules constitute undeniable progress compared with the previously dominant system of unanimity and realize a fair balance between opposite considerations which are relevant (and indeed strikingly so) to human rights instruments as well as to any other kind of treaties. This is true in spite of the two main specific characters of human rights treaties usually invoked in favour of another reservation regime. In reality, reciprocity is a non-issue and monitoring is another question, which is not specific to reservations and appeared after the period when the Vienna regime was conceived and consolidated.

a) Reciprocity is a non-issue

A recurrent argument put forward by the ‘human rightist’ approach to reservation to treaties is based on the premise that the reciprocity principle on which, they believe, the Vienna regime is based cannot operate with regard to human rights instruments.

Indisputably, human rights instruments are not governed by reciprocity. This has prominently been recognized by the Strasburg Court:⁷³ ‘the Convention comprises

⁷⁰ A Pellet, ‘14th Report on Reservations to Treaties (2009)’ UN Doc A/CN.4/614 Annex, para 27.

⁷¹ Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1).

⁷² Professor Simma agrees on this point. *Ibid.*

⁷³ After the ICJ had noted, with respect to the Genocide Convention, that States parties did ‘not have any interests of their own’. See p 531 above.

more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble benefit from a “collective enforcement”.⁷⁴ The Inter-American Court of Human Rights also noted that “[i]n concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction”.⁷⁵ The Human Rights Committee also affirmed that the human rights treaties, ‘and the Covenant [on Civil and Political Rights] 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’.⁷⁶

However, this specificity is not present in human rights instruments only, but also in other categories of treaties establishing obligations owed to the community of contracting States, like treaties on commodities,⁷⁷ on the protection of the environment, some demilitarization or disarmament treaties,⁷⁸ and also private international law treaties providing uniform law,⁷⁹ and it does not make the general reservations regime inapplicable as a matter of principle. Of course, as a consequence of the actual nature of the ‘non-reciprocal’ clauses to which the reservations apply, ‘the reciprocal function of the reservation mechanism is almost meaningless’.⁸⁰ However, besides the fact that reciprocity is not entirely absent from human rights treaties, it must be noted that the reciprocity element of the effect of reservations is not indispensable for the correct operation of the Vienna rules. Any rule of law applies only when it is applicable, and the same is true for the reciprocity principle as provided for in particular in Article 21 VCLT: if and when a valid reservation is made to a non-reciprocal provision, reciprocity simply does not apply.

Just consider reservations purporting to limit the territorial application of a treaty; they are, by definition, deprived of any possible reciprocal application.⁸¹ Similarly,

⁷⁴ *Loizidou v Turkey* (Preliminary Objections) (App no 15318/89) (1995) Series A no 310, para 70, quoting *Ireland v United Kingdom* (App no 5310/71) (1978) Series A no 25, para 239.

⁷⁵ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (n 66).

⁷⁶ General Comment No 24 (n 20) 123, para 17.

⁷⁷ HG Schermers, ‘The Suitability of Reservations to Multilateral Treaties’ (1959) 6 *Netherlands Intl L Rev* 356. See also DW Greig, ‘Reservations: Equity as a Balancing Factor?’ (1995) 16 *Australian Ybk Intl L* 140.

⁷⁸ F Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (TMC Asser Instituut, 1988) 164–5.

⁷⁹ On the conventions of The Hague Conference on Private International Law, see P de Cesari, ‘Riserve, Dichiarazioni e Facoltà nelle convenzioni dell’Aja di Diritto internazionale’ in T Treves (ed), *Six Studies on Reservations* (2002) 22 *Comunicazioni e studi* 149; and F Majoros, ‘Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de la Haye’ (1974) 101 *Journal du droit international* 73.

⁸⁰ Higgins, ‘Human Rights: Some Questions of Integrity’ (n 22) 9.

⁸¹ Imbert, *Les Réserves aux Traités Multilatéraux* (n 24) 258; B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot, 1972) 61.

reciprocal application of the effects of the reservation is also excluded if it was motivated by situations obtaining specifically in the reserving State.⁸² However, the inapplicability of the reciprocity provisions of the Vienna regime does not as such lead to the necessary conclusion that the regime is inappropriate for this kind of treaties. Put simply, the reciprocal effect of the reservation has ‘nothing on which it can “bite” or operate’.⁸³ And, of course, the same is true concerning human rights treaties: it would, indeed, be untenable to sustain that the objections by the various European States to the US reservation on the death penalty discharge them from their obligations under Articles 6 and 7 ICCPR in their relations with the US; this is surely not the intention of the objecting States in making their objections.⁸⁴

This does not mean, however, that the principle of reciprocity plays no role in these particular cases. The reservation will nevertheless produce at least one effect: even if a State accepting the reservation, or for that matter a State formulating an objection to it, is required to discharge the obligations contained in the treaty, the reserving State is not entitled to call for compliance with these obligations which it does not assume on its own account. As Roberto Baratta has rightly pointed out:

... anche in ipotesi di riserve a norme poste dai menzionati accordi l'effetto di reciprocità si produce, in quanto né la prassi, né i principi applicabili in materia inducono a pensare che lo State riservante abbia un titolo giuridico per pretendere l'applicazione della disposizione da esso riservata rispetto al soggetto non autore della riserva. Resta nondimeno, in capo a tutti i soggetti che non abbiano apposto la stessa riserva, l'obbligo di applicare in ogni caso la norma riservata a causa del regime solidaristico creato dall'accordo.⁸⁵

As such, absence of reciprocity neither constitutes a specificity of human rights instruments, nor is it incompatible with the Vienna regime as such. Article 21(1) (b) or (3) simply does not (entirely) operate for the accepting or the objecting party.

⁸² Horn, *Reservations and Interpretative Declarations* (n 78) 165–6; Imbert, *Les Réserves aux Traités Multilatéraux* (n 24) 258–60. See however the more cautious ideas relating to these assumptions formulated by Majoros, ‘Le Régime de Réciprocité’ (n 79) 83–4.

⁸³ G Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications, 1986) 412.

⁸⁴ See WA Schabas, ‘Reservations to Human Rights Treaties: Time for Innovation and Reform’ (1995) 32 *Canadian Ybk Intl L* 65; GG Fitzmaurice, ‘Reservations to Multilateral Conventions’ (1953) 2 *Intl & Comparative LQ* 15.

⁸⁵ R Baratta, *Gli Effetti delle Riserve ai Trattati* (Antonio Giuffrè, 1999) 294 (‘even on the assumption of reservations to the norms enunciated in the above-mentioned agreements, reciprocity produced its effect, as neither practice nor the applicable principles suggest that the reserving State would have a legal right to call for the application of the provision to which the reservation relates by a subject which is not the author of the reservation. There nonetheless remains the obligation for all subjects which have not formulated the reservation to apply in all cases the norm to which the reservation relates, by virtue of the regime of solidarity established by the agreement’, our translation); see also Greig, ‘Reservations: Equity as a Balancing Factor?’ (n 77) 140.

b) *Monitoring is another question*

The existence of monitoring bodies is certainly a particularity of modern human rights treaties, but it does not constitute, at least with regard to the Vienna reservations regime, a specificity which, as such, should lead to, and justify, a change in the substantive legal rules applicable. On the contrary, because of their role, which is now widely recognized,⁸⁶ to assess the permissibility of reservations, the monitoring mechanisms make an objective determination of the permissibility possible and eliminate one of the most important uncertainties with regard to the application of the Vienna regime. Monitoring is consequently not a 'further' specificity of human rights treaties with regard to reservation; it constitutes a clear progress in the application of the Vienna rules.

In General Comment No 24, the Human Rights Committee considered that:

Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles.⁸⁷

It is certainly desirable that the compatibility of a reservation with the object and purpose is determined objectively. That this can rarely be the case because of the particular structure of the international society is a different question. And even in the case of human rights treaties the assessment of the permissibility of a reservation cannot always be made by a monitoring body; this is the case when no such body is instituted by the treaty and/or when the responsibility to make this assessment has been expressly entrusted to the States parties. One of the most well-known and discussed clauses⁸⁸ of this kind is Article 20(2) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination:⁸⁹

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation

⁸⁶ See pp 542–4 below.

⁸⁷ General Comment No 24 (n 20) 124, para 18.

⁸⁸ See, eg, A Cassese, 'A New Reservations Clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)' in *Recueil d'Études de Droit International en Hommage à Paul Guggenheim* (Institut Universitaire des Hautes Etudes Internationales, 1968) 266–304; CJ Redgwell, 'The Law of Reservations in Respect of Multilateral Conventions' in Gardner, *Human Rights as General Norms* (n 69) 13–14; or R Cortado, *Las Reservas a los Tratados—Lagunas y Ambigüedades del Régimen de Viena* (Universidad de Murcia, 2004) 317–22.

⁸⁹ The mechanism set up by Art 20 first dissuaded the Committee on the Elimination of Racial Discrimination established under the Convention from taking a position on the validity of reservations: 'The Committee must take the reservations made by States parties at the time of ratification or accession into account: it has no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect.' GAOR 33rd Session Supp 18 (UN Doc A/33/18) para 374. Recently, however, the Committee has taken a somewhat more flexible position: eg, in 2003, it stated with reference to a reservation made by Saudi Arabia that 'the broad and imprecise nature of the State party's general reservation raises concern as to its compatibility with the object and purpose of the Convention. The Committee encourages the State party to review the reservation with a view to formally withdrawing it.' GAOR 58th Session Supp 18 (UN Doc A/58/18) para 209.

of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties object to it.⁹⁰

This example largely contradicts the position of the Human Rights Committee, which transforms monitoring mechanisms into an inherent specificity of human rights instruments:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, *it is an inappropriate task for States parties in relation to human rights treaties*, and in part because it is a task that the Committee cannot avoid in the performance of its functions.⁹¹

Whereas the existence of monitoring bodies is certainly a particularity of human rights treaties,⁹² it is neither a necessary element of these instruments, nor an 'exclusive' particularity,⁹³ and is certainly not an argument to modify the generally applicable reservations regime which bears upon the substantive principles to be applied by the authority competent to assess the validity of the reservation—whether a State, an international organization, a judge, or a monitoring body. Moreover, as has been shown above, monitoring bodies are committed to this regime and assess the permissibility of reservations with regard to the 'object and purpose' test of Article 19(c) VCLT.⁹⁴ Without any doubt, these monitoring bodies have largely contributed to the development and the refinement of the Vienna regime, rather than to its destruction.

II. Clarifying and Completing the Vienna Regime: Human Rights Treaties as an Incentive

Although it can legitimately be maintained that the regime of reservations, as it has emerged from the 1969 Vienna Convention and subsequent conventions,

⁹⁰ This kind of reservation clause is, however, not limited to human rights instruments. Other examples are Art 20 of the 1954 Convention concerning Customs Facilities for Touring, which authorizes reservations if they have been 'accepted by a majority of the members of the Conference and recorded in the Final Act' (para 1) or made after the signing of the Final Act without any objection having been expressed by one third of the Contracting States within 90 days from the date of circulation of the reservation of the Secretary-General (paras 2 and 3). Similar clauses can be found in Art 14 of the Additional Protocol to this Convention, in Art 39 of the Customs Convention on the Temporary Importation of Private Road Vehicles, in Art 50(3) of the 1961 Single Convention on Narcotic Drugs, and in Art 32(3) of the 1971 UN Convention on Psychotropic Substances, which make the admissibility of the reservation subject to the absence of objections by one-third of the contracting States.

⁹¹ General Comment No 24 (n 20) 124, para 18 (emphasis added).

⁹² See also the summary of the discussion between the ILC and representatives of human rights treaty monitoring bodies (15–16 May 2007) (n 70).

⁹³ Disarmament or environment treaties also quite often create other kinds of monitoring bodies although they operate differently.

⁹⁴ See pp 532–3 above.

constitutes a success, many questions nevertheless persist and the implementation of the regime has not always proceeded smoothly.⁹⁵ The ambiguities of Articles 19–23 VCLT and the gaps in the Vienna regime⁹⁶ have led the ILC to reconsider the issue of reservations, not to put into question the established regime, but in order to ‘try to fill the gaps and, where possible and desirable, to remove their ambiguities while retaining their versatility and flexibility’.⁹⁷ The 16 reports presented by the Special Rapporteur between 1995 and 2010 and the final outcome, the first version of the Guide to Practice adopted in 2010, shed some light on the difficulty of this task.

The practice with regard to human rights treaties has played a leading role in showing the shortcomings of the Vienna regime and the difficulties of its implementation, because of, on the one hand, the very great number of reservations made to these instruments, and, on the other hand, the vigilance of some States and of monitoring bodies with regard to these reservations. The jurisprudence and the practice relating to human rights instruments have considerably further developed the Vienna regime. The implementation of the new monitoring mechanism clarified the relation between Articles 19 and 20 by permitting a more objective assessment of the permissibility of reservations in a (still) essentially decentralized international legal system (Section II(1)). Ultimately, the jurisprudence and the decisions of human rights bodies started to fill one of the most important gaps left by the drafters of the 1969 Convention—the legal effects of an impermissible reservation—and were an important source of inspiration for the ILC when it completed its Guide to Practice in this respect (Section II(2)).

1. The objective (im-)permissibility of a reservation⁹⁸

The difficulties which surfaced with regard to the establishment of the compatibility of a reservation with the ‘object and purpose’ of general human rights instruments have for a long time put into question the workability and even the place of this core element of the Vienna regime. However, the setting up of monitoring mechanisms endowed with the competence to determine more objectively the permissibility of reservations has finally given the ‘object and purpose’ criterion the place it deserved: an objective limitation of the freedom of States to formulate reservations to a treaty.

⁹⁵ P Reuter has noted that ‘the question of reservations has always been a thorny and controversial issue, and even the provisions of the Vienna Convention have not eliminated all these difficulties’. 10th Report on the Question of Treaties concluded between States and International Organizations or between two or more International Organizations UN Doc A/CN.4/341 and Add.1, [1981] II(1) ILC Ybk 56, para 53.

⁹⁶ See A Pellet, ‘Preliminary Report on the Law and Practice Relating to Reservations to Treaties’ UN Doc A/CN.4/470, [1995] II(1) ILC Ybk 142, paras 96–149.

⁹⁷ *Ibid.*, 152, para 163.

⁹⁸ The following section is largely based on the Tenth Report on Reservations to Treaties (2005) by Special Rapporteur A Pellet (UN Doc A/CN.4/558 and Add. 1 and 2).

a) *Some considerations on the 'object and purpose' of general human rights treaties*

There is no doubt that the concept of 'object and purpose' of the treaty—which is far from being limited to the question of permissibility of reservations, but is also referred to in other provisions of the Vienna Convention⁹⁹—is not easily applicable *in abstracto*.¹⁰⁰ While it might be less an 'enigma' than certain authors have written,¹⁰¹ the attempt made in Article 19(c) VCLT to introduce an element of objectivity into a largely subjective system is not entirely successful.¹⁰² The fact that '[t]he claim that a particular reservation is contrary to object and purpose is easier made than substantiated',¹⁰³ was certainly one of the major critiques of the minority in the *Reservations to the Genocide Convention* Advisory Opinion. In their joint dissenting Opinion, the judges expressed the fear that 'object and purpose' could not 'produce final and consistent results'.¹⁰⁴

Notwithstanding the inevitable 'margin of subjectivity' in the appreciation of the object and purpose of a treaty, the criterion has considerable merit and undoubtedly constitutes a useful guideline capable of resolving the issue of permissibility in a reasonable manner.

⁹⁹ Cf Arts 18, 19(c), 20(2), 31(1), 33(4), 41(1)(b)(ii), 58(1)(b)(ii), and 60(3)(b) VCLT. A connection can be made with the provisions relating to the 'essential bas[e]s' or 'condition[s] of the consent to be bound' (see P Reuter, 'Solidarité et Divisibilité des Engagements Conventionnels' in Y Dinstein, *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (Nijhoff, 1999) 627).

¹⁰⁰ The uncertainties surrounding this criterion have been noted (and criticized with varying degrees of harshness) in all the scholarly writing: see, eg, A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) 111; PM Dupuy, *Droit International Public* (9th edn, Dalloz, 2008) 298, para 256; Fitzmaurice, 'Reservations to Multilateral Conventions' (n 84) 12; M Rama-Montaldo, 'Human Rights Conventions and Reservations to Treaties' in *Héctor Gros Espiell Amicorum Liber: Human Person and International Law* (Bruylant, 1997) 1265; C Rousseau, *Droit International Public (Introduction et Sources)* (Sirey, 1970) 126; G Teboul, 'Remarques sur les Réserves aux Conventions de Codification' (1982) 86 *Revue générale de droit international public* 695; A Pellet, 'Preliminary Report on the Law and Practice Relating to Reservations to Treaties' UN Doc A/CN.4/470, [1995] II(1) ILC Ybk 143, para 109. Simma and Hernández noted that: '[i]t is this last situation, set out in Article 19(c) which squarely puts into focus of how little, if any, help the Convention turns out to be when it comes to establishing the admissibility *vel non* of a reservation or looking for guidance regarding the manner in which a contracting party, unwilling to accept an impermissible reservation, could react in an effective way, going beyond essentially empty gestures.' Simma and Hernández, 'Legal Consequences of an Impermissible Reservation' (n 1), referring to Simma, 'Reservations to Human Rights Treaties' (n 1) 662.

¹⁰¹ See n 25.

¹⁰² According to Jean Kyongun Koh, '[t]he International Court thereby introduced purposive words into the vocabulary of reservations which had previously been dominated by the term "consent".' ('Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision' (1982) 23 *Harvard Intl LJ* 85).

¹⁰³ L Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Nijhoff, 1995) 82–3.

¹⁰⁴ Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo (n 10) 44. See also the ILC's resistance to adopt the criterion established by the ICJ, [1951] II ILC Ybk 128, para 24 ('Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that it is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively').

Within the area of human rights, some lively debates have taken place in this regard, particularly over reservations made to general treaties such as the European, Inter-American, and African Conventions or the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. In the case of the latter, the Human Rights Committee stated in its famous (and debatable) General Comment No 24 that:

In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.¹⁰⁵

This statement of principle¹⁰⁶ constitutes one of the major arguments invoked in order to ban all reservations to human rights treaties, because, taken literally, this position would render invalid any general reservation bearing on any one of the rights protected by the Covenant. However, the Committee itself does not go that far and recognizes that reservations may usefully encourage a wider acceptance of the Covenant.¹⁰⁷

In the case of the 1989 New York Convention on the Rights of the Child, a great many reservations have been made to the provisions concerning adoption.¹⁰⁸ As has been noted by an author who is hardly to be suspected of 'anti-human-rightism', '[i]t would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose'.¹⁰⁹

The real difficulty seems to be to find a suitable approach to the 'object and purpose' which both preserves the integrity of the treaty, in general, and general human rights instruments, in particular, without discouraging as wide an acceptance of the treaty as possible. While the object and purpose of a more specific human rights instrument, such as the Torture Convention, is easier to determine specifically (prohibition of all acts of torture and their effective punishment), the

¹⁰⁵ General Comment No 24 (n 20), 120, para 7. See also F Hampson, 'Reservations to Human Rights Treaties, Final Working Paper', UN Doc E/CN.4/Sub.2/2004/42, para 50 ('The difficulty in the case of human rights law is that the object is not the acceptance of a large number of separate obligations. Rather, there is a single goal (respect, protection and promotion of human rights) which is to be achieved by adherence to a large number of separate provisions').

¹⁰⁶ See also the assessment of the 'object and purpose' of the American Convention by the Inter-American Court of Human Rights: speaking of modern human rights treaties, in general, and the American Convention, in particular, it noted that 'their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States'. *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (n 66) para 29.

¹⁰⁷ See p 530 above.

¹⁰⁸ Arts 20 and 21. See *Multilateral Treaties deposited with the Secretary-General*, ch IV, 11 <<http://treaties.un.org/>> accessed 22 August 2010.

¹⁰⁹ WA Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 Human Rights Q 480.

object and purpose of a general human rights instrument is, by definition, more difficult to assess and to evaluate. One must indeed accept that the description of the Human Rights Committee seems to be quite plausible: the object and purpose of the Covenant 'is to create legally binding standards for human rights'. However, this does not bring the issue of permissibility of a reservation much further.

The ILC did not attempt to resolve the salient question of what exactly is the object and purpose of the treaty. Guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty)¹¹⁰ does not purport to give a precise definition of 'object and purpose', but is limited to the more specific question of whether a reservation is, or is not, compatible with the object and purpose of the treaty: it 'indicates a direction rather than establishing a clear criterion that can be directly applied in all cases'.¹¹¹ In order to take account of the specific difficulty raised in regard to reservations to general human rights treaties, guideline 3.1.12 (Reservations to general human rights treaties) complements the very general orientation given in guideline 3.1.5 by adding more detailed criteria, just as the Human Rights Committee did in its General Comment (without, however, adopting the same criteria).¹¹² Guideline 3.1.12 provides:

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.¹¹³

In any event, and this holds true for every treaty whatever its nature or object, the determination of the object and purpose is always a difficult endeavour. 'Such a process undoubtedly requires more "*esprit de finesse*" than "*esprit de géométrie*", like any act of interpretation, for that matter, in which category the process falls.'¹¹⁴

¹¹⁰ See n 34.

¹¹¹ GAOR 62nd Session Supp 10 (UN Doc A/62/10) 77, para (15) of the commentary to guideline 3.1.5.

¹¹² The Human Rights Committee did not limit itself to determining the 'object and purpose' of the Covenant (see p 540 above), but continued to set out in greater detail the criteria it uses to assess whether reservations are compatible with the object and purpose of the Covenant (General Comment No 24 (n 20) 120–1, para 4.

¹¹³ GAOR 62nd Session Supp 10 (UN Doc A/62/10) 113–6. According to Simma and Hernández: '[b]y offering a specific interpretative rule which applies only to them, this draft guideline [3.1.12] is significant in that it marks a shift away from the general, bilateralist framework of the Vienna Convention regime and constitutes cautious recognition by the Special Rapporteur of the limitations of that regime in so far as normative treaties are concerned.' Simma and Hernández, 'Legal Consequences of an Impermissible Reservation' (n 1); not exactly so: in the mind of the Special Rapporteur, this guideline illustrates the flexibility and adaptability of the Vienna regime—including in relation with general human rights treaties.

¹¹⁴ A Pellet, 'Tenth Report on Reservations to Treaties (2005)' UN Doc A/CN.4/558/Add.1, para 90.

b) *Competence of monitoring bodies to appreciate the permissibility*

With regard to the difficult assessment of the compatibility of a given reservation with the object and purpose of the treaty, a great number of human rights treaties are endowed with a particularly valuable mechanism: monitoring bodies. As Judge Simma stated in an article he has written with GI Hernández: ‘We maintain that the monitoring of human rights obligations is a central element in the protection of the overarching object and purpose of human rights treaty instruments.’¹¹⁵ The role and competence of these monitoring bodies, an issue which arose only after the adoption of the Vienna Convention, is, however, not free from controversy.

While it has never been contested that a judge or an arbitrator is competent to assess the validity of a reservation, including its compatibility with the object and purpose of the treaty to which it refers,¹¹⁶ the human rights monitoring bodies have quite different and varied powers provided for under the human rights instruments by which they have been established: Some—the regional human rights courts—can issue binding decisions but others, including the Human Rights Committee, can only adopt general recommendations or recommendations related to an individual complaint. The absence of formally recognized decision powers has nevertheless not prevented monitoring bodies upholding their own competence to assess the compatibility of a reservation with the object and purpose of the treaty that established them, and to consider that they have the power to issue binding decisions on the permissibility of a reservation and its consequences.¹¹⁷ In so doing, they have aroused the opposition of States, which have no interest in being bound by a treaty beyond the limits which they have accepted, and which intend to be able to interpret the precise scope of their commitments as freely as possible.¹¹⁸

There can, however, be no doubt that the human rights treaty bodies are competent to take a position on the validity of a reservation, when the issue comes before them in the exercise of their functions, including of course on the compatibility of the reservation with the object and purpose of the treaty.¹¹⁹ This competence does not arise from the specificity of human rights instruments as the Human Rights Committee concluded in its General Comment No 24.¹²⁰ Rather, the treaty bodies

¹¹⁵ Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1).

¹¹⁶ *Reservations to the Genocide Convention* (n 9) 27. See also *Delimitation of the Continental Shelf between the UK and France* (n 23) 40, para 56; and *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (n 66) para 38.

¹¹⁷ See General Comment No 24 (n 20) 124, para 18; and *Rawle Kennedy v Trinidad and Tobago* (Comm no 845/1999) (1999) UN Doc CCPR/C/67/D/845/1999, para 6.7.

¹¹⁸ Some States have reacted particularly vehemently and gone so far as to deny that the bodies in question have any jurisdiction in the matter. See the observations of the US on the Human Rights Committee’s General Comment No 24 (GAOR 50th Session Supp 40 (UN Doc A/50/40) 154–8); the UK (*ibid*, 158–64) and France (GAOR 51st Session Supp 40 (UN Doc A/51/40) 104–6).

¹¹⁹ See also the ILC’s Preliminary Conclusions on reservations to normative multilateral treaties (n 4, point 5).

¹²⁰ General Comment No 24 (n 20) 124, para 18 (‘It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.

could not carry out their mandated functions if they cannot ascertain 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. The competence to assess the validity of reservations is therefore an inherent part of their functions.¹²¹

Nevertheless, the Human Rights Committee and the other international human rights treaty bodies which do not have a decision-making power endowed by the relevant treaty do not acquire it in the area of reservations.¹²² While all the human rights treaty bodies (or dispute settlement bodies) may assess the validity of a contested reservation—because this function is inherent in the power conferred to them—their assessment cannot be legally binding upon the concerned States when they are deprived of the power to take binding decisions.¹²³

Guideline 3.2.1 (Competence of the treaty monitoring bodies to assess the permissibility of reservations) of the ILC Guide to Practice now recognizes the competence of monitoring bodies to assess the validity of reservations, and clarifies what legal force these assessments may have:

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.

The existence of monitoring mechanisms provides an extremely useful tool for human rights instruments in order to wipe out the uncertainty and the necessary subjectivity which are inherent in the Vienna regime. It cannot and does not replace the general regime as such, but adds a control mechanism which is usually missing in order to apply the Vienna rules more effectively and more objectively.

It is however important to keep in mind that monitoring bodies do not affect the power of the States to make their own assessment of the validity of reservations.

This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties ...').

¹²¹ See also A Pellet, '2nd Report of the ILC Special Rapporteur on Reservations to Treaties' UN Doc A/CN.4/477 and Add.1, [1996] II(1) ILC Ybk 74, paras 193–210; Greig, 'Reservations: Equity as a Balancing Factor?' (n 77) 90–107; and Cortado, *Las Reservas a los Tratados* (n 88) 345–53; and, with particular reference to the bodies established by European Convention on Human Rights, I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case' (1990) 33 German Ybk Intl L 88.

¹²² ILC's Preliminary Conclusions on reservations to normative multilateral treaties (n 4) (point 8) ('The Commission notes that the legal force of the findings made by the monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role').

¹²³ See p 542 above. On the legal effect of an impermissible reservation on the reserving State's consent to be bound by the treaty, see pp 547–51 below.

Indeed, even if the validity of a reservation is not affected by the acceptances or objections made by other contracting States, they constitute a useful means for monitoring bodies for the interpretation of the relevant treaty, the determination of its object and purpose, and the assessment of the permissibility of a reservation. The Human Rights Committee has considered in this regard that ‘an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant’.¹²⁴ The existence of a monitoring mechanism consequently does not discharge States parties from assuming their own responsibility and assessing individually the permissibility of reservations,¹²⁵ by having recourse to Article 19 VCLT.

2. The legal effects of impermissible reservations¹²⁶

One of the most fundamental lacunas of the Vienna Convention regime on reservation is constituted by the absence of any clear provision guiding the legal effects to be attributed to a non-valid, impermissible reservation,¹²⁷ and it must be admitted that the VCLT contains no clear, specific rules concerning the effects of an impermissible reservation.¹²⁸ In this regard, it is particularly striking that:

the 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation . . . , the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time.¹²⁹

Professor Simma also came to the conclusion that the Vienna regime on reservations is applicable only to permissible reservations, in particular because it would be incoherent for a codification convention to establish permissibility conditions on the first hand (Article 19) and then continue to deal with permissible and

¹²⁴ General Comment No 24 (n 20) 124, para 17.

¹²⁵ *Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) 18 RIAA 483, para 81 (‘each State establishes for itself its legal situation vis-à-vis other States’).

¹²⁶ The present section is largely based on A Pellet, ‘15th Report on Reservations to Treaties’ (2010) UN Doc A/CN.4/624/Add.1.

¹²⁷ ILC, ‘Provisional Summary Record, 2888th meeting’ (5 July 2006) UN Doc A/CN.4/2888, 13–4 (Pellet).

¹²⁸ For a detailed analysis of the *travaux préparatoires* of both Vienna Conventions and the issue of impermissible reservations, see A Pellet, ‘15th Report on Reservations to Treaties (2010)’ (n 126) paras 386–402. See also G Gaja, ‘Il Regime della Convenzione di Vienna Concernente le Riserve Inammissibili’ in *Studi in Onore di Vincenzo Starace* (Ed Scientifica, 2008) 349–61; Simma, ‘Reservations to Human Rights Treaties’ (n 1) 667–8; C Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Recueil des Cours* 321.

¹²⁹ A Pellet, ‘Preliminary Report on the Law and Practice Relating to Reservations to Treaties’ UN Doc A/CN.4/470, [1995] II(1) ILC Ybk 152, para 161.

impermissible reservations indistinctively.¹³⁰ Accordingly, in an article written with GI Hernandez, he submits:

Our firm position is that the Vienna Convention regime on the acceptance of and objection to reservations as well as on the legal effects of reservations, their acceptance and objections thereto *does not* apply to impermissible reservations, and *should not* apply to impermissible reservations to human rights treaties by analogy in unmodified terms either.¹³¹

However, if it is true that the Vienna regime does not establish clear rules on the legal consequences of the formulation of an impermissible reservation, the entire regime is indeed not applicable to such impermissible reservations and it is therefore not at all necessary to distinguish in this regard between reservations to human rights instruments and reservations to ‘ordinary’ treaties.

In order to fill this particular gap, the ILC relied quite extensively on State practice and the pronouncements of human rights monitoring bodies and human rights courts and tribunals, without, however, implying that the solution finally adopted would be applicable only to impermissible reservations to human rights instruments. While the ‘missing’ law has certainly been developed by human rights treaty bodies and practice in respect to human rights treaties,¹³² it is certainly not limited to this particular ‘category’ of instruments.

a) An impermissible reservation is a nullity

Guideline 4.5.1 (Nullity of an invalid reservation) fills one of the most important gaps of the Vienna regime. It states:

A reservation that does not meet the conditions of formal validity and permissibility set out [in] the Guide to Practice is null and void, and therefore devoid of legal effect.¹³³

This ‘new’ rule in the law of reservation does not come out of the blue. The absence of any legal effect and the nullity of an impermissible reservation were recognized two decades ago by the European Court of Human Rights in *Weber v Switzerland*,¹³⁴ *Belilos v Switzerland*,¹³⁵ and *Loizidou v Turkey*.¹³⁶ In all three cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and

¹³⁰ Simma and Hernández, ‘Legal Consequences of an Impermissible Reservation’ (n 1).

¹³¹ *Ibid* (emphasis in the original).

¹³² See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma) [2006] ICJ Rep 71, para 23.

¹³³ GAOR 65th Session Supp 10 (UN Doc A/65/10) 181–92.

¹³⁴ *Weber v Switzerland* (App no 11034/84) (1990) Series A no 177, paras 35–8.

¹³⁵ *Belilos v Switzerland* (Preliminary Objections) (App no 10328/83) (1988) Series A no 132, para 60.

¹³⁶ *Loizidou v Turkey* (Preliminary Objections) (App no 15318/89) (1995) Series A no 310, paras 89–98.

Turkey, applied the European Convention on Human Rights as if the reservations had not been formulated and, consequently, had produced no legal effect.

In its General Comment No 24, the Human Rights Committee also came to the conclusion—without relying on the law of treaties but on the specificities of the Covenant—that an impermissible reservation should be disregarded as a nullity.¹³⁷ Despite the unfavourable responses to this General Comment made by the US, the United Kingdom, and France none of the three States challenged the position that a non-valid reservation cannot have any legal effect on the treaty provisions.¹³⁸ The Committee subsequently confirmed the conclusion reached in General Comment No 24 in its decision in *Rawle Kennedy v Trinidad and Tobago*.¹³⁹ The Inter-American Court of Human Rights followed up with its decision in *Hilaire v Trinidad and Tobago*.¹⁴⁰

The findings of human rights bodies, courts, and tribunals—which, without doubt, have influenced the ILC's work on the question of impermissible reservations—are furthermore confirmed by an important State practice which is, interestingly, not limited to human rights instruments.

One must, however, admit that many objections are formulated by States in respect of reservations that are considered impermissible, either because they are prohibited by the treaty or because they are incompatible with its object and purpose, without precluding the entry into force of the treaty.¹⁴¹ This practice, which finds some support in Articles 20(4)(b) and 21(3) VCLT, is both surprising and debatable: it does not give any effect to the impermissibility of the reservation. However Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth Committee's discussion of the report of the Commission on the work of its fifty-seventh session:

A reservation incompatible with the object and purpose of a treaty was not formulated in accordance with article 19, so that the legal effects listed in article 21 did not apply. When article 21, paragraph 3, stated that the provisions to which the reservation related did not apply as between the objecting State and the reserving State to the extent of the reservation, it was referring to reservations permitted under

¹³⁷ General Comment No 24 (n 20) 151–2, para 18. See also F Hampson's final working paper on reservations to human rights treaties, UN Doc E/CN.4/Sub.2/ 2004/42, para 57: 'A monitoring body cannot be expected to give effect to a reservation it has found to be incompatible with the objects and purposes of the treaty.'

¹³⁸ See the observations of the US (GAOR 50th Session Supp 40 (UN Doc A/50/40) 154–8); the UK (ibid, 158–64), and France (GAOR 51st Session Supp 40 (UN Doc A/51/40) 104–6).

¹³⁹ *Rawle Kennedy v Trinidad and Tobago* (Comm no 845/1999) (1999) UN Doc CCPR/C/67/D/845/1999, in particular para 6.7.

¹⁴⁰ *Hilaire v Trinidad and Tobago* (Judgment) (Preliminary Objections), Inter-American Court of Human Rights Series C No 80 (1 September 2001) para 98. See also *Benjamin et al v Trinidad and Tobago* (Judgment) (Preliminary Objections), Inter-American Court of Human Rights Series C No 81 (1 September 2001) para 89.

¹⁴¹ See, eg, the Belgium's objections to the reservations to the Convention on Diplomatic Relations formulated by the United Arab Republic, Cambodia, and Morocco, *Multilateral Treaties deposited with the Secretary-General*, ch III, 3, <<http://treaties.un.org/>> accessed 22 August 2010.

article 19. It would be unreasonable to apply the same rule to reservations incompatible with the object and purpose of a treaty. Instead, such a reservation should be considered invalid and without legal effect.¹⁴²

This is clearly confirmed by the great majority of States' reactions to reservations that they consider impermissible. Whether or not they indicate explicitly that their objection will not preclude the entry into force of the treaty with the author of the reservation, they nevertheless state unambiguously that an impermissible reservation has no legal effect.¹⁴³ State practice is extensive—and essentially homogeneous—and is not limited to a few specific States or to a particular kind of treaty.

The nullity and the inapplicability of a reservation which does not satisfy the requirements of Article 19 VCLT is thus far from being an invention of human rights treaty bodies or organs. It is a general concept which applies irrespective of any specificities of the treaty concerned. Even if the rule has been mostly crystallized with regard to human rights instruments, and in particular with regard to the 1951 Rome Convention and the 1966 ICCPR, it is not limited to them, as made clear by State practice.

b) The preservation of the will of the reserving State

In 2010, the ILC adopted guideline 4.5.2 (Status of the author of an invalid reservation in relation to the treaty), which proposes a solution to one of the most disputed issues concerning reservations to treaties: the severability of an impermissible reservation. Indeed, the mere statement that a reservation which does not satisfy the validity conditions of Article 19 VCLT is devoid of any legal effect cannot, as such, resolve the question whether the reserving State will nevertheless become a party to the treaty, or not; or, in other words, whether the nullity of the reservation affects the consent of the reserving State to be bound by the treaty, or not.

¹⁴² UN Doc A/C.6/60/SR.14, para 22. See also Malaysia (UN Doc A/C.6/60/SR.18, para 86) and Greece (UN Doc A/C.6/60/SR.19, para 39), as well as the report of the meeting of the working group on reservations to the nineteenth meeting of chairpersons of the human rights treaty bodies and the sixth inter-committee meeting of the human rights treaty bodies (UN Doc HRI/MC/2007/5, para 18): 'it cannot be envisaged that the reserving State remains a party to the treaty with the provision to which the reservation has been made not applying.'

¹⁴³ See the objection made by the UK to the reservations formulated by several Eastern European States to the 1949 Geneva Conventions: 'whilst they regard all the above-mentioned States as being parties to the above-mentioned Conventions, they do not regard the above-mentioned reservations thereto made by those States as valid, and will therefore regard any application of any of those reservations as constituting a breach of the Convention to which the reservation relates' (1957) 278 UNTS 268. See also the identical objections to the four Geneva Conventions made by the US. Its objection to the Geneva Convention relative to the treatment of prisoners of war reads: 'Rejecting the reservations which States have made with respect to the Geneva Convention relative to the treatment of prisoners of war, the United States accepts treaty relations with all parties to that Convention, except to the changes proposed by such reservations' (1955) 213 UNTS 383. For further examples, see A Pellet, '15th Report on the Law of Treaties (2010)' UN Doc A/CN.4/624/Add.1, paras 428–9.

For a long time, the severability issue represented one of the most raging disputes between human rights treaty bodies, on the one hand, and defenders of the Vienna reservations regime, on the other. Even though the severability presumption has been adopted by human rights bodies and mainly advocated by the ‘human rightist’ doctrine, it serves more general purposes. First recognized by the Strasbourg Court in its *Belilos v Switzerland*¹⁴⁴ judgment, it has been further refined and developed in a judgment rendered by a chamber of the Court in *Weber v Switzerland*¹⁴⁵ and the judgment on preliminary objections in *Loizidou v Turkey*.¹⁴⁶ In 2001, the Inter-American Court of Human Rights likewise considered Trinidad and Tobago bound by the San José Convention and its declaration of acceptance of the Court’s jurisdiction irrespective of the impermissible reservation formulated.¹⁴⁷ The most categorical affirmation of the severance of an impermissible reservation from the reserving State’s consent has, however, been adopted by the Human Rights Committee:

The 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.¹⁴⁸

This approach has developed and is confirmed by the practice, followed, inter alia, by the Nordic States,¹⁴⁹ of formulating what have come to be called objections with ‘super-maximum’ effect,¹⁵⁰ by which the objecting State contends that because of the impermissibility of a reservation, the treaty will enter into force for the reserving State without the benefit of the reservation. Even if these objections with ‘super-maximum’ effect have appeared in particular as a response to invalid reservations to human rights treaties, they are nevertheless not limited to reservations to such treaties.¹⁵¹

The principal objection to the severability doctrine is the consent principle governing the entire law of treaties, in general, and the law of reservations, in particular. In its comment to Human Rights Committee’s General Comment No 24, France, representing the non-severability doctrine, noted quite categorically:

that agreements, whatever their nature, are governed by the law of treaties, that they are based on States’ consent and that reservations are conditions which States attach

¹⁴⁴ *Belilos v Switzerland* (Preliminary Objections) (App no 10328/83) (1988) Series A no 132.

¹⁴⁵ *Weber v Switzerland* (App no 11034/84) (1990) Series A no 177.

¹⁴⁶ *Loizidou v Turkey* (Preliminary Objections) (App no 15318/89) (1995) Series A no 310.

¹⁴⁷ *Hilaire v Trinidad and Tobago* (Judgment) (Preliminary Objections), Inter-American Court of Human Rights, Series C No 80 (1 September 2001).

¹⁴⁸ General Comment No 24 (n 20) 124, para 18.

¹⁴⁹ Concerning this practice, see, eg, J Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 *Nordic J Intl L* 183.

¹⁵⁰ See Simma, ‘Reservations to Human Rights Treaties’ (n 1) 667–8. See also A Pellet, ‘8th Report on Reservations to Treaties (2003)’ UN Doc A/CN.4/535/Add.1, para 96; and ‘15th Report on Reservations to Treaties (2010)’ UN Doc A/CN.4/624, paras 364–8.

¹⁵¹ For an extensive list of objections with ‘super-maximum’ effects, see A Pellet, ‘15th Report on Reservations to Treaties (2010)’ UN Doc A/CN.4/624/Add.1, paras 437–9.

to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.¹⁵²

This approach finds some support in the 1951 Advisory Opinion of the Court,¹⁵³ in the practice of the Secretary-General,¹⁵⁴ and in State practice.¹⁵⁵ And the ILC seemed to favour such an approach in its 1997 Preliminary Conclusions, where the Commission submitted that:

... in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State's either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.¹⁵⁶

However, the Commission and its Special Rapporteur realized that this approach was rather unrealistic¹⁵⁷ and, in their quest for a largely acceptable solution, turned toward a middle term. Although the two points of view concerning the question of the entry into force of the treaty may initially appear diametrically opposed, both can be reconciled with the principle that underlies treaty law: consent.

Whereas General Comment No 24 describes severability as '[t]he normal consequence'¹⁵⁸ of an invalid reservation grounded exclusively in the alleged specificity of the Covenant, in particular, and human rights instruments, in general, the 'Strasbourg approach'¹⁵⁹—and, in particular, the *Belilos* case¹⁶⁰—is more nuanced and tends to ascertain—although, maybe, rather artificially—the reserving State's will to be bound by the treaty even without the benefit of its impermissible

¹⁵² GAOR 51st Session Supp 40 (UN Doc A/51/40) 106, para 13.

¹⁵³ *Reservations to the Genocide Convention* (n 9) 29 ('a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention') (emphasis added)).

¹⁵⁴ 'Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties' UN Doc ST/LEG/7/Rev.1 57, paras 191–3.

¹⁵⁵ See the examples given in A Pellet, '15th Report on Reservations to Treaties (2010)' UN Doc A/CN.4/624/Add.1, paras 450–1.

¹⁵⁶ *Preliminary conclusions* (n 4).

¹⁵⁷ It is, eg, difficult to envisage that having to assess the validity of a reservation in order to apply a given treaty, the ICJ would pause and suspend the judicial process and wait for the reserving State to decide whether or not it accepts to be bound by the treaty without its impermissible reservation.

¹⁵⁸ General Comment No 24 (n 20) 124, para 18. See also p 000 above.

¹⁵⁹ Simma, 'Reservations to Human Rights Treaties' (n 1) 670.

¹⁶⁰ On this case and its impact, see Baratta, *Gli Effetti delle Reserve ai Trattati* (n 85) 160–3; HJ Bourguignon, 'The Belilos Case: New Light on Reservations to Multilateral Treaties' (1989) 29 Virginia J Intl L 347; Cameron and Horn, 'Reservations to the ECHR' (n 121) 69–116; S Marks, 'Reservations Unhinged: the *Belilos* Case before the European Court of Human Rights' (1990) 39 Intl & Comparative LQ 300; and G Cohen-Jonathan, 'Les Réserves à la Convention Européenne des Droits de l'Homme (à propos de l'Arrêt Belilos du 29 Avril 1988)' (1989) 93 Revue générale de droit international public 272.

reservation;¹⁶¹ it presumes severability on the basis of the reserving State's intent to become a party to the treaty, a premise which indeed should be acceptable to the supporters of the consensual basis of treaty relations. The human rights treaty bodies finally aligned themselves with the Strasbourg approach and nuanced considerably General Comment No 24: in 2006, the working group on reservations noted that there were several potential consequences—and not only one 'normal' consequence—of a reservation that had been ruled impermissible and proposed the following Recommendation:

The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.¹⁶²

It is clear that this solution is not limited to, or justified by, the specific nature of human rights treaties. It is generally applicable and has its place within the general regime applicable to reservation to treaties. This is why the ILC, in part influenced by the 'Strasbourg approach' and sensitive to the new position of the human rights treaty bodies, endorsed a comparable approach. As a consequence guideline 4.5.2 establishes a presumption in favour of severability based on the intent of the reserving State:

When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified.

The intention of the author of the reservation shall be identified by taking into consideration all factors that may be relevant to that end, including:

- the wording of the reservation;
- statements made by the author of the reservation when negotiating, signing or ratifying the treaty, or otherwise expressing its consent to be bound by the treaty;

¹⁶¹ According to Professor Gaja, '[u]na soluzione alternativa alla quale si può giungere nella ricostruzione della volontà dello Stato autore della riserva è che tale Stato abbia inteso vincolarsi in base al trattato anche nel caso in cui la riserva fosse considerata inammissibile e quindi senza il beneficio della riserva'. 'Il Regime della Convenzione di Vienna Concernente le Riserve Inammissibili' (n 128) 358 [An alternative basis for subsequent determination of the will of the reserving State is that the State in question must have purported to be bound by the treaty even if the reservation was considered inadmissible, *ie*, without the benefit of the reservation (our translation)].

¹⁶² UN Doc HRI/MC/2006/5, para 19(7). In December 2006, the working group slightly changed its recommendation: 'As to the consequences of invalidity, the Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, unless its contrary intention is *incontrovertibly* established, will remain a party to the treaty without the benefit of the reservation' (emphasis added). UN Doc HRI/MC/2007/5, para 19(7). The new formulation places the emphasis solely on the presumption that the State entering an invalid reservation has the intention to remain bound by the treaty without the benefit of the reservation as long as its contrary intention has not been 'incontrovertibly' established; but this goes too far. See also A Pellet, '14th Report on Reservations to Treaties (2009)' UN Doc A/CN.4/614, para 54.

- subsequent conduct of the author of the reservation;
- reactions of other contracting States and contracting organizations;
- the provision or provisions to which the reservation relates; and
- the object and purpose of the treaty.¹⁶³

III. Conclusion: Human Rights and Treaty Law Reconciled?

In their Joint Separate Opinion appended to the ICJ judgment in *Democratic Republic of the Congo v Rwanda*, Judges Higgins, Kooijmans, Elaraby, Owada, and Simma rightly stressed:

22. Human Rights courts and tribunals have not regarded themselves as precluded by this Court's 1951 Advisory Opinion from doing other than noting whether a particular State has objected to a reservation. This development does not create a 'schism' between general international law as represented by the Court's 1951 Advisory Opinion, a 'deviation' therefrom by these various courts and tribunals.

23. Rather, it is to be regarded as developing the law to meet contemporary realities, nothing in the specific findings of the Court in 1951 prohibiting this. Indeed, it is clear that the practice of the International Court itself reflects this trend for tribunals and courts themselves to pronounce on compatibility with object and purpose, when the need arises.¹⁶⁴

This is a fair description of the process which led to taking more seriously the *rule*—not the guideline—in Article 19(c) VCLT, in which the practice of human rights bodies played a leading, if not exclusive, role, and which led to the adoption by the ILC of a set of well-balanced rules usefully filling the gaps and dispelling the uncertainties in the Vienna reservations regime.

However, reservations are like the Aesopian language: they can be the worst or the best instrument for promoting community interests, including in the domain of human rights. If there is a risk that they put in danger the integrity of treaties and transform a multilateral convention into a bundle of bilateral relations, they are also, when used with good judgment and moderation, an efficient factor of integration and of strengthening adhesion to community values. The regulation promoted in the ILC Guide to Practice endeavours to minimize the evil while maximizing the good, with the hope of putting an end to Manichean unfounded views.

¹⁶³ GAOR, 65th Session Supp 10 (UN Doc A/65/10) 198–208. Given the reservations of several influential States in respect to this positive presumption, it might be necessary for the ILC to re-examine its position in this respect during its 2011 session.

¹⁶⁴ [2006] ICJ Rep 71, paras 22–3.