RESERVATIONS TO HUMAN RIGHTS TREATIES – SOME RECENT DEVELOPMENTS

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I THE PROBLEM

In recent years, reservations to human rights treaties have become a hot topic in international law.[1] True, international human rights have developed into a veritable growth industry, but at the same time the participation of an impressive number of States in an increasing variety of human rights conventions has also put the system under considerable stress.[2] Perusing the list of parties to the major human rights treaties, any alert observer must wonder how many of these States have decided to join this great enterprise more for symbolic reasons than motivated by the desire to conform their domestic laws and practices to internationally agreed upon human rights standards and to subject themselves to international scrutiny. The quantity and "quality" of reservations lodged by a

1 This development has led to a considerable body of literature; cf. the bibliography contained in Annex 1 to the Second Report on Reservations to Treaties presented by Special Rapporteur A. Pellet to the ILC in 1996, UN Doc. A/CN.4/478, pp. 13ff. See further *G. Cohen-Jonathan*, Les réserves dans les traités relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux, Revue Générale de Droit International Public 100 (1996), pp. 915 ff.; *J.A. Frowein*, Reservations and the International *Ordre Public*, in: Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski (1996), pp. 403 ff.; *M. Rama-Montaldo*, Human Rights Conventions and Reservations to Treaties, in: Héctor Gros Espiell Amicorum Liber (1997), Vol. II, pp. 1261 ff.; *C.J. Redgwell*, Reservations to Treaties and Human Rights Committee General Comment No. 24(52), International and Comparative Law Quarterly 46 (1997), pp. 370 ff.; and, most important, *J.P. Gardner* (ed.), Human Rights as General Norms and a State's Right to Opt out: Reservations and Objections to Human Rights Conventions (1997).

2 Cf. on the following, *B. Simma*, International Human Rights and General International Law: A Comparative Analysis, Collected Courses of the [Florence] Academy of European Law, 1993, Vol. IV, Book 2 (1995), pp. 167 ff.; *J. McBride*, Reservations and the Capacity of States to Implement Human Rights Treaties, in: Human Rights as General Norms (preceding note), pp. 120 ff.

G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek (eds.), Liber Amicorum Professor Seidl-Hohenveldern – in honour of his 80th birthday, p. 659-682. © 1998 Kluwer Law International

State participating in a human rights instrument may certainly serve as an indicator in this regard. Wasch' mir den Pelz, aber mach' mich nicht naß!

Assuming the pervasiveness of such second thoughts and hypocrisy, the international human rights movement tends to condemn reservations *tout court*. However, to the present author, there exist good reasons for a somewhat more balanced position.[3] The explanation why nowhere in international treaty law reservations are more popular and numerous than with regard to human rights conventions is not only to be seen in an undeniable lack of political will on the part of many States to take (all of) the respective commitments seriously but must also be sought on a more systematic, structural level: International human rights law is essentially "inward-targeted"; it turns States' insides out almost in a literal sense. It governs matters which to a considerable degree, if not anymore by law but certainly according to traditional political instincts and reflexes, still remain matters essentially within the domestic domain. Its impact on national law and traditions is therefore much more marked – or even painful – than that of international legal obligations in more traditional areas. It will not just be the rogues that will feel threatened here, that is, States whose political and legal systems find themselves in fundamental contradiction to international human rights obligations to which their governments have felt compelled to sign up for whatever reason. 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. This will be particularly true when the performance of States parties to a human rights instrument is being supervised by international monitoring bodies or even judiciary organs adopting an "evolutionary" or "dynamic" approach to the interpretation of the obligations arising from such treaties.[4] Against this background, the lodging of carefully tailored reservations by which a State intends to withhold clearly delimited sectors of its domestic authority from international scrutiny, at least for the time being, is perfectly understandable, indeed, it might under certain conditions even be taken as a sign that the reserving State takes a human rights treaty seriously.

On the other hand, such a call for a more balanced judgment is not to deny that many reservations to human rights treaties are of such a character that

3 Cf. *Simma*, *ibid.*, pp. 176 ff.

regarding them as going against the very core and essence of the treaty is simply unavoidable. In some instances such reservations are formulated in a general, sweeping way so as to make a sham out of a State's adhesion to the treaty. To provide an example relating to the one human rights treaty that has "attracted" the largest number of, and particularly problematic, reservations, namely the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[5], the Republic of Maldives, when acceding to the Convention on 1 July 1993, entered the following reservation:

> "The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is [*sic*] founded.
> Furthermore, the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges [*sic*] to change its constitution and laws in any manner."[6]

In case of a wording such as this it is impossible to reconcile the purport of the reservation with the object and purpose of the treaty concerned. Not only does the reservation deny CEDAW any corrective effect on the domestic law of the reserving State, it also renders it impossible for other contracting parties and the competent treaty body to assess the practical impact of the reservation and thus to measure it against the object and purpose of the treaty.

The Maldives' reservation to CEDAW may be extreme in combining two elements that are particularly infuriating to the human rights movement. But in recent years many other States have declared reservations containing one or the other of these elements or similarly questionable features – among them Western States regarding themselves as the most prominent players in international

5 Cf. "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", Report by the Secretariat, UN Doc. CEDAW/C/1997/4 (12 November 1996).

6 Text in: Multilateral treaties deposited with the Secretary-General, UN Doc. ST/LEG/SER.E/

human rights.[7] It is this disturbing development which gives the question of how to best counter unbridled reservations its present acuity.

II The Law in Force and Its Shortcomings

The natural starting point for an answer to this question is an analysis of the Vienna Convention on the Law of Treaties.[8] What we are looking for in the Convention is actually two different things: First, we want to know the conditions of the admissibility *vel non* of a reservation; second, if according to these rules a particular reservation is to be deemed inadmissible, we look for guidance as to the courses available to another contracting party which is unwilling to accept this state of things. Unfortunately, on both of these issues, our analysis of the Vienna Convention yields only partial and unsatisfactory results.

According to Art. 19 of the Vienna Convention, reservations cannot be made where they are expressly prohibited by the treaty, or where the treaty provides that only specified reservations may be made and these do not include the reservation in question, or where in case of silence of the treaty text the reservation is incompatible with the object and purpose of the treaty.

The great majority of human rights treaties existing at the universal level are silent on the matter while some more recent instruments simply restate the last-mentioned principle.[9] Thus, it is the "object and purpose" test embodied in Art. 19(c) of the Convention by which the admissibility of reservations is to be determined in all cases. However, in the absence of a collegiate system designed for this purpose[10] or of a binding third-party determination, the measuring of a reservation against the object and purpose of the treaty concerned

7 Cf., e.g., the French reservation concerning Art. 27 of the International Covenant on Civil and Political Rights reproduced *ibid*; p. 123, or the "Reservations", "Understandings" and "Declarations" entered with regard to the same treaty by the United States, *ibid*, p. 130.

8 UN Doc. A/CONF.39/27.

9 Cf. Art. 28(2) of CEDAW and Art. 51(2) of the Convention on the Rights of the Child. Art. 30(2) of the UN Convention against Torture is no exception because it concerns a purely procedural matter.

10 Only to be found in Art. 20(2) of the International Convention on the Elimination of

will be effected in a typically bilateralist and subjective way: it is up to every other State party individually to decide both about the admissibility of a reservation and about the consequences to be attached to a reservation which that State considers inadmissible.

Regarding these very consequences, we encounter a major gap in the Vienna Convention regime.[11] The Convention does provide rules on acceptance of and objections to reservations as well as on the legal effects of such acceptances or objections (Art. 20ff.). But what it does not say is whether these rules are then applicable to all reservations, be they admissible or inadmissible, or only to those which in the view of other States parties have passed the "object and purpose" test ("opposability" versus "admissibility" doctrines). For reasons that cannot be spelt out here, the present author tends to side with the second view, which must then conclude that the express text of the Vienna Convention provides no adequate response to inadmissible reservations. Hence, this takes us back into the realm of customary international law on this matter, if there is any. In passing, it may be mentioned that 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 because this regime is posited upon bilateralist structures of performance also within multilateral treaties as well as upon reciprocity – both characteristics present in human rights treaties in a purely formal, subordinate fashion only.[12] But, as was stated above, the better view appears to be that the ways in which States may react to, and the consequences they may attach to, intolerable reservations are not regulated by the Vienna Convention at all. Rather, the answers to these questions must be looked for in State practice and, eventually, in areas of customary international law not expressly restated in the Convention.

11 Cf. Special Rapporteur A. Pellet's First Report on the law and practice relating to reservations to treaties, submitted to the ILC in 1995, UN Doc. A/CN.4/470, pp. 47 ff.

12 Cf. in more detail. *B. Simma*. From Bilateralism to Community Interest in International

III Objecting to Inadmissible Reservations: Current State Practice

Due to restraints of space it is impossible in the following to draw a complete picture of the legal framework governing all consequences of inadmissible reservations to human rights treaties. What is more relevant in our context than the state of the law on the matter are the actual patterns of practice in this regard. And here, the first observation to be made is to the effect that, overall, objections to reservations to human rights treaties, whether they expressly attach further consequences or not, are still very rare, that, if such objections are declared, this is mostly done by individual States in uncoordinated ways and all too often based on the principle known in guided-missile technology as "fire and forget", that is, lacking any persistent follow-up. Pages could easily be filled with (in)famous instances of non-objection to obviously intolerable reservations. In the words of R. Higgins, "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged".[13] The reasons for such restraint are probably to be seen in the lack of a tangible give and take in the normative substance of human rights treaties that would stir conventional diplomatic instincts, and in the political costs of objecting (and, particularly, refusing to enter into treaty relations with the reserving State) – a factor further aggravated by the existence of traditional friend-or-foe patterns.

To start out the observations on State practice in the field of countering disturbing reservations with the remark that the most pervasive practice is that of not reacting at all, is important also because it is in this abstinence on the part of States that the main reason for the human rights supervisory bodies taking a tougher stance and claiming jurisdiction on the matter has to be seen. Indeed, from a policy viewpoint, a certain correlation may be taken to exist between the adequacy, or inadequacy, of reactions to inadmissible reservations to human rights treaties at the inter-State level on the one hand and the desirability of respective faculties open to treaty bodies on the other.[14] And, to re-emphasize our diagnosis, the general picture of inter-State reactions is clearly one of gross inadequacy.

13 *R. Higgins*, Human Rights: Some Questions of Integrity, Modern Law Review 53 (1998)[due to an editorial error entitled "The United Nations: Still A Force for Peace"], p. 12.

However, while the large majority of contracting parties thus chooses to remain silent, a (slowly growing) minority of governments demonstrate their awareness of the problem and increasing toughness as well as sophistication in their responses to inadmissible reservations declared in regard to human rights treaties. In the present context, these reactions can only be sketched very briefly.[15] They may be arranged on a sort of sliding scale:

> A first pattern consists in the objecting States declaring simply that, in their view, a certain reservation goes against the object and purpose of a treaty, sometimes supplemented by the statement that the objecting State "reserves its rights".
>
> According to a second pattern, the objecting States combine their assessment of a reservation's incompatibility with the object and purpose of the treaty with the remark that such non-acceptance of the reservation shall not preclude (or does not constitute an obstacle to) the entry into force of that treaty between the two States concerned.

While these first two variations leave the legal consequences of incompatibility and non-acceptance unspecified, the patterns of responses to which we now turn go further. Thus, according to a third approach, the non-acceptance of a reservation based on its incompatibility with the object and purpose of the treaty concerned is linked to the statement that, as a consequence, the reserving State will not be regarded as a party to the treaty in general – or in other words, that the objecting State views the reservation as invalidating the consent of the reserving State to be bound by the human rights instrument.

This approach corresponds to the solution which the International Law Commission proposed in its 1966 draft articles with regard to the consequences of objections to a reservation in general – at least at that stage restating the customary international law on the matter.[16] As is well known, the ILC proposal was modified at the Vienna Conference on the Law of Treaties to the effect that an objection to a reservation has to be accompanied by a respective expression of intention if it is to exclude treaty relations.[17] Applied to reservations

15 The patterns of responses described in the following can be traced in the annual publication referred to *supra* n. 6, and, for more recent examples in the Depositary Notifications issued by the UN Secretariat.

16 Cf. Yearbook of the International Law Commission 1966 Vol. II, pp. 202 ff.

to human rights treaties, this approach appears to have been used only rarely, for instance by Sweden objecting to the reservation on CEDAW entered by the Maldives (quoted above).[18] In principle, it can be considered an efficient measure *vis-à-vis* reserving States ratifying a human rights treaty mainly for the symbolic benefit attached to such action because it deprives these States of the desired effect of appearing as members of the "club" at reduced or no cost. But the actual thrust of such a "lock-out" will depend on the number and political weight of the States countering an inadmissible reservation in this way. If it remains an isolated response, as in the case of the Maldives and Sweden, it will not make a great impression upon the reserving State. Besides, the "lock-out" approach has the consequence of depriving the objecting State of the faculty of further influencing the performance of the treaty by the reserving State.

With this, we turn to a fourth pattern of responding to intolerable reservations which consists in the objecting State declaring a reservation to be incompatible with the object and purpose of the treaty concerned, followed by the statement that such a reservation cannot alter or modify in any respect the obligations arising from the treaty for any State party thereto. An even clearer way of reaching the same result is that of stating that the objecting party's assessment shall not preclude the entry into force of the treaty between the two States in its entirety, or alternatively, that the reservation is therefore regarded as devoid of (the desired) legal effect.

Here, contrary to the approach described before, it is not the consent to be bound by the treaty expressed by the reserving State that is considered invalidated by an inadmissible reservation. Rather, the reservation itself is regarded as invalid. Thus, the objecting State considers the reserving State to be a party to the treaty without the benefit of the reservation. Put more graphically, the inadmissible reservation is simply severed from the reserving State's expression of consent to be bound. Recently, adherence to this "severability doctrine", as it may be called, seems to be growing among some Western European States.[19] At first glance, it is not easy to square this response with the principle of

18 See UN Doc. ST/LEG/SER.E/15 (*supra* n. 6), p. 182.
19 According to the UN Depositary Notifications (*supra* n. 15) relating to human rights treaties stemming from late 1996 and early 1997, the "severability doctrine" was pursued by Belgium, Denmark, Finland, Ireland, Portugal and Sweden, albeit not consistently in all cases.

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 inacceptable and therefore invalid and thus severed from its consent to be bound, it might find itself bound by the treaty in its entirety. Following such a claim made by objecting States (or treaty bodies, see *infra*), the reserving State may either rebut this presumption or decide to live with the situation. Hence, there is nothing logically impossible or dogmatically flawed about the "severability doctrine" as such. This being said, its effectiveness and deterrent effect, as it were, will very much depend on the follow-up adopted by the objecting parties. If they conform to the "fire and forget" principle, the severability doctrine will fall flat.

The last approach to be mentioned puts its main emphasis on the follow-up stage. This modified, i.e., more expressly future-oriented version of the severability doctrine was recently adopted as a consistent course by the Austrian Government.[20] In essence, it amounts to declaring what could be called a "preliminary objection" to a reservation regarded as inadmissible *prima facie*, to the effect of the severability doctrine, coupled, however with an invitation to the reserving State to clarify or specify its reservation (and, it could probably be added, not to take full advantage of it). To give an example dating from early 1997, Austria objected to a Sharia reservation made by Saudia Arabia upon accession to the Convention on the Rights of the Child by declaring, *inter alia*, that a reservation of such general nature raised doubts as to its compatibility with the object and purpose of that Convention. Austria then went on to say:

> "Given the general character of these reservations a final assessment as to their admissibility under international law cannot be made without further clarification. Until the scope of the legal affects of these reservations is sufficiently specified by the Government of Saudi Arabia, Austria considers the reservation as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the Convention. In Austria's view, however, the reservations in question are inadmissible to the extent as its application negatively affects the compliance by Saudi Arabia with its obligations under the Convention essential for the fulfilment of its object and

20 The Austrian example was recently followed by Sweden objecting to the reservation made by Saudi Arabia upon accession to the Convention on the Rights of the Child.

> purpose. Austria does not consider the reservation made by the Government of Saudi Arabia as admissible unless the Government of Saudi Arabia, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention. This view by Austria would not preclude the entry into force in its entirety of the Convention between Saudi Arabia and Austria."[21]

Varying this approach slightly, Denmark and Finland have recently begun to recommend in express terms that a reserving State reconsider its reservation.[22] According to (unpublished) information available to the present author, other governments have also engaged reserving States in a discourse on reservations regarded inadmissible *prima facie*, sometimes successfully, without proclaiming this policy as expressly and comprehensively as Austria has chosen to do. Whether the outspokenness of the Austrian approach meets with enthusiasm on the part of reserving States is probably too early to say.

What the last-mentioned pattern of responses necessitates is an exclusion of the time-limit of 12 months for the raising of objections specified in Art. 20(5) of the Vienna Convention.[23] On the basis of the "admissibility doctrine" explained earlier, this result will be automatic because this view regards all the procedural rules of the Convention as only applicable to admissible reservations in the first place.

To sum up this brief *tour d'horizon* of State practice, while the great majority of States parties to human rights treaties prefer to acquiesce in reservations declared by other parties, however troubling these may be, a(n apparently growing) minority of States has resolved to counter such attacks on the integrity of international human rights by objecting to inadmissible reservations and linking such non-acceptance with various legal consequences, culminating in the "severability approach".[24]

21 Cf. Depositary Notification C.N. 126.1997, pp. 1f.
22 Cf. Depositary Notifications C.N. 370.1995, 23.1996, 244.1996, 271.1996, 89.1997 and 96.1997.
23 Expressly in this sense the recent practice of Denmark, cf., e.g., CN.89.1997, p. 3.
24 On a joint initiative of Austria and Ireland starting with an informal meeting of legal advisers of six Council of Europe member States debating the issue of reservations to [illegible]

However, while such *élan* certainly deserves to be welcomed, its shortcomings must not be overlooked. The objecting States' decision on the compatibility of a reservation with the object and purpose of the treaty remains based on subjective auto-determination, with the possibility of different States arriving at different results. Further, the effect of a response even as (relatively) vigorous as those just described will be limited to the bilateral relationship between the reserving State and the objector, even though the specific nature of human rights treaty obligations calls for a judgment on the (in)admissibility of reservations and eventual legal consequences as "objective" as possible and invested with binding effect *erga omnes partes* of these conventions. Such a result could only come about if a single voice were empowered to decide these questions once and for all. Thus, the following questions are at the tip of the tongue: Should those issues be left to unilateral determination by States at all? Can individual contracting parties to human rights treaties ever be adequate guardians of the community interest in universal respect for the treaties concerned? How can such guardianship be multilateralized, respectively institutionalized?

The texts of the existing human rights treaties generally do not provide any collegiate or institutionalized procedure for the assessment of the admissibility of reservations.[25] Nor do they belong to either of the two categories of multilateral treaties for which Art. 2o(2) and (3) of the Vienna Convention itself stipulate a community-oriented response to reservations.

Against this background, the picture of certain human rights supervisory bodies taking these matters into their hands and asserting competence to determine the validity of reservations must have impressed the human rights movement like the appearance on the stage of a *deus ex machina*.

ff. It is to be hoped that this initiative will be continued, meet with broader acceptance among European countries and lead to more coordinatied and concerted countermeasures against intolerable reservations.

IV The Practice of Human Rights Supervisory Bodies and Its Reception by States Parties

1 *The "Strasbourg Approach"*

At the regional level, the "institutionalization" of the final word on the admissibility of reservations to human rights treaties has been achieved by the supervisory organs of the European Convention on Human Rights, the Strasbourg Commission and Court. Their success story is too well known to be repeated here except in the briefest of terms[26]: While up to the beginning of the 1980's the Strasbourg organs took a very cautious position on the issue of reservations, even though the European Convention contains a specific provision on this matter (Art. 64), the Commission turned towards a more assertive stand in 1982 in the *Demeltasch* Case where it decided that a "declaration" made by Switzerland was in fact a reservation proper, which was then measured against Art. 64 and found valid.[27] Six years later, the European Court of Human Rights faced the same scenario in the *Belilos* Case in which it not only followed the Commission in arrogating for itself the competence to determine the admissiblity of a "declaration" again found to be a true reservation, but then decided this question in the negative and, to turn to the most remarkable part of the judgment, held the reserving State – Switzerland again – fully bound by the reserved provision.[28] Thus the "severability doctrine" to which we drew attention in the context of inter-State practice was adopted by the Strasbourg supervisory bodies. In spite of some initial controversy both within Switzerland[29] and in the literature, the principles developed in *Belilos* have in the meantime become routine jurisprudence in Strasbourg. In two more recent cases involving Turkey's invasion of Northern Cyprus, i.e. the decision of the Commission in the *Chrysostomos* Case[30] 1991, and the judgment of the Court affirming jurisdiction in the *Loizidou* Case[31] 1995, application of the *Belilos* doctrine was extended to certain "interpretative declarations" designed to limit the territorial scope of the Turkish declarations of acceptance under Art. 25 and 46 of the European Convention. Again, in accordance with the "severability" approach, Turkey was found to be bound by its declarations of acceptance without the benefit of the intended territorial limitations.

Apparently, the "Strasbourg approach" thus described (competence to determine admissibility plus severance of a reservation found inadmissible) has in the meantime been accepted not only by its immediate "victims" but by the States parties to the European Convention in their entirety. It is not surprising, therefore, that it whetted the appetite of the major human rights treaty body at the UN level, the Human Rights Committee, which had much more reason to be troubled by unacceptable reservations than the European Convention organs whose courageous position it finally tried to emulate.

2 *The Human Rights Committee's General Comment No. 24(52)*

For a long time, the attitude of all human rights treaty bodies operating within the United Nations system towards the issue of reservations had been characterized by great caution, restraint and unconditional deference to States parties' express consent.[32] The situation began to change in the early 1990's, when, on the one hand, the quantity as well as the "quality" of reservations made with regard to human rights treaties at the universal level rose to ever more alarming heights, but on the other, the end of the Cold War allowed the UN human rights machinery to take more assertive stands. For instance, at the meeting of the chairpersons of the UN human rights treaty bodies convened in 1992, these committees were encouraged to take up the issue of questionable reservations as a subject of the "constructive dialogue" to be held with States parties in considering and evaluating reports.[33] By 1994, the same meeting adopted a considerably tougher position by recommending that the UN treaty bodies "state clearly that certain reservations to international human rights instruments are

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26 Cf. the bibliography annexed to the Second Report of Special Rapporteur Pellet (*supra* n. 1), particularly pp. 15 f.; *S. Marks*, Three Regional Human Rights Treaties and Their Experience of Reservations, in: Human Rights as General Norms (*supra* n. 1), pp. 35 ff.

27 European Human Rights Reports 5 (1982), pp. 417 ff.

28 Publications of the European Court of Human Rights, Ser.A, No. 132 (1988).

29 Cf. *L. Wildhaber*, Rund um Belilos. Die schweizerischen Vorbehalte und auslegenden Erklärungen zur Europäischen Menschenrechtskonvention im Verlaufe der Zeit und im Lichte der Rechtsprechung, in: Kleinstaat und Menschenrechte. Festgabe für Gerhard Batliner zum 65. Geburtstag (1993), pp. 325 ff., particularly pp. 331 ff.

30 Human Rights Law Journal 12 (1991), pp. 113 ff.

31 Human Rights Law Journal 16 (1995), pp. 15 ff.

32 In 1976, a legal opinion prepared by the UN Secretariat expressly denied the competence of the Committee on the Elimination of Racial Discrimination to determine the validity of reservations made with regard to CERD, cf. UN Juridical Yearbook 1976, pp. 220 f.

33 Cf. UN Doc. A/47/628, paras. 36 and 60 ff.

contrary to the object and purpose of those instruments and consequently incompatible with treaty law".[34] The 1993 Vienna World Conference on Human Rights encouraged States

> "to consider limiting the extent of any reservations they lodge to international human rights instruments, formulate any reservations as precisely and narrowly as possible, ensure that none is incompatible with the object and purpose of the relevant treaty and regularly review any reservations with a view to withdrawing them."[35]

Other voices emphasized the desirability of third-party assessment of the limits drawn to reservations. Thus, the Committee on the Elimination of Discrimination against Women supported the idea of encouraging ECOSOC to ask the International Court of Justice for an advisory opinion on the compatibility of certain reservations with UN human rights instruments.[36] As far as the International Covenant on Civil and Political Rights was concerned, the United States Government had finally managed to obtain the consent of the Senate necessary for ratification, but only for the price of a long list of reservations, understandings and declarations[37], some of which appeared shocking to the human rights community. The initial report of the US was due for consideration by the Human Rights Committee in the Spring of 1995. At this point, the Committee decided that the time was ripe for making its voice heard and on 2 November 1994 adopted General Comment No. 24(52) relating to reservations made to the Covenant and its two Optional Protocols.[38] Of the numerous issues raised by the General Comment, only a few can be referred to here. The Committee rightly concludes from the specific character of human rights treaty obligations that the operation of the classic rules on reservations as embodied in the 1969 Vienna Convention, although applicable in principle, are inadequate in case of treaties like the Covenant. As to the question of *quis judicabit* on the admissibility of reservations, the Committee maintains that

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34 "Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights", UN Doc. A/49/537, para 30.

35 Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24, Part II, para. 5.

36 CEDAW Report on the work of its twelfth session, UN Doc. A/48/38 (28 May 1993), paras. 3 and 5. Cf. also the Secretariat study cited *supra* n. 5.

37 For the texts see UN Doc. ST/LEG/SER.E/15 (*supra* n. 6), p. 130.

38 Doc. CCPR/C/21/Rev.1/Add. 6, reproduced in Human Rights Law Journal 15 (1994), pp.

> "it necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because ... it is an inappropriate task for States parties in relation to human rights treaties and in part because it is a task 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."[39]

After thus having answered the question of its competence to determine the admissibility of a reservation in the affirmative, the Committee turns to the legal consequences of such a determination:

> "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation".[40]

Hence, what the Human Rights Committee did was to apply the *Demeltasch/Belilos* jurisprudence developed by the Strasbourg organs to the UN Covenant by, first, arrogating for itself the competence to determine "objectively" and with binding effect the admissibility of a reservation and, second, claiming the power to excise, as it were, an illicit reservation from the reserving party's consent to be bound.

What to the international human rights community appeared as a stand strongly desirable *de lege ferenda* and merely extending the *acquis* secured at the regional level to universal human rights treaties of essentially the same normative character, caused, however, great concern on the part of certain governments. In 1995, the United Kingdom, the United States and France sub-

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39 *Ibid.*, p. 467, para 18.

mitted written observations to the Human Rights Committee[41] in which they took issue with most elements of General Comment No 24(52), particularly with the opinion expressed on the effect of inadmissible reservations – an opinion which, in the view of the United States, was "completely at odds with established legal practice and principles...".[42]

The US Government went on to say:

> "[R]eservations 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 General Comment 24 appears to suggest to the contrary."[43]

The British Government expressed itself in a similar way by emphasizing that the severability solution advocated by the Human Rights Committee was "deeply contrary to principle"[44] and

> "would risk discouraging States from ratifying human rights conventions ... or might even lead to denunciations by existing Parties who ratified it against a set of assumptions different from those now enunciated in the General Comment".[45]

As far as the French Government was concerned, it also considered the Committee view of the necessity of a specific reservations regime adjusted to the particular features of human rights treaties unnecessary, indeed untenable, and the severability solution totally incompatible with the existing law of treaties.[46] In the view of all three governments the regime on reservations embodied in the Vienna Convention on the Law of Treaties is fully applicable to and adequate to cope with the specific features of human rights conventions. According

41 For the text of the observations see: Human Rights as General Norms (*supra* n. 1), pp. 193 ff.
42 *Ibid.*, p. 202.
43 *Ibid.*, p. 203.
44 *Ibid.*, p. 197.
45 *Ibid.*, p. 198.
46 *Ibid.*, pp. 204 ff.

to the United Kingdom, a State purporting to ratify such a treaty subject to an inadmissible reservation could not be regarded as having become a party at all unless it withdraws the reservation.[47] If severability was to be regarded as an alternative option at all, it "would entail excising both the reservation *and* the parts of the treaty to which it applies".[48] While the United Kindom's argument thus bases itself unequivocally on the admissibility doctrine described earlier in Section II[49], the United States appears to follow the opposability view but arrives at the same thoroughly negative conclusions regarding severability à la Strasbourg and General Comment No. 24(52). The French observations, couched in more summary terms, seem to be closer to the British line of reasoning.

The reactions thus described are interesting for various reasons. First, it is to be noted that both the United Kingdom and France are parties to the European Convention on Human Rights and, as such, appear to have accepted the "Strasbourg approach" to the European Convention while at the same time showing strong allergic symptoms upon the Human Rights Committee's attempt to transfer this approach to the UN level. Second, none of the three governments appears to have taken note of the recent application of the very position that they so strongly reject by a number of European States parties to human rights treaties at the universal plane. We will return to these points in our concluding observations. Overall, in the present writer's opinion the observations by the three Western governments appear to somewhat overreact to the Human Rights Committee's step by depicting the adequacy of the Vienna Convention law to cope with the uses and abuses of reservations to human rights treaties in too positive a light.[50] The same is true for the International Law Commission's position on the matter.

47 *Ibid.*, p. 198.
48 *Ibid.*, p. 197 (emphasis in the original).
49 *Ibid.*
50 See also R. Higgins [the author of the original draft of General Comment No. 24(52)], Introduction to: Human Rights as General Norms (*supra* n. 1).

V The International Law Commission's "Preliminary Conclusions" of 1997

At its forty-fifth (1993) session, the ILC decided, subject to approval by the General Assembly, to include the "law and practice relating to reservations to treaties" in its agenda. Following endorsement by the General Assembly, the Commission at its forty-sixth (1994) sesssion appointed its French member, Professor Alain Pellet, as Special Rapporteur for this topic. In 1995, Professor Pellet submitted his First/Preliminary Report[51], on the basis of which the Commission decided about the parameters of its future work: It intends to draw up a guide to practice in respect of reservations in the form of draft articles with commentaries, if necessary accompanied by model clauses. Its work is to take as a starting point the relevant rules embodied in the Vienna Conventions of 1969, 1978 and 1986 without changing the text of these provisions. The project aims at filling the gaps and clarifying the ambiguities left in the existing law.[52] As such it marks an interesting new direction in the work of the ILC.

In 1996, Special Rapporteur Pellet submitted his Second Report whose first Chapter elaborates and confirms the just mentioned programme of the Commission's work on the topic.[53] Chapter II of the 1996 Report[54] then takes up the subject under consideration in the present paper, under the heading of "Unity or diversity of the legal regime for reservations to treaties", in particular human rights treaties. It presents a comprehensive and engaged discussion of the question whether the Vienna Convention regime is applicable to such "normative" treaties, as the Special Rapporteur calls them, focussing on – and taking issue with – the first element of the Strasbourg approach and General Comment No. 24(52), namely the assertion of jurisdiction by treaty bodies to ultimately determine the admissibility of a reservation. Annexed to Professor Pellet's Second Report was a draft resolution to be adopted by the Commission and addressed to the General Assembly, in substance allowing a limited recommendatory power to human rights monitoring bodies, and this only in cases where States parties had expressly granted even such a limited competence.[55]

51 UN Doc. A/CN.4/470 and Add. 1.
52 Cf. Chapter I of Professor Pellet's Second Report UN Doc. A/CN.4/477.
53 Ibid.
54 UN Doc. A/CN.4/477/Add. 1.
55 *Ibid.*, pp. 86 f.

At its forty-eighth (1996) session, the Commission was not able to consider the Report due to lack of time. At the Commission's forty-ninth (1997) session, however, Chapter II of the Second Report was discussed at length and in a rather lively way.[56] As was to be expected, two opposing viewpoints were expressed: one maintaining that the Vienna Convention regime in its present form was sufficient, that consent remained the governing principle in the regime also of human rights treaties and that therefore, human rights treaty monitoring bodies could not have greater competence than that specifically granted by States parties; the other view recognizing that the Vienna Convention regime on reservations had only a very limited grip on human rights treaties not premised on reciprocity and, consequently, accepting that human rights treaty monitoring bodies had (or ought to have) an implied competence to determine whether a reservation is compatible with the object and purpose of such treaties. Some supporters of the latter viewpoint took the view that in case of human righs treaties unity (integrity) of substance, rather than universality of participation, was the paramount consideration. The Commission finally adopted a document based on the Special Rapporteur's proposal, although couched in somewhat more restrained language. Further, it was decided to adopt this document not in the form of a draft resolution, as the Special Rapporteur had suggested, but rather as mere "preliminary conclusions" on the matter.[57] In this way, the Commission wanted to put a marker on where it stands at this point in time without obstructing possible change and flexibility.

The Preliminary Conlusions comprise twelve paragraphs and essentially reaffirm the Vienna Convention regime (cf. the awkward terms of paragraph 1). They recognize that when the respective treaties are silent on the matter, monitoring bodies are competent to "comment upon and express recommendations" with regard to the admissibility of reservations (paragraph 5). The Preliminary Conclusions emphasize, however, that this competence of the monitoring bodies does not include or otherwise affect the traditional modalities of control by the contracting parties themselves as well as dispute-settlement mechanisms provided in an instrument. The Commission suggests that in the future competence of

56 See Report of the International Law Commission on the work of its forty-ninth session, General Assembly Official Records Fifty-second Session, Suppl. No. 10, UN Doc. A/52/10, pp. 95 ff. (introduction of the report by Prof. Pellet), pp. 108 ff. (debate in the Commission). See also the following Provisional Summary Records: A/CN.4/SR.2487, 2499-2503, 2509-2511, 2517.
57 1997 Report, pp. 126 f.; also reproduced as an Annex to the present paper.

monitoring bodies to "appreciate or determine" the admissibility of reservations should be expressly conferred by specific clauses or protocols (paragraph 7). In the absence of such express authorization, the Commmission notes, the legal force of the treaty bodies' findings relating to reservations "cannot exceed that resulting from the powers given to them for the performance of their general monitoring role" (paragraph 8). Paragraph 10 stresses that it is first of all the reserving State that has the responsibility for taking action if its reservation(s) were found to be inadmissible. In such a case, it could either modify the reservation, or withdraw it, or choose not to become a party to the treaty at all. The most important change *vis-à-vis* Professor Pellet's proposals consists in the addition of a saving clause designed to leave the state of the law and jurisprudence developed by regional supervisory bodies unaffected by the Commission's otherwise rather critical stand (paragraph 12). This leaves the Human Rights Committee's General Comment No. 24(52) as the sole "target".

The Commission's Preliminary Conclusions must certainly come as a disappointment to human rights lawyers. Even though its mandate comprises not only codification proper but also the progressive development of international law, the ILC has taken a conservative, pronouncedly "statist" stand on the issue of reservations to human rights treaties. To say that the Vienna Convention rules on reservations are suited to the requirements of all treaties, of whatever object or nature (cf. paragraph 2) and that they therefore "govern" reservations to human rights instruments also (paragraph 3), is correct only from a very formalistic viewpoint. The suggestion, embodied in paragraph 7, to provide specific farther-reaching clauses in future instruments is not much of a consolation either, considering the fact that the era of human rights treaty-making has more or less come to an end. The same is valid with regard to the proposal to elaborate respective protocols to existing treaties (paragraph 7), in view of the political as well as technical difficulties in the way of such action. In Paragraph 10 attention is drawn only to the responsibility of the reserving State in case of inadmissibility of a reservation; the courses open to objecting States are mentioned nowhere in the document. The reason for this silence has to be sought in the systematics which the Special Rapporteur plans to follow, according to which issues of, *inter alia*, objections to reservations and their effects will be taken up in Chapters III and IV respectively of his study, to be submitted in 1998 at the earliest.[58] In the present writer's view it would have been preferable

58 Cf. Professor Pellet's Provisional Plan of the entire study on reservations, Second Report, Chapter I (*supra* n. 52), pp. 16 ff.

to deal with the regime applying to (inadmissible) reservations at the inter-State level first and then determine the proper "complementary" role for human rights treaty bodies in light of the adequacy of these rules, and, more important, of the State practice in this regard.[59] This is precisely what the Human Rights Committee has done in General Comment No. 24(52) on the basis of its own experience.

For the same reason of systematics the ILC has not yet dealt with the second element of the Strasbourg/Human Rights Committee approach, that is, the severability view. It is to be hoped that, unlike the governmental observations on General Comment No. 24(52), the Commission will take due account of the recent State practice implementing this view. More generally, it seems that the ILC has been well-advised to emphasize the provisional character of its conclusions. If at a more advanced stage of its study on the subject, the Commission came to see the position taken by the Human Rights Committee in a more positive light, it should not hesitate to revise its findings accordingly.[60]

VI Final Remarks

The differences of opinion and divergent practices in the field of how to counter unacceptable reservations to human rights treaties epitomize the current interim stage of the world of international law between a society marked by bilateralism and a true international community[61]: Undeniable community interests like that in the protection of human rights find themselves consecrated in international treaties but are then, with regard to their realization and enforcement, left to old bilateralist mechanisms. Today, a genuine collective guarantee of human rights is realized only in the case of the European Convention on Human Rights which has developed into a hybrid instrument combining features of international and constitutional law. Thus, the European Court of Human Rights

59 See also A/CN.4/SR.2502, p. 11.

60 In this regard it is relevant that, in its 1997 Report, the ILC welcomed comments on its Preliminary Conclusions not only from governments but also from all treaty bodies set up by "normative" multilateral conventions, cf. 1997 Report (*supra* n. 56), pp. 8, 108, 123 ff. This invitation was endorsed by the General Assembly in Res. 53/156 of 15 December 1997.

61 This tension constitutes the main theme of the present author's 1995 Hague lectures (*supra* n. 12).

is gradually assuming the features of a European constitutional court.[62] In this evolution, the arrogation of final control over reservations lodged to the Convention has marked one of the most important steps. The attempt by the Human Rights Committee to strengthen the UN system of treaty-based concern with human rights by extending to it the *acquis* reached on the regional European plane has failed, at least for now. Apparently, not even States parties to the European Convention, and thus subjected to the Strasbourg approach, are currently prepared to let themselves be treated in the same away at the universal level of the United Nations – at least not by treaty bodies consisting of independent experts. Does this imply that States parties view universal human rights instruments as having a legally different, "softer", character? This would be a troubling conclusion ideed.

Be this as it may, the community interest in the international protection of human rights at the universal level must certainly be regarded as too feebly equipped. The growth in numbers and scope of reservations to universal human rights conventions in particular urgently calls for a more centralized, objective system of determining their validity. Hence, *de lege ferenda,* the UN human rights treaty bodies need – and deserve – to be made competent to render legally binding decisions on admissibility and severability of such reservations. It is important that the International Law Commission has expressed itself in favor of a development in this direction, even if the general thrust of its Preliminary Conclusions adopted in 1997 must be regarded as less than helpful.

62 See *ibid.*, pp. 373 ff.

ANNEX:

PRELIMINARY CONCLUSIONS OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission has considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations. The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions:

1 The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;
2 The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;
3 The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;
4 The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;
5 The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admis-

sibility of reservations by States, in order to carry out the functions assigned to them;

6 The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaties;

7 The Commission suggests providing specific clauses in multilateral normative treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8 The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations can not exceed that resulting from the powers given to them for the performance of their general monitoring role;

9 The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;

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

11 The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12 The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

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AN OPTIONAL PROTOCOL TO CEDAW: A FURTHER STEP TOWARDS STRENGTHENING OF WOMEN'S HUMAN RIGHTS[1]

Lilly Sucharipa-Behrmann[*]

I INTRODUCTION

At the Fourth World Conference on Women held in Beijing in September 1995 governments committed themselves to support the elaboration of a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[2] that could enter into force as soon as possible and should provide for a petition procedure.[3] This was not the first time that a complaints procedure for CEDAW had been suggested. During the drafting of the Convention Belgium proposed the inclusion of an article according to which the State parties, after the entry into force of the Convention, would undertake to examine in the Commission on the Status of Women (CSW) the possibility of establishing a complaints procedure for States parties and for individuals. The Netherlands supported the inclusion of a complaints procedure for States parties as well as for individuals and NGOs. Finland and Canada referred to

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2 1249 UNTS, 13.

3 Beijing Declaration and Platform of Action, UN Doc. A/CONF.177/20, 17 October 1995, at 97, para 230 k; 35 ILM (1996) 401; on the elaboration of an Optional Protocol in general see, Andrew Byrnes, Jane Connors, Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention? 21 Brooklyn J.Int'l L. 679; Cees Flinterman, Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1 NQHR (1995)85; Aloisia Wörgetter, The Draft Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 2 Austrian Journal of International and European Law (1997), 261; Andrew Byrnes, Slow and Steady Wins the Race? The Development of an Optional Protocol to the Women's Convention, 91 ASIL Proc.(1997), 383.

G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek (eds.), Liber Amicorum Professor Seidl-Hohenveldern – in honour of his 80th birthday, p. 683-698. *© 1998 Kluwer Law International. Printed in the Netherlands.*