ascertain the intention underlying the treaty and as a starting point for a broader discussion. It also operates in the broader context of giving effect to the terms of a text.

The principle of effectiveness has two meanings. The first is that all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to express the intended meaning. Thus an interpretation that renders a text ineffective and meaningless is incorrect. The second operates as an aspect of the 'object and purposes' test, and it means that the instrument as a whole and each of its provisions must be taken to have been intended to achieve some end, and that an interpretation that would make the text ineffective to achieve that object is also incorrect. Thirlway observes that this latter approach is similar to the 'object and purpose' criterion, and 'has therefore, like this criterion, to be employed with discretion' (Thirlway, 1992).

F. THE DYNAMIC (EVOLUTIVE) INTERPRETATION OF TREATIES AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

One of the most contentious, disputed and discussed issues in treaty interpretation is so-called the dynamic (evolutive) interpretation of treaties, which in particular has been developed in the jurisprudence of the European Court of Human Rights. The basis for such as an interpretative method is predicated upon the principle that the treaty is a living instrument. There are several cases (such as 1975 *Tryer*, 1978 *Golder*, and 1979 *Marckx*) in which the Court decided to override the consent of the Parties in the name of 'the interests served by the protection of the human rights and fundamental freedoms guaranteed by the Convention', which 'extend beyond individual interests of the parties concerned'. This resulted in the establishment by the Parties to the Convention of the 'standards forming part of the public law of Europe'. First of all, the interpretative method of the ECtHR derives from the special legal nature of this Convention and the obligations, which doctrinal basis was enunciated in the 1965 *Austria v Italy*. The Court also stressed the 'essentially objective character' of the 'obligations undertaken by the High Contracting Parties'. The 'objective legal order' 'benefits from the 'collective enforcement'. However, such an interpretative method was a subject of much criticism (eg by Sinclair and Fitzmaurice) as overriding intention and the consent to be bound of the Parties to the Convention and introducing the element of uncertainty for the Parties due to much more extensive interpretation of the provisions of the Convention. There are other international judicial bodies, which to a certain degree adopted such a method, such as eg within the World Trade Organization (WTO).

G. PLURILINGUAL TREATIES

A further problem concerns the interpretation of treaties drawn up in more than one language. The ILC observed that:

...the majority of more formal treaties contain an express provision determining the status of the different language versions. If there is no such provision, it seems generally accepted that each of the versions in which the text of the treaty was 'drawn' up is to be considered authentic, and therefore authoritative for the purpose of interpretation. Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts... the plurality of texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty. On the other hand, when meaning of terms is ambiguous or obscure in one language, but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretations of the text the meaning of which is doubtful.[52]

In the *Mavrommatis Palestine Concession* case, the ICJ had to interpret the phrases 'public control' and 'contrôle public' in the French and English authentic languages texts of the Palestine Mandate. The Court said:

...Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties.[53]

The matter is covered by VCLT Article 33, which reflects these general approaches to the problem.

In conclusion it may be said that there are numerous examples of the difficulties concerning the treaty interpretation. Such an example is the interpretation of Article 18 of the 1929 Geneva Convention on the Treatment of Prisoners of War, which provides that prisoners were to salute the officers of the captor country. In 1944, this clause was a subject of an interpretative dispute. In the period between 1939 and 1944, allied prisoners of war in Germany saluted their German captors in a classical manner, by touching their hands to the visors of their caps. Articles 18 of the Convention is silent as to whether the salute be returned, which is a universal military tradition: 'a salute unreturned is like the sound of one hand clapping' (Vagts, 1993, at p 490). After the failed attempt at Hitler's assassination (20 July 1944), regular German army troops were ordered to salute prisoners of war in a Nazi style, which resulted in the protest of the British. Eventually, due to the services of the International Committee of the Red Cross, the issue was resolved and prisoners permitted to the salute prevalent in their own army.[54]

VI. RESERVATIONS TO TREATIES

A. THE GENOCIDE CONVENTION CASE

Reservations to multilateral treaties are one of the most problematic issues in the law of treaties. According to VCLT Article 2(d) 'Reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or

[52] *YBILC* (1966), vol II (part two), pp 224–225.

[53] *Mavrommatis Palestine Concessions, Judgment No 2, 1924, PCIJ, Ser A, No 2*, p 19.

[54] Example from Vagts (1993, at p 490) who comments, 'Thus we find interpretation of the Convention being presented and considered by persons far away from the original negotiating process. Most of them were not lawyers and they had no access to *travaux préparatoires* (which, as so often happens, would not have been helpful). There was no-decision-maker to force a solution upon the parties. Yet it is apparent that the parties in dispute, although coming from different and at the time violently hostile states, did share assumptions about what a "salute" was, and when and how one should be rendered. Indeed, it seems likely the professional and traditional German officers had more in common on this point with their British counterparts than with their Nazi colleagues'.

acceding to a treaty, where, it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State'.

In its role as a treaty depository, the League of Nations had only allowed reservations that were accepted by all contracting parties to a treaty, otherwise it treated both the reservations and the signatures or ratifications to which they were attached as null and void. The Pan-American Union adopted a different, more flexible approach, the gist of which was that a treaty was considered to be in force as between a reserving State and States that accepted the reservation but not in force as between a reserving State and States that did not accepted the reservation.

The modern approach is derived from the 1951 Advisory Opinion of the ICJ in the *Reservation to the Convention on Genocide* case, the principal features of which were that:

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.[55]

The Court added that:

If a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention... if on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.[56]

It has to be said that although the Court's approach was subsequently reflected in the VCLT, the Court had made it clear that it was expressing its views on the operation of reservations only in relation to the Genocide Convention, noting that:

In such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.[57]

And that:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis.[58]

It was for these reasons that the Court departed from the more rigid system operated by the League of Nations, which some judges had considered to reflect international

[55] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951*, p 15 at p 29. See also *Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo* v *Rwanda), Jurisdiction of the Court and Admissibility of the Application*; see also Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *ICJ Reports 2006*.

[56] Idem. [57] Ibid, p 23. [58] Ibid, p 24.

customary law.[59] However, it was the General Assembly itself which requested that the UN Secretary-General adopt this new approach when acting in his capacity as depositary of multilateral treaties.[60]

The question of a reservation to Article IX of the Genocide Convention was a subject-matter of the *Democratic Republic of Congo* v *Rwanda* case. The DRC argued that the reservation made by Rwanda to Article IX of the Genocide Convention (ie to the submission of disputes arising from the interpretation of this Convention to the ICJ), was against the spirit of Article 53 of the 1969 VCLT as it prevented 'the... Court from fulfilling its noble mission of safeguarding peremptory norms'.[61] The Court, however, decided that 'the prohibition of genocide, cannot of itself provide a basis for jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties'.[62] This prompted a powerful Joint Separate Opinion by Judges Higgins, Koojimans, Elaraby, Owada, and Simma who, in light of recent developments in relations to reservation in general and to human rights treaties, were of the view that '[i]t is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration'.[63]

B. THE REGIME OF THE 1969 VIENNA CONVENTION

The Court's approach is reflected in VCLT Article 19 and so attempts to strike a balance between ensuring the integrity of a treaty whilst encouraging universal participation. Article 20(4) tips the balance towards widening participation by providing that even if a State party objects to a reservation attached to the signature or ratification of another State, the treaty will nevertheless enter into force and the reservation be effective between them unless 'a contrary intention is definitely expressed by an objecting State'. Moreover, the idea that the approach in the *Genocide Convention* case should be limited to those treaties where there was no particular advantage or disadvantage for an individual State was abandoned and Article 20(5) provides that, a reservation is considered to have been accepted by a State if it has not objected to it within 12 months of being notified of it, unless the reservation concerns the constituent instrument of an international organization, or the treaty in question provides otherwise.

Again following the *Genocide Convention* case, VCLT Article 19(c) provides that a State may not submit a reservation, which is 'incompatible with the object and purpose of the treaty'. This criterion is vague and difficult to grasp. However, reservations of general character are considered to be incompatible with the 'object and purpose' of a treaty.[64] Whilst reservations to treaty provisions which codify international customary law are

[59] See Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, and Hsu Mo, ibid, p 31.

[60] GA Res 598 (VI), 12 January 1952.

[61] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v *Rwanda) Jurisdiction of the Court and Admissibility of the Application, ICJ Reports 2006*, p 6, para 56.

[62] Ibid, para 64.

[63] Ibid, Joint Separate Opinion of Judges Higgins, Koojimans, Elaraby, Owada and Simma, para 29.

[64] See, before the European Court of Human Rights, *Belilos* v *Switzerland*, Judgment of 29 April 1988, Ser A, No 132, para 55.

possible,[65] there is no doubt that reservations to provisions reflecting norms of *jus cogens* are not.

How are those reservations, which are incompatible with the object and purpose of a treaty, distinguished from those which are not? There are two schools of thought: the permissibility school and the opposability school. The permissibility school is based on a two-stage assessment procedure: first, the reservation must be objectively assessed for compatibility with the object and purpose of the treaty. If it is not compatible, acceptance by other States cannot validate it.[66] If, however, the reservation is compatible with the object and purpose of the treaty, the parties may decide whether to accept or object to the reservation on whatever other grounds they wish, such as for political reasons. The opposability school bases the validity of the reservation entirely upon whether it has been accepted by other parties and sees the compatibility test as merely a guiding principle for the parties to contemplate when considering whether to accept or object to the reservation.[67]

Some treaties attempt to deal with this question on a treaty-by-treaty basis. For example, the 1965 International Convention on Elimination of All Forms of Racial Discrimination, Article 20 uses a mathematical test, providing that a reservation is incompatible with the 'object and purpose' of the treaty if at least two-thirds of the contracting parties object to it.

The *Restrictions to the Death Penalty* Advisory Opinion concerned a reservation made by Guatemala to the prohibition of the infliction of capital punishment 'for political offenses or related common crimes' found in Article 4(4) of the 1969 American Convention on Human Rights, which is a non-derogable provision. Faced with the question whether a reservation was permissible in the light of the object and purpose of the Convention, the Inter-American Court of Human Rights said that:

> ...a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed incompatible with the object and purpose of the Convention and, consequently, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose. Since the reservation... does not appear to be of a type that is designed to deny the right to life as such, the Court concludes that to that extent it can be considered, in principle, as being not incompatible with the object and purpose of the Convention.[68]

One unresolved question concerns the legal effect of having attached an impermissible reservation to a signature or ratification. There are two possible solutions: the first is that unless it is withdrawn, a State making an impermissible reservation will not be considered a party to a treaty. The second is that the impermissible reservation may be severed and the State be bound by the treaty in its entirety. Although, as will be seen below, there is some practice supporting the severability approach in the human rights sphere, it is difficult to see how the reservation can legitimately be severed if the consent to be bound is made expressly subject to such a reservation, albeit an impermissible one.

[65] See, eg, *North Sea Continental Shelf, Judgment, ICJ Reports 1969*, p 3, paras 29 and 72 which seem to accept the possibility. But cf UN HRC General Comment No 24(52) on issues relating to Reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 11 November 1994 (for text see (1995) 15 *HRLJ* 262) which argues that reservations to provisions in human rights treaties which represent customary international law are not permissible. This is considered further below.

[66] UN Doc A/CN.4/470 (30 May 1995) (First Report on Reservations), p 49, para 102. See also *YBILC* (1995), vol II (part two), p 101.

[67] Idem.

[68] *Restrictions to the Death Penalty*, Advisory Opinion, Inter-American Court of Human Rights, AO OC-3/83, 8 September 1983, para 61, (1984) 23 ILM 320 at p 341.

C. THE PROBLEM OF RESERVATIONS TO HUMAN RIGHTS TREATIES

The system of reservations found in the Vienna Convention was supposed to be comprehensive but it became clear in the 1980s that the system was difficult to apply particularly as regards the compatibility of reservations to human rights treaties with their 'object and purpose' and in 1993 the topic of the Law and Practice Relating to Reservations to Treaties was added to the ILC's agenda. Human rights treaties are not contractual in nature and do not create rights and obligations between States on the traditional basis of reciprocity; they establish relationships between States and individuals. Several undecided issues had to be solved: were all reservations made by States permissible? If not, who decides on their permissibility? What are the legal effects of accepting or rejecting a reservation or of having made an impermissible reservation? Broadly speaking there are two main approaches: one illustrated by the approach of the UN Human Rights Committee (the HRC) that stresses the inadequacies of the VCLT regime and the other that considers that regime absolutely satisfactory.

There are very few international bodies, other than the European Court of Human Rights and the Inter-American Court of Human Rights, that have an institutionalized procedure to decide upon the permissibility of reservations. In the *Belilos* case the European Court of Human Rights decided that a declaration made by Switzerland when ratifying the ECHR was in fact a reservation of a general character and therefore impermissible under the terms of ECHR Article 64. The Court severed the reservation and decided that Switzerland was bound by the Convention in its entirety.[69] Similarly, in the *Lozidou* case the European Court of Human Rights considered that Turkish reservations to the jurisdiction of the Commission and Court to consider applications relating to activities in Northern Cyprus were invalid and severable, meaning that such applications could be considered by the Strasbourg organs, notwithstanding the intention of Turkey to prevent this.[70]

The question of reservations to human rights treaties was considered by the UN HRC in a controversial General Comment.[71] The HRC is the body established under the 1966 ICCPR and has the task of overseeing compliance by States parties with their obligations under the Covenant. In its General Comment, the Committee took the view that the Vienna Convention provisions, which give a role to State objections in relation to reservations, are inappropriate in the context of human rights treaties, which do not comprise a web of inter-State reciprocal exchanges of mutual obligations but are concerned with endowing

[69] *Belilos* v *Switzerland*, Judgment of 29 April 1988, Ser A, No 132, paras 52–55, 60.

[70] *Lozidou* v *Turkey (Preliminary Objections)*, Judgment of 23 March 1995, Ser A, No 310, paras 15, 27, 89, 90, 95.

[71] See above, n 65.

individuals with rights. The HRC took the view that reservations offending peremptory norms would not be compatible with the object and purpose of the Covenant and raised the question of whether reservations to non-derogable provisions of the Covenant were compatible with its object and purpose. It expressed the view that reservations to the system of individual communications to the Committee established under the first Optional Protocol to the Covenant would not be compatible with its object and purpose. The HRC also took the view that it was the Committee itself, which should determine whether a specific reservation was compatible with the object and purpose of the Covenant.

The General Comment provoked strong reaction, including from the UK and US who considered VCLT Article 19(c) both adequate and applicable to reservations to human rights treaties and considered it for States parties to determine whether a reservation is compatible with the object and purpose of that treaty rather than the Committee. Moreover, the United States stressed that reservations formed an integral part of the consent to be bound and are not severable. The Committee, however, affirmed its General Comment in the *Rawle Kennedy* case, though it was questioned by a number of members who in a dissenting opinion observed that:

> The normal assumption will be that the ratification or accession is not dependent on the acceptability of the reservation and the unacceptability of the reservation will not vitiate the reserving State's agreement to be party to the Covenant. However, this assumption cannot apply when it is abundantly clear that the reserving State's agreement to becoming party to the Covenant is *dependent* on the acceptability of the reservation. The same applies with reservations to the Optional Protocol.[72]

However, in his Second Report as ILC Special Rapporteur Alain Pellet, argued that the system of the Vienna Convention is adequate to address reservations in human rights treaties[73] and has recently noted that the practice of human rights bodies not in uniform and eg, the Committees of the Conventions on Elimination of Discrimination against Woman and International Convention on the Elimination of All Forms of Racial Discrimination attempt to persuade States to withdraw offending reservations rather than to decide on impermissibility.[74] It is, then, clear that there is a significant on-going controversy surrounding this question.

This was confirmed by the 2007 meeting between the ILC and human rights regarding reservations to human rights treaties. During this meeting the representatives of several human rights bodies as well as the members of the Commission presented their views on this issue. During the discussion several issues were raised, the most important being the invalidity of reservation to treaties. Although the special character of human rights treaties was noted, a view was expressed that there were other areas such as environmental protection which also had special characteristics. However, a distinctive feature of human rights treaties was the presence of the human rights bodies. It was observed, nevertheless,

[72] *Rawle Kennedy* v *Trinidad and Tobago*, Comm. No 845/1999, Decision, 2 November 1999, UN Doc A/55/40, vol II, Annex XI, A, Individual Dissenting Opinion of Ando, Bhagwati, Klein, and Kretzmer, para 16.

[73] For a summary see *YBILC* (1997), vol II, pp 53–54, 57.

[74] A Pellet, *Eighth Report on Reservations to Treaties*, ILC, Fifty-fifth Session (2003), A/CN.4/535, paras 17–27.

that the law of treaties generally and the regime set up under Article 19 of the VCLT were applicable and adequate to deal with reservations to human rights treaties but should be applied in 'an appropriate and suitably adopted manner'. The heart of the discussion was the issue of the delicate balance between the integrity and universality of treaties in respect of reservations. All participants were in agreement as to the competence of the human rights bodies to assess the validity of reservations. The most important issue was so-called 'reservation dialogue' between the reserving State and the human rights body. Such an approach was the best the understanding of the political situation underlying reservations and giving the opportunity for the human rights body to exercise pragmatism (which is a particular feature of these bodies' policy towards reservations) and discretion. However, the question of the severance of an offending reservation from consent to be bound by a treaty, remains an unresolved problem in cases of the impossibility of ascertaining intention of the States parties in this respect. On one hand, there were views of the human rights bodies which supported the right of such bodies to severe reservations; on the other hand, some participants adhered to the view that the principle of sovereignty must prevail. [75]

D. INTERPRETATIVE DECLARATIONS

Interpretative declarations are not addressed by the VCLT. They are appended to treaties by governments at the time of signature, ratification, or acceptance and are explanatory in character, setting out how a State understands its treaty obligation when expressing its consent to be bound. However, such declarations must be subject to close scrutiny. If they change the scope of the obligation, they cease to be declarations and become reservations. The legal effect of interpretative declarations depends upon whether they aim to offer an interpretation of the treaty that may subsequently be proved incorrect (a 'mere interpretative declaration') or whether they offer an interpretation that is to be accepted by others (a 'qualified interpretative declaration'). In practice, distinguishing between reservations and forms of interpretative declarations can be a very daunting task.

According to the ILC, this task should be undertaken in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard should be given to the intention of the State or the international organization concerned at the time the statement was formulated.

VII. PROBLEMS CONCERNING THE GROUNDS FOR TERMINATION

This section will consider some specific issues concerning the external grounds for terminating or suspending a treaty, these being material breach, supervening impossibility of performance, and fundamental change of circumstances.

[75] A Pellet, *Fourteenth Report on Reservation to Treaties*, ILC, Sixty-first Session (2009), A/CN.4/6/14, 1–37, pp 27–34.