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Indira Rosenthal

2 September 1996

**RESERVATIONS TO UNITED NATIONS HUMAN RIGHTS TREATIES: IS  
HALF A LOAF BETTER THAN NO BREAD?\***

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## TABLE OF CONTENTS

<b>INTRODUCTION</b>	1
<b>CHAPTER 1</b>	
<b>HISTORY OF RESERVATIONS</b>	5
The Unanimity Rule	5
The pan-American Reservations Framework	6
The ICJ Advisory Opinion on Reservations to the Genocide Convention	8
The Universality v. Integrity Dilemma	14
Reports of the International Law Commission on the Law of Reservations	16
The Regional Human Rights Regimes	18
A: Reservations Under the European Convention on Human Rights and Fundamental Freedoms	18
B: Reservations Under the Inter-American Convention on Human Rights	22
Conclusion	23
<b>CHAPTER 2</b>	
<b>THE VIENNA CONVENTION ON THE LAW OF TREATIES</b>	25
Introduction	25
The Vienna Convention Definition of 'Reservation'	25
Application of the Vienna Convention Reservations Rules	25
The Vienna Convention test for Admissibility of Reservations	26
The Object and Purpose Test	33
Reservations to Non-Derogable Provisions	33
Broad and Vague Reservations and Reservations that Invoke National Laws	35
Failure of States Parties to Object to Incompatible Reservations	37
Failure of Vienna Convention to Accommodate Normative Treaties	38
Conclusion	42

## TABLE OF CONTENTS

<b>CHAPTER 3</b>	
<b>THE HUMAN RIGHTS COMMITTEE'S GENERAL COMMENT 24(52)</b>	43
Role of the Human Rights Committee	43
Possible Motivating Factors Behind the Comment	46
Content of the Comment	48
A: Role of States Parties' Objections	49
B: Authority of the Committee to Determine the Validity of Reservations	54
C: Effect of Making an Incompatible Reservation - Severability	56
The US Reservation to Article 6 of the Covenant: A Case Study	63
Conclusion	68
<b>CHAPTER 4</b>	
<b>SOME REFORM PROPOSALS</b>	69
Introduction	69
Proposals For Procedural Reform: Role of the Supervisory Bodies	70
Proposals For Legislative Reform	71
A: Judicialising the System	71
B: A Different Regime for Human Rights Treaties?	72
C: Model Clauses on Reservations	77
The Work of the International Law Association	78
The Work of the International Law Commission	79
Conclusion	82
<b>CONCLUSION</b>	84
<b>BIBLIOGRAPHY</b>	

## INTRODUCTION

Much of the enormous volume of literature<sup>1</sup> on the law of reservations<sup>2</sup> has been concerned with human rights treaties.<sup>3</sup> This is not surprising given the centrality of the International Court of Justice's Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide<sup>4</sup> to the law of reservations and the sense that human rights objectives are not served by the current law of reservations. The concerns raised in this literature include the failure of the law to protect the rights expressed in the treaties from the undermining effect of reservations that are "incompatible" or otherwise invalid.<sup>5</sup> In particular, concern about certain reservations made to the Convention on the Elimination of All Forms of Discrimination Against Women<sup>6</sup> (the Women's Convention), to the

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<sup>1</sup> For example: D. Greig, "Reservations: Equity as a Balancing Factor" (1995) 16 *Australian Yearbook of International Law* 21; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties" (1993) 64 *British Yearbook of International Law* 245 [hereinafter *Universality*]; S. Rosenne, *Developments in the Law of Treaties 1945-1986*, 1989 [hereinafter *Developments*]; F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties* 1988; J. K. Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision" (1982) 23 *Harvard Journal of International Law* 71; Gamble, "Reservations to Multilateral Treaties: A Macroscopic View of State Practice" (1980) 74 *American Journal of International Law* 372; D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties" (1976-77) 48 *British Yearbook of International Law* 67; J.M. Ruda, "Reservations to treaties" [1975] 146 *Recueil des Cours* 95; S. Rosenne, *The Law of Treaties, A Guide to the Legislative History of the Vienna Convention* 1970 [hereinafter *Law of Treaties*]; W. Bishop, "Reservations to Treaties" [1961] 103 *Recueil des Cours* 245; Fitzmaurice, "Reservations to Multilateral Conventions" [1953] 2 *International and Comparative Law Quarterly* 1; T. O. Elias, *The Modern Law of Treaties* 1974.

<sup>2</sup> "Reservation" is defined in the Vienna Convention on the Law of Treaties 1969 (in force 1980 UNTS Vol. 1155, page 331) as a:

unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State.

Article 2(1)(d), Vienna Convention. The Vienna Convention, including this definition are discussed in more detail in Chapter 2 below. Note that this paper does not address the issue of interpretative declarations to treaties notwithstanding its close relation to reservations. On interpretative declarations, see Horn, above n.1.

<sup>3</sup> For example, J.P. Gardner (ed), *Human Rights as General Norms and A State's Right to Opt Out* (forthcoming 1996); L. Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify or Ruin?* 1995; B. Clark, "The Vienna Convention Reservations Regime and the Convention on the Elimination of All Forms of Discrimination Against Women" (1991) 85 *American Journal of International Law* 281; R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women" (1990) 30 *Virginia Journal of International Law* 643; P. H. Imbert, "Reservations to the European Convention on Human Rights Before the Strasbourg Committee: The Temeltasch Case" (1984) 33 *International and Comparative Law Quarterly* 558 [hereinafter "Temeltasch and the Strasbourg Commission"].

<sup>4</sup> Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep. 1951, 15 [hereinafter *Reservations Opinion*]. The Opinion is discussed below at pages 8-14.

<sup>5</sup> Incompatibility as a ground for invalidating reservations is the focus of the following discussion. Reservations may also be invalid if they are expressly prohibited by the treaty to which they are made. See Article 19 of the Vienna Convention, reproduced below at n. 159.

<sup>6</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* 1979, reproduced in UN Doc. ST/HR/Rev.5 (Vol.I/Part 1) at 150.

## INTRODUCTION

Convention on the Rights of the Child<sup>7</sup> (the Children's Convention) and to the International Covenant on Civil and Political Rights (ICCPR or Covenant),<sup>8</sup> has prompted considerable discussion of the issue of the application of the law of reservations to all human rights treaties.<sup>9</sup>

In 1992, the chairs of the international human rights supervisory bodies met for the fourth time and discussed, *inter alia*, reservations to their respective treaties.<sup>10</sup> The chair of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) reported that CEDAW considered that a number of reservations made to its treaty should not have been made and are incompatible with the object and purpose of the Women's Convention.<sup>11</sup> The Chair of the Committee on the Rights of the Child (CROC) gave a similar report in relation to reservations to the Children's Convention.<sup>12</sup> The meeting expressed the view that the situation facing the Women's and Children's Convention was "very alarming"<sup>13</sup> given the potential that incompatible reservations have "to undermine the goals of the treaty system".<sup>14</sup> The meeting also expressed a view, which appears consistently in the literature, about the effect of reservations on human rights treaties:

The chairpersons consider that the number, nature and scope of the reservations that have been made to the principal human rights treaties are cause for alarm. While recognizing that there is an important and legitimate role for reservations to treaties, they note that some of the reservations that have been lodged would appear to give

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<sup>7</sup> *Convention on the Rights of the Child* 1989, reproduced in UN Doc. ST/HR/1/Rev.5 (Vol.1/Part 1) at 174.

<sup>8</sup> *International Covenant on Civil and Political Rights* 1969, reproduced in UN Doc. ST/HR/1/Rev.5 (Vol.1/Part 1) at 20.

<sup>9</sup> It is interesting that no one has closely analysed the issue of reservations to these two Conventions from a feminist perspective. Especially as the comment has been made repeatedly that more reservations are made to the Women's Convention than any other human rights treaty and that a considerable number of incompatible reservations have been allowed to be made to them by their States parties. Unfortunately, such an analysis is outside the scope of this paper. See Clark, above n. 3; Cook, above n. 3. Also see generally: H. Charlesworth, C. Chinkin, S. Wright, "Feminist Approaches to International Law" (1991) 85 *American Journal of International Law* 613; H. Charlesworth, "Worlds Apart: Public/Private Distinctions in International Law" in M. Thornton (ed) *Public and Private: Feminist Legal Debates* 1995; A. Byrnes, "Women, Feminism and International Human Rights Law - Methodological Myopia, Fundamental Laws or Meaningful Marginalisation" [1992] 12 *Australian Yearbook of International Law* 205; R. Cook, *Human Rights of Women: National and International Perspectives* 1994; J. Peters & A. Wolper (eds) *Women's rights, Human rights: International Feminist Perspectives* 1995; D. Dallmeyer (ed) *Reconceiving Reality: Women and International Law Studies in Transnational Legal Policy* No. 25, 1993, Part 2; Lijnzaad, above n. 3.

<sup>10</sup> See Report of this meeting in *Effective Implementation of Human Rights Instruments*, Report of the 4th Mtg. Of Chairpersons of the Human Rights Treaty Bodies, UN Doc. A/47/628, 10 November 1992 [hereinafter *Effective Implementation*].

<sup>11</sup> *Ibid.*, at 12, para 36.

<sup>12</sup> *Ibid.*

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

<sup>14</sup> *Ibid.*, at 17, para 60.

## INTRODUCTION

rise to serious questions as to their compatibility with the object and purpose of the treaties in question.<sup>15</sup>

In 1994, pursuant to Article 40 of the ICCPR,<sup>16</sup> the Human Rights Committee, following up on the issues raised at the 1992 meeting, reported to the General Assembly its General Comment Number 24(52) on Issues Relating to Reservations Made Upon Ratification or Accession to the Treaty and to Declarations Made by States Under Article 41 of the Covenant (the Comment).<sup>17</sup> In it, the Committee comments on the application of the law of reservations to the ICCPR; sets out some examples of reservations that are likely to be incompatible with the ICCPR; explains the role States parties have in regulating reservations; and gives its opinion on the consequences of making an invalid reservation. The Comment is significant and controversial both because the Committee took it upon itself to comment on these issues and because of what it said about them.<sup>18</sup>

The purpose of this paper is to examine the Comment and to assess it against both the law of reservations and human rights policy considerations. Principally, it considers the development of the law of reservations and its underpinning principles; the meaning and application of the highly technical rules on reservations; the tension between the different policy goals that arise in the human rights context, i.e., the debate about the respective merits of universal participation in human rights treaties and preserving the integrity of such treaties; and the possibility for resolution of any of the difficulties associated with the law of reservations.

Accordingly, Chapter 1 examines in some detail the development of the law of reservations. Chapter 2 looks at the Vienna Convention and international customary rules on reservations, examines the principal criticisms of these rules in their application to human rights treaties, and introduces some of the doctrinal issues that continue to be the subject of debate. Chapter 3 assesses the Comment from an international law and a policy perspective. The Comment has been criticised by some States and Chapter 3 appraises the worth of these criticisms. Finally, Chapter 4 looks at some of the most

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<sup>15</sup> Ibid.

<sup>16</sup> The roles of the Committee, including its functions under Article 40, are discussed below at pages 49-51.

<sup>17</sup> *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40. Note, Article 41 relates to inter-State complaints.

<sup>18</sup> The Comment is discussed at some length in chapter 3.



## INTRODUCTION

common suggestions for reform of the law and practice of reservations to human rights treaties and concludes by evaluating the likelihood of States agreeing to any of these proposals for change.

## CHAPTER 1 - HISTORY OF THE LAW OF RESERVATIONS

### *The Unanimity Rule*

The use of reservations can be traced back to the nineteenth century.<sup>19</sup> Reservations were used sporadically until the 1899 and 1907 Hague Conventions on the Laws of War<sup>20</sup> which attracted numerous reservations from a number of States,<sup>21</sup> and marked the beginning of the extensive and continued use of reservations to multilateral treaties to which we are now accustomed. The growth in multilateral treaties and the concomitant increase in the use of reservations<sup>22</sup> led, predictably enough, to a recognition of the need for rules to govern treaty making, including rules relating to the valid use of reservations.<sup>23</sup> The unanimity rule or unanimous consent rule, was the first such rule to be articulated. Arising out of the Austrian 'reservations' to the 1925 Opium Convention,<sup>24</sup> the unanimity rule was in use (except in relation to the pan-American States)<sup>25</sup> until the ICJ's *Reservations* Opinion in 1951.<sup>26</sup> This rule required the acceptance of a reservation by all the contracting parties for the reservation to be effective. If any contracting State objected to the reservation the reserving State would be excluded from the treaty unless it withdrew its reservation. The rule was inflexible and uncompromising. It was based on an analogy of treaties with the law of contract, which required an offer to be made by one party and an acceptance of that offer by another

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<sup>19</sup> I. Sinclair, *Vienna Convention on the Law of Treaties* (2nd ed.) 1984, at 54; For a history of reservations see Malkin, "Reservations to Multilateral Conventions" (1926) 7 *British Yearbook of International Law* 141; D. Miller, *Reservations to Treaties* 1919.

<sup>20</sup> 29 July 1899, 187 Consolidated Treaty Series (CTS) 429; 18 October 1907 205 CTS 216.

<sup>21</sup> For a discussion of some early uses of reservations see Ruda, above n. 1. at 111-115; Horn, above n. 1 at 7-8.

<sup>22</sup> Several writers have commented on the reasons for the increased need for reservations. McNair, *Law of Treaties* (2nd ed.) 1961 at 168; Greig, above n. 1 at 46-47; Lijnzaad, above n. 3 at 107-108; also ICJ Rep. 1951, 15 at 21-22.

<sup>23</sup> Several disputes which arose in relation to reservations to the 1899 and 1907 Hague Conventions, and to the Treaty of Versailles 1919 brought the issue to the fore. McNair, above n. 22 at 160-163; Horn above n. 1, at 14-15; also Sinclair, above n. 19 at 54-55; Ruda, above n.1 at 111-115.

<sup>24</sup> McNair, above n. 22 at 162-163.

<sup>25</sup> See below at page 7. Note also that the unanimity rule still applies in relation to treaties that fall within the category described in Article 20(2) of the Vienna Convention which is set out below at n. 160.

<sup>26</sup> ICJ Rep. 1951, 15. Note that the practice of the depositary, who had previously applied the unanimity rule, changed when the General Assembly (GA) passed resolution 598 (VI) and asked the depositary to change his practice for the Genocide Convention and treaties concluded after 12 January 1952. In relation to treaties concluded before this date, the depositary continued to apply the unanimity rule. Another GA Resolution (1452 B (XIV) on 7 December 1959, requested the depositary to cease to apply the unanimity rule and uniformly to apply the rule set out in the Reservations Opinion with some limited exceptions relating to treaties concluded under the auspices of the League of Nations. See *General Practice of the Secretary-General as Depositary of Multilateral Treaties* ST/LEG/8 1994 [hereinafter *Depositary Practice*], at 52-53; Ruda, above n. 1 at 111-115; also discussion below at pages 8-9 & n.40.

party for the treaty to be valid.<sup>27</sup> The unanimity rule viewed the making of a reservation as a counter-offer and not as a form of acceptance of the original offer. It therefore required the express consent of every other party to the treaty.

This application of the unanimity rule to reservations is an aspect of the unanimous consent rule that applied to the establishment of the text itself. Prior to World War One, treaty texts were adopted by unanimous consent rather than by majority or consensus.<sup>28</sup> This meant that every State participating in the treaty negotiations gave its unqualified consent to be bound by the treaty. The introduction of majority vote to conclude treaties made it “necessary for certain States to make reservations.”<sup>29</sup>

While the unanimity rule was considered by many to have been a customary rule of international law for treaties,<sup>30</sup> it did not enjoy universal acceptance as such. For example, the socialist States maintained the view that it was the right of every State to make reservations of any kind to any treaty and still become a party to that treaty. Such States believed that the objection or acceptance of a reservation by another State was irrelevant and could not interfere with the sovereign right of a State to join a treaty and to make reservations to it.<sup>31</sup>

### *The pan-American Reservations Framework*

The regional grouping of American States (Pan-American States) applied a different set of rules. The ‘pan-American’ or ‘flexibility’ rule relating to the admissibility of reservations, although never formally adopted by the Pan-American Union, was nonetheless relied upon by the Governing Board of the Union.<sup>32</sup> It comprised three rules:

<sup>27</sup> See Raftopolous, E, *The Inadequacy of the Contractual Analogy in the Law of Treaties* 1990 for a full discussion about the use of this analogy in treaty law.

<sup>28</sup> Sinclair, above n. 19, at 56; ICJ Rep. 1951, 15 at 22.

<sup>29</sup> ICJ Rep. 1951, 15 at 22, acknowledging that majority rule leads to an increased need for reservations.

<sup>30</sup> Horn, above n. 1, at 14-21; Sinclair, above n. 19, at 55; this rule as custom is discussed below at pages 10-12.

<sup>31</sup> This view was rejected by the ICJ as extremist on the basis that it “could lead to a complete disregard of the object and purpose of the Convention.” ICJ Rep. 1951, 15 at 24. However, it is a view that is still held, although not necessarily by the former socialist States. In its Report on the work of its 47th session (1995), the ILC reported that “[a] number of representatives ... pointed out that the right to make reservations and to become a party to multilateral treaties subject to reservations derived from the sovereign right of every State.” Doc A/CN.4/472/ADD. 1, at 38; also Fitzmaurice, above n. 1, at 10.

<sup>32</sup> Sinclair, above n. 19 at 57; for a more detailed discussion of this reservations system see Ruda, above n. 1 at 115-133; *Written Statement of the Organisation of American States, Pleadings, Oral*

## CHAPTER 1

- (1) the treaty applies in the terms in which it was originally drafted between States with no reservations;
- (2) the treaty applies in the form modified by the reservations between the reserving States and States that accept the reservations;
- (3) the treaty is not in force between reserving States and States parties that do not accept the reservations.

Like the unanimity rule, the 'flexibility system' involved only a subjective assessment by other States of the acceptability and admissibility of a State's reservation. The radical element in this system was in (3) above, which allowed a reserving State to join the treaty (in relation to States that accepted the reservation) provided at least one State accepted the reservation and despite any rejection of the reservation by other States. This meant that an objecting State could not affect the treaty relations between the reserving State and an accepting State. It also meant that two States parties to the same treaty might not have treaty relations with each other.<sup>33</sup> Rule (2) above made it possible for a multilateral treaty to fragment into a series of bilateral agreements that might have very little in common with each other except the fact that they all emerged from the single instrument to which all the bilateral agreement parties are members.<sup>34</sup>

The philosophical differences represented by the Soviet absolute sovereignty, unanimity and pan-American approaches to reservations, plus the difficulties with implementation of the unanimity rule, put pressure on the adherents of the rule.<sup>35</sup> The rule was criticised for its failure to establish which States (treaty parties, signatories, other States entitled to join) were entitled to express a view about a reservation and the length of time required to establish that a State had tacitly accepted a reservation.<sup>36</sup> It was also criticised on the ground that it gave a single State enormous power to veto a State's instrument of ratification or accession. These criticisms "received slowly but steadily a wider and wider endorsement"<sup>37</sup> culminating in the General Assembly's request for an Advisory Opinion from the International Court of Justice on reservations to the *Convention on the Prevention and Punishment of the Crime of Genocide* 1948 (the Genocide Convention).<sup>38</sup>

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*Arguments, Documents, Advisory Opinion on Reservations to the Genocide Convention [hereinafter Pleadings]* at 15-20.

<sup>33</sup> Koh, above n. 1, at 82; Horn above n. 1, at 31.

<sup>34</sup> Horn, *ibid.*

<sup>35</sup> *Ibid.*, at 32.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> GA Res. 16(XI) 1950 of 16 November 1950; *Convention on the Prevention and Punishment of the*

*The International Court of Justice: Advisory Opinion on Reservations to the Genocide Convention*

The Genocide Convention contains no reservations provision.<sup>39</sup> As depositary, the Secretary-General was faced with the prospect of determining the number of States which had expressed their consent to be bound by the Genocide Convention in order to determine if the twenty ratification required for the Convention to enter into force had been received. Thus, the Secretary-General needed to know if the ratifications with reservations that were the subject of objections were to count toward that twenty.<sup>40</sup> In an attempt to resolve the matter in relation to the Genocide Convention, the General Assembly requested an advisory opinion from the International Court of Justice and, at the same time, requested that the International Law Commission (ILC) examine the question of reservations to multilateral treaties as a matter of urgency as part of its work on the codification of the law of treaties.<sup>41</sup> The questions the General Assembly asked the Court were:

In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either in ratification or on accession, or on signature followed by ratification:

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more parties to the Convention but not by others?
- II. If the answer to Question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
  - (a) The parties which object to the reservation?
  - (b) Those which accept it?
- III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made:
  - (a) By a signatory which has not yet ratified?
  - (b) By a State entitled to sign or accede but which has not yet done so?<sup>42</sup>

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*Crime of Genocide 1948*, reproduced in UN Doc. ST/HR/1/Rev.5 (Vol 1/Part 2) at 673. [hereinafter the Genocide Convention].

<sup>39</sup> McNair reports that, although the Secretary-General had drawn the attention of the delegates to the issue of reservations, they did not include a provision dealing with reservations in the convention.

McNair, above n. 22 at 164 and his n. 1; also ICJ Rep. 1951, 15 at 22.

<sup>40</sup> This history is well documented. See Rosenne, *Developments*, above n. 1 at 424-425; Horn, above n. 1 at 16-17; *Depositary Practice*, above n. 26 at 50-56.

<sup>41</sup> GA Res. 16(XI) 1950 of 16 November 1950; see ICJ Rep. 1951, 15 at 16; Horn above n.1 at his n. 20.

<sup>42</sup> ICJ Rep. 1951, 15 at 16. Note that question 3 is not discussed here. The Court's discussion of question 3 is at ICJ Rep. 1951, 15, at 27-29, and its answer at 29-30; it is also reproduced below at n. 45.

A large number of States submitted statements on these questions to the Court, which delivered its opinion in 1951.<sup>43</sup> The Court was split 7 to 5 and the majority answered the above questions as follows. To question I, it answered:

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 the State cannot be regarded as being a party to the Convention.<sup>44</sup>

To question II the Court answered:

- (a) 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;
- (b) that 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.<sup>45</sup>

The Court held that the unanimity rule was not a customary norm,<sup>46</sup> and that, in relation to the Genocide Convention, "it is proper to refer to a variety of circumstances which would lead to a more flexible application"<sup>47</sup> of the principle on which the unanimity rule was based, namely that no contracting party is entitled to frustrate or impair, by way of a reservation, the purpose of the treaty.<sup>48</sup>

The Court's answer to the first question gave a new test by which admissibility of reservations to the Convention were to be judged. "[T]he court, in effect, substituted for the requirement of the unanimous consent to a reservation the requirement that it must be 'compatible with the object and purpose of the Convention'".<sup>49</sup> The Court justified this new approach on the

<sup>43</sup> For example, the Organisation of American States, Soviet Union, Jordan, USA, & UK. See *Pleadings*, above n. 32 at 15-76.

<sup>44</sup> ICJ Rep. 1951, 15, 29.

<sup>45</sup> *Ibid.* To question III, the majority answered:

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question 1 only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

*Ibid.*, at 15.

<sup>46</sup> ICJ Rep. 1951, 15 at 24. It referred to the existence of other views (Soviet) and practices (pan-American) on reservations to support this claim, *ibid.*, at 24; Compare Fitzmaurice. He said: "The view embodied in this [unanimity] rule is both traditional and has the entire weight of previous international authority behind it", above n. 1 at 11.

<sup>47</sup> ICJ Rep. 1951, 15 at 21. These circumstances are found in the origin and character of the Genocide Convention as a humanitarian treaty, *ibid.*, at 23.

<sup>48</sup> ICJ Rep. 1951, 15 at 23.

<sup>49</sup> McNair, above n. 22 at 166.

basis of the Genocide Convention's "special characteristics"<sup>50</sup> which, in the Court's view, derived from the Convention's object (the protection of humanitarian rights) and from the intention of the negotiating parties that the Convention be universal in nature and attract a "very wide degree of participation".<sup>51</sup> It was cognisant of the fact that the Convention, as a humanitarian multilateral treaty required a sufficiently flexible reservations regime to encourage maximum participation, but not at the expense of the integrity of the adopted text. The object and purpose test was an attempt to effect a compromise between these objectives and to balance the competing interests of the treaty parties.<sup>52</sup>

Under the new test, the object and purpose of the Convention limited both the making of, and the objecting to, a reservation.<sup>53</sup> An objecting State could not exclude the reserving State from the treaty altogether. Rather, it could only prevent the treaty coming into force between itself and the reserving State, and then only on the basis of a new, and apparently objective, criterion, compatibility.<sup>54</sup> Thus, a State now had to justify the withholding of its consent according to the object and purpose test, an "external standard",<sup>55</sup> if it wished to prevent the treaty coming into force between itself and the reserving State. The Court did accept that States might object to reservations on grounds other than incompatibility.<sup>56</sup> However, according to the ICJ, objections on this ground would not result in the exclusion of treaty relations between the two States. Instead, it would result in the treaty coming into force between the reserving and objecting States except for the clauses affected by the reservation.<sup>57</sup>

Two dissenting opinions were given on the questions asked by the General Assembly, one by Judge Alvarez<sup>58</sup> and a joint dissenting opinion by Vice-

<sup>50</sup> ICJ Rep. 1951, 15 at 23.

<sup>51</sup> The Court linked the intention of the parties that the Convention be universal in scope to its characterisation of the Convention as special because of its humanitarian aims. For the Court, the parties had clearly intended that the Convention would be universal because in order to "liberate mankind from such an odious scourge" (Preamble to *Genocide Convention*) condemnation of, and cooperation to eliminate, it had to be undertaken on a universal scale. ICJ Rep. 1951, 15 at 21 & 23; McNair, above n. 22 at 167.

<sup>52</sup> A discussion of the tension between these two objectives is below at pages 15-17.

<sup>53</sup> ICJ Rep. 1951, 15 at 24; McNair above n. 22 at 176.

<sup>54</sup> The Court said that "... compatibility of a reservation with the object and purpose of the Convention ... must furnish the criterion for the attitude of a State making the reservation ... as well as for the appraisal by a State in objecting to the reservation." ICJ Rep. 1951, 15 at 24.

<sup>55</sup> Koh, above n. 1 at 87.

<sup>56</sup> ICJ Rep. 1951, 15 at 27.

<sup>57</sup> ICJ Rep. 1951, 15 at 27.

<sup>58</sup> ICJ Rep. 1951, 15 at 49.

President Guerrero and Judges McNair, Read and Hsu Mo.<sup>59</sup> All the dissenters criticised the majority opinion and the new compatibility 'rule'. They argued that the unanimity rule did represent a rule of customary international law and much of their opinion is devoted to demonstrating this point.<sup>60</sup> The joint dissenters criticised the new rule on the ground that "it was fundamentally subjective and uncertain in its application and would prove to be unworkable in practice".<sup>61</sup> They did not think that there was any justification for believing that the drafting States had agreed that "object" and "purpose" was the correct measure for determining admissibility of reservations to the Convention. Nor did they believe that there was any evidence in legal or State practice to support the distinction, made by the majority, between compatible and incompatible reservations.<sup>62</sup> The joint dissent predicted<sup>63</sup> that, despite the fact that both the General Assembly and the majority sought to confine the Opinion to the Genocide Convention, the Opinion would have a wider effect than the provision of advice to the General Assembly on reservations to the Genocide Convention.<sup>64</sup>

Significantly, the joint dissenters also discussed the importance of preserving the integrity of the Convention and saw the majority's answer to Question II as potentially undermining this integrity. As the majority's Opinion has become the basis of the existing reservations regime, and because analysis and criticism of the regime is often based on the perception that the regime encourages reservations at the expense of the treaty objectives and integrity, it is worth while setting out in some detail what the joint dissenters said on this point. After asserting that, in their opinion, the integrity of the Convention is more important than universal membership, the joint dissent continued:

While it is undoubtedly true that the representatives of the governments, in drafting and adopting the Genocide Convention, wished to see as many States become parties to it as possible, it was certainly not their intention to achieve universality at

<sup>59</sup> ICJ Rep. 1951, 15 at 31.

<sup>60</sup> ICJ Rep. 1951, 15 at 32-42 (joint dissent) & 49-55 (opinion of Alvarez J); Redgwell, "Universality" above n. 1, at 251-253. She points out that this view was shared by others, particularly Fitzmaurice, above n. 1 & n. 46; Brierly, whose view was expressed in the ILC Reports for which he was Special Rapporteur. See Brierly's first and second reports in 1951 Yearbook of the International Law Commission Vol. II, UN Doc. A/CN.4/Ser. A/1951/Add.1/41 & UN Doc. A/CN.4/Ser. A/1951/Add.1/43.

<sup>61</sup> ICJ Rep. 1951, 15 at 44; Sinclair, above n. 19 at 58; Lijnzaad, above n. 3 at 23-26.

<sup>62</sup> ICJ Rep. 1951, 15 at 42.

<sup>63</sup> ICJ Rep. 1951, 15 at 31. While the joint dissenting opinion was not expressed as a prediction, this aspect of their opinion, and many of their criticisms of the majority opinion have proved to be true. See Lijnzaad, above n. 3 at 24; discussion below of the application of the Opinion and its successor, the Vienna Convention reservations rules, at Chapter 2.

<sup>64</sup> ICJ Rep. 1951, 15 at 47.



any price ... It is therefore not universality at any price that forms the first consideration. It is rather the acceptance of common obligations - keeping step with like-minded States - in order to attain a high objective for all humanity, that is of paramount importance. Such being the case, the conclusion is irresistible that it is necessary to apply to the Genocide Convention with even greater exactitude than ever the existing rule which requires consent of all parties to any reservation to a multilateral convention. In the interests of the international community, it would be better to lose as a party to the Convention a State which insists in the face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocably and unconditionally accepted all the obligations of the Convention.<sup>65</sup>

Thus, the joint dissenters concluded that the special nature of the Convention as a humanitarian treaty, rather than requiring a new rule regarding the admissibility of reservations, required a strict application of the prevailing rules, that is, the unanimity rule.<sup>66</sup>

Although the Court “decided that classic rules derived from the law of contract could not easily be applied in the multilateral treaty context”,<sup>67</sup> it affirmed the contractual basis of the law of treaties.<sup>68</sup> The need for offer and acceptance remained a feature of treaty making but a State could no longer exclude another State<sup>69</sup> by rejecting a counter offer, or reservation, if other treaty parties accepted that counter offer. Thus, the Court upheld the fundamental norm that a State cannot be bound by a treaty provision (including a provision modified by a reservation) without its consent. Moreover, it introduced greater flexibility by allowing a State to determine, in accordance with the object and purpose test, whether it considers a reserving State to be a party to the treaty vis à vis itself, that is, whether to give its consent. In this way, as Koh observes, the Court sought “to reconcile the subjective demands of classical treaty doctrine with its new objective element.”<sup>70</sup>

<sup>65</sup> Ibid.

<sup>66</sup> Lijnzaad, above n. 3 at 25; Koh, above n. 1 at 87-88; see discussion on universality below at pages 15-17.

<sup>67</sup> ICJ Rep 1951, 15 at 21; Schabas, “Reservations to Human Rights Treaties: Time for Innovation and Reform” (1994) 32 *Canadian Yearbook of International Law* 39, [hereinafter “Reservations Reform”] at 45. The Opinion “gives expression to the view, which was [at the time of the Opinion] gaining ground, that the principle of unanimous consent to reservations is not well-suited to the requirements of international intercourse characterised by multilateral conventions of a general character, and that it is impracticable and unwarranted to give one State ... the right to prevent another State from becoming a party to a treaty ... .” R. Jennings & A Watts (eds), *Oppenheim's International Law Vol 1* (9th ed) 1992 [hereinafter *Oppenheim*] at 1245.

<sup>68</sup> ICJ Rep. 1951, 15 at 21.

<sup>69</sup> Except in relation to itself and then only if it objected on the ground of incompatibility.

<sup>70</sup> Koh, above n. 1 at 86.

The majority Opinion was a significant departure from the unanimity rule, although it shared some features with the pan-American system. It introduced a “purposive” element to the previously solely ‘subjective’ view of treaties and reservations.<sup>71</sup> However, as we shall see,<sup>72</sup> the objective restriction that a reservation be compatible with the object and purpose of the treaty is essentially subjective, as all three terms (object, purpose, compatibility) are to be subjectively, and consequently variously, defined by States parties.<sup>73</sup> This is partly because of the difficulty in definitively determining the object and purpose of a treaty or which provisions of a treaty are essential to the fulfilment of its object and purpose, and partly because of the absence of any supra and authoritative body able to determine objectively the compatibility of any reservation to the relevant treaty. This is a fundamental problem of the decentralised international order. Nonetheless, it remains entirely a matter for the State parties (reserving, objecting and accepting) to determine, with little or no guidance, what the object and purpose test requires.

The Genocide Convention is a single issue human rights treaty, whose object and purpose, “the Prevention and Punishment of the Crime of Genocide”,<sup>74</sup> is relatively easily identifiable, and as such it contrasts sharply with the more common “multi-purpose” human rights treaties.<sup>75</sup> Therefore, it is not entirely comparable to these other human rights treaties. Nonetheless, the impact of the Opinion on the law of treaties and on the law of reservations to human rights treaties cannot be underestimated. As the joint dissenting opinion warned, the Advisory Opinion has had a wider effect than was originally intended.<sup>76</sup> It “must be considered as having a distinct bearing on the general rules of customary international law relating to reservations”<sup>77</sup> and is the basis from which much of the principles relating to reservations in the Vienna Convention derive.<sup>78</sup>

<sup>71</sup> This shift from a purely subjective rule, where States decide for themselves whether to accept reservations, to the objective test, albeit with subjective elements, devised by the Court, is discussed below at Chapter 2.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Genocide Convention*, above n. 39, Article 1 states:

“[t]he Contracting Parties confirm that genocide ... is a crime under international law which they undertake to prevent and punish.”

<sup>75</sup> For example, the ICCPR, above n. 8.

<sup>76</sup> ICJ Rep. 1951, 15 at 31.

<sup>77</sup> *Oppenheim*, above n. 67 at 1245.

<sup>78</sup> Principally Articles 19 -21 of the Vienna Convention, above n. 2.

*The Universality v. Integrity Dilemma*

The compatibility test was devised in an attempt to introduce an element of flexibility into the rules for making reservations. The ICJ believed that the unanimity rule was not flexible enough to accommodate the new universalist aspirations of UN contracting parties. However, it was mindful that allowing States to make any reservations they wished would present a real threat to the integrity of the treaty, to its *raison d'être*.<sup>79</sup> The view held by the Court, and by many others since, was that allowing reservations to be made favoured universality, while limiting or prohibiting the making of reservations protected the integrity of the treaty by avoiding subsequent, and possibly numerous, modifications of the text. The new test was supposed to strike a balance between these aims, between the competing interests of reserving and non reserving States parties. However, as we shall see,<sup>80</sup> there is a considerable body of opinion which holds that the Court's compatibility/flexibility test dismally fails to achieve any balance between universality and integrity.

There are two main points to be made in relation to the presumption in the test that flexible reservations systems encourage ratifications. The first relates to what is meant by 'universality'. Lijnzaad states that the "assumption of the universality of human rights is inspired by the conviction that these rights should be available for all. To ensure this, human rights instruments should be binding at a global level."<sup>81</sup> Hence the ICJ's conclusion that, because the contracting parties intended the Convention "to condemn and punish genocide 'as a crime under international law'",<sup>82</sup> their correlative intention was that the Convention "be definitely universal in scope".<sup>83</sup> However, Lijnzaad asserts that assuming that global adherence to human rights treaties would lead to universal protection of human rights is naive.<sup>84</sup> She distinguishes between formal and substantive universality and concludes that "the desire for human rights to be available for all would seem to stretch well

<sup>79</sup> The Court said that the "contracting parties [to the Genocide Convention could not] have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible." ICJ Rep. 1951, 15 at 24. Acknowledging that the origin of the Convention was a desire to "condemn and punish genocide" the Court identified two principles underlying this original aim. The first was that the principles "underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." The second is the "universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge'". ICJ Rep 1951, 15 at 23.

<sup>80</sup> See discussion below at Chapter 2.

<sup>81</sup> Lijnzaad, above n. 3 at 104.

<sup>82</sup> ICJ Rep. 1951, 15 at 23.

<sup>83</sup> Ibid.

<sup>84</sup> Lijnzaad, above n. 3 at 104.

beyond the simple adherence to a human rights treaty”,<sup>85</sup> beyond formal universality. It requires substantive universality; that is “integral acceptance”<sup>86</sup> of the treaty as well as “global adherence.”<sup>87</sup> Not only does a flexible reservations framework fail to achieve integral acceptance of a treaty, it probably prevents it by encouraging fragmentation of the treaty relations and obligations. Lijnzaad states:

Both requirements of the broader concept of universality ... conflict with the basic premises of the law of treaties, the fact that states can only be bound by what they explicitly agree to. This is precisely were [sic] the quest for universality and the issue of reservations meet.<sup>88</sup>

The second issue relates to the claim that reservations actually increase ratifications. As the argument that reservations encourage participation was the justification for abandoning the unanimity rule it is important to test the veracity of this claim. Horn<sup>89</sup> states that the “propagators<sup>90</sup> of the universality argument have never tried to prove the tenability of their assertions.”<sup>91</sup> In fact, some members of the Pan-American grouping<sup>92</sup> were critical of the pan-American reservations regime because they believed that Pan-American conventions had not enjoyed a wider participation despite the ‘liberal’ regime.<sup>93</sup> Likewise, in the UN system, Lijnzaad reports that the figures of ratifications of UN treaties reveal that “adherence is far from universal”<sup>94</sup> notwithstanding the liberal reservations regime.<sup>95</sup> In any event, by the time the Court gave its Opinion, the belief about the role reservations play in encouraging ratifications was well on the way to being treated as axiomatic.

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid at 105.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Horn, above n.1 at 24-28.

<sup>90</sup> For example, the socialist and Afro-Asian States who believe that “all States should have the right to participate in conventions creating norms of general international law and which were therefore of interest to the whole of international society.” Horn, *ibid* at 26.

<sup>91</sup> Ibid, at 27.

<sup>92</sup> Brazil, Panama and Mexico; Horn, *ibid*.

<sup>93</sup> Ibid.

<sup>94</sup> Lijnzaad, above n. 3 at 106.

<sup>95</sup> See also Clark, above n. 3 at 282-283 & 316; Horn also asserts that under the unanimity test, believed to have favoured preservation of the integrity of the treaty at the expense of ratifications, very few objections to reservations were made. Horn, above n.1 at 24.

*Reports of the International Law Commission on the Law of Reservations*

In response to the 1950 General Assembly resolution,<sup>96</sup> the ILC reported to the General Assembly in 1951 soon after the Court had given its Advisory Opinion. The Commission reported that:

in the absence of contrary provisions in any multilateral convention ... [a] State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State, which, at the time the tender is made, has signed, or ratified ...<sup>97</sup>

The Commission, like the dissenters and other critics,<sup>98</sup> believed that the new test formulated by the majority of the ICJ was too subjective and ill-defined, and so was unsuitable for application to multilateral treaties generally.<sup>99</sup> For example, the ILC believed that it was reasonable to assume that parties to a treaty generally regard the treaty as a whole, with each provision an integral part of that whole.<sup>100</sup> On this basis a reservation to any provision may undermine the object and purpose of the treaty. The Commission recommended a return to the traditional or unanimous consent rule.<sup>101</sup> The ILC was concerned that the subjective application of the compatibility test would result in confusion about the status of treaty relations between reserving States and other States, both accepting and objecting. It might also lead to questions about the status of ratification or accession instruments to which a reservation had been attached for the purposes of determining if the instrument should count towards the number of such instruments required to bring the convention into force.<sup>102</sup>

“Faced with these two mutually contradictory opinions, both emanating from highly authoritative organs, ... the General Assembly found itself in something of a quandary.”<sup>103</sup> It accepted the Court’s Opinion in relation to the Genocide Convention and decided to alter UN practice so that the rule from the Opinion applied to future treaties concluded under the auspices of the UN

<sup>96</sup> GA Res. 16(XI) 1950 of 16 November 1950.

<sup>97</sup> Yearbook of the International Law Commission, (1951-II), reproduced in Rosenne, *Developments*, above n. 1 at 428-429; Sinclair, above n.19 at 58-59.

<sup>98</sup> For example, Fitzmaurice, above n.1.

<sup>99</sup> Sinclair, above n. 19 at 58-59.

<sup>100</sup> *Ibid.*

<sup>101</sup> The ILC also recommended some minor amendments to the unanimous consent rule. See Yearbook of the International Law Commission, (1951-II), 130-1.

<sup>102</sup> *Ibid.*; McNair, above n. 22 at 59; This question arose in the context of the Inter-American Convention on Human Rights 1969, reproduced in (1970) 9 ILM 673. The Inter-American Court of Human Rights gave an advisory opinion on the matter. See *Effect of Reservations on the Entry into Force of the American Convention*, OC-2/82 (1982) 22 ILM 37 [hereinafter *American Reservations Opinion*]; a brief discussion of this Opinion is below at pages 22-23.

<sup>103</sup> Rosenne, *Developments*, above n. 1 at 429.

and for which the Secretary-General was depositary.<sup>104</sup> The depositary was to continue to apply the unanimity rule to all other treaties.<sup>105</sup> In relation to the new test, the depositary was requested not to judge the legal effect of such instruments, but to communicate them to States and leave States to draw their own legal conclusions from these communications.<sup>106</sup>

Between 1951 and 1966 the Commission examined the question of reservations in its work on the codification of the law of treaties and developed a series of draft articles that could be adopted as a convention on treaties.<sup>107</sup> In this period the Commission gradually changed its position and moved away from its support for the unanimity rule and began to endorse the principles enunciated in the Advisory Opinion.<sup>108</sup> The result of this gradual change of approach is seen in the provisions of the Vienna Convention on the Law of Treaties 1969 which was adopted by a Conference of over 100 States<sup>109</sup> on the basis of the draft text proposed by the Commission in its 1966 Report.<sup>110</sup>

Rosenne<sup>111</sup> comments that:

If the current law as finally formulated in the Vienna Conventions contains a highly subjective element not itself given to much in the way of third-party control for the

<sup>104</sup> GA Res. 598 (VI), 12 January 1952; *Depositary Practice*, above n. 26, at 53 and accompanying text.

<sup>105</sup> *Ibid*; Rosenne, *Developments*, above n. 1 at 430; *Depositary Practice*, above n. 26 at 52 and accompanying text.

<sup>106</sup> Sinclair, above n.19 at 59; GA Res 598 (VI) of 12 January 1952; *Depositary Practice*, above n. 26 at 53 and accompanying text.

<sup>107</sup> See Yearbooks of the International Law Commission, 1951 (Vol II, Docs. A/CN.4/Ser. A/1951/41 & 43) (the "Brierly" Reports), 1953 (Vol II, Doc. A/CN.4/Ser. A/1953/Add. 1) & 1954 (Vol II, Doc. A/CN.4/Ser. A/1954/Add.1/87) (the "Lauterpacht" Reports), 1956 (Vol II, Doc.A/CN.4/101), 1957 (Vol II, Doc.A/CN.4/107), 1958 (Vol II, Doc.A/CN.4/115), 1959 (Vol II, Doc.A/CN.4/120), & 1960 (Vol II, Doc. A/CN.4/130) (the "Fitzmaurice" Reports) and 1962 (Vol II, Doc.A/CN.4/44), 1963 (Vol II, Doc. A/CN.4/156), 1964 (Vol II, Doc.A/CN.4/167), 1965 (Vol II, Doc. A/CN.4/177 ) (the "Waldock" Reports), 1965 (Vol II) & 1966 (Vol II) (Report of the ILC to UNGA, hereinafter the "ILC Report"); also Raftopolous, above n. 27 at 220-238; Horn, above n. 1.

<sup>108</sup> For a description of the evolution of the work of the ILC on reservations see Ruda, above n.1 at 156-179; D. Hylton, "Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations" (1994) 27 *Vanderbilt Journal of International Law* 419 at 424-429; "First Report on the Law and Practice Relating to Reservations to Treaties", Preliminary Report by Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/470 & Corr. 1, at 7-21. [hereinafter SR Preliminary Report].

<sup>109</sup> For a summary of the background to the Conference see Sinclair, (1970) 19 *International Comparative Law Quarterly* 50 ; for a description of the conference itself see Rosenne, *Developments* above n.1 at 364-390; *Oppenheim* above n. 67 at 1198, their n. 4.

<sup>110</sup> The Vienna Convention regime on reservations is discussed in Chapter 2. Vienna Convention on the Succession of States in respect of Treaties 1978 ((1978) 14 ILM 1478 ) and the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations 1986 ((1986) 25 ILM 543) are based on work of the ILC. The Conventions have similar reservations provisions. The 1986 Convention designates agreements between States and international organisations as "treaties"; *Oppenheim*, above n. 67 at 1198.

<sup>111</sup> Rosenne, *Developments*, above n.1.

purposes of dispute-settlement, it remains nevertheless a fact that since 1952 the question of reservations to multilateral conventions, and the related question of the legal nature and characterization of the functions of the depositary ... have both ceased to be sources of irritation and annoyance in the conduct of international affairs. That is worth more than any contribution to legal theory that can be found in the Vienna Conventions and their antecedents.<sup>112</sup>

This statement reflects Rosenne's sympathy for the view that the problem of reservations to multilateral treaties lay in the issue of the duties of the depositary rather than in the issue of admissibility.<sup>113</sup> While it might be true that developments in the law of reservations may have avoided "annoyance", this should not obscure the basic issue of whether the compromise between integrity and universalism, struck in the *Reservations* Opinion and later in the Vienna Convention, is successful. In fact, the remainder of this paper reveals that it has not been successful and that consequently, "irritation" with the unresolved issues relating to the admissibility of reservations is flourishing.

To complete the scene in which the Vienna Convention rules on reservations operate, it is useful to examine the reservations practice under the European and Inter-American Conventions on Human Rights.<sup>114</sup> Such examination is also important because these regional human rights regimes provide the only examples of judicial consideration, in both contentious and advisory capacities, of the admissibility of reservations to human rights treaties since the *Reservations* Opinion.

### *The Regional Human Rights Regimes*

#### *A: Reservations Under the European Convention on Human Rights and Fundamental Freedoms*

While the Universal Declaration of Human Rights of 1948 was being concluded in the UN, steps were being taken in Europe to establish a regional body and a human rights charter.<sup>115</sup> In 1950 the European Convention on Human Rights and Fundamental Freedoms was concluded.<sup>116</sup> It has its own reservations provision, Article 64, which provides:

<sup>112</sup> Ibid, at 434-435.

<sup>113</sup> Ibid, at 430.

<sup>114</sup> For a brief discussion of the reservations regime under the African Charter on Human and Peoples' Rights see Susan Marks, "Three Regional Human Rights Treaties and their Experience of Reservations" [hereinafter "Regional Treaties"] in Gardner above n. 3 at 60.

<sup>115</sup> P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed) 1990 at 1.

<sup>116</sup> European Convention on Human Rights and Fundamental Freedoms, 213 UN Treaty Series 221 [hereinafter the European Convention]. It entered into force on 3 September 1953. The Convention provides for two principal organs to supervise implementation of Convention obligations by States parties: the European Commission of Human Rights and the European Court on Human Rights which

## CHAPTER 1

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

In the recent decisions of *Temeltasch v Switzerland*,<sup>117</sup> *Belilos v Switzerland*,<sup>118</sup> *Weber v Switzerland*<sup>119</sup> and *Chorherr v Austria*,<sup>120</sup> the respondent States sought to rely on their statements made upon joining to avoid scrutiny of the alleged breaches of the Convention. In each case, the applicant challenged the validity of these statements. In *Temeltasch* and *Belilos* it was necessary first to determine the status of the Swiss statements. At the time of its ratification of the Convention the Swiss made two

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are established by Article 19. The Committee of Ministers and the Secretary-General of the Council of Europe also participate in the supervision of the Convention. However, neither is established by the Convention, but rather under Articles 13-21 of the Statute of the Council of Europe. For its role under the European Convention see Article 32 of the Convention. The principal role of the Secretary-General is given by Article 57 of the Convention. Under this Article, the Secretary-General may request information from States parties on their implementation of the Convention. For a detailed discussion of the role of these two bodies, see P. van Dijk above n. 115 at 191-204 & 207-209. Any State party may refer alleged breaches of, or non-compliance with, the Convention by another party to the Commission (Article 24). Article 25 allows the Commission to receive complaints from individuals, non-government organisations or groups of individuals who are victims of the violation alleged in the petition. This power is subject to the defendant State having accepted the Commission's competence to receive such petitions. The Commission must first consider the admissibility of the petition and, if admissible, investigate the complaint. If a friendly settlement of the complaint is reached (Article 28(1)(b)), the Commission reports the facts and the solution to the States concerned, the Committee of Ministers and the Secretary-General of the Council of Europe (Article 30). If no solution is reached, the Committee still reports on the facts to the above, but also states whether, in its opinion, the facts disclose a violation of the Convention (Article 31). It may also make any proposals it wishes. See van Dijk for a detailed discussion of the procedure before the European Commission, above n. 115 at 61-118. Note that, if the question in issue is not referred to the Court within three months, the Committee of Ministers must decide by majority whether there has been a violation of the Convention. It may also prescribe measures which the Contracting Party that is the subject of a complaint must take within a prescribed period (Article 32). In the latter case, the matter may be referred to the European Court. Only the Commission, a State of which the author of the petition is a national, a State which referred the matter to the Commission or a State against which the complaint has been made, can bring the case before the Court (Article 48). The Court can only deal with a complaint if the allegedly violating State has accepted the compulsory jurisdiction of the Court under Article 46, or if it accepts ad hoc the Court's jurisdiction. Importantly, the decision of the Court is binding on the parties (Article 53). In certain circumstances, the Court may "afford just satisfaction to the injured party" (Article 50). On the European Convention see van Dijk, *ibid*, generally; H. Bourguignon, "The *Belilos* Case: New Light on Reservations to Multilateral Treaties" (1989) 29 *Virginia Journal of International Law* 348; J. Frowein, "Reservations to the European Convention on Human Rights", in Matscher & Petzold (eds) *Protecting Human Rights: The European Dimension*, Studies in Honour of Gérard J. Wiarda 1988; S. Marks, "Civil Liberties at the Margin: The UK Derogation and the European Convention on Human Rights" (1995) 15 *Oxford Journal of Legal Studies* 69 [hereinafter "Civil Liberties"].

<sup>117</sup> *Temeltasch v Switzerland* European Commission of Human Rights, 5 May 1982, 5 EHRR 417 [hereinafter *Temeltasch*].

<sup>118</sup> *Belilos v Switzerland* European Court of Human Rights, 29 April 1988, 10 EHRR 466 [hereinafter *Belilos*].

<sup>119</sup> *Weber v Switzerland* (1990) ECHR Ser. A, No. 177.

<sup>120</sup> *Chorherr v Austria* (1993) ECHR Ser. A, No. 266-B.



reservations and two interpretative declarations. The interpretative declarations related to Article 6(3)(c) and (e) (rights to free legal assistance and free assistance of an interpreter), which was in issue in *Temeltasch*, and Article 6(1) (right to a fair hearing)<sup>121</sup> which was in issue in *Belilos*. The applicants argued that, because Switzerland had described these statements as interpretative declarations, it could not rely on them as reservations to shield it from a finding that it was in breach of the Convention. The European Commission and Court disagreed and found that these ‘declarations’ were reservations.<sup>122</sup> They accepted the Vienna Convention definition of ‘reservation’ in Article 2(1)(d).<sup>123</sup> In *Belilos*, the Court said “[i]n order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content.”<sup>124</sup> It concluded that evidence of Switzerland’s intentions at the time of its ratification, revealed that it intended to exclude certain interpretations of the relevant articles.<sup>125</sup>

None of these cases presented a real challenge to the competence of the European Commission or Court to judge the validity of reservations,<sup>126</sup> but in *Temeltasch* and *Belilos* the Commission took the opportunity to confirm this competence. It found that it had such competence by virtue of “the very system of the Convention itself”.<sup>127</sup> The Court in *Belilos* also found that its competence was derived from the Convention, in particular Articles 45,<sup>128</sup> 49<sup>129</sup> and 19,<sup>130</sup> and from the Court’s case law.<sup>131</sup>

In *Belilos* and *Temeltasch*, and later in *Weber* and *Chorherr*, the focus was on the issue of the admissibility of the reservations. Admissibility had to be determined in accordance with Article 64. Article 64 makes no mention of compatibility with the object and purpose of the Convention. Rather, it

<sup>121</sup> Article 6(1) provides:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

<sup>122</sup> *Temeltasch* above n. 117 at 434, para 82; *Belilos* above n. 118 at 483, para 49.

<sup>123</sup> See above at n.2 for the text of this Article.

<sup>124</sup> *Belilos*, above n. 118 at 483, para 50.

<sup>125</sup> *Temeltasch*, above n. 117 at 433-434, paras 75-81; *Belilos*, *ibid.* Greig criticises this aspect of the judgement. See Greig, above n.1 at 33 for example.

<sup>126</sup> Marks, “Regional Treaties” above n.114, at 41.

<sup>127</sup> *Temeltasch*, above n.117 at 431, para 65, and generally at 430-431, paras 59- 67.

<sup>128</sup> Establishes jurisdiction of the Court in relation to interpretation and application of the Convention.

<sup>129</sup> States: “In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.” Article 49, European Convention above n. 116.

<sup>130</sup> Establishes the supervisory organs, the Commission and the Court.

<sup>131</sup> *Belilos*, above n. 118 at 483, para 49.

requires compliance with formal conditions.<sup>132</sup> Reservations must be specific and they must state the relevant domestic law that requires the reservation. In these cases the European Commission and Court found the ‘reservations’ failed to comply with the Article 64 requirements.

In *Temeltasch*, the Commission found that the Swiss reservation did not fulfil the requirement in Article 64(2) as it did not contain a brief statement of the law concerned. However, the Commission also found that the lack of compliance with Article 64 was not fatal to Switzerland’s ‘reservation’ which was held to be effective.<sup>133</sup> By contrast, the European Court held in *Belilos* that Switzerland’s ‘reservation’ to Article 6(1) breached Article 64 as it was of a “general character”<sup>134</sup> and failed to state the law concerned.<sup>135</sup> The Court concluded that the reservation was invalid. The Court then held that it was “beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration.”<sup>136</sup> For this reason the Court effectively treated the Swiss declaration as severable; severed it from its instrument of ratification; and held that Switzerland had violated Article 6(1).<sup>137</sup>

<sup>132</sup> Article 64 is unique in this regard.

<sup>133</sup> *Temeltasch*, above n. 117 at 437, para 92.

<sup>134</sup> *Belilos*, above n. 118 at 485, para 55.

<sup>135</sup> *Ibid*, at 487, para 60.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid*, at 491, para 73. For a further discussion of these cases see Marks, “Regional Treaties”, above n. 114; S. Marks “Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights”, (1990) 39 *International & Comparative Law Quarterly* 300; Lijnzaad, above n. 3 at 112-121; van Dijk, above n. 116 at 606-615; H. Bourguignon, above n.116; Greig, above n.1 at 31-34; I. Cameron & F. Horn, “Reservations to the European Convention on Human Rights” (1990) 33 *German Yearbook of International Law*, 69; P. H. Imbert, “*Temeltasch* and the Strasbourg Commission”, above n.3. On reservations and the European Convention generally see R. St. J. MacDonald, “Reservations under the European Convention on Human Rights” (1988) 21 *Revue de Belge de Droit International* 429; Marks, “Civil Liberties” above n. 116; P.H. Imbert, “Reservations and Human Rights Conventions”, in I. Maier (ed) *Protection of Human Rights in Europe: Limits and Effects* 1982; Frowein, above n. 116.

*B: Reservations Under the Inter-American Convention on Human Rights*<sup>138</sup>

Unlike the European Court, the Inter-American Court of Human Rights has competence to give advisory opinions on the interpretation of the Convention,<sup>139</sup> and it is in this context that it has considered the admissibility of reservations. The American Convention has a reservations provision, but it merely refers to the Vienna Convention as the benchmark for valid reservations. Article 75 states: "This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention ...".

The Inter-American Court has given two advisory opinions on reservations. The first concerned the effect of reservations on the entry into force of the Convention.<sup>140</sup> In this case the Court discussed the application of the Vienna Convention rules to the American Convention, in particular the 12 month tacit consent rule in Article 20(5).<sup>141</sup> The Court was asked whether a ratification with a reservation only became effective once the 12 month period for objection had expired. The issue was important as the requisite number of

<sup>138</sup> American Convention on Human Rights 1969, (1970) 9 ILM 673. The American Convention establishes a Commission and a Court with competence to hear matters relating to implementation of the Convention by member States (Article 33). The Commission may receive complaints from individuals in respect of violations of the Convention (Article 44). Once the petition has been determined admissible by the Commission (Articles 46 and 47 set out requirements for admissibility), it investigates the complaint and attempts a friendly solution of the matter (Article 48). If successful, the Commission reports to the States concerned and to the other States parties, as well as to the Secretary General of the Organisation of American States (Article 49). If unsuccessful, the Commission reports to the concerned States with any recommendations that the Commission wishes to make (Article 50). If neither the parties nor the Commission refer the matter to the Court within 3 months of the Commission's Report (Article 51), the Commission may make a concluding report with recommendations and may prescribe a period within which the offending State concerned is to take measures necessary to remedy the situation complained of. Under Article 45, the Commission also has the power to receive inter-State complaints where both the respondent and applicant States have accepted the jurisdiction of the Committee to do so under the American Convention. States parties and the Commission may submit cases to the Court after the Commission has completed its consideration of the case (Article 61). Consideration of cases by the Court is limited to those involving States parties that have accepted the Court's binding jurisdiction under Article 62. Once accepted, the Court has the power to find that a State party has violated the Convention, and if appropriate, can rule that "the consequences of the measure or situation that constituted the breach ... be remedied and that fair compensation be paid to the injured party." (Article 63(1)). In grave circumstances, the Court can also order provisional measures to be taken by the respondent State to "avoid irreparable damage to persons" (Article 63(2)). There is no appeal from a decision of the Court (Article 67), and States parties undertake to comply with judgements of the Court in cases in which they are a party (Article 68).

<sup>139</sup> It can also give Opinions on the interpretation of other human rights treaties applicable to the American States and, at the request of a member State, on the compatibility of the State's domestic laws with its human rights obligations under the Convention and other applicable human rights treaties.

<sup>140</sup> *American Reservations Opinion*, above n. 102.

<sup>141</sup> This Article requires States parties to object to reservations within a period of 12 months or they will be taken to have given their tacit acceptance. Discussed below at Chapter 2, & for the text of this Article see n. 160 below.

ratifications for the treaty to enter into force were slow in coming.<sup>142</sup> The Court found that such ratifications could be effective before the expiry of the 12 month period. It found that Article 75 expressly authorised reservations that are compatible with the object and purpose of the treaty and, thus, under Article 20(1) of the Vienna Convention, did not require subsequent acceptance by the other States parties to be effective.<sup>143</sup>

The second Opinion concerned a reservation made by Guatemala to Article 4 of the American Convention, which concerns the right to life.<sup>144</sup> The Court firstly considered if any reservations could be made to Article 4 as it is listed as a non-derogable provision under Article 27(2). The Court said that a reservation to a non-derogable provision would be invalid as incompatible if it sought wholly to exclude the operation of that article.<sup>145</sup> In this case, the Guatemalan reservation did not go so far and thus was valid.<sup>146</sup>

### *Conclusion*

As we shall see, the UN reservations regime suffers from the lack of a body like the regional human rights commissions and courts. The subjective element of the operative test for admissibility of reservations,<sup>147</sup> compatibility, has a greater impact on the practice of reservations in the UN human rights regime than its objective aspects.<sup>148</sup> The presence of an authoritative body, with the competence to determine the admissibility of reservations and their effect on treaty relations, might lead to a less fractured and uncertain framework. However, the Vienna Convention negotiating parties did not establish such a body and the ICJ is unlikely to be called upon to determine this issue in a contentious case.<sup>149</sup> As a prelude to the discussion of the Human Rights

<sup>142</sup> Marks, "Regional Treaties", above n. 114 at 57.

<sup>143</sup> Ibid at 49, paras 35-37. That is, that because reservations that comply with the Vienna Convention are "authorised" and thus do not require subsequent acceptance by the other States parties. The text of Article 20(1) is at n. 160 below.

<sup>144</sup> Restrictions to the Death Penalty (articles 4(2) and (4) of the American Convention on Human Rights, OC-3/83 (1983) 23 ILM 320 [hereinafter *Restrictions to the Death Penalty* Opinion]. Guatemala's reservation sought to extend its use of the death penalty to certain crimes. See discussion of reservations to non-derogable provisions below at pages 33-34.

<sup>145</sup> Ibid at para 61.

<sup>146</sup> Although it also found that the Guatemalan reservation did not succeed in its objective of extending the death penalty to common crimes related to political crimes which were not punishable by death at the time of the Guatemalan ratification. Ibid at paras 67-74; Marks, "Regional Treaties", above n. 114 at 60; Thomas Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 *American Journal of International Law* 1, at 23-25.

<sup>147</sup> Derived from the *Reservations* Opinion, ICJ Rep. 1951, 15.

<sup>148</sup> See further discussion of this test below at Chapter 2.

<sup>149</sup> There have been suggestions that another advisory opinion be sought from the Court but they have been met with mixed reactions. See below at n. 404.

## CHAPTER 1

Committee's attempt to fill in this void, the next chapter discusses the Vienna Convention reservations regime.

## CHAPTER 2 - THE VIENNA CONVENTION ON THE LAW OF TREATIES

### *Introduction*

Following the ICJ's *Reservations* Opinion and the work of the ILC on the codification of treaty law, the Vienna Convention on the Law of Treaties was adopted in 1969.

### *The Vienna Convention Definition Of Reservation*

The Vienna Convention on the Law of Treaties,<sup>150</sup> generally considered as codifying the rules of customary international law on treaties,<sup>151</sup> defines reservations in Article 2(1)(d) as a:

unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of a treaty in their application to that State.

It is important to note that under this definition the fact that a State calls its statement an interpretative declaration, an understanding or a reservation does not affect the status of the statement. If it “purports to exclude or to modify the legal effect of certain provisions of a treaty” then it is a reservation for the purposes of the Vienna Convention.<sup>152</sup> It is the substance of the statement that is determinative of its status and therefore each statement must be judged on its merits.<sup>153</sup>

### *Application of the Vienna Convention Reservations Rules*

It is important to remember that the Vienna Convention applies only to treaties concluded after the Convention came into force in 1980,<sup>154</sup> and then only in relation to States that are parties to it. However, as much of the Convention

<sup>150</sup> Vienna Convention, above n. 2.

<sup>151</sup> Schabas, “Reservations Reform” above n. 67 at 46. Compare discussion at pages 49-55 below.

<sup>152</sup> Although the name given to such a statement is not conclusive, there are many cases of reservations masquerading as interpretative declarations and vice versa. For example Switzerland's interpretative declarations to the European Convention, see above at pages 19-21. There are also many borderline cases where it is difficult to assess the effect of the statement and therefore its nature. The ILC and States' representatives have always been aware of the difficulty in distinguishing between reservations and interpretative declarations. For example see 1966 Yearbook of the ILC Vol II p189. States participating in the 1968 and 1969 Conferences to draft the Vienna Convention also considered this issue. Some thought was given to the use of the term “reservation” in Articles 19-23 while excluding “interpretative declarations”. See statements by Japan and the UK in, Wetzel and Rauschning (eds) *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978) at 178, 180, and generally 186-199. Also Bowett, above n. 1 at 68-70. For a comprehensive discussion of the Vienna Convention definition of “reservation” see Horn, above n. 1 Chapter 6.

<sup>153</sup> See *Oppenheim* above n. 67 at 1242.

<sup>154</sup> The Vienna Convention is not retroactive, see Article 4, Vienna Convention, above n. 2.

was a codification of customary international law, many of the rules therein are generally applicable. Further, a number of the Convention's provisions may have since developed into rules of custom and so, for the same reason, apply to treaties generally and to States that have not ratified or acceded to it. It appears that States,<sup>155</sup> human rights treaty supervisory bodies<sup>156</sup> and regional human rights treaty organs<sup>157</sup> view the definition of reservation in Article 2 and the object and purpose test in Article 19(c) as a rule of customary international law, although the status of the remainder of the reservations rules in the Vienna Convention is not so clear.<sup>158</sup>

### *The Vienna Convention Test For Admissibility Of Reservations*

Articles 19<sup>159</sup> and 20<sup>160</sup> comprise the test for admissibility of reservations. Article 21 spells out the legal effects of reservations and objections to them.<sup>161</sup>

<sup>155</sup> For example, the US and the UK appear to accept the compatibility test as a rule of custom in their discussion of the Human Rights Committee's Comment, above n. 17. *Observations by the United Kingdom on General Comment No. 24* [hereinafter *UK Observations*], and *Observations by the United States of America on General Comment No. 24* [hereinafter *US Observations*], *ibid*, at Annex VI.

<sup>156</sup> See discussion of the Human Rights Committee's Comment (*ibid*); below at Chapter 3.

<sup>157</sup> For example the European Court of Human Rights in *Belilos* above n. 118 and *Loizidou v. Turkey* 20 EHRR 99. *Loizidou* is discussed briefly below at pages 61-61.

<sup>158</sup> A discussion on the extent to which Articles 19-21 represent international customary norms in the context of the ICCPR is at pages 49-55 below.

<sup>159</sup> Article 19 allows a State to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty unless any of the following occur.

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made, or;
- (c) in cases not falling under sub-paragraphs (a) or (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>160</sup> Article 20 provides:

1. A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.
2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:
  - (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
  - (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
  - (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.
5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of the period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Paragraphs 19(a) and (b) cover those treaties that have a specific reservations provision.<sup>162</sup> These paragraphs are generally considered to be relatively unproblematic compared with paragraph (c),<sup>163</sup> and for this reason the following discussion will focus on reservations covered by paragraph 19(c), that is reservations must be compatible with the object and purpose of the treaty to which they are made.

Taken directly from the *Reservations Opinion*, the compatibility test in paragraph 19(c) contains many of the problems that the joint dissent and the 1951 Report of the ILC had identified: the difficulties of interpreting the terms “object”, “purpose” and “compatibility”; the assumption that a treaty will have only one object and purpose and that it will be easily identifiable; and the inherent subjectivity of the test. Nonetheless, it is clear that the States negotiating the Vienna Convention did not want to adopt the unanimity principle in relation to the admissibility of reservations in the Vienna Convention.<sup>164</sup>

Article 20 provides three ways in which a State party may respond to a reservation that it has decided is permissible under Article 19.<sup>165</sup> States may explicitly or tacitly<sup>166</sup> accept a reservation; object to a reservation but consider the treaty to be in force between itself and the reserving State; or object to a reservation with an express statement precluding the entry into force of the

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<sup>161</sup> Article 21 states:

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 if 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.

<sup>162</sup> An example of a provision that would fall under paragraph (a) can be found in Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, which prohibits reservations. 28 April 1983, Eur. T.S. No. 114, Article 4. An example of a provision that would fall under paragraph (b) can be found in the Second Optional Protocol to the ICCPR Aimed at Abolition of the Death Penalty, which allows reservations providing for use of the death penalty for the most serious military crimes committed during wartime. 29 ILM 1464, Article 2. Note, Spain is the only party to the Protocol to have made such a reservation. Also Schabas, “Reservations Reform” above n. 67 at 46.

<sup>163</sup> Although, note that Greig stresses that the belief that these paragraphs are unproblematic is overstated and unfounded. Greig, above n.1, for example at 84.

<sup>164</sup> See, for example, Rosenne, *Law of Treaties*, above n.1; Ruda, above n. 1 at pages 161-190; Wetzel, above n. 152.

<sup>165</sup> Note the two exceptions to the following rules in paragraphs 19(2) and (3) set out above at n. 159.

<sup>166</sup> Under Article 20(5), above at n. 160.



treaty between itself and the reserving State. Thus the treaty relations between the reserving, accepting and objecting States vary. If a State, whether expressly or tacitly, accepts the reservation then the treaty is in force between it and the reserving State in the form modified by the reservation. If a State objects to the reservation the treaty will be in force between it and the reserving State unless it declares that the treaty is not in force between it and the reserving State.

Articles 19 and 20 govern what reservations can be made to treaties and the role that States parties play in ‘regulating’ the making of reservations. As we have seen, under the unanimity rule, there was only one way to determine which reservations were admissible, unanimous consent of all the treaty parties. The role of States parties was clear. Under the *Reservations* Opinion, it is clear what reservations are allowed to be made to the Genocide Convention: those that are compatible with the Convention’s object and purpose. The role States play in determining the admissibility of a reservation is also reasonably certain. States can accept an admissible reservation, object on the ground of incompatibility<sup>167</sup> and decide for themselves the extent of treaty relations they have with the reserving State.<sup>168</sup> The application and meaning of the Vienna Convention provisions are less certain and are the subject of an ongoing doctrinal debate comprising two schools of thought, those that favour an ‘opposability’ interpretation and those that prefer a ‘permissibility’ interpretation. At the crux of the debate is the question of whether or not a reservation which is incompatible but is accepted by all the other States parties, expressly or tacitly, can be considered admissible. Underlying this question is the issue of the role States parties have in determining the validity of reservations made by their co-contracting States.

According to the permissibility school, the test in Articles 19 and 20 is a two-tier one. Under the two-tier test, the reservation must satisfy two steps, permissibility and acceptability, before it is admissible. The permissibility of a reservation is the first step and is determined in accordance with Article 19; that is, in accordance with the terms of the treaty<sup>169</sup> or if the treaty is silent,<sup>170</sup>

<sup>167</sup> States can object on other grounds as well, but it will be recalled that then it will not be open to the objecting State to prevent the Convention entering into force between them. ICJ Rep. 1951, 15 at 27.

<sup>168</sup> That is, whether to consider the treaty in force between itself and reserving State. See Greig, above n. 1. at 82. In the case of an objection to an incompatible reservation, it is likely that a State can only so determine until the issue of the incompatible reservation is decided on the “jurisdictional plane”. ICJ Rep. 1951, 15 at 26. See above discussion of the *Reservations* Opinion at pages 8-14.

<sup>169</sup> In which case paragraphs 19(a) and (b) apply.

<sup>170</sup> Paragraph 19(c). For examples of such treaties see the ICCPR and arguably Article 28(2) of the

in accordance with the ICJ-devised object and purpose test. In the latter case, a State must decide for itself if the reservation is compatible with the object and purpose of the treaty and must do so solely by reference to the text of the treaty. Only after a State has determined that a reservation is compatible with the object and purpose of the treaty can it consider what action to take under Article 20.

Article 20 is the acceptability arm of the test. If a reservation is found by a treaty party to be incompatible, and therefore inadmissible, it cannot accept it under Article 20. However, “[i]t is implicit in the distinction between permissibility and opposability”<sup>171</sup> that a State can reject a reservation on grounds other than incompatibility with object and purpose.<sup>172</sup> Otherwise, under this analysis, Article 20 would serve no function. Under the two-tier test, the role of treaty parties in determining the effect of an impermissible reservation is limited. They determine the permissibility of a reservation for themselves, but having found a reservation to be impermissible, their acceptance or rejection of it is of no consequence. The permissibility school’s position is well expressed by Bowett.<sup>173</sup> He said:

The issue of ‘permissibility’ is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other Parties find the reservations acceptable or not.<sup>174</sup>

By contrast, the ‘opposability’ school claims that “there is nothing to prevent a State accepting a reservation, even if such a reservation is intrinsically incompatible to the object and purpose of the treaty.”<sup>175</sup> For adherents of this view, acceptance and admissibility go hand in hand and the validity of a reservation depends solely on the acceptance of the reservation by another contracting State. Article 19(c) is seen “as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that.”<sup>176</sup> Thus, States parties are the sole

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Women’s Convention. The latter merely re-states paragraph (c) of Article 19.

<sup>171</sup> Clark, above n. 3 at 303.

<sup>172</sup> This was also the view taken by the majority of the ICJ in the *Reservations* Opinion. ICJ Rep. 1951, 15 at 27. Note also that an objection by a State party to a type of reservation that is expressly allowed by the treaty usually has no effect (Art 20 (1)) and a State party cannot accept a reservation that is expressly prohibited by the treaty (Art 19(a)). Clark, above n. 3 at 303-306 for a summary of the views of Sinclair, Ruda and Bowett on this point.

<sup>173</sup> Bowett, above n. 1 at 68-70; *Oppenheim*, above n. 67 at 1247.

<sup>174</sup> *Ibid.*, at 88.

<sup>175</sup> Ruda, above n. 1 at 190. Greig shares this view. He says that: “Although it is sometimes argued that reservations can only be accepted if they are permissible and that the concept of acceptability is distinct from that of permissibility, these contentions are flawed ...”. Greig, above n.1 at 118.

<sup>176</sup> *Ibid.*

determinants of the admissibility of a reservation. An objection does not preclude the reserving State from joining the treaty, but the objecting State may decide that the treaty does not come into force between itself and the reserving State.<sup>177</sup>

One could conclude that, despite the differences between the permissibility and opposability analyses, they share some commonalities.<sup>178</sup> For example, according to both, “the will of the contracting State must prevail”.<sup>179</sup> It has been suggested that the difference between the two lies in whether the “emphasis is to be placed in the initial will of the negotiators or on the subsequent will of the States making reservations or objections.”<sup>180</sup> The difference is apparent when these two theses are followed to their logical conclusions. They lead to very different consequences.

For example, according to the ‘opposability’ thesis, it could be argued that dispute settlement organs, whether jurisdictional or not, ought to refrain from ruling on the permissibility of a reservation if there is no objection by the other parties.”<sup>181</sup>

Whereas, for the permissibility school,

the consequence of finding a reservation ‘impermissible’ may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a Party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole.<sup>182</sup>

[The permissibility school] might give the impression that an objection to a reservation which is incompatible with the object and purpose of the treaty or is prohibited by the treaty has no particular effect, since the reservation is in any event null and void.<sup>183</sup>

States’ belief as to the correct interpretation of the test is difficult to discern. Clark reports contradictory State practice, at least in relation to the Women’s Convention,<sup>184</sup> in her analysis of the paltry and inadequate responses given by States parties to the Secretary-General’s survey of attitudes to reservations to the Convention.<sup>185</sup> Eight States<sup>186</sup> implied that, in relation to the Women’s

<sup>177</sup> Ibid, at 191. Note that some commentators believe that the ICJ gave an ‘opposability’ test in its *Reservations* Opinion, on the basis that it allows States parties to determine the extent of their treaty relations even with reserving States that have made incompatible reservations, until there is a determination on the “jurisdictional plane”. ICJ Rep. 1951, 15 at 26. For example, Greig, above n.1; D. P. O’Connell, *International Law*, (2nd ed) 1970; I. Brownlie, *Principles of Public International Law* (4th ed) 1990 at 610-611.

<sup>178</sup> SR Preliminary Report, above n. 108 at 50.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Bowett, above n. 1 at 88.

<sup>183</sup> SR Preliminary Report, above n.108 at 50.

<sup>184</sup> Clark, above n.3 at 304.

<sup>185</sup> Ibid, at 21.

Convention, incompatible reservations cannot be accepted. The remainder of the respondents gave mixed comments. Some States indicated that incompatible reservations could be made in limited circumstances,<sup>187</sup> and others,<sup>188</sup> that there is no bar on the making of incompatible reservations. The replies to the Secretary-General's request "leave the impression of having been formed in a vacuum, with no regard paid to the desirability of placing a consistent, if not universal, construction on Articles 19 and 20 of the Vienna Convention".<sup>189</sup> The inconsistency in the responses of the few States that made comments provides no clear picture as to whether States favour a opposability, or a permissibility interpretation of Articles 19 and 20. The lack of response to the Secretary-General's request and the paucity of objections to reservations that are clearly incompatible with the Women's Convention<sup>190</sup> are open to varying interpretations. They may indicate that most States believe that the reservations made to that treaty are not incompatible, that objecting is an empty gesture<sup>191</sup> or that it is open to them to accept an incompatible reservation.<sup>192</sup>

Regardless of their position on which interpretation is the correct one, most States are likely to agree that they can object to compatible reservations, and circumstances in which a need to object for other reasons are easy to imagine. For example, a State may only agree to join a treaty because of the inclusion of certain provisions. Consequently, a reservation to those provisions by another State is likely to be unacceptable to the first State notwithstanding

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<sup>186</sup> Canada, Czechoslovakia, Denmark, the Federal Republic of Germany, Mexico, Portugal, Spain and Sweden. UN Doc. A/41/608. at 6; UN Doc. A/41/608 Add. 1 at 1; & UN Doc. A/41/608. at 7, 8, 10, 11, 13 and 14 respectively.

<sup>187</sup> For example, Japan and the USSR. UN Doc. A/41/608, at 9 and 16 respectively.

<sup>188</sup> For example, France and Turkey, both implicitly defending incompatible reservations and States' power to accept them. See UN Doc. A/41/608, at 16 & 8 respectively.

<sup>189</sup> Clark, above n. 3 at 285.

<sup>190</sup> For example Bangladesh's reservation to the Women's Convention which states: "The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2 ... as they conflict with the Sharia law based on Holy Quran and Sunna." *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER.E/1996. [hereinafter *Multilateral Treaties*]. Note that the 1996 edition is only available on internet and that the internet version does not have page numbers. (The cite is <http://www.un.org/Depts/Treaty/>). Article 2 of the Women's Convention requires States parties to "... condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake to take, *inter alia*, all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women". Article 2(f). This article clearly states the fundamental obligation imposed by the treaty of its States parties. Therefore, reservations to it are highly questionable. See Chinkin, "Reservations and Objections to the Women's Convention" in Gardner, above n. 3, [hereinafter "Reservations to the Women's Convention"] at 65.

<sup>191</sup> This point is discussed below at pages 37-38.

<sup>192</sup> Compare Ruda on this point above n.1 at 85.

that the reservation is not incompatible with the object and purpose of the treaty.<sup>193</sup>

Arguably, there is enough doubt about the meaning of the test in Articles 19 and 20 to support both an opposability and a permissibility interpretation. A one-tier view is supportable on the basis that Article 19 speaks to reserving States formulating reservations and Article 20 relates to the other contracting parties and says nothing about Article 19 or compatibility. They appear to operate independently of each other, suggesting that Article 19 is irrelevant to non-reserving States. Further, as the Vienna Convention is silent as to the consequences of making an inadmissible reservation, it is arguable that this matter is to be determined by the States parties. However, to interpret Articles 19 and 20 in this way “would entirely defeat the purpose of the compatibility criteria and the establishment of an agreed treaty text in the first place.”<sup>194</sup> It would also thwart the international community’s attempts to balance the rights of all treaty parties by regulating the making of reservations. It offers no protection to the integrity of a treaty, subordinating the treaty objectives to an increasingly outdated view of the role of consent in treaty making, particularly in human rights treaties.

The debate about the relationship between Articles 19 and 20 clearly cannot be dismissed as a matter of mere semantics. In the absence of any guidance from the Vienna Convention text (including Article 21 which, arguably, applies only to compatible reservations) and without consensus amongst States and commentators on the implications of an acceptance of, or objection to, an incompatible reservation for treaty membership and relations, it is impossible to determine what effect an incompatible reservation might have. Conversely, one cannot determine the status of the ratification or accession of a State that has made an incompatible reservation unless one knows whether acceptance or objection of a reservation has any role to play in such a

<sup>193</sup> Clark, above n. 3, at 304; Another reason States may wish to object to compatible reservations might involve an assessment by objecting States that the reservation to which they are objecting is a type that should be discouraged. For example, Belgium and the Netherlands objected to a reservation made by the Congo to Article 11, a non-derogable provision of the ICCPR. Although it is arguable that reservations to non-derogable provisions of human rights treaties may also be incompatible, these States did not object on this ground but because they did not want a precedent set whereby reservations to non-derogable provisions of the Covenant were tolerated. See discussion of reservations to non-derogable rights below at pages 33-35.

<sup>194</sup> Clark, above n. 3 at 306; Greig suggests that these Articles are complementary and not intended to operate in isolation from each other. In support, he refers to paragraphs 20(4) and (5), indicating that they should be interpreted as applying only to Article 19(c) because of the presence in those paragraphs of “unless the treaty otherwise provides”. Thus, it is logical that they be read as excluding an interpretation that would apply them to Articles 19(a) and (b). Greig, above n.1 at 83; *Multilateral Treaties*, above n. 190.

determination. Clarification is necessary to provide a consistent and coherent normative regime that adequately protects the interests of all treaty parties.

### *The Object And Purpose Test*

One of the most obvious difficulties with the reservations regime is that its operation is dependent on a subjective assessment of objective rules. No guidance is offered to help parties determine the object and purpose of a treaty,<sup>195</sup> or identify those provisions which are crucial to that object and purpose, so it is left to States to make their own subjective determination. This means that there are potentially as many different versions of the object and purpose of the treaty as there are treaty parties, and no limit to the subjective factors States may rely upon in assessing the compatibility or otherwise of a reservation.<sup>196</sup> Further, determining which provisions are central to the object and purpose of the treaty and therefore cannot be reserved is essentially a matter for States to decide, either at the time the treaty is concluded, or if the treaty is silent on this matter, when confronted with reservations. If the treaty is silent it will be a matter of interpretation by States parties of the text to determine if particular reservations can be made. Thus, there is potential for many different versions of the object and purpose of a single treaty.

### *Reservations to Non-Derogable Provisions*

The matter may be further complicated if the treaty is silent on reservations but has a provision setting out certain obligations as non-derogable. Non-derogable provisions may be non-derogable for reasons other than their centrality to the object and purpose of the treaty further obscuring the object and purpose. For example, the Human Rights Committee identified Article 11 of the ICCPR (imprisonment for debt) as a provision that is non-derogable because its “suspension is irrelevant to the legitimate control of the State of emergency”<sup>197</sup> in which States may derogate from certain obligations under the Covenant. On the other hand there may be provisions which are not included amongst the non-derogable provisions but which are central to the object and purpose of the treaty.

<sup>195</sup> Nor, if there are many objects and purposes, the principal one. Greig, above n.1 at 71; See above comments on the compatibility test devised in the *Reservations* Opinion, at pages 8-14.

<sup>196</sup> See Zemanek K, “Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties”, in *Essays in International Law in Honour of Judge Manfred Lachs*, 232, (1984), re unilateral right of states to object and accept reservations; Hylton, above n.108 at 438, & his n. 135.

<sup>197</sup> General Comment, above n. 17 at 126. For a discussion about the link between non-derogability and reservations see Clark, above n. 3 at 319-320; Schabas, “Reservations Reform”, above n. 67 at 50-53; Buergenthal, above n. 146 at 24-25.

It is not clear whether States can make reservations to non-derogable Articles. Again, State practice suggests that there is little consensus on this issue.<sup>198</sup> However, given that in the context of human rights treaties there “seems to be an almost universal consensus about rights that are considered the most fundamental and these, in general, are the rights from which no derogation is permitted”<sup>199</sup> the importance of having the matter clarified, and knowing if States can avoid their obligations to guarantee the most basic rights by making reservations to non-derogable provisions, cannot be overstated.

The Inter-American Court of Human Rights considered this issue in its Advisory Opinion on *Restrictions on the Death Penalty*<sup>200</sup> and decided that reservations that exclude non-derogable provisions are incompatible with the American Convention. The Court said:

Article 27 of the Convention allows State parties to suspend, in time of war ... the obligations they assumed by ratifying the Convention, provided that in doing so they do not suspend or derogate from certain basic or essential rights, among them the right to life guaranteed in Article 4. It would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.<sup>201</sup>

Determining the issue of the object and purpose of a human rights treaty raises other questions about the extent to which States can make reservations to provisions, often non-derogable, that reflect peremptory norms. It is clear that States cannot avoid their obligations under a peremptory norm by making a reservation, but whether a reservation to such a provision was incompatible with the object and purpose of the treaty has not yet been determined.<sup>202</sup>

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<sup>198</sup> There is some precedent for States reserving non-derogable provisions. For example, the reservation of the Congo to Article 11 of the ICCPR. See above n. 193. The Netherlands and Belgium objected on this ground to the reservation of the Congo. Also Reservations of the US to Articles 6 and 7 of the ICCPR. Eleven European States objected to the US reservations to Articles 6 and a similar number objected to the reservation to Article 7. The US reservation to Article 6 is discussed in some detail below at pages 63-68.

<sup>199</sup> Buergenthal, above n. 146 at 24.

<sup>200</sup> *Restrictions to the Death Penalty* Opinion, above n. 144.

<sup>201</sup> *Ibid.*, at para 61. However, the reservation in question, made by Guatemala, was considered to be effective by the Court as it did not seek to exclude the entire operation of the non-derogable provision. See above page 23.

<sup>202</sup> There is no consensus on what norms fall into the category of peremptory norms. Given the norms that regularly appear on the list as peremptory, such as the right to self-determination, it is also likely that reservations to a treaty provision that represents such a norm would also be incompatible with the object and purpose of the treaty in question. The problem may arise in the context of emerging *jus cogens*. Buergenthal, in relation to this Inter-American Court Advisory Opinion, said the Opinion:

constitutes the first unambiguous international judicial articulation of a principle basic to the application of human rights treaties, that non-derogability and incompatibility are linked. The nexus between non-derogability and incompatibility derives from and adds force to the conceptual interrelationship which exists between certain fundamental human rights and emerging *jus cogens*.

*Broad and Vague Reservations and Reservations that Invoke National Laws*

Reservations to human rights treaties to which States most commonly object fall into the category of reservations that are so broad and general that it is impossible to determine their effect. Typically, these reservations also subordinate treaty obligations to national laws, customs or religion.<sup>203</sup> Unlike the European Convention,<sup>204</sup> the Vienna Convention does not specify any form or content requirements for reservations. Nevertheless, reservations that are vague and general may constitute “sufficient grounds for failing the Article 19(c) test”.<sup>205</sup> In any event, they are increasingly attracting objections.

There are two reasons why such reservations draw objections. The first is their generality. This type of reservation is commonly criticised on the ground that it does not make it possible to know what obligations the State has undertaken. For example, the first Tunisian declaration to the Children’s Convention declares that “... Tunisia ... shall not, in implementation of this Convention, adopt any legislative or statutory decision that conflicts with the Tunisian Constitution.”<sup>206</sup> The vagueness of this reservation<sup>207</sup> makes it difficult for States to assess the compatibility of Tunisia’s declaration with the object and purpose of the Children’s Convention. It also limits States’ ability to determine the extent to which Tunisia is bound by the Convention. States might be able to decipher the effect of the reservation by observing Tunisian practice in relation to the Convention, but this would be a resource intensive exercise and thus a great burden for Tunisia’s co-contracting States.<sup>208</sup>

The second ground for objection is that the reservation indicates that the State is less than committed to implementing its treaty obligations, even on a progressive basis, and does so by invoking its domestic legislation, customs or

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Buergenthal, above n. 146 at 25; Also on this issue see Schabas, “Reservations Reform”, above n.67 at 49-53; The Comment, above n. 17 at 125-6 paras 8, 9 &11.

<sup>203</sup> There are exceptions to this. Some reservations that invoke national laws etc are reasonably specific. For example, Algeria’s reservation to the Children’s Convention asserts that certain Articles of the Convention “shall be interpreted ... in compliance with the basic foundations of the Algerian legal system” *Multilateral Treaties*, above n. 190. However the Articles are specified (Articles 13, 14, 16 & 17) as are the relevant provisions of its domestic law. *Ibid.*

<sup>204</sup> See Article 64, European Convention, above at pages 18-19; also discussion of this Article above at pages 18-21.

<sup>205</sup> Clark, above n.3 at 310-312; Schabas, “Reservations to the Convention on the Rights of the Child” (1996) 18(2) *Human Rights Quarterly*, 472 [hereinafter “Reservations to CROC”] at 477-479.

<sup>206</sup> *Multilateral Treaties*, above n. 190.

<sup>207</sup> Germany stated in its objection to this declaration, the declaration seeks to exclude unspecified interpretations to the Convention, and so is really a reservation for the purposes of the Vienna Convention. Germany objected to the declaration because it considered it to be too general. *Multilateral Treaties*, above n. 190.

<sup>208</sup> Clark, above n.3 at 311.



religion to limit its obligations under the treaty. In the most extreme cases, such reservations arguably also render ratification by the reserving State meaningless.<sup>209</sup> Thus, the most common objection is that these reservations “may raise doubts as to the commitment of these States to the object and purpose of the Convention, and ... contribute to undermining the basis of international treaty law.”<sup>210</sup> For example, Indonesia’s reservation to the Children’s Convention has been the subject of a number of objections on this ground. The Reservation states that its “ratification of the Convention ... does not imply the acceptance of obligations beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.”<sup>211</sup>

Another form of objection to this kind of reservation derives from Article 27 of the Vienna Convention which prohibits treaty parties from invoking “the provisions of its internal law as justification for its failure to perform a treaty”.<sup>212</sup> Although the sentiment expressed in these objections and in Article 27 is the same (States should not be able to rely on their internal laws to justify evading treaty obligations) Article 27 probably does not apply to reservations. It applies at a later stage, when a State party’s obligations under a treaty have been determined. Nonetheless, such reservations may be incompatible with the object and purpose of the treaty to which they are made on the first ground discussed, that they are wholly indeterminable.<sup>213</sup>

<sup>209</sup> For example, the Iranian reservation to the Children’s Convention is such an example. It states that “the Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the internal legislation in effect.” This reservation reveals a total lack of commitment to implementing Iran’s Convention obligations. *Multilateral Treaties*, above n. 190. Some States parties have objected to this reservation on this ground. Eg: Germany & Ireland, *ibid*.

<sup>210</sup> Objection by the Netherlands to the Iranian reservation to the Children’s Convention, *ibid*. This formula has been used by other objecting States in relation to reservations to the Children’s Convention, eg: Germany (Qatar and Malaysia); Ireland (Bangladesh, Djibouti, Indonesia, Jordan, Kuwait, Tunisia, Myanmar, Thailand, Pakistan and Turkey); Norway (Djibouti, Indonesia, Pakistan, Syria, Iran); Portugal (Myanmar, Bangladesh, Djibouti, Indonesia, Kuwait, Pakistan, Turkey, Iran, Malaysia, Qatar); Sweden (Indonesia, Pakistan, Jordan, Syria, Iran, Thailand, Myanmar, Bangladesh, Djibouti, Qatar), *ibid*.

<sup>211</sup> This reservation has been objected to. See below n. 212.

<sup>212</sup> Article 27, Vienna Convention, above n.2. Article 27 is expressed not to prejudice Article 46 (provisions of internal law regarding competence to conclude treaties) of the Vienna Convention. This was the substance of the objection by Finland to reservations made by Jordan, Indonesia, Pakistan, Qatar, Syria, Iran) to the Children’s Convention. *Multilateral Treaties*, above n. 190. This formula also has been used by other objecting States in relation to reservations to the Children’s Convention, eg: Germany (Qatar, Malaysia); Slovakia (Qatar); Czechoslovakia (Kuwait), *ibid*.

<sup>213</sup> This view is also taken by the Human Rights Committee in relation to reservations to the ICCPR. In General Comment 24(52) it said: “Reservations must be specific and transparent...” The Comment, above n. 17 at paragraph 19. It also said that “widely formulated reservations” are of particular concern as they “essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted.” *Ibid*, at para 12; See discussion of the Comment below at Chapter 3; *Reservations*

*Failure of States Parties to Object to Incompatible Reservations*

Another serious problem for the application of the rules to human rights treaties is that States do not use the rules in the manner intended. Principally, they appear reluctant to object to incompatible reservations. The dearth of objections made to reservations that are clearly incompatible with the treaty<sup>214</sup> and to reservations whose admissibility on the ground of compatibility with the object and purpose of the treaty is doubtful, is testament to this. The reluctance of States to object to such reservations, with some notable exceptions,<sup>215</sup> may be attributable to a number of factors, including a belief that States are able to make incompatible reservations. More often they may tacitly accept incompatible reservations through inertia or inattention. They may lack sufficient resources or administrative will to ensure that objections are made within time.<sup>216</sup> This factor cannot be overstated. Many States cannot or do not prioritise consideration of reservations and for this reason it is necessary to be cautious in concluding that States do not object because of a belief that incompatible reservations are not prohibited under the Vienna Convention.<sup>217</sup> In fact, the opposite might be the case; that States generally believe that they do not need to object to an incompatible reservation as it is null and void.<sup>218</sup>

The infrequency with which objections to reservations are made may make them appear to be acts of hostility. Even objecting States that do not feel any vulnerability vis à vis the reserving State would wish to avoid appearing hostile. It has been argued that States may be reluctant to object to

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Opinion where the ICJ refers to comments by the Secretary-General, and debates in the Sixth Committee of the General Assembly, on the draft Genocide Convention. ICJ Rep. 1950, 15 at 22

<sup>214</sup> For example, the reservation by Bangladesh to the Women's Convention, above n. 190; Chinkin, "Reservations to the Women's Convention" above n. 190 at 65.

<sup>215</sup> Mexico, Germany, Denmark and Sweden are amongst the States that most frequently object to reservations they consider to be incompatible with the treaty in question. *Multilateral Treaties*, above n. 190.

<sup>216</sup> For example, Clark reports that Sweden would have objected to Egypt's reservation to the Women's convention but ran out of time. Nonetheless, Sweden included in its objections to the reservations of various states that, "as a matter of principle, the same objection could be made to the reservations made by Egypt" et al. Clark goes on to say that the UN secretariat appears not to distinguish the two categories of objections and in its report to the General Assembly on reservations and objections the Swedish "objection" to the Egyptian reservation is included in the list of objections to reservations made by other states to which Sweden had objected in time. See Clark, above n. 3 at 313-314; Also Greig, above n.1 at 90 & 132 & also at 23 & 129 on the position of States eligible to join a treaty but not yet a party and objections to reservations.

<sup>217</sup> That is, in accordance with the analysis made by Bowett (above n. 1), above page 33. This conclusion is also made by the Human Rights Committee in its General Comment, above n. 17 at 128, para 19.

<sup>218</sup> For example, the UK. See *UK Observations*, above n. 155 at 138, para 13.

reservations made by States with whom they have regional alliances.<sup>219</sup> An example given relates to Mexico, which has entered objections to reservations made to the Women's Convention by a number of States<sup>220</sup> but has not objected to Brazil's reservation which is in substantially the same terms as those reservations to which Mexico has objected.

When States do expressly object to a reservation on the ground that it is incompatible with the object and purpose of the treaty, they almost invariably also state that the treaty remains in force between it and the reserving State notwithstanding the objection.<sup>221</sup> The effect of this is that the objection to the reservation has the same effect as acceptance of it. Although the provisions subject to the reservation are probably not in force between the reserving and objecting States, the reserving State still achieves its objective, which is to exclude or modify the relevant treaty provisions. Given the "little practical difference"<sup>222</sup> between the effect of an objection to, and an acceptance of, the reservation, there is little incentive for States to take the "politically unfriendly"<sup>223</sup> act of making an objection.

#### *Failure Of Vienna Convention To Accommodate Normative Treaties*

The Vienna Convention reservations rules make no distinction between treaties that establish reciprocal rights and duties and treaties, like human rights treaties, that are essentially normative.<sup>224</sup> This means that the reservations regime is imposed on all treaties without distinction.<sup>225</sup>

<sup>219</sup> Schabas, "Reservations Reform", above n. 67 at 68.

<sup>220</sup> Ibid.

<sup>221</sup> UK and Israeli objections to a Burundian reservations to the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, are exceptions. Both the UK and Israel stipulate that they are "unable to consider Burundi as having validly acceded to the Convention until such time as the reservation is withdrawn." *Multilateral Treaties*, above n. 190 at 83.

<sup>222</sup> Chinkin, "Reservations to the Women's Convention", above n. 190 at 78. Note that this may not be the case if the reservation is a modifying rather than an excluding one.

<sup>223</sup> Ibid. See also the *UK Channel Arbitration Case* 54 International Law Reports (1977) 6. The Court of Arbitration held that this was the effect envisaged by Article 21(3) of the Vienna Convention (which is reproduced above at n. 161). Ibid at pages 44-45. Further, that the effect of the UK's rejection of France's reservation to Article 6 of the Geneva Convention on the Continental Shelf 1958 was to "render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservation". *ibid.*

<sup>224</sup> Brownlie suggests that law making treaties "create legal obligations the observance of which does not dissolve the treaty obligations" Brownlie, above n. 177 at 12. Schacter refers to the North Sea Continental Shelf Case, ICJ Rep. 1969, for a definition of law-making treaties as treaties: "... of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."; O. Schacter, *International Law in Theory and Practice* 1991 at 72 & 74. Note that there is no agreement on whether this is a valid or useful distinction. On this point see Schacter *ibid* at 75.

<sup>225</sup> Hylton states that this "artificial framework ... inadequately serves the needs of the different types of international agreements." Hylton, above n. 108 at 434. He identifies three main types of treaty; Bilateral Reciprocal Rights Agreements, Multilateral Reciprocal Rights Agreements and Legislative Treaties. He further identifies three types of Legislative Agreements: treaties that codify customary

Many aspects of the law of treaties as set out in the Vienna Convention and in customary international law are based on an assumption that States regulate their relations on a bilateral or contractual basis. Even in the absence of any reservations, the relationships between treaty parties are treated primarily as bilateral, fragmenting multilateral treaties into a series of coexisting bilateral agreements. In practice, each State party enters into the agreement with every other treaty party individually and is considered to have the obligations imposed, and rights conferred, on it by the treaty reciprocally. This becomes evident when a dispute arises out of the treaty relationship. For example, a dispute as to the correct interpretation of the treaty, or of a breach, may be of relevance to every treaty member. Theoretically all States parties can seek resolution of the dispute provided they have accepted the jurisdiction of the relevant judicial authority. But is it usual that the claim will be specific to particular parties and its outcome will bind only those parties.<sup>226</sup> The States and the relevant international legal rules thus assume that the obligations owed by States to each other are also bilateral.

Chinkin asserts that “bilateralism is no longer appropriate as the paradigm model for the regulation of activities in the international arena.”<sup>227</sup> Looking at international law as it relates to third parties, she views the bilateral model as inappropriate, both in fact and in law, as it ignores the reality that the actions of States invariably affect the interests of other States, even actions taken under a bilateral treaty. She cites the allocation of natural resources and their exploitation as an example and refers to the impact that State action has on non-State party actors such as individuals, international bodies, and on the international community as a whole.<sup>228</sup>

As the Vienna Convention assumes a bilateral model of treaties,<sup>229</sup> the effective operation of the reservations framework is dependent on States acting as if they were parties to bilateral treaties of multilateral reciprocal rights treaties. “A basically bilateral system is used to realize multilateral interests.”<sup>230</sup> But,

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international law, regulate international conduct and those that are the constituent documents of international organisations. He suggests that separate, specially tailored frameworks are needed for each type of international agreement to ensure that the individual objectives of each agreement, and therefore the needs of the community that has negotiated the agreement, are met, *ibid* at 446. Hylton’s proposals for reform are discussed in greater detail below at pages 72-73.

<sup>226</sup> See C. Chinkin, *Third Parties in International Law* 1993. She points out that attempts to resolve differences and disputes arising out of treaty relations through diplomatic channels “accentuates the bilateral character” of State interrelations, *ibid*, at 2.

<sup>227</sup> *Ibid*, at 3.

<sup>228</sup> *Ibid*, at 2-5.

<sup>229</sup> Lijnzaad, above n. 3 at 400.

<sup>230</sup> *Ibid*.

“standard-setting human rights treaties”<sup>231</sup> are not reciprocal, obligations under them are owed by the State to its individual inhabitants not to other States parties. Nor do they establish rights and obligations to promote the self interests of their States parties. Instead, they represent the international community’s attempts to advance altruistic objectives to improve the lot of humankind.<sup>232</sup>

This fact has been recognised by the ICJ, the European Commission on Human Rights and the Inter-American Court of Human Rights.<sup>233</sup> In its *Reservations Opinion*,<sup>234</sup> the ICJ relied on this and the other distinguishing features of the humanitarian Genocide Convention to justify abandoning the unanimity rule in relation to it and formulating the new test. The Court stated that because the contracting parties to human rights treaties such as the Genocide Convention adopt such conventions for:

a purely humanitarian and civilizing purpose, ... in a convention of this type [the Genocide Convention] one cannot speak of individual advantages or disadvantages to States, or the maintenance of a perfect contractual balance between rights and duties.<sup>235</sup>

Likewise, the European Commission on Human Rights declared that the obligations of the contracting states to the European Convention are “of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”.<sup>236</sup> The Inter-American Court of Human Rights, in its 1982 *American Reservations Opinion*,<sup>237</sup> took a similar view, emphasising that:

modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings .... In concluding these human rights treaties, contracting States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.<sup>238</sup>

<sup>231</sup> Chinkin, “Reservations to the Women’s Convention” above n. 190, at 65.

<sup>232</sup> See *American Reservations Opinion*, above n. 102 at para 29.

<sup>233</sup> Although it is not without its sceptics. See Greig, above n. 1 at 168.

<sup>234</sup> ICJ Rep. 1951, 15; for a discussion of this issue see Greig, above n.1 at 48.

<sup>235</sup> *Ibid*, at 23.

<sup>236</sup> *Austria v. Italy* 4 European Yearbook of Human Rights, (1960) 116 at 140.

<sup>237</sup> *American Reservations Opinion*, above n. 102.

<sup>238</sup> *Ibid*, at para. 29.

The fact that human rights treaties are non-reciprocal may contribute to the lack of incentive to object to incompatible reservations.<sup>239</sup> Reciprocity in domestic contracts operates as a check on unilateral action, protecting the interests provided for in the contract from such action and thus operating as an important enforcement mechanism.<sup>240</sup> Given the absence of a compulsory international judicial system or other international law enforcer, reciprocity has an importance in treaties not matched in the domestic sphere. In the case of human rights treaties this check is virtually non-existent. States' do not view their interests as directly affected by an unauthorised unilateral act, and indeed the obligations are owed to individuals not to other States parties. The Vienna Convention, based on a contractual model, assumes that the principle of reciprocity applies to ensure that States parties will enforce the treaty themselves. But this presupposes that breaches or the making of incompatible reservations cause direct harm to the interests of other States parties prompting them to retaliate in some way. If States' interests are unaffected by the observance or breach of a treaty obligation it is unlikely that they will take action against a defaulting State party. Yet Articles 19 and 20 provide no mechanism to protect treaties from invalid reservations other than action by other States parties. This begs the question what outcome would make it worthwhile for a State to object? Should a State be able to join a treaty with a reservation which indicates that it has little or no intention of complying?<sup>241</sup> The Vienna Convention already provides an objecting State with the option of stating in its objection that the treaty is not in force as between itself and the reserving State,<sup>242</sup> but objecting States have rarely relied on this<sup>243</sup> and it is doubtful that use of it would lead to a more satisfactory result. Reserving States would still avoid being bound by the provision they have reserved and avoid being called to account by objecting States for any breach they might commit in relation to non-reserved provisions of the treaty. In either case the objective of universal protection of human rights is thwarted.

<sup>239</sup> See Lijnzaad, above n.3 at 111-112 & 402; and discussion on States failure to object to reservations at pages 37-38 above.

<sup>240</sup> Ibid, at 65-72.

<sup>241</sup> One must query why such a State would want to join treaties to which they make reservations that have the effect of rendering their ratification meaningless. Political benefits are the most obvious reason. For example Iran and its ratification of the Women's Convention. See above n. 209.

<sup>242</sup> Article 21(3) in effect provides this. It states:

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 reservations relates do not apply as between the two States to the extent of the reservation.

<sup>243</sup> The exception is the objections of the UK and Israel to the Burundian reservation to the Convention on the 1973 Prevention and Punishment of Crimes Against Internationally Protected Persons. Above n. 221; *Multilateral Treaties*, above n. 190.

*Conclusion*

The above “examination of the effects of the Convention’s provisions on different types of treaties ... illuminates the shortcomings”<sup>244</sup> of the Vienna Convention reservations provisions. The rules clearly favour reserving States, which, Hylton states, “undermines the negotiated balance of rights and duties ...”.<sup>245</sup> Further, the unresolved doctrinal debate about the extent of States parties’ power to determine the admissibility of reservations has caused much confusion amongst States about the content of the law. Even in the absence of this confusion, there is little incentive for States to use whatever power is conferred on them by the Vienna Convention reservations regime to regulate adequately the making of reservations. The result is that in human rights treaties with over one hundred members, only a handful of States object to the increasing number of reservations made to core provisions of human rights treaties and reservations that are arguably so broad as to exclude any operation of the treaty in the reserving State.<sup>246</sup> It may be that “... the core problem is that the law of treaties is inappropriate for solving the new challenge of international law, the aim of creating obligations other than strictly reciprocal obligations.”<sup>247</sup>

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<sup>244</sup> Hylton above n.108 at 434.

<sup>245</sup> Ibid, at 437.

<sup>246</sup> For example, Iran’s reservation to the Children’s Convention, set out above n. 209.

<sup>247</sup> R. Higgins, “The United Nations, Still a Force for Peace” (1989) 52 *Modern Law Review* 1, at 11.

## CHAPTER 3 - THE HUMAN RIGHTS COMMITTEE'S GENERAL COMMENT 24(52)

At its fifty second session, the Human Rights Committee, the body established to supervise the International Covenant on Civil and Political Rights (the ICCPR),<sup>248</sup> discussed the preparation of a general comment<sup>249</sup> that would address issues relating to reservations made to the ICCPR, or its Optional Protocols,<sup>250</sup> upon ratification or accession. On 2 November 1994 the Committee adopted General Comment No. 24 (52).<sup>251</sup> As the only statement of its kind from a UN human rights treaty supervisory body, the Comment is a very important part of any discussion of reservations to human rights treaties. It deals with a number of matters that are central to the debate about the law of reservations and, therefore, is of relevance to other human rights treaties. Unsurprisingly, these matters are also the most controversial aspects of the law of reservations.

The Comment purports to set out the relevant international law governing the making of reservations to the Covenant, principally the Vienna Convention articles on reservations, and seeks to clarify the application of those articles to reservations to the ICCPR.<sup>252</sup> It spells out what kinds of reservations the Committee considers would be incompatible with the Covenant as well as the effect of making an incompatible reservation.<sup>253</sup> Every aspect of the Comment has been criticised,<sup>254</sup> but its most controversial feature relates to the role the Committee has suggested for itself in relation to determining the compatibility of reservations to the Covenant.

### *Role of the Human Rights Committee*

The Human Rights Committee is a supervisory body comprised of 18 elected members who are nationals of the States parties to the Covenant. Members

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<sup>248</sup> The ICCPR above n. 8. The Human Rights Committee is established by Article 28.

<sup>249</sup> A discussion of the Committee's role is below at page 43.

<sup>250</sup> (First) *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted and opened for signature on 16 December 1966. Entered into force on 23 March 1976. Reproduced in ST/HR/1/Rev. 5 (Vol. 1/Part 1) at 41. [Hereinafter the *First Optional Protocol*].

*Second Optional Protocol to the International Covenant on Civil and Political rights, Aiming at the Abolition of the Death Penalty*, adopted and proclaimed by the General Assembly on 15 December 1989. Reproduced in UN Doc. ST/HR/Rev. 5 (Vol 1/Part 1) at 46. [hereinafter the *Second Optional Protocol*].

<sup>251</sup> The Comment, above n. 17.

<sup>252</sup> The following discussion is limited to examining only those aspects of the Comment that are relevant to UN human rights treaties generally. A thorough analysis of the whole of the Comment is outside the scope of this paper. See Greig, above n. 1; Gardner, above n. 3.

<sup>253</sup> The Comment is discussed at length below at pages 48-68.

<sup>254</sup> See Greig, above n. 1.



serve in their personal capacity and are supposed to be persons “of high moral character and [of] recognized competence in the field of human rights”.<sup>255</sup> The Committee has a limited role and no authority to make binding declarations or decisions. Thus, the Comment, and any other pronouncements it makes while exercising its functions under the Covenant, are merely recommendatory, aimed at assisting States parties to prepare their periodic reports and to comply with their Covenant obligations. The Committee’s principal task is to supervise implementation of the Covenant and, to this end, it receives the periodic reports States are required to submit to the Secretary-General under Article 40. Article 40 requires States parties to prepare and submit periodic reports on “measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights”<sup>256</sup> The extent of the Committee’s role in relation to this Article is to consider the reports submitted, seek further information from States in relation to their implementation of the Covenant, and to transmit its own report to the States parties, and to the Economic and Social Council (ECOSOC), together with any comments it may wish to make.<sup>257</sup> The Committee’s reports to ECOSOC provide it with an opportunity to detail the extent to which States have implemented the Covenant and any difficulties States may have in complying with their obligations under the Covenant.

The requirement to submit an annual report to the General Assembly<sup>258</sup> provides another avenue for reporting on the pace of implementation of the Covenant by member States.<sup>259</sup> Increasingly, the Committee is using its annual report to relay information about implementation directly to the General Assembly. “In 1994, as part of its assertion of a more judgemental role”,<sup>260</sup> the Committee altered the structure of its annual reports to “give greater emphasis to the Committee’s views on the degree of compliance by individual States with Covenant norms”.<sup>261</sup> It omitted from the annual reports ““summaries of

<sup>255</sup> Article 28, ICCPR, above n. 8.

<sup>256</sup> (Article 40(1)). The Secretary-General then transmits them to the Committee for its consideration (Article 40(2)). Under Article 40(4), the Committee must examine these reports, and forward its comments to the States parties and, if it wants, to the Economic and Social Council.

<sup>257</sup> Article 40(4), ICCPR, above n. 8.

<sup>258</sup> Article 45, ICCPR, above n. 8.

<sup>259</sup> For a critical analysis of the value of the State periodic reporting requirement under UN human rights treaties see A. Bayefsky, “Implementing Human Rights Treaties: The Prognosis After Vienna” 1994 *American Society of International Law Proceedings*, 428.

<sup>260</sup> Greig, above n. 1 at 96.

<sup>261</sup> *Ibid.*

the consideration of States parties' reports",<sup>262</sup> providing instead the text of the Committee's comments on these Reports.

The power of the Committee to receive communications from States parties alleging violation of the Covenant by other States parties under Article 41 has never been used.<sup>263</sup> This power is limited to communications from and about State parties that have expressly accepted the Committee's competence to receive inter State communications under Article 41. The Committee's power to resolve such disputes is limited to making "available its good offices to the States parties concerned with a view to a friendly solution of the matter".<sup>264</sup> If no friendly solution of the matter is reached, the Committee can establish an *ad hoc* Conciliation Commission to assist the parties to reach an "amicable solution".<sup>265</sup> The authority of the Committee is limited to submitting a report on the outcome and attaching the written, and a record of the oral, submissions it received.<sup>266</sup> The *ad hoc* Commission's authority is similarly restricted.<sup>267</sup> Neither the Committee nor the Commission has the power to compel States parties to resolve the dispute or to make binding decisions as to the merits of the complaint or any other aspect of the dispute.

Another role of significance ascribed to the Committee<sup>268</sup> is under the First Optional Protocol to the Covenant. Article 5 requires the Committee to receive and consider communications from individuals who claim to be victims of a violation of the Covenant by a State party that has accepted the Committee's competence under Article 1 of the Protocol. Again, the Committee's findings and comments made in relation to a communication are recommendatory and, although there may be some political incentive for States parties to adopt the recommendations made by the Committee in the context of an individual complaint, they are not bound to do so.<sup>269</sup> The

<sup>262</sup> Ibid.

<sup>263</sup> Clearly the political costs are too high, and the gains not great enough, for States to consider using such a mechanism in the human rights field.

<sup>264</sup> Article 41(1)(e), ICCPR, above n.8.

<sup>265</sup> Article 42(1)(a), ICCPR, above n.8.

<sup>266</sup> Article 41(1)(h), ICCPR, above n.8.

<sup>267</sup> Article 42(7)(b) and (c), ICCPR, above n. 8.

<sup>268</sup> Note also that under Article 3 of the Second Optional Protocol, States parties must provide periodic reports to the Committee on the progress made to implement the Protocol. Article 4 allows the Committee to receive and consider interstate communications about alleged breaches of the Protocol if the alleged violator and the complainant have accepted the Committee's competence to do so under Article 41 of the Covenant. Second Optional Protocol, above n. 250, Articles 3 and 4.

<sup>269</sup> See Greig, above n.1 at 94-101. For example, the former Australian Labor Government responded to the report of the Committee in the Toonen communication by passing the Human Rights (Sexual Conduct) Act 1994. Toonen made an individual complaint to the Committee under the First Optional Protocol alleging that some provisions of the Tasmanian Criminal Code which outlawed certain sexual acts violated Australia's obligations under the Covenant. The Committee agreed, stating that Article

Committee must include in its annual report to the General Assembly a summary of its activities under the First Optional Protocol.<sup>270</sup>

*Possible Motivating Factors Behind the Comment*

In the first paragraphs of the Comment, the Committee sets out its reasons for making the Comment. It states that “[a]s of 1 November 1994, 46 of the 127 States parties to the [ICCPR] had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant.”<sup>271</sup> The Committee expresses concern that the “number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of the States parties.”<sup>272</sup> The Committee points out that they also make it extremely difficult for States parties to determine what obligations reserving States have undertaken and the extent of treaty relations between themselves and other States parties. They also hinder the performance of the Committee’s duties under Articles 40<sup>273</sup> and 41<sup>274</sup> of the Covenant and under the Optional Protocols.<sup>275</sup> As the Committee said, “[i]n order to know the scope of its duty to examine a State’s compliance under Article 40 ...”<sup>276</sup> the Committee must

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17, which sets out a privacy guarantee, was breached by these Criminal Code Provisions. (HRC Report, CCPR/C/50/D/488/1992). Much has been written concerning this complaint and analysing the HRC’s report. For example, see generally: Sarah Pritchard, “Gay Rights Victory at the UN” (1994) 3(2) *Human Rights Defender* 13; R. Croome, “Australian gay rights case goes before the UN” (1992) 2 *Australian Gay and Lesbian Law Journal* 55; and I. A. Shearer, “Human Rights Committee - The Toonen Case” (1995) 69(8) *Australian Law Journal* 600. For an analysis of the Act as a response to the HRC report, see generally: W. Morgan, “Identifying evil for what it is: Tasmania, sexual perversity and the UN” (1994) 19(3) *Melbourne University Law Review* 740; W. Morgan, “Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994” (1994) 1(1) *Australian Journal of Human Rights* 409; and S. Bronitt, “Protecting sexual privacy under Criminal law: the Human Rights (Sexual Conduct) Act 1994” (1995) 19(4) *Criminal Law Journal* 222.

<sup>270</sup> Article 6, First Optional Protocol above n. 250.

<sup>271</sup> The Comment, above n. 17 at 124. Note this is a scenario common to all UN human rights treaties. The Women’s Convention fares the worst, “with at least 23 of 100 states parties making a total of 88 substantive reservations” (as of February 1990). Cook, above n. 3 at 643-644. Clark reports that “Eighty five percent of multilateral agreements have no reservations entered, and of the 15 percent that do, most do not relate to substantive provisions but to dispute resolution provisions.”, *ibid.* The picture is completely different in relation to human rights treaties. *Ibid.* at 282-283 & 316; Lijnzaad, above n.3; at 106; W. Schabas, “Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?” (1995) 21(2) *Brooklyn Journal of International Law* 277, at 288, [hereinafter “Invalid Reservations”].

<sup>272</sup> *Ibid.*

<sup>273</sup> See above page 44.

<sup>274</sup> Section 41 allows for inter-State complaints.

<sup>275</sup> The First Optional Protocol to the ICCPR provides for individual communications to be made to, and determined by, the Committee on alleged breaches or non-implementation of Covenant obligations by those States parties that have ratified or acceded to this Protocol. The Committee may need to determine the effect and validity of a reservation to the Covenant or to the Protocol in order to fulfil its role under this Protocol. Under Article 4 of the Second Optional Protocol the Committee may consider inter-State complaints of breach of the Protocol.

<sup>276</sup> The Comment, above n. 17 at 129.

examine a State's reservations and interpretative declarations to determine their effect (if any) on the obligations undertaken by that State. The need to determine the effect of a reservation is perhaps even more important in the context of the Committee examining an individual communication under the first Optional Protocol. If the reservation has been made in relation to the provision or provisions allegedly breached by the applicant, a determination of its effect must be made before the merits of the communication can be considered. A valid, effective reservation will preclude the Committee from further considering the communication.

The Committee has been concerned about the undermining effect of reservations on the Covenant for some time,<sup>277</sup> but, after a history of less than effective action in relation to reservations,<sup>278</sup> it only began to take a more aggressive role with States parties in relation to their reservations in the years immediately preceding 1994. For example, former Committee member Roslyn Higgins, in questioning Austria about possible withdrawal of its reservations,<sup>279</sup> observed that relying on States to regulate the making of reservations sufficiently to protect the integrity of the Covenant had not worked. Therefore, the Committee was required to take up the slack, and in fact, was best placed to deal with reservations as "... for the most part, States did not recognise their mutuality of interests in the field of human rights and failed to monitor reservations."<sup>280</sup> The General Comment No. 24 reaffirms this position.<sup>281</sup>

In 1992, the US ratified the Covenant with several reservations and interpretative declarations.<sup>282</sup> These reservations were the subject of much academic debate and criticism. It is likely that the reservations and the controversy they generated, provided further motivation to the Committee to

<sup>277</sup> The meetings of the Chairs of the human rights supervisory bodies have been discussing the issue of reservations to their treaties for a number of years. For example, see *Effective Implementation*, above n. 10.

<sup>278</sup> Lijnzaad observes that all the supervisory bodies failed adequately to regulate the making of reservations to their respective treaties, principally by failing to take a comprehensive and consistent approach to questioning States parties about their reservations. For example, she reports that commitments made by State representatives to the Committees were not always followed up by Committees when they were considering that State's next Report. Nor did they follow up their line of questioning on reservations when considering subsequent Reports. Lijnzaad, above n. 3 at 412-416.

See also Bayefsky, above n. 259 at 431.

<sup>279</sup> CCPR/C/SR/1982. 1167, para 67; Lijnzaad, above n.3 at 413.

<sup>280</sup> *Ibid.*

<sup>281</sup> The Comment, above n. 17 at 129.

<sup>282</sup> The US made five reservations, four interpretative declarations and five "understandings". *Multilateral Treaties* above n. 190.

prepare a General Comment on this topic. Since preparing the Comment<sup>283</sup> the Committee has had occasion to examine for itself the US reservations<sup>284</sup> and to apply the assertions it made in the Comment to the US in its consideration of the US initial report. For this reason, and by way of a case study, I propose to examine one of the US reservations,<sup>285</sup> and reactions to it, in some detail after examining the Comment itself.

### *Content of the Comment*

The General Comment attempts to clarify what kinds of reservations can be made to the Covenant on the basis of the application of the object and purpose test set out in the Vienna Convention. It also addresses the gaps in the Vienna Convention rules relating to the effect of objections made under Article 20 and the making of incompatible reservations. The Comment has been welcomed as an important step in overcoming some of the inherent problems in the rules relating to reservations, at least in relation to the ICCPR, but possibly also in relation to human rights treaties generally. For example, Roslyn Higgins<sup>286</sup> sees the Comment as a useful guide to States considering ratifying the Convention with reservations<sup>287</sup> and believes it to signal the Committee's willingness to push the debate on reservations to human rights "in a realistic and consensus-building manner."<sup>288</sup> By contrast, the UK and the US<sup>289</sup> have criticised what they see as the Committee's mis-statement of the relevant international law and its attempt to assert a role for itself that was neither envisaged nor authorised by the treaty parties and that is contrary to established rules of international law. While these States agree that there is much confusion about the law of reservations and that certain reservations may be problematic,<sup>290</sup> neither of them believe that the position taken by the

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<sup>283</sup> November 1994.

<sup>284</sup> *Consideration of Reports Submitted by States Parties Under Article 40 of the ICCPR*, Comments of the Human Rights Committee on the Initial Report of the United States of America, UN Doc. CCPR/C/79/Add. 50, 7 April 1995 [hereinafter *Consideration of 1st US Report*].

<sup>285</sup> The reservation to be discussed below relates to Articles 6 of the ICCPR, see page 71.

<sup>286</sup> Roslyn Higgins was a member of the Committee at the time the Comment was prepared.

<sup>287</sup> Higgins, in Gardner, above n. 3.

<sup>288</sup> *Ibid.*

<sup>289</sup> France has also been critical. France's observations are reproduced in Gardner, above n. 3 at Annex; also Greig above n. 1.

<sup>290</sup> The UK said that it "shares the Committee's concern that the integrity of the Covenant's treaty regime should not be undermined by too extensive a practice of reservations formulated by States on becoming Party to them. *UK Observations* above n. 155, at para 3. Similarly the US said that "[t]here can be no serious question about the propriety of the Committee's concern about the possible effect of excessively broad reservations ... nor any reasonable doubt regarding the general desirability of reservations that are specific, transparent and subject to review ...". *US Observations* above n. 155, at introduction.

Committee to address these issues is justifiable or consistent with international legal principles.

*A: Role of States Parties' Objections*

The Covenant has no reservations provision.<sup>291</sup> However, as we have seen, this does not mean that any reservation may be made to the Covenant.<sup>292</sup> As the Covenant was concluded prior to the Vienna Convention, it is subject to the relevant rules of customary international law relating to reservations to multilateral treaties rather than the Vienna Convention rules in the strict sense. However, to the extent that the Vienna Convention represents the relevant customary norms, it applies to the Covenant.

The Committee treats the admissibility rule in Article 19(c), relating to compatibility with the object and purpose, as a rule of customary international law that therefore applies to the ICCPR.<sup>293</sup> It said: “[t]he matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19(c) of the Vienna Convention on the Law of Treaties provides relevant guidance.”<sup>294</sup> Thus, States parties may make reservations to the Covenant only if they are compatible with its object and purpose.<sup>295</sup> The Committee did not expressly state its views on the applicable law governing State party objections to reservations. It did not comment on the status of the Vienna Convention rules on objections in Articles 20 and 21 as rules of customary law, nor did it enter the doctrinal debate about the correct interpretation of these rules. Rather, it asserts the view that these provisions are ill-suited to human rights and other normative treaties.<sup>296</sup> It said that they “are inappropriate to address the problem of reservations to human rights treaties.”<sup>297</sup>

<sup>291</sup> Lijnzaad reports that, although the Covenant is silent on reservations, the matter was discussed extensively during drafting. She says that no agreement could be reached on the content of such a provision so none was included. Lijnzaad, above n. 3 at 186.

<sup>292</sup> The Comment, above n. 17 at para 6. There is support for the view that the object and purpose test is a customary norm. See Elias who said: “[i]t seems best to accept the ... principle that compatibility with the object and purpose of the treaty is a suitable general criterion for determining the legitimacy of the reservations to multilateral treaties ...”, above n. 1 at 32.

<sup>293</sup> Ibid.

<sup>294</sup> For example, the European Court of Human Rights has used the test of compatibility notwithstanding that the European Convention on Human Rights is not subject to the Vienna Convention and has its own reservations provision that makes no reference to compatibility. See *Loizidou*, above n. 157.

<sup>295</sup> The Committee goes to some lengths to spell out what sort of reservations, in its opinion, would fail to satisfy the admissibility requirement. The Comment, above n. 17.

<sup>296</sup> Refer discussion above at pages 38-41.

<sup>297</sup> The Comment, above n. 17 at 128.

The Committee's principal concern is the failure of States parties to object to incompatible reservations. In explaining the causes for this failure, the Committee, like many commentators before it, noted that because human rights treaties do not create "a web of inter-State exchanges of mutual obligations"<sup>298</sup> and "concern the endowment of individuals with rights",<sup>299</sup> the objections rules in the Vienna Convention are inadequate to govern reservations to human rights treaties. According to the Committee, these factors combine to act as a disincentive for States to object to reservations they consider to be inadmissible or otherwise unacceptable.<sup>300</sup> Those that do object, the Committee points out, do not always state the reason for the objection and even less frequently state what consequence they expect to flow from the objection. For these reasons, the Committee concludes, there is no discernible pattern of State practice on objections and therefore "it is not safe to assume that a non-objecting party thinks that a reservation is acceptable."<sup>301</sup> Finally, the Committee goes on to say that the special characteristics of the Covenant as a human rights treaty raises doubt about "what effect objections to reservations have between States *inter se*."<sup>302</sup> All these factors lead the Committee to conclude that it "necessarily falls to [it] to determine whether a specific reservation is compatible with the object and purpose of the Covenant",<sup>303</sup> with any objections to reservations made by States parties to serve as "guidance to the Committee in its interpretation as to [the reservation's] compatibility ...".<sup>304</sup>

The US and the UK, in responding to the Committee,<sup>305</sup> argue that the Committee has mis-stated the law applicable to objections to reservations made to the Covenant. The US said that the "Committee appears to dispense with the established procedures for determining the permissibility of reservations ...".<sup>306</sup> The US does not say what it considers the "established procedures" to be, but it observes that the Committee's conclusion that "[t]he absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant"<sup>307</sup>

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<sup>298</sup> Ibid.

<sup>299</sup> Ibid at para 17.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid. See also above discussion at pages 40-42.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid. at para. 18.

<sup>304</sup> Ibid.

<sup>305</sup> See *US Observations* and *UK Observations*, above n.155.

<sup>306</sup> *US Observations*, above n. 155 at 132.

<sup>307</sup> The Comment, above n. 17 at 128, para. 17. The Committee then goes on to suggest that reservations to human rights treaties must be evaluated on an objective basis and that States parties are

is “interesting, [but] contrary to the Covenant scheme and international law.”<sup>308</sup> From this it could be assumed that the US sees the relevant international law at least as based on the opposability/subjective interpretation of Article 19(c) of the Vienna Convention.

The UK assumes that the relevant law, presumably applicable as custom, derives from the *Reservations* Opinion and the Vienna Convention.<sup>309</sup> It dismisses the Committee’s assumption that human rights treaties are “different”<sup>310</sup> and the Committee’s conclusion that because of this difference, the “existing rules of international law are inadequate to cope”<sup>311</sup> with human rights treaties. The UK believes that “[t]he correct approach is rather to apply the general rules relating to reservations laid down in the Vienna Convention in a manner which takes full account of the particular characteristics of the treaty in question.”<sup>312</sup> The UK concludes on this point:

Given, therefore, that the bilateral rights and general interests of other Parties are as indicated, directly affected, the United Kingdom regards it as a self-evident proposition that the reaction of those Parties to a reservation formulated by one of them is of direct significance both in law and in practice.<sup>313</sup>

Despite the fact that the US and the UK seem to indicate that there are rules, probably derived from Articles 20 and 21, relating to objections applicable to the ICCPR as customary norms, it is arguable that the lack of agreement about the meaning of the Vienna Convention rules and their practical application in the general international community,<sup>314</sup> means that their content is too uncertain for them to be customary norms. Greig argues variously that Article 20(4) applies to Article 19(c), that is, in favour of the opposability interpretation as custom,<sup>315</sup> or, at least, that this interpretation is a plausible one.<sup>316</sup> But given the doubt and the importance of determining whether the law as stated by the Committee, the US or the UK is accurate, it is necessary to

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not in a position to judge the compatibility of reservations on this basis. *Ibid.*, at 128, para 18.

<sup>308</sup> *US Observations*, above n. 155 at 132.

<sup>309</sup> *UK Observations*, above n. 155 at 135, para 4.

<sup>310</sup> *Ibid.*

<sup>311</sup> It refers to the fact that the modern law of reservations to multilateral treaties is derived from the ICJ *Reservations* Opinion, and that the ICJ devised this law precisely because of the perceived need to take into account the special characteristics of human rights treaties like the Genocide Convention. See *UK Observations*, above n. 155 at 135, para 4.

<sup>312</sup> *Ibid.* Note that the UK does not suggest how the Vienna Convention rules can be applied flexibly to take account of the particular characteristics of the treaty in question. See also Greig, above n. 1 at 93 & his n. 287. He asserts that the pattern of objections to human rights treaties does not differ greatly from the position under other types of treaty. Compare Lijnzaad, above n. 3 at 106; Clark, above n.3 at 282-283 & 316, who assert the opposite.

<sup>313</sup> *Ibid.* at 136, para 5. See also the French reaction in Gardner, above n. 1 at Annex, para 5.

<sup>314</sup> See above discussion of the content of the admissibility test is at pages 26-33.

<sup>315</sup> Greig, above n. 1 at 97 & 118.

<sup>316</sup> *Ibid.* at 112.



re-examine the *Reservations* Opinion<sup>317</sup> and the Vienna Convention provisions on objections.

Turning first to the *Reservations* Opinion, it will be recalled that, after establishing compatibility with the object and purpose as the admissibility test for reservations to the Genocide Convention, the ICJ went on to discuss the effect of objections on reservations.<sup>318</sup> The Court said that an objection to a reservation would not result in the exclusion of the reserving State from the Convention. However, an objecting State could prevent the treaty coming into force between itself and the reserving State if it found the reservation to be incompatible with the object and purpose of the Convention. In relation to permissible reservations, a State could object to a reservation and decide for itself the effect such an objection would have on its treaty relations with the reserving State.<sup>319</sup> The ICJ said that:

each State which is a party to the [Genocide] Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint. As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State party objecting to [the reservation] will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose ... consider the reserving State to be a party to the Convention.<sup>320</sup>

There can be no doubt about the intention of the ICJ in relation to the role States parties play in negotiating the extent of their treaty relations with reserving States parties. The only fetter on States determining the extent of their treaty relations in this way is the compatibility with the object and purpose of the Convention test.

This part of the Opinion found its way, in modified form, into Articles 20 and 21 of the Vienna Convention. Article 20(4) of the Vienna Convention provides that the treaty parties will determine the effect that reservations shall have on their treaty relations with a reserving State party. While there is debate about the extent to which a State can accept a reservation that is inadmissible under Article 19,<sup>321</sup> there is little doubt that Article 20(4) allows

<sup>317</sup> See above at pages 8-14 for a discussion of the ICJ Opinion.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid, at 29-30.

<sup>320</sup> ICJ Rep. 1951, 15.

<sup>321</sup> *UK Observation*, above n. 155 at para 13. The UK points out that it is questionable whether Articles 20 and 21 were intended to cover inadmissible reservations. The UK is of the view that it was not so intended. It observes that it "is highly improbable that a reservation expressly *prohibited* by the treaty (the case in Article 19(a) ...) is open to acceptance by another Contracting State. And, if so, there is no clear reason why the same should not apply to the other cases enumerated in Article 19, including incompatibility with the object and purpose under 19(c)." *ibid*.

the States parties to decide, on the basis of their own policy interests, the extent of their treaty relations with reserving States. In this regard, Article 20(4) closely follows the *Reservations* Opinion.

Roslyn Higgins comments that the UK's concern<sup>322</sup> at what it sees as an attempt by the Committee to do away with the role assigned to States parties in relation to reservations and to establish "a different legal regime to regulate reservations to human rights treaties",<sup>323</sup> may "state the issue too broadly".<sup>324</sup> She asserts that the Comment does not ignore the Vienna Convention but rather, "seeks to provide an answer to the issue that neither the Court in the [*Reservations* Opinion], nor the Vienna Convention, ever addressed."<sup>325</sup> On her analysis, the Committee may not be abandoning the existing legal regime but rather, seeking to provide answers to the unresolved issues related to the making of an incompatible reservation.

However, the Committee is mistaken in its assumption that the doubtful effect of States' objections to reservations is the result of the special nature of human rights treaties. The Committee said that "because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States inter se."<sup>326</sup> Non-reciprocity and the other unique features of human rights treaties identified by the Committee, might highlight the failings of the reservations rules,<sup>327</sup> but they are not necessarily the cause of this doubtful effect. Rather, it is the fault of the Vienna Convention, which fails to adequately cover all, or even the most likely, eventualities, and to state the law unambiguously.<sup>328</sup> Thus, it is not the case that only human rights treaties suffer from the lack of consensus about the role of objections to reservations. The problem is endemic to multilateral treaties. Nonetheless, in the context of the ongoing debate about the correct interpretation and application of the reservations rules, it is possible to interpret the above statement by the Committee, not as a radical deviation from accepted legal principles, but rather as an expression of the commonly

<sup>322</sup> Her comment applies equally to the US.

<sup>323</sup> *UK Observations*, above n. 155 at 135, para 3.

<sup>324</sup> Higgins, in Gardner, above n.3, at xv.

<sup>325</sup> *Ibid.*

<sup>326</sup> The Comment, above n. 17 at 129, para 20.

<sup>327</sup> At least in regard to the rules in Section 2 of the Vienna Convention, but query whether there is some other version of rules more applicable, such as customary international legal norms that are not identical to the Vienna Convention rules.

<sup>328</sup> See above discussion on flaws in the Vienna Convention reservations rules, Chapter 2. See Lijnzaad for a discussion of the failure of the *Reservations* Opinion to establish working and fair rules on reservations. Lijnzaad, above n. 3 at 26-28 & 403-404.

held view that the meaning of the rules relating to objections are obscure and consequently it is truly “open to question what effect objections have between States *inter se*.”<sup>329</sup>

*B: Authority of the Committee to Determine the Validity of Reservations*

Much of the commentary on the Comment has focussed on the Committee’s claim that it is best placed to determine the validity of reservations. In this regard, the Committee said that it “necessarily falls to [it] to determine whether a specific reservation is compatible with the object and purpose of the Covenant”.<sup>330</sup> While the authority of the Committee to comment on the law of reservations as it relates to the ICCPR is not questioned, its competence to do so in any authoritative manner is. The UK accepted that the “Committee must necessarily be able to take a view of the status and effect of a reservation where this is required to permit the Committee to carry out its substantive functions under the Covenant”,<sup>331</sup> but it expresses concern that the Committee purports to go beyond this. The UK focuses on the Committee’s use of the word “determine”<sup>332</sup> in the Committee’s consideration of the status of reservations to the Covenant. Moreover, according to the UK, it uses ‘determine’ “in the context of its *dictum* that the task in question is inappropriate for the States Parties.”<sup>333</sup> The UK concludes that:

[e]ven if it were the case (as the General Comment argues but the United Kingdom doubts ...) that the law of reservations is inappropriate to address the problem of reservations to human rights treaties, this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the Covenant; any new competence could only be created by amendment to the Covenant, and would then be exercisable on such terms as were laid down.

The US expressed similar sentiments. It said that the General Comment “appears to go too far”<sup>334</sup> in its efforts to address the possible effects of “excessively broad reservations on the general protection and promotion of the rights reflected in the Covenant.”<sup>335</sup> The US states that the Covenant scheme “does not impose on States Parties an obligation to give effect to the

<sup>329</sup> The Comment, above n. 17 at para 17.

<sup>330</sup> *Ibid*, at 129, para 21.

<sup>331</sup> *UK Observations* above n. 155, at para 11.

<sup>332</sup> See the Comment, above n. 17 at 18; *UK Observations*, above n. 155 at para. 11; Higgins suggests that “too much is not to be read into the verb ‘determine’.”, in Gardner, above n.3 at xvi, her n. 7.

<sup>333</sup> *UK Observations*, above n. 155 at 137, para 11.

<sup>334</sup> *US Observations*, above n. 155 at 131.

<sup>335</sup> *Ibid*.

Committee's interpretations [of the Covenant] or confer on the Committee the power to render definitive or binding interpretations of the Covenant."<sup>336</sup>

The US and the UK are careful not to accuse the Committee of assuming a competence to make binding determinations on matters relating to interpretation of the Covenant, including the effect of reservations. The US confines itself to pointing out the absence of such competence in the Committee, and the UK merely expresses concern and calls for further discussion of the matter. Clearly, the Committee's intentions are not obvious to these States. However, Higgins suggests that the inference drawn by the US and the UK confuses "a competence to do something with the binding effect of that which is done."<sup>337</sup> She is of the view that the Committee has not asserted that it has binding authority, but nonetheless, that it is able to consider reservations and express its 'opinion' on their validity. But it is whether the Committee is claiming an expanded power that is in contention. Thus, Higgins seems to mis-state the position of the US and the UK. While she is in no doubt as to the limits of the Committee's implicit<sup>338</sup> and explicit powers, acknowledging that "[t]he Committee cannot compel a State to accept its view as to a reservation",<sup>339</sup> Higgins suggests that there is room for the Committee to fill in the void in the Vienna Convention rules. She argues in support of the Committee that the objections rules are inappropriate for human rights treaties, and asserts that the application of the object and purpose test, while originally conceived as "an objective task, subjectively defined",<sup>340</sup> need not "continue to be subjectively defined where a mechanism for 'objective' appraisal now exists."<sup>341</sup> The objective mechanism, is, of course, the Committee. From the perspectives of the US, the UK, and other like minded States parties, it is difficult to see how the latter view can be consistent with the former, and avoid usurping the part played by States in determining acceptability of reservations. From their perspective, Higgins' defence of the Committee is too close to a claim for the Committee to provide the "jurisdictional plane" referred to in the *Reservations Opinion*.<sup>342</sup> If, on the other hand, the Committee is only seen as expressing a non-authoritative 'view' for the guidance of States parties, it should be less problematic.

<sup>336</sup> Ibid.

<sup>337</sup> Higgins, in Gardner, above n.3 at xx.

<sup>338</sup> For a discussion of the extent of the Committee's implicit powers under the Covenant, see Greig, above n. 1 at 94.

<sup>339</sup> Higgins, above n. 3 at xxvii.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> ICJ Rep. 1951, 15 at 26.

*C: Effect of Making an Incompatible Reservation - Severability*

It is essential to determine the intentions of the Committee in the Comment in order to assess the impact the suggestions in the Comment will have on the making of reservations to the Covenant. An important part of its suggestions relate to the effect on the treaty obligations of a State that has made an incompatible reservation. The Committee's conclusions on this point, while reflective of recent European Court practice, are radical as they appear to disregard the fundamental principle of treaty-making that States cannot be bound without their consent. The Committee commented that in the normal course of events, an offending reservation would be severed from the reserving State's instrument of ratification or accession,<sup>343</sup> with the result that "the Covenant will be operative for the reserving party without the benefit of the reservation."<sup>344</sup> From the point of view of protecting the integrity of the ICCPR, and thus its efficacy, such an outcome seems reasonable. It is unacceptable for an incompatible reservation to have the same effect as a valid reservation.<sup>345</sup> And, it is equally unsatisfactory for such a State to be excluded from the Covenant as long as universal participation in human rights treaties remains a principal aim. Yet these are the outcomes that the US proposes as the only viable options.

The US refers to Article 20(4)<sup>346</sup> as containing the relevant rule.<sup>347</sup> According to it, this paragraph provides only two possible consequences for reserving States whose reservations have been the subject of objections on the ground of incompatibility.<sup>348</sup> The first is that the "remainder" of the treaty enters into force for the two parties. The second is that it does not enter into force between the two parties. The US asserts that the third possibility suggested by the Committee, the treaty entering into force in its entirety after the reservation has been severed, is unlawful.<sup>349</sup> The US said:

The general view of the academic literature is that reservations are an essential part of a State's consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: obligation is based on consent. A State which does not consent to a treaty is not bound by that treaty. A State which

<sup>343</sup> The Vienna Convention does not offer the option of severing an invalid reservation, although Article 44 refers to "separability" in relation to a ground for termination or suspension of, withdrawal from, specific provisions of a treaty.

<sup>344</sup> The Comment, above n.17 at 129. This reflects the outcome of the *Belilos* case before the European Court, above n. 118; See also Bowett, above n. 1.

<sup>345</sup> On this point see Greig, above n.1 at 52.

<sup>346</sup> Text is above at n. 160.

<sup>347</sup> *US Observations*, above n. 155 at 134.

<sup>348</sup> *Ibid.*

<sup>349</sup> *Ibid.*

expressly withholds its consent from a provision cannot be presumed, on the basis of some legal fiction, to be bound by it.<sup>350</sup>

However, the application of paragraph 20(4) is uncertain and the US' view may not be correct. State practice offers little assistance. As the Committee noted, objections to reservations on the ground of incompatibility usually do not set out the objecting State's intention vis à vis its treaty relations with the reserving State. At best it may state that the objection is not intended to preclude the entry into force of the treaty between itself and the reserving State.<sup>351</sup> Thus, one must speculate as to whether the objecting State considers its objection to have the effect of binding the reserving State to the whole of the treaty. However, the only conclusion to be drawn is that the objecting State's intention is that the treaty is in force as a whole. Otherwise, the outcome would be the same as if the objecting State had accepted the reservation,<sup>352</sup> defeating any practical purpose of objecting.

The second option outlined by the US (that the treaty does not enter into force) is also inadequate in the context of a human rights treaty. Presumably, an objecting State does not want to exclude a reserving State from all of its treaty obligations as this may leave the individuals in the reserving State's jurisdiction without any of the protections afforded by the treaty in question. The fact that many objectors make the point that the objection does not affect the treaty coming into force for it and the reserving State, may be evidence of a desire to avoid such an outcome.<sup>353</sup> States appear still to be genuinely committed to universal participation in human rights treaties. The second option proposed by the US would undermine this commitment.

As the Committee has subsequently expressed the view that the US reservations to Article 6 and 7 are incompatible,<sup>354</sup> the US must feel

<sup>350</sup> Ibid, at 134-5.

<sup>351</sup> Norway's objection to the reservation made by Djibouti to the Children's Convention. *Multilateral Treaties*, above n. 190.

<sup>352</sup> See MacDonald, above n. 137 at 449.

<sup>353</sup> For example, Germany's objections to reservations made to the Children's Convention. *Multilateral Treaties*, above n. 190.

<sup>354</sup> *Consideration of 1st US Report* above n. 284 at 3, paragraph 14. Note that the Comment was prepared 5 months before the Committee considered the initial report of the US; See below discussion of the reservation to Article 6 at pages 71-76. The US reservation to Article 7 (right to be free from torture and cruel, inhuman or degrading treatment) states:

The United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendments to the Constitution of the United States.

*Multilateral Treaties*, above n. 190; A number of States have objected to this reservation on the ground that it is incompatible with the object and purpose of the Covenant or that it is made to a non-derogable provision, *ibid*. For a discussion of reservations to non-derogable provisions see above pages

particularly vulnerable to suggestions that incompatible reservations are to be severed from ratification and the US bound by Articles 6 and 7 as set out in the Covenant. The UK expressed concern that the Committee's approach to incompatible reservations "would risk discouraging States from ratifying human rights conventions".<sup>355</sup> It seems the US would not have ratified the Covenant in the absence of its reservation to Article 6.<sup>356</sup> The statement by the US in its Observations is unequivocal. It said the

... reservations contained in the United States' instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole could thereby be nullified.<sup>357</sup>

While agreeing that severing an incompatible reservation from ratification may be appropriate in limited circumstances,<sup>358</sup> the UK strongly opposed the Committee's conclusion that severance would result in the party concerned being bound by those provisions that were the subject of its reservation. The UK agreed with the US that this would be contrary to the fundamental principle that a State cannot be bound by a treaty provision without giving its consent. It reiterated its support for the approach adopted by the ICJ in the *Reservations* Opinion that the maker of an incompatible reservation cannot be regarded as a party to the treaty unless it withdraws its reservation (at least until there is a determination on the "jurisdictional plane", ie., by an authoritative judicial body).<sup>359</sup>

The difficulty of reconciling the making of an invalid reservation with a States' ratification was considered by Bowett.<sup>360</sup> In answering the question of what effect an impermissible reservation has, Bowett said that the making of the impermissible reservation reveals a "patent contradiction in the expression of will by the State."<sup>361</sup> On the one hand there is the expression of

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<sup>36-38.</sup> Also *Soering v UK*, 161 Eur. Ct. H.R. (Ser. A) (1989).

<sup>355</sup> *UK Observations*, above n. 155 at para 14.

<sup>356</sup> Schabas, "Invalid Reservations" above n. 271 at 324.

<sup>357</sup> *Ibid.* In support of this view, Stewart, speaking of the death penalty, said "... one could not realistically expect adoption of the Covenant to overrule the democratically expressed desires of a majority of citizens in a majority of states." D. Stewart, "US Ratification of the ICCPR: The Significance of the Reservations, Understandings and Declarations" (1993) 14 *Human Rights Law Journal* 77, at 83. Compare Schabas, "Invalid Reservations", above n. 271. Schabas examines other US state practice, such as its signing of the Children's Convention without reservations, and concludes that the US intention is that it be bound by the Covenant in the event of its reservation to Article 6 being determined illegal. Schabas, *ibid.* Of course the US may formulate reservations if and when it ratifies the Children's Convention.

<sup>358</sup> *UK Observations*, above n. 155 at para 14.

<sup>359</sup> *Ibid.*, at para 14 & 15; *US Observations*, above n. 155 at para 5; ICJ Rep. 1951, 15 at 26.

<sup>360</sup> Bowett, above at n. 1.

<sup>361</sup> *Ibid.*, at 75. Bowett says that this contradiction does not occur when the reservation is formulated at the time of signing a treaty if the signing was insufficient to make the State a party to the treaty. The

the State's will to be bound by the treaty, as evidenced by its act of joining (ratification or accession). On the other hand there is the expression of the State's will to limit its consent to be bound by imposing conditions (reservations etc.) which are inconsistent with the intention to be bound because they are impermissible under the treaty itself. Bowett suggests that, in principle, the former intention should prevail as it is the "overriding, the primary intention of the State".<sup>362</sup> The result is that the reservation is a nullity.<sup>363</sup> He supports this view by suggesting that it is unlikely that States knowingly make impermissible reservations, but they fully understand the effect of giving consent to be bound by a treaty.<sup>364</sup> However, he observes that there is no direct authority to support this view, only the "related, but not strictly analogous"<sup>365</sup> issue of reservations to the Optional Clause (Article 36(2)) of the Statute of the ICJ.

In the *Norwegian Loans*<sup>366</sup> and *Interhandel*<sup>367</sup> cases, Judge Lauterpacht, in his dissenting opinions, like Bowett, considered that the best approach is to treat the matter of conflicting expressions of will as one of construction of the State's intent. In the *Norwegian Loans* case, Judge Lauterpacht considered the issue of severability after finding that a French reservation to its declaration recognising the compulsory jurisdiction of the Court under Article 36(2) of the Statute of the Court was incompatible with the Statute. He decided the question of whether it was possible to sever the reservation from the declaration by examining the intention of the parties and the nature of the instrument concerned.

In *Interhandel* the Court considered the US reservation to Article 36(2). After examining US State practice over a long period, Judge Lauterpacht found that the reservation was not severable. He said:

If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the declaration.<sup>368</sup>

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contradiction only arises when the State "purports to accept two inconsistent legal obligations." Ibid.

<sup>362</sup> Ibid, at 76.

<sup>363</sup> Ibid.

<sup>364</sup> According to Bowett, this fact means that the problem of incompatible reservations can be construed "as a 'mistake of law' and, in principle, a mistake of law as opposed to a mistake of fact will not operate so as to invalidate the treaty, however fundamental the mistake of law is" *ibid*; Article 48, Vienna Convention, above n. 2; Compare Greig, above n. 1 at 54.

<sup>365</sup> Bowett, above n. 1, at 76.

<sup>366</sup> *Case of Certain Norwegian Loans* (Fr. v Nor.) ICJ Rep. 1957, 9.

<sup>367</sup> *Interhandel Case*, (Switz. v US) ICJ Rep. 1959, 6.

<sup>368</sup> ICJ Rep. 1959, 6 at 117; Bowett, above n. 1, at 76-77.



For obvious reasons, the US might prefer to rely on Lauterpacht's conclusions in *Norwegian Loans* and *Interhandel* in relation to its reservation to Article 6. However, in the light of more recent judicial consideration of the severability of reservations it is difficult to predict whether the Lauterpacht view would prevail in the unlikely event that an authoritative judicial body was required to decide the matter. In some recent cases, the European Court of Human Rights has adopted the opposite approach to deciding the severability of invalid reservations to the Convention it oversees, disregarding the statements of intent by States parties. The Human Rights Committee's Comment reveals that it, at least, finds these recent European Court decisions more persuasive than the Lauterpacht view.

In *Belilos v Switzerland*<sup>369</sup> before the European Court of Human Rights, the Swiss Government clearly stated during oral pleadings that it intended to be bound by the European Convention irrespective of any finding that its reservations to Article 6(1)<sup>370</sup> of the Convention were inadmissible.<sup>371</sup> The intention of the party here was beyond doubt and the Court was able to sever the reservation in accordance with the Lauterpacht "test".<sup>372</sup> However, the case of *Loizidou v Turkey*<sup>373</sup> was different. In this case, Turkey had made reservations to its declaration accepting the individual petition mechanism under the European Convention.<sup>374</sup> Unlike Switzerland in *Belilos*, Turkey argued before the European Court that if its reservations were found to be invalid, its declaration was inoperative.<sup>375</sup> Turkey also asserted that it had made statements upon accepting the individual petition mechanism emphasising that

it had to be clearly understood that the conditions built into the Declaration are so essential that disregarding any of them would make the entire Declaration void and

<sup>369</sup> See *Belilos*, above n. 118

<sup>370</sup> Article 6(1) enshrines the right to a hearing by an independent and impartial tribunal established by law.

<sup>371</sup> Council of Europe, *Belilos Case: Notes of the Public Hearing 45-58 (1987)* at 45.

<sup>372</sup> Although the European Court did not discuss the Lauterpacht decisions nor the issue of severability. It just assumed that the reservation, once held to be invalid, was severable and severed from the Swiss ratification of the Convention. This is not to suggest that because of the Swiss declarations this aspect of the decision has not been without its critics. See Imbert, "Temeltasch and the Strasbourg Commission", above n.3. See also *Weber*, above n. 119 in which the European Court, after finding the reservation in question to be invalid, simply said that the provision that had been the subject of the reservation applied as if the reservation had not been made. *ibid*, at para 38.

<sup>373</sup> *Loizidou v Turkey*, above n.157.

<sup>374</sup> Articles 25 and 46. Turkey's reservations purported to limit its acceptance of the individual complaint mechanism so that it applied in territory "to which the Constitution of the republic of Turkey is applicable" or to the "national territory of Turkey", 1987 Yearbook, Eur. Conv. on H. R., 8.

<sup>375</sup> *Ibid* at 27.

thus lead to the consequence of a complete lapse of Turkey's acceptance of the right of individual petition.<sup>376</sup>

But the Court dismissed the Turkish statements and said that Turkey "must have been aware"<sup>377</sup> that State practice revealed a consistent pattern by parties to the European Convention of unconditional acceptance of the competence of the European Commission and Court, and thus, that its reservations "were of questionable validity under the Convention and might be deemed impermissible by the Convention organs."<sup>378</sup> The Court concluded that "the *ex post facto* statements by Turkish representatives cannot be relied upon to detract from the respondent Government's basic, albeit qualified, intention to accept the competence of the Commission and the Court."<sup>379</sup>

The decision in *Loizidou* indicates that the European Court is unlikely to be persuaded by governmental intentions, even those emphatically expressed, to deviate from its decision to sever and then ignore an invalid reservation. The Court has not said that a State's intentions are irrelevant in determining whether an invalid reservation is to be severed from a State's declaration of acceptance of the Convention, but it is arguable that expressions of such intentions will not override the State's expression to be bound by the Convention. This approach is favoured by Schabas,<sup>380</sup> who, after examining US state practice, concludes that the subsequent US statements that its reservations to Articles 6 and 7<sup>381</sup> of the ICCPR are indivisible from its consent to be bound by the ICCPR, do not affect its first expression of intent to be bound by the Covenant.<sup>382</sup> Under his analysis, the US is bound by these Articles, and is also in breach of them.<sup>383</sup>

<sup>376</sup> Statement of Turkish Delegate to the Committee of Ministers to the Council of Europe, in Council of Europe, European Court of Human Rights, Doc. Cour/Misc (94) 271, 35.

<sup>377</sup> *Loizidou*, above n. 157 at 28.

<sup>378</sup> *Ibid.* In fact a number of States had objected to the Turkish reservations and the Court had found reservations of a similar nature invalid in two earlier cases. (See *Belgian Linguistics Case*, 1 ECHR (Ser. B) 432 (1962) and *Kjeldsen v Netherlands*, 21 ECHR (Ser. B) 119 (1978)). The Court said these objections and earlier decisions meant that Turkey was well aware of its fragile position prior to making its declarations. *Loizidou*, *ibid.*, at 28; See Schabas, "Invalid Reservations", above n. 271 at 321.

<sup>379</sup> *Loizidou*, *ibid.*

<sup>380</sup> Schabas, "Invalid Reservations", above n. 271.

<sup>381</sup> Below at pages 71-76.

<sup>382</sup> *Ibid.*, at 324.

<sup>383</sup> *Ibid.* He asserts that the US is in breach of Article 6(5) on the basis of several juvenile executions since the Covenant came into force for the US. He also states that the US is in breach of Article 7 because of the use of gas chambers in carrying out the death sentence. He says that the Committee has "ruled" that the gas chamber constitutes torture, or inhuman treatment or punishment. See *Views of the Human Rights Committee: Communication No. 469/1991, Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991 (1993).

Like the Bowett view<sup>384</sup> the European Court seems to be of the view that Turkey's first expression of will, to be bound by the Convention, prevailed over its second expression of its will, its reservation. A difficulty with this approach is that, in this case, as in the case of the US reservations to Articles 6 and 7 of the ICCPR,<sup>385</sup> the two expressions of will appear to occur simultaneously and to be indivisible. States are likely to fiercely resist such an approach as they are always anxious to defend against any real or perceived encroachment on their sovereignty, and they will rightly point out that none of the treaty supervisory bodies have the power to effect severance of reservations, or to ignore the lack of a State's consent to be bound. If a State declares at the time of accession or ratification that its reservations are integral to its ratification and cannot be severed, such an approach will be even less acceptable. Thus, it is difficult to see how severance, as envisaged by the Committee, and implemented by the European Court, could be an acceptable method of dealing with incompatible reservations to the UN human rights treaties.

Greig<sup>386</sup> says that, "unless some objective factor is introduced into the equation"<sup>387</sup> the difficulties in making determinations about the effect of incompatible reservations cannot be resolved. The Human Rights Committee and its supporters assert that General Comment 24 purports to introduce such an objective element. The Committee openly acknowledges the failure of the subjective system to regulate the making of reservations and attempts to devise an objective means (i.e. its own judgement) to alleviate the problems caused by this subjectivity. But not only will the Committee probably have to battle States' unwillingness, possibly justified, to accept any determinations it may make about the validity of reservations, it may have to overcome any perception of its own want of objectivity. Bayefsky asserts that the Committee suffers a lack of credibility because some of its members have been ill-qualified or clearly not independent of their governments.<sup>388</sup> If the Committee is to increase its authority, even symbolically, so that its Comment can be accepted, even as a document worthy of discussion, if not as a

<sup>384</sup> See above at page 66 & n. 152.

<sup>385</sup> See discussion below at pages 63-68.

<sup>386</sup> Greig, above n. 1.

<sup>387</sup> Ibid, at 171; Greig suggests applying the principles of equity and reasonableness to the making of determinations about reservations. For a more detailed discussion of Greig's view see below at page 73-76.

<sup>388</sup> Bayefsky, above n. 259 at 430. Although she suggests that these problems are not limited to the Human Rights Committee, *ibid* at 432-433 in relation to the Convention on the Elimination of All Forms of Racial Discrimination [hereinafter Race Convention].

prescription for change, it will need to be very careful about its own image and ensure it is not, and does not appear, biased.

There is no ready answer to the seemingly insurmountable obstacles to devising a more effective reservations framework. The single most obstructive factor is the decision by the negotiating parties to the ICCPR and the other UN human rights treaties to choose to establish a supervisory body with no binding authority to interpret, and ensure compliance with, the treaty provisions. This is, of course, a factor that cannot be resolved by tinkering with procedure. Overcoming it may require States to adopt an entirely different attitude to human rights and to reservations to human rights treaties. Some other ways of governing reservations to human rights treaties are suggested in the next chapter.

*The US Reservations To Article 6 Of The ICCPR: A Case Study*

The following discussion examines the US reservations to Article 6 of the ICCPR in light of the above discussion on the Human Rights Committee's views on the compatibility test and the effect of making an incompatible reservation.

Article 6 guarantees the right to life, and is non-derogable under Article 4(2).<sup>389</sup> Article 6 is as follows.

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State party ... to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence may be granted in all circumstances.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

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<sup>389</sup> Article 4(2) prohibits derogation from Articles 6 (right to life), 7 (prohibition on torture), 8(1) & (2) (prohibitions on slavery and servitude), 11 (no imprisonment for debt), 15 (*nullum crimen sine lege*), 16 (right to legal personality), and 18 (freedom of thought, conscience and religion).

6. Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present Covenant.<sup>390</sup>

The US reservation to Article 6 states:

That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.<sup>391</sup>

Eleven European States parties have objected to the US reservation to Article 6 on the ground that it is incompatible with the object and purpose of the Covenant.<sup>392</sup> For example, the Netherlands stated in its objection that “it follows from the text and the history of the Covenant that the [US] reservation is incompatible with the text, the object and purpose of Article 6”.<sup>393</sup> Finland went further, claiming that “the right to life is of fundamental importance in the Covenant and the ... reservation therefore is incompatible with the object and purpose of the Covenant”.<sup>394</sup> Some other objecting States parties<sup>395</sup> referred to the fact that Article 6 was non-derogable and therefore could not be the subject of a reservation.<sup>396</sup> The reservations also generated considerable academic literature.

The principal objection to the reservation to Article 6 is that it is incompatible with the object and purpose of the Covenant, but it has also been criticised for its breadth and lack of clarity.<sup>397</sup> Schabas<sup>398</sup> in particular, criticises it on this ground. He observes that, although the US reservation appears to deal only with the subject matter in paragraph 6(5) of the Covenant, because of its failure to specify that its reservation is limited to this paragraph, it is possible to read it as reserving the whole of Article 6. Its failure to specify which

<sup>390</sup> Article 6, ICCPR above n. 8.

<sup>391</sup> *Multilateral Treaties*, above n. 190.

<sup>392</sup> *Ibid*, at 123.

<sup>393</sup> *Multilateral Treaties*, above n. 190, reproduced in Markus Schmidt, “Reservations to United Nations Human Rights Treaties - The Case of the Two Covenants”, in Gardner, above n. 3, at 21 & 26.

<sup>394</sup> *Ibid*.

<sup>395</sup> For example, Spain, Italy and Finland. *Ibid*.

<sup>396</sup> Although not necessarily because a reservation to a non-derogable treaty provision would automatically be incompatible with the object and purpose of the Covenant and therefore, invalid, but because they did not want a precedent of tolerating reservations to non derogable provisions to be set. *ibid*. For a discussion of the link between non-derogable provisions and incompatible reservations see above at pages 33-34; Buergenthal, above n. 146 at 24-25; Schabas, “Reservations Reform”, above n.67 at 50-53; note that, in relation to a reservation to the comparable provision in the Inter-American Convention on Human Rights (Article 4), the American Court of Human Rights said that a reservation to a non-derogable provision would be invalid as incompatible if it sought wholly to exclude the operation of that provision. *Restrictions to the Death Penalty* Opinion above n. 144 at para 61.

<sup>397</sup> Refer to above discussion of ambiguity and breadth of reservations as a ground for their incompatibility, above pages 35-36.

<sup>398</sup> Schabas, “Invalid Reservations”, above n.271 at 283.

domestic laws it intends to protect with its reservation makes its scope difficult to determine. He says that this means the reservation “must be assessed with reference to the worst possible hypotheses.”<sup>399</sup> According to him, such an assessment leaves open the possibility of the US allowing execution of very young children and the insane. Interestingly, Stewart<sup>400</sup> gives this part of the reservation the opposite interpretation. He says that the reservation allows US legislatures to adopt legislation *prohibiting* the imposition of the death penalty for crimes committed by those under 18. Strictly speaking, the reservation could be given this interpretation, but an ordinary reading of it suggests that the opposite is meant. It is more likely that it *allows* for the possibility that US legislatures may impose the death penalty on people under the age of 18. In fact, the US Supreme Court has upheld the constitutionality of state laws permitting the imposition of the death penalty for especially serious crimes committed by juveniles aged 16 and 17.<sup>401</sup>

According to Schabas, the worst possible interpretation of the reservation would also allow the US to introduce capital punishment for crimes other than the “most serious crimes”, including political crimes and crimes without violence, and to arbitrarily deprive people of their life.<sup>402</sup> Although this interpretation seems extreme and is likely to be denied by the US at this time, it is not inconceivable that it could be relied upon by the US in the future to extend its use of capital punishment. Any judicial body required to interpret the reservation<sup>403</sup> as part of a dispute resolution<sup>404</sup> would have to consider if

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<sup>399</sup> Ibid.

<sup>400</sup> Stewart above n. 357 at 81.

<sup>401</sup> Ibid. See *Stanford v. Kentucky*, 492 US 361 (1988); *Thompson v. Oklahoma*, 467 US 815 (1987). The Human Rights Committee criticised this in its consideration of the US initial report on the Covenant. *Consideration of 1st US Report*, at 4, para 9.

<sup>402</sup> Ibid. at 282-284.

<sup>403</sup> The Vienna Convention has its own treaty interpretation provision in Article 31(1). Note that, as a reservation forms part of the treaty text, at least once it is accepted, it is appropriate to apply the same rules of interpretation to it. Analyses of treaty interpretation principles and practice abound. I do not propose to discuss this complex area here. See generally, McNair, above n. 22 at 364-392; *Oppenheim*, above n. 67 at 1267-1284; Thirlway H, “The Law and Procedure of the International Court of Justice 1960-1989” Part Three, 1992 *British Yearbook of International Law*, 1-72; Elias, above n. 1, at 71-84; Rosenne, *Developments*, above n. 1 (particularly on good faith in treaty interpretation at 135-173).

<sup>404</sup> Such an occasion is unlikely ever to arise. The effect of the US withdrawal of its acceptance of the compulsory jurisdiction of the ICJ is that there is no forum in which it could be considered. Even if the US did accept the compulsory jurisdiction of the ICJ and did not limit its acceptance by reservations to exclude matters arising under the ICCPR, it is extremely unlikely that another State party would feel sufficiently aggrieved by an alleged US violation of the Covenant to seek resolution of the resultant dispute in the ICJ. A US ratification of the First Optional Protocol is unlikely to change this situation. An adverse finding against the US by the Committee under this Protocol might be politically embarrassing for the US, but of limited practical effect given that its findings are recommendatory only.

the norm in Article 6 prohibits the extension of the use of the death penalty before pronouncing the reservation incompatible with that Article.

Lijnzaad,<sup>405</sup> in assessing whether reservations to Article 6 would automatically be incompatible with the object and purpose of the Covenant, considers whether Article 6 requires the abolition of the death penalty and whether the Article is part of the object and purpose of the Covenant. She concludes that the drafting of the Second Optional Protocol<sup>406</sup> proves that Article 6 is not abolitionist in intent.<sup>407</sup> On this basis, a reservation to Article 6 that stresses the permissibility of the death penalty<sup>408</sup> probably would not be invalid as incompatible with the object and purpose of the Covenant. Nevertheless, she further observes that Article 6 does contain “a general tendency to abolish the death penalty.”<sup>409</sup> Therefore, she concludes, “[i]ncreasing the number of cases in which the death penalty may be imposed is contrary to the spirit of the provision, and is in general contrary to the obligation to implement the CCPR.”<sup>410</sup>

Schmidt<sup>411</sup> agrees with Lijnzaad’s conclusion on Article 6, but goes one step further. He states that current developments and State practice appear to be moving in the direction of outlawing the death penalty at international law.<sup>412</sup> In support, Schabas,<sup>413</sup> states that the issue of the death penalty has always been central to the purpose of Article 6.<sup>414</sup> According to him, “[i]n keeping with the general purpose of the right to life provision in the [Universal Declaration of Human Rights<sup>415</sup>], the Covenant’s drafters provided a more explicit definition of the limitations of the death penalty ... with a view to its eventual abolition.”<sup>416</sup> He believes State practice and Committee activity

<sup>405</sup> Lijnzaad, above n. 3 at 205.

<sup>406</sup> *Second Optional Protocol*, above n. 250.

<sup>407</sup> The Human Rights Committee’s *General Comment 6(16) on Article 6*, UN GAOR, Hum. Rts. Comm. 16th Sess., 378th mtg, at 2-3, UN Doc. CCPR/C/21/Add. 1 (1982) reiterates that the Article does not abolish the death penalty.

<sup>408</sup> The US reservation to Article 6 assumes that Article 6 does not prohibit capital punishment.

<sup>409</sup> Lijnzaad, above n. 3 at 205.

<sup>410</sup> *Ibid.*

<sup>411</sup> Schmidt above n.393 at 21.

<sup>412</sup> For example, he cites the conclusion of the Second Optional Protocol and the fact that 28 States had ratified or acceded to it as of 1 May 1995, *ibid.*, at 26. *Multilateral Treaties*, above n. 190. 28 States is not very many, though perhaps more than expected given the prevalence of the use of capital punishment.

<sup>413</sup> Schabas, “Invalid Reservations”, above n. 271.

<sup>414</sup> *Ibid.*, at 298-299.

<sup>415</sup> *Universal Declaration of Human Rights* (1948), (Article 3) reproduced in UN Doc. ST/HR/Rev. 5 (vol 1/Part 1) 1, at 2.

<sup>416</sup> The Committee has prepared two General Comments on the right to life. The first one reveals that the Committee considers the death penalty issue to be central to the general purpose of Article 6. See *General Comment 6(16) on Article 6*, UN GAOR, Human Rights Committee 16th Sess., 378th mtg,

under the Covenant, primarily under Article 40, supports this conclusion.<sup>417</sup> States parties report on the use of the death penalty in their country and the Committee routinely questions States parties about the use of the death penalty and measures taken by the State to further limit its use, urging them to abolish it altogether.<sup>418</sup> Evaluated in this light, the US reservation “appears to run counter to the purpose and object of the Covenant and is thus unacceptable.”<sup>419</sup>

The Human Rights Committee appears to agree with the conclusions of Lijnzaad, Schabas and Schmidt. In its consideration of the US initial report,<sup>420</sup> the Committee, after noting the “concerns” expressed by the US in its Observations on the General Comment,<sup>421</sup> itself expressed concern about the excessive number of offences punishable by the death penalty in a number of states in the US and the number of death sentences handed down.<sup>422</sup> Further, “[i]t deplores the recent expansion of the death penalty under Federal law and the re-establishment of the death penalty in certain States.”<sup>423</sup> The Committee then declared the US reservation to Article 6(5) to be invalid as incompatible with the object and purpose of the Covenant<sup>424</sup> and recommended that it be withdrawn.<sup>425</sup>

Given that the weight of opinion suggests that the death penalty is not outlawed at international law, the issue that seems to have occupied much of the discussion is whether a reservation, like the US reservation to Article 6, that purports to ‘extend’ the use of the death penalty, including contrary to the minimalist requirements set out in paragraph 5 of Article 6, is incompatible with the object and purpose of the Covenant? However, even allowing for

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at 2-3, UN Doc. CCPR/C/21/Add. 1 (1982); The second relates to the right to life and issues relating to war and nuclear weapons. See *General Comment 14(23) of Article 6*, UN GAOR, Human Rights Committee 14th Sess., Annex VI, Supp. No. 40, at 162, UN Doc.. A/40/40 (1985).

<sup>417</sup> Ibid.

<sup>418</sup> Ibid.

<sup>419</sup> Schmidt, above n. 393 at 26.

<sup>420</sup> *Consideration of 1st US Report*, above n. 284.

<sup>421</sup> Ibid, at 3, para 13.

<sup>422</sup> Ibid, at 3, para 16.

<sup>423</sup> Ibid. According to Schabas, the Comment also suggests that the US reservation to Article 6(5), to the extent that it frees the US from any obligation to refrain from imposing capital punishment on a person under 18 years of age, is illegal for violating a customary norm. Schabas, “Invalid Reservations”, above n. 271 at 296.

<sup>424</sup> Ibid, at 3, para 14; The Inter-American Court of Human Rights supports this view to some extent. It has held that there is a customary norm prohibiting the execution of children. However, it also held that the norm only extends to an unspecified age under eighteen years. “Application of Death Penalty in the US: Violation of Human Rights Obligation Within the Inter-American System” (1987) 8 *Human Rights Law Journal* 355; Schabas, *ibid*.

<sup>425</sup> *Consideration of 1st US Report*, above n. 284 at 5, para 27.



the difficulties of determining object and purpose, the US reservation appears to be invalid as it is patently incompatible with paragraph 5 of Article 6. Thus, according to the Committee's own conclusions in the Comment,<sup>426</sup> it is to be treated as severed from the US instrument of ratification. Although the Committee failed to make this point in its consideration of the US initial report, one can only assume that it will adhere to its views in the Comment and thus, consider the US to be bound by the whole of Article 6.

### *Conclusion*

The US reservation to Article 6 highlights the practical implications of the Committee's General Comment. While it may prove to be a useful guide to States considering ratifying with reservations,<sup>427</sup> its conclusion as to the effect of an incompatible reservation is clearly problematical. Given that the issue is likely only to arise in the Committee's consideration of future US reports,<sup>428</sup> the fact that, presumably in the mind of the Committee, the US reservation is severed from its instrument of ratification and is bound by all of Article 6, is likely to have a minimum impact. However, the Committee may not always be able to avoid the implications of its Comment, and the inevitable stand-off between the Committee and the US over this issue may weaken the authority of the Committee's views on this and other matters it may address in the future. This would be an unfortunate outcome, given that the Human Rights Committee is the body of experts directly responsible for ensuring, to the best of its ability and within the limits of its competence, that the object and purpose of the ICCPR is met. Its view of the effect of incompatible reservations is clearly one that will need to be addressed by the work of the ILC, which is discussed in the next chapter.

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<sup>426</sup> The Comment, above n. 17 at 129, para 21; above discussion at pages 48-58.

<sup>427</sup> As suggested by Higgins, above at page 54, n. 291.

<sup>428</sup> Rather than in a contentious case before the ICJ or under the First Optional Protocol.

## CHAPTER 4 - SOME REFORM PROPOSALS

### *Introduction*

Although the Human Rights Committee did not present its General Comment 24(52) as a reform proposal, the Comment, in describing what is arguably a new role for the Committee, is clearly about change. The change is aimed at improving the operation of the Vienna Convention reservations regime in respect of the ICCPR. The Committee was prompted to make the Comment in a climate of increasing concern amongst the human rights treaty supervisory bodies and writers about the impact that reservations were having on the efficacy and authority of human rights treaties.<sup>429</sup> There is a strong feeling that something needs to be done to improve the situation, and most critics of the reservations regime offer some suggestions for change along with their criticisms. The International Law Commission,<sup>430</sup> has once again entered the discussion on reservations rules and is now devising means to address the identified gaps and ambiguities in the rules.<sup>431</sup>

The reform proposals include legislative and procedural alterations. Some would require abandonment of the existing regime and others only adjustments of it. Like the General Comment, all are directed towards improving the efficacy of the regime and re-balancing the rights of all treaty parties. They also reveal, once again, the extremely complicated, and difficult nature, legally and politically, of this area of international law.

The following chapter will examine a sample of some of the most commonly suggested reform proposals and will measure their likely effectiveness against their ability to overcome the problems at which they are aimed, and against the likelihood of States accepting and implementing them.

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<sup>429</sup> Personal Communication from Elizabeth Evatt, member of the Human Rights Committee, 2 August 1996; also *Effective Implementation*, above n. 10.

<sup>430</sup> See SR Preliminary Report, above n. 108; *Second Report on Reservations to Treaties* by Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/477 [hereinafter SR Second Report]. Note that the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe has also been considering the rules on reservations. Its work is not considered here in the interests of space. See Meeting Report of 21-22 March 1995, CAHDI (95) 5, and Issues Concerning Reservations, Summary and Suggestions by the Delegation of Austria, CAHDI (95) 24. Note also that it will consider this issue again at its next meeting in early September 1996.

<sup>431</sup> See below at pages 79-82 for a discussion of the ILC's current work on this issue. For a history of its previous work on reservations see Ruda, above n. 1 at 156-179; Rosenne, *Guide to Vienna Convention*, above n. 1; Rosenne, *Developments*, above n. 1.

*Proposals For Procedural Reform: Role of the Supervisory Bodies*

The most common procedural reform relates to the work of the human rights treaties' supervisory bodies. Suggestions for reform include enhancing the role of the supervisory bodies to enable them to assess the validity of reservations, determine the effect of invalid reservations and provide guidance to state parties, existing and potential, in relation to the making of reservations to their respective treaties.<sup>432</sup> This is what the Human Rights Committee has done in its General Comment 24. Calls have also been made for the supervisory bodies to tackle the questioning of States parties on their reservations in a more consistent and probing fashion,<sup>433</sup> to prepare guidelines on the making of reservations,<sup>434</sup> and to approach international human rights law in a more coherent fashion when considering the effect of a State party's reservation on its general human rights treaty obligations.<sup>435</sup> To this end, the supervisory bodies could look at the extent to which States have accepted the same or similar obligations under other human rights instruments. However, as most reservations are admissible and a legitimate method by which States can limit the extent to which they are bound by a treaty, such questioning should focus on reservations of doubtful compatibility with the object and purpose of the treaty. These reforms would be relatively easy to implement, requiring action by the supervisory bodies only.

Tougher questioning of States parties may bring greater pressure on reserving States to withdraw their reservations. Or it may just expose the reserving State to greater scrutiny of its implementation of treaty obligations. Both outcomes would be valuable in ensuring that the issue of reservations to human rights treaties maintains a high profile from which may spring the more fundamental reforms required. As always, the attitude of States to the introduction of such measures from the supervisory bodies is essential to their success. Without State party support, any measures the supervisory bodies might take to clarify or toughen the reservations process cannot succeed.

<sup>432</sup> For example, Lijnzaad, above n.3 at 412-420; Bayefsky, above n. 259 at 435; D. Shelton, "State Practice on Reservations to Human Rights Treaties" (1983) *Canadian Yearbook of International Law*, 205, at 227; Schmidt, above n. 393 at 33; First Report of the Committee on International Human Rights Law and Practice of the International Law Association, [hereinafter ILA Report], at 12-22. A discussion of its views is below at pages 78-79.

<sup>433</sup> Lijnzaad, above n. 3 at 416.

<sup>434</sup> Ibid, at 415; the General Comment may be viewed as an attempt at guidelines by the Human Rights Committee.

<sup>435</sup> Lijnzaad, above n. 3 at 420.

The suggestions for procedural reform are in essence about substantive reform since they necessarily involve a judgement that the subjective regime established by the ICJ and, arguably by the Vienna Convention rules, should be replaced, or at least, down-graded.

### *Proposals For Legislative Reform*

#### *A: Judicialising the System*

The proposals for amendment to the Vienna Convention, or to the human rights treaties themselves, are necessarily more radical than those suggestions aimed only at the procedure of the supervisory organs. For example, Bayefsky<sup>436</sup> argues that the “reporting scheme does not work for States that are subject to no internal scrutiny”.<sup>437</sup> Accordingly, it should be scrapped and be replaced with country rapporteurs or treaty monitoring bodies, assigned to each ratifying State. These rapporteurs or bodies would investigate the implementation of the State’s treaty obligations and, presumably, report back to the relevant supervisory body.<sup>438</sup> She also suggests that individual complaint handling be judicialised,<sup>439</sup> perhaps in a way similar to the European or Inter-American human rights system where courts, with the power to make binding determinations, hear and consider individual complaints,<sup>440</sup> interpret treaty and protocol provisions and resolve inter-State disputes.<sup>441</sup>

Such proposals appear to be based on the belief that the UN human rights system would have been more effective if the supervisory bodies were enforcement bodies with competence to make authoritative determinations in relation to disputes, individual complaints and treaty interpretation. However, the negotiating parties of all the UN human rights treaties with which we are concerned, decided against establishing such a body and it seems unlikely

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<sup>436</sup> Bayefsky, above n. 259.

<sup>437</sup> Ibid, at 435.

<sup>438</sup> Ibid.

<sup>439</sup> Bayefsky does not specify her preferred method of judicialisation. However, she does say that her suggestion “depends on overhauling the quality and expertise of the players. Without doing that, of course, judicialization would not be a positive development.” Bayefsky, above n. 259 at 438.

<sup>440</sup> Of course the decisions of the organs under the European and Inter-American Conventions of Human Rights under their individual communication mechanisms are binding (but not directly enforceable) only on the parties to the dispute who must have explicitly accepted the Court’s competence to hear and determine individual complaints. See discussion on the role and authority of these Courts, above at pages 20-25.

<sup>441</sup> Bayefsky makes a couple of other suggestions for change, such as, drafting a non-optional right of individual petition for every human rights treaty, and encouraging TV coverage and press conferences in ratifying States. Those States that refused to allow such media coverage would be excluded from the treaty. These suggestions are likely to be very unpopular and raise many important issues, including questions of consent and sovereignty.

that they would now agree to create new, or transform the existing bodies into, authoritative bodies.<sup>442</sup>

*B: A Different Regime for Human Rights Treaties?*

The ongoing discussion about the Vienna Convention reservations rules and human rights treaties has often incorporated consideration of whether the rules are suited to human rights treaties. It will be recalled that, in its *Observations* on the Human Rights Committee's General Comment 24,<sup>443</sup> the UK vigorously denied that human rights treaties were "different" and therefore did not need, nor were they subject to, a different set of reservations rules. In fact, few critics of the Vienna Convention rules suggest that a separate, human rights treaty-oriented, regime is required. One of these few is Hylton,<sup>444</sup> who, it will be remembered, suggests that different reservations frameworks are required for different types of treaties.<sup>445</sup> For example,<sup>446</sup> Hylton distinguishes those treaties that are legislative or regulate international conduct. This is the group of treaties for whom it is most commonly said that the Vienna Convention reservations rules are ill-suited. And, it is into this category that human rights treaties would most likely fall.<sup>447</sup> Hylton favours a collegiate system<sup>448</sup> for these treaties as he believes it would reduce fragmentation and "sham" ratifications<sup>449</sup> whereby a reserving State can

<sup>442</sup> There must be serious doubt as to whether even the European Court of, and Commission on, Human Rights could be established in their present form if they were being created today. One may speculate as to how many European States would have accepted the Court's competence to hear individual complaints, or even agreed to giving a supervisory body binding authority if they had foreseen the outcome in cases like *Loizidou*. *Loizidou*, above n. 157. The Human Rights Committee's General Comment is partially aimed at filling in, as best as it is able given its limited mandate, the gap left by the negotiating States to the ICCPR when they decided against establishing such a body. The Committee clearly states in the Comment that it is the only body able to make any consistent decisions, albeit non-binding, on the validity and effect of reservations to the ICCPR. It defends its position strongly against the criticisms of States, such as the US and the UK, that it has no power to determine reservations on the basis that realistically, in the absence of an authoritative decision maker, and given the paucity of State objections to reservations of dubious validity, it is incumbent upon it, as the supervisory body, to so determine. The Comment, above n. 17; *US Observations*, above n. 155; *UK Observations*, above n. 155; Personal Communication with Elizabeth Evatt, member of the Human Rights Committee, 2 August 1996; Hylton, above n. 108 at 448. He favours establishing an authoritative decision maker to determine the compatibility of reservations, but offers no suggestion as to how States' predictable rejection of this suggestion might be overcome.

<sup>443</sup> *UK Observations*, above n. 155.

<sup>444</sup> Hylton, above n. 108.

<sup>445</sup> *Ibid* at 446-448.

<sup>446</sup> For a description of the other types of treaty that Hylton identifies and the reservations system he prescribes for each see *ibid*.

<sup>447</sup> They may also be codifying treaties, either at their inception or after a period of State implementation of, and practice on, them.

<sup>448</sup> Such a system requires a specified majority to object to reservations before they can be considered incompatible or inadmissible. An example can be found in Article 20 of the Race Convention. See below n. 451.

<sup>449</sup> Hylton, above n.108 at 448.

have the benefits of being a treaty party without committing itself to undertake the treaty obligations.

Hylton's proposal relies on the Vienna Convention's presumption in favour of reserving States being reversed.<sup>450</sup> In particular, the 12 month tacit acceptance rule requires alteration as it reinforces the underlying presumption that, where a treaty is silent on reservations, reservations are generally acceptable. The collegiate system he suggests for treaties regulating international conduct is dependent on reversal of the presumption. The majority of States parties would have to accept expressly any reservations made for them to be admissible.<sup>451</sup>

By contrast, Greig suggests amendments to the Vienna Convention rules to remove some of the ambiguities and introduce more flexibility.<sup>452</sup> His principal theme is that the principles of equity and reasonableness should guide all determinations of the validity and effect of reservations and the effect of objections to reservations. For example, he suggests limiting the application of paragraph 20(5), which sets out the 12 month tacit acceptance rule for objecting to reservations, to paragraph 20(2). In relation to paragraph 20(4), to which 20(5) currently applies, he suggests that a new sub-paragraph be inserted which stipulates that "reservations should only be regarded as having been accepted if it is reasonable and equitable to do so."<sup>453</sup> He also suggests that these principles be used to determine the effect of an incompatible reservation on treaty relations in the absence of an authoritative determination of the matter.

An approach based on reasonableness and equity<sup>454</sup> has an immediate attraction. Greig attempts to develop examples of how reasonableness and

<sup>450</sup> Ibid at 445.

<sup>451</sup> The system in Article 20 of the Race Convention is an example of an ineffective collegiate system because of its underlying presumption that States will be active in objecting. Article 20(2) states:

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

Race Convention, above n.388. Of course, the protection of such a provision diminishes as more States join the treaty regime. See Lijnzaad for a detailed description and criticism of the Article 20 model. Above n. 3 at 131-183, 421.

<sup>452</sup> See Greig, above n. 1, generally and at 170. For example, he suggests that the definition of reservation in Article 2 to clearly distinguish between interpretative declarations and reservations, *ibid* at 165-6.

<sup>453</sup> Greig, above n.1 at 170.

<sup>454</sup> Greig does not define equity here, but Schacter has this to say about the meaning of equity: "No concept on international law resists precise definition more than the notion of equity. It is often defined by listing approximate synonyms that seem equally elusive: fairness, justice, reasonableness

equity would work in practice, for example: in determining the true nature of a “declaration”;<sup>455</sup> allowing greater flexibility in the application of the rule in Article 20(5) dealing with the time allowed for making objections;<sup>456</sup> the role of objections in a regime that has an authoritative decision maker<sup>457</sup> or where third party dispute resolution is envisaged;<sup>458</sup> and, where there is no dispute resolution mechanism available, application of the test to decide on the compatibility of a reservation.<sup>459</sup> His suggestions go some way toward correcting the present imbalance in favour of the reserving State<sup>460</sup> on a number of issues. However, it is not clear that his suggested approach on incompatibility, which continues to see the role of objecting States as relevant,<sup>461</sup> would overcome the problem he has identified himself,<sup>462</sup> of drawing conclusions from, or relying on, the erratic behaviour of States as objectors. In the absence of a fully developed, practical and predictable method of applying reasonableness and equity in this case it is difficult to see how Greig’s general thesis can solve the fundamental problems of reservations. It appears that, at least in relation to human rights treaties, Greig’s equity and reasonableness “test” would prove equally as difficult to apply, and be as subject to the whimsical and inconsistent interpretations of States parties, as the existing test of compatibility with the object and purpose of the treaty. It is arguable that such a “test” is more subjective than the object and purpose test which, at least, provides some limitation on States’ interpretation of the test via the treaty text and is generally understood.<sup>463</sup>

His suggestion that, if the validity of a reservation is challenged, the reserving State should have the opportunity of modifying its reservation to comply with the Article 19 requirements, may prove useful. It will be recalled that Article 19 allows States to *make* reservations at the time of “signing, ratifying,

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and good faith. Apart from the imprecision of these terms, they are not adequate to convey the full use of equity in legal reasoning.” Schacter, above n. 224 at 255.

<sup>455</sup> Ibid, at 165-166.

<sup>456</sup> Ibid, at 167.

<sup>457</sup> Ibid.

<sup>458</sup> Ibid, at 168 & 171.

<sup>459</sup> Ibid, at 171.

<sup>460</sup> Ibid. Greig says the “Notions of equity are called in aid to redress the balance between States in a particular advantage in their dealings with those in a situation of disadvantage.” *ibid*, at 23.

<sup>461</sup> Ibid, at 115 & 171.

<sup>462</sup> Ibid, at 89 & 132.

<sup>463</sup> Jennings, referring to the application of equitable principles in a different context, has said that “[a] structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono* may properly contemplate.” R.Y. Jennings, “Equity and Equitable Principles” (1986) 42 *Annuaire Suisse de Droit International* 27, at 32. Higgins makes a similar point. See R. Higgins, *Problems and Process, International Law and How We Use It* 1994 at 219-238

accepting, approving or acceding to a treaty".<sup>464</sup> Thus, it may not be contrary to this Article to allow States to modify reservations they made when ratifying etc. Each modification would need to be assessed to determine if it amounts to a new reservation.

In *Chorherr v Austria*,<sup>465</sup> Judge Valticos, in his dissenting opinion, recognised the possibility of subsequent amendment of reservations to the European Convention.<sup>466</sup> He said that although reservations can only be made at the time of ratification etc., it is unreasonable to prevent a State from amending its reservation when the reservation has been held to be in breach of Article 64 of the Convention and, therefore, null and void, sometime after its ratification.<sup>467</sup>

Two matters are worth noting about Greig's and Valticos' proposal in the context of human rights treaties. The first is that allowing subsequent modification of reservations may add another avenue by which States can avoid their treaty obligations and further undermine the objectives of the treaty. States would be able to amend their reservations to exclude "new" interpretations of the treaty<sup>468</sup> and their obligations under it, with the effect that progressive development of the law governed by the treaty may be stymied.<sup>469</sup>

The second matter is that the most problematic reservations, those that are most clearly incompatible, are unlikely to be able to be amended in such a way as to bring them into line with Article 19(c). For example, Iran's reservation to the Children's Convention has been criticised as incompatible with the

<sup>464</sup> Vienna Convention, Article 19, above n. 2.

<sup>465</sup> *Chorherr*, above n.120.

<sup>466</sup> In the *Belilos* case before the European Court of Human Rights, Switzerland produced a revised declaration after the Court decided its original declaration was invalid. No other State party to the European Convention has yet objected to the amendment. This may be because Switzerland amended an interpretative declaration rather than a reservation, which, strictly speaking, is not governed by the European Convention's reservation making provision, Article 64. Article 64 allows reservations to be made at the time of ratification etc. *Belilos*, above n.118 and accompanying text; Schabas, "Reservations Reform", above n. 67 at 77; (1988) 31 Y.B. Eur. Conv. H.R. 5.

<sup>467</sup> *Chorherr*, above n.120 at 42.

<sup>468</sup> For example the US, in relation to its reservations to Articles 6 and 7 of the ICCPR, said they were a "reaction to the views of the Human Rights Committee about the length of judicial proceedings and the consequences this could have in cases involving capital punishment." Lijnzaad, above n.3 at 205.

<sup>469</sup> It is interesting to note the Syrian Arab Republic replied to the German objection that its reservation to the Children's Convention did not "meet the requirements of international law" (*Multilateral Treaties*, above n. 190) because of its indefinite nature. The reply spelt out in some detail the way the reservation was intended to operate and the Convention provisions it was intended to exclude, *ibid*. Strictly speaking, this is not a subsequent modification of a reservation. However, it is arguable that it is not very different to a subsequent modification that merely clarified the intention of the original reservation.



Convention<sup>470</sup> on the ground that its effect is potentially so broad as to render Iran's ratification meaningless. It will be recalled that the reservation states that Iran "reserves the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect."<sup>471</sup> It is difficult to see how such a reservation could be transformed into a compatible form. This reservation and a number of others<sup>472</sup> made to the Children's Convention are similar to reservations made to the Women's Convention<sup>473</sup> which are non-specific and frequently invoke national laws, customs and religion to limit their treaty responsibilities.<sup>474</sup> While it may be possible to make some incompatible reservations compatible, it is unlikely that the above extreme examples could, or would, be made compatible. Thus, allowing modification of reservations is unlikely to contribute much to preserving the integrity of those human rights treaties that are the subject of such reservations.

It is also worth mentioning that Greig has suggested that the conciliation mechanism in the Annex to the Vienna Convention, which deals with the procedures for the termination and suspension or invalidation of a treaty (Articles 65 and 66) be applied to contested reservations. It is hard to see what incentive there would be in the case of human rights treaties for an objecting State to invoke these procedures.<sup>475</sup>

<sup>470</sup> Schabas, "Reservations to CROC", above n. 205 at 478; Kuper J, "Reservations, Declaration and Objections to the 1989 Convention on the Rights of the Child", in Gardner, above n.3, at 105.

<sup>471</sup> *Multilateral Treaties*, above n. 190.

<sup>472</sup> For example, see reservations and declarations of Afghanistan (declaration), Algeria (declaration), Bangladesh (reservation), Brunei Darussalam (reservation), Djibouti (reservation), Egypt (reservation), Holy See (reservation), Indonesia (reservation), Iraq (reservation), Jordan (reservation), Kuwait (reservation), Maldives (reservation), Mauritania (reservation), Morocco (reservation), Pakistan (reservation), Qatar, Saudi Arabia, Syrian Arab Republic and Tunisia (declaration). Reservations by these countries may be incompatible because of their breadth, uncertain scope, exclusion of fundamental principles such as freedom of religion for children or because they assert that their national law is paramount. Objections have been made to the reservations of Indonesia, Pakistan, Qatar, Syrian Arab Republic, Iran, Myanmar (withdrawn), Tunisia, Jordan, Kuwait, Thailand, Turkey and Malaysia. Objections were made by Sweden Norway, Portugal, Finland, Ireland, Germany, Czech Republic, Italy and the Netherlands, although not all objected to all of the same reservations. Some objecting States specified that they were objecting because they believed the reservations in question to be incompatible and others because they believed that the reservations revealed a lack of commitment by the reserving State to the object and purpose of the Convention. All of the objecting States specified that the treaty remained in force between it and the reserving State. *Multilateral Treaties*, above n. 190.

<sup>473</sup> For example reservations by the Maldives, Egypt, Tunisia, Libya and Morocco. *Ibid*; Chinkin, "Reservations to the Women's Convention", above n.214 at 69-76.

<sup>474</sup> See discussion of these kinds of reservations as incompatible, above at Chapter 2.

<sup>475</sup> Greig, above n.1 at 172.

*C: Model Clauses on Reservations*

Lijnzaad<sup>476</sup> suggests that negotiating parties of future human rights treaties should avoid replicating the faults of those already in existence, they should negotiate their own reservations provision for inclusion in the treaty.<sup>477</sup> She suggests a draft clause with three principal features. The first is that, given the absence of a “tight supervisory structure”,<sup>478</sup> the article should be simple enough to be applied by the depositary. Such simplicity will require States parties to identify the core obligations to be protected by the reservations provision so that the depositary can monitor the admissibility of reservations. In determining these provisions, States must take into account the object and purpose of the treaty. They should also protect any non-derogable provisions and those provisions that establish the supervisory mechanism from reservations. Thus, she suggests that the clause specify either which provisions can or cannot be reserved.<sup>479</sup> In order to reduce the ambit of reservations, Lijnzaad’s second suggestion is that the reservations clause should limit the type of reservations that can be made as well as the provisions of the treaty to which they can be made. Only reservations that deal with “matters of existing legislation conflicting with the standards set in the human rights instrument”<sup>480</sup> would be allowed. Under this scheme, the US reservation to Article 6 of the ICCPR would be invalid as it reserves the right of the US to introduce in the future, national laws that are incompatible with the Article.<sup>481</sup>

Lijnzaad’s final recommendation is designed to strengthen the clause as a whole. She proposes a mechanism to ensure that reservations have a temporary life and are withdrawn as soon as possible. Under her model reservations clause, reservations would be time limited.<sup>482</sup> Thus, reservations in respect of existing conflicting internal laws could not be relied upon indefinitely to avoid treaty obligations. However, in order to cater for genuine instances when States parties have been unable to amend national laws in time, Lijnzaad provides an option for renewal. But States who wanted to continue to rely on the reservation after its initial life had expired would be

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<sup>476</sup> Lijnzaad, above n. 3 at 421.

<sup>477</sup> In 1951 the ILC recommended the same. See ILC Report 1951, UN GAOR 66th Sess. Supp. No. 9 UN Doc. A/1858, at para 27. GA Res. 598 (VI) of 12 January 1952.

<sup>478</sup> Lijnzaad, above at 421.

<sup>479</sup> Ibid at 422.

<sup>480</sup> Ibid at 421.

<sup>481</sup> See discussion of this reservation above at pages 63-68.

<sup>482</sup> Lijnzaad, above n.3 at 422.

required to take action to ensure that the reservation did not lapse. 'Renewal' of reservations would focus attention on the reserving State whose reservation would be the subject of renewed scrutiny.

Lijnzaad's model clause appears quite watertight and practicable. It combines flexibility to allow for reservations in genuine cases of need, with checks to ensure that only admissible reservations can be effective. Her suggestion shows that it is possible to craft a precise and effective reservations provision. However, where it might fail is in the fact that it requires States negotiating treaties to include it in the text and thus give up the Vienna Convention reservations regime. This will require States to forego the relative freedom to make reservations that the ambiguity of the Vienna Convention regime provides.

Nonetheless, a model reservations clause would be of great use to States, and if included in a treaty would allow States parties to bypass the Vienna Convention rules, which, as has been shown, are less than satisfactory and rather ambiguous.<sup>483</sup> It may also reduce the likelihood of disputes on interpretation as the parties would have consented to an agreed set of, hopefully straightforward, rules on reservations in respect of their treaty. Lijnzaad's draft clause may prove simple enough for State's to consider adopting it, but first it would be necessary for them to overcome their lack of agreement as to what the content of the reservations rules should contain.

#### *The Work Of The International Law Association*

At its most recent meeting,<sup>484</sup> the Committee on International Human Rights Law and Practice (ILA Committee) of the International Law Association (ILA) considered the issue of reservations to human rights treaties as part of a wider discussion on the "implementation crisis facing the principle human rights legal standards".<sup>485</sup> The ILA Committee was strongly critical of the number of incompatible reservations it considered were allowed to be made by States parties to these treaties. It referred to the "many Islamic and Asian States [that] only ratify the treaties with the caveat that any obligation sustained must first be compatible with Islamic law or a similar broad reservation."<sup>486</sup> It said "[s]uch reservations are inconsistent with international law which requires reservations to conform to the object and purpose of the treaty, and

<sup>483</sup> See discussion of the Vienna Convention reservations regime above at Chapter 2.

<sup>484</sup> 1996 meeting in Helsinki.

<sup>485</sup> ILA Report, above n. 432 at 11.

<sup>486</sup> *Ibid* at 12.

in the case of human rights treaties means identifying and applying overriding, universal standards. Nevertheless, few states are prepared to challenge other states on the legitimacy of their reservations."<sup>487</sup> The ILA Committee concluded its discussion on reservations with some provocative, but not novel, reform proposals:

The treaty bodies should decide the issues of the compatibility of reservations...

States parties should accept that the treaty bodies should decide the issue of the compatibility of reservations...

States parties should withdraw reservations that are incompatible...

States parties should object to reservations that are incompatible...

States parties should support moves by the treaties bodies to conduct a dialogue with a state party that has made reservations that are incompatible... and moves to extend questions to areas covered by such reservations.<sup>488</sup>

### *The Work Of The International Law Commission*

In December 1993 the General Assembly endorsed the decision of the International Law Commission (the ILC) to include in its programme of work the topic "The Law and practice relating to reservations to treaties."<sup>489</sup> Alain Pellet was appointed Special Rapporteur for this topic. His first report<sup>490</sup> (the Preliminary Report) was considered by the Commission at its forty-seventh session in 1995.

After discussing the problems associated with the law of reservations, the Special Rapporteur, in the Preliminary Report, suggested several routes the Commission might take in its consideration of these problems and possible solutions. The principal issues requiring the Commission's attention derive from the gaps and ambiguities in the Conventions' rules. They include the question of how to determine the permissibility of a reservation,<sup>491</sup> the effect of an impermissible reservation<sup>492</sup>, the effect of objections on reservations,<sup>493</sup> and the reservations regime and human rights treaties.<sup>494</sup> On this latter point, the

<sup>487</sup> Ibid.

<sup>488</sup> Ibid, at 19.

<sup>489</sup> GA Res. 48/31 of 9 December 1993.

<sup>490</sup> SR Preliminary Report, above n. 108.

<sup>491</sup> As stated, there are at least two principal schools of thought on this: the "permissibility" and "opposability" schools. See discussion above; Also SR Preliminary Report, above n.108 at para 97.

<sup>492</sup> Ibid, at paras 97-114.

<sup>493</sup> Ibid, at paras 115-125.

<sup>494</sup> Ibid, at paras 138-142. Other problem areas identified by the Special Rapporteur included reservations to provisions codifying customary rules, reservations to bilateral treaties, the effect of reservations and objection on entry into force of a treaty, State succession and reservations and reservations to preemptory norms. See SR Preliminary Report, *ibid*, generally & at paragraph 148.

Special Rapporteur asked whether the existing regime of reservations and objections to reservations were satisfactory for human rights treaties given that the “main consensual element that permeated the whole regime laid down under articles 19 to 23 of the Vienna Convention [had been] challenged not only by certain writers but also by international bodies concerned with the protection of human rights.”<sup>495</sup> In particular, the “revival of controversy by international human rights bodies, in particular, the Human Rights Committee, the European and Inter-American Courts of Human Rights, by their adoption of a bold new stand on the special problems of reservations to human rights treaties”<sup>496</sup> was considered by the Rapporteur to have “added to the complexity of the topic to such a point that the question arose whether a uniform legal regime governing reservations to treaties was necessary or possible.”<sup>497</sup>

When considering the scope and form of the Commission’s future work on this topic, the principal concern of the Special Rapporteur was that the past achievements in this area of international law should be neither abandoned nor undermined.<sup>498</sup> Thus he did not favour rewriting the Vienna Convention rules which, in his opinion, had acquired some customary force and were generally workable.<sup>499</sup> He hoped that the Commission would try to determine additional rules to complement the three Vienna Convention treaties, and, where possible, remove ambiguities and fill gaps.

In keeping with his view that the Vienna Conventions’ reservations rules be treated by the Commission as well established, Pellet suggested several approaches available to the Commission. The first two options involve drafting new treaties. The first would require the preparation of three draft protocols to the existing conventions. The protocols would supplement and refine, but be consistent with, the three existing treaties on the law of reservations.<sup>500</sup> The alternative drafting option would be to consolidate the reservations provisions in each treaty into one draft treaty.<sup>501</sup> The

<sup>495</sup> *Report of the International Law Commission on the work of its 47th Session*, GAOR, 50th Sess. Supp. No. 10, UN Doc. A/50/10, [hereinafter 1995 ILC Report], at 244, para 427. For example, the Human Rights Committee in its General Comment 24. The Special Rapporteur also considered if other types of treaties, such as environmental and disarmament treaties, should also be recognised as requiring special treatment. *ibid.*, at 245, para 428.

<sup>496</sup> *Ibid.*, at page 241 para 418.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*, at para 153-169.

<sup>499</sup> *Ibid.*, at 245, para 432

<sup>500</sup> SR Preliminary Report, above n.108 at para 175, page 77.

<sup>501</sup> *Ibid.*, at 77, para 176.

consolidation also would provide an opportunity to refine the rules. The General Assembly would then decide whether to adopt the draft. Either option would produce the same result.

The non-treaty based approaches canvassed by the Special Rapporteur involved producing a guide on State and international organisational practice relating to reservations.<sup>502</sup> The Special Rapporteur envisaged that such a guide might be in the form of an article by article commentary on the relevant provisions in each of the three treaties. It could detail developments in the law and in practice since the conclusion of the first Vienna Convention in 1969. It could be accompanied by various model reservations clauses to be adapted as necessary, and inserted into future treaties. "This approach would allow the specific features of certain types of treaties to be taken fully into consideration".<sup>503</sup> The Special Rapporteur concludes by acknowledging that any, or a combination, of these approaches would achieve the Commission's goal of fill in the gaps and remove the ambiguities in the treaty texts while paying "due regard for the flexibility that facilitates the broadest possible participation in multilateral conventions, while simultaneously safeguarding their basic objectives."<sup>504</sup>

After considerable debate and discussion of the Preliminary Report and the Special Rapporteur's suggestions, the Commission and the majority of representatives to the Sixth Committee of the General Assembly endorsed the Report.<sup>505</sup> There was consensus that the reservations provisions in the Vienna Conventions should not be altered. Instead, the Commission would progress consideration of the topic by developing and adopting a guide to practice in relation to reservations in the form suggested by the Special Rapporteur.<sup>506</sup> The guidelines could be transformed into a convention or protocol in the future if it was decided that this was a better and a viable approach to take. The guide "is intended to indicate to States and international organizations 'guidelines for [their] practice in respect of reservations'".<sup>507</sup> To this end it will consist of general rules that can be applied to all treaties that are silent on

<sup>502</sup> Ibid, at 78, para 178.

<sup>503</sup> Ibid.

<sup>504</sup> Ibid.

<sup>505</sup> See respectively *Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat* and General Assembly Resolution 50/45. at para 4.

<sup>506</sup> 1995 ILC Report, above n. 495 at 260, para 491. See also Sixth Committee's consideration of the Preliminary Report and ensuing discussion of it in the ILC, in UN Doc A/CN.4/472/Add. 1.

<sup>507</sup> SR Second Report, above n.430 at para 26, page 11; 1995 ILC Report, above n. 495 at para 491, page 260.

reservations.<sup>508</sup> To be useful, the guide must interpret each of the reservations provisions. Such clarification is long overdue and would be of the greatest assistance in educating States about the complicated rules. It may be that, as a result, a more consistent pattern of State practice on reservations will emerge.

Under authorisation from the Commission,<sup>509</sup> the Special Rapporteur prepared a detailed questionnaire designed to elicit information from States on their practice in respect of reservations. The questionnaire was sent to States members of the United Nations or of a specialised agency, or parties to the Statute of the ICJ in December 1995.<sup>510</sup> Eight States have responded thus far.<sup>511</sup> A similar questionnaire has been prepared for international organisations which are depositaries of multilateral treaties.

### *Conclusion*

As stated, draft clauses will no doubt be very useful to States and international organisations negotiating new treaties. And the model clauses provided by the ILC probably will be seen as “good” examples as they will be drafted by “experts” after careful consideration of all the relevant issues. Thus, they may enjoy considerable approval. More challenging is the proposed guide to practice on reservations. Given the extent of disagreement, and the longstanding debate about the law of reservations, it is likely that it will be extremely difficult for the Commission to reach consensus on correct interpretations. States may continue to act according to their own interpretation if it is not the one favoured by the ILC’s guide. Like the Human Rights Committee’s General Comment 24, its success is entirely dependent on States, and it may not be any more acceptable to States parties than the Comment. As the Special Rapporteur acknowledged, “... like the actual rules of the Vienna Convention and the customary norms which they enshrine, [the rules in the guide] will be purely residual where the Parties

<sup>508</sup> SR Second Report, *ibid*, at para 26, page 11

<sup>509</sup> 1995 ILC Report, above n.495 at para 493, page 261.

<sup>510</sup> See SR Second Report, above n. 430 at 4.

<sup>511</sup> As of 21 May 1996 Canada, Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovenia, Spain, Switzerland, the UK and the USA had responded. See SR Second Report, *ibid*, at note 8, page 4.

## CHAPTER 4

concerned have no stated position; they cannot be considered binding and the Contracting Parties will naturally always be free to disregard them.”<sup>512</sup>

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<sup>512</sup> Ibid.



## CONCLUSION

The conclusion of the Vienna Convention may be viewed as the beginning of a relatively quiet period in the history of debate on the law of reservations. However, the large volume of recent writing on this issue, the interest in reform of the law and practice evident in this writing, the measure of attention the issue is currently receiving by international organisations such as the ILA, the ILC and by the General Assembly, is testament to fact that, once again, the question of reservations is hotting up.

Further, it appears as if the current debate is focused on the same issues as the debate in the period between the *Reservations* Opinion and the conclusion of the Vienna Convention. For example, the lack of consensus about the content of the relevant international law still dominates the debate. In addition, the struggle for paramountcy by the two conflicting aims of the international community: to achieve universal participation in multilateral treaties, particularly, human rights treaties; or to preserve the integrity of the adopted text, is still very much a live issue. However, unlike the debate leading up to the adoption of the Vienna Convention, we have now experienced a significant period in which the universality aspirations of the UN have taken priority. It is clear that the resultant imbalance is as unsatisfactory as the imbalance evident under the unanimity regime. Dissatisfaction with the effect of the ambiguities in the law and the favouritism shown to reserving States appears to be the impetus for much of the renewed debate, particularly in relation to human rights treaties.

The argument,<sup>513</sup> that the imbalance needs to be righted, that “the half-a-loaf doctrine must prove detrimental to what is the most desirable course of all, namely that countries should accept Conventions as they stand”,<sup>514</sup> is attractive from the point of view of strengthening implementation of human rights. Bayefsky has said that:

the emphasis placed on universal ratification of the major human rights treaties is a mistake ... priorities ought to be reordered. Universal ratification ought to be secondary to the ultimate goal of safeguarding the integrity of the treaty system ... Disrespect for international law is exacerbated by sustaining the false claim that ratification is laudable in itself.<sup>515</sup>

However, such a reordering is unlikely to be acceptable to States. What is needed is another attempt to reach an effective compromise between these

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<sup>513</sup> For example, see ILA, ILA Committee Report, above n. 432 at 11.

<sup>514</sup> Fitzmaurice, above n. 1 at 17.

<sup>515</sup> Bayefsky, above n.259 at 435.

## CONCLUSION

priorities. Unfortunately there is little to suggest that this compromise, which has thus far proved elusive, can now be attained. Those reform proposals that tackle the imbalance,<sup>516</sup> are unlikely to gain support from States. Similarly, the ILC proposed guide<sup>517</sup> is likely to encounter strong resistance from those States that disagree with the conclusions it must make if the guide is to contribute to the resolution of some of the identified problems in the existing law of reservations.

Lijnzaad writes that: “[r]estoring the ruins”<sup>518</sup> created by the failure of the reservations regime to regulate adequately the making of reservations, particularly incompatible ones, “is possible to a certain extent.”<sup>519</sup> She argues that this restoration “will largely depend on the agility of the supervisory organs”,<sup>520</sup> and that they are the mechanism by which the impact of incompatible reservations can be limited. The Human Rights Committee’s General Comment 24(52) can be viewed, not as an assertion of a formal authority it does not have, but as an indication that it is cognisant of the fact that realistically, it and the other supervisory human rights treaty bodies,<sup>521</sup> are the only mechanisms in the human rights system currently available to keep States parties alert to the fact that half a loaf may not be enough. Through their questioning of States parties on reservations they may pressure States parties to adopt new reservations practices. As any change to the reservations regime is wholly dependent on the co-operation of States, it seems that this may be the only way forward.

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<sup>516</sup> For example, Lijnzaad’s draft clause on reservations, above n. 3 at 421.

<sup>517</sup> See above discussion of this proposal at pages 79-82.

<sup>518</sup> Lijnzaad, above n.3 at 424.

<sup>519</sup> Ibid.

<sup>520</sup> Ibid.

<sup>521</sup> Note that the Human Rights Committee does not refer to the other UN human rights treaty supervisory bodies in the Comment. However, it seems reasonable to assume that it would welcome any moves by those bodies to follow its lead.

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