
New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights

Konstantin Korkelia*

Abstract

This article deals with the legal effect of reservations to human rights treaties with particular reference to the International Covenant on Civil and Political Rights. In treaty practice, two conflicting views may be identified. On the one hand, it is maintained that, as consent remains the governing principle of the existing regime of reservations, states parties to human rights treaties have the discretionary power to determine the admissibility and validity of reservations to treaties. On the other hand, it is argued that, because of the special features of human rights treaties, a different regime of reservations should be applicable to these treaties: treaty supervisory organs should be competent to decide on the admissibility of reservations and to determine the consequences of inadmissible reservations. The fundamental question raised in this controversy is whether human rights treaties are sufficiently different from other treaties to apply to them distinct rules for determining the admissibility of reservations and the consequences of inadmissible reservations. On the basis of General Comment No. 24(52) of the Human Rights Committee and its recent practice, the article examines the persuasiveness of arguments advanced by both sides. In the light of the controversial views on the legal effect of invalid reservations, some conclusions are drawn on how best to deal with reservations to human rights treaties with particular reference on the role of treaty supervisory organs to reservations.

1 Introduction

It is no exaggeration to assert that the issue of reservations to human rights treaties and, in particular, the role of treaty monitoring bodies with regard to reservations are

* Senior Lecturer, Faculty of International Law and International Relations, Tbilisi State University, Georgia. The author would like to thank Professor John Dugard and Dr Rick Lawson for their helpful comments and assistance while writing this paper. All errors and omissions of course remain the sole responsibility of the author.

currently among the most controversial issues in international law. Two divergent views are expressed in this regard. On the one hand, it is maintained that, as consent remains the governing principle of the existing regime of reservations, states which are parties to treaties, including human rights treaties, have the discretionary power to determine the admissibility and validity of reservations to treaties. This represents the traditional view followed for a long period of time. On the other hand, it is argued that, because of the special features of human rights treaties, a different regime of reservations should be applicable to these treaties: treaty supervisory organs should be competent to decide on the admissibility of reservations and to determine the consequences of inadmissible reservations.

These opposing views make it clear that the fundamental question in this regard is whether human rights treaties are sufficiently different from other treaties to apply to them distinct rules for determining the admissibility of reservations and the consequences of inadmissible reservations. The differences of opinion on the rules applicable to reservations to human rights treaties should not be seen in isolation. Rather, differences of opinion are caused by a much wider controversy between supporters of the interests of the international community and those of state sovereignty.

The purpose of this article is to examine, in the light of recent developments, the persuasiveness of the arguments advanced by both sides. The analysis will focus on General Comment No. 24(52) adopted by the Human Rights Committee which provides, *inter alia*, that the Committee is competent not only to determine the admissibility of reservations entered to the International Covenant on Civil and Political Rights, but also to sever inadmissible reservations. Although the article examines the case law of the supervisory bodies of the European Convention on Human Rights, it will focus only on General Comment No. 24, as the approach of the European Convention's supervisory bodies has already been well established and is not doubted by states parties to the ECHR. This article does not, however, deal with other controversial issues raised in General Comment No. 24 such as reservations to provisions of the Covenant which represent *jus cogens* and customary international law.

The article will initially deal with the special features of human rights treaties (section 2). This will be followed by an analysis of the regional experience of the role of supervisory bodies with regard to reservations (section 3) and a discussion of the developments at the universal level preceding the adoption by the Human Rights Committee of General Comment No. 24 (section 4). The article will draw particular attention to General Comment No. 24 (section 5) and the 'Preliminary Conclusions' of the International Law Commission on reservations to human rights treaties (section 6). It will also inquire into the practice of the Human Rights Committee since 1994 (section 7). Finally, some conclusions will be drawn on how best to deal with reservations to human rights treaties with particular reference to the role of treaty supervisory organs in relation to reservations (section 8).

2 The Special Features of Human Rights Treaties

A Reciprocity

It is clear that the Vienna Convention on the Law of Treaties sets the rules on reservations for all treaties without distinguishing particular categories of treaties.¹ These rules are based on the reciprocity of rights and obligations of states parties to treaties.² It is frequently argued that the most significant feature distinguishing human rights treaties from other treaties lies in their non-reciprocal nature.

Unlike a large majority of multilateral treaties, human rights treaties do not create reciprocal relationships between states parties, but create an objective regime of protection of human rights.³ Obligations under human rights treaties are not only undertaken between states but also *vis-à-vis* individuals. They are understood as unilateral obligations towards individuals as opposed to obligations under other treaties which are obligations undertaken before other states. In contrast to other treaties, the direct beneficiaries of human rights treaties are individuals.⁴

A number of pronouncements of international courts (and organs) confirm the distinct nature of human rights treaties. References may be made to the case law of the International Court of Justice,⁵ the European Commission on Human Rights⁶ and the Inter-American Court.⁷

Under treaties which determine reciprocal rights and obligations, the effect of an objection to a reservation is that the provisions to which a reservation relates will not apply as between the reserving and objecting states. However, the situation is different with regard to human rights treaties, as they are of a non-reciprocal character. Even if a state objects to a reservation made by other states, an objecting state's obligations will not be changed or reduced.⁸ The objecting state will continue to fulfil the same

¹ Two exceptions are treaties with a limited number of participating states (Article 20(2)) and treaties which are constituent instruments of international organizations (Article 20(3)).

² See Article 21 of the 1969 Vienna Convention.

³ Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994-VI) 229, at 343.

⁴ However, it does not mean that states do not gain extra-legal benefits for becoming parties to human rights treaties, for instance the prestige of being regarded as a state respecting international human rights standards.

⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951) 15, at 23.

⁶ *Austria v. Italy*, Application 7881/60, 4 *European Yearbook on Human Rights* (1961) 138, at 140; *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, 90; see also *Temeltasch v. Switzerland* (1982) DR 31, 120, at 144–145, at para. 63; *Cyprus v. Turkey*, Application 8007/77, 21 *Yearbook of the European Convention on Human Rights* (1979) 226.

⁷ *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion No. OC-2/82 of 24 September 1982, para. 29, reprinted in 22 *ILM* (1983) 37, at 47.

⁸ As Simma pointed out: 'Reciprocal non-application of a reserved provision by another State Party would not only be absurd but also legally inadmissible.' Simma, 'International Human Rights and General International Law: A Comparative Analysis', 4 *Collected Courses of the Academy of European Law* (1995) 153, at 181–182.

obligations in relation to the nationals of the reserving states as it did before the objection.

Because of the non-reciprocal nature of human rights treaties, states parties in almost all cases are not directly influenced by reservations entered by other states, since such reservations may affect only nationals of the reserving state.⁹ In such situations, states may see no interest in objecting other than in order to maintain the effectiveness of a human rights treaty.

However, there may be some exceptions. A reservation which limits the rights provided for in a human rights treaty may directly affect the interests of other states if such a reservation limits the rights of their nationals on the territory of the reserving state. A state may object to a reservation which limits certain human rights guarantees, including those of their own nationals, by declaring that the reservation is incompatible with the object and purpose of the treaty. In such situations, the purpose of objecting is solely to protect the interests of its own nationals and not to limit similar human rights guarantees of the nationals of the reserving states residing on the territory of the objecting state.¹⁰ In contrast to reciprocal treaties, the reason for objecting to impermissible reservations is not that these reservations will make states free to fulfil these obligations with regard to nationals of the reserving state. Yet, this is not to say that objections to human rights treaties are made solely to protect nationals of the objecting state.

The non-reciprocity of human rights treaties is emphasized even by the Vienna Convention itself when it deals with the consequences of a breach of human rights treaties.¹¹ The fact that a breach of a human rights treaty does not make it possible for other states to do likewise is confirmed in Article 60(5) of the Vienna Convention. The Article clearly excludes the possibility of termination or suspension of the operation of a treaty of a humanitarian character by other states parties as a result of a material breach of the treaty by one of the parties.¹²

It has been argued that the principle of reciprocity is not totally absent in human rights treaties.¹³ Article 41 of the International Covenant on Civil and Political Rights, which provides for reciprocity of inter-state complaints with regard to human rights

⁹ Higgins, 'Human Rights: Some Questions of Integrity', 52 *Modern Law Review* (1989) 1, at 11.

¹⁰ Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79 *AJIL* (1985) 1, at 22.

¹¹ L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (1994) 71.

¹² Provost, 'Reciprocity in Human Rights and Humanitarian Law', 65 *BYIL* (1994) 383, at 403.

¹³ Professor Imbert, in proving that reciprocity is not totally absent in the field of human rights, invokes the Geneva Conventions of 12 August 1949 on the protection of war victims and the agreements concerning refugees. Imbert, 'Reservations and Human Rights Conventions', 6 *Human Rights Review* (1981) 28, at 37. See also A. Pellet, 'Second Report on Reservations to Treaties', A/CN.4/477/Add.1 (1996), at 14, para. 85.

breaches, is sometimes referred to in this regard.¹⁴ However, this provision may be seen as an exception to the rule. Although it may be argued that reciprocity still plays a role in human rights treaties, its role is much less important with regard to other multilateral treaties.¹⁵

The claim that the non-reciprocal nature of human rights treaties makes it necessary that an objective system of determination of the compatibility of reservations with the object and purpose of a treaty should be applied, has its disadvantages. It is difficult to draw a clear line between purely human rights treaties and other treaties which grant certain rights to individuals.¹⁶ The determination as to what constitutes human rights may give rise to difficulties in the light of the claims that third generation rights (such as the right to a clean environment, the right to development, etc.) constitute human rights.¹⁷

It may be argued that human rights treaties are not the only category of treaties which purports to create non-reciprocal rights and obligations for states.¹⁸ Other treaties, such as treaties for the protection of the environment, are similarly of a non-reciprocal nature. The result is that, if a special regime of reservations is claimed for human rights treaties on the basis of their non-reciprocal nature, a different regime of reservations may also be claimed for other treaties of a non-reciprocal nature.

The Vienna Convention's rules on reservations are based on a bilateral pattern of relationships between states, and are therefore not well suited to human rights treaties which are of a non-reciprocal nature.¹⁹ Although there are exceptions, in general, if the interests of states are not directly affected by reservations, states are not likely to act, given the non-reciprocal nature of the obligations.²⁰ The absence of reciprocity discourages states to object to inadmissible reservations, which makes the

¹⁴ A different approach has been taken by the European Commission on Human Rights with respect to the inter-state application of France against Turkey for an alleged breach of Article 15 of the European Convention. Although Turkey objected to the application, stating that France was barred from making an inter-state application against Turkey because of its reservation to Article 15, the Commission rejected this submission, and emphasized the 'objective character of the Convention'. See *France v. Turkey*, Application 9940/82, 26 *Yearbook of the European Convention on Human Rights* (1983), at Part II, para. 42.

¹⁵ Provost, *supra* note 12, at 383.

¹⁶ Pellet, 'Second Report', *supra* note 13, at 13, para. 81; Vierdag, 'Some Remarks About Special Features of Human Rights Treaties', in L.A.N.M. Barnhoorn and K.C. Wellens (eds), *Diversity in Secondary Rules and the Unity of International Law* (1995) 119, at 120.

¹⁷ Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', 64 *BYIL* (1993) 245, at 280.

¹⁸ Vierdag, *supra* note 16, at 125.

¹⁹ A. Pellet, 'First Report on the Law and Practice Relating to Reservations to Treaties', A/CN.4/470 (1995), at 63, para. 138.

²⁰ Bourguignon notes that: 'When a State perceives that its particular interest will be adversely affected by some other State's reservation, it has a strong incentive to object to it. The system of acceptance and objection works in an atmosphere of reciprocal self-interest found in traditional commercial-type multilateral agreements but falters badly when applied to most human rights treaties.' See Bourguignon, 'The Belilos Case: New Light on Reservations to Multilateral Treaties', 29 *Virginia Journal of International Law* (1989) 347, at 368.

general regime of reservations when applied to human rights treaties extremely ineffective.

B The Existence of a Treaty Supervisory Body

The existence of a treaty supervisory body is another feature which often distinguishes human rights treaties from other treaties. A number of human rights treaties establish a treaty supervisory body to monitor the implementation of the treaty. The monitoring of the implementation of human rights treaties includes the consideration of reports submitted by states on the fulfilment of their treaty obligations. It also includes an examination of individual and inter-state complaints.

Although most treaty supervisory bodies are created by human rights treaties, their existence is not a characteristic feature only of human rights treaties. A number of other treaties establish a body to monitor the fulfilment of obligations undertaken by states. Treaties on the protection of the environment and treaties on disarmament are illustrative in this regard. Although the functions of these supervisory bodies may include an examination of reports on the implementation of treaties by states, hardly any of the treaty supervisory bodies are competent to examine individual or inter-state complaints.

However, it may be argued that the existence of a treaty supervisory organ does not per se grant the relevant body the competence to determine the validity of reservations. It seems that the nature of treaty monitoring bodies and the functions they exercise are determinative in this respect.

It may be concluded that neither the non-reciprocal character of human rights treaties (although an important factor discouraging states to object to impermissible reservations) nor the existence of a treaty supervisory body in themselves provide a basis for granting a treaty monitoring body the competence to determine the validity of reservations.

3 The Regional Approach to the Validity of Reservations: The Experience of the European Convention on Human Rights

A The Regime of Reservations under the European Convention on Human Rights

Before analyzing the case law of the European Convention's supervisory institutions on the validity of reservations to the European Convention on Human Rights, it is necessary to outline the relevant provisions of the Convention on reservations. Article 57 (formerly Article 64) of the European Convention reads as follows:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.

2. Any reservation made under this article shall contain a brief statement of the law concerned.

The conditions for making reservations under the European Convention are as follows:

- 1 reservations should be made when expressing the consent of the state to be bound by the Convention;
- 2 reservations should be made to the extent that any law then in force in its territory is not in conformity with any particular provision of the Convention;
- 3 reservations should not be of a general character; and
- 4 reservations should contain a brief statement of the national law which is not in conformity with the provision of the Convention reserved.

The European Commission on Human Rights, in its decision in the *Temeltasch* case in 1982, considered a declaration to the European Convention on Human Rights made by Switzerland.²¹ The case dealt with the issue of whether Switzerland could invoke its interpretative declaration to Article 6(3)(e) of the Convention to remove the obligation to provide the free assistance of an interpreter if a person charged with a criminal offence cannot understand or speak the language used in court.²²

After determining that the Swiss interpretative declaration was a reservation, the European Commission considered the validity of the reservation. The Commission emphasized that the reservation was not 'of a general character' as it was clearly worded and expressly referred to a particular provision of the Convention.²³ The Commission also pointed out that, although the requirement that the reservations 'contain a brief statement of the law concerned' was not met, this requirement was regarded as a formality that did not automatically invalidate the Swiss reservation.

Based on Article 64 of the Convention, the Commission held the reservation to be valid. This decision of the Commission was the first departure from the general rule that only states may judge the validity of reservations. The Commission made it clear that it is competent to determine the validity of a reservation entered by states parties to the Convention.

This precedent paved the way for other cases in which the European Convention's supervisory bodies had to decide on the validity of reservations. The most important case in this regard was the *Belilos v. Switzerland* case.²⁴ Here, the European Court of Human Rights considered an interpretative declaration made by Switzerland under

²¹ *Temeltasch v. Switzerland* (1982) DR 31, 120.

²² MacDonald, 'Reservations under the European Convention on Human Rights', 21 *Revue belge de droit international* (1988) 429, at 435–436.

²³ The Commission pointed out that '[a] reservation is of a general character if it does not refer to a specific provision of the Convention or if it is worded in such a way that its scope cannot be defined'. *Temeltasch v. Switzerland* (1982) DR 31, 120, at 149, para. 84.

²⁴ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132.

Article 6(1) of the Convention which was regarded as constituting a reservation.²⁵ The Court pointed out that a reservation is general if it is ‘couched in terms that are too vague or broad for it to be possible to determine [its] exact meaning and scope’, and held that the Swiss reservation did not meet this requirement.²⁶ In addition, it was found that Switzerland failed to meet the requirement of Article 64(2). In contrast to the decision of the Commission in the *Temeltasch* case, the Court (and the Commission) in the *Belilos* case emphasized that the statement referred to in Article 64(2) of the Convention ‘is not a purely formal requirement but a condition of substance’.²⁷

After establishing that it was competent to determine the validity of the reservation, the Court held that the Swiss reservation was invalid and that Switzerland remains party to the Convention. The *Belilos* case was the first precedent in which an international court declared a reservation to a treaty invalid.

The European Court of Human Rights took a similar approach in the *Loizidou* case.²⁸ The case concerned Turkey’s acceptance of the competence of the European Commission on Human Rights and the European Court of Human Rights under Article 25 and Article 46 respectively to hear individual claims subject to, *inter alia*, a declaration restricting the territorial application of the European Convention with regard to northern Cyprus.

The Court referred to Article 64 of the Convention and pointed out that ‘[t]he power to make reservations under Article 64 is, however, a limited one, being confined to particular provisions of the Convention “to the extent that any law then in force in [the] territory [of the relevant contracting party] is not in conformity with the provisions”. In addition reservations of a general nature are prohibited.’²⁹ The Court then emphasized that ‘the existence of such a restrictive clause governing reservations suggests that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their “jurisdiction” from supervision of the Convention institutions’.³⁰ Therefore, taking into consideration the character of the Convention, the ordinary meaning of Articles 25 and 46 in the context of their object and purpose, and the practice of contracting parties, the Court concluded that the restrictions *ratione loci* attached to Turkey’s Article 25 and Article 46 declarations were invalid.³¹

²⁵ The Swiss declaration reads: ‘The Swiss Federal Council considers that the guarantee of fair trial in article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.’ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, at 20, para. 38.

²⁶ *Ibid.*, at 26, para. 55. Frowein, ‘Reservations to the European Convention on Human Rights’, in F. Matscher and H. Petzold (eds), *Protecting Human Rights: The European Dimension — Studies in Honour of Gérard J. Wiarda* (1988) 193, at 198.

²⁷ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, at 27–28, para. 59.

²⁸ *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995) Series A, No. 310.

²⁹ *Ibid.*, para. 76.

³⁰ *Ibid.*, para. 77.

³¹ P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998) 781–782.

B The Competence to Determine the Validity of Reservations

In the *Temeltasch* case, the European Commission on Human Rights based its competence to determine the validity of the Swiss reservation on ‘the very system of the Convention’.³² The Commission referred to the objective character of the Convention’s obligations, the collective enforcement of rights enshrined in the Convention and the function of the organs under Article 19 of the Convention to ensure ‘the observance of the engagements undertaken by the High Contracting Parties’.³³ The Commission emphasized that the Convention did not intend:

to concede to each other reciprocal rights and obligations in pursuance of their individual interests, but . . . to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedoms and the rule of law. . . The obligations undertaken by States are of an essentially objective character, which is particularly clear from the supervisory machinery established by the Convention. The latter ‘is founded upon the concept of a collective guarantee by the High Contracting Parties of the rights and freedoms set forth in the Convention’.³⁴

In the *Belilos* case, the European Court, noting that its jurisdiction in this respect ‘had not been disputed in the present case’, established its competence to determine the validity of the Swiss reservation by invoking Article 19 (providing that the Court and the Commission were established to ‘ensure the observance of the engagements undertaken by the state parties to the Convention’), Article 45 (providing that the Court has jurisdiction over the interpretation and application of the Convention) and Article 49 (providing that the Court has jurisdiction to determine its own jurisdiction).³⁵

In the *Loizidou* case, the Court held that, in addressing the validity of Turkey’s declarations under Articles 25 and 46 of the Convention, ‘the Court must bear in mind the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individuals, and its mission, as set out in Article 19, “to ensure the observance of the engagements undertaken by the High Contracting Parties”’.³⁶

An important element which contributed to the approach of the supervisory institutions of the European Convention to the validity of reservations is that the

³² *Temeltasch v. Switzerland* (1982) DR 31, 120, at 145, para. 65.

³³ *Ibid.*, at 144–145, paras 62–64.

³⁴ *Ibid.*, at 144–145, para. 63.

³⁵ The relevant paragraph of the case reads as follows: ‘The Court’s competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Articles 45 and 49 of the Convention, which were cited by the Government, and from Article 19 and the Court’s case law.’ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, at 24, para. 50. F. Jacobs and R. White, *The European Convention on Human Rights* (1996) 329; S. Marks, ‘Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights’, 39 *ICLQ* (1990) 300, at 307–308. In addition to the provisions of the Convention, the Court found its authority on its previous case law, in particular *Ettl v. Austria* (1987) Series A, No. 117, 5, at 19, para. 42, which in fact did not deal with the validity of the reservation.

³⁶ *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995) Series A, No. 310, at para. 93.

Convention is regarded as establishing a common European public order in the field of human rights.³⁷ The Court, in considering Turkey's declaration restricting *ratione loci* the jurisdiction of the Commission and the Court, went even further by characterizing the Convention as a 'constitutional instrument of European public order (*ordre public*)'.³⁸

The practice of the Commission and the Court has clearly diverged from the rule of the Vienna Convention on the Law of Treaties which provides that states individually determine the permissibility and validity of reservations. The case law discussed above demonstrates that the supervisory institutions of the European Convention are competent not only to interpret reservations, but also to determine the validity of such reservations. At least some of the elements which contributed to the competence of the supervisory organs to determine the permissibility of reservations and their validity under the Convention are clearly identifiable:

- 1 The Convention expressly states that the Court and the Commission are established to 'ensure the observance of the engagements undertaken by the state parties to the Convention'.
- 2 The Convention provides that the Court has jurisdiction over the interpretation and application of the Convention.
- 3 The Convention also provides that the Court has jurisdiction to determine its own jurisdiction.
- 4 The Convention determines the conditions for the validity of reservations, in particular the requirement that reservations of a general character are not permitted and that any reservations should contain a brief statement of any law not in conformity with the provision reserved.
- 5 The Convention has evolved into a constitutional instrument of European public order.³⁹
- 6 The rights and freedoms provided for in the Convention are of a non-reciprocal nature.

All these features have been considered essential by the Commission and the Court for taking a different approach to reservations than that taken by the general law of treaties.

4 The Developments at the Universal Level Preceding the Adoption of General Comment No. 24

Although the adoption of General Comment No. 24 may be considered as a new phase in the increasing role of treaty supervisory organs with regard to reservations at the

³⁷ *Temeltasch v. Switzerland* (1982) DR 31, 120, at 144–145, para. 63; *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995) Series A, No. 310, at para. 93. See also R. Lawson and H. Schermers, *Leading Cases of the European Court of Human Rights* (1999) 604–605.

³⁸ *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995) Series A, No. 310, at para. 75.

³⁹ It should be noted that, unlike the *Temeltasch* and *Loizidou* cases, the European Court of Human Rights in the *Belilos* case did not expressly refer to the concept of European public order.

universal level, it must be remembered that this process has been ongoing over a long period of time. The role of treaty supervisory organs with regard to reservations was on the agenda of the United Nations long before the adoption of General Comment No. 24 in 1994.

One of the earliest initiatives taken at the United Nations level to determine the role of a treaty monitoring body with regard to reservations occurred in 1976 in connection with the work of the Committee on the Elimination of Racial Discrimination. One of the questions referred to the Office of Legal Affairs of the United Nations by the Committee on the Elimination of Racial Discrimination for expert advice was whether the Committee had the authority to decide upon the compatibility of reservations entered to the Convention on the Elimination of Racial Discrimination.⁴⁰

The Office of Legal Affairs was unequivocal in its response, stating that the Committee had no competence to decide on the compatibility of reservations, as the Committee was not a representative organ of states parties which alone had general competence with regard to reservations to the Convention. The Office of Legal Affairs pointed out that '[w]hen a reservation has been accepted at the conclusion of the procedure expressly provided for by the Convention [Article 20], a decision — even a unanimous decision — by the Committee that such a reservation is unacceptable could not have any legal effect'.⁴¹ This position was subsequently adopted by the Committee.

Another example of the attempt to determine the role of a treaty supervisory organ with respect to reservations was made with regard to the Convention on the Elimination of All Forms of Discrimination Against Women. The Committee on the Elimination of Discrimination Against Women referred to the Office of Legal Affairs a question concerning the role of the Committee with regard to reservations that were incompatible with the object and purpose of the Convention. The opinion expressed by the Office of Legal Affairs was that 'the functions of the Committee do not appear to include a determination of the incompatibility of reservations, although reservations undoubtedly affect the application of the Convention and the Committee might have to comment thereon in its reports in this context'.⁴² Thus, the Office of Legal Affairs denied the competence of the Committee on the Elimination of Discrimination Against Women to determine the compatibility of reservations with the object and purpose of the Convention.

It is clear that these responses from the Office of Legal Affairs to the requests from the Committee on the Elimination of Racial Discrimination and the Committee on the

⁴⁰ 'Legal Effects of Statements of Interpretation and Other Declarations Made at the Time of Ratification or Accession', ST/LEG/SER.C/14, *UN Juridical Yearbook* (1976), at 219–221.

⁴¹ *Ibid.*, at 221, para. 8. See also Shelton, 'State Practice on Reservations to Human Rights Treaties', 1 *Canadian Human Rights Yearbook* (1983) 206, at 229–230.

⁴² 'The Legal Opinion of the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat upon an Inquiry by the Committee Concerning the Implementation of Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women', in 'Report of the Committee on the Elimination of Discrimination Against Women', vol. 2, Official Records of the General Assembly, 39th Session, Supplement No. 45, UN Doc. A/39/45, 55, at 56.

Elimination of Discrimination Against Women were based on Article 20 of the Vienna Convention on the Law of Treaties, according to which states determine the compatibility of reservations to the treaties.

In addition to the above, important steps have been taken to encourage states to withdraw their reservations, as the number and character of reservations greatly affect the effectiveness of human rights treaties. Particular attention was drawn to the problem of reservations at the fourth meeting (1992) of the chairpersons of UN treaty bodies.⁴³ It was agreed by the chairpersons that ‘States parties concerned should be urged to withdraw the reservations’.⁴⁴

In the light of the number, nature and scope of reservations made to the principal human rights treaties, chairpersons recommended taking a number of measures. It was recommended, *inter alia*, that if, in the view of the relevant treaty body, reservations ‘give rise to significant questions in terms of their apparent incompatibility with the object and purpose of the treaty, that treaty body should consider requesting the Economic and Social Council or the General Assembly, as appropriate, to request an advisory opinion on the issue from the International Court of Justice’.⁴⁵ The chairpersons emphasized that, if the present system relating to reservations is to function adequately, ‘States that are already parties to a particular treaty should give full consideration to lodging an objection on each occasion when that may be appropriate’.⁴⁶ States were also recommended to review regularly the reservations made and to set out the results of such reviews in their reports submitted to the treaty bodies concerned, in order to address the issues of reservations in the dialogue with states parties.⁴⁷

An even more assertive position was taken by the chairpersons during their fifth meeting (1994).⁴⁸ The chairpersons pointed out that ‘treaty bodies should be insistent in seeking explanations from States parties regarding the reasons for making and maintaining reservations to the relevant human rights treaties’.⁴⁹ Moreover, most significantly, they recommended that ‘treaty bodies state clearly that certain reservations to international human rights instruments are contrary to the object and purpose of those instruments and consequently incompatible with treaty law’.⁵⁰

The impact of reservations on the efficiency of universal human rights treaties was an object of concern of the World Conference on Human Rights held in 1993. The Vienna Declaration and Programme of Action encouraged states to avoid formulating reservations incompatible with the object and purpose of human rights instruments

⁴³ ‘Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights’, UN Doc. A/47/628, paras 36 and 60–65.

⁴⁴ *Ibid.*, at para. 36.

⁴⁵ *Ibid.*, at para. 61. No such request for an advisory opinion has been made so far.

⁴⁶ *Ibid.*, at para. 64.

⁴⁷ *Ibid.*, at para. 63.

⁴⁸ ‘Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights’, UN Doc. A/49/537 (1994).

⁴⁹ *Ibid.*, para. 30.

⁵⁰ *Ibid.*, para. 30.

and to consider their withdrawal.⁵¹ In addition, the opinions of individual members of the supervisory organs were clearly in support of a more active role for these organs in respect of reservations.⁵²

The above examples of the steps taken with regard to reservations clearly evidence the desire of supervisory organs to play a more assertive role in this regard.⁵³ It is clear that, from the beginning of the 1990s, the supervisory organs started to change their previously cautious approach to reservations to an increasingly active policy. This process culminated in General Comment No. 24 of the Human Rights Committee. In view of the developments preceding General Comment No. 24, its adoption was not at all surprising.

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

A Introduction

The Human Rights Committee established under the International Covenant on Civil and Political Rights adopted on 2 November 1994 'General Comment No. 24(52) on 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',⁵⁴

The Human Rights Committee in its General Comment No. 24 makes two important statements on its role with regard to reservations. In its first statement, the Committee points out that:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because . . . it is an inappropriate

⁵¹ See para. 5 of Chapter I and para. 26 of Chapter II of the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 ch. III (1993) reproduced in 14 *HRLJ* (1993) 352, at 356 and 357.

⁵² The view expressed by the then member of the Human Rights Committee, R. Higgins, is illustrative in this regard: 'The classic position that reservations to treaties were a matter of State sovereignty did not work for human rights treaties, in which States mutually agreed to give certain rights to individuals. The reality was that, for the most part, States did not recognize their mutuality of interests in the field of human rights, and failed to monitor reservations. The Committee should surely not take the conservative view that a State party should make whatever reservation it chose and that the Committee would do nothing. If the Committee did not take up the general question of reservations to the Covenant, no one else would do so.' CCPR/C/SR.1167 (1992), at 10, para. 67.

⁵³ An assertive role for treaty monitoring bodies has been reflected in their practice. See W. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform', 32 *Canadian Yearbook of International Law* (1994) 39, at 70.

⁵⁴ UN Doc. CCPR/C/21/Rev.1/Add.6. Reproduced in 15 *HRLJ* (1994) 464. It should be noted that the Covenant contains no reservation clause, despite the UN General Assembly's request to include a provision on reservations and despite attempts by some states to incorporate a reservation clause in the Covenant. Despite the failure of states to agree upon a particular regime on reservations, it was made clear that the 'object and purpose' test established in the *Genocide Convention* case would be applicable to the Covenant.

task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.⁵⁵

In its second statement, which was closely related to the first statement, the Human Rights Committee emphasized that:

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

The above statements are clear that the Human Rights Committee considers itself to be competent to determine: (a) the compatibility of a reservation with the object and purpose of the Covenant; and (b) the consequences of an incompatible reservation.

In contrast to the approach of the Human Rights Committee, international law provides that it is for each state party to determine the compatibility of a reservation with the object and purpose of a treaty and the legal consequences of a reservation *vis-à-vis* a reserving state. The issue of whether or not the Human Rights Committee has the competence to determine the permissibility of a reservation and the consequences of an impermissible reservation became the object of divergent opinions among legal scholars and practitioners. While some argue that the Human Rights Committee has the authority to determine the compatibility of a reservation with the object and purpose of the Covenant and the consequences of an incompatible reservation, others argue that the validity of a reservation may not be determined by the Committee. Therefore, it is important to examine the arguments for and against the claimed competence.

First, the competence of the Human Rights Committee to determine the compatibility of a reservation with the object and purpose of the Covenant will be examined. Secondly, the competence of the Committee to determine the consequences of an incompatible reservation to the Covenant will be dealt with.

B The Competence of the Human Rights Committee to Determine the Admissibility of Reservations

In order to determine which body has the authority to decide whether a reservation is compatible with the object and purpose of the Covenant, the Human Rights Committee in its General Comment No. 24 initially addressed the rules on objections to reservations, and the consequences of such objections, in respect of 'international treaties in general', as provided for in the *Genocide Convention* Advisory Opinion and

⁵⁵ 15 *HRLJ* (1994) 464, at 467, para. 18.

the Vienna Convention on the Law of Treaties. After their analysis, the Committee concluded that 'the Committee believes that [the Vienna Convention's] provisions on the role of State objections in relation to reservations are *inappropriate* to address the problem of reservations to human rights treaties'.⁵⁶

To justify this view, the Committee referred to the non-reciprocal nature of human rights treaties as one of the reasons for the inappropriateness of the application of the general regime to such treaties. The Committee noted:

Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under Article 41.⁵⁷

The Committee placed an emphasis on the effect of the non-reciprocal nature of the Covenant on reservations by stating that, 'because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservation'.⁵⁸

General Comment No. 24 also referred to the ambiguities evidenced by the state practice of objecting to reservations to the Covenant, and concluded that 'the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable'.⁵⁹ This appears to be a valid reasoning since non-objection by a state does not necessarily imply that a state considers a reservation permissible. A state may remain silent as to a reservation not because it considers the reservation permissible, but because it considers that the reservation fails to meet the object and purpose test under Article 19(c) of the Vienna Convention and, therefore, no objection is necessary.

Most of the human rights treaties do not contain a reservation clause.⁶⁰ In the absence of a reservation clause in a treaty, neither Article 19(a) nor Article 19(b) applies. For these treaties, the only applicable provision for determination of the admissibility of a reservation is Article 19(c), which provides that a reservation should be compatible with the object and purpose of the treaty. As, under the Vienna

⁵⁶ *Ibid.*, at 467, para. 17 (emphasis added). Rama-Montaldo, 'Human Rights Conventions and Reservations to Treaties', in *Héctor Gros Espiel Amicorum Liber*, vol. 2 (1997) 1261, at 1268–1269.

⁵⁷ 15 *HRLJ* (1994) 464, at 467, para. 17.

⁵⁸ *Ibid.*

⁵⁹ This part of para. 17 reads as follows: 'The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on ground not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States *inter se*.' 15 *HRLJ* (1994) 464, at 467, para. 17.

⁶⁰ However, there are some exceptions, which include the Convention on the Elimination of Discrimination Against Women (Article 28(2)) and the Convention on the Rights of the Child (Article 51(2)) restating the rule of the Vienna Convention on the compatibility of a reservation with the object and purpose of a treaty.

Convention, every state individually determines the admissibility of reservations and the consequences of inadmissible reservations, the position of states with regard to reservations entered varies to a great extent.

Although the Vienna Convention establishes the rules on the acceptance of and objections to reservations (Article 20) as well as rules on the legal effect of reservations and of objections to reservations (Article 21), the Convention fails to make it clear whether the provisions of Articles 20 and 21 are applicable only to admissible reservations or are applicable to both admissible and inadmissible reservations.⁶¹ In other words, the Convention is silent as to whether a reservation is admissible only if it is compatible with the object and purpose of a treaty.⁶² Nor does it answer the question of the legal effect of an inadmissible reservation.

This gap in the Vienna Convention gave rise to a permissibility/opposability debate. Two doctrinal schools have been established in this regard.⁶³ According to the *permissibility (admissibility)* doctrine, reservations incompatible with the object and purpose of a treaty are impermissible and cannot be accepted by other states.⁶⁴ Under this view, which distinguishes the scope of Article 19(c) and Article 20(4), ‘the effect of an impermissible reservation should not depend upon the reactions of the other parties’.⁶⁵ Permissibility is the ‘preliminary issue’.⁶⁶ The supporters of this doctrine maintain that opposability arises only in relation to a permissible reservation and involves inquiring into the reactions of the parties to that reservation and the effect of such reactions. The opposability of a reservation may be raised only if the reservation successfully passes the object and purpose test.⁶⁷ According to this doctrine, if the reservation is compatible with the object and purpose of a treaty, other states may either accept it or object for reasons other than incompatibility with the object and purpose of a treaty.

Support for the permissibility doctrine may be found in the commentary of the ILC to the draft Articles on the law of treaties in which the ILC pointed out that Article 16 of the draft (Article 19 of the Convention) ‘has . . . to be read in close conjunction with

⁶¹ ‘Second Report’, *supra* note 13, at para. 177.

⁶² ‘Report of the International Law Commission on the Work of Its Forty-Ninth Session’, Official Records of the General Assembly, Fifty-Second Session, Supplement No. 10, UN Doc. A/52/10, at 112 (1997).

⁶³ Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’, 64 *BYIL* (1993) 245, at 263.

⁶⁴ Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’, 46 *ICLQ* (1997) 390, at 405.

⁶⁵ Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’, 48 *BYIL* (1976–1977) 67, at 89.

⁶⁶ According to Bowett, permissibility ‘must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservation acceptance or not. The consequence of finding a reservation “impermissible” may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.’ Bowett, *supra* note 65, at 88.

⁶⁷ Coccia, ‘Reservations to Multilateral Treaties on Human Rights’, 15 *California Western International Law Journal* (1985) 1, at 24; Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’, 30 *Virginia Journal of International Law* (1990) 643, at 657–658.

the provisions of article 17 [Article 20 of the Convention] regarding acceptance of and objection to reservations'.⁶⁸

Support for this doctrine may also be found in the *Genocide Convention* Advisory Opinion which limits the freedom to make reservations (and the freedom to object to reservations) on the ground of the compatibility of a reservation with the object and purpose of the treaty where the treaty in question is silent in this regard.⁶⁹

On the other hand, according to the *opposability (acceptability)* doctrine, '[t]he validity of a reservation depends . . . on whether the reservation is or is not accepted by another State, not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty'.⁷⁰ Supporters of this doctrine view Article 19(c) 'as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that'.⁷¹

The link between Article 19(c) and Article 20(4) leads to contradictory interpretations.

The applicable rule is complicated by Article 20(5) of the Vienna Convention which regards an absence of an objection to a reservation as an acceptance.

The argument based on the non-reciprocal nature of the Covenant makes it clear that, in addition to political considerations and administrative difficulties (which are often the reasons why no objections are made to impermissible reservations), the lack of objections to reservations made to the Covenant as a human rights treaty is also due to its non-reciprocal nature, as states see no legal interest or need to object to such reservations.

However, if we take a closer look at the statement of the Human Rights Committee, not all of its reasoning is convincing. It emphasizes that, because of the non-reciprocal nature of human rights treaties, it is an 'inappropriate task' for states parties in relation to human rights treaties to determine the compatibility of a reservation with the object and purpose of the treaty. This view seems to be an exaggerated appraisal of the absence of any legal interest in objecting to a reservation and of an ambiguous pattern of objections. The absence of a legal interest or a need to object to reservations, and the ambiguous pattern of objections, in themselves are not arguments for or against the inappropriateness of this task for states.

Another argument referred to by the Human Rights Committee in General Comment No. 24 for claiming the competence to determine the compatibility of a reservation with the object and purpose of the Covenant is that 'it is a task that the

⁶⁸ *Yearbook of the International Law Commission*, vol. 2 (1966) 207.

⁶⁹ The relevant passage of the Advisory Opinion reads as follows: 'The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservations on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.' *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951) 15, at 24.

⁷⁰ Ruda, 'Reservations to Treaties', 146 *RdC* (1975-III) 190.

⁷¹ *Ibid.*

Committee cannot avoid in the performance of its functions'.⁷² The Committee further pointed out that, in the performance of its functions, namely, an examination of a state's compliance under Article 40 or a communication under the first Optional Protocol, the Committee has 'necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law'.⁷³

The main question to be addressed here in order to judge the persuasiveness of the Committee's argument is whether or not an examination of a state's report or an individual communication necessarily requires taking a view on the compatibility of a reservation with the object and purpose of the Covenant. It may be assumed that the Committee's taking a view on whether a state party to the Covenant is bound by a specific provision inevitably implies the interpretation of a reservation by establishing the scope of the restrictions provided for in a reservation. The interpretation of the reservation will result in taking a view on whether a reservation either meets the object and purpose test and therefore is permissible or fails to meet this test and therefore is impermissible.

The argument that the Human Rights Committee may have the competence to determine the compatibility of a reservation with the object and purpose of the Covenant is supported by its functional necessity. The functions of the Committee, as provided for in the Covenant, in practice necessitate the Committee taking steps not explicitly mentioned in the Covenant.⁷⁴

It may be argued that the Human Rights Committee established by the Covenant as an organ to monitor the effective implementation of the Covenant will necessarily have to develop its practice in order to secure the effectiveness of the rights set forth in the Covenant. It is clear that the effectiveness of human rights treaties (as well as treaties in general) is reduced by reservations and in particular reservations which conflict with the object and purpose of the treaty in question. The treaty supervisory organ not only has the right to take appropriate measures to secure the effectiveness of the instrument which creates the supervisory organ but also has a duty to do so. It seems logical that the Human Rights Committee as a supervisory organ should necessarily take measures against those reservations which 'may undermine the effective implementation of the Covenant and tend to weaken respect for the

⁷² 15 *HRLJ* (1994) 464, at 467, para. 18.

⁷³ It should be noted that, in its observations on General Comment No. 24, the United Kingdom acknowledged that the Human Rights Committee 'must necessarily be able to take a view of the status and effect of a reservation to carry out its functions', but disagreed that the Committee has the competence to 'determine' the compatibility of a reservation. See 'Observations of the United Kingdom on General Comment No. 24', in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (1997), Appendix 2, at 196.

⁷⁴ Opsahl, 'The Human Rights Committee', in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1991) 369, at 396–397; Giegerich, 'Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien — Ein Konstitutioneller Ansatz' ['Reservations to Human Rights Agreements: Admissibility, Validity and Review Powers of Treaty Bodies — A Constitutional Approach'], 55 *ZaöRV* (1995) 713, at 781 (includes a summary in English); Rama-Montaldo, *supra* note 56, at 1271.

obligations of State Parties'.⁷⁵ The way to take effective measures in this respect, even if it is not expressly provided for in a treaty, is to develop the practice.

The functional justification of the competence of the Human Rights Committee to determine compatibility is supported by the practice of making reservations to the monitoring role of the Committee. It will be recalled that General Comment No. 24 determines what, in the opinion of the Committee, constitutes the object and purpose of the Covenant. It notes that: 'The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.'⁷⁶

A reservation which hinders an efficient supervisory machinery for the implementation of the rights provided for in the Covenant should be deemed incompatible with the object and purpose of the Covenant. Since one of the functions of the Human Rights Committee in monitoring the implementation of rights provided for in the Covenant is to examine periodical reports of states, a reservation which precludes carrying out this function should be regarded as incompatible with the object and purpose of the Covenant. This is expressly stated in General Comment No. 24: 'A State may not reserve the right not to present a report and have it considered by the Committee.'⁷⁷

A reservation entered by a state to Article 40 aimed at excluding the competence of the Human Rights Committee to examine periodic reports, will most probably not be objected to by other states since those states will not have a direct interest in objecting other than in order to maintain the effectiveness of the Covenant. It would be in the direct interest of the Committee to have a report of a state examined.

The reservations to the monitoring role of the Human Rights Committee and their detrimental effect on the proper operation of the monitoring system support the view that the Committee should have the competence to pronounce on the compatibility of such reservations.

An argument which is frequently used to deny the role of treaty monitoring bodies, including the Human Rights Committee, with regard to reservations is that such bodies lack the power to make binding decisions.⁷⁸ Both the intention of the drafters of

⁷⁵ 15 HRLJ (1994) 464, at para. 1.

⁷⁶ *Ibid.*, at 465, para. 7 (emphasis added).

⁷⁷ *Ibid.*, at 464, para. 11.

⁷⁸ According to Pellet: 'Although it seems controversial, the answer to [the] question [whether the findings of the treaty monitoring bodies are binding on the reserving states] does not present any problem. Indeed, it seems almost obvious that the authority of the findings made by the monitoring body on the question of reservations will depend on the powers with which the body is invested: they will have the force of *res judicata* where the body is jurisdictional in character, or is arbitral and adjudicates and will have the status of advisory opinions or recommendations in other cases.' Pellet, 'Second Report', *supra* note 13, at 80, para. 234.

the Covenant and the provisions of the Covenant and the Optional Protocol make it clear that the Committee has no power to make binding decisions.⁷⁹

Although the Human Rights Committee in its General Comment No. 24 states that it falls to the Committee to ‘determine’ the admissibility of reservations, it is not expressly stated whether the determination of permissibility will be binding on a reserving state.⁸⁰ Despite this uncertainty, what may be definitely asserted is that all states parties to the Covenant should examine the findings of the Committee in good faith.

The lack of an express power for the Committee to make binding decisions does not mean that there is no mechanism to implement its findings. It has been rightly suggested that, if a state party does not follow the views of the Human Rights Committee with regard to reservations, the Committee may bring the matter to the attention of the UN General Assembly, as it does in the case of a failure by states to submit state reports under Article 40 of the Covenant.⁸¹

The Human Rights Committee in its General Comment No. 24 also referred to the necessity to determine *objectively* the compatibility of a reservation with the object and purpose of the Covenant. The General Comment emphasized that the Committee is ‘particularly well placed to perform this task’. The argument of objectivity in determining compatibility is convincing. It is emphasized that the Human Rights Committee consists of experts who act in their personal capacity, who are not subject to instructions from their governments and who are impartial in carrying out their functions. If the membership of the Human Rights Committee were composed of state officials acting in their official capacity, this would greatly reduce the persuasiveness of the argument that the Human Rights Committee has the power to make a compatibility determination.

Thus, it may be concluded that the Human Rights Committee puts an emphasis on functional necessity in order to justify its role with regard to reservations rather than claiming such competence on a legal basis. It is clear that, under the Covenant, the Human Rights Committee has no express power either to decide upon the compatibility of reservations with the object and purpose of the Covenant or to make legally binding decisions.

The dynamic nature of human rights may also be considered as an argument in favour of granting the Human Rights Committee the competence to determine the compatibility of a reservation with the object and purpose of the Covenant. As is widely recognized, the content of human rights may change over time. The same

⁷⁹ M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (1987) 652–653. See Articles 40 and 41 of the Covenant and Article 5 of the Optional Protocol. See also Pellet, ‘Second Report’, *supra* note 13, at 81, para. 237.

⁸⁰ Ando, ‘Reservations to Multilateral Human Rights Treaties: The General Comment of the Human Rights Committee and the Critique of the Comment’, in T. Schoenbaum, J. Nakagawa and L. Reif (eds), *Trilateral Perspectives on International Legal Issues: From Theory into Practice* (1998) 111, at 117. See also ‘Observations of the United Kingdom on General Comment No. 24’, *supra* note 73, at para. 11.

⁸¹ Cameron and Horn, ‘Reservations to the European Convention on Human Rights: The Belilos Case’, 33 *GYIL* (1990) 69, at 96.

holds true for human rights treaties, and in particular the Covenant. Although its express provisions may not be changed, the substance of the rights may be modified to ensure better protection of the rights of individuals. The Committee's individual communication system essentially contributes to this dynamism. In addition, the Committee's practice of adopting general comments, although they lack the status of authoritative interpretations of the Covenant, has a significant impact on understanding the meaning of various provisions of the Covenant.

The change of the content of the rights and freedoms will necessarily lead to a change in the object and purpose of the Covenant.⁸² The dynamism of human rights, considered in the context of reservations entered to the Covenant, may lend support to the Human Rights Committee's approach to reservations. For example, a reservation made during the ratification of or accession to the Covenant may be considered by other states parties to be compatible with its object and purpose and therefore acceptable to them. The interpretation of the Covenant over time may make it clear that the reservation entered is in conflict with the object and purpose of the Covenant. If a reserving state does not itself withdraw its reservation, other states cannot object to the reservation they previously consented to.

Unlike states parties to the Covenant, the Human Rights Committee may adequately respond to this dynamism by determining the compatibility of a reservation with the object and purpose of the Covenant and by determining the legal consequences of an incompatible reservation. This feature of human rights will lead to the view that there is a risk for states that their reservations may be declared inadmissible over the course of time.

It may be concluded that, in the light of the dynamic nature of human rights treaties, in particular the Covenant, the Human Rights Committee is best suited to determining whether or not certain reservations are in conformity with the object and purpose of the Covenant.

1 The Mode of Determination of Admissibility by the Human Rights Committee

An important issue which will inevitably arise in the practice of a treaty supervisory organ competent to determine the compatibility of a reservation with the object and purpose of a treaty is how a supervisory organ will fulfil this function. It seems that several options are possible: the supervisory organ will either make an objective determination of the compatibility of a reservation with the object and purpose, or (in addition to its own evaluation of compatibility) it will rely on the reactions of other states parties to the reservation entered. It would also be possible for the supervisory organ to determine the compatibility of the object and purpose of a treaty solely on the basis of the subjective approach of other states parties to a treaty.

The Human Rights Committee makes an unambiguous statement in its General Comment No. 24 on the way it will make a compatibility determination. The Committee points out that 'an objection to a reservation made by States may provide

⁸² W. Schabas, 'Reservations to the Convention on the Rights of the Child', 18 *Human Rights Quarterly* (1996) 472, at 479.

some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant'.⁸³ This statement sheds light on the position of the Committee as to how it will determine the compatibility of a reservation with the object and purpose of the Covenant. The 'some guidance' to which the Committee refers certainly implies that it will rely on the reactions of states as to whether or not they consider a reservation compatible with the object and purpose of the Covenant.

The reference to 'some guidance' seems to be a correct evaluation of the 'importance' of reactions of states to reservations, as states tend to show no or little interest in reservations to non-reciprocal obligations in the Covenant. As the Committee emphasizes in its General Comment No. 24, the absence of protest by states cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. This statement in General Comment No. 24 requires us to take a cautious view on the importance of the reactions of states to reservations.

The claim by the Human Rights Committee to have the competence to determine the compatibility of a reservation with the object and purpose of the Covenant gives rise to the question of whether or not objections or acceptances of states will continue to have a legal effect *vis-à-vis* the reserving state. Although it may be argued that the competence of the Committee to make a compatibility determination does not exclude the power of states to carry out a similar function, it may be assumed that, without providing an appropriate machinery of complementarity, the parallel system of evaluation of the compatibility of a reservation with the object and purpose of the Covenant, on the one hand, by the Committee, and, on the other, by states, will presumably lead to legal uncertainties in this respect.⁸⁴ Without an effective machinery, this parallel system will raise a number of difficult legal issues when, for example, the views of the Committee and the states parties conflict.⁸⁵ This parallel system of determining the compatibility of a reservation with the object and purpose of the Covenant does not seem to be the intention of the drafters of General Comment No. 24.

The reference to 'some guidance' suggests that the Human Rights Committee still considers the role of states in objecting or accepting reservations to be relevant. Since the Committee declares that it will rely on the reactions of states to reservations, it would certainly be pointless to suppose that the Committee intends to ignore such objections and acceptances by states.

It appears that, in the Committee's view, the reactions of states will only serve the

⁸³ 15 *HRLJ* (1994) 464, at 467, para. 17 (emphasis added).

⁸⁴ It is important to note that a number of delegations at the Sixth Committee of the UN General Assembly, during discussion on the Preliminary Conclusions of the ILC, expressed the view that the admissibility of reservations should be assessed jointly by monitoring bodies (where they existed) and states parties to the human rights conventions. See A. Pellet, 'Third Report on Reservations to Treaties', *A/CN.4/491* (1998), at 6, para. 19.

⁸⁵ Pellet points out in this respect that 'the possibilities of cross-verification in fact strengthen the opportunity for the reservations regime to play its real role. The problem is not of setting one up against the other or, in the case of a single system, of seeking to affirm its monopoly over the others, but of combining them so as to strengthen their overall effectiveness, for, while their modalities differ, their end purpose is the same.' Pellet, 'Second Report', *supra* note 13, at 72–73, para. 214.

Committee as evidence for the interpretation of compatibility. In other words, it may be supposed that the Committee views objections and acceptances by states to reservations as only an evidential matter. However, objections to reservations will still have legal consequences *vis-à-vis* the reserving state and the objecting state.

Thus, based on the wording and the lack of importance attached to the reactions of states to reservations, the Human Rights Committee argued that it has the exclusive competence to determine compatibility with the object and purpose of the Covenant. However, the Committee does not exclude reliance on the reactions of states parties as evidence of interpretation of the compatibility.

In practice, it may be argued by a reserving state that silence on the part of other states parties to the Covenant should be understood as tacit consent by these states parties, and thus bar the Human Rights Committee from determining the compatibility of the reservation with the object and purpose of the Covenant. The European Commission and the European Court have considered similar situations in their practice.

The European Commission in the *Temeltasch* case pointed out that, 'even assuming that some legal effect were to be attributed to an acceptance or an objection made in respect of a reservation to the Convention, this could not rule out the Commission's competence to decide the compliance of a given reservation or an interpretative declaration with the Convention'.⁸⁶ In the *Belilos* case, the European Court pointed out that 'the silence of . . . the Contracting Parties does not deprive the Convention organs of the power to make their own assessment [of the reservation]'.⁸⁷

In both cases, the supervisory institutions made it clear that they are competent to determine the compatibility of a reservation. In the *Loizidou* case, the European Court, which declared the restrictions attached to Turkey's Article 25 and Article 46 declarations invalid, relied heavily on the reactions of other states parties to Turkey's declaration.

The preference shown by the Human Rights Committee for its own interpretation of compatibility, relegating the reactions of states parties to 'guidance' only, may partly be explained by the shortcomings of the possible alternative. If the Human Rights Committee took the view that it would interpret the compatibility of a reservation with the object and purpose of the Covenant on the basis of the subjective reactions of states parties, the Committee would open Pandora's box. This would raise issues such as: how many objections were necessary for declaring a reservation incompatible with the object and purpose of the Covenant? What would happen if some states objected to a reservation but others accepted it? Would the Committee declare a reservation incompatible with the object and purpose of the Covenant if the majority of states objected to a reservation but the Committee was of the opinion that the reservation was compatible with its object and purpose? These and other questions would need answering.

It may be concluded that the Human Rights Committee will apply its own subjective

⁸⁶ *Temeltasch v. Switzerland* (1982) DR 31, 120, at 144, para. 61.

⁸⁷ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, at para. 47.

standard in interpreting the compatibility of a reservation with the object and purpose of the Covenant. However, the Committee will rely on the subjective approach of states parties only as an additional means of interpreting compatibility.

However, whether states accept the limited role of objections to reservations not entailing legal consequences between objecting states and a reserving state will depend on the formulation of their objections to new reservations. If states refer only to whether or not they consider a reservation compatible with the object and purpose of the Covenant without determining the consequences of an incompatible reservation, the Human Rights Committee's view on its exclusive role in determining the compatibility of a reservation with the object and purpose of the Covenant will be considered to be accepted by the states.

The approach taken by the Human Rights Committee in its practice will be discussed below.

2 *Modification of Incompatible Reservations*

An issue which may arise in practice is the possible modification of a reservation that has been found to be inadmissible.⁸⁸ It is clear that no such possibility exists under the Vienna Convention on the Law of Treaties, which provides in Article 2(1)(d) that a reservation may be made 'when signing, ratifying, accepting, approving or acceding to a treaty', i.e. when a state expresses its consent to be bound by a treaty.⁸⁹ The Human Rights Committee, in General Comment No. 24, is silent on the matter of the modification of a reservation. However, the possibility of the modification of a reservation should not be excluded.⁹⁰

If the Human Rights Committee finds a reservation incompatible with the object and purpose of the Covenant, it may not necessarily go directly to the extreme measure of severing an incompatible reservation but may instead request the reserving state to modify the reservation appropriately in order to bring it into line with the object and purpose of the Covenant. This possibility may be inferred from the wording of the statement of the Human Rights Committee on the consequences of an incompatible reservation when General Comment No. 24 points out that the *normal* consequence of an incompatible reservation will be that such a reservation will *generally* be severable.

However, although the possibility of requesting a reserving state to modify its

⁸⁸ Bourguignon considers that '[a]n amended reservation would be a bizarre novelty in international law'. Bourguignon, *supra* note 20, at 383.

⁸⁹ It should be pointed out that the developments under the European Convention on Human Rights confirmed this possibility. After the judgment of the European Court of Human Rights in the *Belilos* case, in which the Swiss reservation was declared invalid as it failed to meet the generality requirement and did not provide for a statement of the national laws as required under Article 64 of the Convention, Switzerland amended its reservation by providing a lengthy list of national laws. It is, however, to be noted that in the *Belilos* case the amendment was made *after* the Swiss reservation was declared invalid. Marks, 'Three Regional Human Rights Treaties and Their Experience of Reservations', in Gardner, *supra* note 73, at 44.

⁹⁰ It should be recalled that Switzerland has modified its reservation to the European Convention as a result of the judgment of the European Court in the *Belilos* case. See *supra* note 89.

reservation exists both with regard to an examination of periodical reports and to individual communications, in practice the possibility is greater with regard to periodical reports. In the case of individual communications, the Committee will have to consider a specific situation and will have to decide on the admissibility of a communication.

The possibility of modifying a reservation has been emphasized by the Special Rapporteur of the International Law Commission. He stated in his report that one of the means a reserving state could use in order to 'regularize' the situation is the replacement of an impermissible reservation with a permissible reservation. However, the suggestion of the Special Rapporteur is that it is at the discretion of a reserving state (and not of a monitoring body) to take such measures as it deems appropriate, which includes maintaining or withdrawing a reservation or renouncing its ratification of a treaty.⁹¹

3 The (Non-)Applicability of the '12 Months Rule' Under General Comment No. 24

The Human Rights Committee in its General Comment No. 24 did not expressly state whether the '12 months tacit consent rule' set forth in Article 20(5) of the Vienna Convention will be applicable in a determination by the Committee of the compatibility of a reservation with the object and purpose of the Covenant. It seems that the only reasonable interpretation of the Committee's silence in this respect is that it will not follow the 12 months tacit consent rule. The reason is not difficult to identify. The Committee may simply have no chance to determine the compatibility of a reservation with the object and purpose of the Covenant, unless an individual communication is submitted for examination.

In practice, the 12 months tacit consent rule will also be inapplicable as regards the examination of reports. As is stated in Article 40(1)(a) of the Covenant, a state party undertakes to submit to the Human Rights Committee a report on the implementation of the Covenant within one year of the entry into force of the Covenant for the state concerned. Even if a reserving state submits its report to the Committee within one year, in practice it takes quite a long time from submission of a report to its actual examination.

It may be concluded that the Committee should not be prevented from determining the compatibility of a reservation with the object and purpose of the Covenant, even if the 12-month time limit expires. The non-applicability of the 12 months rule has clearly been established under the case law of the European Convention on Human Rights.

C Competence to Determine the Consequences of Inadmissible Reservations

In its second statement, the Human Rights Committee declared that the Committee itself will determine the consequences of an inadmissible reservation. General

⁹¹ 'Report of the International Law Commission on the Work of its Forty-Ninth Session', *supra* note 62, at 107, paras 85–86.

Comment No. 24 points out, without any legal reasoning, that: ‘The normal consequences of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.’ This statement makes it clear that, in addition to the competence to determine the compatibility of a reservation with the object and purpose of the Covenant, the Human Rights Committee claims the competence to judge the consequences of impermissible reservations.

Two important conclusions may be drawn from this statement. The first conclusion is that, if the Human Rights Committee finds a reservation incompatible with the object and purpose of the Covenant, the Covenant itself will normally not cease to be binding on a reserving state. The state will remain a party to the Covenant. The second conclusion is that the Human Rights Committee will generally sever an incompatible reservation from the consent of the reserving state to be bound by the Covenant, and thus the reserving state will not benefit from its reservation. In other words, the Committee will declare an impermissible reservation invalid and the state will continue to be a party to the Covenant without the intended effect of a the reservation.

There is no doubt that the intention of the Human Rights Committee is to apply at the universal level the severability doctrine evolved at the regional level. The claim of competence to determine the consequences of impermissible reservations by the Human Rights Committee brought critical reaction from several states which immediately reacted to the severability approach of the Human Rights Committee. The United States,⁹² the United Kingdom and France submitted written observations on various issues dealt with in General Comment No. 24, including the severability approach.

According to the United States’ written observations, the severability approach of the Human Rights Committee is ‘completely at odds with established legal practice and principles’.⁹³ It further pointed out that:

The reservations contained in the United States’ instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified.⁹⁴

The United Kingdom, in its written observations, took a similar position to that of

⁹² The importance attached by the United States to General Comment No. 24 is demonstrated by the fact that the United States Congress passed a Bill purporting to cut off funding for the United States’ obligations under the Covenant beginning in 1998, unless the Human Rights Committee revoked the Comment and expressly recognized the validity of the United States’ reservations, declarations and understandings. However, the Bill was vetoed by the President of the United States. See Baylis, ‘General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties’, 17 *Berkeley Journal of International Law* (1999) 277, at 318–319.

⁹³ See ‘Observations of the United States of America on General Comment No. 24’, in Gardner, *supra* note 73, Appendix 3, at 202.

⁹⁴ *Ibid.*, at 202.

the United States, and emphasized that the approach of the Human Rights Committee was 'deeply contrary to principle'.⁹⁵ Referring to the approach taken by the International Court of Justice as the only sound one, the United Kingdom noted that:

a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at all — unless it withdraws the reservation.⁹⁶

France also commented on the severability approach of the Human Rights Committee. It stated that:

France rejects this entire analysis and considers the last sentence ['such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'] to be incompatible with the law of treaties. France believes it should be noted that agreements, whatever their nature, are governed by the law of treaties, that they are based on States' consent and that reservations are conditions which States attach to that consent; it necessarily follows that if these reservations are deemed incompatible with the purpose and object of the treaty, the only course open is to declare that this consent is not valid and decide that these States cannot be considered parties to the instrument in question.⁹⁷

It may be concluded from the above comments that these states consider that a reservation is a condition attached to the consent of a state to be bound by a treaty, and is therefore not severable; and, even if a reservation is found incompatible with the object and purpose of a treaty, the reservation may not be severed from the consent to be bound by a treaty. Instead, a state will not be considered a party to a treaty.

From this analysis it is evident that the main controversy between the approach of the Human Rights Committee and that of the United States, the United Kingdom and France concerns which expression of *will* should prevail. The statement of the Human Rights Committee is unambiguous: the consequence of determining the inadmissibility of a reservation is not that the reserving state will not be regarded as a party to the treaty; rather, the state will be deemed a party but its reservation will be invalidated. On the other hand, the position of the United States, the United Kingdom and France is that, if a reservation is found inadmissible, it may not be severed from the consent of the state to be bound by a treaty. Rather, the state will not be considered a party to a treaty. The former argument maintains that the will of a state to be bound

⁹⁵ 'Observations of the United Kingdom on General Comment No. 24', *supra* note 73, at 197.

⁹⁶ *Ibid.*, at 198. See the opinion of Judge Higgins on the interpretation by the United Kingdom of the approach of the International Court of Justice: 'But has the International Court adopted such a principle? Certainly not in the *Reservations* case. What the Court said in the *Reservations* case was rather different: that its rejection of the unanimity would decide whether that affected only the relationship between itself and the reserving State, or whether the decision "might aim at the complete exclusion from the Convention".' Higgins, 'Introduction', in Gardner, *supra* note 73, at xxvi.

⁹⁷ Official Records of the General Assembly, Supplement No. 40, UN Doc. A/51/40, at 106. Although the United Kingdom and France apparently accept the severability approach taken by the European Commission and the European Court under the European Convention on Human Rights, nevertheless the two same states clearly deny the applicability of the severability approach with respect to the Covenant, thus apparently assuming that there is a substantial difference between the European Convention and the Covenant.

by a treaty should prevail over the will to reserve certain provisions of a treaty. The latter argument maintains that, since a reservation is a condition which a state attaches to its consent to be bound by a treaty, the will to enter a reservation prevails over the will to be bound by the treaty.

As no express answer to the question can be found in the Vienna Convention on the Law of Treaties as to which expression of will should prevail in the context of reservations, the opinion expressed by Judge Lauterpacht in the *Interhandel* case may serve as a good starting point for our analysis. He stated that:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration.⁹⁸

Commenting on this opinion, Bowett pointed out that:

If it can be objectively, and preferably judicially, determined that the State's paramount intention was to accept the treaty, as evidenced by the ratification or accession, then an impermissible reservation which is not fundamentally opposed to the object and purpose of the treaty can be struck out and disregarded as a nullity. Conversely, if the State's acceptance of the treaty is clearly dependent upon an impermissible condition of which the terms are such that the two are not severable and the reservation is in fundamental contradiction with the object and purpose of the treaty, then the effect of that impermissible and invalid reservation is to invalidate the act of ratification or accession, nullifying the State's participation in the treaty.⁹⁹

It is clear that, in the case of 'a patent contradiction in the expression of the will of the State'¹⁰⁰ (i.e. the contradiction between the will to become a party to a treaty and the will to enter a reservation), two solutions are possible: either a reservation is to be severed from the consent to be bound by a treaty, or an impermissible reservation will invalidate the consent of a state to be bound by a treaty. This view will inevitably raise the issue of the *intention* of a state to enter a reservation.¹⁰¹

The argument that the expression of will to be bound by a treaty should prevail over the will to enter a reservation is supported by the assumption that a state acting *bona fide* and following the object and purpose criterion does not intend to make an impermissible reservation. It seems fair to assume that in certain cases a state may not even perceive that its reservation may be incompatible with the object and purpose of a treaty.¹⁰² These assumptions appear correct in respect of all treaties.

⁹⁸ See *Interhandel* case, *Switzerland v. United States* (1959) ICJ Reports 6, at 117. See also Judge Lauterpacht's dissenting opinion in the *Norwegian Loans* case, *France v. Norway*, (1957) ICJ Reports 9, at 55–56.

⁹⁹ Bowett, *supra* note 65, at 77.

¹⁰⁰ *Ibid.*, at 75.

¹⁰¹ The Special Rapporteur on reservations to treaties strongly opposed the appropriateness of a determination of the intention of a state in making reservations by treaty monitoring bodies. See Pellet, 'Second Report', *supra* note 13, at 79, para. 230. According to the Special Rapporteur, only the state could know the exact role of its reservation in its consent. 'Report of the International Law Commission on the Work of its Forty-Ninth Session', *supra* note 62, at 106–107, para. 83.

¹⁰² Bowett *supra* note 65, at 75–76.

This line of analysis will necessarily lead to the question of how one can determine the intention of a state ratifying a treaty subject to a reservation. Undoubtedly, determining intention will require reliance not only on the views of the state concerned but also on the *travaux préparatoires*, including an analysis of parliamentary involvement in the treaty-making process.¹⁰³

It may be argued that an express provision in the instrument of ratification or accession stating the intention of the state would help to determine the intention of the state. Although it might seem a practical solution to the problem, it will not work in practice. The risk that a reservation may be severed will almost always result in a state making a statement in its instrument of ratification of or accession that its reservation is a *sine qua non* of the ratification or accession to a treaty. Moreover, it is apparent that a state's view on the importance of a reservation may change over time: a state ratifying a treaty on the basis of an absolute reservation may later take the view that its reservation is subsequently of less importance as compared to the significance attached to it when the treaty was ratified or acceded to. Certainly, a state may not take the opposite view.

Based on the special features of human rights treaties and their role in protecting the rights of individuals, it seems that a more appropriate solution would be to lean towards giving priority to the expression of will to be bound by a human rights treaty over the will to enter a reservation.¹⁰⁴ Yet, the preference to be bound by a treaty should not be absolute. A clear intention to ratify a treaty or to accede to it on the condition of attaching a reservation should rebut this assumption. The difficulties in following this 'alternative' approach are easily identifiable. In practice, it may happen that the legal effect of a reservation may be determined long after the expression of the consent of a state to be bound by a treaty. A clear example is the Swiss reservation to the European Convention on Human Rights, which was determined to be impermissible by the Court in the *Belilos* case 14 years after the Swiss ratification of the Convention. In situations when a reservation is an absolute condition for the consent of a state to be bound by a treaty, withdrawal from the treaty as a result of finding the reservation incompatible with the object and purpose of the treaty will necessarily imply the deprivation of individuals residing in that state of the rights which they enjoyed before the reservation was found impermissible.

Recent legal authority in support of this argument can be found in General Comment No. 26 of the Human Rights Committee which provides that states, after becoming parties to the Covenant, may not withdraw from it.¹⁰⁵

An important guide as to which expression of will prevails when a state party to a

¹⁰³ The intention of the United States in ratifying the Covenant is illustrative in this regard. The United States Senate's advice and consent for the ratification of the Covenant was 'subject to reservations'. Sucharipa-Behrmann, 'The Legal Effects of Reservations to Multilateral Treaties', 1 *Austrian Review of International and European Law* (1996) 67, at 80.

¹⁰⁴ It should be pointed out that neither the opinion of Judge Lauterpacht, nor the statement of Bowett quoted above were made in the context of human rights treaties.

¹⁰⁵ General Comment No. 26 on 'Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights', adopted by the Human Rights Committee on 8 December 1997.

treaty enters a reservation may be found in the jurisprudence of the European Convention on Human Rights. The European Court in the *Belilos* case held that, since the Swiss reservation did not meet the conditions for reservations under Article 64 of the European Convention, it was invalid, and the Court pointed out (though with little reasoning) that 'it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration'.¹⁰⁶

Counsel for Switzerland stated that it would be disproportionate to regard the Swiss Government's consent to be bound by the European Convention as null and void if this interpretative declaration should be held invalid.¹⁰⁷

Based on the intention of Switzerland, the Court, in considering the two expressions of will (i.e. the will to ratify the Convention and the will to enter a reservation), gave priority to the will to be bound by the Convention. It held the Swiss reservation to be invalid but also held that this had no effect on Switzerland's consent to be bound by the Convention. The Court made it clear that invalidation of the reservation did not invalidate the consent of a state to be bound by the Convention.

In a similar vein, in the *Loizidou v. Turkey* case, the European Commission emphasized that Turkey recognized the jurisdiction of the Commission to determine the validity of Turkey's restrictions, and relied on the intention of Turkey, when it made its Article 25 declaration on 28 January 1987, to accept the right of individual petition. The European Court stressed that the reservation attached to Turkey's Article 25 and Article 46 declarations under the Convention was invalid, and pointed out that the intention of Turkey was to be bound by Articles 25 and 46 of the Convention.

In contrast to the position of Switzerland, Turkey argued that, if its reservations to the declarations under Articles 25 and 46 were found to be invalid, the declarations would be inoperative. Counsel for Turkey pointed out that the Turkish delegate, during Turkey's acceptance of the competence of the European Commission under Article 25 in 1987, declared to the Committee of Ministers of the Council of Europe that:

it had to be clearly understood that the conditions built into the Declarations are so essential that disregarding any of them would make the entire Declaration void and thus lead to the consequence of a complete lapse of Turkey's acceptance of the right of individual petition.¹⁰⁸

Counsel for Turkey also noted that the position of Turkey is the 'exact opposite' of

¹⁰⁶ *Belilos v. Switzerland*, ECHR (1988) Series A, No. 132, at 28, para. 60.

¹⁰⁷ Verbatim record of the public hearing held on 26 October 1987, ECHR Doc. Cour/Misc (87) 237, at 45, quoted in Schabas, *supra* note 82, at 490. It should be noted, however, that there was an attempt in the Swiss Council of States to denounce the European Convention as a result of the Court's judgment in the *Belilos* case. The voting on denunciation failed by only one vote. See also Cameron and Horn, *supra* note 81, at 117.

¹⁰⁸ Council of Europe, ECHR Doc. Cour/Misc (94) 271, at 35 (verbatim record of the hearing held on 22 June 1994), quoted in Schabas, *supra* note 82, at 320.

Switzerland's in the *Belilos* case.¹⁰⁹ However, the European Court rejected the argument of Turkey that the reservation to the declaration could not be invalidated. The Court held that Turkey:

must have been aware, in the view of the consistent practice of Contracting Parties under Articles 25 and 46 to accept unconditionally the competence of the Commission and Court, that the impugned restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs.¹¹⁰

The Court further emphasized that Turkey:

[ran] the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves. Seen in this light, the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic — albeit qualified — intention to accept the competence of the Commission and Court.¹¹¹

The Court, in addressing the issue of the validity of Turkey's declarations under Articles 25 and 46 of the Convention, relied, *inter alia*, on 'the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings'.¹¹²

It is clear from these cases that the European Court of Human Rights applied the intention test in determining whether it may sever a reservation. However, it also referred to the special character of the Convention as an instrument of European public order. Since the Court remained silent as to whether the special character of the Convention is determinative in invalidating an impermissible reservation, it is unclear whether, in the absence of this concept, the Court would have drawn the same conclusion.

In determining the intention of the states in question, the European Court took a different approach in the *Belilos* case than it took in the *Loizidou* case. While in the *Belilos* case the Court referred only to the express statement by the Swiss representative during the public hearing before the Court without further analyzing the 'initial' intention of Switzerland in ratifying the European Convention with a reservation, in the *Loizidou* case the Court deemed the reliance on the statement of Turkey's representative before the Court insufficient and therefore analyzed the 'initial' intention of Turkey in attaching restrictions to a declaration.

This leads to the view that the European Court, in examining the position of a state as to whether a reservation is an absolute condition for ratification of the Convention,

¹⁰⁹ Council of Europe, ECHR Doc. Cour/Misc (94) 271, at 36 (verbatim record of the hearing held on 22 June 1994), quoted in Schabas, *supra* note 82, at 322. Rama-Montaldo refers to the letter dated 26 June 1987 from the Permanent Representative of Turkey to the Council of Europe addressed to the depository of the European Conventions on Human Rights, stating that the points contained in Turkey's declaration under Article 25 (concerning individual petitions) 'were not to be considered as "reservations" in the sense of international treaty law'. Rama-Montaldo, *supra* note 56, at 1275.

¹¹⁰ *Loizidou v. Turkey*, Preliminary Objections, ECHR (1995) Series A, No. 310, at para. 95.

¹¹¹ *Ibid.*, at para. 95.

¹¹² *Ibid.*, at para. 93.

leans to a ‘human-rights-friendly’ interpretation of the intention of the reserving state.

The Court’s reasoning in the *Loizidou* case (that Turkey ‘[ran] the risk that the limitation clauses at issue would be declared invalid by the Convention institutions without affecting the validity of the declarations themselves’) is important for the Human Rights Committee’s approach to determining an intention of a state ratifying the Covenant with a reservation. The Human Rights Committee made it clear in its General Comment No. 24 that it will sever incompatible reservations without this having any effect on the participation by the state in question in the Covenant. This view is a clear indication that a state may run the risk that their reservations, if found to be incompatible with the object and purpose of the Covenant, may be severed from the consent of the state to the bound. This equally applies to those states yet to become a party to the Covenant and those which already are.

It may seem at first sight from General Comment No. 24 that the only action the Human Rights Committee will take with regard to a reservation it finds incompatible with the object and purpose of the Covenant is to sever it from the consent of the reserving state to be bound and to regard the reserving state to be a party to the Covenant without the effect of the reservation. However, the wording of the relevant provision of General Comment No. 24 demonstrates that the Human Rights Committee left itself room for the interpretation of the *intention* of the reserving state. General Comment No. 24 clearly indicates that the ‘normal’ consequence of an impermissible reservation will be that a reservation will ‘generally’ be severable.

The Human Rights Committee made a presumption in favour of the severability of an incompatible reservation but did not exclude other possibilities when a reservation is found to be a *sine qua non* of the consent of a state to be bound by the Covenant and therefore could be severed from the instrument of ratification or accession by a state. For the Human Rights Committee, the basis for an appraisal as to whether or not the Committee will sever an incompatible reservation is the intention of a reserving state.

A significant issue which will be raised in practice is the temporal effect of a finding of invalidity of a reservation, i.e. whether the reservation declared invalid will be regarded as invalid from the moment of making the incompatible reservation or from the moment of declaring the reservations invalid. Although the Human Rights Committee is silent in its General Comment No. 24 as to whether the effect of an invalid reservation will be *ex tunc* or *ex nunc*, it is submitted that a reservation will be inoperative from the moment of finding the reservation invalid.

6 The Preliminary Conclusions of the International Law Commission

In 1993, the United Nations International Law Commission (ILC) made a decision, subject to the approval of the General Assembly, to include the topic of ‘The Law and

Practice Relating to Reservations to Treaties' in its agenda.¹¹³ In the same year, the General Assembly approved this decision.¹¹⁴ In 1994, at its forty-sixth session, the ILC appointed Professor Alain Pellet as Special Rapporteur for the topic.¹¹⁵ In 1995, the Special Rapporteur submitted his first report which, *inter alia*, put forward a number of suggestions as to the scope and form of the ILC's future work on the topic.¹¹⁶

In 1996, the Special Rapporteur submitted his second report which consisted of two chapters.¹¹⁷ Chapter I dealt with the programme of the work of the ILC on the topic of reservations to treaties.¹¹⁸ Chapter II, entitled 'Unity or Diversity of the Legal Regime for Reservation to Treaties (Reservations to Human Rights Treaties)', was a comprehensive study of the issues of reservations to human rights treaties, including the role of treaty supervisory organs.¹¹⁹ The Special Rapporteur included in his report a draft resolution on reservations to multilateral normative treaties, including human rights treaties. Owing to a lack of time, the ILC was unable to consider the second report at its 1996 session.

At its 1997 session, the ILC considered the Special Rapporteur's second report. As a result, the ILC adopted the 'Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties, Including Human Rights Treaties'.¹²⁰ In its Preliminary Conclusions, the ILC endorsed the suitability of the Vienna Convention regime on reservations to the requirements of all treaties, including human rights treaties. It emphasized that, 'where human rights treaties are silent [on the determination of the admissibility of reservations], the monitoring bodies established thereby are competent to comment upon and express recommendations with regard . . . to the admissibility of reservations by States, in order to carry out the functions assigned to them'.¹²¹ Yet, the ILC stressed that 'this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties'.¹²²

The ILC suggested providing specific clauses in these treaties or elaborating

¹¹³ Official Records of the General Assembly, Forty-Eighth Session, Supplement No. 10, UN Doc. A/48/10, para. 440.

¹¹⁴ A/RES.48/31, para. 7.

¹¹⁵ Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 10, UN Doc. A/49/10, para. 382.

¹¹⁶ Pellet, 'First Report', *supra* note 19. The Commission decided to draw up a guide to practice in respect of reservations in the form of draft Articles with commentaries which may be accompanied by model clauses. The Commission also decided that there should be no change in the provisions of the 1969, 1978 and 1986 Vienna Conventions. See also Pellet, 'Second Report', *supra* note 13, at 3, para. 2.

¹¹⁷ Pellet, 'Second Report', *supra* note 13.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, at Add.1.

¹²⁰ 'Report of the International Law Commission on the Work of its Forty-Ninth Session', *supra* note 62, at 126–127. It should be noted that the Special Rapporteur submitted to the Commission a draft resolution. However, it was finally decided to adopt 'Preliminary Conclusions' in order not to prejudge any future ideas of the Commission. 'Report of the International Law Commission on the Work of its Forty-Ninth Session', *supra* note 62, at 149.

¹²¹ *Ibid.*, at 126, para. 5.

¹²² *Ibid.*, at 126, para. 6.

protocols to existing treaties where states seek to confer competence on the monitoring body to ‘appreciate or determine’ the admissibility of a reservation.¹²³ However, it pointed out that, unless monitoring bodies have been expressly provided with such competence, ‘the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role’.¹²⁴

The ILC called upon states to cooperate with monitoring bodies and to ‘give due consideration’ to recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future.¹²⁵

One of the most important conclusions drawn by the ILC was that, if reservations are found to be inadmissible, ‘it is the reserving State that has the responsibility for taking action’.¹²⁶ It also pointed out that such action may consist in the state either modifying or withdrawing its reservation or abstaining from becoming a party to the treaty.¹²⁷

In the last paragraph of the Preliminary Conclusions, the ILC emphasized that its conclusions do not affect the practice and rules developed by monitoring bodies within regional contexts.¹²⁸

A substantial number of observations made by the ILC in its Preliminary Conclusions clearly contradict the approach of the Human Rights Committee’s General Comment No. 24. Unlike the Human Rights Committee, the ILC attached much less importance to the role of treaty supervisory organs with regard to reservations.

Although both the Human Rights Committee and the International Law Commission emphasized the significance of carrying out the functions assigned to treaty supervisory organs, the ILC limits the competence of supervisory organs to commenting upon and expressing recommendations with regard to the admissibility of reservations. However, the Committee sees its role not only in pronouncing on the admissibility of reservations, but also in severing inadmissible reservations.

However, the ILC explicitly stated in this regard that the legal force of the findings of these bodies cannot exceed that resulting from the powers given to them for the performance of their general monitoring role. This statement clearly denies the competence of treaty supervisory organs, including the Human Rights Committee, to appraise the admissibility of reservations in a legally binding way.

It may also be concluded from the position of the ILC (that monitoring bodies are competent to comment upon and express recommendations on the admissibility of reservations in order to carry out the functions assigned to them) that, in the ILC’s opinion, a treaty supervisory organ does not in general need to appraise the

¹²³ *Ibid.*, at 126–127, para. 7.

¹²⁴ *Ibid.*, at 126–127, para. 8.

¹²⁵ *Ibid.*, at 126–127, para. 9.

¹²⁶ *Ibid.*, at 126–127, para. 10.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, at 127, para. 12.

admissibility of a reservation in a legally binding way in order to carry out its functions.

In contrast to the approach of the Human Rights Committee (that the Committee itself is competent to determine the compatibility of a reservation with the object and purpose of the Covenant), the ILC stressed that the competence to comment on and express recommendations on the admissibility of reservations does not either exclude or otherwise affect the traditional modalities of control by states parties.

Probably the most important difference in approach between the Human Rights Committee and the ILC relates to the consequences of inadmissible reservations. While the Human Rights Committee claims that it is for the Committee to determine the consequences of inadmissible reservations, the ILC strongly supports the traditional rule that it is for the reserving state to take whatever action it deems appropriate. According to the ILC, the action which may be taken by a reserving state includes not only withdrawing its reservation and abstaining from participation in a treaty, but also modifying its reservation. Although the former possibility is not expressly provided for in General Comment No. 24, it may serve as a solution in certain circumstances.

The conclusion drawn by the ILC — to provide for a clause on reservations or to elaborate protocols to existing treaties in order to confer power on monitoring bodies to appreciate or determine the admissibility of a reservation — might be an appropriate solution in theory but it will be difficult to realize in practice.

That the Preliminary Conclusions are without prejudice to the approach of regional supervisory organs undoubtedly limits the ILC's conclusions exclusively to the supervisory organs established under the universal human rights treaties. By doing so, the ILC distinguished between regional and universal supervisory organs. The ILC did not give any reasoning as to why it excluded the effect of its conclusions from regional supervisory bodies. In order to justify its exclusionary approach, the ILC could certainly distinguish the distinct features of regional human rights supervisory organs, such as their judicial nature (including the competence to determine its own competence), the legally binding nature of their decisions, and the special character of a regional human rights instrument (the European Convention as an instrument of European public order). These reasons might have served as convincing arguments in favour of the distinct treatment of universal and regional human rights treaty supervisory organs. It would certainly have been more convincing had the ILC distinguished these supervisory organs on the basis of their legal nature (the argument frequently suggested to distinguish between the European Court of Human Rights with its power to determine the validity of reservations, and quasi-judicial organ with non-binding decisions), rather than the area of their activities.

In itself, the fact that supervisory organs (whether judicial or quasi-judicial) are created at the regional or universal level does not imply that these bodies may or may not determine the compatibility and the consequences of impermissible reservations. *A fortiori* both regional and universal supervisory organs serve the purpose of the effective implementation of the rights and freedoms set forth in their respective treaties.

7 The Practice of the Human Rights Committee Since 1994

Despite the motivation of the Human Rights Committee to play a more assertive role with regard to reservations, the adoption of General Comment No. 24 in 1994 has not been a turning point for the Committee in pursuing the severability policy. The Committee did not go beyond recommending states to reconsider their reservations or to withdraw them.¹²⁹

It may be suggested that the most important reason why the Human Rights Committee has not pursued the intended policy is the sharply negative reaction not only on the part of several states but also within the United Nations. As noted earlier, the United States, the United Kingdom and France made a number of critical observations on various issues dealt with in General Comment No. 24, including a rejection of the competence of the Committee to determine the compatibility of a reservation and to sever an incompatible reservation. As regards the United Nations itself, the adoption of General Comment No. 24 coincided with the consideration by the ILC of the matter of reservations. The Special Rapporteur drew particular attention to the role of supervisory organs with regard to reservations, which resulted in the adoption of the Preliminary Conclusions by the ILC. The Human Rights Committee presumably considered it expedient to wait for the reactions of other states and to observe developments in the ILC.

Notwithstanding the initial failure of the Human Rights Committee to pursue the severability policy in practice, the decision of the Committee under the Optional Protocol dated 31 December 1999 with regard to an individual communication against Trinidad and Tobago makes it clear that the Committee will exercise the claimed power in practice.¹³⁰

In this case, the Human Rights Committee considered the admissibility of a communication from a person condemned to death. The Committee had to decide on the admissibility of the communication in the light of a reservation entered by Trinidad and Tobago following its reaccession to the Optional Protocol of the Covenant which it had previously denounced. In its reservation to the Optional Protocol, Trinidad and Tobago rejected the competence of the Human Rights Committee 'to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his

¹²⁹ The comment of the Committee on the United States' reservations, declarations and understandings clearly illustrates that it has not exercised the claimed functions. The Committee pointed out that: 'The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.' Further, the Committee 'recommend[ed] that the State party review its reservations, declarations and understandings with a view to withdrawing them'. 'Concluding Observations of the Human Rights Committee: United States of America', 3 October 1995, CCPR/C/79/Add.50; A/50/40, chapter 4, paras 279 and 292. See also 'Concluding Observations of the Human Rights Committee: Sweden', 9 November 1995, CCPR/C/79/Add.58, para. 21.

¹³⁰ *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, CCPR/C/67/D/845/1999.

detention, his trial, his conviction, his sentence or the carrying out of the death sentence on his and any matter connected therewith'.¹³¹

On the basis of its General Comment No. 24, the Human Rights Committee, in its decision in the case, stated:

As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without the jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.¹³²

The Committee further emphasized that, since the Optional Protocol itself does not govern the admissibility of reservations to its provisions, the admissibility should be examined on the basis of its compatibility with the object and purpose of the Optional Protocol.¹³³ As regards the issue of what constitutes the object and purpose of the Optional Protocol as provided for in its General Comment No. 24, the Committee pointed out that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with respect to certain provisions of the Covenant could not be considered to meet the object and purpose test.¹³⁴

After determining that the reservation entered by Trinidad and Tobago was incompatible with the object and purpose of the Optional Protocol,¹³⁵ the Human Rights Committee stated that '[t]he consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol', and the communication was declared admissible.¹³⁶

In general, it can be noted that, despite the serious criticism of General Comment

¹³¹ *Multilateral Treaties Deposited with the Secretary-General: Status as at 30 April 1999* (1999) 172.

¹³² *Rawle Kennedy v. Trinidad and Tobago*, *supra* note 130, at para. 6.4.

¹³³ *Ibid.*, at para. 6.5.

¹³⁴ As to what constitutes the object and purpose of the Optional Protocol, the Committee referred to para. 13 of its General Comment. 15 *HRLJ* (1994) 464, at 466, para. 13.

¹³⁵ The reasoning on the incompatibility of the reservation of Trinidad and Tobago by the Committee reads: 'The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely, prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocol, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol.' *Rawle Kennedy v. Trinidad and Tobago*, *supra* note 130, at para. 6.7.

¹³⁶ *Ibid.*

No. 24, the present decision makes it clear that the Human Rights Committee does not intend to depart from the claimed competence. In the present case, the Committee not only determined the compatibility of the reservation with the object and purpose of the Optional Protocol but also the consequences of the incompatible reservation.

Although the Committee does not expressly employ the wording used in its General Comment No. 24 on the consequence of an incompatible reservation (i.e. that an incompatible reservation will be severable), the determination that the Committee is not precluded from considering the communication should presumably be regarded as equivalent to the wording of General Comment No. 24.

The Human Rights Committee did not give any reasoning as to why it ignored the reservation but still considered Trinidad and Tobago a party to the Covenant without the benefit of the reservation. It will be recalled here that under General Comment No. 24 the *normal* consequence of an unacceptable reservation is that it will *generally* be severable.¹³⁷ Although there may be a general presumption in favour of severance of an unacceptable reservation while keeping a state a party to the Covenant or its Optional Protocols, the circumstances of the present case arguably should have rebutted this presumption. It should be noted here that the only reason why Trinidad and Tobago denounced the Optional Protocol and reaccessed to it on the same day was precisely to make this reservation.¹³⁸ This will lead to the conclusion that Trinidad and Tobago considered its reservation as a *condition* for its participation in the Optional Protocol and, thus, not severable from its consent to be bound by the Optional Protocol.

Despite a strong basis for considering the reservation entered by Trinidad and Tobago as a *sine qua non* of the reaccession to the Optional Protocol, the Committee failed to explain its position. The Committee has neither proved that the intention of Trinidad and Tobago was to have its reservation severed from its instrument of accession without any effect on its participation in the Optional Protocol nor identified the opinion of the state party in this respect. Based on the General Comment's wording on the legal consequence of an unacceptable reservation, it seems that it would have been more appropriate to regard Trinidad and Tobago as not a party to the Optional Protocol.¹³⁹

The position taken by the Human Rights Committee in the present case would have been justified if it had referred to a *mala fide* intention of Trinidad and Tobago in denouncing the Optional Protocol and reaccessing to it immediately. The *mala fide*

¹³⁷ Although it may be argued that the Committee took this approach only as regards the Covenant, there is no basis for assuming that the approach of the Human Rights Committee on the *normal* consequences of the incompatibility of a reservation to the Optional Protocol would have been different from that of the Covenant.

¹³⁸ It should be noted that, unlike the Covenant, Article 12 of the Optional Protocol expressly provides for the possibility of its denunciation.

¹³⁹ The same view has been taken in the dissenting opinion of the Committee members, N. Ando, P. Bhagwati, E. Klein and D. Kretzmer. The dissenting opinion points out that, 'if we had accepted the Committee's view that the reservation is invalid, we would have had to hold that Trinidad and Tobago is not a party to the Optional Protocol'. See *Rawle Kennedy v. Trinidad and Tobago*, *supra* note 130, Appendix, at para. 17.

intention seems to be the only exception justifying the position taken by the Committee in ignoring the intention of the state. Yet, the Committee remained silent on whether or not it justified its position on the basis of such an intention of Trinidad and Tobago.

It is also important to note that the Committee emphasized in its decision that the reservation of Trinidad and Tobago 'was entered after the publication of General Comment No. 24'.¹⁴⁰ This reference would supposedly imply that General Comment No. 24 gave notice to states, including Trinidad and Tobago, that this kind of reservation will not be regarded as compatible with the object and purpose of the Optional Protocol.

8 Conclusion

A number of conclusions may be drawn on the role of treaty monitoring bodies and specifically the Human Rights Committee with regard to reservations. The analysis of the case law of the European Convention on Human Rights, which set the first precedent of determining the validity of reservations, made it clear that almost all features (i.e. with the exception of reciprocity) contributing to the severability approach of the European Convention's supervisory institutions are peculiar to the European Convention. Except for elements such as (a) the duty of supervisory organs to ensure the observance of the obligations undertaken by the parties; (b) jurisdiction over the interpretation of the Convention; and (c) the jurisdiction to determine its own jurisdiction and the express conditions for the validity of reservations, the European Convention's supervisory institutions have developed a concept under which the Convention is regarded as a constitutional instrument of European public order. All these elements clearly distinguish the reasoning of the severability policy pursued by the European Commission and the European Court of Human Rights from that of the Human Rights Committee. Therefore, the reliance on the European 'precedent' by supporters of the severability policy pursued by the Human Rights Committee seems unconvincing.

The Human Rights Committee in its General Comment No. 24 failed to make a *legal* justification for the claim that it is competent to determine the compatibility of reservations and to sever incompatible reservations. The reason undoubtedly lies in the lack of power of the Human Rights Committee to make binding decisions.

However, the *functional* justification of the Human Rights Committee to determine the compatibility of reservations with the object and purpose of the Covenant is convincing. That the Committee needs to pronounce on the compatibility of a reservation with the object and purpose of the Covenant in order to exercise its functions is self-evident. Even opponents of the Human Rights Committee's severability policy recognize this view. It is fair to assume that the Committee should have the necessary power to take measures against reservations which may undermine the effective implementation of the Covenant.

¹⁴⁰ *Rawle Kennedy v. Trinidad and Tobago*, *supra* note 130, at para. 6.7.

The current situation is uncertain. On the one hand, it leads to the conclusion that the Human Rights Committee does not intend to depart from its declared policy. This was confirmed in the recent case considered by the Committee under the Optional Protocol when it disregarded a reservation to the Protocol entered by Trinidad and Tobago and consequently declared an individual communication admissible. On the other hand, the ILC maintains that the role of the Human Rights Committee should be limited to the functions assigned to the treaty monitoring body, and instead it would be the states which would take action in the event of inadmissibility. Many states share views similar to the ILC.

Taking into consideration the controversy surrounding the severability policy, and specifically the approach taken by the Human Rights Committee, it seems that the solution of the problem should lie somewhere in the middle. Although this solution may not be problem-free, it is clear that the current situation is less than satisfactory. However, compromise may effectively solve the problem.

The Human Rights Committee should have the competence to pronounce on the compatibility of reservations with the object and purpose of the Covenant. This is essential for the proper functioning of the Committee and for maintaining the effectiveness of the Covenant. The Human Rights Committee should have an admissibility determination function. Unlike the position of the ILC (according to which treaty monitoring bodies are competent to comment upon and express recommendations on the admissibility of reservations), this solution suggests that the Committee should be competent not only to comment and to express recommendations but also to *determine* whether or not a reservation is compatible with the object and purpose of the Covenant.

Although the binding character of a decision may not always secure its effectiveness, the binding nature of decisions by the Human Rights Committee will be a more fitting solution in the present circumstances. This solution might not seem appropriate from a purely legalistic point of view. Alternatively, not only should findings of the Human Rights Committee on the inadmissibility of reservations be considered in good faith, but also a mechanism to ensure fulfilment of their findings should be established. Certainly, what matters most is not whether the admissibility of reservations are determined in a binding or non-binding way, but whether they are implemented in practice. If the possibility of ignoring the determination of the inadmissibility of reservations is removed by setting up an effective mechanism for enforcement, then the Human Rights Committee is unlikely to disagree with this solution. The possibility of the Committee examining new reservations to determine their compatibility with the object and purpose of the Covenant should not be excluded.

In the case of a failure by a reserving state (as determined by the Human Rights Committee itself) to take measures with regard to the findings of the Committee on the incompatibility of a reservation with the object and purpose of the Covenant, the Committee should be able to adopt a final decision in this respect.

However, the functions of the Committee should not go beyond the determination of the compatibility of reservations with the object and purpose of the Covenant. The

Human Rights Committee may not determine the consequences of inadmissible reservations. The consequences of inadmissible reservations should be determined by the states concerned.

In the current circumstances, this seems to be an adequate solution to the problem. The Human Rights Committee will be able to carry out the functions assigned to it. The Committee will be able to assess objectively the admissibility of reservations. By doing so, the Committee will necessarily limit the number of impermissible reservations, which was undoubtedly the purpose of the Committee in adopting General Comment No. 24.

Regarding the states parties to the Covenant, they will not have their will overridden. They will still have the options either to withdraw an incompatible reservation, to modify it to make it compatible with the object and purpose of the Covenant, or to withdraw from participation in the Covenant. Undoubtedly, withdrawal from the Covenant should be an exceptional measure. In making a decision to withdraw, states should take into account the humanitarian character of the Covenant. Moreover, unfavourable political reaction to withdrawal should also be taken into account in making this decision.

Instead of withdrawal, the advantages of modifying an incompatible reservation should be fully employed. This solution may require a constructive dialogue between the reserving state and the Human Rights Committee.

It is true that consent by a state remains a fundamental principle in international law. If a reservation is declared inadmissible, a decision on the legal consequences of its inadmissibility should be taken by the reserving state alone. Although the Human Rights Committee may apply objective criteria to determine the intention of a state entering a reservation to a human rights treaty, the recent decision of the Human Rights Committee with regard to Trinidad and Tobago's reservation leads to a pessimistic conclusion in this respect. In such circumstances, it seems that states are still best suited to identifying their own intention on entering a reservation.

This proposed solution to the problem may be equally applicable to other human rights treaty monitoring bodies, taking into consideration the latter's determination to play a more important role with respect to reservations. Given the crucial and ever-expanding role of human rights, it is necessary to incorporate a realistic solution to ensure peaceful co-existence and a minimum standard of basic freedoms for all human beings.

