

LEGAL CONSEQUENCES OF AN IMPERMISSIBLE RESERVATION TO A HUMAN RIGHTS TREATY: WHERE DO WE STAND?

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A. INTRODUCTION

Giorgio Gaja has written some of the most insightful articles on the topic of reservations to multilateral treaties.¹ We therefore take the opportunity of contributing to this *Festschrift* in his honour to trace and critically analyse the latest developments concerning a particularly controversial aspect of the law on reservations, situated at the interface of the law of treaties and international human rights law. Twelve years ago, at what was probably the peak of literary attention to the topic of reservations in general, in another *Festschrift* (at that occasion for Ignaz Seidl-Hohenveldern), the first-named of the present authors (hereinafter ‘the first Author’) took a critical view at the state of the law and practice on reservations to human rights treaties as it had then developed, particularly at the first reaction in 1997 of the UN International Law Commission (of which the first Author was at the time a member) to the approach taken by its Special Rapporteur on the topic of reservations, Professor Alain Pellet, to what he called

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¹ G. Gaja, ‘Unruly Treaty Reservations’ in *Le droit international à l’heure de sa codification, Études en l’honneur de Roberto Ago* (Giuffrè, Milan 1987) 313; G. Gaja, ‘Il regime della convenzione di Vienna concernente le riserve inammissibili’ in V. Starace (ed.), *Studi in onore di Vincenzo Starace* (Editoriale Scientifica, Naples 2008) 349.

‘normative treaties’.² In a certain sense, then, our present contribution is a follow-up to the 1998 piece.

Human rights treaties represent the area of international treaty law where reservations are most popular and numerous. This might suggest that the desire of States parties to these treaties fully to implement internationally agreed-upon human rights standards on the domestic plane is somewhat less than sincere. In this regard, some academic commentary has focussed on dubious reservations and the concomitant ‘almost universal’ failure to object concertedly to such reservations.³ However, in our view, there are good reasons to adopt a somewhat more balanced position, as set out by the first Author in his 1998 contribution. First, international human rights law is essentially ‘inward-targeted’: it turns States’ insides out almost in a literal sense, and exposes them to international scrutiny. Even governments ‘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 the time of the conclusion of the treaty’.⁴ This will be particularly true when the performance of States parties to a human rights instrument falls under the supervision of international monitoring bodies or even judicial organs ‘adopting an “evolutionary” or “dynamic” approach to the interpretation of the obligations arising from such treaties’.⁵ Thus, the lodging of carefully

² 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 Ignaz Seidl-Hohenveldern in honour of his 80th birthday* (Kluwer Law International, The Hague, 1998), 659-80.

³ See eg I. Boerefijn, ‘Impact of the Law on Treaty Reservations’ in M.T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights on International Law* (Oxford University Press, Oxford 2009) 63, 93; E. Swaine, ‘Reserving’ (2006) 31 *Yale Journal of International Law* 307, 324. In relation to the International Covenant on Civil and Political Rights, R. Higgins, ‘Human Rights: Some Questions of Integrity’ (1989) 52(1) *Modern Law Review* 1 [due to an editorial error entitled ‘The United Nations: Still a Force for Peace’], 12 has been even more critical: ‘one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged’.

⁴ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note 2, 660.

⁵ Higgins, ‘Human Rights: Some Questions of Integrity’ (1989), *supra* note 3, 5-8, argued to the effect that the special nature of human rights treaties also favours the authoritative interpretation of such human rights obligations to provide a safeguard for the integrity of the treaty instrument. See also C. Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No 24(52)’ (1997) 46 *International and Comparative Law Quarterly* 390, 408-409, has characterised the existence of such authoritative interpretation by a monitoring organ as the *sine qua non* of any system grappling with the incompatibility of reservations with human rights treaties.

tailored reservations may also be taken as a sign that the reserving State takes the respective human rights treaty seriously. This is, of course, not to deny that some reservations do offend the very core and essence of a treaty; one can be particularly critical, in this regard, of reservations formulated in such broad, sweeping language that they make a mockery out of a State's adherence to a treaty instrument. It is therefore not the *practice* of making reservations to human rights treaties *per se*, but the *substance* of such reservations which is of concern.

For this reason, in the present article, we wish to revisit the central issue in the area of reservations to human rights treaties: the legal consequences of a reservation to a human rights treaty which is considered incompatible with that treaty's object and purpose and therefore impermissible. Already in his First Report on the law and practice relating to reservations to treaties, Special Rapporteur Pellet recognised that the regime on reservations established by the 1969 Vienna Convention on the Law of Treaties⁶ does not provide an answer to the fundamental question whether the provisions of the Convention are to be applied to all reservations, or only to permissible ones.⁷ Already in the 1970s, two views had been developed in the literature. One of them, well-represented by Ruda in his Hague Lectures of 1975, favoured the application of the Convention regime (Art. 20 *ff*) to all reservations, even if contrary to the object and purpose of a treaty, defending an 'opposability doctrine' whereby the permissibility of a reservation can only play out through the process of objections.⁸ Following this process on the basis of the view expressed by Ruda would entail that manifestly impermissible reservations may remain valid if other States make insufficient objections to that effect; if a reservation is not reciprocal in nature, it would practically remain unaffected. Obviously, this conclusion leads to grave problems, most

⁶ Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁷ International Law Commission, First Report on the Law and Practice relating to Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/470 (30 May 1995), 1995 Yearbook of the International Law Commission vol II, pt 1, 145, paras. 119-120.

⁸ J.-M. Ruda, 'Reservations to Treaties' (1975-III) 146 Recueil des cours de l'Académie de droit international 179, 190. He considered the object and purpose test embodied in Article 19(c) VCLT 'a mere doctrinal assertion'.

prominently in the context of human rights treaties, which are of a special nature (to be discussed in Section B.2 *infra*). As the first Author explained already in 1998, ‘if we decided to follow the “opposability” doctrine and thus viewed the inadmissibility of a reservation as only becoming operational through objections raised by other States, the Vienna Convention regime on consequences of such objections will hardly have any “bite” in case of our human rights treaties’.⁹ 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. We find unacceptable, both in logic and policy, that the regime of a codification convention could first declare certain reservations impermissible and then simply continue to regulate the ways in which (also) such impermissible reservations can be made and become effective, without distinguishing them in any way from permissible ones. In other words, we endorse the position articulated by Bowett (the so-called “admissibility doctrine”), who rejected the idea that the concept of reciprocity had any part to play in so far as the effect of impermissible reservations was concerned, arguing that ‘if it can be objectively, and preferably judicially, determined that the State’s paramount intention was to accept the treaty, as evidenced by the ratification or accession, then an impermissible reservation which is not fundamentally opposed to the object and purpose of the treaty can be struck out and disregarded as a nullity’.¹⁰

Up until extremely recently,¹¹ Special Rapporteur Pellet had demurred in taking a clear position with regard to the effect of impermissible reservations, particularly to human rights treaties. It is true that multilateral treaties rarely specify the consequences of what should happen

⁹ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note 2, 663.

¹⁰ D.W. Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976-1977) 48 *British Yearbook of International Law* 67, 77.

¹¹ See International Law Commission, First Addendum to the Fifteenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/624/Add.1 (26 May 2010), directly addressing the legal effects of an impermissible reservation to treaties. It will be discussed *in extenso* in Section C.4 below.

if a reservation is found invalid,¹² and State practice has remained glaringly inconsistent on the issue. This has given increased importance to the practice of monitoring bodies and international judicial institutions. Against this background, our present essay therefore constitutes an exercise in ‘progressive development’ in the broadest sense: we propose to analyse Pellet’s various reports, including especially various draft guidelines that he submitted to the ILC with a view that these would help ‘clarify’ the Vienna Convention regime, in the light of both the Vienna Convention and the particular nature of human rights treaties. For reasons that will be explained below, and building upon the position taken by the first Author twelve years ago, we take the position that the legal consequence of a reservation to a human rights treaty that is found impermissible because it is contrary to the object and purpose of a treaty should be that the reservation is severed from the reserving State’s consent, and that the reserving State should be bound to the obligations contained in the treaty in full. It is heartening that in his most recent report, Pellet seems to have arrived at the same conclusions.

B. THE CONTINUED RELEVANCE OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

1. Operation of the Vienna Convention framework

Article 19 of the Vienna Convention remains the starting-point of any meaningful analysis of the regime governing reservations to treaties. It stipulates that reservations are impermissible in three sets of circumstances: first, where they are expressly prohibited by the treaty; secondly, where the treaty provides that only specified reservations may be made and these do not include the reservation in question; and thirdly, where in case of silence of the treaty text the reservation is incompatible with the object and purpose of the treaty. It 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

¹² As commented upon by R. Baratta, ‘Should Invalid Reservations to Human Rights Treaties be Disregarded?’ (2000) 11 European Journal of International Law 413, 414.

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.¹³

From the outset, 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.¹⁴ As regards the compatibility of reservations with the object and purpose of human rights instruments, this shortcoming has major practical repercussions. Representing essentially a codification of the *Reservations to the Genocide Convention* opinion,¹⁵ the Convention left major gaps, both by failing to provide a means to measure a reservation against the object and purpose of the relevant treaty, and by leaving open the consequences to be attached to a reservation considered impermissible under this test.¹⁶ Further, the Convention is silent as to whether its rules concerning the making of objections against reservations are applicable to *all* reservations, even those which violate the treaty's object and purpose, or whether different rules apply to such reservations, especially—and importantly—when relating to provisions of a universalist character.

To counter this gap, various human rights supervisory bodies turned to adopting a practice of their own regarding the admissibility and effect of reservations to human rights treaties. In a

¹³ Simma, 'Reservations to Human Rights Treaties' (1998), *supra* note 2, 662.

¹⁴ As W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 Canadian Yearbook of International Law 39, 48, suggests, an application of Article 31 of the Vienna Convention leads to the circular conclusion that a treaty's object and purpose is to be determined in the light of its object and purpose. See also K. Zemanek and I. Buffard, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 Austrian Review of International and European Law 311, 333.

¹⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, 1951 ICJ Rep 15, 23, first observing that the Genocide Convention 'was manifestly adopted for a purely humanitarian and civilizing purpose' and that '[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of these high purposes which are the *raison d'être* of the convention.' The drafting history of Article 19 demonstrates the ambiguities inherent in the 'object and purpose' test and the attempts of the Commission to reconcile the twin purposes of securing the unity of a convention and ensuring maximum accession to the obligations contained therein. See, in this regard, International Law Commission, Draft Articles on the Law of Treaties, 1966 Yearbook of the International Law Commission, vol II, Commentary to Articles 16 and 17, 205, paras. 10-11; and International Law Commission, First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur UN Doc A/CN.4/144, (1962) Yearbook of the International Law Commission, vol II, 65-66, para. 10.

¹⁶ Simma, 'Reservations to Human Rights Treaties' (1998), *supra* note 2, 662-663.

series of cases beginning with *Temeltasch*¹⁷ in 1982, and through *Belilos*,¹⁸ *Chrysostomos*¹⁹ and *Loizidou*,²⁰ the European Commission and European Court of Human Rights developed what in 1998 the first Author termed the ‘Strasbourg approach’,²¹ arrogating for themselves the competence to determine whether so-called ‘interpretative declarations’ were in fact reservations proper, as well as the power to determine the admissibility of what they found to be reservations. By finding that inadmissible reservations could lead to the reserving State remaining fully bound to the European Convention on Human Rights, the Strasbourg approach gave life to the ‘severability doctrine’, which, albeit somewhat grudgingly, became accepted by the States parties to the Convention.

On the plane of universal human rights law, the ‘severability’ approach came to be adopted by the Human Rights Committee in its General Comment No. 24 (52) of 2 November 1994.²² General Comment No. 24 was highly controversial at the time because it concluded from the specific character of human rights treaty obligations, in this case those of the International Covenant on Civil and Political Rights,²³ that the classic rules on reservations embodied in the Vienna Convention, although applicable in principle, were inadequate in case of treaties such as the Covenant. Particularly striking was the manner in which the Human Rights Committee

¹⁷ *Temeltasch v Switzerland*, Eur. Comm. case 9116/80 (5 May 1982), (1982) 5 EHRR 417.

¹⁸ *Belilos v Switzerland* Series A No 132 (24 April 1988), (1988) 10 EHRR 466.

¹⁹ *Chrysostomos et al v Turkey*, Eur. Comm. cases 15299-15300-15318/89, comm. 68/216 (4 March 1991), reprinted in (1991) 12 Human Rights Law Journal 113.

²⁰ *Loizidou v Turkey*, Preliminary Objections, Series A No 310 (23 March 1995), (1995) 20 EHRR 99.

²¹ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note *supra* note 2, 670-71. See also G. Cohen-Jonathan, ‘Les réserves dans les traités institutionnels relatifs aux droits de l’homme’ (1996) (4) *Revue générale de droit international public* 915, 940.

²² Human Rights Committee, General Comment No 24 (52), UN Doc CCPR/C/21/Rev.1/Add.6 (11 November 1994), reprinted in (1994) 15 Human Rights Law Journal 464.

²³ International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976), 999 UNTS 171.

maintained that it ‘necessarily’ had the power to determine whether a specific reservation is compatible with the object and purpose of the Covenant:

This is in part because ... 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. In order to know the scope of its duty to examine a State’s compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. 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, and the Committee is particularly well placed to perform this task.²⁴

What has reverberated most is the Committee’s endorsement of the ‘Strasbourg approach’, concluding that the legal consequence of a reservation being found incompatible with the object and purpose of a treaty is severance, ‘in the sense that the Covenant will be operative for the reserving party without benefit of the reservation’.²⁵

2. Beyond the Vienna Convention, without leaving it behind

In what regard are human rights treaties qualitatively different from other types of treaties? Certainly, what distinguishes them is the universalist character of the substantive norms embodied therein. To use the words of Rosalyn Higgins, human rights treaties ‘reflect rights inherent in human beings, not dependent upon grant by the state’.²⁶ Hence, as she emphasised, given the heterogeneity of States and their differing legal systems, not to mention the diversity of cultures and religions, arriving at an understanding of the rights embodied in human rights conventions is a challenge.²⁷

The argument that human rights are not just voluntary concessions made by enlightened States for the benefit of their subjects has been used by theory to justify abandoning a purely bilateralist and subjective method of analysing reservations to human rights treaties. Indeed, reciprocity, as underlying the rules on reservations in the Vienna Convention, does not adapt

²⁴ General Comment No 24 (1994), *supra* note 22, para. 18.

²⁵ *Ibid.*.

²⁶ Higgins, ‘Human Rights: Some Questions of Integrity’ (1989), *supra* note 3, 11.

²⁷ *Ibid.*, 2.

easily to the structure of, and the sociology behind, human rights treaties,²⁸ whose essential characteristic remains that such treaties do not define inter-State relationships, but are ‘inward-targeted’,²⁹ as States commit to a certain behaviour above all vis-à-vis individuals under their jurisdiction.³⁰ The Vienna Convention regime governing the rejection of reservations relies on the process of objections; yet, the objection-based system has not been adapted with regard to treaties protecting human rights, to which it seems unsuited as regards impermissible reservations. This conclusion is shared by Pellet, in that, when a treaty is not itself based on reciprocity of rights and obligations between the parties, as is the case with human rights treaties, a reservation cannot produce such reciprocal effect either.³¹ This is surely accurate: when following the familiar pattern of reciprocity, a reservation, once accepted, has the effect of releasing the reserving State from compliance with the treaty obligations the subject of the reservation, that State also loses the right to require the other States parties to fulfil their treaty obligations covered by the reservation.³² In other words, both reserving and objecting/accepting States are exempted from the reserved provisions in their treaty relations, as their mutual consent

²⁸ A recurring *leitmotif* in Strasbourg: see *Ireland v United Kingdom* Series A No 25 (18 January 1978), (1978) 2 EHRR 256, 59 ILR 199, para. 239; *Loizidou v Turkey* (1995), *supra* note 20, para. 93.

²⁹ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note 2, 660.

³⁰ International Law Commission, Second Addendum to the Fourteenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/614/Add.2 (7 August 2009), 40, para. 285, referring to General Comment No 24 (1994), *supra* note 22, paras. 8, 17. See also Schabas, ‘Reservations to Human Rights Treaties: Time for Innovation and Reform’ (1994), *supra* note 14, 72, citing ICCPR, *supra* note 23, art. 2, para. 1.

Draft guideline 4.2.5, entitled ‘Non-reciprocal application of obligations to which a reservation relates’, reads as follows:

‘In so far as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligation or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.’

The authors note that many of the draft guidelines on the legal effects of reservations and interpretative declarations proposed by Pellet were provisionally adopted, with amendments, by the Drafting Committee during the 2010 session of the Commission. See International Law Commission, Draft Guidelines provisionally adopted by the Drafting Committee on 11, 12, 17, 18, 19, 20, 21, 25 and 27 May 2010, Addendum, UN Doc A/CN.4/L.760/Add.1 (28 May 2010).

³¹ Pellet, Fourteenth Report on Reservations to Treaties, Second Addendum, *supra* note 30, 40, paras. 284-285.

³² *Ibid.*, 36, paras. 273-274. This is further developed in draft guideline 4.2.4, paragraph 2, as provisionally adopted by the Drafting Committee on 28 May 2010: *supra* note 30, 4.

is confined to the narrower limits indicated by the reservation.³³ Hence, it comes as no surprise that the protagonists of a ‘human rights approach’ to our topic attempt to move beyond this bilateralist and reciprocity-based system in the case of impermissible reservations to human rights treaties.

One clarification is in order. We emphatically do not argue here that the Vienna Convention regime on reservations is incompatible with the particular structure of performance of human rights treaties. Rather, because of this particular structure and in the light of the object and purpose pursued by these treaties, the Vienna Convention regime on the effects of reservations is to operate differently with respect to them.³⁴ Returning for a moment to the structure of their obligations, from a strictly legal point of view, human rights treaties are ‘built’ like all other multilateral treaties. Their parties promise each other to respect and ensure the rights set out in the treaty vis-à-vis all individuals within their jurisdiction.³⁵ Human rights treaties, too, create rights and obligations between their parties to the effect that any State party is obliged as against any other State party to perform its obligations, and that, conversely, any party has a correlative right to integral performance by all the other contracting States. The obligations arising from such treaties can be considered obligations *erga omnes partes*, that is, the *omnes* here being limited to the circle of the other contracting parties. The performance of obligations arising from such treaties cannot be split up into pairs of bilateral interactions, like, for instance, in the application of the two Vienna Conventions on diplomatic and consular relations; rather, such performance is inseparable, or integral.

³³ Waldock, First Report on the Law of Treaties, *supra* note 15, 68, para. 21; and *Certain Norwegian Loans (France v Norway)*, Judgment of 6 July 1957, 1957 ICJ Reports 9, 23, where the Court confined its jurisdiction within the narrower limits indicated by the French reservation, on the basis of reciprocity.

³⁴ See F. Coulée, ‘À propos d’une controverse autour d’une codification en cours : les réactions aux réserves incompatibles avec l’objet et le but des traités de protection des droits de l’homme’ in L. Condorelli et al (eds), *Libertés, Justice, Tolérance : Mélanges en hommage au Doyen Gérard Cohen-Jonathan* (Bruylant, Brussels 2004) 500, 507 *ff*.

³⁵ B. Simma, ‘From Bilateralism to Community Interest’ (1994-VI) 250 *Recueil des cours de l’Académie de droit international* 229, 335; Cohen-Jonathan, ‘Les réserves dans les traités institutionnels relatifs aux droits de l’homme’ (1996), *supra* note 21, 940.

Since we base ourselves on the view that the Vienna Convention regime on reservations as it stands is meant to regulate neither the courses of action which may be followed by States in their reactions to impermissible or intolerable reservations nor the consequences that these States might attach thereto, we suggest that one must look beyond a restrictive reading of the Vienna Convention and consider an application of its rules which balances the consent of the reserving State with the consent of the other States parties to a treaty instrument. Moreover, we consider that certain rules of customary international law which were not expressly restated in the Vienna Convention may yet provide guidance in this regard, especially in the light of more recent practice.³⁶

For these reasons, we agree with the following conclusions arrived at during the joint meeting of 15-16 May 2007 of certain members of the International Law Commission and representatives of United Nations human rights treaty bodies and regional human rights bodies:³⁷

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. It was nevertheless pointed out that that specific feature was not unique and that environmental protection treaties and disarmament treaties also presented particular features that could have an impact in terms of reservations. 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.³⁸

It is from that vantage point that we will now turn to the recent work of the International Law Commission on the issue of reservations to treaties, and find out whether it may inspire further reflection on the consequences of an impermissible reservation contrary to the object and purpose of a treaty.

³⁶ Gaja, 'Il regime della convenzione di Vienna concernente le riserve inammissibili' (2008), *supra* note 1, 350, pursues a different approach by attempting to establish a regime for impermissible reservations whilst remaining within the confines of the Vienna Convention.

³⁷ The minutes are annexed to International Law Commission, Fourteenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/614 (2 April 2009).

³⁸ *Ibid.*, 32, para. 27. The analysis here reflects the findings in International Law Commission, Second Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/477 and Add.1 (10 May and 13 June 1996), 1996 Yearbook of the International Law Commission vol II, pt 1, 56, paras. 85-87.

C. THE WORK OF THE INTERNATIONAL LAW COMMISSION, 1996-2010

1. From the Second Report (1996) to the Tenth Report (2005)

a. The continued applicability of the Vienna Convention regime

The work of the International Law Commission on the topic of reservations to treaties dates back to 1993, when it was first included in the Commission's agenda.³⁹ Using the relevant rules embodied in the Vienna Conventions of 1969, 1978 and 1986 as a starting-point, the Commission's project aimed to fill the gaps and clarify the ambiguities left in the existing law.⁴⁰ One major question taken up by Special Rapporteur Pellet from the outset was that of the applicability of the Vienna Convention regime on reservations, without modification, also to so-called 'normative treaties', and especially to human rights treaties, in the light of the challenge posed by the jurisprudence of the Strasbourg court and, particularly, by the then-recent adoption of General Comment 24 (52) by the Human Rights Committee. Thus, in his Second Report (1996), and in a markedly pugnacious spirit, Pellet took issue with the assertion of competence by treaty bodies to ultimately determine the admissibility of reservations. Demanding that the 'voice of international law' be heard,⁴¹ Chapter II of the Second Report affirmed that the Vienna Convention regime in its present form was sufficient, that consent remained the governing principle in a treaty regime which also extended, in unmodified form, to human rights treaties, that it was primarily for the States parties to these treaties to determine the permissibility *vel non* of reservations and how to deal with impermissible ones and that, consequently, human rights treaty monitoring bodies could not have more competences in these matters than those specifically granted to them by States parties to the respective treaties.⁴² After a lively debate

³⁹ See 1993 Yearbook of the International Law Commission vol II, pt 2, 96, paras. 427-430, 440.

⁴⁰ Pellet, Second Report on Reservations to Treaties, *supra* note 38, Ch. I. In the following, only the rules of the 1969 Convention will be considered.

⁴¹ Ibid., 53, para. 62, and in the preamble of the Draft Resolution he submitted on the topic and appended to the Second Report, *ibid.*, 83, immediately following para. 260.

⁴² Ibid., 82, para. 252(d).

during the 1997 session of the International Law Commission, in which an alternative view made itself heard (amongst others, by the first Author) to the effect that the Vienna Convention regime on reservations had only a very limited grip on human rights treaties not premised on reciprocity (and that the paramount consideration for these treaties was unity of substance rather than universality of participation), the Commission adopted a set of ‘Preliminary Conclusions’ which were based on a ‘draft resolution’ proposed by the Special Rapporteur in his Second Report,⁴³ but worded in somewhat more restrained language.⁴⁴ The first Author criticised this state of discourse on the matter in 1998, arguing that the Commission had neglected the ‘progressive development’ aspects of its mandate and taken a ‘conservative, pronouncedly statist’ stand on the issue of the consequences of reservations to human rights treaties;⁴⁵ he considered that, in abstracting the Vienna Convention rules to be applicable as general rules and thus to accept them as also governing reservations to human rights instruments, the Commission’s position in its 1997 Preliminary Conclusions was only correct on the most formalistic level.⁴⁶

b. A cautious step towards a new approach to normative treaties

It seems that on some level, Pellet has taken to heart criticism like the one just referred to. In his Tenth Report,⁴⁷ released in 2005, Pellet explored the conditions for the validity of reservations to treaties. After some justification for the choice of the term ‘validity’ over that of ‘permissibility’ of reservations (to his mind, the former term better taking into account both the concepts of opposability and permissibility⁴⁸), Pellet explained how the principle of freedom to

⁴³ Ibid., 83, immediately following para. 260.

⁴⁴ 1997 Yearbook of the International Law Commission vol II, pt 2, 57, immediately following para. 157.

⁴⁵ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note 2, 678.

⁴⁶ Ibid.

⁴⁷ International Law Commission, Tenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/558 (1 June 2005).

⁴⁸ Ibid., 2-4.

formulate reservations entails a presumption that they are valid,⁴⁹ thus implying both the possible existence of invalid reservations and that the consequences attached to such invalid reservations might be different from those attaching to valid reservations.

The First and Second Addenda to the Tenth Report⁵⁰ presented a series of draft guidelines dealing with the validity of reservations. Several of these guidelines are designed to assist in discerning whether a certain reservation is compatible with the object and purpose of a treaty,⁵¹ although these general guidelines do not stipulate the consequences of incompatibility. Other guidelines consider reservations ‘worded in vague, general language which does not allow [their] scope to be determined’, as being incompatible *per se* with a treaty’s object and purpose;⁵² reservations relating to customary norms as not being invariably contrary to a treaty’s object and purpose;⁵³ and reservations relating to peremptory norms as invariably being null and void.⁵⁴

Whilst the draft guidelines mentioned thus far are conceptually interesting but do not illuminate much as regards the consequences of incompatibility, another one of Pellet’s 2005 proposals is closer to our point. Already in 1996, Pellet had termed the competence of the supervisory organs of human rights bodies to determine not only compatibility, but also the legal

⁴⁹ Ibid., 5-9.

⁵⁰ International Law Commission, First Addendum to the Tenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/558/Add.1 (14 June 2005); International Law Commission, Second Addendum to the Tenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/558/Add.2 (30 June 2005).

⁵¹ Pellet, Tenth Report on Reservations to Treaties, First Addendum, *supra* note 50, 8-14, paras. 75-92 (draft guidelines 3.1.5 and 3.1.6).

⁵² Ibid., 26, para. 115 (draft guideline 3.1.7). This draft guideline in large part reflects General Comment No 24 (1994), *supra* note 22, para. 19.

⁵³ Ibid., 29-30, para. 120: because a reservation may be limited only to treaty-specific aspects of a customary norm, leaving unaffected the norm’s binding force under customary international law. *Cf* General Comment No 24 (1994), *supra* note 22, para. 8, which stated that ICCPR provisions that also embody rules of customary international law may not be the subject of reservations.

⁵⁴ Ibid, 36, paras. 136-137. The Drafting Committee did not agree with Pellet’s conclusion on this point, instead adopting draft guideline 4.4.3, in which an invalid reservation ‘does not affect the binding nature’ of a peremptory norm, thus applying the same rule as with regard to customary international law: *supra* note 30, 8.

consequences of a determination, the ‘determination function’.⁵⁵ In draft guideline 3.1.12 of 2005, he attempted to provide further guidance to monitoring bodies and States parties in discerning the object and purpose of general human rights treaties, and highlighted their particular nature:

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.⁵⁶

It is the focus on the manner in which such rights are set out within human rights treaties which is pertinent. By offering a specific interpretative rule which applies only to them, this draft guideline 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.

2. ILC work on effects of reservations, Fourteenth Report (2009)

a. Valid and invalid reservations

Because the Tenth Report’s approach was limited to the validity of reservations as regards their form or their compatibility with the object and purpose of the treaty, it was only with the Fourteenth Report of the Special Rapporteur, submitted in 2009, that the legal effects of a finding of impermissibility were considered anew, albeit through the lens of the effects of reservations and interpretative declarations.⁵⁷ However, from the outset, Pellet concentrated his analysis on the nature and effect of *valid* reservations, in that regard confirming the Vienna

⁵⁵ Pellet, Second Report on Reservations to Treaties, *supra* note 38, 83, at fifth operative clause of the ‘Draft Resolution’ following para. 260.

⁵⁶ Report of the International Law Commission on the Work of its Fifty-ninth Session, UN Doc A/62/10, GAOR 62nd Sess, Supp 10 (2007), 113-116.

⁵⁷ Pellet, Fourteenth Report on Reservations to Treaties, Second Addendum, *supra* note 30, Part IV. In Pellet, Fourteenth Report on Reservations to Treaties, *supra* note 37, 4, para. 12, it was noted that some delegations felt that the question of reservations incompatible with the object and purpose of a treaty was the most important aspect of the topic.

Convention principle that the legal effect of reservations is to modify the relations between the reserving State and other States with regard to which the reservation was entered.⁵⁸

Pellet's analysis expressly relied on the assumption that Articles 20 and 21 of the Vienna Convention contain an important gap, in that they only purport to regulate the effects of a reservation whose permissibility is not called into question, and neither set out the consequences of a reservation being found impermissible under Article 19 (or formally so under Articles 23 and elsewhere), nor resolve the question whether the application of Article 21, paragraph 3, on the combined effect of a reservation and an objection, is limited to cases of permissible reservations.⁵⁹

In this respect, Pellet highlighted some recent developments with regard to reservations and interpretative declarations, focussing notably on practice concerning human rights. Figuring prominently was the product of a 'Working Group on Reservations', established jointly by the Chairpersons of the human rights treaty bodies and the Inter-Committee Meeting of these bodies.⁶⁰ The Working Group examined the practice of human rights treaty bodies with respect to reservations to 'their' treaties, concluding that the specific nature of human rights treaties was that they 'do not constitute a simple exchange of obligations between States but are the legal expression of the essential rights that each individual must be able to exercise as a human being', although it also explained that 'general treaty law remains applicable to human rights instruments', even if it can only be applied 'taking fully into account their specific nature,

⁵⁸ Ibid., 29, paras. 253 *ff*, relying upon the wording of art. 21, para. 1(a), of the Vienna Convention.

⁵⁹ Ibid., 8, para. 195. Gaja, 'Unruly Treaty Reservations' (1987), *supra* note 1, 330, calls Article 21 'rather obscure'. In his 2008 contribution, the same author considers that more recent practice of States and treaty organs has tended to leave the path prescribed by Vienna Convention articles 20 and 21: cf. *supra* note 1, 353, 356.

⁶⁰ Report on the Practice of Human Rights Treaty Bodies with respect to Reservations to International Human Rights Treaties, submitted to the seventeenth meeting of chairpersons of the human rights treaty bodies and the fourth Inter-Committee Meeting of the human rights treaty bodies, UN Doc HRI/MC/2005/5 (13 June 2005).

including their content and monitoring mechanisms'.⁶¹ This led the Working Group to draw the following important conclusions:

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.⁶²

Special Rapporteur Pellet embraced this position, but only to a certain extent. He explained that the Working Group's conclusions placed the emphasis solely on the presumption that the State entering an invalid reservation has the intention to be bound by the treaty without the benefit of the reservation as long as its contrary intention has not been *incontrovertibly* established. Pellet considered that the test thus articulated 'perhaps goes a little far'.⁶³ He did not disagree, however, that there was room for treaty bodies to express their concern as regards reservations formulated to certain provisions, in line with the Working Group's recommendations in this regard.⁶⁴ Of further interest is the fact that the Working Group recommended that treaty monitoring bodies can ask States why a given reservation was considered necessary and was maintained, and enquire about its effect and projected longevity.⁶⁵ These aspects may eventually be of use in determining the essential nature of a reservation and ultimately its permissibility.

b. The consequence of invalid reservations: nullity

The non-validity of a reservation incompatible with the object and purpose of a treaty was directly addressed in draft guideline 3.3 of Pellet's Fourteenth Report:

⁶¹ Report of the Meeting of the Working Group on Reservations of the Sixth Inter-Committee Meeting of the human rights treaty bodies, UN Doc HRI/MC/2007/5 (9 February 2007), 6-7, para. 19 [due to an editorial error; listed as para. 16 in the Report], sub-para. 8, quoted in Pellet, Fourteenth Report on Reservations to Treaties, *supra* note 37, 16-18.

⁶² *Ibid.*, para. 19, sub-para. 7 (emphasis added).

⁶³ Pellet, Fourteenth Report on Reservations to Treaties, *supra* note 37, 18, para. 54.

⁶⁴ Report of the Meeting of the Working Group on Reservations, *supra* note 61, para. 19, sub-para. 9.

⁶⁵ *Ibid.*

A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and purpose of the treaty is impermissible, without there being any need to distinguish between these grounds for non-permissibility.⁶⁶

The effect of draft guideline 3.3 is to establish a common approach for the three types of invalid reservations defined in Article 19, although it does not address the actual consequences of the invalidity of a reservation except to state that such a reservation is not valid. Because the draft guideline and the commentaries thereto do not elaborate what those specific consequences will be, its scope therefore seems to be confined to the conclusion that an impermissible reservation, even if validly formed, will still be impermissible. No elaboration is given as to whether the nullity of the reservation invalidates the reserving State's consent to be bound,⁶⁷ which is at the heart of the question presently at hand. A hint at another (non-) consequence of impermissibility can be found in draft guideline 3.3.1, however:

The formulation of an impermissible reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the responsibility of the State or international organization which has formulated it.⁶⁸

Draft guideline 3.3.1 thus clarifies the nature of the act of formulating a reservation, confining it strictly to the law of treaties, and in this sense settles in the negative the question whether formulating a reservation could entail a breach of an international obligation.⁶⁹ More directly related to the effects of an invalid reservation is the nullity attached thereto in draft guideline 3.3.2: 'A reservation that does not fulfil the conditions for validity laid down in guideline 3.1

⁶⁶ Report of the International Law Commission on the Work of its Sixty-first Session, UN Doc A/64/10, GAOR 64th Sess, Supp 10 (2009), ch. V, sec. C.2, 302 *ff.*, draft guidelines 3.3 and 3.3.1. These draft guidelines were somewhat reformulated and provisionally adopted by the Commission at its 3025th meeting of 22 July 2009, *ibid.*, para. 61; all quotations are to the reformulated guidelines.

⁶⁷ Pellet seems to have gone to certain lengths to avoid this point: in Tenth Report on Reservations to Treaties, Second Addendum, *supra* note 50, 25, para. 200, he expressly deferred consideration of the topic to future meetings.

⁶⁸ Report of the International Law Commission on the Work of its Sixty-first Session, *supra* note 66, 309, draft guideline 3.3.1. In the Commentary thereto, Pellet refers to the ICJ's decision in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* Judgment of 25 September 1997, 1997 ICJ Reports 7, 38, para. 47, as lending support to this guideline.

⁶⁹ Gaja, 'Unruly Treaty Reservations' (1987), *supra* note 1, 317, had already, in 1987, found this argument unconvincing.

[which repeats the conditions set out in Article 19 of the Vienna Convention] is null and void.’⁷⁰

While draft guideline 3.3.3, by providing that ‘[a]cceptance of a reservation by a contracting State or by a contracting international organization shall not change the nullity of the reservation’⁷¹ is in keeping with the general spirit of the Fourteenth Report as it also confirms that the reservation has no legal effect, the following proposal (draft guideline 3.3.4) on the possibility of a collective acceptance of an invalid reservation, deserves a closer look. It reads as follows:

A reservation that is explicitly or implicitly prohibited by the treaty or which is incompatible with its object and its purpose may be formulated by a State or an international organization if none of the other contracting parties object to it after having been expressly consulted by the depositary.

During such consultation, the depositary shall draw the attention of the signatory States and international organizations and of the contracting States and international organizations and where appropriate, the competent organ of the international organization concerned, to the nature of the legal problems raised by the reservation.⁷²

On the one hand, the approach embodied in this proposal may be regarded as pragmatically sound: it does not do away with the rule that, even after a process of extensive consultation, a single objection suffices to nullify an impermissible reservation. That said, as a matter both of legal dogmatics and, maybe more importantly, of policy, we do not consider this approach to be opportune, since it leaves open the possibility, even if slight, that a reservation which is incompatible with the object and purpose of a convention may ultimately serve its (illegitimate) purpose due to some collective acceptance, however it may have been achieved. We maintain that no such collective acceptance, even if unanimous, can serve to cure an offending reservation of its incompatibility with the object and purpose of a treaty and the consequences entailed by such an incompatibility. This appears particularly important in the case of an impermissible

⁷⁰ Tenth Report on Reservations to Treaties, Second Addendum, *supra* note 50, 25. In Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11, it was suggested that the idea found in draft guideline 3.3.2 be incorporated instead within what is now draft guideline 4.5.1. Draft guidelines 3.3.3 and 3.3.4 were subsequently renumbered as draft guidelines 3.3.2 and 3.3.3, and provisionally adopted, with commentaries, by the Commission at its 3077th meeting, on 5 August 2010. They will appear in the Draft Report of the International Law Commission on the Work of its Sixty-second session, UN Doc A/CN.4/L.764/Add.2, Ch. IV, XXX. These two guidelines were not renumbered for the purposes of this present essay.

⁷¹ Tenth Report on Reservations to Treaties, Second Addendum, *supra* note 50, 26, draft guideline 3.3.3.

⁷² *Ibid.*, 28, draft guideline 3.3.4.

reservation to a human rights treaty, in view of the fundamental premise that such rights do not constitute more or less generous concessions granted by States but derive from the dignity inherent in all human beings.⁷³

3. ILC work on objections, Fifteenth Report (2010)

It is only in Professor Pellet's Fifteenth Report, which is in substance a continuation of the Fourteenth Report,⁷⁴ that the Special Rapporteur finally deals with the effect of objections made to reservations, although the Report limits its analysis to objections to valid reservations, which *a fortiori* are those compatible with the object and purpose of a treaty. Its utility for our purposes lies, *inter alia*, in the fact that, in articulating the relationship between objections and reservations, the bilateralist conception which underlies the Vienna Convention regime on reservations becomes once again apparent in order to be overcome subsequently in regard to human rights treaties (*infra* 4. *et seq.*).

The Fifteenth Report outlines that a State objecting to a reservation has several choices as to the effect which such a reservation may have. The objecting State may choose not to have the treaty enter into force between it and the reserving State, on condition that such intent be expressed *definitively*.⁷⁵ It may also elect not to oppose the entry into force of the treaty between itself and the reserving State (or refrain from saying anything on the matter), in essence reserving its rights as regards the extent to which its treaty relations with the reserving State are modified in accordance with Article 21, paragraph 3, of the Vienna Convention. This is consonant with Pellet's view that reservations are 'consubstantial' with a State's consent to be bound, and as

⁷³ See again Higgins, 'Human Rights: Some Questions of Integrity' (1989), *supra* note 3, 11.

⁷⁴ International Law Commission, Fifteenth Report on Reservations to Treaties by Mr. Alain Pellet, Special Rapporteur, UN Doc A/CN.4/624 (31 March 2010), 3.

⁷⁵ *Ibid.*, 4 *ff.*, paras. 296 *ff.* explain this in more detail. The respective guidelines were provisionally adopted on 28 May 2010: see *supra* note 30, 4-7.

such, objections constitute the objecting State's expression of its refusal to consent to that reservation.⁷⁶

The effect of an objection, therefore, is to make a valid reservation *inapplicable* against an objecting State, as draft guideline 4.3 suggests,⁷⁷ but the objection does not preclude the entry into force of a treaty between the two States in question, except in cases where the objecting State goes one step further and declares definitively that it does not intend to apply the treaty vis-à-vis the author of the reservation and thus does not want a treaty relationship with the reserving State to come about.⁷⁸ In State practice, this option, described by the Special Rapporteur as 'maximum effect' given to the objection and consisting in a definitive expression of the intention not to apply the treaty vis-à-vis the author of the reservation,⁷⁹ has, again according to Pellet, fallen into desuetude; now, there exists the new practice of objecting States attempting to modify the treaty relations by adapting them to their own position.⁸⁰ Basing themselves on the finding that the reservation is incompatible with the object and purpose of a treaty, States have taken the 'super-maximum' position, severability: the treaty applies without modification to the reserving State.

Pellet excludes the applicability of a 'super-maximum' outcome in the case of permissible reservations with vehemence. He does so in draft guideline 4.3.9, which establishes clearly that

⁷⁶ Pellet, Fifteenth Report on Reservations to Treaties, *supra* note 74, 3-4, paras. 292-293, where the Special Rapporteur draws upon the commentary to guideline 2.6.1, found in Report of the International Law Commission on the Work of its Fifty-seventh Session, UN Doc A/60/10, GAOR 60th Sess, Supp 10 (2005), 191, para. 13, and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep 15, *supra* note 15, 26.

⁷⁷ *Ibid.*, 4 *ff.*, paras. 296 *ff.* This is all consonant with the shift from unanimity which took place between 1951 and 1969 at the Commission: see *ibid.*, 5-7, paras. 300-305 for the brief drafting history behind this curious compromise. As adopted on 28 May 2010: see *supra* note 30, 4, the word 'inapplicable' has disappeared, replaced instead with the idea that the 'the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against' the reserving State or international organisation.

⁷⁸ *Ibid.*, 7, para. 306.

⁷⁹ *Ibid.*, 8, paras. 307-308, draft guideline 4.3.3. As provisionally adopted by the Drafting Committee on 28 May 2010, *supra* note 30, the formulation is somewhat changed, from the negative 'unless a contrary intention has been definitely expressed' to the positive 'if the objecting State ... has definitely expressed'.

⁸⁰ *Ibid.*, 12, para. 320.

the author of a permissible reservation cannot be compelled to comply with the provisions of a treaty without the benefit of the reservation.⁸¹ He considers that to apply the severability solution in the case of permissible reservations would be ‘clearly incompatible with the principle of mutual consent’: ‘[t]he objecting State ... cannot impose on the reserving State ... that has validly exercised its right to formulate a reservation any obligations which the latter has not expressly agreed to assume’.⁸² This seems surely unobjectionable in the case of valid reservations, but cannot extend to reservations which are not considered valid (a point which the Special Rapporteur himself highlights⁸³) because the ‘super-maximum’ effect of severance has been developed by State practice precisely within the context of objections made to reservations that are incompatible with the object and purpose of a treaty.⁸⁴

One last observation on this point: despite the fact that it is dogmatically sound, the traditional method used for accepting or objecting to reservations remains entrenched in the bilateralist framework embodied in the Vienna Convention regime. Because the effectiveness and deterrent effect of an objection remains contingent on the follow-up conduct of an objecting party and other parties to a treaty after the filing of an objection, to focus narrowly on objections in identifying impermissible reservations frames the question of the admissibility of reservations subjectively. Determination of the permissibility of a reservation remains vested in States parties rather than in any objective decision-maker.⁸⁵ For this reason, even if objections are raised in a concerted manner, and despite the fact that objections by States can constitute

⁸¹ Ibid., 27, para. 367, draft guideline 4.3.9, which was provisionally adopted by the Drafting Committee on 28 May 2010, *supra* note 30, 7, as draft guideline 4.3.7.

⁸² Ibid., 27, para. 366, in what now is draft guideline 4.3.7.

⁸³ Ibid., 16, para. 335.

⁸⁴ Ibid., 26, para. 365.

⁸⁵ See Ago’s intervention on this point in the 1962 Yearbook of the International Law Commission vol I, 163, paras. 25-27. But *cf* the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195, Article 20, paragraph 2, which provides that if at least two-thirds of the States Parties to the Convention object to the reservation, it is considered incompatible with the object and purpose of CERD; the reserving State must either withdraw the reservation or it cannot become a party to the Convention.

evidence as to the incompatibility of a reservation with the object and purpose of a treaty,⁸⁶ when determining the compatibility of a reservation with the object and purpose of a treaty, reliance upon objections is not particularly well-suited to the human rights framework.

4. The Addendum to the Fifteenth Report of 26 May 2010

Just before our contribution went to press, the Special Rapporteur submitted the First Addendum to his Fifteenth Report (circulated in June 2010),⁸⁷ in which he confirmed the idea that a presumption of severability was to apply in the case of impermissible reservations to human rights treaties, leaving the reserving State's consent to be bound untouched. The Addendum finally focuses on impermissible reservations, highlighting both the concerns raised in the present essay and by the first Author in 1998, as well as the impact which the practice of the various treaty monitoring bodies has had on the development of the law. Pellet's recommendations on these issues merit close review, since they also constitute a synthesis of his earlier reports and represent the logical culmination of his work on our subject of concern in the Tenth, Fourteenth and Fifteenth Reports.

a. The nullity of an invalid reservation and the consequences thereof

As highlighted above and introduced in Pellet's Tenth Report, draft guideline 3.3.2 provided for the nullity of a reservation that does not fulfil the conditions for validity; however, as the Special Rapporteur now recalls, the nullity of a reservation and the consequences and effects of such nullity remain two separate matters. Pellet describes the nullity of an act as merely one of the characteristics which influence the capacity of that act to produce or modify a legal situation.⁸⁸ He then identifies the very problem with the bilateralist framework preferred in the Vienna Convention regime, namely, that placing the power of determining the permissibility of a

⁸⁶ Cohen-Jonathan, 'Les réserves dans les traités institutionnels relatifs aux droits de l'homme' (1996), *supra* note 21, 942.

⁸⁷ Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11.

⁸⁸ *Ibid.*, 11, para. 407. In paras. 408 *ff.*, he describes the consequences of nullity at some length.

reservation solely with the other contracting parties has the effect of denying ‘any useful effect’ to Article 19 of the Vienna Convention, in so far as States could accept reservations which are not valid under the Convention regime.⁸⁹ The State practice of objecting to impermissible reservations surveyed in the Report concords with Bowett’s view that objections need not, and indeed cannot, be made against impermissible reservations; whilst objections may assist in *identifying* impermissible reservations by signalling them, they do not in and of themselves do much to determine their validity: ‘the test of permissibility is the treaty itself’.⁹⁰

From this starting-point, Pellet’s draft guideline 4.5 covers the effect of invalid reservations, in the sense that they are to be considered ‘null and void’.⁹¹ In the commentary thereto, Pellet reviews State practice, as well as the experience of treaty monitoring bodies, to demonstrate rather conclusively that reservations found incompatible with a treaty’s object and purpose do not prevent a treaty from entering into force between objecting and reserving States, even if States and monitoring bodies were to conclude that the reservation itself is deprived of any legal effect.⁹² He therefore confirms this important development based on the practice of human rights monitoring bodies.

⁸⁹ Ibid., 12-13, paras. 410-13.

⁹⁰ Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976-1977), *supra* note 10, 81. *See also* J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 *Nordic Journal of International Law* 179, 187, who surveys the practice of the European Nordic States in asserting a super-maximum effect of their objections to reservations: ‘such objections have the aim of seeing to it that the reserving state does not get what it wants’. But rather than endorsing their practice, he views the Nordic approach to severability as ‘an attempt to influence the development of the law on reservations’, *ibid.*, 190. Swaine, ‘Reserving’ (2006), *supra* note 3, 359 considers these innovative objections as liberating non-reserving States to choose amongst a spectrum of alternatives in their reaction to reserving States, so that reserving States no longer unilaterally manage the risks of treaty-making.

⁹¹ Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11, 16, draft guideline 4.5.1. In the Fifth Report of the Drafting Committee on Reservations to Treaties (UN Doc A/CN.4/L.760/Add.3 (23 July 2010)), it was suggested that draft guidelines 4.5.1 and 4.5.2 be merged. The Drafting Committee’s proposed reformulation was provisionally adopted by the Commission at its 3069th meeting on 27 July 2010.

⁹² Ibid., 18-22, paras. 426-433. Draft guideline 4.5.2 was meant to codify this widespread acceptance; it is now the second prong of draft guideline 4.5.1.

b. *Effects of the nullity of a reservation on the consent of its author to be bound*

The consequences of the nullity of a reservation are at the heart of our present study, and Pellet now finally turns to addressing this question.⁹³ For decades, various options had been debated in international legal doctrine. Sir Hersch Lauterpacht's classic separate opinions in *Norwegian Loans* and *Interhandel* maintained that, if a provision is invalid, then the entire instrument in which it is contained is invalid, for one must operate on the assumption that the consent in that instrument is made *on the basis* of its containing the problematic provision.⁹⁴ This position against severability, or in favour of 'maximum effect', has elicited much support in doctrine;⁹⁵ nonetheless, Pellet attempts to bridge the gap, in his own words, 'to find a middle ground', between such a theory of 'integral' consent and that of the 'super-maximum' effect of severability, according to which the invalid reservation is considered null but leaving the consent to be bound untouched.⁹⁶ He cites recent practice in favour of the severability doctrine of 'super-maximum effect',⁹⁷ as well as the Strasbourg approach and the effect of General Comment No. 24 described above, but nevertheless notes the difficulties inherent in a presumption of

⁹³ Ibid., 22 ff, paras. 435 ff.

⁹⁴ *Certain Norwegian Loans (France v Norway)*, 1957 ICJ Reports 9, *supra* note 33, Separate Opinion of Judge Lauterpacht, 55-59; *Interhandel (Switzerland v United States)*, Preliminary Objections, Judgment of 21 March 1959, 1959 ICJ Reports 6, Separate Opinion of Judge Lauterpacht, 117.

⁹⁵ This view was endorsed, *inter alia*, by Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976-1977), *supra* note 10, 89; R. Jennings and A. Watts (eds), *Oppenheim's International Law* vol I (9th edn Longmans, London 1992), 1247; C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) LXIV British Yearbook of International Law 245, 267; C.A. Bradley and J.L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 University of Pennsylvania Law Review 399, 429-439; and L. Helfer, 'Not Fully Committed? Reservations, Risk and Treaty Design' (2006) 31 Yale Journal of International Law 367, 380. However, Gaja, 'Il regime della convenzione di Vienna concernente le riserve inamissibili' (2008), *supra* note 1, 361, rightly regards this theory as "una soluzione che non pare conciliabile con il fondamento consensuale dei vincoli derivanti di trattati".

⁹⁶ Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11, 22, para. 435.

⁹⁷ Ibid., 23-24, paras. 437-439, citing the recent practice of the Nordic States as reviewed by Klabbbers, 'Accepting the Unacceptable?' (2000), *supra* note 90, 183-186 and Simma, 'Reservations to Human Rights Treaties' (1998), *supra* note 2, 667-68. Pellet also cited the 2010 practice of several European States objecting to the reservation by the United States to the Third Protocol on the Convention on Certain Conventional Weapons (opened for signature 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137, and to Qatar's reservations to the Convention on the Elimination of Discrimination against Women (opened for signature 18 December 1979, entered into force 3 September 1982), 1249 UNTS 13.

severability. He also emphasises the view that it should be the author of a reservation that should take the final decisions to ‘cure’ the nullity of a reservation, and should not be considered a party to a treaty so long as that nullity persists.⁹⁸

c. The presumption of the will of the author of the invalid reservation

Faced with these two conflicting viewpoints, Pellet explains that both positions may be reconciled with the basic principle governing the law of treaties, that is, consent.⁹⁹ Examining both Lauterpacht’s *Interhandel* and *Norwegian Loans* opinions on the one hand, and the relevant work of the various human rights courts (the European Court of Human Rights’ practice in *Belilos* and *Loizidou* and the Inter-American Court of Human Rights’ finding in *Hilaire*)¹⁰⁰ on the other, he concludes (correctly, in our view) that the paramount consideration in all of these decisions remains the reserving State’s consent to be bound.¹⁰¹ After considering the solution embodied in General Comment No. 24, according to which the ‘normal consequence’¹⁰² of an invalid reservation was the entry into force of a treaty for the reserving State without the benefit of the reservation, Pellet returns to the recommendation of the Working Group in 2007 referred to above,¹⁰³ whereby a reserving State faced with an assessment by another party, a monitoring body or a court to the effect that its reservation is invalid, must ‘*establish incontrovertibly*’ that the reservation was a *conditio sine qua non* of its consent to be bound by the treaty, and that it does not

⁹⁸ Ibid., 28, para. 448. Pellet cites the practice of the Secretary-General and some State practice in this regard, paras. 449-452, but recognises that the ‘immense majority’ of States objecting to reservations have nevertheless held that their objection should not prevent the entry into force of the treaty between objecting and reserving States.

⁹⁹ Ibid., 31, para. 455.

¹⁰⁰ *Hilaire v Trinidad and Tobago*, Preliminary Objections, Judgment of 1 September 2001, IACHR Rep Series C No 80, paras. 93-94.

¹⁰¹ Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11, 31-33, paras. 456-60.

¹⁰² General Comment No 24 (1994), *supra* note 22, para. 18.

¹⁰³ *Supra* note 60.

want to remain a party without the benefit of the reservation.¹⁰⁴ Although in 2007, Pellet considered that establishing ‘incontrovertibility’ as the relevant test went ‘a little too far’, he now seems to have come to the conclusion that a presumption of severability can, and does, give adequate consideration to the reserving State’s consent to be bound. This point had already been made by the first Author in 1998:

At first glance, it is not easy to square [a presumption of severability] with the principle of consent governing the law of treaties. It can be reconciled, however, if the reserving State is presumed as having tacitly agreed—accepted the risk—that, if its reservation were found unacceptable and therefore invalid and thus severed from its consent to be bound, it might find itself bound by the treaty in its entirety.¹⁰⁵

Similarly, Pellet considers that a presumption of severability can validly be established, and should be seriously taken into consideration by the Guide to Practice, ‘since it offers a reasonable compromise between the underlying principle of treaty law—consent—and the potential to consider that the author of the impermissible reservation is bound by the treaty without benefit of the reservation’.¹⁰⁶ He lays out several additional policy considerations which privilege a presumption of severability. First, the author of a reservation has by definition wished to become a contracting Party to the relevant treaty; reservations thereto, whilst playing an important part in a States’ consent, do not necessarily reflect the essential conditions for a State to consent to be

¹⁰⁴ Examples include the US reservations to the ICCPR: see United States, Senate Committee Foreign Relations Report on the International Convention on Civil and Political Rights, (1992) 31 ILM 645, 658-59; United States practice in relation to the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85, is also pertinent: see Multilateral Treaties Deposited with the Secretary-General, Status of 31 December 1994, UN Doc ST/LEG/SER.E/13, 179. See also Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976-1977), *supra* note 10, 77.

¹⁰⁵ Simma, ‘Reservations to Human Rights Treaties’ (1998), *supra* note 2, 666-667. Gaja, ‘Il regime della convenzione di Vienna concernente le riserve inammissibili’ (2008), *supra* note 1, 360, remains skeptical towards this solution; according to him “sarebbe difficile giustificare l’esistenza di una presunzione in tal senso”. While he regards the approach of ‘maximum effect’ as even more problematic than that of the ‘super-maximum’ effect/presumption of severability, he appears to consider these developments at least helpful in the sense that they might lead the reserving State either to withdraw its impermissible reservation or acquiesce ‘rispetto alla considerazione che la volontà di tale Stato di essere parte del trattato sia considerata prevalente rispetto a quella espressa nella riserva’: *ibid.*, 361. Gaja thus seems to accept a solution which comes very close to that presented by Special Rapporteur Pellet and supported by the present authors.

¹⁰⁶ Pellet, Fifteenth Report on Reservations to Treaties, First Addendum, *supra* note 11, 35, para. 465.

bound.¹⁰⁷ Secondly, to his mind, the practical implications of keeping a reserving State within the treaty regime during the process of resolving the difficulties posed by an impermissible reservation outweigh the disadvantages of keeping a recalcitrant State inside the treaty framework.¹⁰⁸ Thirdly, Pellet argues that a presumption of severability privileges legal certainty, in that under such a presumption, there is no ‘legal vacuum’ between the point in time at which the reservation is made and the (later) point in time at which it is found impermissible and therefore null; the reserving State is bound as a State party to the treaty.¹⁰⁹

D. THE ADVANTAGES OF A PRESUMPTION OF SEVERABILITY

The Special Rapporteur’s considerations in the Addendum to his Fifteenth Report being in line with what has been maintained throughout this study and what the first Author has suggested 12 years ago, we wish to conclude with some final observations on the advantages of a presumption of the severability of impermissible reservations to human rights treaties, which we believe confirm rather than undermine the importance and seriousness of consent.

The first advantage is the transparency that would undoubtedly result for a State knowing *ex ante* that its reservation runs the risk of being found incompatible with the object and purpose of a treaty. Although the ambiguity in the Vienna Convention regime as to the effects of incompatibility does also have a certain advantage, in that it may ‘engender the flexibility necessary to enable States party to a convention to adjust gradually and progressively to rules which may not be precise in their application nor interpreted consistently over time’,¹¹⁰ we

¹⁰⁷ Ibid., 35-36, para. 469.

¹⁰⁸ Ibid., 36, para. 470. It is true that there can high costs of re-accession associated with the ‘maximum effect’ of a reserving State no longer being bound to the treaty: see eg the enormously complex treaty ratification process in the United States Senate, as described by Bradley and Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’ (2000), *supra* note 95, 404-410.

¹⁰⁹ Ibid., 36, para. 471.

¹¹⁰ Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ (1993), *supra* note 95, 279; and Swaine, ‘Reserving’ (2006), *supra* note 3, 345. Pellet also recognised the deliberate normative gap in the Vienna Convention regime: see Pellet, Tenth Report on Reservations to Treaties, Second Addendum, *supra* note 50, para. 181.

consider that the time has come to resolve such ambiguity at least with regard to human rights treaties. Pellet's call for the Commission to endorse a presumption of severability is therefore most welcome.

Secondly, a presumption of severability is justified by the very nature of a State's consent to be bound by a human rights treaty of a universal character. By consenting to the obligations embodied in a treaty of that kind, a State *ipso facto* expresses its consent to be bound by the essential purposes of the treaty, its very core and *raison d'être*. In other words, the reserving State consents to the 'common core' of the consent of all States parties and consents to be bound by all provisions central thereto. Thus, in case of an impermissible reservation, assuming that it is made in good faith, the severability solution tacitly holds the reserving State to agreeing that a reservation cannot infringe upon the fundamental consent to be bound by the treaty's object and purpose and all provisions central thereto. A determination that a given reservation goes against the object and purpose of the treaty will necessarily entail a determination that the provision against which the reservation has been entered constitutes part of the treaty's object and purpose, and a State making a reservation must accordingly have foreseen the possibility that its reservation might conceivably be found to be invalid. In the face of a situation in which a State has expressed its consent to be bound by the treaty's object and purpose, while at the same time desiring to exclude a provision that is central to that object and purpose, it must be presumed that the fundamental consent to be bound, expressed in the act of ratification, is paramount and takes primacy over the reservation.¹¹¹ This holds true unless, as outlined above, the reserving State incontrovertibly (or definitively) rebuts the presumption and instead establishes that its consent was premised on the effectiveness, the 'success', of the reservation.¹¹²

¹¹¹ Cf. R. Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 American Journal of International Law 531, 536: the opposite presumption assumes that a State would have preferred not to be part of the treaty without the reservation, and further unravels what can be a complicated series of inter-related guarantees.

¹¹² Simma, 'Reservations to Human Rights Treaties' (1998), *supra* note 2, 667. From the outset Pellet foresaw a relaxation of the rules governing the time limits for the formulation or re-formulation of reservations for precisely

Thirdly, to oblige a reserving State to establish that it considered its reservation to be an essential condition for it to be bound *at the time* the reservation was made, would also facilitate the task of a third-party monitor or adjudicator by providing it with the freedom to honour a State's definitively expressed consent to be bound. Where parties to a treaty have established their own monitoring or judicial machinery, as under the European and Inter-American human rights conventions, they have already accepted a 'primarily objective standard for the assessment of the validity of reservations and the effect that such invalidity might eventually entail'.¹¹³ Even if such monitoring or judicial machinery is not a special creation of the treaty, from a strong human rights viewpoint it would be highly problematic if a State were to make a reservation excluding recourse thereto, especially if such recourse constitutes the only option available to have questionable reservations evaluated in an 'objective' manner. This point was central to the Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma in *Armed Activities in the Territory of the Congo*,¹¹⁴ which noted the importance of the role of the International Court of Justice for the achievement of the purposes of a treaty such as the Genocide Convention, where, in the absence of a treaty body exercising supervisory functions, States are the only monitors of each other's compliance with their treaty obligations.¹¹⁵ The five judges concluded that it is 'thus not self-evident that a reservation to Article IX [the Convention's compromissory clause] could not be regarded as incompatible with the object and purpose of the

these reasons: see Pellet, Second Report on Reservations to Treaties, *supra* note 38, 81, paras. 247-251. Any comprehensive treatment of the time element as regards the process of reservations and objections thereto exceeds the scope of this essay. See eg the Commentary to draft guideline 2.6.15 (on late objections to reservations) in Report of the International Law Commission on the Work of its Sixtieth session, UN Doc A/63/10, GAOR 63rd Sess, Supp 10 (2008), 221-225.

¹¹³ D.W. Greig, 'Reservations: Equity as a Balancing Factor?' (1995) 16 Australian Yearbook of International Law 21, 108.

¹¹⁴ *Armed Activities in the Congo (Democratic Republic of the Congo v Rwanda)*, Judgment of 3 February 2006, 2006 ICJ Reports 3, Joint Separate Opinion of Judges Higgins, Kooijmans, Buergenthal, Elaraby and Simma, 65.

¹¹⁵ The Joint Separate Opinion also noted, *ibid.*, 70, para. 21, that, in the case of human rights treaties, a reservation to a procedural provision excluding the role of treaty monitoring bodies could be contrary to a treaty's object and purpose.

Convention’.¹¹⁶ 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,¹¹⁷ and we contend that the permissibility of a reservation excluding the competence of a treaty body or a judicial institution over the monitoring of a human rights treaty is far from established.

Fourthly, a presumption of severability finds its root in the consent of States taken as a whole. Because a reservation incompatible with the object and purpose of a human rights treaty would, if successful, *ipso facto* constitute a fundamental change to the treaty,¹¹⁸ it follows logically that the ability of States to restrict the scope of their consent relating to the core purposes of that treaty would do violence to the consent of all other States parties. As was recognised in the advisory opinion on *Reservations to the Genocide Convention*,

It is well established that in its treaty relations a State cannot be bound without its consent. ... none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.¹¹⁹

The essential purpose of a treaty concluded between States therefore may be considered as a common core of the States parties’ consent, a core which other States may not freely modify or change. For this reason, then, objections based on incompatibility with the object and purpose of a treaty acquire heightened importance in so far as the validity of reservations may be considered. A presumption of severability serves to accommodate the values of universality and integrity,¹²⁰ the hallmarks of human rights treaties; it accepts the view that such treaties constitute a set of fundamental normative propositions whilst simultaneously deriving the normative aspect of these treaties from the intention of the parties which drafted them.

¹¹⁶ Ibid., 72, para. 29.

¹¹⁷ In his Second Report on Reservations to Treaties, *supra* note 38, 75, para. 209, Pellet emphasises the special role of human rights monitoring bodies because of the ‘ordinariness’ of these bodies: ‘Being established by treaties, they derive their competence from those instruments and must verify the extent of that competence on the basis of the consent of the States parties and of the general rules of the law of treaties.’

¹¹⁸ Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002), *supra* note 111, 534.

¹¹⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep 15, *supra* note 15, 21.

¹²⁰ Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002), *supra* note 111, 535.

A final word: we see the great appeal of a presumption of severability in the fact that it removes human rights instruments from the grip of the bilateralist paradigm and places them into an objective, but equally consensualist, framework. In adopting this solution States will not agree to severability *simpliciter*: they agree in advance to the assessment of the compatibility of their reservations with the object and purpose of the treaty, and they agree in advance to abide by the effect which might be ascribed to their reservations. A presumption of severability is far more subtle than a presumption of ‘maximum effect’, whereby the impermissible reservation ‘poisons’ the consent to be bound as a whole. It takes into account a State’s consent to be bound *at the time* of the definitive expression of such consent, not at a subsequent point in time.

Of course, a presumption of severability will carry with it certain challenges. It will sometimes be difficult in practice to discern the intention of the author of a reservation, and there will be problems in distinguishing between reservations which are essential to the consent to be bound and those which are dispensable in order to secure the benefits of treaty participation in any eventual severability test. Our presumption could moreover exacerbate future difficulties in that expressions of consent could be subjected to a practice of ‘overclaiming’ whereby a State might declare that every one of its reservations is indispensable for its consent to be bound, thus distorting the ability of other States to object to reservations and diminishing their discretion to do so.¹²¹ However, it remains clear that a presumption of severability introduces transparency into the treaty-making process as a whole, thus elevating a State’s genuine consent to be bound over a narrow, cautious approach to consent that the application of ‘maximum effect’ would entail. For this reason, we welcome the step towards a presumption of severability taken by Special Rapporteur Pellet, and hope that the Commission’s future debates will pay due regard to what is an important development in the field of reservations to treaties.

¹²¹ Helfer, ‘Not Fully Committed? Reservations, Risk and Treaty Design’ (2006), *supra* note 95, 381; Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002), *supra* note 111, 537.

