

.....

Should Invalid Reservations to Human Rights Treaties Be Disregarded?

Roberto Baratta*

Abstract

The article deals with the effects of invalid reservations to human rights treaties on the position of the reserving state. Although some actions of monitoring bodies established by human rights treaties support the 'Strasbourg approach', a deeper consideration of practice points in the opposite direction. Consequently, it is not easy to reconstruct a customary norm whereby an invalid reservation to human rights treaties should be considered as not being formulated at all. In addition, the 'Strasbourg approach' needs to be reconciled with the consent principle, the bedrock of treaty obligations. On this basis, some possible solutions to the problem of the effects of invalid reservations to human rights treaties are suggested. Naturally, a special regime for invalid reservations to human rights treaties (and for treaties protecting other fundamental values) is a desirable prospect for the progressive development of international law. Finally, on a de iure condendo level of reasoning and among the possible new models of discipline that cannot be as stringent as the 'Strasbourg approach', the author puts forward a proposal.

1 Introduction

Finding customary international rules governing the effects of 'invalid'¹ reservations to treaties, and particularly to human rights treaties, on the reserving state's position is a many-sided problem. The Vienna Convention on the Law of Treaties (VCLT) yields only unclear, or at least partial, answers for authors siding with the 'opposability' doctrine and no answers at all for those agreeing with the 'admissibility' doctrine.² In

* Professor of European Community Law, Faculty of Law, University of Macerata, Ph.D. (Rome).

¹ A reservation (or a declaration of a similar effect) is usually termed invalid whenever it has been formulated without following the normative standards on its admissibility and manner of making. From a theoretical-doctrinal perspective, it has been suggested that the notion of invalidity cannot always be extended to the act of making a reservation: R. Baratta, *Gli effetti delle riserve ai trattati* (1999) 115 *et seq.* (further references below to my book are made only for the sake of brevity of this article).

² As is well known, the 'opposability' doctrine implies that VCLT rules on acceptance of and objections to reservations should be applied also to reservations that are inadmissible because they do not overcome

addition, recent trends in the actions of certain monitoring bodies established by human rights treaties have generated heterogeneous and sometimes contrasting reactions from states and doctrine. These trends, in particular, deserve a careful analysis on the basis of generally accepted principles of the law of treaties.

Naturally, if an agreement ruled on the effects of invalid reservations, there would not be a problem. But this seldom happens. One of the most controversial points seems to be the identification of consequences for the reserving state in terms of both the applicability of the reserved provisions of the agreement to it and its status as a party to the treaty. The following remarks focus on this topic with regard to human rights treaties.

2 Recent Trends in Practice

It is well known that since the *Belilos*³ and *Weber*⁴ cases, it has been suggested that the state making invalid reservations should be bound by the obligations of the agreement beyond the limits foreseen in those reservations. Jurisprudence of the European Court of Human Rights (ECHR) has become firm on the ‘Strasbourg approach’⁵ to invalid reservations and the same could be said for the former European Commission of Human Rights. In 1994 the UN International Covenant on Civil and Political Rights Human Rights Committee (HRC) took the same position,⁶ finding that ‘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

the object and purpose test. Conversely, the ‘admissibility’ doctrine means that those rules apply only to reservations that are compatible with the object and purpose criterion. Since the VCLT does not set out the consequences that should be attached to reservations inconsistent with this criterion, in this case — as previously noted — a gap exists in the discipline. Although it is possible to admit that the VCLT distinguishes reservations incompatible with the objective and purpose of the treaty from admissible reservations and that, from a logical viewpoint, the reserving state formulating the former should not be considered a participant to the treaty unless it withdraws them or the treaty is modified, the first group of reservations are in practice, and according to most scholars, assimilated into admissible reservations as far as rules of acceptance/objection are concerned: see e.g., P. Imbert, *Les réserves aux traités multilatéraux* (1979) 134 *et seq.*, Gaja, ‘Unruly Treaty Reservations’, in *Le droit international à l’heure de sa codification*, I (1987) 313 *et seq.*, Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’, 64 *British Yearbook of International Law* (1993) 269 *et seq.* For more observations and references see Baratta, *supra* note 1, at 68 *et seq.* and 121 *et seq.*

³ *Belilos* case, ECHR (1988) Series A, Vol. 132.

⁴ *Weber* case, ECHR (1990) Series A, Vol. 177. For instance, in *Weber* the ECHR held that, although Switzerland’s reservation to Art. 6, para. 1 was invalid because it did not fulfil one of the requirements of Art. 64 of the European Convention on Human Rights, Art. 6, para. 1 was applicable as a whole (*ibid.*, at 20).

⁵ Simma’s succinct term for this jurisprudence; see ‘Reservations to Human Rights Treaties — Some Recent Developments’, in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Bermann and K. Zemanek (eds), *Liber Amicorum Professor Seidl-Hohenveldern — in Honour of His 80th Birthday* (1998) at 30.

⁶ See General Comment No. 24 (52) adopted 2 November 1994, under Article 40 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols, or in relation to declarations under Article 41 of the Covenant, in 3 *International Legal Materials* (1995) 839 *et seq.*

severable, in the sense that the covenant will be operative for the reserving party without benefit of the reservation'.⁷

On examining the cases, one may find elements of practice, even related to other kinds of treaties and prior to *Belilos*, which endorsed the idea that invalid (or inadmissible) reservations should be considered as not being formulated at all.⁸ It may be that the tendency of obliging states, which did not follow normative standards on making reservations to human rights treaties beyond the given limits, is part of a more general international human rights movement willing to condemn in these cases any kind of reservation *tout court*.⁹

3 Does Competence to Ascertain the Invalidity of a Reservation Influence Resolution of the Issue?

Which subjects or bodies are competent to ascertain that a reservation has been made in a manner inconsistent with specific normative parameters? If a monitoring body is charged with resolving questions about the agreement's interpretation or application or is particularly set up to ensure that the agreement is complied with, it might suggest that that centralized body is able to declare the invalidity of a reservation and, going a step further, apply the reserved treaty provision *vis-à-vis* the reserving state.¹⁰

It is true that this kind of body has the inherent power to judge irregular reservations, regardless of whether the agreement gives them so-called *Kompetenz-Kompetenz*,¹¹ or attributes to them a proper jurisdictional status.¹² On the other hand, practice shows a clear tendency to allow contracting states to dispute or raise objections to invalid or irregular reservations. The presence of a monitoring body does not necessarily prevent unilateral reactions by states. Some instances of practice indicate a legitimacy of reaction by states, even where there is a centralized body capable of pronouncing on the inadmissibility or invalidity of the reservations.¹³

⁷ *Ibid.*, at 846, para. 20.

⁸ Space constraints rule out the possibility of an examination or an overview of the relevant practice and doctrine here. Some reasons which have supported the trend referred to in the text will be examined *infra*, at paras 3–6. For a global analysis of practice see Baratta, *supra* note 1, especially at 83–115.

⁹ The existence of this movement is mentioned, for example, by Simma, *supra* note 5, at 660.

¹⁰ See D. Brändle, *Vorbehalte und auslegende Erklärungen zur europäischen Menschenrechtskonvention* (1978) 42 *et seq.* and Kühner, 'Vorbehalte und auslegende Erklärungen zur europäischen Menschenrechtskonvention. Die Problematik des Art. 64 MRK am Beispiel der schweizerischen "auslegenden Erklärungen" zu Art. 6 Abs. 3 lit e MRK', 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1982) 88–89.

¹¹ '... as a general rule, any body possessing jurisdictional power has the right in the first place itself to determine the extent of its jurisdiction': *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* (1928) PCIJ Series B, No. 16, at 20; see further the *Tadić* case (Jurisdiction), International Tribunal for the Former Yugoslavia (Appeal Chamber), 2 October 1995, in 78 *Rivista di diritto internazionale* (1995) 1025–1026, para. 18.

¹² For instance, the ECHR should have the power to ascertain the compatibility of reservations with Art. 64 (now, Art. 57 after the entry into effect of the Eleventh Protocol), as its judgments have already held. An identical affirmative position has been taken by the HRC in the General Comment No. 24 (52) *supra* note 6, at 845, para. 20.

¹³ Cf. e.g., *Belilos* case, *supra* note 3, at 23.

Although there may be — as in fact there often are — monitoring bodies set up to deal with cases of violations of human rights protected by a convention, this does not necessarily imply that the state which made an invalid reservation is compelled to observe the reserved provisions. Certainly a monitoring body may ascertain the legality of a reservation, but the matter of the effect of its inadmissibility (or invalidity) is a different kind of question and its resolution does not depend on provisions dealing with the competence of conventional courts or bodies. On a conceptual and practical level, it seems quite obvious to distinguish between, on the one hand, the legal criteria set up by the agreement, which have not been observed by the reserving state and, on the other, the application of the provision irregularly reserved. While the former issue will be solved according to the rules — often clarified in the convention — which limit the power of making reservations, the resolution of the latter depends on general international law. This occurs whenever the agreement — as is usually the case — does not contain rules on the effects of reservations made regardless of specific normative prohibitions or conditions. In other words, the inadmissibility or invalidity of a reservation does not necessarily involve, as a consequence, the applicability of the reserved provision *vis-à-vis* the reserving state. Enlarging the scope of application of the treaty, on a subjective and substantial level, seems to be a different question unrelated to the norms that govern the competence of monitoring bodies.

4 Obstacles to the Determination of a Customary Norm whereby Invalid Reservations Should Be Disregarded

This leads to a crucial point: inferring from *Belilos* and other cases, is it possible to reconstruct a customary norm whereby impermissible or invalid reservations to human rights treaties should be considered as not being formulated at all?¹⁴

A glance at Switzerland's acquiescence, following the ECHR judgments in *Belilos* and *Weber*, might lead to an affirmative answer. But a deeper consideration of practice suggests that it is hard to find clear evidence of *usus*, since reserving states, faced with the instruction to observe the irregularly reserved provision, often react by claiming the exact opposite. To mention practice related to specifically human rights treaties, Turkey, before the ECHR in the *Loizidou, Yagci et Sargin* and *Mansur* cases, rejected the assumption that its conditions to the acceptance of the Court's jurisdiction were invalid and produced no juridical effects.¹⁵

In addition, it is doubtful whether the 'Strasbourg approach' prevails among European countries. Recommendation 1233 (1993) on reservations made by Member States to the Council of Europe, adopted by the Assembly on 1 October 1993, simply invited 'member states to make a careful review of their reservations, withdraw them as far as possible and make a reasoned report to the Secretary General

¹⁴ Cf. M. Shaw, *International Law* (4th ed., 1997) 647–648; Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', 46 *International and Comparative Law Quarterly* (1997) 390. According to B. Conforti, *Diritto internazionale* (5th ed., 1997) 98, if this solution prevailed in general international law the typical effects of reservations would be 'poco più che niente'.

¹⁵ See Baratta *supra* note 1, at 142.

if certain reservations are maintained'.¹⁶ In 1995, the Chief Legal Advisers of the Foreign Ministries of six European states met in Vienna and analysed issues related to reservations to human rights treaties, but '[no] final view was expressed on the legal effects of inadmissible reservations'.¹⁷

Furthermore, as is known, some states, according to Article 40§5 ICCPR, responded with unfavourable and strongly worded observations to the General Comment adopted in 1994 by the HRC. The US government has simply refuted the Committee's view that in the presence of an unacceptable reservation the Covenant is deemed to be operative for the reserving state without benefit of the reservation.¹⁸ Moreover, the United Kingdom¹⁹ and France²⁰ made it clear that they opposed the idea of severing inadmissible reservations from consent to be bound by the Covenant.

More generally, even when a reservation is characterized as 'invalid' or 'without effect', it is by no means certain whether the state claiming the invalidity or ineffectiveness intends to consider the reserving state bound beyond the reservation. Sometimes states clearly assume an attitude that is similar to a mere objection, namely when they specify that their declarations do not prevent the entry into force of the convention between themselves and the reserving state and, then, recommend the

¹⁶ *Yearbook of the European Convention on Human Rights* (1993) at 435.

¹⁷ Cf. 5 *Österreichische außenpolitik Dokumentation* (1995), at 49.

¹⁸ On 28 March 1995 the US government addressed a letter to the Committee declaring *inter alia* that the Committee's assertion 'is completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States . . . The reservations contained in the United States instrument of ratification are an integral part of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified. Articles 20 and 21 of the Vienna Convention set forth the consequences of reservations and objections to them. Only two possibilities are provided. Either (i) the remainder of the treaty comes into force between the parties in question or (ii) the treaty does not come into force at all between these parties. In accordance with Article 20, paragraph 4(c), the choice of this results to the objecting party. The Convention does not even contemplate the possibility that the full treaty might come into force for the reserving State. The general view of the academic literature is that reservations are an essential part of a State's consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by that treaty. A State which expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it. It is regrettable that the General Comment 24 appears to suggest the contrary.' ('Observations by the United States of America on General Comment No. 24 (52)', in 16 *Human Rights Law Journal* (1995) at 423–424). See further the negative reaction of the US Senate to the conclusions of the HRC (S. Rep. No. 95, 104th Cong. 1st Sess. § 314(a)(5)(1995). Draft of Bill, s. 908, at <<http://rs.9.loc.gov/cgi-bin/query>>.

¹⁹ Basically, the United Kingdom's observations appeared to focus on the principle of consent, reaching the following conclusion: 'the only sound approach is accordingly that . . . a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all – unless it withdraws the reservation' ('Observations by the United Kingdom on General Comment No. 24', *ibid.*, at 426, n. 15).

²⁰ In short, the French government considered, on the one hand, that it was unnecessary to create a specific regime for reservations to human rights treaties and, on the other, that the 'severability' doctrine was incompatible with the existing law of treaties. The French reaction is relevant because France made *inter alia* a general reservation to Art. 27 ICCPR: see Baratta, *supra* note 1 at 145–146, n. 227.

latter to reconsider its reservation.²¹ In addition, a statement may try to define a state's view on the permissibility of a reservation made by another state, without necessarily affecting any right or obligation of the latter under the treaty.²² This kind of statement, with respect to the legal position of the reserving state, does not substantially differ from a declaration aimed at urging the withdrawal of a reservation considered as inadmissible.²³

A cautious attitude has been endorsed by the Committee on the Rights of the Child when expressing its intention to examine the issue of reservations to the Convention on the Rights of the Child. In fact, the admissibility of such reservations has at times appeared doubtful. The Committee stated that this issue should be considered not as a '*facteur de division*', but as pursuing the purpose of leading the reserving state to re-examine the utility of a reservation and, as the case may be, to withdraw it.²⁴ Similarly, a recent Presidency statement (published in Brussels and Bonn on 11 February 1999) on behalf of the European Union clearly urged the United States to withdraw its reservation to Article 6 of the ICCPR, without mentioning the 'severability' doctrine at all.²⁵

Further, in its preliminary conclusions of 15 July 1997 on reservations to treaties, a topic which has been back on the International Law Commission (ILC) agenda since 1993,²⁶ the Commission took a cautious attitude, considering 'in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its

²¹ See for instance Denmark's objections to reservations made by some Islamic countries to the UN Convention on the Rights of the Child, 'Elements of Nordic Practice in International Law in the Year of 1995', 65 *Nordic Journal of International Law* (1996) at 262; and Finland's objections, *ibid.*, at 274. An identical attitude has been taken by those states when objecting to reservations to human rights treaties: cf. 'Elements of Nordic Practice in International Law in the Year of 1996', 66 *Nordic Journal of International Law* (1997) at 322 and 'Elements of Nordic Practice in International Law in the Year of 1997', 67 *Nordic Journal of International Law* (1998) at 327. See also the position of Mexico on the reservation made by United States Government to the Genocide Convention, in *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1997*, at 90.

²² States often react to inadmissible reservations to human rights treaties with a typical objection: cf. e.g., the declarations of the Netherlands and the United Kingdom as to the United States reservation to Art. IX of the Genocide Convention (*ibid.*, at 90–91); the declarations of the Netherlands and Sweden regarding the Yemen reservations to the Racial Discrimination Convention (*ibid.*, at 103–104); the declaration of Germany concerning the Myanmar and Tunisia reservations to the Convention on the Rights of the Child (*ibid.*, at 221).

²³ Cf. the Belgian declaration regarding the Congo reservation to the ICCPR (*ibid.*, at 132).

²⁴ Cf. *Rapport du Comité des droits de l'enfant*, AG NU, A/49/41 (1994), paras 527–529.

²⁵ The EU statement, made on the execution of Sean Sellers, who was 16 at the time when the crime for which he was sentenced was committed, recognized 'that the United States has made a reservation to Article 6 of the ICCPR', but considered 'that Article 6 enshrines the minimum for the protection of the right to life and the generally accepted standards in this area'. The EU presidency, recalling the view of the HCR (*supra* note 6), noted that 'the US reservation is incompatible with the object and purpose of the convention and should be withdrawn'. Many countries of Central and Eastern Europe, associated with the EU, and the EFTA countries also aligned themselves with this declaration (see <http://europa.eu.int/abc/doc/off/bull/en/9901/p104009.htm> and *Bulletin EU* 1/2 (1999) 1.4.9).

²⁶ See Pellet, *First Report on the Law and Practice Relating to Reservations to Treaties. Preliminary Report*, 30 May 1995, UN GA A/CN.4/470.

reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty.²⁷

The former European Commission of Human Rights interpreted the expression ‘ut res magis valeat quam pereat’ as resulting in severing the invalid reservations from the reserving state’s expression of consent to be bound by the treaty,²⁸ so as to give it the broadest possible range of effects. Going a step further, one may assume that a reserving state should be responsible for violations of rights protected by the irregular reserved provisions. Since this principle appears as an interpretative element of an act (or a norm), the existence and validity of which are taken for granted or previously ascertained, it is not easy to use it as a parameter for verifying the effects of a reservation and eventually disregarding it. First of all, alongside the *effet utile* of the consent to be bound by a treaty, there could exist the *effet utile* of a reservation and it seems hard to explain how the former could prevail over the latter. Paradoxically, one might argue exactly in the opposite way in order to make the efficacy of a reservation as wide as possible. Secondly, it is difficult to reconcile the priority given to the will of being party to a treaty over the intention declared in the reservation, even if formulated in an irregular manner, with the principle of consent governing the law of treaties.

5 The Role of the Consent Principle in Determining the Effects of Invalid Reservations

This leads to a consideration of the element of consent to be bound by the rule of a treaty. Such an argument seems to be decisive because an agreement — as is well known — is an expression of mutual and concordant consent.²⁹ Arguably, a treaty provision is compelling for parties which ratified it if, and only if, their expressions of consent have the same content. This implies that there is no room for agreement between the contracting states and the reserving state on the provision of the treaty affected by the reservation. A mutual agreement on the contents of the text, essential in the declaration of intent of states adhering to the treaty so that its clauses produce rules of conduct, is then missing with regard to a reserved provision. The principle of consent applies to human rights treaties even though they are characterized as having a ‘normative’ nature. Admittedly, a multilateral agreement on the protection of human rights does not impose reciprocal obligations upon the parties and therefore is not based on a series of bilateral and reciprocal relationships. Following this line of

²⁷ Text of the Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties Adopted by the Commission, at para. 10, reproduced in *Report of the International Law Commission on the Work of its Forty-ninth Session* (1997) UN Doc. A/52/10, at Ch. 5. Moreover, it is difficult to say that state practice supports the ‘severability’ doctrine in human rights treaties if one looks at the comments of states on the work of the ILC (cf. UN GA A/CN.4/496, 16 February 1999, *Report of the International Law Commission on the work of its fiftieth session* (1998), at 22–23).

²⁸ See the *Chrysostomos v. Turkey*, *Papachryostamou v. Turkey* and *Loizidou v. Turkey* cases (1991) *Rivista di diritto internazionale* (1994), at 184–185.

²⁹ Cf. e.g., G. Morelli, *Nozioni di diritto internazionale* (7th ed., 1967) 305.

reasoning, there is room for asserting that the non-reserving parties should comply with the reserved provision *vis-à-vis* the reserving state.³⁰ But for the reserving state, it is undoubtedly true that it is not in agreement with the reserved provision, given the intention expressed in the reservation, regardless of the fact that it was formulated in an irregular manner. In short, the theory that treats invalid reservations as not made — within the limits of the provisions of the agreement that are directly involved — appears flawed in its implication that it will impose duties on the reserving state in the absence of a declaration of compliance that was never, in fact, tendered.³¹

The pervasive influence of the consent principle when appraising consequences of invalid reservations is indirectly confirmed by the judicial organs of the European Convention on Human Rights. For instance, in *Belilos* and *Weber*, the ECHR, arguing from the behaviour of the defendant's state (Switzerland) during the proceedings, stated that it had consented *pendente lite* to be bound by the reserved provision.³² Similarly, in proceedings where Turkey was concerned, it was presumed that its willingness to be a party to the convention would prevail over the intent to formulate invalid reservations.

In principle, nothing seems to prevent a state from expressly withdrawing an invalid reservation or conforming to the reserved clauses in its actions, something that must be verified on a very cautious case-by-case basis. Ascribing a non-existent intent to comply with reserved provisions to a state as a *fiction juris* cannot be justified in international law and reconciled with the principle of consent, which implies that a state is bound to comply with treaty obligations only within the limits fixed by a certain reservation — either valid or invalid. At this stage of development of international law, it is hard to distinguish among different kinds of impermissible reservations, assuming that at least in some cases the will to accept the treaty should prevail over the will to make those reservations. Leaving aside other observations,³³ it is worth noting that the attitude of many states which have entered reservations to

³⁰ On the reciprocity effects of reservations whenever a multilateral agreement does not engender a series of rights/obligations severable into binomial relations, whenever, in other words, the agreement produces 'absolute' or 'integral' obligations among the parties, see for further references Baratta, *supra* note 1 at 261 *et seq.*

³¹ Exclusion of the application of the treaty provision affected by an invalid reservation depends, legally speaking, on the principle of consent that governs the law of treaties. Nonetheless, it may be argued that this conclusion gives (indirectly) effect to an invalid act (that of making a reservation): for this argument cf. MacDonald, 'Reservations Under the European Convention on Human Rights', in 21 *Revue belge de droit international* (1988) at 449; Edwards, 'Reservation to Treaties', 10 *Michigan Journal of International Law* (1989) at 378; Marks, 'Reservations Unhinged: the *Belilos* Case Before the European Court of Human Rights', 39 *International Comparative Law Quarterly* (1990), at 313–314.

³² Commenting on the *Belilos* case, many scholars have followed this line of reasoning: for example, Bourguignon, 'The *Belilos* Case: New Light on Reservations to Multilateral Treaties', 10 *Michigan Journal of International Law* (1989) 282; Cohen-Jonathan, 'Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt *Belilos* du 29 avril 1988)', 93 *Revue général de droit international public* (1989) 299; Cameron and Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case', 33 *German Yearbook of International Law* (1990) 116. Similarly, see Schabas, 'Invalid Reservations to the International Covenant on Civil and Political Rights: is the United States Still a Party?', in 21 *Brooklyn Journal of International Law* (1995) at 322–323.

³³ See Baratta, *supra* note 1, at 134 *et seq.*

human rights treaties does not easily justify this assumption, and indeed counters it in some instances.³⁴

6 Possible Solutions to the Problem of the Effects of Invalid Reservations

The possibility certainly exists that, regardless of the binding nature of the decision made by a convention body that an invalid reservation is to be considered as not formulated, the interested state will conform to the decision. In fact, the very existence of convention bodies, particularly when the protection of human rights is involved, can lead states to adjust their reservations or broaden the agreement's range of application with respect to its original intention.³⁵ If the state's behaviour displays a conclusive conduct aimed at 'performing' the decision and to relinquish its title not to be bound by the treaty *ab origine*, it is bound to the original reservation not by virtue of the decision, but by a different legal phenomenon, that is, acquiescence.³⁶ The effect, in this case, appears fully consistent with the consent principle, the bedrock of treaty

³⁴ Most representatives of states that intervened in the sessions of the Sixth Committee of the General Assembly of the United Nations refuted the 'severability' doctrine: see Pellet, *Third Report on Reservations to Treaties*, 30 April 1998 UN GA A/CN.4/491, at 5 *et seq.* On a doctrinal level it has been assumed that human rights treaties are part of the fundamental principles of international *ordre public* that cannot be departed from by reservations (see Giegrich, 'Vorbehalte zu Menschenrechts Abkommen: Zulässigkeit und Prüfungs Kompetenzen von Vertragsremien', 55 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1995) 713 *et seq.* and Frowein, *Reservations and the international ordre public*, in *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of K. Skubizewsky* (1996) at 411). But this attractive viewpoint should be examined on the basis of the consent principle once the '*ordre public*' set out by an agreement is founded on the intent of the adhering states. A different hypothesis that the reserved provision coincides with a normative rule can surely be put forward. In this case, even the reserving state is bound to comply with such a norm, but the obligation's source is the custom and not the agreement. Finally, it seems worth noting that the issue of the *compulsory* nature of a customary rule *vis-à-vis* the state which made a reservation on a human rights treaty provision that is hypothetically identical in its content to that rule should be distinguished from the issue of the *admissibility* of such a reservation (on this point see also Hilpold, 'Das Vorbehaltsregime der Wiener Vertragskonvention', in *Archiv des Völkerrechts* (1996) at 401: reservations inconsistent with *ius cogens* 'können nicht angenommen werden und sind nichtig'; Pellet, *Second Report on Reservations to Treaties*, A/CN.4/477/Add. 1, 13 June 1996, at 36–37: 'there can be no doubt that the provisions concerning the peremptory norms of general international law (*ius cogens*) cannot be subject to reservations', and similarly the view of some states in UN GA A/CN.4/496, *supra* note 27, at 25. Obviously the reserving state must comply with normative rules that have, subjectively speaking, a general range of application. Yet the reserving state might have an interest in making these reservations if it expects, for example, a modification of customary law so as not to be bound by that rule in the future (of course, this is a most speculative hypothesis as far as human rights treaties are concerned).

³⁵ It even seems arguable that one of the aims pursued by HRC No. 24 (52) was to persuade reserving states to withdraw reservations that are against the very essence of the ICCPR (in this sense it is worth noting that in March 1995 the HRC President declared to the US representatives that 'while the general comment did not suggest that the Committee's interpretations were binding, the Committee hoped that they would be given careful consideration by states parties': see UN HR/CT/405 (1995) *Human Rights Committee Concludes Consideration of U.S. Initial Report* (at 2) and, at the most, they should contribute to the evolution of a general international law of reservations.

³⁶ This was the attitude taken by the Swiss government after the *Belilos* and *Weber* cases: cf. Baratta, *supra* note 1, 160 *et seq.*, at 168.

obligations. Conversely, there is an equal possibility that, in cases where it is not forbidden by the agreement, the other contracting parties will allow the state that entered an irregular reservation to modify it so that it conforms to the rules governing its making.

The fact that at this stage of its development international law is unable to construct a customary rule identifying invalid reservations to human rights treaties as ineffective acts does not exclude either the hypothesis that states explicitly foresee a similar outcome in the agreement or the hypothesis that a norm of identical content — particularly at a regional level — comes into being due to subsequent practice in the application of a given human rights treaty. This then suggests the possibility of verifying the existence of a uniform conduct — on the part of convention bodies (where these exist) and also through acquiescence on the part of the contracting states — intended to bind the subjects of the agreement to observe irregular reserved provisions of the convention. A similar ‘modifying’ phenomenon appears, in theory, to find its source in the category of either tacit agreements stipulated by *facta concludentia* or of (special) custom. This would be in line with the principles guiding normative sources of international law: coming into play in the first case is the rule of freedom of forms in the conclusion of treaties, and in the second the possibility of departing from an agreement through later custom. To qualify practice in the application of a treaty as tacit agreement or custom, which would be supplemental to the agreement in both cases, will depend mainly on the possibility of finding in the behaviour of the contracting parties — and, when applicable, of the bodies responsible for verifying actual performance of the treaty — a congruous volitional element (in a form of tacit agreement) or a serious commitment to conform to an actual rule of conduct (as the subjective element of custom). Such an operation appears rather complex and should be approached with caution, not so much because of the difficulty involved in opting for one or the other theoretical construction, but because it involves verifying the emergence of a new norm (compared with the original ones foreseen by the agreement) intended to determine whether states which had communicated irregular reservations are bound by obligations from which they had withdrawn.³⁷

Apart from these considerations, the demonstrable lack of customary standards concerning the purely legal consequences likely to follow from irregular or invalid reservations to human rights treaties makes it necessary to examine the question from

³⁷ It even seems possible, provided that certain conditions are fulfilled, that at a regional human rights treaty level the new norm in question may concern only some of the contracting parties. Since VCLT (Art. 41) permits modification of a treaty among some states without affecting the rights and obligations of other contracting parties, so it may happen by *facta concludentia* that a group of states decides to disregard its own (ascertained) invalid reservations and, at the same time, not to prejudge the positions of states who disagree with this normative evolution. A growing trend of acquiescence in the jurisprudence of ECHR tends to support a similar perspective in the European context of protection of human rights (typically observed in the position of the French government which was against the ‘Strasbourg approach’ before the HRC (see *supra* note 20) but apparently accepted it in relation to the European Convention on Human Rights: see the government statement in Charpentier, ‘Pratique française du droit international (1990)’, 36 *Annuaire français de droit international* (1990) at 1096–1097).

the perspective of general principles applied to treaty law. More than one solution can be envisaged.

Where reservations are inconsistent with the articles of the agreement in which they are explicitly or implicitly forbidden or where they are required to observe certain conditions for their making, the inapplicability of the reserved provision alone, without effects on participation to the agreement, appears plausible only when the reservation has been made to an optional clause. In this event, it seems possible to separate the intentions related to optional clauses from the other parts of the treaty. Such a possibility was originally envisioned by the parties and the consent of the subject involved may reasonably be presumed. This solution appears to be in line with the consent principle as well.

Conversely, when the reservation does not affect an optional portion of the agreement, the entire ratification or adherence is ineffectual³⁸ as long as the reservation is not withdrawn or the agreement is not amended to correspond with the reservation. As a consequence of the premise whereby the consent to be bound by a treaty must be expressed with reference to the text negotiated by the plenipotentiaries — or, in cases of adherence to an open multilateral treaty, predetermined by others — the state making an irregularly formulated (or invalid, if one prefers it) reservation, by straying from the text that should have been the object of the ratification or adherence, demonstrates a declaration of intent inconsistent with that of the other ratifying parties.³⁹

Finally, with regard to reservations inconsistent with the object and the scope of a particular human rights treaty, it does not appear possible to reconstruct corresponding legal consequences from the perspective of the rule requiring unitary consent for the agreement to be binding, since the regime does not make clear what reservations can and cannot be formulated. The treaty is entrusted instead to a criterion (consistency with the object and purpose) that presupposes an *a posteriori* assessment by the contracting parties, except when it gives exclusive power to a monitoring body. This position — presupposing that reserved clauses of this kind are in any case not binding on the reserving state — is rather complex. In practice, both the theory that the state is a party to the agreement, but only to those parts untouched by reservations, and the theory that it is not a party⁴⁰ unless the reservation concerns an optional clause, seem possible.

In this normative framework, the solution, to a large extent, appears to depend on the individual unilateral reactions to a reservation that is inconsistent with the object and purpose of the agreement. Naturally, such a solution may well turn out to be confusing. Yet this approach is the one provided by actual customary law. In the final analysis, it is fully in keeping with the very nature of the object and purpose criterion, which itself is both subjective and relative. If the conduct pursued is the exclusion of

³⁸ See e.g., the United Kingdom's observations, *supra* note 19.

³⁹ A similar conclusion is to be considered in terms of ensuring that the efforts made during the negotiation phase should not be in vain. The end purpose is to establish the text of the treaty with which states will be called upon either to agree or to disagree, not just to select the parts they want.

⁴⁰ See e.g., the US position, *supra* note 18.

the reserving state from the group of contracting parties (or from participation in the optional clause affected by the reservation), because it has expressed a consent bearing elements prejudicial to the pursuit of the intended object and purpose of the agreement, no legal relationship is engendered among the subjects *inter se*. At a time when there seems to be extensive freedom to formulate reservations inconsistent with the object and purpose of a treaty — given the subjectivity of reactions that the criterion implies — it would seem reasonable to establish an opposite and contrary freedom as a balance, that would ‘invalidate’ any attempt to ratify, where a reservation subtracts from the agreement (or from the optional clause) any contents that other contracting states consider to be of fundamental importance. If adopted unanimously (in theory, but quite remote in practice), a ‘lock-out’ reaction would have the practical advantage of not allowing the reserving state to flaunt its membership in the agreement before the international community when it has not made a commitment to observe provisions of fundamental importance.⁴¹ The unpleasant isolation that would ensue — especially in cases of acceptance by a substantial number of parties of treaties intended to protect basic human rights, an acceptance that allows a state to be included among the most ‘advanced’ states⁴² — could serve to encourage adherence to the agreement with no reservations.

This solution would not necessarily, on the politico-legal level, be less advantageous than the one sanctioning the invalidity of a reservation when a reserving state maintains a position of refusing to observe the convention’s reserved obligation. At the same time, there is the possibility that the foregoing reaction would not occur and,

⁴¹ Cf. Simma, *supra* note 5, at 666. As far as the practice of states is concerned see the declaration of the Netherlands with regard to the reservation made by the United States to Art. IX of the Genocide Convention in *Multilateral Treaties*, *supra* note 21, at 90: ‘the Government of the Kingdom of the Netherlands does not consider the United States of America a party to the Convention’.

⁴² One of the most impressive elements of practice concerns the participation of (some) Islamic states in human rights treaties, reserving the treaty provisions as a whole that are inconsistent with principles of Islamic Sharia (on a sovereign right claimed by Islamic countries to formulate any kind of reservation they consider as proper when adhering to human rights treaties, see Quinn, ‘The General Assembly into the 1990s’, in P. Alston (ed.) *The United Nations and Human Rights* (1992) 70–71). The ideologically favourable attitude of some Islamic countries to entering reservations to human rights treaties may be explained on the ground of the (assumed) ‘Western’ character of human rights set up at universal level after World War II. At the same time they propose their own religious vision of human rights (cf. e.g., Bormans, ‘I diritti dell’uomo nel mondo religioso dell’Islam’, in G. Concetti (ed.), *I diritti umani. Dottrina e prassi* (1982) 495 *et seq.*), which seems based much more on God’s will as expressed in *Sharia* than on the need to protect human beings. As a consequence, it is quite obvious that Islamic values — founded on various elements of inequality, particularly between men and women — cannot easily be reconciled with a human rights vision of modern states which has its background both in the American Declarations of Rights of 1776–1789 and the French Declaration of the Rights of Man and of the Citizen of 1789 (cf. T. Paine, *Rights of Man* (1791–1792; reprinted in 1988) 39 *et seq.*; A. Cassese, *I diritti umani nel mondo contemporaneo* (1988) 19 *et seq.*). Apart from too general reservations which cast doubts on the real intention of the reserving state to implement the treaty, any means capable of giving a certain degree of flexibility to human rights treaties do not always have to be considered negatively. A degree of flexibility may allow the involvement, as an initial step, in the same treaties of countries that start from a very different conception of human rights.

conversely, that the reservation would be accepted merely implicitly or that an objection would be raised without detriment to the agreement's entry into force. As a consequence, the reserving state might consider itself a contracting party to those parts of the agreement not covered by the reservation only in individual legal relations with those accepting this situation.

7 Conclusion

In the final analysis, to consider invalid reservations to human rights treaties as not formulated at all is, at the present time, a position not supported by state practice. In sketching the current status of international law, there appears to be a demonstrable trend still aimed towards making individual subjects responsible for resolving the problem of the effects of reservations to human rights treaties either assumed to be or in fact inconsistent with the object and purpose of the agreement. This comes only as a partial surprise knowing that 'fragmentation' of a multilateral agreement into a series of bilateral agreements is a typical consequence of a reservation and its effects on the agreement itself. It is also important to remember that a flexible regime tends to increase the number of parties to multilateral agreements, even containing reservations inconsistent with their object and purpose. A partial acceptance of a human rights treaty may sometimes be favourably considered in view of inducing the reserving state at a later time to widen the consent originally given to the treaty.⁴³ A special reservations regime for invalid reservations to human rights treaties is certainly a desirable prospect for the progressive development of international law.⁴⁴ This new discipline could obviously not be as stringent as the 'Strasbourg approach'. A possible direction might be towards a sort of cooperative commitment within procedures aimed at periodically reviewing invalid reservations (for the purpose of examining whether the conditions which created the need for them still prevail) and inducing reserving states to bring their domestic law gradually into line with the irregular reserved provisions.⁴⁵

⁴³ Sucharipa-Behrmann, 'The Legal Effects of Reservations to Multilateral Treaties', 1 *Austrian Review of International and European Law* (1966) 85 underlines that the 'severability' doctrine 'might discourage States from ratifying treaties. It will definitely make it more difficult to get the necessary approval for ratification from national parliaments . . .'.

⁴⁴ Nevertheless, as noted by the Special Rapporteur of the ILC, many states oppose the creation of a specific reservations regime applicable to human rights treaties (cf. Pellet, *Fourth Report on Reservations to Treaties*, UN GA A/CN.4/499, 25 March 1999, at 10, para. 24, and 15, para. 41).

⁴⁵ Further, it might be useful to oblige the state that formulated invalid reservations to submit a detailed periodical report of cases where the related provisions of the human rights treaty would have been applied if they had not been unduly reserved. It should also be noted that the Council of Europe Assembly has recommended for conventions to be concluded in the future to 'limit the validity of reservations to a maximum period of ten years. At the end of that period the Secretary General of the Council of Europe shall invite the state which made the reservation to review it, withdraw it as far as possible or make a reasoned report to the Secretary General if the reservation is maintained. If the reservation is not expressly renewed by the Contracting State, it shall automatically lapse one year after the invitation of the Secretary General to react' (*supra* note 16, at 435).