SEVERING RESERVATIONS

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Abstract How to address invalid reservations has been an ongoing struggle for States, legal practitioners and academics. This article considers the evolution of severability and whether States intend the language of severance to serve as a signal of their view on legality to reserving States or simply use severability to bolster their own public reputation. Over the past decade, State practice toward invalid reservations to norm-creating treaties has shifted and both this shift and its impact on treaty law must be acknowledged. The arguments and assertions that follow rely heavily on contemporary practice relating to reservations made to the core UN human rights treaties which, admittedly, limits the application of the doctrine in many ways. Review of State practice, especially to human rights treaties, demonstrates that a broader number of States are slowly opting for severability when defining their treaty relations with States authoring invalid reservations. The doctrine of severability is gaining a slow but steady following by a growing number of States though there is tension about whether severing reservations is *lex specialis*, pertaining only to human rights treaties, or *lex ferenda*. This article examines the evolving practice and forecasts the role it will play in the future of treaty law.

Keywords: human rights, invalid reservation, opposability, permissibility, reservations, severability, treaty law, Vienna Convention on the Law of Treaties.

I. INTRODUCTION

The legal effect of an invalid reservation has long been a source of angst for international legal practitioners and observers, particularly in relation to human rights treaties. States, too, have struggled with how to address reservations which are invalid either as a result of their being impermissible under Article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT)[1] or

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[1] (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention).

[*ICLQ* vol 63, July 2014 pp 599–634] doi:10.1017/S0020589314000281

because of other shortcomings. States have traditionally resorted to either the 'permissibility' or the 'opposability' doctrines in order to define the legal effect of an invalid reservation. In the past decade, however, certain States have warmed to the 'severability' doctrine as a means of addressing the consequence of a reservation that fails to clear the permissibility hurdles imposed by VCLT Article 19. This subtle change in State practice marks a departure from the long-held position that States alone determine their own treaty obligations. Severing an invalid reservation amounts to a denial of a State's right to reserve against multilateral treaty obligations, a bedrock principle of customary international law.

This article considers the evolution of severability and whether States intend the language of severance to indicate their view regarding the legality of reservations to reserving States or whether they are simply using severability to bolster their own public reputation. The article also forecasts the role that severability will play in future. The arguments and assertions that follow rely heavily on contemporary practice relating to reservations made to the core UN human rights treaties—which, admittedly, limits the application of the doctrine in many ways. Commentators often view the practice of severing reservations as *lex specialis* pertaining only to human rights treaties. Others suggest it is *lex ferenda,* and the 2011 Guide to Practice on Reservations to Treaties[2] (Guide to Practice) produced by the International Law Commission (ILC) gives support to this view. The debates surrounding severability indicate that it is no longer a practice limited to the European human rights system nor is it only attributable to a small, regional set of States. In the past decade State practice concerning reservations to norm-creating treaties has shifted and both this shift and its impact on treaty law must be acknowledged. Review of State practice, especially that relating to human rights treaties, indicates that a broader number of States are slowly opting for severability when defining their treaty relations with States authoring invalid reservations.

The primary question addressed by this paper is whether the increasing recognition of the severance doctrine tracks a paradigm shift in customary international law? Underlying this question are two further inquiries, asking 'who decides whether a reservation should be severed' and 'what is the consequence of this decision?' Whilst the bulk of the evidence of such a shift concerns human rights treaties, the number of standard-setting treaties is on the rise and the severability doctrine is easily transferable. This study is based primarily upon a doctrinal analysis of practice related to multilateral human rights treaties, supplemented by the observations of States, the ILC and other commentators. Though it is clear that severability has had an impact upon the assessment of the extent of State obligations in regional human rights

[2] ILC 'Guide to Practice on Reservations to Treaties' (2011) UN Doc A/66/10, para 75 (Guide to Practice).

adjudicatory forums, the influence of the principle in the broader UN system is less obvious; it is difficult to trace the consequences flowing from a State's unilateral act of severing a reservation if the objecting State and reserving State do not seek to have that question resolved. Therefore, this article will examine the historical and contemporary practice of States in respect of invalid reservations and will pose suggestions as to the impact these practices may have on the law of reservations as a matter of customary international law.

Section II introduces the subject by considering the historical underpinnings of the severability principle. This is followed in section III by a summary of contemporary State practice in response to invalid reservations to human rights treaties. Section IV examines the ILC Guide to Practice on Reservations to Treaties. Finally, section V will posit ideas on what these trends mean for international treaty practice, considering their impact on legal doctrine and what the future holds for States authoring invalid reservations.

II. HISTORICAL UNDERPINNINGS

The treaty that brought the issue of invalid reservations to the fore was the Convention on the Prevention and Punishment of the Crime of Genocide[3] (Genocide Convention). This represented a new type of treaty designed to benefit and protect individuals rather than providing rights for the benefit of States alone. Some States formulated reservations upon accession—such as the Philippines and Bulgaria, which made reservations regarding the automatic dispute resolution mechanism found in Article IX of the Convention[4]—and non-reserving States found themselves perplexed as to how to react. The controversy stemming from these reservations has been attributed to the potential 'accounting problem' arising from the need to determine the point at which the Genocide Convention would enter into force, since there were States that had ratified subject to reservations to which there had been objections.[5] To resolve the controversy, a request was submitted by the UN General

[3] (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

[4] Both States made other interpretive declarations in addition to the reservations to the automatic referral to the ICJ in the event of a dispute among States. Bulgaria ultimately withdrew its reservation on 24 June 1992, see 78 UNTS 318. The Philippines continues to maintain the reservation.

[5] See UN Treaty Section of the Office of Legal Affairs 'Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties' (1999) UN Doc ST/LEG/7/Rev.1, para 173; ET Swaine, 'Reserving' (2006) 31 YaleJIntlL 307, 312–3; WA Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 CanadianYBIL 39, 45; C Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 BYBIL 245, 248; GG Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 ICLQ 1, 2.

Assembly (UNGA) to the International Court of Justice (ICJ) on 17 November 1950 which asked the following:

> In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide, in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:
>
> I. Can the reserving State be regarded as being a party to Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
> II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
>
> a. The parties which object to the reservation?
> b. Those which accept it?[6]

The opportunity thus presented to the ICJ was of twofold importance. First, it was an opportunity to provide definitive guidance on the issue of reservations, an area that appears to have been of concern to some States outside the context of the Genocide Convention.[7] The second issue concerned the protection of human rights, namely the prevention and punishment of genocide and, being fresh in the minds of States following the horrors of World War II, this seems to have diverted attention away from what could have been a defining moment for treaty law. Though the scope of the request for an advisory opinion request was clearly limited to reservations pertaining to the Genocide Convention—a law-making treaty with human rights as the subject matter—the Court's opinion ultimately served as the preamble to a lengthy discourse on reservations in general, which continues today.

Historically, and certainly up until the 1951 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[8] advisory opinion (*Genocide Advisory Opinion*), the crux of whether a reservation was permissible or not hinged on whether another State accepted or objected to the reservation formulated. A reservation can only be 'established' and therefore produce a legal effect if it has been accepted either expressly or by tacit consent. Following the request for the advisory opinion, the ICJ surveyed

[6] T Lie, 'Secretary-General of the UN to the President of the ICJ, Request for Advisory Opinion' (Leg. 46/03 (6)) New York, 17 November 1950. Question III has been omitted as it is not relevant to the present discussion.

[7] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Advisory Opinion*) [1951] ICJ Rep 15, Pleadings, Oral Arguments, Documents, 28 May 1951, Written Statement by The Organization of American States (14 December 1950) 15 (OAS Statement to the ICJ).

[8] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15 (*Genocide Advisory Opinion*).

existing State practice concerning reservations and found that it generally followed traditional concepts of contract law. As an issue of first impression, the Court welcomed comments given by interested parties[9] on their reservations practice, the primary approaches of which are distilled below. It must be underlined that the ICJ's request for information on State practice on the question of reservations was not limited to reservations to the Genocide Convention but concerned their views on reservations in general.

A. Unanimity

Until the *Genocide Advisory Opinion*, there were three prevailing schools of thought regarding the acceptance of reservations: unanimity, absolute State sovereignty and the compromise approach. In brief, unanimity was a strict rule whereby a State depositing an instrument of ratification with a proposed reservation would not become a State Party to a convention if any single previously ratifying State objected to the reservation. This was the practice then exercised by the UN Secretary-General[10] and was believed by many to be a universally recognized principle of international law.[11] However, according to some States, this approach 'extended the veto' into the UN system because a single State could prevent another State from becoming a party to a multilateral treaty even if all the other existing State Parties to the treaty accepted the reservation.[12] The unanimity rule paid deference to the 'law-making' character of treaties, seeing them as agreements which embodied rules of law adopted by States and which were to be enforced by the governments of each.[13]

B. Absolute Sovereignty

The second approach to reservations was the absolute sovereignty principle, according to which making a reservation was a sovereign act and a necessary attribute of the exercise of sovereignty. This approach is underpinned by the long-standing and fundamental principle that State consent is necessary before a treaty obligation can be imposed upon a State, but this is clearly challenged

[9] Written statements were received by the Organization of American States, USSR, Jordan, United States of America, United Kingdom, Israel, the International Labour Organization, Poland, Czechoslovakia, the Netherlands, Romania, Ukraine, Bulgaria, Byelorussia and the Philippines and the Court heard oral Statements from the United Kingdom, France and Israel. *Genocide Opinion*, Pleadings, Oral Arguments, Documents, Minutes of the Sittings held 10–14 May 1951 and 28 May 1951, 301.

[10] For a brief summary of the UN Secretary-General's practice prior to 1952 see UN Treaty Section (n 5) paras 168–172.

[11] H Lauterpacht, 'Some Possible Solutions of the Problem of Reservations to Treaties' (1953) 39 Transactions of the Grotius Society 97, 97.

[12] OAS Statement to the ICJ (n 7) 19, referencing a memorandum from Uruguay to the Sixth Committee of the UNGA.

[13] 'Note: The Effect of Objections to Treaty Reservations' (1951) 60 YaleLJ 728, 731.

by the very idea of reservations being 'invalid' and therefore, by definition, not allowed. The absolute sovereignty position was primarily advocated by the USSR[14] and some members of the Slav language group of States.[15]

In support of this extreme view of the exercise of sovereign power it was asserted that because conventions were the written expression of the will of the majority (due to majority voting being the accepted practice for multilateral treaty adoption at the time) reservations were the only method by which minority views could be accommodated. If minority States were not allowed to make reservations then they would be forced to choose between subscribing to a convention expressing the will of the majority or to not becoming a party at all.

C. Compromise Approach

A number of the written statements submitted to the ICJ demonstrated a third reservation practice by States, which sought to strike a balance between strictly maintaining the integrity of the treaty and adhering to long-standing traditions of State sovereignty. Drawing upon the experience of concluding over 100 multilateral treaties within the Pan-American Union, the Organization of American States (OAS) explained how it had sought to find a point between the two extremes of prohibiting all reservations except those attracting unanimous consent or of permitting reservations without any limitation at all, a practice that it considered would effectively render subscribing to conventions futile.[16]

The OAS had adopted a practice whereby reserving States would first circulate reservations to existing State Parties and obtain their comments on proposed reservations prior to submitting an instrument of ratification or adherence. This practice closely tracked contract law and encouraged States proposing to make an unpopular reservation to revise or reconsider the reservation in order to conform to the popular will of the other parties. The Pan-American approach encouraged ratification, assuming that 'reservations may frequently be technical qualifications of a treaty rather than substantial limitations of its obligations'.[17] It also was touted as the best rule to accommodate 'the use of treaties both for purposes of a contractual character and for the development of general principles of international law'.[18] The OAS

[14] Fitzmaurice (n 5) 10–11, fn 20, citing Report of the Secretary-General, UN Doc A/1372, para 20.

[15] *Genocide Advisory Opinion* (n 8) Oral Arguments, Documents, Written Statement by the United Kingdom (January 1951), Pleadings, 53 (UK Statement to the ICJ); Y Liang, 'The Third Session of the International Law Commission: Review of Its Work by the General Assembly' (1952) 46 AJIL 483, 492, citing UNGA, 6th Sess, Official Records of the Sixth Committee, 273rd meeting, paras 34 and 36.

[16] OAS Statement to the ICJ (n 7) 15.

[17] ibid 18.

[18] ibid 20.

was adamant that some State policies were of such importance that even the promise of promoting the development of international law or common political and economic interests would not be a strong enough incentive for them to be abandoned, even if this meant that the State in question was unable to become a party to a multilateral convention.

D. The Genocide Opinion

Recognizing the rarity of objections to reservations in practice at the time,[19] the ICJ surmised that none of the submitted views on reservations could provide definitive proof of an international customary rule. In fact, the views generally tended to represent administrative practices rather than legal interpretations. The Court noted that when the UN Sixth Committee debated reservations to multilateral conventions there was also a 'profound divergence of views' ranging from preserving the absolute integrity of a treaty to an extremely flexible approach which would maximize participation.[20] A flexible approach was favoured in order to address the actual questions asked regarding the Genocide Convention,[21] a treaty that was both normative and humanitarian and unlike any that it had previously considered. Because no settled practice could be extracted from the various debates and views examined, the Court, by a slim majority,[22] chose to forge a new principle of law. Reservations would be subject to the objections of other State Parties but an objection would not necessarily prevent the reserving State from becoming a party to the treaty. This departed from the unanimity rule and reflected the compromise approach. Therefore, in the particular case of the Genocide Convention,

> a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.[23]

The groundbreaking aspect of the *Genocide Advisory Opinion* was the introduction of the 'object and purpose' test. The test created a new system of tiered rights, allowing States to choose among the rights enumerated by the

[19] *Genocide Advisory Opinion* (n 8) 25.

[20] ibid 26; For a historical summary of the debate about integrity versus universality see Redgwell (n 5) 246–9; Fitzmaurice (n 5) 8.

[21] R Higgins, 'Introduction' in JP Gardner (ed), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL 1997) xix.

[22] The majority opinion was supported by Judges Basdevant, Winiarski, Zoričić, de Visscher, Klaestad, Badawi and Pasha. There were dissenting opinions by Judges Guerrero, McNair, Read, Mo and Alvarez. Alvarez filed a separate dissenting opinion.

[23] *Genocide Advisory Opinion* (n 8) 29.

treaty and only prohibited those reservations that violated the object and purpose of the treaty.

In light of its assumption that a State should generally aim to preserve the essential object of the treaty,[24] the Court presumed that a reserving State would not intentionally make a reservation that was incompatible with the object and purpose test and if it did, then it would be assumed that the State had failed to recognize that incompatibility. Otherwise, as noted by the Court, the 'Convention itself would be impaired'.[25] The Court reiterated that the reservations practice it advanced was limited to the Genocide Convention, a convention with a humanitarian subject-matter and that States could exercise their sovereign rights as long as the object and purpose of the convention was not contravened.[26]

III. PRACTICE IN RESPONSE TO INVALID RESERVATIONS

Ultimately, VCLT Article 19(c) codified the object and purpose test as the default rule for determining the permissibility of a reservation for all treaties, not only those with a humanitarian or civilizing purpose.[27] Furthermore, the role of making such a determination was seemingly vested in the State Parties. Outside an objection based on incompatibility with the object and purpose of the treaty, States are at liberty to object to a reservation on any basis or no basis at all—the political feature of the reservations regime.[28] To provide an element of closure on the issue of permissibility, VCLT Article 20(5) places a time limit of 12 months on State objections. If no objection to a reservation is received within that time limit, the reservation is deemed to have been accepted by the non-objecting State—the tacit acceptance rule. But what is the consequence of a reservation being met by an objection? Over the years, three doctrines have developed over the years: permissibility, opposability and severability.

In keeping with the vocabulary preferred by the ILC, permissibility encompasses evaluations of a reservation made in the light of VCLT Article 19, including those specifically concerning questions of compatibility

[24] *Genocide Advisory Opinion* (n 8) 27. [25] ibid. [26] ibid 23, 29.

[27] Vienna Convention (n 1) art 19: 'A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.'

[28] A Aust, *Modern Treaty Law and Practice* (3d edn, CUP 2013) 125; O Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 YaleLJ 1935, 1952; MG Schmidt 'Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants' in JP Gardner (ed), (n 21) 21; S Marks, 'Three Regional Human Rights Treaties and Their Experience of Reservations' in JP Gardner (ed) (n 21) 35–63, 61; JK Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision' (1982) 23 HarvIntlLJ 71, 73.

arising from the object and purpose test set out in Article 19(c).[29] Validity is the term adopted by the ILC to

> describe the intellectual operation consisting in determining whether a unilateral Statement made by a State . . . and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State . . . was capable of producing the effects attached in principle to the formulation of a reservation.[30]

Therefore, in order to be valid, a reservation must be permissible. Whilst validity includes evaluation of a reservation in relation to all sub-paragraphs of VCLT 19, the presentation that follows will focus on objections based on invalidity due to failure to clear the hurdle of VCLT Article 19(c) unless otherwise noted.

A. Permissibility

The permissibility doctrine argues that a reservation which is incompatible with the object and purpose test is invalid and without legal effect, and is therefore a nullity, regardless of whether other States object. This view stems from the natural reading of Vienna Convention Article 19(c) and suggests that incompatible reservations are void *ab initio*.[31] However, the issue is not as clear-cut as the permissibility doctrine makes it seem.

The general wording found in several of the UN core human rights treaties is that 'a reservation incompatible with the object and purpose of the convention shall not be permitted'[32] and it seems natural that a reservation which is not compatible with the convention will not alter a State's obligations under that convention. If the reservation does not survive the object and purpose test then the reservation should not be up for debate. It is a nullity regardless of whether it has been objected to or accepted by other State Parties, and their doing so will have no bearing on the status of the reserving State as a party to the treaty.

[29] See ILC 'Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC at its 62nd session' (2010) UN Doc A/65/10 (Draft Guide to Practice), 3.1.3 and accompanying commentary. Furthermore, findings of impermissibility are solely the realm of law of treaties and do not engage international State responsibility, concerns over which sparked much debate during the 18-year study on reservations to treaties by the ILC. Guide to Practice (n 2) 3.3.2. See also the ILC Yearbook 2002 (2002) UN Doc A/57/10, 114, para 7; ILC, 'Tenth report on reservations' (2005) UN Doc A/CN.4/558, Add.1 and Add.2, paras 1–9; Draft Guide to Practice (n 29) 1.6, commentary, para 2 and 2.1.8, commentary, para 7.

[30] ILC, 'Report of the International Law Commission on the Work of its 58th session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 324, para (2) of the general introduction to Part 3 of the Draft Guidelines.

[31] Swaine (n 5) 315; DW Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976–77) 48 BYBIL 67, 84.

[32] For example, Convention on the Elimination of all forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 20(2); Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW), art 28(2); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC), art 51(2).

However, this neglects the fact that incompatibility is one of the primary reasons which is given by States when they do object to reservations to human rights treaties, thus intimating that some States consider that an assessment should be made. This is problematic as reservation practice has demonstrated that not all States agree on the invalidity of reservations.

In 1993, Maldives acceded to the Convention on the Elimination of all forms of Discrimination against Women[33] (CEDAW) with the following reservations:

> 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 founded. Furthermore, the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges to change its Constitution and laws in any manner.[34]

The first reservation subordinates all CEDAW obligations to Sharia principles which makes Maldives commitments to the equality envisioned in CEDAW unclear. The second reservation contravenes the Convention obligation on State Parties to take 'all appropriate measures, including legislation to ensure the full development and advancement of women'.[35] Austria objected to the Maldives' reservations as incompatible with Article 19(c):

> The reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19(c) of the Vienna Convention on the Law of Treaties and shall not be permitted, in accordance with article 28(2) of the [CEDAW]. Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto.[36]

The objection employs the language of permissibility and leaves no doubt as to the consequence anticipated in relations between the two parties from Austria's point of view. Pursuant to the permissibility approach, however, this objection is unnecessary. A similar objection asserting the invalidity of the Maldives' reservations and asserting the permissibility doctrine was lodged by Portugal in 1994.[37]

Another notable point is that the 12-month rule facilitating the tacit acceptance of reservations should have no effect if a reservation is deemed impermissible.[38] States should not be able to accept impermissible reservations vis-à-vis another State simply on the basis of no objection, which is what the tacit acceptance rule brings about.[39] The tacit-acceptance rule combined

[33] (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13 (CEDAW). [34] 1726 UNTS 238 (1993). [35] CEDAW, art 4.
[36] 1830 UNTS 312 (1994). [37] ibid. [38] Swaine (n 5) 317.
[39] C Redgwell, 'Reservations and General Comment No 24(52)' (1997) 46 ICLQ 390, 405; see generally Bowett (n 31).

with the lack of finality when applying the permissibility doctrine results in arguably impermissible reservations being maintained by the reserving state. The ILC has acknowledged that whilst the permissibility approach is probably theoretically correct, it is the opposability approach that more accurately describes State practice,[40] though not necessarily in the context of human rights treaties.

B. Opposability

The opposability doctrine proposes that if a reservation is objected to by another State Party then the reserving State will not be considered a party to the treaty. The pure opposability doctrine implies that, even in the face of a single objection, the reserving State would not become a party to the convention, reflecting the unanimity rule discussed in section II. The key difference between the opposability and the permissibility approach is that under the opposability approach the objection is the trigger for determining the status of the reserving State. State practice, however, has presented a different outcome in which the result is not contingent on the validity of the reservation, as with the permissibility approach. Rather, it is opposability which instead governs State-to-State treaty relations, in that whilst no treaty relationship is established between a reserving State and an objecting State, this has no bearing on the relationship between the reserving state and non-objecting State Parties. Thus, the situation would seem to result in there being one set of States—those who do not object to a reservation—with whom the reserving State will be considered as being in a treaty relationship, and another set of States—those who have objected to the same reservation either for reasons of invalidity or another reason—for whom the reserving State will not be a party to the treaty. This reflects the compromise approach followed by the OAS, discussed in section II. It is notable that the opposability doctrine was specifically *not* adopted at the Vienna Conference on the Law of Treaties, as evidenced by VCLT Article 20(4)(b), which provides that an objection will not prevent the entry into force of the treaty between the reserving State and objecting State unless 'a contrary intention is definitely expressed by the objecting State'.

Due to the nature of human rights treaties there appears to be no pressing need for State Parties to determine whether the State making a reservation objected to by others is to be considered a non-State Party.[41] This 'super-maximum' effect is rarely invoked and, most often, objecting States specify

[40] ILC, 'Report of the International Law Commission on the work of its 47th session' UN Doc A/50/10 (1995) para 457.

[41] Though this was clearly a consideration of the UN Secretary-General and one of the reasons for referring the question regarding reservations to the Genocide Convention to the ICJ.

that the objection will not inhibit the entry into force of the treaty between the two States,[42] thus discarding the opposability approach. States rarely adhere to the traditional opposability doctrine. Fiji purports to follow the opposability doctrine in its reservation to Convention on the Elimination of all forms of Racial Discrimination[43] (CERD) when it says that, 'In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.'[44] However, whilst Fiji may take this position, no State has made public whether or not they agree with this approach to CERD.[45] Sweden also provides an example of a State invoking the traditional opposability approach. Its objections to numerous States' reservations to CEDAW specify that the reservations to which it objected 'constitute an obstacle to the entry into force of the Convention between Sweden and the Maldives [Kuwait,[46] Lebanon[47] and Niger[48]]'.[49] Followers of the opposability approach maintain that the Vienna Convention invests non-reserving States with the determinative function of assessing the compatibility of reservations.[50]

The lack of objections to invalid reservations under the opposability doctrine results in the unintended and illogical consequence that the reserving State always becomes a party to the treaty despite the unacceptable reservation. If there is no objection, as a result of the reserving State becoming a State Party the invalid reservation ultimately becomes acceptable via the doctrine of tacit acceptance set forth in Vienna Convention Article 20(5). Considering the unilateral nature of ratification and reservation formulation relating to human rights treaties and since such actions are taken entirely independent of other State Parties given the non-reciprocal nature of such treaties, 'it makes little sense then to suggest that the reservation may be opposable'.[51] This view of the inapplicability of the opposability doctrine is supported by the Inter-American Court of Human Rights in its *Effect of Reservations on the Entry into Force of the ACHR*[52] advisory opinion.

[42] Including a sentence that the objection will not prevent entry into force of the treaty between the reserving and objecting State is technically unnecessary due to the automatic presumption established by Vienna Convention, art 21(3).

[43] (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).

[44] 854 UNTS 223 (1973) 224.

[45] Though Fiji is not a party of the Vienna Convention it is worth noting that Fiji's assertion of the opposability doctrine predates the entry into force of the Vienna Convention.

[46] 1903 UNTS 202 (1996).

[47] 2001 UNTS 436 (1998).

[48] 2105 UNTS 621 (2000).

[49] 1830 UNTS 13 (1994).

[50] See Swaine (n 5) 315; JM Ruda, 'Reservations to Treaties' (1975–III) 146 Recueil des Cours 95, 101.

[51] M Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489, 508.

[52] *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982) para 29.

The opposability approach does not resolve the problem of invalid reservations and, as noted by Craven, it 'has little salience in the context of human rights treaties',[53] especially in light of the goal of achieving universal ratification. The application of the opposability doctrine is indecisive and fails to give serious consideration to the issue of invalidity since the practice produces the same result no matter what the basis of the objection.[54] The legal effect of an invalid reservation is not definitively clarified by this doctrine, especially when applied to non-reciprocal treaties, such as human rights treaties.

C. Severability

According to the severability approach, if an impermissible reservation is formulated then the author State will be bound by the treaty without the benefit of the reservation. It is an approach that addresses the legal consequence of an impermissible reservation. The concept of a State being bound 'without the benefit' of an invalid reservations is a natural extension of the permissibility doctrine, given that States authoring invalid reservations generally act as if the concept of permissibility did not exist, which they are able to do because of the failure of States opposing invalid reservations setting out the consequences of their doing so. Severability is not in direct opposition to opposability; it has instead grown out of the reality that parties to multilateral treaties are less inclined to insist on the 'super-maximum' effect that the classic opposability doctrine mandates if observed in the strictest sense, that the State authoring the invalid reservation would fail to become party to the treaty.

The severability principle cannot be found in the Vienna Convention nor is it currently supported in customary international law. Rather, it has been developed through court and treaty body jurisprudence related to human rights treaties, particularly in the late 1980s and early 1990s, and a review of objections made to reservations to the core UN human rights treaties shows that severability has gained slow, but steady acceptance. The obvious advantage of this approach is that the State remains bound by the treaty.[55]

Though case law on reservations is scant, the European Court of Human Rights (ECtHR) outlined the principle of severability in the 1988 *Belilos v Switzerland*[56] case. Opting to follow the severability doctrine instead of the opposability doctrine, the Court found that Switzerland was bound by the European Convention on Human Rights (ECHR)[57] despite having made an invalid reservation. The Court succinctly stated that if a reservation were

[53] Craven (n 51) 497.

[54] Under the opposability doctrine, objections to invalid reservations generate the same effect as objections to validly formulated reservations. See Swaine (n 5) 315.

[55] Redgwell (n 39) 407.

[56] *Belilos v Switzerland* [1988] 10 EHRR 466.

[57] As amended by Protocol Nos 11 (ETS No 155) and 14 (CETS No 194) (adopted 4 November 1950, entered into force 1 June 2010) ETS No 005, 213 UNTS 221.

determined to be invalid then it was without effect and would be severable with the result that the obligation to which the invalid reservation was attached would still be in effect in its entirety for the reserving State.[58] In this instance, the Court determined that the reservation[59] in question (to ECHR Article 6(1)) was invalid and severable because it was not only of a general nature, contrary to ECHR Article 57(1), but also because there was no 'brief statement of the law concerned' as required by ECHR Article 57(2).[60] Despite Switzerland's contention that the ECHR State Parties had accepted the declaration/reservation by virtue of their silence, the Court pointedly clarified that '[t]he silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment'.[61]

This case was, in fact, the first in which an international tribunal had determined a reservation to be invalid.[62] The difference in approach between the Court and the other State Parties reflects the unsettled approach to invalid reservations in practice. It may also indicate that States generally were not in the business of assessing the reservations of other State Parties. Marks notes that in *Belilos* the ECtHR had four options once it determined that the Swiss reservation was invalid: first, that the invalid reservation would have no effect; second, that the invalid reservation meant that the applicable article (ECHR Article 6) would be inapplicable to Switzerland; third, that the invalid reservation would be ignored (severed) and Article 6 would remain applicable to Switzerland; or, finally, that the Swiss ratification as a whole would be treated as invalid, resulting in Switzerland no longer being considered a party to the ECHR.[63] Choosing the third option, the Court gambled that being a party to the ECHR was more important to Switzerland than the exclusion of the provision against which it had entered the reservation, and so it severed the reservation from the ratification.[64] Counsel for Switzerland had actually admitted the importance of ECHR membership during the hearing,[65] which arguably made the Court's decision easier. Switzerland subsequently redrafted and resubmitted an amended reservation to the same article.[66]

[58] *Belilos* (n 56) para 60. For a discussion, see generally, HJ Bourguignon, 'The Belilos Case: New Light on Reservations to Multilateral Treaties' (1989) 29 VaJIntlL 347; RSJ Macdonald, 'Reservations under the European Convention on Human Rights' (1988) Revue Belge de Droit International 429.

[59] The reservation was actually titled a declaration, however, as applied it created a reservation. See S Marks, 'Reservations Unhinged: The *Belilos* Case before the European Court of Human Rights' (1990) 39 ICLQ 300; I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: The Belilos Case' (1990) 33 GermanYBIntlL 69. For an analysis of the distinctions, see DM McRae, 'The Legal Effect of Interpretative Declarations' (1978) 49 BYBIL 155.

[60] The Court referred to then art 64 as was in force in 1988. See Bourguignon (n 58) 362.

[61] *Belilos* (n 56) para 47.

[62] Bourguignon (n 58) 380.

[63] Marks (n 28) 48–9.

[64] *Belilos* (n 56) para 60.

[65] Schabas (n 5) 73.

[66] This exercise in reformulation of a reservation introduced a novel approach to rectifying impermissible reservations as will be discussed in section V.

The severance principle was confirmed by two subsequent European cases. In *Weber v Switzerland*[67] the Court examined the revised Swiss reservation to Article 6(1) and found that the reservation was invalid due to the failure of the Swiss government to append 'a brief statement of the law concerned' as required by then-Article 64(2).[68] Recalling its *Belilos* judgment, the Court severed the reservation and applied the ordinary meaning of Article 6.[69] *Loizidou v Turkey*[70] further cemented the Strasbourg approach,[71] when the ECtHR noted the special character of the ECHR and stated that the Convention regime 'militates in favour of severance'.[72] It further opined that Turkey's 'impugned restrictions [could] be severed from the instruments of acceptance … leaving intact the acceptance of the optional clauses'.[73] These 1990 and 1995 decisions put all ECHR State Parties on notice that a reservation, or any statement amounting to a reservation, must comply with the structural and substantive requirements for reservations as set forth in the Convention.

The ECtHR's approach to severing an invalid reservation and leaving the reserving State bound by the article to which the reservation had been attached is different from the approach to invalid reservations in the VCLT. Under the VCLT approach, each State determines validity itself, which, as has been seen, means that the invalid reservation may be applicable between the reserving State and accepting States while simultaneously being inapplicable between the reserving State and an objecting State. In the second scenario, the entirety of the article that is the object of the reservation will not be in effect as between the reserving and objecting States. This, however, is irrelevant in the context of non-reciprocal treaties where the obligations are owed to third parties and no rights are modified *inter se*.

The *Belilos* decision marked a crucial moment in the reservations debate as it departed from the State-centric view according to which States were the sole arbiters of validity and in doing so encroached upon the long-held principle of absolute State sovereignty in determining treaty obligations. Furthermore, despite the recognition in both customary international law and the Vienna Convention of the State's role in assessing a reservation either by acceptance of or by objection, the Court in *Belilos* also excluded consideration of the reaction, or lack of reaction, of other Contracting Parties evaluating the validity of a reservation.[74] With these decisions the ECtHR bolstered the idea that when

[67] *Weber v Switzerland* European Court of Human Rights Series A No 177 (22 May 1990).
[68] ibid paras 37, 38. [69] ibid para 38.
[70] *Loizidou v Turkey*, Preliminary Objections, European Court of Human Rights Series A No 310 (23 March 1995); [1995] 20 EHRR 99.
[71] Severability is often referred to as the 'Strasbourg approach' as a result of the Court's stance on continued applicability of reserved articles of the ECHR when a reservation to the article is deemed invalid. [72] *Loizidou* (n 70) para 96. [73] ibid para 97.
[74] *Belilos* (n 56) para 47: 'The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.'

a supervisory organ is created specifically to oversee a convention, States are relieved of absolute control over determining reservation compatibility.

Lending support to Strasbourg, the Inter-American Court of Human Rights (IACtHR) also determines the compatibility of a reservation with the VCLT object and purpose test, rather than consider whether or not the reservation has been accepted by another State Party. Thus the *Restrictions on the Death Penalty* advisory opinion suggests that it is the Convention supervisory organs, not the States that have the final say on the compatibility of reservations.[75] For the purposes of the advisory opinion, the Court indicated that a reservation, even without an evaluation of compatibility, would not preclude the entry into force of a treaty for a State whose instrument of ratification was accompanied by a reservation. This supports the severability principle, as the IACtHR did not consider that a subsequent determination of incompatibility would invalidate the State's consent to be bound.

The severability principle was affirmed in the Inter-American system in the 2001 *Hilaire* case, despite Trinidad and Tobago's argument that if it was decided that its reservation to the Court's jurisdiction was invalid then its declaration accepting the compulsory jurisdiction of the Court would be void *ab initio*.[76] The counterargument highlighted that the reservation was excessively vague and made it impossible to determine its scope.[77] Further supporting the concept of severance, the Inter-American Commission on Human Rights (IACommHR) argued that if the State's consent to the jurisdiction of the Court was voided, rather than the reservation to that acceptance of jurisdiction severed, then the rights of the applicant would not be guaranteed, which was the entire point of the American Convention on Human Rights[78] (ACHR).[79] The IACtHR ultimately agreed with the IACommHR and severed the reservation, holding Trinidad and Tobago bound to the ACHR without the benefit of the reservation and thus enabling it to proceed to an examination of the merits of the case.[80]

The Human Rights Committee (HRC)—the supervisory body established under the International Covenant on Civil and Political Rights[81] (ICCPR)—further entrenched the severability principle in its controversial *General Comment No 24,* confirming its position that an invalid 'reservation [to the

[75] *Restrictions on the Death Penalty* (arts 4(2) and (4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983) para 45ff.

[76] *Hilaire v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 80 (1 September 2001) para 49.

[77] ibid para 53.

[78] (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR).

[79] *Hilaire* (n 76) para 67.

[80] The Inter-American Court came to the same conclusion on invalidity of Trinidad and Tobago's reservation to the compulsory jurisdiction clause of the Court in a series of cases: *Benjamin et al v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 81 (1 September 2001); *Constantine et al v Trinidad and Tobago* (Preliminary Objections) Inter-American Court of Human Rights Series C No 82 (1 September 2001).

[81] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

ICCPR] will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation'.[82] *General Comment No 24* was formulated in response to the great number of reservations attached to ratifications of the ICCPR—at the time, some 150 reservations of varying significance made by 46 of the then 127 State Parties.[83] Initially addressing reservations threatening the coherence of the treaty regime, the HRC indicated that reservations offending peremptory norms or customary international law were not compatible with the object and purpose of the ICCPR and it provided a 'laundry list' of ICCPR protections against which no reservation could be deemed valid.[84] Specifically invoking principles of general international law and particularly the Vienna Convention, the HRC then outlined human rights treaties were not of a traditional reciprocal nature and therefore 'the role of State objections in relation to reservations is inappropriate to address the problem of reservations to human rights treaties'.[85]

1. Severability and its discontents

The primary difficulty with the concept of severability is that is contradicts the long-held principle in international law that a State may not be bound by a treaty to which it has not consented.[86] Obviously, holding a State bound to a treaty obligation against which it has formulated a reservation contravenes this principle. Not surprisingly, the severability doctrine has been rejected by many governments, particularly the US, UK and France, as being in violation of this fundamental principle.[87] More recent objections to invalid reservations by the US, UK and France suggest that their objection practice has not evolved on the issue of severability.[88]

[82] UN Human Rights Committee (HRC), 'General Comment No 24 (52): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (2 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 18, reprinted in UNCHR 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I), 210 (General Comment No 24). [83] ibid para 1. [84] ibid para 8.

[85] ibid. para 17; an opinion echoed by many, see I Boerefijn, 'Impact on the Law on Treaty Reservations' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 85; EA Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 BerkeleyJIntlL 277.

[86] *Genocide Advisory Opinion* (n 8) 21.

[87] 'Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No 24 (52) relating to Reservations' (1995) UN Doc A/50/40; see also K Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13 EJIL 437, 462ff; R Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11 EJIL 413, 417; Baylis (n 85) 318–22.

[88] See, for example, the US, UK and France objections in 2011 to invalid reservations made by Pakistan to the ICCPR. Objections to Pakistan's reservation to the ICCPR have not yet been assigned a UNTS volume but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>; see also

Where a State's consent to be bound is tied to the acceptance of its reservations it seems questionable whether another State Party may negate the effect of that reservation, even if it is invalid. When consent to be bound is facilitated by domestic legislatures which have made that consent contingent upon the acceptance of reservations which turn out to be invalid, the current system offers no governing principles. There is, then, a problem in knowing how to treat reservations that are invalid but integrally tied to consent to be bound. This lacuna is both a practical roadblock to interpretation in the event of a violation and detrimental to determining overall compliance with treaty obligations. States such as the US and the UK often make their consent to be bound by a treaty conditional upon its ratification subject to reservations determined by their legislatures. Under the severability principle the State becomes a party without the benefit of an invalid reservation, yet this expressly ignores the conditional nature of the consent to be bound. It seems that States are cognizant of such conditional consent and are willing to maintain objections without specifying severance.

Consider, for example, the reservations to ICCPR made by the US which indicate that ratification is expressly subject to acceptance of the reservations attached to the instrument of ratification.[89] In 1993 Sweden objected to six of the reservations made by the US, indicating that 'reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to domestic legislation' and were therefore contrary to the treaty.[90] The US reservations have not been removed and in its statement Sweden made it clear that its objection did not preclude entry into force between the two countries. Sweden did not specifically say that the US would not benefit from the reservations, as it did when objecting to reservations by a number of States to CEDAW.[91] Where does this leave the status of the reservations made by the US? Under the current regime there is no straightforward answer.

Comments by the US in ILC, 'Reservations to Treaties, Comments and Observations Received from Governments' (2011) UN Doc A/CN.4/639, paras 170–182.

[89] Three of the reservations read as follows: '(1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States. (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. (3) That the United States considers itself bound by Article 7 to the extent that ''cruel, inhuman or degrading treatment or punishment'' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'

[90] 1725 UNTS 374 (1993), Objections to Reservations to the ICCPR, Declaration by the Government of Sweden with respect to reservations made by the United States of America to ICCPR. Many other States, including Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal and Spain also objected.

[91] For example, objections to reservations by Syria, 2220 UNTS 353 (2003); Bahrain, 2199 UNTS 190 (2002).

It has been suggested that severance is 'conceptually closer' to the regime set out by the ICJ in the *Genocide Opinion*.[92] However, there is no clear regime to follow. Schabas pointed out that the severability principle was ambiguous in that it did not clearly indicate, at least as evidenced by States' objections, whether the reserved provision would actually be enforced as part and parcel of the treaty.[93] In other words, what is severed? The reservation, or the Article to which the reservation is attached? Subsequent to Schabas's observation, some objections do now indicate that the treaty will be applicable in its entirety 'without the benefit' of the offending reservation.[94] Unless it is expressly stated that the invalidly reserved provision is to be enforced, severability would actually give full effect to the reservation.[95] States appear to have noted this incongruity and have remedied it to the extent possible when formulating their objections.

Responding to the early uptake of the severance approach, Bradley and Goldsmith argue that it is incorrect to conclude that a State continues to be bound by articles to which it has made reservations, even if the reservations are considered by some States to violate the object and purpose test.[96] They assert, for example, that if offending US reservations are treated as severed in an adversarial procedure, the US position would be that its consent to the treaty as a whole would have been nullified. Alternatively, Goodman and Macdonald argue that completely invalidating the consent to be bound to a treaty gives disproportionate significance to the invalid reservation and that even invalidating the obligation that was the subject of the reservation is not appropriate when the obligations are non-reciprocal.[97] Following Goodman and Macdonald's reasoning, if severing the invalid reservation negates the consent to be bound to the treaty as a whole, or less drastically, negates the obligation that was the subject of the invalid reservation, the value of States 'policing' reservations is in fact then lost, as the reserving State ultimately has no obligation with respect to the article reserved against—precisely as it originally intended.

D. State Adherence to the Severability Principle

Despite early resistance, some States have indicated an increasing preference for severance as the consequence of a reservation being invalid. The trend of States purporting to sever reservations is traceable primarily across humanitarian and human rights conventions adopted following World War II.

[92] Redgwell (n 39) 410.
[93] Schabas (n 5) 72.
[94] For example, those by Sweden to reservations made to CEDAW (n 91).
[95] Macdonald (n 58) 449.
[96] CA Bradley and JL Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 UPaLRev 399, 436.
[97] R Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 AJIL 531; Macdonald (n 58) 449.

For example, though now opposed to the principle, the UK demonstrated a penchant for severing invalid reservations in the late 1970s and early 1980s when it objected to the reservations made by several States to the 1949 Geneva Conventions. In its ratification of the Geneva Conventions the UK declared that it held certain reservations made by others to be invalid and therefore 'regard[ed] any application of any of those reservations as constituting a breach of the Convention to which the reservation relates' while also regarding the reserving States as parties to the Geneva Conventions.[98] The UK reiterated this position when objecting to subsequent reservations made to the Geneva Convention on the Treatment of Prisoners of War[99] by the Republic of South Vietnam and Guinea-Bissau[100] in 1976 and to reservations made by Angola[101] in 1985.[102]

Indeed, there were some references to severability during the 1970s and 1980s, though the practice and language varied greatly among States and treaties. New Zealand and the Netherlands, for example, both asserted severance in response to reservations made to the 1961 Vienna Convention on Diplomatic Relations[103] by Bulgaria, Byelorussia, Mongolia and the Ukraine, among others.[104] Having said that a reservation was 'not acceptable', the phraseology used by the Netherlands generally indicated 'that this provision remains in force in relations between it and the said States in accordance with international customary law'.[105] New Zealand followed a similar approach when responding to invalid reservations, indicating that it 'considers that those paragraphs are in force between New Zealand and China'.[106] Other States acknowledged the same reservations as 'illegal'[107] or as not being valid[108] without specifying a consequence.

Admittedly, many treaties forbid or leave little space for reservations. Agreements negotiated by consensus coupled with a further opt-in agreement,

[98] UK ratification of the 1949 Geneva Conventions, 75 UNTS 973 (1949), ratification at 278 UNTS 259 (1957) 266–8.

[99] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.

[100] 1404 UNTS 337 (1985).

[101] 995 UNTS 394 (1976).

[102] See discussion by F Hampson, Sub-Commission on the Promotion and Protection of Human Rights, 'Specific Human Rights Issues, Reservations to Human Rights Treaties, Final Working Paper' (2004) UN Doc E/CN.4/Sub.2/2004/42, paras 16–17.

[103] (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

[104] The Netherlands objected to reservations to Art 11(1) by Bulgaria, the German Democratic Republic, Mongolia, Ukraine, USSR, Byelorussia and Yemen; art 27(3) by Bahrain and Qatar; and art 37(2) by Egypt, Cambodia (then Khmer Republic), Malta, Morocco, Qatar, Yemen. It specified in all instances that the provisions would remain in effect between the parties 'in accordance with customary international law'. See 1444 UNTS 397 (1986), objection to reservations by Qatar and Yemen. New Zealand also specified severance in its objections to reservations to art 11(1) by Bulgaria, Byelorussia, Mongolia, Ukraine and USSR and to arts 37(2), (3) and (4) by China. See, for example, 1033 UNTS 347 (1977), objection to reservations by China.

[105] 1444 UNTS 397 (1986).

[106] 1033 UNTS 347 (1977).

[107] USSR objection to reservation to art 27(3) by Qatar. 1437 UNTS 332 (1986).

[108] For example, objections to reservations by China to art 37(2), (3) and (4) by Hungary, 1102 UNTS 313 (1978) and Ireland, 1066 UNTS 330 (1978).

or 'package deal' approach, are unlike the 'majority voting plus reservations' approach followed in the human rights regime.[109] 'Package-deal' approaches are aimed at attaining widespread agreement on overarching principles and delegating minutiae to the intergovernmental bodies or international organizations responsible for overseeing the treaty, such as with the UN Convention on the Law of the Sea[110] (UNCLOS). UNCLOS Article 309 prohibits all reservations except those expressly permitted.[111] Therefore, objections implying severance—such as that by Australia in response to a reservation (titled a declaration)[112] by the Philippines regarding its archipelagic waters—are based upon a violation of the UNCLOS Article 309, which brings the analysis under VCLT Article 19(a) and (b), rather than 19(c).[113] Australia objected to the reservation, stating:

> Australia cannot, therefore, accept that the statement of the Philippines has any legal effect … and considers that the provision of the Convention should be observed without being made subject to the restrictions asserted in the declaration ….[114]

Without using the more contemporary formulation, Australia nevertheless indicated that it considered the convention to be in force for the Philippines without effect being given to the unilateral assertions made in its declaration. Considering the UNCLOS Article 309 prohibition of all reservations except those expressly permitted, the use of severance language is arguably superfluous. However, Australia was not alone in 'policing' UNCLOS,[115]

[109] See A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 159.

[110] (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). See Boyle and Chinkin (n 109) on the different approaches to treaty-making.

[111] ibid, art 309 provides: 'No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.' Art 310 further provides: 'Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of the Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

[112] As indicated in the Vienna Convention (n 1) at 2(1)(d), a reservation is a 'unilateral statement, *however phrased or named* … whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty' (emphasis added). Australia's objection indicated that the Philippines interpretative declaration was a reservation, despite the title, and objected to the declaration as a violation of UNCLOS art 309. The 'disguised' reservation therefore fails, according to Australia. On disguised reservations, see McRae (n 59).

[113] Vienna Convention (n 1) Article 19—Formulation of reservations—A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

[114] 1835 UNTS 149 (1994).

[115] Bulgaria also 'rejected as devoid of legal force the statement made by the Philippines', 1835 UNTS 151 (1994). Russia indicated that it could not 'recognize as lawful the statement of the Philippines and considers it to be without legal effect in the light of the provisions of the Convention', see 1835 UNTS 170 (1994) 172.

which supports this essay's contention that States do not rely singularly on nullity based on impermissibility to provide a clear consequence for an invalid reservation. In other words, States will, in some cases, assert severance as the legal consequence of an invalid reservation when the reserving State maintains that its reservation is valid, as the Philippines did in its response to Australia's objection.[116] While the preceding examples of severance are sprinkled across the international system,[117] the true emergence of severance as the defined consequence of making an invalid reservation did not occur until several years after the HRC's *General Comment No 24*.

1. Practice specific to human rights treaties

There has been marked evolution in many States' approaches to outlining the effect of invalid reservations over the past two decades, particularly in relation to human rights treaties. This evolution loosely tracks the overall change in attitude toward human rights and reflects a heightened appreciation of the importance of these obligations. It is, however, unclear whether the States outlining the effect of an invalid reservation, such as Sweden and Austria, are more interested in sending a message to reserving States that they value the maintenance of a coherent treaty system or whether the use of increasingly strong language merely satisfies a 'human rightist' agenda without any particular concern for treaty law itself.[118] Either way, a review of the practice of the States which frequently file objections reflects the progression toward more stringent approaches to outlining the legal effect of an invalid reservation. Some, such as Sweden, have moved from permissibility to opposability and then to severance; others, such as Austria, have simply jumped from permissibility to severability, as is seen by comparing its 1994 objection[119] to the reservations by Maldives to CEDAW (which followed the permissibility doctrine) with its subsequent objections to reservations to CEDAW by Pakistan[120] and Lebanon,[121] among others (which followed the severance approach). This hesitation in adhering to the severability approach is not surprising, given that doing so directly challenges a reserving State's sovereignty.

Recalling Sweden's response to the US reservations to the ICCPR (discussed in the previous section), it could be argued that its nuanced approach to the US reservations took into account the conditional consent factor. This, however, is to be contrasting with the objections it subsequently made to the reservations of other States to CEDAW, where it specified that '[t]he Convention enters into force in its entirety between the two States,

[116] See 1835 UNTS 164 (1994).
[117] Further examples include Sweden's objection to reservations to the Vienna Convention by Peru, 2155 UNTS 150 (1998).
[118] See below (nn 120, 121 and 126).
[119] 1830 UNTS 312 (1994).
[120] 1979 UNTS 439 (1997).
[121] 2005 UNTS 524 (1998).

without Bahrain [and others] benefiting from its reservation'.[122] It is likely that this simply reflects the development of the doctrine during the intervening period.[123] Prior to 1994 Sweden generally noted the incompatibility of reservations pursuant to the object and purpose test and underscored their undermining effect on international law but rather than outlining the legal effect of these objections, simply noted that the reservations would not prevent the entry into force of the treaty between Sweden and the reserving State.[124] Between 1994 and 2001 Sweden generally followed the opposability doctrine, at least in relation to States making reservations to CEDAW. This followed the issuance in 1994 of *General Comment No 24* in which the HRC indicated that it would sever incompatible reservations, possibly opened the eyes of States to this option. Interestingly, Sweden did not subscribe to the severability approach until 2001,[125] but has remained true to the principle since.[126] The evolution of Swedish practice exemplifies the development of approaches to the legal effect of invalid reservations and the recognition that the more concrete approach of severance should be attached to States' objections.

Sweden is not alone in moving toward the severability approach. Objections to reservations to the ICCPR made by Denmark (to Botswana, 2001),[127] Finland (to Maldives and Pakistan, among others),[128] Greece (to Turkey, 2004),[129] Latvia (to Mauritania, 2005; to Pakistan, 2011),[130] Norway (to Botswana, 2001),[131] Slovakia (to Pakistan, 2011),[132] to name a few, indicate that States are gradually opting for giving a clearer indication that the

[122] 2199 UNTS 190 (2002). The same statement was made *mutatis mutandis* in response to reservations made by Saudia Arabia, North Korea, Mauritania, Syria, Micronesia, United Arab Emirates, Oman, Brunei Darussalam and Qatar.

[123] There is also a strong argument that political considerations play into the use of severance, and objections generally, but it is not a theme to be pursued in this article.

[124] See for example 1566 UNTS 430 (1990) objection to reservations by Libya. The same phraseology is commonly used eg the objection by the Netherlands to reservations made by Bahrain, 2199 UNTS 188 (2002).

[125] The same can be said generally of the other Nordic States. See J Klabbers, 'Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties' (2000) 69 NordJIntlL 179; L Magnusson, 'Elements of Nordic Practice 1997: The Nordic Countries in Co-ordination' (1998) NordJIntlL 350.

[126] Since 2001 Sweden has indicated the severance of incompatible reservations made to the ICCPR by Botswana, Turkey, Mauritania, Maldives and Pakistan, see eg, 2155 UNTS 125 (1998) objection to reservations by Botswana, and also in response to incompatible reservations made to CEDAW by Micronesia, United Arab Emirates, Syrian Arab Republic, Bahrain, Mauritania, among others, see eg, 2199 UNTS 190 (2002) objection to reservations by Bahrain. Though Sweden did technically indicate severance of Kuwait's reservation to the ICCPR somewhat earlier than this, in 1997, it was in a less clear formulation than that subsequently used. See 1984 UNTS 435 (1997).

[127] 2163 UNTS 178 (2001).

[128] 2472 UNTS 128 (2007); Objections to Pakistan's reservation to the ICCPR have not yet been assigned a UNTS volume but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

[129] 2283 UNTS 242 (2004).

[130] 2346 UNTS 215 (2005). On objections to Pakistan's reservation to the ICCPR see (n 128).

[131] 2163 UNTS 185 (2001).

[132] On objections to Pakistan's reservation to the ICCPR see (n 128).

consequence of invalidity is to be severability. The same trend can be seen in the patterns of States' objections to reservations to ICESCR,[133] CEDAW,[134] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[135] (CAT) and, to a lesser extent, in CERD.[136] This definitive shift towards severability is a boon to the human rights system if its ultimate goal is global recognition of universal rights; whether recognition of the doctrine will gain momentum outside of the human rights regime remains to be seen.

IV. GUIDE TO PRACTICE ON RESERVATIONS

In 1993 the ILC began a systematic study of the practice of making reservations to multilateral treaties, including human rights treaties. The study culminated in the 2011 Guide to Practice on Reservations to Treaties[137] (Guide to Practice, or Guide). Extensive attention was paid to the legal effect of invalid reservations and though human rights treaties produced the most persistent problems the ILC Guide is generally applicable to all types of treaties. In a bid to fill the 'consequences gap', and with the support of the

[133] Objections to reservations to the ICESCR by Denmark (to *Pakistan, 2005), Finland (to Bangladesh, 2095 UNTS 161(1999); to *Pakistan, 2005), Greece (to Turkey, 2283 UNTS 234 (2004)), Italy (to Kuwait, 1984 UNTS 424(1997)), Latvia (to *Pakistan, 2005), Netherlands (to *Pakistan, 2005), Norway (to China, 2180 UNTS 54 (2002); to *Pakistan, 2005), Pakistan (to India, 2514 UNTS 17 (2005)), Slovakia (to *Pakistan, 2009), and Sweden (to Bangladesh, 2095 UNTS 162 (1999); to China, 2180 UNTS 53 (2002); to Turkey, 2265 UNTS 207 (2004); to Kuwait, 1984 UNTS 435 (1997); to *Pakistan, 2005). *Objections to Pakistan's reservations to ICESCR have not been assigned a UNTS volume number but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en>.

[134] The objections to reservations to CEDAW are numerous thus the following is only a small sample and does not include those States noted for advocating severance in their objections to reservations to the ICESCR (n 133): Belgium (to Brunei Darussalam, 2427 UNTS 70 (2007); Oman, 2427 UNTS 71 (2007); to *Qatar, 2010); Canada (to Brunei Darussalam, 2444 UNTS 95 (2007)), Czech Republic (to Oman, 2411 UNTS 196 (2007); to Brunei Darussalam, 2427 UNTS 67 (2007); to Qatar, 2634 UNTS 32 (2009)) and Estonia (to Syria, 2253 UNTS 322 (2004); to *Qatar, 2010). *Objections to Qatar's reservations to CEDAW have not yet been assigned a UNTS volume number but can be viewed on the UN Treaty Collection website at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

[135] (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT). Objections to reservations to the CAT by Czech Republic (to *Pakistan 2011), Denmark (to Botswana, 2163 UNTS 234 (2001)), Finland (to Bangladesh, 2095 UNTS 216 (1999); to Qatar, 2133 UNTS 247 (2001); to *Pakistan, 2011), Latvia (to *Pakistan, 2011), Norway (to Qatar, 2133 UNTS 248 (2001); to Botswana, 2163 UNTS 233 (2001); to *Pakistan, 2011), Slovakia (to *Pakistan, 2011), Sweden (to Qatar, 2105 UNTS 683 (2000); to Botswana, 2163 UNTS 230 (2001), to Thailand, 2542 UNTS 89 (2008); to *Pakistan, 2011). *Objections to Pakistan's reservations to CAT have not yet been assigned a UNTS volume number but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en>.

[136] See specifically Sweden's objections to reservations to CERD by Saudia Arabia, 2001 UNTS 403 (1998); by Thailand, 2241 UNTS 247 (2004).

[137] (n 2).

human rights treaty bodies,[138] the ILC set out its most progressive approach so far concerning the legal position of a State that has formulated an invalid reservation. Departing from its previous views on the approach of regional human rights bodies and the HRC to invalid reservations,[139] the Guide indicates that an invalid reservation will be null and void[140] even if it has not been the subject of an objection by another State Party[141] and will be severed:

> 4.5.3 Status of the author of an invalid reservation in relation to the treaty
>
> 1. The status of the author of an invalid reservation in relation to a treaty depends on the intention expressed by the reserving State or international organization on whether it intends to be bound by the treaty *without the benefit of the reservation* or whether it considers that it is not bound by the treaty.
> 2. Unless the author of the invalid reservation has expressed a contrary intention or such an intention is otherwise established, it is considered a contracting State or a contracting organization *without the benefit of the reservation*.
> 3. Notwithstanding paragraphs 1 and 2, the author of the invalid reservation may express at any time its intention not to be bound by the treaty *without the benefit of the reservation*.
> 4. If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organization intends not to be bound by the treaty *without the benefit of the reservation*, it should express its intention to that effect within a period of twelve months from the date at which the treaty monitoring body made its assessment.[142]

In essence, this guideline applies a rebuttable presumption that the State formulating an invalid reservation will remain bound by the treaty without the benefit of the reservation unless the State expresses an alternative intention, to no longer be a party to the treaty.[143]

Thus the guideline adheres to the principle of severability, without using the specific term save in the commentary, but it also allows room for movement if the author State's consent to be bound is tied to the acceptance of its reservation. This position pays great deference to the practice of regional human rights courts as well as to the HRC[144] and marks a sharp departure from the ILC's earlier views on severability. It also reflects the growing recognition of the principle by States. The Guide commentary also advocates the doctrine of 'divisibility' or 'severability' if a reservation is formulated in clear contravention of Articles 19(a) or 19(b),[145] thus it is not only incompatibility

[138] UNCHR, '2007 Report on Reservations' (2007) UN Doc HRI/MC/2007/5 and Add.1, para 16(7).

[139] ILC, 'Report on the work of the 49th session' (12 May–18 July 1997) UN Doc A/52/10, para 84. In the report Pellet suggested that the Strasbourg approach was a form of regional customary law that did not otherwise impact customary law on reservations.

[140] Guide to Practice (n 2) 4.5.1.

[141] ibid 4.5.2.

[142] ibid 4.5.3 (emphasis added).

[143] See Draft Guide to Practice (n 29) commentary to 4.5.2.

[144] Particularly to HRC General Comment No. 24.

[145] Draft Guide to Practice (n 29) 3.3, commentary para 6.

with the object and purpose test—impermissibility—that triggers severance but also other flaws in its formulation which may have rendered the reservation invalid.

While this step towards addressing the 'consequences gap' perpetuated by the Vienna Convention is undoubtedly a step in the right direction, there is still the question of whether the proposal will be accepted by the international community of States. Early indications suggest that a 'severance rule' will not sit easily with all States.[146] Pellet, too, acknowledges that 'practice alone will be the judge of [the Guide's] adaptation to the needs of the international community'.[147] The lack of a consistent practice by States concerning how invalid reservations should be handled has thus far impeded a resolution of the issue despite the clear growth in recognition of the severability principle. Outside the ILC and the treaty bodies, the one undisputed point is that there is no settled practice or common agreement regarding the consequences of an invalid reservation, particularly in the context of State-to-State treaty relations.

There is another cause for hesitation regarding the ILC's new predilection for severance. In the period between the adoption of the draft and the finalized guidelines several States commented on the consequences of making a determination of invalidity upon a State's consent to be bound, a problem that has been recognized throughout the debate on severability. From the viewpoint of some States, the main concerns relate to the status of the reserving State,[148] which would be determined in accordance with Guide to Practice 4.5.3. Reading Guideline 4.5.3 on its own suggests there is closure on the issue of the consequence of having made an invalid reservation. However, the commentary to draft Guideline 4.3.7 (finalized as Guideline 4.3.8) makes it clear that a State might, in fact, not be compelled to comply with the treaty without the benefit of its reservation. Relying on the logical application of the principle of mutual consent, the commentary suggests that a State cannot be bound—and thus, the reservation severed—if it is not willing to be.[149] Both draft Guideline (4.3.7) and the final Guideline (4.3.8) specifically concern valid reservations. However, the commentary to draft Guideline 4.3.7 implies that the principle of mutual consent means that even an impermissible reservation cannot be severed. In a bid to reconcile the existence of invalid reservations and

[146] Comments by Germany and the United States in ILC, 'Reservations to Treaties, Comments and Observations Received from Governments' (2011) UN Doc A/CN.4/639, paras 149–150 and 170–182 and compare with, Comments by El Salvador and Finland, paras 135–136 and 138–145; UNCHR 'Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No 24 (52) Relating to Reservations' UN Doc A/50/40 (1995).

[147] A Pellet, 'The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur' (2013) 24 EJIL 1061, 1094

[148] See, for example, comments by Australia, Austria, Bangladesh and Finland in ILC (n 146) paras 113–118, 131 and 133.

[149] Draft Guide to Practice (n 29) 4.3.7, commentary paras 1–3.

the principle of mutual consent the ILC relies on the permissibility doctrine. The permissibility doctrine dictates that the concrete consequence of an impermissible reservation is that it is null and void, a position supported by the treaty bodies.[150] As previously indicated, this position gives no definitive guidance as to who has the final authority to conclude that a reservation is invalid. The implication that an impermissible reservation cannot be severed returns to the debate on the validity of a reservation to the same that has plagued the Vienna Convention reservation regime from its inception. Thus the ILC guidelines provide for a dizzying cyclical debate in which the ultimate consequences of having made an invalid reservation still remain uncertain.

Furthermore, the ILC's approach to the presumption of severability provides the reserving state with an extraordinary right of denunciation which, if engaged, may require further justification in terms of the Vienna Convention, which exhaustively enumerates the grounds upon which a State may terminate a treaty in Article 42(2). It may therefore be necessary to consider whether it is in fact legally possible for the treaty in question to be denounced in this way.

The work of the treaty bodies has not advanced alternative approaches to the resolution of the consequences issue. The chairpersons of the human rights treaty bodies' working group on reservations, which was established to examine the practice of human rights treaty bodies, discarded other options for the consequences to be attached to impermissible reservations and outlined that an impermissible reservation should be severed unless a contrary intention could be proved—the same position ultimately taken by the ILC:

> *The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation*. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.[151]

Thus the resulting position is that, according to the ILC and the UN human rights treaty bodies, the consequence resulting from an invalid reservation appears to be that it will be severed from the instrument of ratification and the State will not benefit from the reservation unless the State otherwise chooses to forgo treaty membership. If the State opts to withdraw from the treaty rather than maintain its membership without the benefit of the reservation it is unclear

[150] UNCHR 'Report on nineteenth meeting of the Chairpersons of the human rights treaty bodies: Report of the sixth inter-committee meeting of human rights treaty bodies' (2007) UN Doc A/62/224, Annex, para 48(v), endorsing the recommendations of the working group recorded in Chairpersons of the HRTBs, 2007 Report on Reservations UNCHR (n 138) para 18.

[151] UNCHR 'Report of the Chairpersons of the human rights treaty bodies on Reservations' (2006) UN Doc HRI/MC/2006/5, para 16 (emphasis added).

whether the State will be bound by the obligation against which it reserved until that point in time, or whether the reserving State will be treated as if it had never been party to the treaty at all. If the former, then the overall aim of the reservation policing system—the object and purpose test—achieves its intended purpose; if the latter, then it seems that there is little certainty for State Parties to any treaty, as a reserving State could withdraw from membership in the event of a dispute when a ruling on the permissibility of a reservation does not go its way. This is surely not a logical direction for treaty law to take and Pellet concedes that it was the 'least worse possible' solution.[152]

V. REFLECTIONS ON THE CURRENT TREND

What does the noticeable uptake of severability across the international community mean for international law? Currently, the consequence of an invalid reservation remains unsettled. The ILC, the treaty bodies and an increasing number of States favour severability. While this is welcomed by many human rights advocates,[153] it remains to be seen whether a majority of States will accept this point of view. If the number of States concurring with the principle of severability grows it would facilitate a shift away from a traditional view of absolute State sovereignty toward a more conscientious approach of assessing reservations. It is also unclear whether such practice would be exercised in relation to non-human rights treaties. The one clear point is that unless a definitive view is taken on the validity of a reservation there can be no resolution on the issue of its consequence, meaning that the obligations of the State remain unclear. The lack of settled practice on the international level suggests that this area of treaty law is ripe for development, which may be why an increasing number of States are spelling out the consequence of severance when objecting to invalid reservations and why the ILC ultimately included severability in the Guide to Practice.

The best way to address the concrete consequence is to establish a final arbiter on the validity of the reservation so that its legal effect is clear.[154] As it stands, States may diverge on the issue of validity. Identifying a final arbiter is difficult in light of the competing States and organs deemed competent to assess reservations. The ILC took special care in its Guide to Practice to not give preference to one organ over another; Contracting States, dispute settlement bodies and treaty monitoring bodies are equally invested with the ability to assess validity.[155] Regardless of which organ makes the

[152] Pellet (n 147) 1094.

[153] Though a favourable result for the international human rights regime in general, the author does not suggest that even without reservations all States fulfil their human rights treaty obligations.

[154] For an examination of the determinative function see KL McCall-Smith, 'Reservations and the Determinative Function of the Human Rights Treaty Bodies' (2011) 54 GermanYBIntlL 521.

[155] Guide to Practice (n 2) 3.2.

assessment, one reasoned determination of invalidity should put the reserving State on notice that it may not rely on the reservation.[156]

A. Potential Responses to Severance

In relation to invalid reservations it is important to note that the stark positions of nullity and severance could benefit from more nuanced approaches that allow the reserving State to cure the defective reservation or its position as a State Party and, therefore, preserve State consent to the treaty as a whole. Providing alternatives would make severance seem less of a challenge to State sovereignty. Multiple options to address the invalid reservation have been suggested: first, the State may withdraw the offending reservation; second, the State may denounce the convention (where possible) with the possibility of re-acceding with a compliant reservation (where possible); or, finally, the State may amend the defective reservation *a posteriori* so as to comply with the opinion of the organ exercising the determinative function.[157]

1. Withdrawal

Vienna Convention Article 22 outlines the procedural aspects for withdrawing reservations. These guidelines are mere practicalities in the event that a State *chooses* to withdraw a reservation following an objection. In the event that a final determination is made on invalidity, the same result achieved by nullity and severance can be achieved by inviting the reserving State to withdraw its reservation. Withdrawal is the more State-sensitive approach to eliciting a consequence for a reservation and is most often employed by the human rights treaty bodies when they review periodic reports. This option was taken recently by Pakistan in response to the multitude of objections made to its reservations to the ICCPR, particularly in reaction to its reservation to Article 40 regarding the monitoring function of the HRC.[158] Though the legal effect is precisely the same as severance, the more genteel terminology allows the reserving State to take control of the situation and 'elect' to withdraw the invalid reservation rather than have it severed.

[156] This excludes objections not related to invalidity, such as political or diplomatic reasons.

[157] H Golsong, 'Les reserves aux instruments internationaux pour la protection des droits de l'homme', cited in PH Imbert, 'Reservations and Human Rights Conventions' (1981) 6 HumanRtsRev 28, 45; see also Macdonald (n 51) 448.

[158] Withdrawal of reservations by Pakistan (21 September 2011) following objections to reservations to the ICCPR, for example, by Latvia and Slovakia, (which outlined severance as the consequence), Ireland, Italy, and the Netherlands, to name a few. Pakistan's withdrawal of reservations to the ICCPR and the objections to the reservations have not yet been assigned a UNTS volume but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

2. Denunciation

The least attractive option, but an option nonetheless, would be denunciation of the treaty if the reserving State deemed the reservation to be an essential feature of its consent to be bound. If the State formulating an invalid reservation chooses not to withdraw the offending reservation and cannot otherwise prove it is essential to its consent to be bound as outlined by the ILC guidelines introduced above, then the State could denounce the treaty. The obvious problem with the denunciation option is that not all treaties expressly permit this—such is the case with the ICCPR—and the legality doing so under international law is therefore questionable.[159] This response is contemplated by the Guide to Practice providing States with 12 months in which to express the intention not to remain bound by a treaty without the benefit of a reservation that has been determined to be invalid.[160]

On 25 August 1997, North Korea notified the Secretary-General of its intent to withdraw completely from the ICCPR. Since it has no denunciation provision, the following month the Secretary-General informed North Korea that its withdrawal would only be valid if all other State Parties to the Covenant agreed to it.[161] To date, unanimous consent has not been given and so North Korea is still bound by the ICCPR.[162] However, it has not provided a periodic report to the HRC as required by the treaty since.[163]

The potential to denounce and re-accede with a reservation has been canvassed and has been done at least once in practice. In 1998, Trinidad and Tobago denounced and re-acceded to the Optional Protocol to the ICCPR with a reservation that the HRC would not be competent to consider communications by any prisoner under the sentence of death in respect of any matter relating to the prosecution, detention, trial, conviction, sentence or carrying out of the sentence.[164] Seven State Parties objected to the reservation on the basis of its being incompatible with the ICCPR, as well to the 'propriety of the procedure' used by Trinidad and Tobago to make the reservation.[165] In a divided opinion in *Rawle Kennedy v Trinidad and Tobago*, the HRC declared

[159] E Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 751, 775–8.

[160] Guide to Practice (n 2) 4.5.3, para 4.

[161] See (12 November 1997) UN Doc C.N.467.1997.TREATIES-10.

[162] During its review under the Universal Periodic Review, many States urged North Korea to comply with its obligations under the ICCPR and file its delinquent report. UNHRC, 'Report of the Working Group on the Periodic Universal Review, Democratic People's Republic of Korea' (2010) UN Doc A/HRC/13/13.

[163] ibid.

[164] See Optional Protocol to the ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (OP-ICCPR). Trinidad and Tobago acceded to the OP on 14 November 1980 and denounced the OP on 26 May 1998 and at the same time re-acceded with a reservation taking effect on 26 August 1998, 2016 UNTS 54 (1998). Following the decision in *Rawle Kennedy v Trinidad and Tobago*, HRC decision on Communication No 845/1999 (31 December 1999) UN Doc CCPR/C/67/D/845/1999, Trinidad and Tobago again denounced the OP on 27 March 2000, 2102 UNTS 407 (2000).

[165] Objections to reservations by Trinidad and Tobago to the OP-ICCPR by the Netherlands (2077 UNTS 304 (1999)) and Sweden (2077 UNTS 307 (1999)). Many have argued that

the application by Kennedy, a prisoner on death row, to be admissible, thus treating the reservation as severed.[166] Following this, Trinidad and Tobago once again denounced the Optional Protocol, this time without re-acceding. Bates notes 'the HRC arguably upheld the integrity of the system of human rights supervision' but did so at the cost of Trinidad and Tobago's participation in the Optional Protocol system.[167] Though it may be questionable[168] whether this is preferable to accepting an invalid reservation, it must not be forgotten that there are many reasons for participating in human rights treaties and it is ultimately up to the individual State to determine which sacrifices are most important, a reservation or treaty membership.

These instances of denunciation led the HRC to issue *General Comment No 26* on issues relating to the continuity of obligations to the ICCPR.[169] The HRC outlined that denunciation was guided by the provisions of each specific treaty and where there was no provision on denunciation the applicable rules of international law as reflected in the Vienna Convention were applicable. It pointed out that while the Optional Protocol to the ICCPR did specifically allow for denunciation, as do other conventions such as CERD, as a part of the 'International Bill of Human Rights' the ICCPR does 'not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted'[170] where no such provision is expressly provided. Therefore, while denunciation may be possible and may be a State's preferred means of responding to a determination that its reservation is invalid, each treaty will serve as its own a guide to the viability of this option.

3. *Reformulation*

While no rule exists in either the Vienna Convention or customary international law to support reformulation, practice has shown that it is a potential option. This was the approach taken by the ECtHR in *Belilos*[171] and, on another occasion, by Liechtenstein[172] in relation to its reservations to

denunciation with re-accession does not comply strictly with the Vienna Convention but that particular question is outside the parameters of the present research.

[166] *Rawle Kennedy* (n 164).

[167] Bates (n 159) 763.

[168] M Scheinen, 'Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee' in I Ziemele (ed), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff 2004) 50–1.

[169] HRC, 'General Comment No 26: Continuity of obligations' (1997) UN Doc CCPR.C/21/Rev.1/Add.8/Rev.1 (1997).

[170] ibid para 3.

[171] Reformulation was actually suggested by Swiss counsel during the course of the case and Switzerland did produce a revised declaration following the final judgment on the case. See (1988) 31 YBEurConvHumRts 5. It subsequently modified the reservation once again, see doc H/INF (89) 2, Information Sheet No 24, 7–8.

[172] See Liechtenstein's reformulation of its reservation to ECHR, art 6(1), doc H/INF(92) 1, Information Sheet No 29, 1.

the ECHR. Despite the 'bizarre novelty'[173] of this approach, reformulation seems a preferred means of deviating from the strict rule that a reservation must be made simultaneously with the consent to be bound.[174] This approach would create a 'new rule of international law' and allow 'subsequent modification of reservations in order to render them compatible with the object and purpose of the instrument'.[175]

Allowing reformulation of a reservation following a declaration of invalidity encourages ratification 'by assuring new parties a degree of certainty as to the consequences and effects of any reservations'[176] in that a State would have the opportunity to correct any deficiencies. Both the CEDAW Committee[177] and Committee on the Rights of the Child, the treaty body overseeing the Convention on the Rights of the Child,[178] have voiced support for the prospect of modifying errant reservations; the potential of the practice has also been recognized by ICCPR State Parties in their objections to invalid reservations.[179]

The reformulation approach was employed by Malaysia in relation to the original reservations it made to CEDAW. On 6 February 1998 it notified the UN Secretary-General that it was withdrawing its reservations to CEDAW Articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h) and at the same time modifying its reservations to Articles 5(a), 7(b), 16(1)(a) and 16(2).[180] The Secretary-General's response to the modifications suggests that re-formulation is a possibility, despite not being acknowledged in the Vienna Convention:

> In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998.[181]

[173] Bourguignon (n 58) 383. [174] Korkelia (n 87) 460–1; Schabas (n 5) 77–8.

[175] Schabas (n 5) 77. This idea was supported by Judge Valticos of the ECtHR in his dissenting opinion to the *Chorherr v Austria*, European Court of Human Rights Series A No 266-B (25 August 1993) para 42. [176] Schabas (n 5) 78; see also Schmidt (n 28) 33.

[177] UN Committee on the Elimination of Discrimination against Women, 'Statement on Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1998) UN Doc A/53/38/Rev.1, 49, para 18.

[178] UNCHR 'Chairpersons of the human rights treaty bodies Report on Reservations' (2009) UN Doc HRI/MC/2009/5, 4.

[179] See, for example, the UK's objection (28 June 2011) to the reservations made to the ICCPR by Pakistan where it suggest that it would reconsider its objections if Pakistan modified its reservations. Objections to the reservations made by Pakistan to the ICCPR have not yet been assigned a UNTS volume but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

[180] On 19 July 2010 Malaysia withdrew the reservations to arts 5(a), 7(b) and 16(2). The notification of withdrawal has not yet been assigned a UNTS volume but can be viewed on the UN Treaty Collection website <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#36>. [181] ibid.

https://doi.org/10.1017/S0020589314000281 Published online by Cambridge University Press

On 20 July 1998, France filed its objection to these modifications on the basis of their being incompatible with the object and purpose of the treaty and, as a result, the modifications were not accepted. The Netherlands also filed a response but did not expressly reject the modifications. Neither objection addressed the actual procedure of reformulating or modifying existing reservations, thus it seems that reformulation could be acceptable in practice.

The following year the Maldives also submitted a modification to its original reservations to CEDAW. Responding in the same vein as to the Malaysian modification, the Secretary-General set a date of 23 June 1999 for the receipt of objections to the modification. No objections were received by the deadline and the reformulated reservations were accepted for deposit. Subsequent to the deadline, both Finland and Germany responded by way of objection but only Germany specifically indicated its rejection of the modification, insisting that the modification was in fact a new reservation to Article 7. However, in light of the expiration of the deadline for objections, the reformulated reservations are now in place. Notably, the reservations for which both Malaysia and the Maldives sought modification were ones to which objections highlighting their incompatibility had previously been filed.

Surprisingly, the ILC has little to say on the concept of reformulation in the Guide to Practice except in the context of a partial withdrawal.[182] The ILC does recognize, at least in relation to the succession of States, that the Vienna Convention is flexible enough to accommodate a wide variety of practices and has generally allowed succeeding States to reformulate reservations originally made by their predecessors.[183]

Though a reservation must be made at the time of ratification or accession, a progressive dimension seems slowly to be creeping into reservations practice with regard to modification, as indicated both by the reaction to notices of modification by the UN Secretary-General as well as practice within the European regional system. As noted by the Council of Europe Secretariat, it must be understood that the reformulation cannot expand the scope of the original reservation.[184]

Reformulation is a particularly appealing possibility in light of the individual complaints procedure within the treaty body system whereby a State may only be notified of the invalidity of its reservation years after having made it. The same is true if the reservation is reviewed by a dispute settlement body. Reformulation would provide the State with the opportunity to adjust its reservation in order to achieve what it originally intended, though

[182] Guide to Practice (n 2) 2.5.10.

[183] Draft Guide to Practice (n 28) 5.1 and commentary para 19. Specifically referring to the 1978 Vienna Convention. See also Pellet (n 147) 1083–4.

[184] PTB Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations' (2005) 99 AJIL 433, 435; J Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publishing 1999) 96.

reformulation should not operate as a procedural bar to any pre-existing claim made in the shadow of an invalid reservation. These modifications would obviously remain subject to the existing standards of review on validity and, unlike reservations made at the time of ratification, would not be accepted by the depositary in the event of even a single objection, as was the case with Malaysia's reformulated reservation.

Another technical point is that reformulation could only apply to previously formulated reservations. From a procedural standpoint this includes only those reservations made at the time of ratification or accession and does not include late reservations. Bahrain attempted to file a reservation to the ICCPR over two months after it ratified the Covenant in September 2006. Fifteen State Parties[185] objected to this attempt to file a late reservation and although the objections were primarily based on the violation of the Vienna Convention requirement that a reservation be made upon ratification (Article 2(1)(d)) most also noted the general incompatibility of the reservation with the object and purpose of the treaty.

Marginally departing from the traditional Vienna Convention approach, the ILC appears to accept the possibility of formulating late reservations in the Guide to Practice:

> *2.3. Late formulation of a reservation*
> A State . . . may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, *unless* the treaty otherwise provides or none of the other contracting States . . . opposes the late formulation of the reservation (emphasis added).

However, this is a separate concept and simply filing a reservation as an afterthought is not contemplated in the context of the reformulation option discussed here, even if the option of filing a late reservation has not been completely ruled out in theory. The distinction between a reformulation and a late reservation may seem slight but in light of the existing lacunae in the Vienna Convention reservations regime there is a compelling reason to avoid deviations from the strict definition of a reservation which would further dislocate the system.

VI. FINAL REMARKS

The *Genocide Opinion* recognized that State sovereignty is challenged when States police the validity of reservations themselves and where a State may be prevented from unilaterally modifying its treaty obligations; however,

[185] Objecting States included: Australia, Canada, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Mexico, Netherlands, Poland, Portugal, Slovakia, Sweden and the UK. Four of the objections were outside the 12-month period for filing objections though it is unclear that this would matter since in any event the attempted reservation did not comply with the Vienna Convention.

the Court was unwilling to completely sacrifice treaty integrity by allowing absolute State sovereignty to prevail. By opting for a hybrid reservation/objection system and fostering a system that perpetuates the absence of a true legal consequence when an invalid reservation is made to a treaty, the ICJ opened the door for a new reservation practice to develop.

The traditional principles of permissibility and opposability that often guide inter-State treaty relations yield variable results depending on the type of treaty and in relation to human rights treaties the impact on State-to-State treaty relations is negligible. A large number of reservations of questionable validity remain attached to the core UN human rights treaties. Whilst this reality has little impact on horizontal inter-State relations, the third-party beneficiaries of the obligations suffer detriment because it is unclear which rights they are entitled to benefit from. If treaty law can develop rules which clearly outline the consequences of an invalid reservation then the law would be more coherent and rights at the domestic level could be better defined. Severing a reservation is a clear consequence in response to a determination of invalidity.

The ECtHR was the first organ to practice the severing of invalid reservations. The HRC developed the concept in *General Comment No 24* as did the IACtHR in multiple decisions. Each instance was met with different responses by States. Within the European system the principle of severance was originally a response to reservations that failed to meet structural requirements set forth in the ECHR. The HRC broadened the scope to include reservations that were deemed invalid for failure to meet the object and purpose test. All of these organs understood the non-reciprocal nature of the obligations found in human rights treaties and their intention was to assist rights-holders by making the obligations of states under those treaties clear. Human factors undoubtedly spurred these organs into action but claims that severance is a form of *lex specialis* applicable only to human rights treaties ignores evolving State practice.

While still controversial, there is a marked uptake of the principle that States will be bound to a treaty without the benefit of an invalid reservation. Instances of States adhering to the severability principle, as a necessary extension of the permissibility doctrine, are sprinkled throughout post-1970 practice related to objections to reservations. In order to curb reservations in general and foster more universal agreement, some law-making treaties have used alternatives, such as the 'package deal' approach, to the 'majority voting plus reservations' approach followed in the human rights regime.[186] Ultimately all treaty making is an attempt to facilitate compromise within the international system thus there are always sacrifices to be made.

This article highlights that the problem of invalid reservations is primarily confined to human rights treaties. While it is difficult to dismiss the reality that severability has developed in direct response to reservations made to human

[186] Boyle and Chinkin (n 109).

rights treaties, the inclusion of severability in the ILC Guide to Practice suggests that the wider potential of the practice cannot be ignored. Following 18 years of debate, the ILC's conclusion that an invalid reservation may be severed, coupled with the shift in contemporary State practice concerning objections, indicates that perhaps a change in treaty law is on the horizon and that severability is more accurately described as *lex ferenda*. With an ever-increasing number of norm-creating and regulatory treaties, it is important to reflect on the evolving recognition of severability. States have been put on notice that they no longer remain able to redefine their treaty obligations unilaterally and must consider the consequences of making an invalid reservations to multilateral treaties.