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Why Severability? A New Theory of the Effect of Invalid Treaty Reservations

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Abstract

The 1969 Vienna Convention on the Law of Treaties does not establish the effect of an invalid reservation to a treaty. Still, it leaves this issue to the discretion of legal decision-makers. These have developed two different approaches to the problem. According to the first approach, a State that makes an invalid reservation to a treaty does not become a party. According to a second approach, the invalid reservation is severed, and the reserving State is a party without benefitting from the reservation. The second approach –the severability solution, so-called– can be observed mainly in the practice of human rights courts and treaty monitoring bodies. None of them have produced any complete and convincing explanation as to why the severability solution should be preferred to the alternative. Neither have any of the human rights scholars written about the issue. This article fills this critical gap. It introduces a new theory of the effect of invalid treaty reservations. This theory provides an answer to the general question of why, in the application of human rights treaties, the severability solution should be adopted, whereas in the application of many other treaties, it should not.

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1. Introduction

According to Article 19 of the Vienna Convention on the Law of Treaties (VCLT), a reservation to a treaty is invalid if either of three conditions is met: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations may be made, and the reservation does not come within the scope of this provision; (c) the reservation is incompatible with the object and purpose of the treaty.[2] Article 21 of the VCLT states the effects of *permissible* reservations to a treaty.[3] Interestingly, there is no similar provision that establishes the effect of *impermissible* reservations. Judged by the preparatory work of the Convention, it would seem as if the negotiating parties left this decision to the discretion of legal decision-makers.[4]

Legal decision-makers have developed two different approaches to the issue of the effect of invalid reservations to a treaty. A first approach implies the adoption of '*the total invalidity solution,*' so-called: a State that makes an invalid reservation to a treaty simply does not become a party.[5] This is the approach that the International Court of Justice took for granted in the *Reservations to the Convention on Genocide Advisory Opinion*.[6] Thus, the Court concluded:

> [A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.[7]

Up until at least the end of the last century, the total invalidity solution would seem to have had the support of a great number of States, and a majority of international scholars.[8] It is

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2 Vienna Convention on the Law of Treaties [1969] 1115 UNTS 331, art 19.

3 Ibid, art 21. Art 21 reads:
'1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation'.

4 The ILC Commentary to the Draft Articles on the Law of Treaties with Commentaries, (1966) 2 *Yearbook of the International Law Commission*, UN Doc A/CN.4/Ser.A/1966/Add.1, p. 187, at 203-208, emphasizes repeatedly the 'flexibility' of the regime established by then-draft articles 16 and 17. This categorization refers primarily to the principle, which confers on the parties to a treaty the power to decide themselves the effects of a reservation *inter se*. This desire to leave to scope for flexibility can also be understood to explain the notable lack of a provision establishing the effect of an invalid reservation to a treaty. McCall-Smith seems to disagree when she states: 'The ECtHR's approach to severing an invalid reservation and leaving the reserving State bound by the article to which the reservation had been attached is different from the approach to invalid reservations in the VCLT.' K McCall-Smith. 'Severing Reservations', (2014) 63 *International and Comparative Law Quarterly*, p 599, at 613.

5 For this terminology, see C Walter, 'Article 19', in O Dörr and K Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012), p. 239, at 279.

6 *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p 15.

7 Ibid, p 29.

8 See, for example, the observations made by the Governments of the United States and the United Kingdom upon the adoption by the Human Rights Committee of its General Comment No. 24, Report of the Human Rights Committee, Vol 1, Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (UN Doc A/50/40), 126-130, 130-134. See similarly the observations made by the Government of France, in Report of the Human Rights Committee, Vol 1, Official Records of the General Assembly, Fiftieth Session, Supplement No.

justified by the idea of reservations as an integral part of a state's consent to be bound by a treaty – if a State has not given its consent to be bound by a treaty, it cannot be a party.[9]

A second approach to the issue of the effect of invalid reservations implies an adoption of '*the severability solution*': the invalid reservation is severed and the reserving state is a party without benefitting from the reservation.[10] As interpreted by the ILC Special Rapporteur on Reservations to Treaties, Alain Pellet, the severability solution comes in two different versions.[11] According to the first of these versions, the severability solution is definite and without exceptions.[12] According to the second version –and this is the version that the ILC later adopted for its Guide to Practice– the severability solution is conditional upon a rebuttable presumption: the invalid reservation is severed and the reserving State becomes a party '*only insofar as it has not expressed a contrary intention or such an intention is otherwise established.*'[13] Henceforth in this article, I will deal with the two versions of the severability solution as mere variants of the same norm, since in my understanding both approaches are generically distinct from the total invalidity solution.

The severability solution can be observed mainly in the practice of human rights courts and treaty monitoring bodies. The European Court of Human Rights has been practicing this solution consistently, since its 1988 judgment in the case of *Belilos v. Switzerland*.[14] The Inter-American Court of Human Rights has followed in the footsteps of the European Court.[15] The Human Rights Committee and the other nine human rights treaty bodies set up under the auspices of the United Nations have done so too.[16] This practice raises questions of justification. International law may leave it to international legal decision-makers to decide themselves the effect of an invalid reservation to a treaty. Still, we would expect them to act based on reason rather than instinct, or a predisposition to always side with certain interests, or again a mere whim.

As will emerge from subsequent sections of this article, none of the decision-making institutions that have dealt with the issue of the effect of invalid reservations to human rights treaties have produced any complete and convincing explanation as to why the

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40 (UN Doc A/51/40), 104; D Bowett, 'Reservations to Non-Restricted Multilateral Treaties', (1976-77) 48 *British Yearbook of International Law*, 77, at 89; C A Bradley and J L Goldsmith, 'Treaties, Human Rights, and Conditional Consent', (2000) 149 *University of Pennsylvania Law Review*, 399, at 436-437; M Fitzmaurice, 'The Practical Working of the Law of Treaties', in M Evans (ed.), *International Law* (3rd ed, OUP 2010), 172, at 193; G Gaja, 'Unruly Treaty Reservations', in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (Giuffré Editore 1987), Vol. 1, 307, at 314; L Helfer, 'Not Fully Committed? Reservations, Risk, and Treaty Design', (2006) 31 *Yale Journal of International Law*, 367, at 380; J Klabbers, 'Accepting the unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties', (2000) 69 *Nordic Journal of International Law*, 179, at 188-189; R Jennings and A Watts (eds.), *Oppenheim's International Law* (9th ed, OUP 2008), Vol. 1, 1247, n 1; C Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', (1993) 64 *British Yearbook of International Law*, 245, at 267; C Tomuschat, 'Admissibility and Legal Effectsof Reservations to Multilateral Treaties: Comments on Arts. 16 and 17 of the ILCs 1966 Draft Articles on the Law of Treaties', (1967) 27 *Zeitschrift für ausländisches öfentliches Recht und Völkerrecht*, 463, at 476-477; A Pellet, 'Article 19: Formulation of a Reservation', in O Corten and P Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary* (OUP 2011), Vol. 1, 405, at 442.

9 See e.g. the observations made by the Governments of the United States upon the adoption by the Human Rights Committee of its General Comment No. 24 *supra* (n 8).

10 For this terminology, see 'Guide to Practice on Reservations to Treaties', *Yearbook of the International Law Commission*, (2011) Vol. II, Part Three, UN Doc CN.4/SER.A/2011/Add.1 (Part 3), 35, at 311.

11 Ibid, 306-316.

12 Ibid.

13 Ibid.

14 ECtHR, *Belilos v Switzerland*, Judgment of 29 April 1988. For later practice, see *infra*, Section 2.

15 See *infra*, Section 3.1.

16 See *infra*, Section 3.2

severability solution should be preferred to the alternative. Human rights scholars have attempted to fill this critical void.[17] They have suggested several different explanations: (i) that the severability solution is the result of a balancing of intentions; (ii) that adoption of the total invalidity solution comes with great practical difficulties; (iii) that the structure of human rights law prompts an adoption of the severability solution; (iv) and that the severability solution is needed to ensure the effectiveness of human rights treaties. As this article will argue, none of these explanations meets the standard of rational reason. The first three are inadequate. The last explanation needs further development. Since '*effectiveness*' implies consideration of the objects and purposes of human rights treaties, scholars need to clarify the precise relationship between these objects and purposes and the severability solution. The following question seems to be crucial: what is it with the objects and purposes of human rights treaties that point us in the direction of the severability solution?

This background helps to explain the objective of this article. The objective is twofold: (i) to give the overall context that explains the importance of this crucial question; and (ii) to provide it with an answer. The article will be organized in line with the logic of this objective. Sections 2 and 3 will very briefly go through the practice of human rights courts and treaty monitoring bodies. This survey will confirm what was noted already above: human rights courts and treaty monitoring bodies have not been able to produce any complete and convincing explanation as to why the severability solution should be preferred to the alternative. Section 4 will critically assess the teaching of human rights scholars. This assessment will spell out why the several explanations that these scholars have contributed are either inadequate or insufficient. Section 5 will fill in the gaps in the reasoning of human rights scholars and decision-making institutions. It will develop a robust theory of the effect of invalid treaty reservations. This theory will answer the general question of why, in the application of human rights treaties, the severability solution should be adopted, whereas, in the application of many other international treaties, it should not.

2. The practice of the European Court of Human Rights

2.1 The jurisprudence relating to the effect of invalid reservations

The European Court examines individual applications made under Articles 25 and 34 of the European Convention (before and after the adoption of Protocol No. 11, respectively). This task has several times prompted it to address the issue of the effect of invalid reservations to the European Convention and its Additional Protocols. The pioneering case was that of *Belilos v. Switzerland*.[18] In this case, the Court considered the several declarations that the Swiss Federal Council had made in 1974, in connection with the deposit of its instrument of ratification of the European Convention. One of them related specifically to Article 6, paragraph 1:

> The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 (art. 6-1) 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.[19]

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[17] See *infra*, Section 4.

[18] *Belilos v. Switzerland supra* (n 14).

[19] *Belilos v. Switzerland supra* (n 14), para 38.

The Court noted that despite the language in which this declaration had been framed, it was not an interpretative declaration, but a reservation. The Federal Council had acted '*to remove certain categories of proceedings from the ambit of Article 6 § 1 (art. 6-1) and to secure itself against an interpretation of that Article (art. 6-1) which it considered to be too broad.*'[20] Thus, as the Court explained, it would have to proceed to examine its validity in the light of Article 64 of the Convention. This Article corresponds to Article 57 of the Convention as revised by Protocol No. 11. It reads:

> 1. Any State may, when signing the 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.[21]

The Court found that the Swiss declaration failed to meet the requirements of this provision on two counts. First, it fell short of the rule that reservations must not be general. It was framed in a language that created great uncertainty as to the effect of the declaration, '*in particular as to which categories of dispute are included and as to whether or not the 'ultimate control by the judiciary' takes in the facts of the case.*'[22] Secondly, it did not contain a brief statement of the laws that were not compatible with Article 6, paragraph 1.[23] Therefore, as the Court concluded, it would have to consider the declaration invalid.[24] The Court could not stop at that, but had to continue to decide also the effect of the declaration, since the Swiss Federal Council, in a preliminary objection, had suggested that the Court decline to exercise jurisdiction over the application. In response to this need, the Court added:

> At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it. The Government's preliminary objection must therefore be rejected.[25]

Later cases have given the European Court further occasion to develop this reasoning.[26] A mere reference to an alleged implicit intention of this government does not meet the standard of rational reason.[27] Sadly, the Court has been reluctant to add anything

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[20] Ibid, para 49.

[21] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, ETS, vol 5.

[22] Ibid, para 55.

[23] Ibid, para 59.

[24] Ibid, para 60.

[25] Ibid.

[26] See *Weber v. Switzerland*, Judgment of 22 May 1990, para 38 ff; *Gradinger v. Austria*, Chamber, Judgment of 23 October 1995, para 51 ff; *Eisenstecken v. Austria*, Chamber, Judgment of 3 October 2000, para 30 ff; *Grande Stevens and Others v. Italy*, Chamber, Judgment of 4 March 2014, para 211 ff. All decisions are available at <https://hudoc.echr.coe.int>.

[27] In the oral hearings, the Swiss Government argued that its reservation was valid, but it also stated that, if the European Court found otherwise, its intention was that its ratification of the European Convention would

of importance. It has consistently adopted the severability solution, but it has never made an effort to explain why this particular solution should be adopted, and not the total invalidity solution. The Court's judgment in the *Case of Weber v. Switzerland* is symptomatic. In this case, the European Court examined another of the several declarations that the Swiss Federal Council had made when depositing its instrument of ratification of the European Convention.[28] Unlike the declaration considered in *Belilos*, the language of this declaration left no doubt that it was a reservation and not merely an interpretative declaration. It read:

> The rule contained in Article 6, paragraph 1 (art. 6-1), of the Convention that hearings shall be in public shall not apply to proceedings relating to the determination [...] of any criminal charge which, in accordance with cantonal legislation, are heard before an administrative authority. […]
>
> The rule that judgment must be pronounced publicly shall not affect the operation of cantonal legislation on civil or criminal procedure providing that judgment shall not be delivered in public but notified to the parties in writing.[29]

The Court found that this reservation did not satisfy the requirements of Article 64 of the European Convention, since the Federal Council had not appended '*a brief statement of the law concerned.*'[30] As it concluded, the reservation must be regarded as invalid.[31] That being so, the Court found it unnecessary to determine whether the reservation was of '*a general character*', contrary to Article 64, paragraph 1.[32] Without further explanation, it proceeded to consider the merits of the Applicant's complaints, ignoring the reservation.[33]

2.2 The jurisprudence relating to the effect of invalid declarations

As is apparent, the reasoning of the European Court in cases concerning the effect of invalid reservations to the European Convention does little to explain why the severability solution should be adopted, and not the total invalidity solution. Adjusting for this observation, this article will proceed to reconstruct the reasoning of the Court based on other jurisprudence – that which concerns the effect of invalid declarations made according to Articles 25 and 46 of the European Convention before the entry into force of Protocol No. 11. Formally, a declaration made according to Articles 25 and 46 is not a reservation to a treaty, so nothing prevents the Court from ascribing a different effect to an invalid reservation than to an invalid declaration. Still, a closer look at particular decisions gives the clear impression that the Court, when it determined the effect of such acts, was motivated by the same reasons. This makes the jurisprudence on the effect of invalid declarations important for understanding the reasons of the Court for adopting the severability solution.

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nevertheless be effective. At the same time, the Swiss Government requested an opportunity to reword its reservation in a manner that would be valid. See Public Hearings held on 26 October 1987, COUR/MISC (87) 237, at 46-48.

28 *Weber v. Switzerland supra* (n 26).

29 Ibid, para 23.

30 Ibid, para 38.

31 Ibid.

32 Ibid.

33 Ibid, para 39.

The central decision is that in the *Case of Loizidou v. Turkey (Preliminary Objections)*.[34] This case was referred to the European Court of Human Rights by the Government of Cyprus in 1993. It originated in an application against Turkey submitted to the European Commission of Human Rights by a Cypriot national, Mrs. Titina Loizidou, according to Article 25 of the European Convention before the entry into force of Protocol No. 11. Article 25 empowered the European Commission to receive petitions from any person claiming to be the victim of a violation by one of the High Contracting Parties of the rights outlined in the Convention, '*provided the High Contracting Party against which the complaint has been lodged had declared that it recognises the competence of the Commission to receive such petitions.*'[35] The new application submitted by the Government of Cyprus referred to Article 48(b) of the Convention, according to which cases could be brought before the European Court by a High Contracting Party when one of its nationals was alleged to be a victim of a violation by another High Contracting Party. Much like in Article 25, this right of petition was subject to the condition that both Contracting Parties had recognized the compulsory jurisdiction of the Court. Such recognition would normally be given by way of the deposition of a declaration with the Secretary-General of the Council of Europe.[36]

By its application, the Government of Cyprus sought a decision on whether the rights of Mrs. Loizidou had been affected as a result of the occupation and control of the northern part of Cyprus by Turkish armed forces. What raises our interest in the judgment is the territorial restrictions that the Government of Turkey had appended to its declarations of Articles 25 and 46. It had limited its acceptance of the competence of the European Commission to '*acts and omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable*.'[37] In a similar vein, it had recognised the jurisdiction of the European Court only to the extent of '*matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 (art. 1) of the Convention, performed within the boundaries of the national territory of the Republic of Turkey.*'[38]

As expected, the Turkish Government asked the Court to take these restrictions into account. They were legally valid, it said, and they bound the Convention institutions. As the Turkish Government expressed it, '*the system set up under Articles 25 and 46 (art. 25, art. 46) is an optional one into which Contracting States may, or may not, 'contract-in'.*'[39] To corroborate this understanding, the Turkish Government referred to the established practice of the International Court of Justice (ICJ) of permitting territorial restrictions to the optional recognition of its jurisdiction. It pointed to the wording of Article 36, paragraph 3 of the Statute of the International Court, which was, as the Turkish Government expressed it, '*in all material respects' the same as that of Articles 25 and 46 of the European Convention*.'[40] This was no mere coincidence, it maintained since Article 46 had been modelled on Article 36.[41] Consequently, if the Statute permitted territorial restrictions, Articles 25 and 46 should be understood to do it too.

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34 *Case of Loizidou v. Turkey (Preliminary Objections)*, Chamber, Judgment 23 March 1995.

35 European Convention for the Protection of Human Rights and Fundamental Freedoms (n 21).

36 See European Convention on Human Rights (n 21), art 46.

37 *Loizidou v. Turkey supra* (n 36), para 25. In 1990, some six months after the lodging by Mrs Loizidou of her application with the European Commission, the Government of Turkey revised this to read 'acts and omissions of public authorities in Turkey performed within the boundaries of the national territory of the Republic of Turkey'.

38 Ibid, para 27.

39 Ibid, para 67.

40 Ibid.

41 Ibid.

In addressing these claims, the Court recalled the emphasis that it had many times before placed on the dynamic character of the European Convention. The Convention was a living instrument, the Court explained; it had to be interpreted, at all times, in the light of present-day conditions.[42] This had to be the approach whether interpretation concerned the substantive provisions of the Convention or the provisions that governed the operation of the Convention's enforcement machinery.[43] As the Court inferred, Articles 25 and 46 could not be interpreted solely under the intentions of their authors as expressed more than forty years ago, contrary to what the Turkish Government had suggested.[44] More importantly, the Court would have to consider the ordinary meaning of these provisions in their context and the light of their object and purpose.[45]

In this respect, the Court noted the absence of any express provision permitting explicitly states to make territorial restrictions on their acceptance of the competence of the Commission and Court.[46] The Court pointed to the far-reaching consequences that such a provision would have entailed:

> The rule contained in Article 6, paragraph 1 (art. 6-1), of the Convention that If, as contended by the respondent Government, substantive or territorial restrictions were permissible under these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*).[47]

The Court further noted that Article 64 restricted the power of states to make reservations to the European Convention. As the Court inferred:

> [T]he existence of such a restrictive clause governing reservation 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 by the Convention institutions. The inequality between Contracting States which the permissibility of such qualified acceptances might create would, moreover, run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights.[48]

Prompted by the submissions of the Respondent, the Court considered the argument that the wording of Articles 25 and 46 of the European Convention should be interpreted in much the same way as Article 36 of the Statute of the International Court of Justice. For reasons connected with the '*fundamental difference in the role and purpose of the respective tribunals*,' this argument did not persuade it:[49]

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42 *Loizidou v. Turkey supra* (n 34).
43 Ibid.
44 Ibid.
45 Ibid, para 73
46 Ibid, para 75.
47 Ibid.
48 Ibid, para 77.
49 *Loizidou v. Turkey supra* (n 34), para 85.

> In the first place, the context within which the International Court of Justice operates is quite distinct from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of international law. In the second place, unlike the Convention institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention.[50]

As the Court finally concluded, the territorial restrictions that the Turkish Government had appended to its Articles 25 and 46 declarations were invalid.[51]

Having come to this conclusion, the Court had to proceed to establish the effect of the Turkish declarations.[52] Should the declarations be considered null and void in their entirety, as the Government of Turkey contended, or should they be applied without Turkey benefitting from its territorial restrictions, as if they had never been made? This question is comparable to the issue of the effect of invalid reservations to the European Convention and its Additional Protocols, and the European Court addressed it consistently with its decisions in *Belilos* and *Weber*. The Turkish declarations, it insisted, contained valid acceptances of the competence of the Commission and the Court.[53] The Court explained this decision in fairly brief terms, considering the fundamental importance of the issue. It recalled its earlier finding in *Belilos*.[54] It noted once again '*the special character of the [European] Convention as an instrument of European public order.*'[55] This character, it insisted, militated '*in favour of the severance of the impugned clauses since it is by this technique that the rights and freedoms set out in the Convention may be ensured in all areas falling within Turkey's 'jurisdiction' within the meaning of Article 1 (art. 1) of the Convention.*'[56]

3. The practice of the Inter-American Court and of UN treaty monitoring bodies

3.1 The practice of the Inter-American Court

According to Article 62, paragraph 2 of the Inter-American Convention on Human Rights, a State party may at any time declare '*that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of this Convention.*'[57] As further established by paragraph 2, '*such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases.*'[58] In the *Case of Hilaire v. Trinidad and Tobago*, the Inter-American Court considered a declaration made under Article 62 by the Government of

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50 *Loizidou v. Turkey supra* (n 34), para 84.
51 Ibid, para 89.
52 Ibid, paras 90-98.
53 Ibid, para 98.
54 Ibid, para 94.
55 Ibid, para 93.
56 Ibid, para 96.
57 American Convention on Human Rights [1969] 1144 UNTS 123, art 62.
58 Ibid.

Trinidad and Tobago in its instrument of accession.[59] This Government subjected its recognition of the jurisdiction of the Court to a reservation:

> [A]s regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in the said article, only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.[60]

The Court noted that this declaration was invalid for two reasons.[61] First, it was inconsistent with Article 62, paragraph 2, which spelled out the conditions that states could lawfully attach to their declarations.[62] Secondly, the declaration was incompatible with the object and purpose of the Convention:

> The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the discretional power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.[63]

Furthermore:

> [A]ccepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.[64]

It remained for the Court to determine the effect of the invalid declaration.

In addressing this issue, the Inter-American Commission had suggested that the Court should follow the reasoning of the European Court of Human Rights in *Loizidou* – it should decide that the reservation be severed from the declaration and the declaration be applied absent this reservation.[65] As it had argued:

> Severing the impugned term from the State's declaration of acceptance, instead of annulling the declaration *in toto*, serves to guarantee Mr. Hilaire's fundamental human rights and those of individuals in similar situations who would not otherwise have effective domestic remedies of protection.[66]

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59 *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment of 1 September 2001, Ser. C, No. 80.
60 Ibid, para 43.
61 Ibid, para 98
62 Ibid, para 88.
63 Ibid, para 92.
64 Ibid, para 93.
65 Ibid, para 69.
66 Ibid, para 67.

The Court acted as the Commission had suggested that it should. It decided to dismiss the objections made by Trinidad and Tobago to the jurisdiction of the Court and to continue to examine the case on its merits.[67] It did not add any specific explanation as to why the severability solution should be adopted rather than the alternative.

3.2 The practice of UN treaty monitoring bodies

In 1994, the Human Rights Committee adopted General Comment No 24.[68] This Comment identifies the principles that the Committee applies for the assessment of reservations to the International Covenant on Civil and Political Rights and its Optional Protocols. Paragraph 18 of the Comment bears directly on the effect of such reservations when found to be invalid:

> 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. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.[69]

Five years later, in 1999, a communication to the Human Rights Committee submitted by a resident of Trinidad and Tobago, Mr. Rawle Kennedy, gave the Committee occasion to revisit this issue relative to a concrete case.[70] The author of the communication was in State prison awaiting execution, having been found guilty of murder and sentenced to death by a local court. When, in 1998, the Government of Trinidad and Tobago had deposited its instrument of accession to the Optional Protocol to the International Covenant, it had included the following reservation:

> Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent 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 detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith.[71]

The Government contended that because of this reservation, and because the author was a prisoner under sentence of death, the Committee was not competent to consider his communication.[72]

The Committee noted that the Optional Protocol did not itself govern the issue of the permissibility of reservations to its provisions. It focused attention instead on the test laid down in Article 19(c) of the Vienna Convention: a reservation to a treaty is valid only to the extent that it is compatible with its object and purpose. In examining the implications

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67 *Hilaire v. Trinidad and Tobago* (n 59), para 98.
68 UN Doc CCPR/C/21/Rev.1/Add.6.
69 Ibid, para 18.
70 *Rawle Kennedy v. Trinidad and Tobago*, Communication No 855/1999, UN Doc CCPR/C/67/D/845/1999.
71 Ibid. para 4.1.
72 Communication No 855/1999 (n 70), para 4.2.

of this test for an assessment of the reservation that Trinidad and Tobago had made, the Committee quoted from its General Comment No. 24:

> The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to object and purpose of the first Optional Protocol, even if not of the Covenant.[73]

The Committee stressed the purport of the reservation, which was to exclude the competence of the Committee concerning the entire Covenant for one particular group of complainants, namely prisoners under sentence of death.[74] To accept such a reservation, the Committee explained, would be to admit discrimination – one that would run counter to some of the basic principles embodied in the Covenant and its Protocols.[75] For this reason, the Committee would have to regard it as incompatible with the object and purpose of the Optional Protocol.[76] As the Committee concluded, it was not precluded from considering the communication that Mr Kennedy had submitted.[77]

The adoption of General Comment No. 24 triggered a development of the practice of UN treaty monitoring bodies generally. In 2004, an inter-committee meeting of human rights treaty bodies requested the establishment of a working group and entrusted it with the task of examining the reservations practice of all human rights treaty monitoring bodies.[78] The working group submitted its final report three years later.[79] This report included a series of recommendations, one of which dealt with the consequences of the invalidity of reservations:

> [T]he Working Group agrees with the proposal of the Special Rapporteur of the International Law Commission according to which an invalid reservation is to be considered null and void. It follows that a State will not be able to rely on such a reservation and, unless its contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.[80]

A meeting of chairpersons of the human rights treaty bodies subsequently endorsed this recommendation in 2007.[81]

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73 Communication No 855/1999 (n 70), para 6.6.
74 Ibid, para 6.7.
75 Ibid.
76 Ibid.
77 Ibid.
78 Report of the third inter-committee meeting of human rights treaty bodies, Geneva, 21 and 22 June 2004, Report of the chairpersons of the human rights treaty bodies on their sixteenth meeting, UN Doc A/59/254, Annex, para 18.
79 Report of the Meeting of the Working Group on Reservations, UN Doc HRI/MC/2007/5.
80 UN Doc HRI/MC/2007/5 (n 79), p 7.
81 Report of the sixth inter-committee meeting of human rights treaty bodies, Report of the nineteenth meeting of

4. The teaching of human rights scholars

This survey of the practice of human rights courts and treaty monitoring bodies illustrates the need for a new theoretical framework. None of the institutions that have dealt with the issue of the effect of invalid reservations to human rights treaties have produced any complete and convincing explanation as to why the severability solution should be preferred to the alternative. Human rights scholars have attempted to fill this critical void. In trying to explain the soundness of the severability solution, they have pointed to the relevance of a wide range of different factors. This work can be understood to suggest four different explanations:

1. The severability solution is the result of a balancing of intentions.

This explanation is inspired by the judgment of the European Court in *Belilos*, which placed a whole lot of emphasis on the fact that the Swiss Government regarded itself as bound by the European Convention.[82] It builds upon the ambivalence that inheres in the deposit by a State of an instrument of ratification or accession subject to an invalid reservation.[83] By this act, on the one hand, the State expresses an intention to be bound by the treaty. On the other hand, it expresses an intention to make its adherence to the treaty conditional upon a reservation. As scholars argue, the severability solution should be adopted in cases where a legal decision-maker finds that the former intention is predominant.[84]

2. An adoption of the total invalidity solution comes with great practical difficulties.

According to Walter, policy considerations militate against total invalidity: *'[a] factor of consideration must be seen in the fact that a reservation to a specific provision to a treaty may only turn out to be impermissible after several years during which the reserving State would be treated as a party to the treaty.'*[85] Such situations will raise difficult questions concerning the legal consequences of the many acts that the reserving State performed in reliance on the treaty since its ratification.[86]

3. The structure of human rights law prompts an adoption of the severability solution.

Judged by the wording of General Comment No. 24, the justification of the Human Rights Committee's approach to the issue of the effect of invalid reservations lies in '*the special*

chairpersons of human rights treaty bodies, Geneva, 21 and 22 June 2007, UN Doc A/62/224 (2007), Annex, para 48.

82 See *supra*, Section 2.1.

83 S Marks, 'Reservations Unhinged: The Belilos Case before the European Court of Human Rights', (1990) 39 *International and Comparative Law Quarterly*, 300, at 312.

84 See e.g. I Boerefijn, 'Impact on the Law of Treaty Reservations', in M Kamminga and M Sheinin (eds.), *The Impact of Human Rights Law on General International Law* (OUP 2009), 63, at 89; H Bourgignon, 'The Belilos Case:New Light on Reservations to Multilateral Treaties', (1989) 29 *Virginia Journal of International Law*, 347, at 382; K Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights', (2002) 13 *European Journal of International Law*, 437, at 464-468; Marks (n 82), 312; C Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)', (1997) 46 *International and Comparative Law Quarterly*, 390, at 407; W Schabas, 'Reservations to the Convention on the Rights of the Child', (1996) 18 *Human Rights Quarterly*, 472, at 490.

85 Walter (n 5), 279-280.

86 See VCLT (n 2), art 69.

character of human rights.'[87] This remark begs the question: what is it with human rights that not only makes them special but also naturally leads to the adoption of the severability solution? In response to this question, human rights scholars often stress the structure of human rights law.[88] Individuals, and not States, are the beneficiaries of human rights treaties.[89] Thus, human rights treaties do not establish a set of bilateral relations that operate reciprocally.[90] Instead, they create a framework for a 'collective guarantee' of certain rights and freedoms for the benefit of public order.[91]

4. Human rights courts and treaty monitoring bodies have acted to ensure the effectiveness of human rights treaties.

This explanation picks up on the reasoning of the European Court in *Loizidou*.[92] The argument put forth by the Inter-American Commission in *Hilaire* may also be understood to point in this same direction.[93] As scholars have put it, human rights treaties must be given the broadest possible range of effects.[94] States should not be entitled to rely upon their will to an extent that would undermine the public order system established by a human rights treaty.[95] The common public interest overrides that of individual States.[96]

None of these explanations meets the standard of rational reason. The suggestion that the severability solution be seen as the result of a balancing of intentions is question-begging: what reason do legal decision-makers have for thinking of an intention of a reserving State to be bound by treaty as predominant, rather than the intention of this State to make its adherence to the treaty conditional upon a reservation? The explanation that stresses the great practical difficulties entailed by the total invalidity solution is over-inclusive and fails to convince for that reason. There is no doubt that the adoption of the total invalidity solution may sometimes have unwieldy consequences: a reserving State may believe itself to be a party to a treaty for many years until it is discovered that it was acting on false assumptions. However, this is an argument against the adoption of the total invalidity solution in the consideration of the effect of invalid treaty reservations generally. It does not explain why this solution should be avoided in the consideration of invalid reservations to human rights treaties specifically, but not in the consideration of invalid reservations to other treaties. Over-inclusiveness can also be said to be a flaw of the explanation that stresses the structure of human rights law. Human rights treaties are certainly not the only ones that do not establish bilateral and reciprocal relations between

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87 See *supra* Section 3.1. See also I Cameron and F Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case', (1990) 33 *German Yearbook of International Law*, 69, at 116.

88 See e.g. Marks (n 83), 316; M Scheinin, 'Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee', in I Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Regime* (Martinus Nijhoff 2004), 41, at 51.

89 See e.g. G McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol', (2001) 23 *Human Rights Quarterly*, 769, at 789-790; Scheinin (n 88), 51.

90 See e.g. Marks (n 83), 316.

91 See e.g. ibid.

92 See *supra* Section 2.2.

93 See *supra* Section 3.1.

94 See e.g. R Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?', (2000)11 *European Journal of International Law*, 413, at 419; Marks (n 83), 326; J Polakiewicz, 'Collective Responsibility and Reservations in a Common European Human Rights Area', in I Ziemele (n 88), 95, at 118; B Simma and G Hernández, 'Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?', in E Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011), 60, at 82.

95 See e.g. J Frowein, 'Reservations and the International *Ordre Public*', in J Makraczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krysztof Skubiszewski* (Martinus Nijhoff 1996), 403, at 407.

96 See e.g. Marks (n 83), 226.

duty-bearers and right-holders. Many other treaties establish such relations, including those on matters such the suppression of international crimes, and the protection of the cultural heritage and the natural environment.[97]

The explanation that ties the adoption of the severability solution to the effectiveness of human rights treaties promises more but needs further development. An essential element of this explanation is the concept of effectiveness. The effectiveness of an object is its quality of producing an intended or desired result.[98] When you speak about an effective pair of scissors, for example, you refer to its cutting ability. When you speak about an effective argument, you refer to its ability to convince. Again, when you speak about an effective outfit, you refer to its ability to help you accomplish whatever you wish to accomplish when wearing it. Similarly, when human rights scholars speak about the effectiveness of human rights law, they imply consideration of the objects and purposes of human rights treaties. The question arises: what is it with the objects and purposes of human rights treaties that points us in the direction of the severability solution? This question must be answered if an appeal to the effectiveness of human rights treaties is to serve as a complete and convincing explanation of why human rights institutions should adopt the severability solution. The new theory of the effect of invalid reservations will meet this concern.

5. A new theory of the effect of invalid reservations

This theory builds upon the principle of good faith. International scholars stress the foundational value of this principle.[99] They refer, interchangeably, to the principle of good faith as '*a major pillar of treaty law'*, as the basis of the law of treaties, and an idea that '*pervades the whole of this branch of the law.*'[100] Article 26 of the VCLT confirms this assumption by tying the relevance of the principle to the application of treaties generally. The article reads: '*every treaty in force is binding upon the parties to it and must be performed by them in good faith*.'[101]

As this author has argued extensively elsewhere, good faith stands for the assumption that international lawmakers act rationally.[102] Without making this assumption, we cannot understand their actions – this is why the principle of good faith is fundamental. Rationality is a relationship between an action or an activity and a given objective, the assumption can be phrased in terms such as these: By engaging in conduct of a kind that is capable of producing an effect governed by international law, States and international organisations commit themselves to act for the realisation of certain purposes.

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97 See L A Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', (2002) 13 *European Journal of International Law*, 1127-1145.

98 See 'Cambridge Dictionary', <https://dictionary.cambridge.org/dictionary/english/effective>, accessed 4 January 2024.

99 See eg M Virally, 'Review Essay: *Good Faith in Public International Law*', (1983) 77 *American Journal of International Law*, 130, at 132.

100 K Schmalenbach, 'Preamble', in Dörr and Schmalenbach (n 5), 9, at 12; M K Yaseen, 'L'interprétation des traits d'après la Convention de Vienne sur le droit des traités', (1976) 151 *Recueils des cours*, 1, at 22. See, similarly, B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953), Grotius Classic Reprint Series, Vol II (1987), 105; S Rosenne, *Developments in the Law of Treaties 1945-1986* (CUP 1989), 173.

101 See VCLT (n 2), art 26.

102 U Linderfalk, 'What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics', 78 (2018) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1-32.

First, they commit to act to make themselves understood – to bring their communicative intention across.[103] A treaty is a vehicle, which helps to carry the communicative intention of its parties across. The only way to capture this intention is through the assumption that the treaty parties acted rationally, and thus, that they conformed to certain communicative standards. The good faith requirement inserted in Article 31 of the VCLT confirms the necessity of such an assumption. It has further implications. When legal decision-makers engage in the interpretation of a treaty, must they find their arguments on the primary and supplementary means of interpretation described in Articles 31 and 32 of the VCLT. They must also act on assumptions such as any of the following: that the parties expressed themselves in conformity with the lexicon, grammar, and pragmatic rules of conventional language; that they ascribed to words and lexicalised phrases a consistent meaning; that they arranged it so that no norm established by the treaty logically contradict any other; that they arranged it so that no parts of the treaty comes out as redundant; that they arranged it so that the application of the treaty will not require derogation from other international norms applicable in the relationship between them, and so forth.[104]

Secondly –since fulfilling this first purpose cannot be assumed to be an end in itself– States and organisations commit to act to bring about the object and purpose of the treaty.[105] Several of the provisions laid down in the VCLT give precise form to this commitment. Obvious examples include the prohibition of reservations that are incompatible with the object and purpose of a treaty, the obligation to reconcile the different authenticated texts of multilingual treaties by adopting the meaning that helps best attain their object and purpose, the provision that excludes any modification of a treaty incompatible with the effective execution of its principal object and purpose, the prohibition of suspension of the operation of a treaty by agreement between some of its parties when a suspension is incompatible with the object and purpose of the treaty, and the requirement that a breach of a treaty may only be used as an excuse for terminating it, or suspending its operation when it consists in the violation of a provision essential for the accomplishment of the object and purpose of the treaty.[106]

This analysis directs attention to the objects and purposes of human rights treaties. There is certainly something about the objects and purposes of these treaties that distinguishes them from treaties on most other topics: they all seek to create and maintain a public order. A public order, as commonly understood, consists of the conditions that must exist to protect the fundamental interests of a community and to preserve its most basic values.[107] It was always difficult to define these conditions with any precision. They seem to depend on the precise community considered. If we limit considerations to the perspective of international human rights law, public order presupposes compliance with certain human rights standards by all community members. More importantly, it presupposes a common understanding of those standards.

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[103] Linderfalk (n 102).

[104] See e.g. *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, *ICJ Reports 1999*, 1045, at 1062; *Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment of 13 July 2009, ICJ Reports 2009, 213, at 239; *Case of Soering v. The United Kingdom*, Judgment of 7 July 1989, 33-34; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, *ICJ Reports 2011*, 70, at 125-126; *Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of 24 May 2005, *UNRIAA*, Vol 27, p 35, at 72-73.

[105] Linderfalk (n 102).

[106] VCLT (n 2), art 19(c); 33, para 4; 41, para 1(b); 58, para 1(b); 60, para 3(b).

[107] F Hofmeister and T Kleinlein, 'International Public Order', *Max Planck Encyclopedia of Public International Law*, article last updated June 2019.

As the Universal Declaration of Human Rights reminds us, UN Member States '*have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.*'[108] The Declaration stresses in this context the importance of a common understanding of human rights and fundamental freedoms:

> Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge.[109]

In slightly different terms, the European Convention reminds us of the aim of the Council of Europe, which is '*the achievement of greater unity between its members.*'[110] It reiterates '*that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms*.'[111] Other human rights treaties have been framed in a language that presupposes a similar communal conception of human rights. Treaties concluded under the aegis of the United Nations recall the origin of human rights, which derive from '*the inherent dignity of the human person*.'[112] They stress the nature of human rights, which are '*equal and inalienable*' and inhere to '*all members of the human family*.'[113] They call attention to the obligations of Member States of the UN '*to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all.*'[114] The Inter-American Convention on Human Rights, for its part, emphasizes '*that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they, therefore, justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states*.'[115]

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[108] UNGA res 217 A (III).

[109] Ibid, preambular para 7.

[110] See preambular para 3.

[111] See preambular para 3. Article 1 of the Statute of the Council of Europe reads:
(a) The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.
(b) This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

[112] See Convention on the Elimination of Racial Discrimination, 660 UNTS 195, preambular para 1; International Covenant on Economic, Social and Cultral Rights, 993 UNTS 3, preambular para 2; International Covenant on Civil and Political Rights, 999 UNTS 171, preambular para 2; Convention on the Elimination of Discrimination of Women, 1249 UNTS 13, preambular para 1; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, preambular para 2; Convention on the Rights of the Child, 1577 UNTS 3, preambular para 1; Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, Art. 1.

[113] See Convention on the Elimination of Racial Discrimination, *supra* n 111, preambular para 3; International Covenant on Economic, Social and Cultral Rights, *supra* n 111, preambular para 1; International Covenant on Civil and Political Rights, *supra* n 111, preambular para 1; Convention on the Elimination of Discrimination of Women, *supra* n 111, preambular para 2; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* n 111, preambular para 1; Convention on the Rights of the Child, *supra* n 111, preambular para 1; Convention on the Rights of Persons with Disabilities, *supra* n 111, preambular para (a).

[114] See Convention on the Elimination of Racial Discrimination, *supra* n 111, preambular para 1; International Covenant on Economic, Social and Cultral Rights, *supra* n 111, preambular para 4; International Covenant on Civil and Political Rights, *supra* n 111, preambular para 4; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* n 111, preambular para 3; International Convention for the Protection of all Persons from Enforced Disappearance, 2716 UNTS 3, preambular para 1.

[115] Preambular (n 108), para 2.

These observations lay the foundations of a new theory of the effect of invalid reservations on treaties. A treaty shall be performed in good faith. As suggested, good faith stands for the assumption that international lawmakers act rationally. Thus, when a State enters into a treaty relationship, this gives us reason to assume that this State is committed to acting for the realisation of its object and purpose. As shown by the brief survey just conducted, the object and purpose of human rights treaties presuppose a common understanding of human rights standards on the part of all members of the relevant community of States. In assessing the effect of an invalid reservation to a human rights treaty, consequently – for reasons of the object and purpose of this treaty – good faith would seem to require the adoption of the severability solution. To adopt instead the total invalidity solution would be contrary to the object and purpose of the treaty, as it would necessarily impede realisation of a common understanding of human rights standards.

Readers may object to this line of reasoning. They may find it difficult to cohere with the fact that no human rights treaty prevents reservations in absolute terms. If the realisation of the object and purpose of a human rights treaty presupposes a common understanding of human rights standards, why does not teleological effectiveness altogether preclude the possibility of making reservations? This argument disregards the context of a teleological argument, which makes effectiveness relative to a concrete choice. Thus, when considering the effect of an invalid reservation on a human rights treaty, legal decision-makers can adopt either the total invalidity solution or the severability solution. Depending on whether they decide to adopt either the former or the latter solution, their decision will impede the realisation of the object and purpose of the treaty, or it will not. Similarly, drafters of a human rights treaty can decide to allow reservations or to prohibit them altogether. They will make this decision based on a prediction of State behaviour. If drafters decide to prohibit reservations rather than allow them, there is a possibility that States will be more reluctant to become parties.[116] Thus, relative to the alternative, allowing reservations will not necessarily impede the realisation of a common understanding of human rights standards. In many cases, it will work in the exact opposite direction.

The new theory of the effect of invalid treaty reservations helps to explain decisions such as those considered in earlier sections of this article. In *Belilos*, if the European Court had opted for the total invalidity solution, not only would this have excluded Switzerland from the group of contracting parties to the European Convention and its Additional Protocols.[117] It would have made it very difficult for Switzerland to maintain its membership in the Council of Europe, since according to established practice there is a requirement upon members in this organisation to adhere to the European Convention.[118] This in turn would have impeded realisation of the overarching object and purpose of the Convention, which is to achieve greater unity in the maintenance and further realisation of human rights.

In *Loizidou*, the European Court had to decide whether to declare the Turkish declaration null and void or apply it without allowing Turkey to benefit from its territorial restriction.[119] The former alternative would have deprived the Court of the competence to receive petitions from any person claiming to be a victim of a violation of a right resulting from the occupation of the northern part of Cyprus by Turkish armed forces. If we conceive of this competence as a means to achieve greater unity in the maintenance and further

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[116] See McGrory (n 89), 799.

[117] See *supra* Section 2.1.

[118] See V Djerić, 'Admission to Membership of the Council of Europe and Legal Significance of Commitments Entered into by New Member States', (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 605, at 611.

[119] See *supra*, Section 2.2.

realisation of human rights, much like the Convention itself, then clearly this would also have been contrary to its object and purpose, although in a different way. Greater unity in the maintenance and further realisation of human rights presupposes not only the acceptance of a common standard of behaviour, but also the existence of an international enforcement mechanism that enjoys the confidence of all Member States of the Council of Europe.

In *Hilaire*, the Inter-American Court decided to sever the reservation that Trinidad and Tobago had made to its declaration recognizing the jurisdiction of the Court, and to apply the declaration short of the reservation.[120] If, instead, it had declared the declaration null and void, it would have had no jurisdiction to receive petitions from any person complaining about the violation of rights committed by authorities in Trinidad and Tobago. This would have impeded the realisation of a common understanding of human rights among the members of the Organisation of American States – for the same reason as declaring the Turkish declaration ineffective would have made it more difficult to achieve greater unity among the members of the Council of Europe.

In *Rawle Kennedy*, the Human Rights Committee decided to severe the reservations that Trinidad and Tobago had made to the Optional Protocol.[121] Since the purport of the reservation was to exclude parts of the competence of the Committee, this decision can be explained in much the same way as the decisions by the European and Inter-American Courts in *Loizidou* and *Hilaire*, respectively.

The principle of good faith makes no distinction between treaties depending on their topic. Hence, the new theory can be generalised and applied beyond that of human rights treaties. Human rights treaties are not the only ones that place heavy emphasis on unity in the maintenance of a legal regime. To give one example, constituent instruments of international organisations are typically drafted based on similar premises. Take for example the Statute of the Council of Europe. This treaty does not include any provision that explicitly either allows or precludes reservations. To the extent that the treaty does permit reservations, according to Article 20, paragraph 3 of the VCLT, reservations still require the acceptance of the competent organ of each respective organization. This rule seems to be justified by the object and purpose of the treaty, which presupposes unity in the maintenance of a legal regime, just like the European Convention. If a State makes a reservation to the Statute of the Council of Europe, and this reservation is found to be invalid, it would seem reasonable therefore to deal with it in the same way as a reservation to a human rights treaty: the invalid reservation should be severed, and the reserving State should be considered a member of the Council of Europe without benefitting from the reservation.

The new theory of the effect of invalid treaty reservations not only explains why, in the case of some treaties, the severability solution should be adopted but also explains why in many cases the severability solution should *not* be adopted. After all, human rights treaties and the founding treaties of international organisations remain the exception, not the rule. Most treaties have objects and purposes that do not presuppose unity in the maintenance of a legal regime. The object and purpose of the 1961 Vienna Convention on Diplomatic Relations, for example, is '*the maintenance of international peace and security, and the promotion of friendly relations among nations.*'[122] The object and purpose of the 1999 Convention on Arrest of Ships is '*the harmonious and orderly development of world seaborne*

[120] See *supra*, Section 3.1.
[121] See *supra*, Section 3.2.
[122] Vienna Convention on Diplomatic Relations [1961] 500 UNTS 95, preambular para 3.

trade.'[123] The object and purpose of the 1972 World Heritage Convention is '*the protection of the cultural and natural heritage of outstanding universal value*'.[124] In the case of an invalid reservation to any of these treaties, the adoption of the total invalidity solution would not necessarily impede the realisation of its object and purpose in the way that it would in the case of an invalid reservation to a human rights treaty. If a reserving State is not allowed to become a party to the 1961 Vienna Convention, for example, international peace and security will not immediately suffer. In contrast, if a reserving State is not allowed to become a party to the European Convention on Human Rights, there will immediately be less than unity in the maintenance and further realisation of human rights.

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[123] International Convention on Arrest of Ships [1999] 2797 UNTS 3. See preambular para 1,

[124] Convention concerning the Protection of the World Cultural and Natural Heritage [1972] 1037 UNTS 151. See preambular para 8.