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Reservations to treaties and the integrity of human rights

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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 principally surfaced with regard to human rights treaties – is fixed since the 1951 International Court of Justice (ICJ) Advisory Opinion and its terms and scope are clearly represented by the opposition between the majority and the dissenting judges in that case.[1]

While not exclusively unfolding in the field of human rights, these are at the very heart of the classic dialectic according to which, on the one hand, reservations, in a way, 'bilateralise' the relations between the parties to multilateral treaties and therefore 'fragment' the treaty regime, while, at the same time, they facilitate a wider acceptance of the core elements of the treaties in question and, therefore serve the global community interest. Although reservations strengthen 'the universality of human rights', the dominant view among human rights activists is that they endanger the 'unity of human rights' and therefore constitute an absolute evil. They are not – nor are they a threat to the global consistency of human rights treaty regimes, at least when the rules applicable to reservations are correctly perceived and applied.

These rules are now embodied in the Guide to Practice on Reservations to Treaties (hereafter 'Guide to Practice'), adopted by the International Law Commission (ILC) in 2011.[2] This

* This chapter is in large part directly inspired from my joint contribution with Daniel Müller, 'Reservations to Human Rights Treaties: Not an Absolute Evil', in U. Fastenrath and others (eds), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma* (OUP, 2011) 521–51.

1 Comp. Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 24 (hereafter: *Reservations to the Genocide Convention*), and 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.

2 Report of the International Law Commission, *GAOR 66th Session Supp 10*, (2011) UN Doc. A/66/10/Add.1.

non-binding instrument[3] clarifies the rules on reservations to treaties which are embodied in Articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties[4]. While still contemplating a unitary regime, it fills in large parts the latters' lacunae and realises a globally fair balance between the legitimate requirements for the unity of treaty regimes and the needs to widen the participation to multilateral treaties with universal or regional purposes, with particular regard to the unity of international treaty law itself. In other words, the law applicable to reservations embodied in the Guide to Practice preserves both the unity of international law (section 19.1) and that of human rights (section 19.2).

1 The unity of international law preserved

It is worth noting from the outset that, even though the members of the ILC have been sensitive to the 'voices of human rights' during the elaboration of the Guide to Practice, and have taken 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 gaps of the Vienna regime, the expression 'human rights' appears in none of the guidelines of the Guide to Practice.[5] This means that the Commission considered that, as a matter of principle, there is no justification for deviating from the general regime applicable to reservations to treaties in the field of human rights.

1.1 The 'flexible regime' of reservations

And for good reasons: the rules applicable to reservations constituting the 'Vienna regime', as developed in the Guide to Practice, have realised the best possible balance between the prerequisites of universality and of the integrity of the treaty. Undoubtedly, that is what the Guide to Practice strives for, irrespective of the particular nature or content of the treaty concerned. The specificities of certain types of treaties put forward by the advocates of parochial approaches of specialised fields of international law and, singularly, by 'human rightists',[6] do not constitute a valid argument against the applicability of the general regime of reservations under the 1969 Vienna Convention[7] which is flexible enough to provide the appropriate solutions in respect to human rights as well as for any other kind of treaties.

3 The Guide to Practice was be discussed by the Sixth Committee of the UN General Assembly during its 67th Session (2011–12). For a topical summary of the debate prepared by the UN Secretariat, see UN Docs A/CN.4/650 (2012) and A/CN.4/650/Add.1 (2012).

4 The 1986 Convention on the law of treaties between states and international organisations or between international organisations is very similar to the 1969 Convention in most respects, including on the rules applicable to reservations. Many guidelines in the Guide to Practice are copied from the more complete 1986 Convention.

5 As explained in para. (1) of the Introduction to the Guide to Practice, this lengthy instrument (630 pp.) 'consists of guidelines that have been adopted by the Commission . . . accompanied by commentaries', (n. 2) 34.

6 On the notion of 'human rightism', see A. Pellet, ' "Human Rightism" in International Law' (2000) 10 *Italian YB Intl L* 3.

7 The 1986 Convention on the law of treaties between states and international organisations or between international organisations is very similar to the 1969 Convention in most respects, including on the rules applicable to reservations.

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.[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':[9] 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.[10] 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 even if it has not consented to it.[11] 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.

However, 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 mainly governed by reciprocity. This has prominently been recognised by the ICJ[12] and the regional courts of human rights.[13]

As such, absence of reciprocity neither constitutes a specificity of human rights instruments (it is also present in in other categories of treaties establishing obligations owed to the

8 UNHRC 'General Comment No. 24', in *GAOR 50th Session Supp 40* (1995) UN Doc. A/50/40, 120, para. 8.

9 B. Simma and G.I. 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* (OUP, 2011) 60–85.

10 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 MLR 11; see also B. Simma and G.I. Hernández (n. 9). 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.

11 *Reservations to the Genocide Convention* (n. 1) 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 60–61); W.W. Bishop, Jr., 'Reservations to Treaties' (1961) 103 *Recueil des Cours de l'Académie de Droit International* 255; Ch. Tomuschat, 'Admissibility and Legal Effects of Reservations to Multilateral Treaties' (1967) 27 ZaöRV 466; D. Müller, Commentary to Art. 20 (1969), in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP, 2011) 496–98, paras 18–22.

12 *Reservations to the Genocide Convention* (n. 1) 23.

13 *Loizidou v Turkey* (preliminary objections), App. No. 15318/89, (ECtHR, 1995) Series A no. 310, para. 70, quoting *Ireland v United Kingdom* App. no. 5310/71 (1978) Series A no. 25, para. 239. See also Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-2/82, 24 September 1982, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)*, IACtHR Series A No. 2; and HCR, General Comment No. 24 (n. 8) 123, para. 17.

community of contracting states[14]), nor is it incompatible with the Vienna regime as such. However, this specificity 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.'[15] 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: if and when a valid reservation is made to a non-reciprocal provision, Article 21(1)(b) or Article 21(3) simply does not (entirely) operate for the accepting or the objecting party.[16]

This does not mean that human rights treaties have no special characteristics, but simply shows that, despite their specificity, the Vienna rules apply to reservations to those treaties.

This should come as no surprise: one must not omit that the 1951 Advisory Opinion, which marked the starting point of the radical transformation of the reservation regime 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 dominant[17] 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. The Court expressly referred to the special character of that Convention, i.e., its 'purely humanitarian and civilizing purpose', and to the fact that state parties did 'not have any interests of their own',[18] arguments which have been constantly put forward by those who want to prove the inadaptability of the Vienna regime to human rights treaties. Should there have been particularities of human rights treaties with regard to reservations, they would consequently already have been incorporated into the regime of the Vienna Convention. The ILC questioned the possibility of exceptions to this general regime but did not deem necessary to include any.[19]

14 This applies as well to treaties on commodities, on the protection of the environment, to some demilitarisation or disarmament treaties or to private international law treaties providing uniform law.

15 R. Higgins, 'Human Rights: Some Questions of Integrity' (n. 10) 9. It would, of course, be untenable to sustain that the objections by the various European states to the United States reservation on the death penalty discharge them from their obligations under Articles 6 and 7 of the Covenant on Civil and Political Rights in their relations with the United States; this is surely not the intention of the objecting states in making their objections (see W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1995) 32 *Canadian YB of Intl L* 65; G.G. Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 ICLQ 15–16).

16 Exactly as reservations purporting to limit the territorial application of a treaty are, by definition, deprived of any possible reciprocal application; in such a case, the reciprocal effect of the reservation has 'nothing on which it can "bite" or operate.' See G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications, 1986) 412.

17 As is convincingly shown by the joint dissenting opinion quoted above (n. 1) 32–42.

18 Ibid. 23.

19 The question of the specificity of human rights treaties was abundantly discussed during the elaboration of the Vienna Convention and, even in more depth, during that of the Guide to Practice. 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 Art. 20(2) and (3)).

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 Covenant on Civil and Political Rights, 'the matter of reservations . . . is governed by international law'[20] and makes an express reference to Article 19 of the 1969 Vienna Convention. Admittedly, it considers this provision as providing only 'relevant guidance';[21] nevertheless it accepts the applicability of the 1969 Vienna Convention to the Covenant as part of customary international law.[22] 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.[23]

It is thus apparent that the object and purpose test,[24] the foundation of the Vienna regime concerning reservations, which originated directly from the specific nature of human rights instruments – without however being limited to these kinds of treaties – is fully applicable to human rights treaties. Indeed it has expressly been referred to in the reservations provisions of these instruments themselves,[25] in the recommendations of human rights treaty bodies,[26] and by states making objections to reservations deemed incompatible with the object and purpose of human rights instruments.[27] It is therefore undeniable that 'there is a general agreement that the Vienna principle of "object and purpose" is the test'.[28] It is also worth noting that the jurisprudence and the practice relating to human rights instruments have considerably developed the Vienna regime further.[29]

20 General Comment No. 24 (n. 8) 120, para. 6.
21 Ibid.
22 Ibid.
23 Ibid.
24 See below (nn. 44–45) and accompanying text.
25 See Art. 75 of the American Convention on Human Rights, and IACtHR, Advisory Opinion (n. 13). 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 pre-dates 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').
26 See the Reports of the fourth and fifth meetings of persons chairing the human rights treaty bodies: UN Doc. A/47/628 (1992) para. 60; and UN Doc. A/49/537 (1994) 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 (2007) para. 19, points 4 and 6 of the recommendations.
27 See examples provided in the commentary to guideline 4.5.1, ILC Report 2011 (n. 2) 511–17, paras 8–23.
28 R. Higgins, 'Introduction', in J.P. 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. See also the conclusions of the joint meeting of 15–16 May 2007 of the International Law Commission and representatives of human rights treaty bodies and regional human rights bodies in A. Pellet, *Fourteenth Report on Reservations to Treaties* (2009), UN Doc. A/CN.4/614, Annex, para. 27.
29 On the objectivising role of the monitoring treaty bodies, see below section 19.2.2.

1.2 The effects of invalid reservations clarified

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[30] or to object[31] to a permissible reservation formulated by another state; and, if they feel the need, they can even go as far as to exclude the application of the entire treaty in regard to the reserving state,[32] which does not help to preserve the unity of human rights but instead excludes the reserving state from the circle of the parties. For this reason, this possibility is rarely resorted to.[33]

One of the most fundamental lacunae 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.[34] In fact, the Vienna regime of 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 impermissible reservations indistinctively.[35] The ILC Guide to Practice carefully makes the difference: guideline 4.3.8 (Right of the author of a valid reservation not to comply with the treaty without the benefit of the reservation) squarely excludes that an objection with 'super-maximum' purpose[36] could deprive the author of the valid reservation of its right 'to comply with the provision of the treaty without the benefit of its reservation'. 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 unnecessary to distinguish in this regard between reservations to human rights instruments and reservations to 'ordinary' treaties.

30 Acceptance is necessary in order for the reservation to produce is effects. See Arts 20(4)(a) and (c), and 21(1) of the Vienna Convention. See also the guidelines in sections 4.1 (Establishment of a reservation with regard to another state or international organisation) and 4.2 (Effects of an established reservation) of the ILC Guide to practice.

31 Arts 20(4)(b) and 21(3) of the Vienna Convention. See also guideline 2.6.2 (Right to formulate objections), and the relevant guidelines of section 4.3 (Effect of an objection to a valid reservation).

32 Art. 20(4)(b) of the Vienna Convention. See also guidelines (n. 2) 2.6.6 (Right to oppose the entry into force of the treaty vis-à-vis the author of the reservation) and 4.3.5 (Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect).

33 For examples of such maximum-effect objections, see ILC Report 2011 (n. 2) 415, footnote 1939.

34 For a detailed analysis of the *travaux préparatoires* of both Vienna Conventions and the issue of impermissible reservations, see A. Pellet, *Fifteenth Report on Reservations to Treaties* (2010), UN Doc. A/CN.4/624/Add.1 (2012) 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; B. Simma, 'Reservations to Human Rights Treaties— Some Recent Developments', in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek (eds), *Liber-Amicorum Professor Seidl-Hohenveldern in Honour of his 80th birthday* (Kluwer Law International, 1998) 659, 667–68; Ch. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours de l'Académie de Droit International* 321.

35 See the commentary of guideline 4.3.6 (Effect of an objection on treaty relations) (n. 2) 486–87, paras 19–22.

36 That is 'objections in which the authors deem not only that the reservation is not valid but also that, as a result, the treaty as a whole applies ipso facto in the relations between the two States'. See ILC Report 2011 (n. 2) 419, para. 17 of the commentary of guideline 3.4.2 (Permissibility of an objection to a reservation).

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 implying that the solution finally adopted would be applicable only to impermissible reservations to human rights instruments. However, the relevant guidelines should contribute to enhancing the integrity of human rights treaty regime.

Thus, guideline 4.5.1 on the 'Nullity of an invalid reservation' fills up 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 Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of any legal effect.[37]

This 'new' rule in the law of reservations does not come out of the blue. The absence of any legal effect and the nullity of an impermissible reservation were recognised more than two decades ago by the European Court of Human Rights in *Belilos v Switzerland*,[38] and *Loizidou v Turkey*.[39] In both cases, the Court, after noting the impermissibility of the reservations formulated by Switzerland and 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.[40] Despite the unfavourable responses to this General Comment made by the United States of America, 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.[41] The Committee subsequently confirmed the conclusion reached in General Comment No. 24 in its decision in *Rawle Kennedy v Trinidad and Tobago*.[42] The Inter-American Court of Human Rights followed up with its decision in *Hilaire v Trinidad and Tobago*.[43]

The findings of human rights bodies, courts and tribunals – which have influenced the ILC's work on the question of impermissible reservations – are furthermore confirmed by important state practice which is, interestingly, not limited to human rights instruments.[44]

37 Ibid. 509.

38 *Belilos v Switzerland*, App. No. 10328/83, (ECtHR, 1988) Series A No. 132, para. 60 (Preliminary objections).

39 *Loizidou* (n. 13) paras 89–98.

40 General Comment No. 24 (n. 8), pp. 151–52: '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' (para. 18). See also Françoise Hampson's final working paper on reservations to human rights treaties (2004) UN Doc. E/CN.4/Sub.2/2004/42, para. 57.

41 See the observations of the United States of America, *GAOR 50th Session Supp 40* (1995) UN Doc. A/50/40, 154–58; the United Kingdom (ibid., 158–64) and France, *GAOR 51st Session Supp 40* (1996) UN Doc. A/51/40, 104–106.

42 *Rawle Kennedy v Trinidad and Tobago*, Communication No 845/1999 (1999) UN Doc. CCPR/C/67/D/845/1999, para. 6.7.

43 *Hilaire v Trinidad and Tobago*, IACtHR, Series C No. 80 (2002), para. 98 (Preliminary Objections). See also *Benjamin et al. v Trinidad and Tobago*, IACtHR, Series C No. 81 (2002), para. 89 (Preliminary Objections).

44 See ILC Report 2011 (n. 2), paras 9, 15, 22 of the commentary to guideline 4.5.1 (Nullity of an invalid reservation); see also below (n. 50).

One must 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 however precluding the entry into force of the treaty.[45] This practice is both surprising and debatable: it does not give any effect to the impermissibility of the reservation. Sweden, speaking on behalf of the Nordic countries, rightly explained during the Sixth (Legal) Committee of the General Assembly'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 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.[46]

In this perspective, the ILC adopted in 2011 guideline 4.5.3 (Status of the author of an invalid reservation in relation to the treaty) which offers a suitable solution to one of the most disputed issues concerning reservations to treaties: the severability of an impermissible reservation. For a long time, that 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 hand. Even though the severability presumption has been adopted by human rights bodies[47] and mainly advocated in the 'human rightist' doctrine, it serves more general purposes.

This approach has developed and is confirmed by the practice, followed, inter alia, by the Nordic states,[48] of formulating what have come to be called objections with 'super-maximum' effect.[49] 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.[50]

45 See the examples given in paras 1–2 of the commentary to guideline 3.4.2 (Permissibility of an objection to a reservation) ILC Report 2011 (n. 2) 413–16 and paras 20–38 of the commentary to guideline 4.3.6 (Effect of an objection to treaties relations) 486–91.

46 UN Doc. A/C.6/60/SR.14 (2004), para. 22. See also Malaysia UN Doc. A/C.6/60/SR.18 (2004), para. 86; and Greece (2004) 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 (11 June 2007), para. 18: '[I]t 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.'

47 See n. 37 and accompanying text.

48 Concerning this practice, see e.g. J. Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' (2000) 69 *Nordic J of Intl L* 183–86.

49 For a definition, see n. 36. On the general issue, see Simma (n. 34) 667–68. See also A. Pellet, *Eighth Report on Reservations to Treaties*, UN Doc. A/CN.4/535/Add.1 (2003) para. 96; and *Fifteenth Report on Reservations to Treaties*, UN Doc. A/CN.4/624 (2010) paras 364–68.

50 For an extensive list of objections with 'super-maximum' effects, see A. Pellet, *Fifteenth Report on Reservations to Treaties*, UN Doc. A/CN.4/624/Add.1 (2010) paras 437–39.

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.[51] But this principle is not one-sided, in that if the consent of the author of the reservation must be preserved, so must the will of the other parties to the treaty, which should not be placed before a *fait accompli* by the reserving state. Remarkably the two 'quantitatively equal' groups of states which expressed themselves in 2010 in the Sixth Committee both agreed 'that the intention of the author of the reservation was the key criterion for determining whether the author was bound by the treaty or not, and that the author of the reservation was best placed to specify what that intention was.'[52] But they were divided in respect to the 'positive presumption' retained provisionally by the Commission, in line with the practice of the human rights monitoring bodies, in favour of the principle of severability of the invalid reservation from the rest of the treaty. Based on the proposals made by some states during that debate, in 2011 the ILC adopted a compromise solution, preserving the 'positive presumption', but emphasising even more the role of the will of the reserving state.

Considering that 'the key to the problem is simply the will of the author of the reservation: does the author intend to be bound by the treaty even if its reservation is invalid – without benefit of the reservation – or is its reservation a *sine qua non* for its commitment to be bound by the treaty?',[53] the ILC adopted guideline 4.5.3 which provides:

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

51 See e.g. France's comments to Human Rights Committee's General Comment No. 24, *GAOR 51st Session Supp 40*, UN Doc. A/51/40 (1996) 106, para. 13. This approach finds some support in the 1951 Advisory Opinion of the Court (*Reservations to the Genocide Convention* (n. 1) 29, in the practice of the Secretary-General (*Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc. ST/LEG/7/Rev.1, 57 (1994), paras 191–93), and in state practice (see the examples given in A. Pellet, *Fifteenth Report on Reservations to Treaties* (2010), UN Doc. A/CN.4/624/Add.1, paras 450–51). And the ILC seemed to favour such an approach in its 1997 Preliminary Conclusions (Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission, in (1997) ILC YB, vol. II(2) 57, point 5).

52 ILC Report 2011 (n. 2) 533, para. 21 of the commentary of guideline 4.5.3, see UN Doc. A/C.6/65/SR.19 (2010).

53 Ibid. 534, para. 22 of the commentary to guideline 4.5.3.

As the Commission has noted in its commentary:

> This position offers a reasonable compromise between the underlying principle of treaty law – mutual consent – and the principle that reservations prohibited by the treaty or incompatible with the object and purpose of the treaty are null and void.[54]

This solution is largely in line with the 'Strasburg approach' and with the Recommendation made in June 2006 by the Working Group on Reservations of the human rights treaty bodies:

> 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.[55]

2 The integrity of human rights treaties preserved

The traditional unanimity principle[56] 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; however, it made 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 Vienna Convention,[57] certainly strikes a better balance by preserving the essential integrity of the treaty. Moreover, the existence and growing weight of monitoring bodies enhances the objective appraisal of the validity of reservations.

54 *GAOR 66th Session Supp 10* (2011) A/66/10/Add.1, 537, para. 32 of the commentary to guideline 4.5.3.

55 UN Doc. HRI/MC/2006/5 (2006) 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). See UN Doc. HRI/MC/2007/5 (2007), 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, *Fourteenth Report on Reservations to Treaties*, UN Doc. A/CN.4/614 (2009), para. 54.

56 *Reservations to the Genocide Convention* (n. 1) 21.

57 On this long saga, see the Preliminary Report on the Law and Practice relating to Reservations to Treaties, by A. Pellet, Special Rapporteur, A/CN.4/470 (1995) ILC YB, vol. II (1), 127–36, paras 10–61; and Pellet, commentary to Article 19 (n. 11) 645–73, paras 2–67.

2.1 The essential integrity of human rights treaties preserved

It has to be admitted, however, that, for its part, the Vienna regime does not guarantee an absolute integrity of treaties. The concept of reservations is incompatible with the very notion of integrity.[58] By definition, a reservation 'purports to exclude or to modify the legal effect of certain provisions of the treaty'.[59] The only way to preserve this integrity completely is to prohibit any reservations whatsoever, a solution which is perfectly consistent with the Vienna regime,[60] and which is sometimes resorted to in human rights treaties.[61]

The fact remains that, where a treaty is silent – and most human rights treaties are silent on this issue – the rules on reservations set out in the Vienna Convention, while 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'.[62] Even if one must admit that 'the object and purpose of a treaty are indeed something of an enigma',[63] 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 tenour, in

58 As the International Court of Justice 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'. See *Reservations to the Genocide Convention* (n. 1) 24.

59 Art. 2(1)(d) of the 1969 Vienna Convention. See also n. 2 guideline 1.1.1 (Object of reservations) of the Guide to practice: 'A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty, by which its author purports to limit the obligations imposed on it by the treaty, constitutes a reservation.'

60 See Art. 19(a) of the Vienna Convention. See also LC Report 2011 (n. 2) guideline 3.1 (Permissible reservations) and 3.1.1 (Reservations prohibited by the treaty).

61 See e.g. the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 7 September 1956 (Art. 9); the Convention against Discrimination in Education of 14 December 1960 (Art. 9, para. 7); Protocol No. 6 to the European Convention on Human Rights on the abolition of the death penalty of 28 April 1983 (Art. 4); or the European Convention against Torture of 26 November 1987 (Art. 21); which all prohibit any reservations to the treaty.

62 J.M. Ruda, 'Reservations to Treaties' (1975) 146 *Recueil des Cours de l'Académie de Droit International* 190. For similar points of view, see J. Combacau, *Le droit des traités*, Que sais-je?, No. 2613 (PUF, 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) 134–37; P. Reuter, *Introduction au droit des traités*, 3rd edn (PUF, 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) 331–33.

63 I. Buffard and K. Zemanek, 'The Object and Purpose of a Treaty: An Enigma?' (1998) 3 *Austrian Rev of Intl & Eur L* 322.

such a way that the reservation impairs the *raison d'être* of the treaty.'[64] Thus interpreted, Article 19(c) constitutes 'the fundamental criterion for the permissibility of a reservation',[65] and the linchpin of the flexible system laid out by the Vienna regime.[66] The 'object and purpose' criterion limit the sovereign freedom[67] of states to formulate reservations to a treaty.[68]

The fact that '[t]he claim that a particular reservation is contrary to object and purpose is easier made than substantiated'[69] was certainly one of the major critiques of the minority in the *Reservations to the Genocide Convention* Advisory Opinion. In their joint dissenting opinion, they expressed the fear that 'object and purpose' could not 'produce final and consistent results'.[70] However, 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.

Within the area of human rights, most lively debates have taken place in this regard, particularly over reservations made to general treaties such as the European and Inter-American Conventions, the African Charter, 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.[71]

This statement of principle constitutes one of the major arguments invoked in order to ban all reservations to human rights treaties, because, taken literally, this position would render

64 ILC Report 2011 (n. 2) guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty). More generally, guidelines 3.1.5.1 to 3.1.5.7 aim at better assessing the notion of 'object and purpose' of the treaty.

65 ILC Report 2011 (n. 2) 351, para. 1 of the commentary to guideline 3.1.5 (Incompatibility of a reservation with the object and purpose of the treaty).

66 See Pellet (n. 11) 443, para. 95.

67 The ILC pointed out that '[a]lthough the view has sometimes been expressed that it was 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 permissibility. 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 . . .". It should, however, be noted that 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.' ILC Report 2011 (n. 2) 333, para. 5 of the commentary to guideline 3.1 (Permissible reservations), footnotes omitted.

68 See *Reservations to the Genocide Convention* (n. 1) 24.

69 L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Nijhoff, 1995) 82–83.

70 Joint dissenting opinion (n. 1) 44. See also the ILC's resistance to adopt the criterion established by the ICJ, (1951) ILC YB, vol. II, 128, para. 24.

71 General Comment No. 24. (n. 8) 120, para. 7. See also Hampson (n. 40) 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.'

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 recognises that reservations may usefully encourage a wider acceptance of the Covenant.

In order to take account of the specific difficulty raised in this regard by reservations to general human rights treaties, the ILC had at first envisaged devoting a particular guideline to the specific issues concerning the determination of the object and purpose of 'general human rights treaties'.[72] However, realising that there was no reason to individualise human rights treaties since the same considerations came into play for all treaties containing numerous interdependent rights and obligations,[73] the Commission eventually adopted guideline 3.1.5.6,[74] which:

> [A]ttempts to strike a particularly delicate balance between these different considerations by combining three elements:
>
> - The interdependence of the rights and obligations;
> - The importance that the provision to which the reservation relates has within the general tenour of the treaty; and
> - The extent of the impact that the reservation has on the treaty.
>
> The first element, the *interdependence of the rights and obligations* affected by the reservation, lays emphasis on the goal of achieving global realization of the object and purpose of a treaty and aims at preventing the dismantling of its obligations, that is, their disintegration into bundles of obligations, the individual, separate realization of which would not achieve the realization of the object of the treaty as a whole.
>
> The second element qualifies the previous one by recognizing – in keeping with practice – that nonetheless certain rights protected by these instruments are less essential than others – in particular, than the non-derogable ones. The *importance of the provision* concerned must, of course, be assessed in the light of the 'general tenour' of the treaty, an expression taken from guideline 3.1.5.
>
> Lastly, the reference to 'the extent of the *impact that the reservation has*' upon the right or the provision to which it relates allows for the inference that, even in the case of essential rights, reservations are possible if they do not preclude protection of the rights in question and do not have the effect of excessively modifying their legal regime.[75]

72 Draft Guideline 3.1.5.5 ('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.') *GAOR 62nd Session Supp 10* UN Doc. A/62/10 (2007) 113–16.

73 The ILC thus confirms the unity of the reservations regime.

74 Guideline 3.1.5.6 (Reservations to treaties containing numerous interdependent rights and obligations): 'To assess the compatibility of a reservation with the object and purpose of a treaty containing numerous interdependent rights and obligations, account shall be taken of that interdependence as well as the importance that the provision to which the reservation relates has within the general tenour of the treaty, and the extent of the impact that the reservation has on the treaty.'

75 ILC Report 2011 (n. 2) 386–87, paras 6–9 of the commentary to guideline 3.1.5.6, footnotes omitted (emphasis added).

Thus conceived, 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, that is it constitutes the bookmark 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,[76] irrespective of any acceptance or objection by the other contracting states.[77] Thus, the regime is designed to preserve the essence of the collective will of the parties, that is the quintessence of the community interest embodied in the conventional instrument.

On the other hand, the flexibility of the Vienna regime, and in particular the way it recognises the freedom of a state to formulate valid reservations to a treaty, encourages the aim to universality of multilateral treaties much better than the traditional 'unanimity' system largely prevailing before the 1969 Vienna Convention. Such a purpose certainly comports with the objective of most multilateral human rights instruments which inherently yearn for universal application.[78] '[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.'[79] And, as has been recognised, 'the lodging of carefully tailored reservations may also be taken as a sign that the reserving State takes the respective human rights treaty seriously.'[80] In this respect, Article 19(c) of the Vienna Convention 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.[81]

2.2 The essential integrity of human rights treaties controlled

The preservation of the integrity of human rights is enhanced by the existence of monitoring bodies, which certainly is a particularity of modern human rights treaties. Their existence makes an objective determination of the validity of reservations possible and eliminates one of the most important uncertainties with regard to the application of the Vienna regime.

76 See the beginning of section 19.1.2 above.

77 See e.g. D.W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976–1977) 48 *British YB of Intl L* 88.

78 See *Reservations to the Genocide Convention* (n. 1) 21–22.

79 M. Coccia, 'Reservations to Multilateral Treaties on Human Rights' (1985) 15 *Cal W Intl L J* 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".'

80 Simma and Hernández (n. 9); see also Simma (n. 34) 660.

81 For recent illustrations in the jurisprudence of the ICJ: *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility*, ICJ Reports 2006, 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*, ICJ Reports 2002, 246, para. 72.

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.[82]

It is certainly desirable that the compatibility of a reservation with the object and purpose of a treaty be 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, possibly, when the responsibility to make this assessment has been expressly entrusted to the state parties.[83]

However, whereas the existence of monitoring bodies is certainly a particularity of human rights treaties, it is neither a necessary element of these instruments, nor an 'exclusive' particularity,[84] and certainly not an argument to modify the generally applicable reservations regime which bears upon the substantive principles to be applied by the competent authority to assess the validity of the reservation – whether a state, an international organisation, a judge or a monitoring body. But the control of the compatibility of a reservation to the object and purpose of the treaty constitutes a guarantee of a more objective assessment of this objective test. Monitoring constitutes consequently a clear progress in the application of the Vienna rules and therefore contributes to ensuring the integrity of human rights by permitting an objective assessment of the compatibility of a given reservation to the object and purpose of the treaty.

3 Conclusion: human rights and treaty law reconciled?

In their Joint Separate Opinion appended to the ICJ judgment in *DRC 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.[85]

This is a fair description of the process which led to taking more seriously the *rule* contained in Article 19(c) of the Vienna Convention, in which the practice of human rights bodies

82 General Comment No. 24 (n. 8) 124, para. 18.
83 See e.g. Art. 20(2) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination.
84 Disarmament or environment treaties quite often also create other kinds of monitoring bodies although they operate differently.
85 *Armed Activities on the Territory of the Congo* (n. 81) 71, paras 22–23.

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 minimise the evil while maximising the good, with the hope of putting an end to Manichean unfounded views.

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