

# INCOMPATIBLE RESERVATIONS TO HUMAN RIGHTS TREATIES: SEVERABILITY AND THE PROBLEM OF STATE CONSENT

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*[Article 19(c) of the Vienna Convention on the Law of Treaties requires that reservations to treaties be compatible with the object and purpose of those treaties. This article examines the possible consequences for reservations to multilateral 'law-making' treaties that are not compatible with the object and purpose of those treaties. While the conventional approach by writers has been to treat the incompatibility of a reservation as nullifying that state's consent to be bound by the treaty, there is increasing recognition of an alternative option — severing the reservation from the state's acceptance of the treaty, thus treating the state as a party to the convention without the benefit of its proposed reservation. This article begins by outlining the background to the ongoing problem of incompatible reservations in international law and the challenge of regulating dubious and sweeping reservations made to human rights treaties by states. It then considers the alternatives for dealing with incompatible reservations and outlines the benefits of a regime of severability for human rights protection. It examines the consideration given to severability by international courts and the approach of states and international bodies. It is submitted that state consent is not necessarily frustrated if a progressive approach is taken to determining the essentiality of a reservation. The author concludes that severing inessential reservations may be the best option for preserving and strengthening the modern international human rights regime.]*

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## I INTRODUCTION

The development of treaty law in the last half century has raised two compelling but frequently contradictory goals: universality of treaty membership and integrity of treaty content. The rise of the multilateral treaty as the most prolific form of law-making among states has seen international law evolve to

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encourage universality of treaty membership. Widespread treaty membership means greater consensus on states' legal rights and obligations, and fewer disputes. This is reflected in the flexible approach taken to treaty reservations, which allows a state to attach one or more reservations to its ratification without requiring the express approval of all other States Parties.

However, this flexible approach, combined with the lack of incentive for states to object to reservations to 'law-making' treaties, has enabled states to make broad reservations to human rights instruments that detract from the integrity of such instruments. This has eroded the basis for modern international human rights protection. The rule that a reservation must be compatible with the object and purpose of a convention was developed to prevent such erosion. Part II of this article discusses the background to the problem of incompatible reservations under the modern law of treaties, including the debate between the 'admissibility' and 'opposability' approaches.

The law of treaties, however, does not specify the consequences for a reservation that falls foul of this rule. Part III explores three possible legal consequences that have been suggested for such reservations: the 'surgical' doctrine, which involves acceptance of the state's ratification except for in relation to those parts of the treaty to which the reservation objects; the 'backlash' doctrine, which involves total rejection of the state's ratification; and the 'severability' doctrine, which involves acceptance of the state's ratification, excluding (severing) the incompatible reservation. It is argued here that, in many cases, taking a severability approach would strengthen the modern international human rights regime, protecting both its universality and integrity.

Part IV then examines the way in which international courts have approached the issue of incompatible reservations, and the patterns of state practice. Severability is the approach that has been adopted by the European Court of Human Rights ('ECHR'). It is submitted that severability is consistent with the principle of state consent if it is limited to incompatible reservations that are inessential to state consent to be bound to the treaty. Part V discusses the issue of state consent and how to determine the inessentiality of a reservation.

In light of these considerations, it is submitted that the severability approach should be taken: incompatible reservations which are not essential to a state's consent to be bound by the treaty should be severed from the state's instrument of ratification, so that the state remains a party to the treaty without the benefit of the reservation.

## II INCOMPATIBILITY OF RESERVATIONS

The *Vienna Convention on the Law of Treaties* establishes the modern regime dealing with reservations to treaties under international law.<sup>1</sup> Article 19(c) of the *VCLT* provides that a state may not formulate a reservation which is incompatible with the object and purpose of the treaty. This provision reflects the view taken by the International Court of Justice in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*

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<sup>1</sup> Opened for signature 23 May 1969, 1115 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

(*Advisory Opinion*).<sup>2</sup> In this case, the Court was concerned to protect the integrity of human rights instruments from erosion due to broad reservations which diluted the most fundamental provisions.

However, the ICJ did not specify who was to determine compatibility. Those who adhere to the ‘opposability’ school maintain that incompatibility is determined along bilateral lines. Article 20(4) of the *VCLT* provides that, where a state makes a reservation to a treaty, any other contracting state may object to that reservation and specify that the treaty will not enter into force between the objecting and reserving states.<sup>3</sup> According to the ‘opposability’ school, a reservation cannot be invalidated for being incompatible with the object and purpose of the treaty unless a contracting state objects to a reservation on grounds of incompatibility within 12 months.<sup>4</sup> Conversely, the ‘admissibility’ school dictates that the *VCLT* rules on acceptance of, and objection to, reservations are only applicable to reservations that are compatible with the object and purpose test.<sup>5</sup> According to this view, if a reservation is challenged before a competent international court or tribunal, even many years after the reservation was initially drafted, it can still be declared invalid on the grounds of incompatibility.

It is submitted that the ‘admissibility’ doctrine is preferable, particularly in the case of human rights treaties. In traditional ‘contractual’ treaties, which are reciprocal in nature — such as those governing trade, security or territorial delimitation — there is a significant incentive for contracting states to object to reservations they find unacceptable. Such reciprocity is all but absent in the case of human rights and humanitarian treaties. In such instruments, ‘the contracting states do not have any interests of their own; they merely have a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention’.<sup>6</sup> The lack of direct self-interest by states, and the administrative resources needed to track all reservations and determine their compatibility, means that there is often little incentive for states to object to dubious reservations.<sup>7</sup> This is evidenced by the few objections to the sweeping reservations that have been made to a number of human rights treaties. For example, in the case of the *Convention on the Elimination of All Forms of Discrimination against Women*,<sup>8</sup> only four objections were lodged against the far-reaching reservation made by Libya that the *Convention* would not apply

<sup>2</sup> [1951] ICJ Rep 15 (‘*Reservations Case*’).

<sup>3</sup> Roberto Baratta, ‘Should Invalid Reservations to Human Rights Treaties be Disregarded?’ (2000) 11(2) *European Journal of International Law*, 413, 413, fn 2.

<sup>4</sup> Curtis Bradley and Jack Goldsmith, ‘Treaties, Human Rights and Conditional Consent’ (2000) 149 *University of Pennsylvania Law Review* 399, 434–5. *VCLT*, above n 1, art 20(5) provides that ‘unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation’.

<sup>5</sup> Baratta, above n 3, 413, fn 1; Daniel Hylton, ‘Default Breakdown: The *Vienna Convention on the Law of Treaties*’ Inadequate Framework on Reservations’ (1994) 27 *Vanderbilt Journal of Transnational Law* 419, 430.

<sup>6</sup> *Reservations Case* [1951] ICJ Rep 15, 23. See also *Ireland v United Kingdom* (1978) 25 Eur Court HR (ser A) 5, 89–90; 2 EHRR 25, 103.

<sup>7</sup> Ryan Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002) 96 *American Journal of International Law* 531, 537; Hylton, above n 5, 439.

<sup>8</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

where its provisions conflicted with sharia law.<sup>9</sup> Higgins suggests that ‘one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged’.<sup>10</sup>

When the ICJ first articulated the object and purpose test in the *Reservations Case*, it intended that the test would operate as an additional limitation upon the making of reservations above and beyond that provided by the ability to object to reservations under art 20(4) of the *VCLT*: ‘Any other view would lead ... to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind’.<sup>11</sup> It is submitted that the ‘admissibility’ school better reflects this approach, as it gives the object and purpose test an importance independent of the ability of individual states to accept or object to reservations and create differing bilateral relationships.

However, adherence to the ‘admissibility’ approach exposes a doctrinal gap in the *VCLT* regime. Under the ‘opposability’ doctrine, individual states can determine the compatibility of reservations with the object and purpose of the treaty. Furthermore, the consequence of an incompatible reservation is that the objecting state can consider the reserving state no longer a party on a bilateral basis. The ‘admissibility’ approach, on the other hand, leaves two important issues unanswered: first, who has the authority to determine incompatibility, and second, what is the legal consequence of an incompatible reservation. It is the latter issue that is the concern of this article.

### III POSSIBLE CONSEQUENCES FOR INCOMPATIBLE RESERVATIONS

There are three possible consequences for reservations held to be incompatible with the object and purpose of a treaty. First, a reserving state’s ratification may be considered valid so that the state remains a party to the entire treaty, excluding the provision in relation to which the reservation was made. This outcome has been labelled the ‘surgical’ solution because it involves excising the ‘infected’ or disputed provision.<sup>12</sup> Second, the incompatible reservation may be said to invalidate the state’s instrument of ratification, so that the state is excluded from the treaty as a whole. This has been called the ‘backlash’ solution, because the invalidity of the reservation lashes back at the instrument of consent and invalidates it.<sup>13</sup> Third, an incompatible reservation may be ‘severed’ from the state’s instrument of ratification, leaving it as a party to the treaty without the benefit of its reservation.

<sup>9</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General: Convention for the Elimination of All Forms of Discrimination against Women* <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>> at 1 May 2004; Liesbeth Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (1995) 324, 348.

<sup>10</sup> Rosalyn Higgins, ‘Human Rights: Some Questions of Integrity’ (1989) 52 *Modern Law Review* 1, 12. See also Human Rights Committee, *General Comment 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, as contained in *Report of the Human Rights Committee*, UN GAOR, 50<sup>th</sup> sess, Annex V, UN Doc A/50/40 (1999) (‘*General Comment 24*’).

<sup>11</sup> *Reservations Case* [1951] ICJ Rep 15, 24.

<sup>12</sup> Iain Cameron and Frank Horn, ‘Reservations to the *European Convention: The Belilos Case*’ (1990) 33 *German Yearbook of International Law* 69, 115.

<sup>13</sup> *Ibid.*

A *The 'Surgical' Doctrine*

The practical effect of the 'surgical' doctrine would be to give the state the benefit of its reservation, notwithstanding that the reservation is incompatible with the object and purpose of the treaty. This outcome would appear to defeat the purpose of art 19(c) of the *VCLT*, as Judge St John MacDonald of the ECHR, writing extra-curially, has observed: 'To exclude the application of an obligation by reason of an invalid reservation is in effect to give full force and effect to the reservation'.<sup>14</sup> This is clearly an unacceptable outcome and has not commonly been defended as an option by writers, or accepted by international bodies.

B *The 'Backlash' Doctrine*

Proponents of the 'backlash' approach ground their support in the principle of state consent,<sup>15</sup> which has been described by others as the 'major limitation of the multilateral treaty as a source of international law'.<sup>16</sup> A state cannot be bound in international law without its consent. Since a reservation is a condition of a state's consent to be bound to a treaty, '[i]t would contravene this fundamental principle ... to invalidate a reservation to a treaty but hold the party to the remainder of the treaty without recognizing the reservation'.<sup>17</sup> Bowett, while supporting the severability of reservations rendered impermissible by the express terms of the treaty, argues that a reservation incompatible with the object and purpose of the treaty invalidates the state's acceptance of that treaty, because the state's will to become a member of the treaty is outweighed by its will to attach an incompatible condition to its acceptance of treaty membership.<sup>18</sup> In practice, however, there are few examples of either objecting states or competent international organisations treating reserving states as not bound by the treaty in such a situation.<sup>19</sup>

One of the aims for multilateral human rights conventions is that they be as widely ratified as possible. This goal of universality — and the problems of excluding a state from a treaty because of a reservation it has proposed — was acknowledged by the ICJ when it first accepted the flexible approach to reservations: 'The complete exclusion from the [Genocide] Convention of one or more states would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis'.<sup>20</sup> It is submitted that the 'backlash' approach significantly interferes with this goal of universality. The force of this observation is demonstrated by the

<sup>14</sup> Ronald St John MacDonald, 'Reservations under the *European Convention*' (1988) 21 *Revue Belge de Droit International* 4295, 449.

<sup>15</sup> Derek Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1977) 48 *British Yearbook of International Law* 67, 84; Catherine Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 *British Yearbook of International Law* 245, 267; Bradley and Goldsmith, above n 4, 436–7; Barratta, above n 3, 424.

<sup>16</sup> Catherine Logan Piper, 'Reservations to Multilateral Treaties: The Goal of Universality' (1985) 71 *Iowa Law Review* 295, 296.

<sup>17</sup> Bradley and Goldsmith, above n 4, 437.

<sup>18</sup> Bowett, above n 15, 84.

<sup>19</sup> Catherine Redgwell, 'Reservations to Treaties and Human Rights Committee *General Comment No 24(52)*' (1997) 46 *International and Comparative Law Quarterly* 390, 406.

<sup>20</sup> *Reservations Case* [1951] ICJ Rep 15, 24.

United States' reservations to the *International Covenant on Civil and Political Rights*<sup>21</sup> which seek to exclude from the *ICCPR*'s scope its domestic practices relating to the death penalty. With respect to art 6(5) of the *ICCPR* in particular, the US reserved the right 'to impose capital punishment on any person ... including such punishment for crimes committed by persons below eighteen years of age'.<sup>22</sup> Eleven European States Parties to the *ICCPR* filed objections condemning these reservations as invalid.<sup>23</sup> The UN Human Rights Committee ('HRC') has also affirmed that at least some of the elements of those reservations are incompatible with the object and purpose of the *ICCPR* and, consequently, invalid.<sup>24</sup> Assuming that such declarations are evidence that the reservations are incompatible, the 'backlash' principle would dictate that this has the result of excluding the US from the *ICCPR* altogether.<sup>25</sup> The Court's warning in the *Reservations Case* that complete exclusion may adversely affect the moral authority of the treaty assumes additional importance in this case when one considers the hegemonic status of the US. Without the world's most powerful nation as a party, the authority of, and respect for, the *ICCPR* may be seriously undermined.<sup>26</sup>

### C The 'Severability' Doctrine

Severing an incompatible reservation from a reserving state's instrument of ratification would have the effect of leaving the state a party to the treaty without the benefit of their reservation. Where the reservation is not essential to the State's consent to be bound, this would better serve the goal of universality by protecting treaty membership, while still leaving intact the principle of state consent. This is discussed further in Part V of this article.

A severability regime would also have a number of clear benefits for both the states concerned and the international human rights regime. Keeping reserving states within the treaty regime would significantly strengthen international human rights protection. Many non-democratic states ratify human rights treaties as tactical concessions to placate international and domestic pressure groups, without any intention of honouring their obligations under the treaty.<sup>27</sup> The importance of keeping such states within the regime becomes clear when those states move towards democracy. Chile, under the Pinochet government, ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading*

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<sup>21</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

<sup>22</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General: International Covenant on Civil and Political Rights*, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>> at 1 May 2004.

<sup>23</sup> *Ibid.*

<sup>24</sup> Human Rights Committee, *Report of the Human Rights Committee*, UN GAOR, 50<sup>th</sup> sess, Supp No 40, [279], UN Doc A/50/40 (3 October 1995).

<sup>25</sup> William Schabas, 'Invalid Reservations to the *International Covenant on Civil and Political Rights*: Is the United States Still a Party?' (1995) 21 *Brooklyn Journal of International Law* 277, 278.

<sup>26</sup> *Ibid.*; Edward Sherman Jr, 'The US Death Penalty Reservation to the *International Covenant on Civil and Political Rights*: Exposing the Limitations of the Flexible System Governing Treaty Formation' (1994) 29 *Texas International Law Journal* 69, 85.

<sup>27</sup> Goodman, above n 7, 551–5.

*Treatment or Punishment*<sup>28</sup> with significant reservations attached.<sup>29</sup> In particular, the Committee against Torture challenged Chile's reservation to art 2 as incompatible with the object and purpose of the *Torture Convention*,<sup>30</sup> with 20 other states also objecting to the reservation on the same basis.<sup>31</sup> Goodman writes: 'The British House of Lords' decision concerning Pinochet's extradition turned on the fact that Chile was a party to the [*Torture Convention*] between 1988 and 1990'.<sup>32</sup> If the incompatible reservation had been held to nullify Chile's instrument of ratification and excluded it from the treaty regime, the extradition request would have potentially been quashed.<sup>33</sup> Goodman argues that, in relation to non-democratic states, a severability regime as outlined below 'provides a meaningful opportunity to keep a state bound to a human rights treaty despite an invalid reservation'.<sup>34</sup> In some cases it may also facilitate movement towards democratisation. Risse, Ropp and Sikkink, for example, argue that tactical concessions made by a non-democratic government — which include accession to treaties under international pressure — trigger causal changes which lead to a degree of socialisation and democratic reform.<sup>35</sup> Automatic exclusion from the treaty regime would prevent this transition occurring.

For many newly established democracies, adherence to the 'backlash principle' may create considerable instability. Many such governments use international human rights instruments 'to "lock in" and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis non-democratic political threats'.<sup>36</sup> Where automatic exclusion from a treaty regime by operation of international law becomes a possibility, the potential for the stability of a new regime to come under threat is evident. Severing inessential and incompatible reservations would obstruct the roll back of democratic reforms that may occur in the early days of a new democracy should there be attempts

<sup>28</sup> Opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987) (*Torture Convention*).

<sup>29</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General: Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Punishment* <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>> at 1 May 2004.

<sup>30</sup> *Report of the Committee against Torture*, UN GAOR, 45<sup>th</sup> sess, Supp No 44, [349], UN Doc A/45/44 (21 June 1990).

<sup>31</sup> See Note 16 in United Nations, *Multilateral Treaties Deposited with the Secretary-General: Convention against Torture and Other Forms of Cruel, Inhuman and Degrading Punishment* <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>> at 1 May 2004.

<sup>32</sup> Goodman, above n 7, 554. See *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 3) [1999] 2 All ER 97, 111, 121.

<sup>33</sup> Goodman, above n 7, 554.

<sup>34</sup> *Ibid.*

<sup>35</sup> Thomas Risse, "'Let's Argue!': Communicative Action in World Politics' (2000) 54 *International Organization* 1, 29. See generally Thomas Risse and Stephen Ropp, 'International Human Rights Norms and Domestic Change: Conclusions' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds), *The Power of Human Rights* (1999) 234; see also Thomas Risse and Kathryn Sikkink, 'The Socialisation of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds), *The Power of Human Rights* (1999) 1, 11.

<sup>36</sup> Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217, 220.

made to undermine the new regime. Severability is particularly important for states such as Russia, which have constitutionally recognised the priority of international human rights norms over domestic law.<sup>37</sup> Arguments in favour of automatic exclusion from the treaty also tend to ignore the massive political and financial transaction costs a government will confront if it wishes to reaccede to the treaty.<sup>38</sup> Since the cost of withdrawing from a treaty is lower than the cost of being automatically ejected from treaty membership and then reacceding, severability may be a preferable option for new democracies yet to achieve economic stability.<sup>39</sup>

Established democracies may also prefer that certain incompatible reservations be severed than to be automatically excluded from the treaty regime. The ramifications of exclusion would be significant for states with genuinely monist constitutions which guarantee human rights through international, rather than domestic, instruments. In such states, rights guarantees would be indefinitely suspended should the state be excluded from treaty membership, causing turmoil for domestic human rights protection. The Netherlands and the five Nordic States in particular have expressed their preference for severability on this basis.<sup>40</sup> Democracies without monist constitutions also have significant incentives to remain a party to human rights treaties. For example, the US government has commented that standing outside the treaty regime ‘would preclude the US from participating in the treaty-related institutions that ... influence the course of international human rights law’, and that it would also ‘create a “troubling complication” in US diplomacy, namely, that the United States could not credibly encourage other nations to embrace human rights norms if it had not itself embraced those norms’.<sup>41</sup>

#### IV JUDICIAL CONSIDERATION AND STATE PRACTICE

##### A *Severability in the International Court of Justice*

The severability of invalid reservations has been considered twice by the ICJ, in the *Case of Certain Norwegian Loans (France v Norway) (Preliminary Objections)*<sup>42</sup> and *Interhandel (Switzerland v United States of America) (Preliminary Objections)*.<sup>43</sup> On both occasions, Judge Hersch Lauterpacht, in his separate opinions, suggested that inessential and invalid reservations were severable from a state’s instrument of ratification. In neither case, however, did the rest of the Court consider the issue directly.

In his separate opinion in the *Norwegian Loans Case*, having held France’s reservation to its acceptance of the jurisdiction of the Court to be invalid, Judge Lauterpacht refused to sever the reservation on the grounds that it was ‘essential’

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<sup>37</sup> *Constitution of the Russian Federation* (1993) art 15(4).

<sup>38</sup> Goodman, above n 7, 538.

<sup>39</sup> *Ibid* 538–9. This aspect may, of course, also make severability attractive to wealthy states for the same reason.

<sup>40</sup> *Ibid* 546–7.

<sup>41</sup> Bradley and Goldsmith, above n 4, 414.

<sup>42</sup> [1957] ICJ Rep 7 (*Norwegian Loans Case*’).

<sup>43</sup> [1959] ICJ Rep 4 (*Interhandel Case*’).



to France's consent.<sup>44</sup> However, in coming to this conclusion, he had regard to the general principle of contract law that

it is legitimate — and perhaps obligatory — to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument.<sup>45</sup>

Judge Lauterpacht considered that this principle was applicable to the present case such that the Court 'should not allow its jurisdiction to be defeated as the result of remediable defects of expression which are not of an essential character'.<sup>46</sup> The view that inessential and invalid elements of a state's ratification could be severed from the whole was, by Judge Lauterpacht's own admission, a departure from the earlier view that

every single provision of a treaty is indissolubly linked with the fate of the entire instrument which, in their view, lapses as the result of the frustration or non-fulfilment of any particular provision, however unimportant and non-essential.<sup>47</sup>

In the *Interhandel Case*, Judge Lauterpacht repeated this view. In refusing to sever a reservation which he held to be essential to acceptance by the US of the Court's jurisdiction, he averred again to the 'general principle of law' relating to severability, calling it 'a maxim based on common sense and equity'.<sup>48</sup> However, as in the *Norwegian Loans Case*, Judge Lauterpacht did not elucidate his reasons for finding that the reservation was 'essential', simply stating that the reservation was a safeguard that had 'been of the essence of every general commitment which the United States of America has been willing to undertake in that sphere'.<sup>49</sup>

### B *Severability in the European Court of Human Rights*

The ECHR has on two occasions, in the cases of *Belilos v Switzerland* and *Loizidou v Turkey*,<sup>50</sup> severed reservations found to be incompatible with the *Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>51</sup> but has provided only limited insight into its rationale for so doing.

*Belilos v Switzerland* concerned a fine of 200 Swiss Francs imposed on the applicant by the municipal police board, for allegedly participating in an illegal demonstration. The applicant brought a claim before the Court arguing that the failure to provide an adequate appeal from an administrative decision was contrary to art 6(1) of the *European Convention*,<sup>52</sup> which guaranteed the right to a fair trial. The Swiss Government relied on its interpretative declaration which

<sup>44</sup> Ibid 59 (Separate Opinion of Judge Lauterpacht).

<sup>45</sup> Ibid 56–7 (Separate Opinion of Judge Lauterpacht).

<sup>46</sup> Ibid 57 (Separate Opinion of Judge Lauterpacht).

<sup>47</sup> Ibid 56 (Separate Opinion of Judge Lauterpacht).

<sup>48</sup> *Interhandel Case* [1959] ICJ Rep 4, 116 (Dissenting Opinion of Judge Lauterpacht).

<sup>49</sup> Ibid 117 (Dissenting Opinion of Judge Lauterpacht).

<sup>50</sup> *Belilos v Switzerland* (1988) 132 Eur Court HR (ser A) 7; 10 EHRR 466. See also *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A) 7; 20 EHRR 99.

<sup>51</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*').

<sup>52</sup> *Belilos v Switzerland* (1988) 132 Eur Court HR (ser A) 7, 19–20, 28; 10 EHRR 466, 478, 487.

purported to limit Switzerland's obligations under art 6(1) to ensuring a review of the lawfulness of the decision of the tribunal of original jurisdiction.<sup>53</sup> Having struck down the interpretative declaration on grounds of invalidity, the Court held that Switzerland was still bound by the *European Convention*.<sup>54</sup> It is interesting to note that although, during the case, the Swiss Government considered that nullifying its ratification would be 'obviously disproportionate', following the judgment, a proposal to withdraw from the *European Convention* was debated in the Swiss Parliament and defeated narrowly.<sup>55</sup>

In the more recent case of *Loizidou v Turkey* the applicant, a Greek Cypriot, claimed that she owned property in northern Cyprus and that Turkish forces prevented her from returning to it. During a march to assert the rights of Greek Cypriot refugees to return to their homes she was detained by members of the Turkish Cypriot police force. She complained that her arrest and detention, together with the denial of access to her property, was a violation of the *European Convention*.<sup>56</sup> Turkey relied on declarations it had made restricting its acceptance of the Court's jurisdiction to events occurring within Turkish national territory and not to northern Cyprus.<sup>57</sup> As in *Belilos v Switzerland*, the Court treated these declarations as 'disguised reservations',<sup>58</sup> and held that they were incompatible with the object and purpose of the *European Convention* as an instrument for the protection of individual human beings, because they seriously weakened the role of the Court in the discharge of its duties.<sup>59</sup> The Court proceeded to sever these declarations from Turkey's ratification of the *European Convention*.<sup>60</sup>

In neither *Belilos v Switzerland* nor *Loizidou v Turkey* did the Court enter into an explanation of why it chose to sever the invalid reservations. However, given its emphasis of 'the special character of the *European Convention* as an instrument of European public order',<sup>61</sup> it may be that the political ramifications of ejection from the *European Convention* were considered to be too serious.

### C State Practice and Severability

State practice reveals no clear trend as to what the legal consequences of an incompatible reservation are perceived to be. In many cases, states do not articulate their grounds for objecting to reservations.<sup>62</sup> When they do base their objection on an assertion of incompatibility, the most common use of words by a state objecting to a reservation is 'unlawful', 'impermissible', 'unacceptable', 'invalid', 'inadmissible', 'not recognised', or 'one which the reserving state is not entitled to make'.<sup>63</sup> In most cases it is not clear what consequences the

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<sup>53</sup> Ibid 25; 484.

<sup>54</sup> Ibid 28; 487.

<sup>55</sup> Cameron and Horn, above n 12, 117.

<sup>56</sup> *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A) 7, 20; 20 EHRR 99, 127.

<sup>57</sup> Ibid 17.

<sup>58</sup> Ibid 26; 132.

<sup>59</sup> Ibid 27; 134.

<sup>60</sup> Ibid 34; 141.

<sup>61</sup> Ibid 31; 138.

<sup>62</sup> Bowett, above n 15, 75.

<sup>63</sup> Redgwell, 'Universality or Integrity?', above n 19, 276.

objecting states attach to their objection. However, Horn's empirical study of reservations practice suggests that states objecting to reservations on grounds of incompatibility prefer severability as opposed to treating the reserving state as a non-party.<sup>64</sup> This was the view taken by the British Government on the French reservation in the *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*.<sup>65</sup>

#### D *The United Nations and Severability*

In 1994 the HRC issued *General Comment 24*, which set out its controversial new policy on reservations to the *ICCPR*.<sup>66</sup> It stated that the HRC itself would judge the validity of reservations, and would sever reservations it deemed to be incompatible, leaving reserving states as parties to the *ICCPR* without the benefit of their reservation. The HRC did not attempt to justify or explain this policy, simply stating 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 severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation.<sup>67</sup>

The HRC's position attracted criticism from the US, the UK and France. Alain Pellet, Special Rapporteur to the International Law Commission on Reservations to Treaties, objected to the 'excessive pretensions' of the HRC and stated that severing reservations deemed incompatible by the HRC was not an option.<sup>68</sup>

#### E *Conclusion*

Evidently, while severability may be considered a valid option for international courts that are faced with an incompatible reservation, it cannot be said that there is an emerging customary international norm in favour of severing invalid reservations.<sup>69</sup> It may instead be true to say that what the lack of clear and consistent state and judicial practice shows is that 'the severability issue, even when considered by a court, is more an issue for political judgment (in the best sense of the term) than for legal analysis'.<sup>70</sup>

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<sup>64</sup> Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* (1988) 119–20.

<sup>65</sup> (1977) 18 RIAA 3, 15–16: Submission of the Government of the United Kingdom of Great Britain and Northern Ireland on 9 February 1977, [1A(f)], [2(b)].

<sup>66</sup> Human Rights Committee, *General Comment 24*, above n 10.

<sup>67</sup> *Ibid* [18].

<sup>68</sup> International Law Commission, *Report of the International Law Commission on the Work of its 49<sup>th</sup> session, 12 May – 18 July 1997*, UN GAOR, 52<sup>nd</sup> sess, Supp No 10, 106–8, UN Doc A/52/10 (1997).

<sup>69</sup> Barratta, above n 3, 416.

<sup>70</sup> Richard Edwards Jr, 'Reservations to Treaties' (1989) 10 *Michigan Journal of International Law* 362, 378.

## V THE PROBLEM OF STATE CONSENT

Despite strong arguments in favour of severability, there remains the problem of state consent, which would seem to add force to arguments in favour of the 'backlash' principle. As discussed above, the costs for many states of being ejected from treaty membership will far outweigh the importance of the 'ideal package' of reservations which it submits. Furthermore, Baylis argues that state consent takes on a different form in the case of human rights treaties, because the intention behind such treaties is to create norms of customary international law which bind all states, not simply States Parties to the treaty:

The imposition of a human rights standard on a state does not ultimately depend upon that state's consent, but upon the acceptance of that standard in the international community. In this context, binding a state to a reserved human rights norm does not pose the same affront to national sovereignty as would be presented by binding the state to an economic or political provision.<sup>71</sup>

Although these arguments are persuasive, they are not sufficiently strong to rationalise binding a state to a provision, the reservation of which may have been an essential condition of its consent to be bound. Moreover, the likelihood that a reserving state will continue to ignore that provision undermines the authority and respect that human rights instruments should command.

It is submitted, therefore, that any regime of severability should apply only to reservations that are inessential to a state's consent. Redgwell does caution against drawing an artificial distinction between 'an intention to be bound and an intention to modify certain provisions of the convention in their relation to the reserving state'.<sup>72</sup> However, it is still true that reservations are often an inessential component of ratification, and that when challenged, the desirability of remaining in the treaty regime will often outweigh the importance of the reservations. As Goodman says, '[t]he package of reservations a state submits [with its instrument of ratification] reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound'.<sup>73</sup>

However, determining the essentiality of a reservation to a state's consent to be bound by a treaty regime may be problematic. The ILC has focused upon this problem as justification for its rejection of the severability option, stating '[i]n international society at the present stage, the state *alone* could know the exact role of its reservation to its consent'.<sup>74</sup> Determining the essentiality of a reservation from evidence of a state's intention at the time of formulating the reservation presents two distinct difficulties.

The first is an evidentiary problem: what is the best and most objective manner of determining whether a provision is 'essential' to consent? Some writers have suggested that deciding severability 'is essentially a matter of

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<sup>71</sup> Elena Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 *Berkeley Journal of International Law* 277, 327.

<sup>72</sup> Redgwell, 'Universality or Integrity?', above n 19, 267.

<sup>73</sup> Goodman, above n 7, 537. See also Henry Bourguignon, 'The *Belilos* Case: New Light on Reservations to Multilateral Treaties' (1989) 29 *Virginia Journal of International Law* 347.

<sup>74</sup> *Report of the International Law Commission*, above n 68, 106 (emphasis in original).

construction of the state's ratification instrument'.<sup>75</sup> However, such a narrow interpretative guide is arguably not sufficiently instructive, given the wealth of considerations that can inform a state's decision to ratify a treaty. While international treaty conference debates and domestic parliamentary debates will be a guide, they cannot be determinative, given the obvious difficulties in determining what is essentially the political will of a state.

The second problem arises when the validity of a reservation is challenged before an international tribunal. A reserving state concerned to prove the essentiality of its reservation has the best access to evidence of its 'intention' at the time of formulating the reservation. Moreover, at the time of formulating the reservation it is relatively simple for the state to make a statement saying that it is 'essential'. Determining essentiality on the basis of unilateral statements made by a state and subjectively selected evidence is unreliable and would make a system of severability and the reservations regime largely meaningless.

The ECHR outlined an alternative approach to determining essentiality in *Loizidou v Turkey*, the facts of which are discussed above. In *Loizidou v Turkey*, Turkey pointed to statements it made at the time of making its reservation as evidence that the reservations were an essential element of Turkey's consent to be bound by the *European Convention* and thus could not be severed from its instrument of ratification. Thus, disregarding the reservations would have the consequence that Turkey's acceptance of the right of individual petition under the *European Convention* would lapse.<sup>76</sup> However, the Court refused to determine the essentiality of the reservations by reference to Turkey's statements. Instead, it observed that Turkey must have been aware of the impermissibility of its reservation in view of the consistent practice of other contracting states.<sup>77</sup> Objections by other contracting states at the time of making the reservation lent 'convincing support' to arguments that the reserving state should have been aware of the invalidity of its reservation.<sup>78</sup> Turkey's awareness of the legal position 'indicates a willingness on her part to run the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves'.<sup>79</sup> In other words, where a state should have known that its reservation was invalid, it will be deemed inessential to the state's consent and subject to severance. This sets a high standard for essentiality. However, it is submitted that this would have the effect of forcing states to take greater responsibility in the negotiation of human rights treaties and the formulation of reservations. It is important to note that a state in this position would always have the option of withdrawing from a treaty, and then redrafting an instrument of ratification by either amending or redrafting the impugned reservation.<sup>80</sup> In short, although severability creates the useful presumption that states wish to remain within the treaty regime, this may be rebutted by the states themselves.

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<sup>75</sup> Edwards, above n 70, 375.

<sup>76</sup> *Loizidou v Turkey* (1995) 310 Eur Court HR (ser A) 7, 30; 20 EHRR 99, 137.

<sup>77</sup> *Ibid* 31; 138.

<sup>78</sup> *Ibid* 32; 138.

<sup>79</sup> *Ibid* 32; 139.

<sup>80</sup> Goodman, above n 7, 538–9.

VI CONCLUSION

The major multilateral human rights treaties are among the most significant achievements of the international community in the last half century. The twin goals of universality and integrity have rightly been the basis of treaty law as it has developed to accommodate such instruments. However, the integrity of human rights treaties is being threatened by sweeping reservations made by contracting states, and their universality is being threatened by a reservations regime that automatically excludes states whose reservations are held to be incompatible with the object and purpose of those treaties. It is submitted that severing an inessential and incompatible reservation from a state's instrument of ratification, using the criteria for essentiality adopted by the ECHR in *Loizidou v Turkey*, would strengthen the integrity and universality of multilateral human rights treaties, without undermining state sovereignty.