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**RESERVATIONS TO HUMAN RIGHTS TREATIES**

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Lowe, Kasey, 'Human Rights Treaty Bodies as Mechanisms of Review' (2010) 1(2) Edinburgh Student Law Review 53.		

## ABSTRACT

This thesis examines the default application of the 1969 Vienna Convention on the Law of Treaties reservation rules to reservations to human rights treaties. The contemporary practice of formulating reservations allows states to unilaterally modify their treaty obligations following the conclusion of negotiations. Though multilateral treaties address a broad spectrum of subjects and are negotiated using a variety of methods, all treaties are governed by the same residual reservation rules of the Vienna Convention when there is not a treaty-specific reservation regime in place. The Vienna Convention system is only engaged if a state seizes the opportunity to determine whether a reservation is valid pursuant to default rules or if a challenge regarding the validity of a reservation is brought before another competent mechanism of review, such as a dispute resolution mechanism. Even when applied, the Vienna Convention rules are ambiguous at best and have been criticised since their inception due to the high degree of flexibility in their application, especially in relation to human rights treaties. In light of the inherent flaws of the Vienna Convention reservation regime and the structural characteristics of human rights treaties, rarely will a reserving state be deprived of the benefit of the reservation even if it is determined to be invalid by another State Party. Though the consequences of an invalidity determination are more concrete when the decision is taken by a dispute resolution mechanism, such as a court, seldom are disputes over the validity of a reservation to a human rights treaty submitted to a competent mechanism. Using the core UN human rights treaties as a case study this research highlights that the past thirty years have revealed a practical impasse in treaty law when the default reservation rules are relied upon to regulate reservations to human rights treaties. Reservations of questionable validity gain the same status as valid reservations because the Vienna Convention rules do not address the consequence for a reservation determined to be invalid outwith the traditional *inter se* application of the reservation between the reserving and objecting states, which is not logical in the context of a human rights treaty. Against this background, this thesis examines whether the default reservation rules adequately govern reservations to human rights treaties. The conclusion affirms that the Vienna Convention reservation regime can regulate reservations to human rights treaties but only if there is a clearly defined

final view on the validity of a reservation taken by an organ other than the state. Therefore, it is argued that treaty-specific supervisory mechanisms attached to each of the core UN human rights treaties should be invested with the competency to serve a determinative function with respect to evaluating reservations to human rights treaties in order to facilitate a stronger basis for the international human rights system.

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### **Declaration of Original Work**

I certify that this is an original work and it has been composed in its entirety by my self, Kasey Lowe McCall-Smith, the author signed below. This work has not been submitted for any other degree of professional qualification other than that for which it is presently submitted which is for the PhD in the College of Humanities and Social Science at the University of Edinburgh.

Signed \_\_\_\_\_ on \_\_\_\_\_ March 2012.

## CHAPTER ONE INTRODUCTION

This thesis examines the default application of the 1969 Vienna Convention on the Law of Treaties reservation rules to reservations to human rights treaties. The contemporary practice of formulating reservations allows states to unilaterally modify their treaty obligations following the adoption of the text. The imperative for pursuing this research stems from the recognition that the Vienna Convention reservations regime contains normative lacunae and in the context of multilateral human rights treaties these normative gaps prevent the formulation of a clear picture of the true obligations taken on by reserving states. This thesis also recognises that the mechanisms to clarify the incoherence in the human rights treaty system do exist in the form of the human rights treaty bodies.

Reservations to treaties were rare prior to 1945. Until the delivery of the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>1</sup> (*Genocide Opinion*) by the International Court of Justice (ICJ) in 1951 reservations made to multilateral treaties were generally subjected to a stringent unanimity rule. At the time the opinion was delivered, the International Law Commission (ILC) had already commenced a review on the subject of reservations to treaties in response to the evolving views and practice of states. These combined activities led to the eventual adoption of the Vienna Convention on the Law of Treaties<sup>2</sup> (Vienna Convention) in 1969.

The Vienna Convention is generally viewed as the codification of the customary rules governing treaty law. The one-size fits-all reservations regime of the Vienna Convention applies to all treaties regardless of type, including normative, social and standard-setting, or subject-matter, including trade, environment and human rights. While treaties are the products of intense negotiations, the finalised agreements are more closely akin to ‘agreements to disagree’. This is particularly true of the core UN human rights treaties developed since 1965 where the catalogues of obligations are not straightforward exchanges of reciprocal obligations but are,

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<sup>1</sup> 1951 ICJ Reports 15, 28 May 1951 (*Genocide Opinion*).

<sup>2</sup> 1155 UNTS 331, 23 May 1969 (Vienna Convention).

instead, compacts outlining obligations for the benefit of human beings who are not party to the treaties.<sup>3</sup> Unlike the consensus law-making that facilitates a large majority of multilateral treaties, human rights treaties tend to be agreed in the ‘majority plus reservations’ model.<sup>4</sup> Quite aptly, Boyle and Chinkin note that ‘while consensus negotiations aim to produce a set menu for everyone, human rights negotiators prefer to offer an à la carte selection from a gourmet menu.’<sup>5</sup> In the context of subscribing to human rights obligations, states not only decidedly favour an à la carte menu, they also prefer to eat very different meals. In light of the non-reciprocal nature of human rights treaties and the obligations set forth therein, states have relied heavily upon the opportunity to make reservations to these agreements and the result has been particularly detrimental to the advancement of a coherent international human rights system.

In a best attempt to define the international human rights regime, it can be said to encompass ‘those international norms, processes, and institutional arrangements, as well as the activities of domestic and international pressure groups that are directly related to promoting respect for human rights.’<sup>6</sup> This regime was born in the aftermath of successive world wars and following the struggle of its early decades it has taken on a new life. The UN Charter broke away from state sovereignty as the primary focus of international law and ‘established the human person as a second focal point, proposing to make it the subject of international rights and to impose on states corresponding obligations under international law for the benefit of persons under their jurisdiction.’<sup>7</sup> As noted by Zemanek, it is unclear whether the UN appreciated the great change that would result in international law by putting in place the human rights focused programme it adopted with the UN Charter and he credits this lack of appreciation for the fact that it ‘failed to prescribe

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<sup>3</sup> See, *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82 (24 Sept. 1982), IACtHR (Ser. A) No. 2 (1982), paras. 29, 33; W.A. Schabas, ‘Reservations to Human Rights Treaties: Time for Innovation and Reform’ (1994) 32 *Canadian Yearbook of International Law* 39, 65; P.-H. Imbert, ‘Reservations and Human Rights Conventions’ (1981) 6 *Human Rights Review* 28, 33.

<sup>4</sup> A.E. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford 2007), p. 159.

<sup>5</sup> *Ibid.*

<sup>6</sup> P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, Oxford 1992), p. 1.

<sup>7</sup> K. Zemanek, ‘New Trends in the Enforcement of Erga Omnes Obligations’ [2000] *Max Planck Yearbook of United Nations Law* 1, 3.

the manner in which these new types of obligations should be fitted into the traditional framework of international law.’<sup>8</sup>

The 1980s and 1990s saw human rights move from a subsidiary theme to a dominant concern in international discourse due in large part to the efforts of the UN and the development of the core human rights treaties which moved human rights from aspirations to legally enforceable obligations. It was during these decades of increasing human rights treaty adherence that the lacunae in the Vienna Convention reservations regime became apparent. Recognising this, Hampson describes the relationship between human rights and international law:

Human rights norms do not merely express moral values but those values that are essential to international society. They are constitutive of an international legal order. This results in an overlap between moral values and legal principles because the object and purpose of a human rights norm is, ultimately, the maintenance of international peace and security.<sup>9</sup>

Pride of place has been given to human rights not only at the UN, as evidenced by the continued reiteration of rights-based governance,<sup>10</sup> but also in the policy decisions of many states<sup>11</sup> as they increasingly underpin states’ external relations.

The idea of human rights as the basis of international peace and order is not one that all states or international lawyers are willing to accept. Yet there is an

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<sup>8</sup> Ibid.

<sup>9</sup> F. Hampson, *Working paper submitted pursuant to Sub-Commission decision 1998/113*, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (*1999 Working paper*), para. 13.

<sup>10</sup> See, e.g., Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) (Vienna Declaration); General views expressed in the Third Committee, *Yearbook of the United Nations:1948-49* (UN, New York 1950), p. 527 (reflecting the human rights imperative from the outset of the UN); see also Zemanek, ‘New Trends in the Enforcement of Erga Omnes Obligations’.

<sup>11</sup> See, e.g., European Initiative for Democracy and Human Rights (2000); European Community Regulation (EC) 1889/2006 (setting forth an EU/Africa initiative linking human rights to the continued project of country strengthening at home and in global relations); Regulatory Impact Analysis Statement in relation to Special Economic Measures (Syria) Regulations, pursuant to the Special Economic Measures Act, [2011] Vol. 145, No. 12, available at <http://www.gazette.gc.ca/rp-pr/p2/2011/2011-06-08/html/sor-dors114-eng.html> <accessed 8 Feb. 2012> (Canada’s imposition of economic sanctions in response to human rights abuses in Syria); UK House of Commons Foreign Affairs Committee, UK-Brazil Relations, Ninth Report of Session 2010-12, available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/949/949.pdf> <accessed 8 Feb. 2012> (underscoring the importance of both Brazil and the UK’s commitment to human rights in policy decisions).

undeniable truth that on a basic level, the international legal order can only work if states respect the law that has been established as it is a ‘means of achieving outcomes possible only through coordinated behavior’.<sup>12</sup> On the international level, this includes references to both legal rules and politics. It has been argued that the ‘possibility of UN effectiveness is rooted in the fact that, as members of a community, states pursue goals whose achievement depends significantly on avoiding political isolation.’<sup>13</sup> This argument primarily attributes the success of the human rights movement and its institutions to politics,<sup>14</sup> however there must be a more tangible reason compelling states to comply with their legal obligations.

Human rights treaties recognise individuals as the subjects of international law and with that recognition grants them the benefit of obligations imposed on the state. It is clear that violations of human rights, unlike violations of obligations owed between states, are different because they rarely invoke international consequences in the context of state-to-state treaty relations.<sup>15</sup> Human rights institutions rely on law, among other things, to ensure that human rights obligations are carried out by treaty parties. This includes not only the law found within the treaty texts but also the law that guides the formation and interpretation of treaties, the Vienna Convention. Without clarification of the law governing reservations, the institutions that promote and protect human rights have no hope to create a stable system based on accountability.

Human rights do not exist in a legal vacuum.<sup>16</sup> As human rights treaties have evolved, the existing legal rules for interpreting these treaties have proved an ill fit. There are three dynamic features of human rights treaties that support the argument that the Vienna Convention’s reservations regime is not adequately equipped to handle reservations to human rights treaties:

1. The obligations are for the benefit of individuals, rather than states, and thus the traditional concept of treaty reciprocity is absent;

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<sup>12</sup> O. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 Yale Law Journal 1935, 1950.

<sup>13</sup> P.J. Flood, *The Effectiveness of UN Human Rights Institutions* (Praeger, Westport, Connecticut 1998), p. ix.

<sup>14</sup> *Ibid.*

<sup>15</sup> H.J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context*, 3d ed. (OUP, Oxford 2007), pp. 58-59.

<sup>16</sup> Hampson, *1999 Working paper*, para. 13.

2. Human rights treaties generally have their own supervisory mechanisms to oversee implementation and interpretation;
3. If the state acceptance/objection system is the end point on the validity of reservations, what is the point of having a treaty body?

The reservations regime warrants reconsideration in light of these unique features of human rights treaties.

Do human rights merit different protection from invalid reservations because they 'are the world of the individual person'<sup>17</sup> and represent some level of morality or because the UN has given them pride of place in the international norms hierarchy? The answer is probably a combination of both but, more importantly, reservations to human rights treaties deserve closer scrutiny because unlike the typical bargained-for treaty, the beneficiaries of these treaties have no role in the treaty process save being protected or not.<sup>18</sup> This research does not engage the moral question but instead looks at the gaps in the legal structure governing treaties that are non-reciprocal in nature.

The non-reciprocal nature of human rights treaties is the primary factor which renders the application of the Vienna Convention reservations regime to human rights treaties problematic due to the unconfirmed status of certain reservations. The flexibility of the regime anticipates that desired treaty terms will not always be identical and provides rules, including the reservations rules, to facilitate flexible agreements. However, those rules are premised on notions of legal reciprocity and the state self-policing aspect of the reservations rules, which have proved to have little effect on normative human rights treaties.

Reciprocity is the leitmotif of international legal order according to Simma; however he contends that human rights treaties do not have reciprocal rights and obligations in the material sense, but rather in the sense that all state parties have an interest in accepting identical obligations.<sup>19</sup> Simma's contention fails to take into account reservations which by definition alter the identical nature of the obligations. If human rights treaties are intended to be universal and indivisible then it is even

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<sup>17</sup> Comments by Eleanor Roosevelt at the signing of the Universal Declaration on Human Rights.

<sup>18</sup> Schabas, 'Time for Innovation and Reform', 65; Imbert, 'Reservations and Human Rights Conventions', 33.

<sup>19</sup> B. Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217, 296.

more important to establish the legal effect and consequence of all reservations.<sup>20</sup> The UN human rights system is designed to improve the protection of rights-holders. This can only be achieved by facilitating implementation of the obligations defined in the core human rights treaties.

Over a half-century after the adoption of the Universal Declaration of Human Rights<sup>21</sup> (UDHR) the large number of parties to the core agreements attests to the great strides that have been made toward realising the original intent of the UN ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’.<sup>22</sup> Every one of the 193 Member States of the UN is party to at least two of the core UN human rights treaties.<sup>23</sup> Most of the treaties, in fact, include over half of the UN Member States as parties. Unfortunately the number of parties does not necessarily reflect the strength of the international community’s commitment.

Treaties are governed by the Vienna Convention both in terms of formation, application and interpretation. The rules governing reservations, however, have proven untenable when applied to human rights treaties. Therefore, in terms of reconsidering treaty law the starting point must be the Vienna Convention and its shortcomings for dealing with invalid reservations. To properly evaluate the state of reservations to the core human rights treaties and the propriety of applying the Vienna Convention rules, the history surrounding the reservations rules must be understood. The initial phase of this research involves returning to early to mid-twentieth century writings on reservations published long before an international human rights system was contemplated. Thus there is an examination of the general law related to reservations to treaties. This broad context quickly narrows to focus on the law that developed in concert with the adoption of the first multilateral human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide<sup>24</sup> (Genocide Convention). Not only did this agreement mark the first world-wide effort to establish the crime of genocide but it also represented the first

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<sup>20</sup> Outlined in the Vienna Declaration.

<sup>21</sup> UNGA Res. 217A(III), 10 Dec. 1948 (UDHR).

<sup>22</sup> *Preamble*, Charter of the UN, 26 Jun. 1945.

<sup>23</sup> UN Treaty Collection at <http://treaties.un.org> (UN Treaty Collection).

<sup>24</sup> 78 UNTS 277, 9 Dec. 1948 (Genocide Convention).

manifestation of a legal obligation to protect a human right—the right to be protected against genocide—by states.<sup>25</sup>

Reservations are generally acknowledged as one of the most difficult aspects of treaty law.<sup>26</sup> The overarching goal of the reservations regime is to balance the goal of universal ratification against the goal of maintaining treaty integrity.<sup>27</sup> However, a fundamental challenge exists in that the Vienna Convention provides little guidance as to how apply the rules related to reservations found in Articles 19–23. These articles contemplate a system where a treaty embodies reciprocal obligations among states and its system of reservations and objections can be employed to achieve identifiable consequences. Time has proven that the Vienna Convention residual reservations rules cannot provide coherent normative outcomes where the treaty is made up of non-reciprocal obligations and there is no final determination on the validity of reservations. The lack of coherence stems from normative ambiguities in the rules themselves in the context of *invalid* reservations. The Vienna Convention works from the assumption that states will only formulate *valid* reservations yet a review of the core UN human rights treaties indicates that a multitude of the reservations attached to these treaties are arguably invalid. Thus a practical impasse seems to exist as to how to address invalid reservations in the absence of a final determination. As succinctly summarised by Simma:

When human rights are violated there simply exists no directly injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the

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<sup>25</sup> Due to the particular purpose and limited scope of the Genocide Convention it will only be addressed to the extent that it formed the basis of the ICJ advisory opinion which shaped the development of the law governing reservations. It must also be noted that some human rights protections had been included in previous conventions concluded under the International Labour Organization, for example, ILO Convention No 29 on Forced Labour, ILO/C29, 28 Jun. 1930; ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise, ILO/C87, 9 July 1948.

<sup>26</sup> Helfer notes that reservations have been the ‘longstanding irritant for international legal scholars’. L. Helfer, ‘Not Fully Committed? Reservations, Risk, and Treaty Design’ (2006) 31 *Yale Journal of International Law* 367, 367. See the following selection tracking the point since the *Genocide Opinion*, W.W. Bishop, Jr., ‘Reservations to Treaties’ (1961) 103 *Recueil des cours* 245; D.R. Anderson, ‘Reservations to Multilateral Conventions: A Re-examination’ (1964) 13(2) *ICLQ* 450, 450; J.M. Ruda, ‘Reservations to Treaties’ (1975) 146 (3) *Recueil des cours* 95, 101; R.W. Edwards, Jr., ‘Reservations to Treaties’ (1989) 10 *Michigan Journal of International Law* 363.

<sup>27</sup> A point recognised by almost every commentator on reservations: E.T. Swaine, ‘Reserving’ (2006) 31 *Yale Journal of International Law* 307, 330; R. Moloney, ‘Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent’ (2004) 5 *Melbourne Journal of International Law* 155, 155; R. Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002) 96 *AJIL* 531, 533 et seq; Schabas, ‘Time for Innovation and Reform’, 40.



substantive obligations flowing from international human rights law are to be performed above all within the State bound by it, and not vis-à-vis other States. In such instances to adhere to the traditional bilateral paradigm and not to give other states or the organized international community the capacity to react to violations would lead to the result that these obligations remain unenforceable under general international law.<sup>28</sup>

Against this background, the purpose of this thesis is to analyse the Vienna Convention reservations rules in their application to human rights treaties. Specifically the analysis will respond to two research questions: the first asks whether the Vienna Convention reservations regime adequately governs reservations to human rights treaties and the second asks whether the treaty-specific supervisory mechanisms are competent to serve a determinative function with respect to reservations to the core UN human rights treaties. In pursuit of the answers to these questions this doctrinal analysis comprises two main components in the form of an analysis of treaty law pertaining to reservations and a review of the practice of states making reservations to human rights treaties. The legal analysis focuses on the Vienna Convention rules and relies on the Convention's text, principles of general international law and the literature addressing reservations to both multilateral treaties generally and human rights treaties. Judicial opinions, where available, are also utilised to gather a complete picture of the intricacies of the reservations regime and how it works in theory. The practice analysis is firmly grounded in the core UN human rights treaties. The reservations and objections chronicled by UN documentation provide a wealth of practice examples from which the bulk of the analysis is drawn. Opinions of international tribunals further contribute to the examination of the practical use of the reservations rules to determine the validity of reservations and outline the legal effect and consequence for an invalid reservation. There is also a broad range of literature on reservation practice which further informs the analysis. This thesis argues that in order to fortify international law and its associated institutions the basic building blocks of this law must be strengthened. At its core, the international human rights regime is based on treaties for it is within the UN human rights treaties that the legal basis of states' obligations are enumerated. Utilising each of these identified sources aids in painting a picture of the current state

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<sup>28</sup> Simma, 'From Bilateralism to Community Interest', 296-97.

of the law and practice surrounding reservations to treaties and provides a basis for the articulation of answers to the primary and secondary research questions.

## 1 SURVEY OF LITERATURE

This is by no means the first attempt to make sense of the Vienna Convention rules in their application to human rights treaties. It is a recurring topic among academics, practitioners and observers of the human rights regime and it is often acknowledged that the topic of reservations even outwith the human rights framework is one of the most controversial subjects in international law.<sup>29</sup> A survey of pertinent literature reveals that the following recurring analytical themes have attended reservations to human rights treaties since the *Genocide Opinion* was delivered: (1) the right of states to make reservations; (2) the unanimity versus integrity debate; (3) the application of the Vienna Convention rules, particularly the vague object and purpose test, to human rights treaties; (4) the appropriate authority (states, courts, treaty bodies) to employ the object and purpose test; and (5) the legal effect of an impermissible reservation. These themes have been bandied about in academic literature since the mid-twentieth century. Articles examining the question of reservations to general multilateral treaties date back even further.<sup>30</sup>

The most recent comprehensive volumes on reservations to human rights treaties address a wide range of rights-specific problems associated with the application of reservations.<sup>31</sup> Both Ziemele's and Gardner's books are compilations of articles by authors with extensive experience in the field of human rights either as academics or practitioners and they have been greatly relied upon throughout this work. Additionally, the decade of the 1990s saw a flourish of academic writing surrounding reservations, both as a general concept and in relation to human rights. This is not unsurprising considering that the core treaties on women's and children's

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<sup>29</sup> Helfer, 'Not Fully Committed?', 367; Edwards, 'Reservations to Treaties'; Ruda, 'Reservations to Treaties'; Anderson, 'Reservations to Multilateral Conventions', 450; Bishop, 'Reservations to Treaties'.

<sup>30</sup> e.g., H.W. Malkin, 'Reservations to Multilateral Conventions' (1926) 7 BYBIL 141; M. Owen, 'Reservations to Multilateral Treaties' (1929) 38(8) Yale Law Journal 1086; M.O. Hudson, 'Reservations to Multipartite International Instruments' (1938) 32(2) AJIL 330.

<sup>31</sup> I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden 2004); J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997); L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995).

rights gained considerable ratification momentum during that time and reservations to both conventions were steadily mounting.

It is almost universally accepted that international law allows states to formulate reservations to treaties as long as specific treaty reservations rules or the Vienna Convention rules are observed.<sup>32</sup> Early ILC rapporteurs on the law of treaties, including Brierly<sup>33</sup>, Lauterpacht<sup>34</sup> and Fitzmaurice<sup>35</sup>, grudgingly acknowledged that the evolving practice of states had moved away from the unanimity rule that existed prior to 1950 and this reality was ultimately reflected in the proposals put forward by Waldock<sup>36</sup>, the final rapporteur on the topic before the adoption of the Vienna Convention. During the developmental years of the Vienna Convention the subtle shift in state practice was also noted out-with the ILC.<sup>37</sup> More recent authors tend to treat the ability to formulate reservations as a necessary tool for the effective creation of international law<sup>38</sup> or as a right to be exercised hand-in-hand with exercises of state sovereignty<sup>39</sup>.

Despite the view of some that international law is largely a political project,<sup>40</sup> the rules related to reservations provide a unique illustration of a legal doctrine that incorporates pure law and political considerations simultaneously.<sup>41</sup> It is clear that motives behind becoming a party to a social, law-making or system changing convention are often complex, highly politicised and involve reasons ranging from a state's desire to be an upstanding member of the international community to the desire to avoid criticism for not becoming a member of such an agreement.

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<sup>32</sup> See, generally, Swaine, 'Reserving'; Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out*.

<sup>33</sup> J.L. Brierly, *Report on Reservation to Multilateral Conventions*, UN Doc. A/CN.4/41 in ILC Yearbook, Vol. II, UN Doc. A/CN.4/SER.A/1951/Add.1 (1951), pp. 3-4, paras. 11-13

<sup>34</sup> H. Lauterpacht, *Report on the Law of Treaties*, UN Doc. A/CN.4/63 (1953), reprinted in ILC Yearbook, 1953, Vol. II, UN Doc. A/CN.4/SER.A/1953/Add.1 (1953), pp. 91-92; *Second Report on the Law of Treaties*, UN Doc. A/CN.4/87 (1954), reprinted in ILC Yearbook, 1954, Vol. II, UN Doc. A/CN.4/SER.A/1954/Add.1 (1954), pp. 131-33.

<sup>35</sup> G.G. Fitzmaurice, *Report on the Law of Treaties*, UN Doc. A/CN.4/ 101 (1956); see, also, G.G. Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 ICLQ 1, 11.

<sup>36</sup> H. Waldock, *First report on the Law of Treaties, Appendix*, UN Doc. A/CN.4/144 (1962).

<sup>37</sup> Bishop, 'Reservations to Treaties'; Anderson, 'Reservations to Multilateral Conventions'.

<sup>38</sup> Swaine, 'Reserving'.

<sup>39</sup> C.A. Bradley and J.L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 *University of Pennsylvania Law Review* 399, 426. This staunch perspective has been acknowledged by the ILC, see, e.g., ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 438;

<sup>40</sup> M. Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *MLR* 1, 1; Flood, *The Effectiveness of UN Human Rights Institutions*, p. ix.

<sup>41</sup> J.K. Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision' (1982-83) 23 *Harvard International Law Journal* 71, 73.

Boerefijn<sup>42</sup>, Lijnzaad<sup>43</sup>, Marks<sup>44</sup> and Schabas<sup>45</sup> suggest joining a treaty regime is often an attempt to improve the international image of a state and has an inherent promotional value, especially in the field of human rights. Focusing on the question of why reservations are made,<sup>46</sup> many writers reiterate that political considerations both at home and abroad have a great impact on the reservations formulated.<sup>47</sup> While the ‘why’ question is helpful when reflecting on reservations, it is not one that is explored in the course of this research as it is a question greatly influenced by a wide-range of factors, including international relations and politics, and the purpose of this study is limited to the examination of pure reservations law.

There also exists the idea that ratification of *some* human rights obligations is better than none at all.<sup>48</sup> While this may be true, Schabas correctly notes that there are ‘both good and bad sides to this practice’ of reservations.<sup>49</sup> The good and bad sides to reservation practice is reflected in the competing desires for widespread participation and maintaining treaty integrity, as has been thoroughly examined by Redgwell<sup>50</sup>, Schabas<sup>51</sup> and Swaine<sup>52</sup>. This idea is typically framed as the unity versus integrity debate and it has arguably been the core preoccupation in the reservations field since the ICJ introduced the concept of a dichotomy of rights in the *Genocide Opinion*.<sup>53</sup> Swaine’s recent comprehensive article ‘Reserving’<sup>54</sup> addresses a wide

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<sup>42</sup> I. Boerefijn, ‘Impact on the Law on Treaty Reservations’ in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009), p. 65.

<sup>43</sup> Lijnzaad, *Ratify and Ruin*, p. 86.

<sup>44</sup> S. Marks, ‘Three Regional Human Rights Treaties and Their Experience of Reservations’ in Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out*, p. 35.

<sup>45</sup> Schabas, ‘Time for Innovation and Reform’, 41.

<sup>46</sup> For a guide to the ‘why’ issue and critiques of such, see generally, Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out*; Lijnzaad, *Ratify and Ruin*. See also Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 1951-52.

<sup>47</sup> A. Aust, *Modern Treaty Law and Practice*, 2d ed. (CUP, Cambridge 2007), pp. 133-34; Swaine, ‘Reserving’, 312; Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 1952; M.G. Schmidt ‘Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants’ in Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out*, p. 21; Marks, ‘Three Regional Human Rights Treaties’, p. 61; Koh, ‘Reservations to Multilateral Treaties’.

<sup>48</sup> Schmidt ‘Reservations to United Nations Human Rights Treaties’, p. 21; M. Morris, ‘Few Reservations about Reservations’ (2000) 1 *Chicago Journal of International Law* 341.

<sup>49</sup> Schabas, ‘Time for Innovation and Reform’, 40.

<sup>50</sup> C. Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ (1993) 64 *BYBIL* 245.

<sup>51</sup> Schabas, ‘Time for Innovation and Reform’, 40-41.

<sup>52</sup> Swaine, ‘Reserving’, 330. Swaine disagrees that encouraging wider participation alone is a sufficient basis for allowing the reservations problem to go unchecked.

<sup>53</sup> See, e.g., Fitzmaurice, ‘Reservations to Multilateral Conventions’, 8; C.L. Piper, ‘Reservations to Multilateral Treaties: The Goal of Universality’ (1985) 71 *Iowa Law Review* 795; Redgwell,

range of treaties and spends a great deal of time exploring the value of reservations, objections to reservations and the insecurity that exists in current practice, all aspects of the modern universality versus integrity debate. The universality versus integrity debate is a permanent fixture in treaty law and a delicate balancing act but one that could benefit from a more nuanced approach than that which now exists in order to address reservations to treaties that embody non-reciprocal obligations. Thus it is clear, and has been for some time, that reconsideration of the reservations rules in relation to human rights treaties is necessary.

The universality versus integrity debate is facilitated by the reservations rules found in the Vienna Convention. The default rules governing reservations have been described as ‘complex, ambiguous, and often counterintuitive’.<sup>55</sup> The flexibility of the reservations regime embodied in Articles 19–23 is the focus of an extraordinary amount of literature due to the imprecise nature of the object and purpose test found in Article 19(c). The general meaning of object and purpose under the Vienna Convention rules has been chronically rehashed without a definitive answer from its inception beginning with Brierly<sup>56</sup> and Fitzmaurice<sup>57</sup> then, more recently, by Buffard and Zemanek,<sup>58</sup> with a host of opinions in between.<sup>59</sup> The object and purpose test represents a constraint on a state’s ability to attach reservations to its instrument of ratification.<sup>60</sup> Lijnzaad astutely observes that ‘the claim that a particular reservation is contrary to the object and purpose is easier made than substantiated’.<sup>61</sup> This is due to the fact that there is little guidance on how to apply the object and purpose test

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‘Universality or Integrity?’; I. Brownlie, *Principles of Public International Law*, 7th ed. (OUP, Oxford 2008), p. 614; A.-C. Martineau, ‘The Rhetoric of Fragmentation: Fear and Faith in International Law’ (2009) 22 *Leiden Journal of International Law* 1.

<sup>54</sup> Swaine, ‘Reserving’. Swaine argues that reservations enhance treaty commitments and simultaneously provides useful information about the reserving state.

<sup>55</sup> Helfer, ‘Not Fully Committed?’, 367.

<sup>56</sup> Brierly, *Report on Reservations to Multilateral Conventions* (1951).

<sup>57</sup> Fitzmaurice, ‘Reservations to Multilateral Conventions’.

<sup>58</sup> I. Buffard and K. Zemanek, ‘The ‘Object and Purpose’ of a Treaty: an Enigma?’ (1998) 3 *Austrian Review of International and European Law* 311.

<sup>59</sup> e.g., D. Harris, *Cases and Materials on International Law*, 7th ed. (Sweet & Maxwell, London 2010), p. 653; Bradley and Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’, 429-39; J. Klabbbers, ‘Some Problems Regarding the Object and Purpose of Treaties’ (1997) 8 *Finnish Yearbook of International Law* 138; Schabas, ‘Time for Innovation and Reform’, 47; D. Hylton, ‘Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations’ (1994) 27 *Vanderbilt Journal of Transnational Law* 419, 429-32.

<sup>60</sup> C. Redgwell, ‘The Law on Reservations in Respect of Multilateral Conventions’ in Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out*, p. 8; Koh, ‘Reservations to Multilateral Treaties’, 74-76; Ruda, ‘Reservations to Treaties’, 190.

<sup>61</sup> Lijnzaad, *Ratify and Ruin*, pp. 82-83.

when the treaty being examined contains multifarious rights and obligations, such as one of the core human rights treaties. Despite the fact that years of debate has not shed any further light on the application of the Vienna Convention rules, the ILC maintains that the object and purpose test should remain.<sup>62</sup>

When specifically addressing human rights treaties commentators on the appropriateness of the regime tend to fall into two camps. The first group typically relies on general principles of international law to support the adequacy of the Vienna Convention to address reservations to human rights.<sup>63</sup> According to a few such authors the flexibility of the system is a boon to human rights treaties.<sup>64</sup> The key considerations are the appropriateness of a single residual system to govern reservations and the assumption that the Vienna Convention includes a self-policing element—the acceptance/objection system found in Article 20—which will rectify any invalid reservations.

The second group of commentators points to the unique characteristics of human rights treaties, including non-reciprocity,<sup>65</sup> that prevent any meaningful application of Vienna Convention regime<sup>66</sup> and the subsequent detrimental effect of reservations on the realisation of human rights<sup>67</sup>. Redgwell notes that the flexibility of the Vienna Convention is ‘somehow contrary to the inalienable political rights and freedoms of human beings’ therefore circumstances, such as economic depression, are less palatable excuses for making reservations than they might be in the context

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<sup>62</sup> See, for example, the confirmation of the Vienna Convention regime throughout the development of the study on Reservations to Treaties: *Report of the International Law Commission on the work of its 45<sup>th</sup> Session*. Yearbook of the ILC 1993, vol. II (Part Two), UN Doc. A/48/10 (1993), para. 440; *Report of the ILC on the work of its 50th session*, ILC Yearbook 1998, vol. II (Part Two), UN Doc. A/53/10 (1998), para. 482; *Report of the ILC on the work of its 61st session*, ILC Yearbook 2009, vol. II (Part Two), UN Doc. A/64/10 (2009), para 53.

<sup>63</sup> Schmidt, ‘Reservations to United Nations Human Rights Treaties’, p. 33; Imbert, ‘Reservations and Human Rights Conventions’, 46; A. Seibert-Fohr, ‘The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties’ in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*, p. 207; Morris, ‘Few Reservations’.

<sup>64</sup> Morris, ‘Few Reservations’, 343.

<sup>65</sup> Swaine, ‘Reserving’, 342; Redgwell, ‘The Law or Reservations in Respect of Multilateral Conventions’, p. 18; Lijnzaad, *Ratify and Ruin*, pp. 65-72; Imbert, ‘Reservations and Human Rights Conventions’, 33.

<sup>66</sup> C. Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’ (1997) 46 ICLQ 390; Redgwell, ‘Universality or Integrity?’, 252; Imbert, ‘Reservations and Human Rights Conventions’.

<sup>67</sup> See generally, R. Higgins, ‘Human Rights: Some Questions of Integrity’ (1989) 15 Commonwealth Law Bulletin 598; Lijnzaad, *Ratify and Ruin*; Imbert, ‘Reservations and Human Rights Conventions’, 34.

of an environmental treaty.<sup>68</sup> Some commentators have attached an air of moral reprimand to their discussions of reservations formulated by states,<sup>69</sup> while others contend that they could be a healthy sign that a state has seriously considered the treaty and its implications.<sup>70</sup> Particularly damning is Hathaway's contention that reservations perpetuate the idea that securing human rights through treaties is simply 'cheap talk'.<sup>71</sup>

Non-reciprocity is one of the most salient features of human rights treaties when examining the issue of reservations from a pure treaty law perspective. The traditional concept of reciprocity is largely a 'stabilizing factor' in international treaty law as it allows for a balancing of interests between the parties.<sup>72</sup> Lijnzaad insists that reciprocity is essential when there is no compulsory judicial system or central authority with the power to enforce the law such as the situation of international law.<sup>73</sup> There is no 'probability of harm'<sup>74</sup> to the interest of a state stemming from the reservation of another state to a human rights treaty.

There are also discordant views as to which entity—state, court or treaty body—has the ultimate competence to assess reservations using the Vienna Convention rules. Some authors choose to avoid this question, yet others have argued adamantly in favour of concurrent competency including the treaty bodies<sup>75</sup>. Linton argues that it is precisely this failure to designate a competent mechanism of review that has created a 'vacuum'.<sup>76</sup> Alston and others have spent many years analysing the development, strengths and weaknesses of the treaty bodies as part of the overall

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<sup>68</sup> Redgwell, 'The Law of Reservations in Respect of Multilateral Conventions', p. 18.

<sup>69</sup> See discussion in Aust, *Modern Treaty Law*, pp. 133-34; compared with P.-H. Imbert, 'Reservations to the European Convention on Human Rights Before the Strasbourg Commission: the *Temeltasch* Case' (1984) 33 ICLQ 558, 568, noting the 'devious approach' used by Switzerland when formulating an interpretative declaration that was subsequently determined to be a reservation by the European Commission on Human rights in the *Temeltasch* case.

<sup>70</sup> Marks, 'Three Regional Human Rights Treaties', p. 61. In this instance Marks notes that the small number of reservations to the African Charter on Human and Peoples' Rights suggests that the Charter is not taken seriously. However, the thirteen years since Marks's article has shown much progress within the African system.

<sup>71</sup> Hathaway, 'Do Human Rights Treaties Make a Difference?', 1946.

<sup>72</sup> Lijnzaad, *Ratify and Ruin*, p. 67.

<sup>73</sup> *Ibid.*, p. 68.

<sup>74</sup> *Ibid.*, p. 70; Simma, 'From Bilateralism to Community Interest', 296-97.

<sup>75</sup> For example, S. Linton, 'ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children' (2008) 30 Human Rights Quarterly 436, 486 et seq; Marks, 'Three Regional Human Rights Treaties', p. 35; D. Shelton, 'State Practice on Reservations to Human Rights Treaties' (1983) 1 Canadian Human Rights Yearbook 205, 234.

<sup>76</sup> Linton, 'ASEAN States', 486.

human rights regime.<sup>77</sup> The strong criticism of the treaty bodies by states is attributed to their positions as independent, non-political features of the UN system.<sup>78</sup> Though the ILC Special Rapporteur submits that human rights treaty bodies possess this competency pursuant to their mandates just as states have a concurrent competency under general international law,<sup>79</sup> it is unclear whether his proclamation will alter the opposing view held by many, especially states. There is, however, confidence that treaty bodies are a powerful tool for improving human rights. Lijnzaad posits that it is the dynamic force of the international human rights system and functions of the treaty bodies that will ultimately lead to new rules related to treaty observance.<sup>80</sup> It is the supervisory side of reciprocity that ultimately concerns human rights treaties as the mutuality of obligation and exercise of mutual limitations pursuant to reservations are absent in a human rights treaty, which is where treaty bodies can fill a gap.

Another crucial sticking point is what to do once a position has been taken on the validity, more specifically the invalidity, of a reservation. Goodman's 2002 article on invalid reservations and state consent examines the 'normative puzzle' and progressively suggests that a human rights system allowing for severance of invalid reservations actually maximises state consent.<sup>81</sup> Whether the reserving state's consent to be bound is affected and whether the reserving state continues to be a contracting party is often questioned in relation to a determination that a reservation is invalid.<sup>82</sup> Bowett, who is credited with the most extensive examination of these questions, framed the issue as tension between two different expressions of the will

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<sup>77</sup> P. Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law' reprinted in H.J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3d ed. (OUP, Oxford 2008), pp. 873-76; P. Alston, 'Beyond 'Them' and 'Us': Putting Treaty Body Reform into Prospective' in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (CUP, Cambridge 2000), pp. 501-25; Flood, *The Effectiveness of UN Human Rights Institutions*; Alston, *The United Nations and Human Rights*. For a discussion particularly in the context of reservations, see the thesis by V. Engström, *Understanding Powers of International Organizations* (Åbo Akademi University Press, Turku, Finland 2009), part IV.

<sup>78</sup> See, for example, discussion by H. Charlesworth, 'The United Nation's Human Rights System' in C. Reus-Smit (ed.), *Keynote 05: The Challenge of UN Reform* (RSPAS: ANU, 2005).

<sup>79</sup> Draft Guide to Practice, adopted by the ILC at its 62nd session, UN Doc. A/65/10 (2010), guidelines 3.2 and 3.2.1, see [http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations\\_commentaries\(e\).pdf](http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations_commentaries(e).pdf) <accessed 1 Sept. 2011> (Draft Guide to Practice).

<sup>80</sup> Lijnzaad, *Ratify and Ruin*, p. 79.

<sup>81</sup> Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent'.

<sup>82</sup> See generally Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent'; D.W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976-77) 48 BYBIL 67.



of the state: on one hand a state expresses the will to be bound to a treaty and on the other hand there is the will to impose a condition, the invalid reservation.<sup>83</sup> He equates the invalidity of the reservation to a mistake of law, rather than a mistake of fact, which will not automatically invalidate the consent to be bound or the treaty according to the Vienna Convention<sup>84</sup>.<sup>85</sup> Bowett's work is primarily concerned with the resulting relationship between the state parties. While the legal position of the state is an undeniably interesting legal query there is relatively little attention paid to what happens as a consequence of a reservation being declared invalid.

It is the lack of guidance on legal effect that facilitates a state's ability to maintain an invalid reservation as there is nothing in the Vienna Convention to address the legal effect when a reservation to a human rights treaty is determined to be invalid by an entity other than a state, such as a treaty body. When addressed in an international tribunal the legal effect will be detailed in the decision. Only in the context of the regional human rights systems has the question of precisely what legal effect an impermissibility determination has on a reservation been examined by an international tribunal.<sup>86</sup> The practice of the judiciary in this regard fails to deliver failsafe answers to the legal effect question on the UN treaty level for a multitude of reasons.

The primary doctrines that provide finality to the legal effect and consequence of reservations are permissibility, opposability and severability. Permissibility argues that a reservation incompatible with the object and purpose test is invalid regardless of whether other states object and supporters of this doctrine

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<sup>83</sup> Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 76.

<sup>84</sup> Article 48(1) provides: 'A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.'

<sup>85</sup> Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 76.

<sup>86</sup> See, e.g., *Belilos v. Switzerland*, (App. No. 20/1986/118/167), ECtHR, Series A, Vol. 132, 10 EHRR 466, 29 Apr. 1988; *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC 2/82 (24 Sept. 1982), IACtHR (Series A) No. 2 (1982); see discussions in Marks, 'Three Regional Human Rights Treaties', p.35; S. Marks, 'Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights' (1990) 39 ICLQ 300; I. Cameron and F. Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case' (1990) 33 German Yearbook of International Law 69; R.St.J. Macdonald, 'Reservations under the European Convention on Human Rights' (1988) 1988 Revue belge de droit international 429; H.J. Bourguignon, 'The *Belilos* Case: New Light on Reservations to Multilateral Treaties' (1988) 29 Virginia Journal of International Law 347.

argue that it is legally impossible for states to accept an invalid reservation.<sup>87</sup> Thus a state formulating an invalid reservation should never benefit from its purported legal effect.

Opposability is drawn from Vienna Convention Article 20 and proposes that if a reservation is objected to by another state party for being incompatible with Article 19 then the reserving state will not be considered a party to the treaty, a situation some note results in the splintering of a treaty into various bilateral treaties depending on the position taken by the objecting state.<sup>88</sup> Opposability incorporates a political element in that under this doctrine states self-determine their relations with reserving states.<sup>89</sup> It has also been argued that opposability seems to render objections to reservations a ‘fruitless endeavour’ because one state’s objection will have no bearing on the treaty relations between the reserving state and other state parties.<sup>90</sup> Building on Bowett’s work, Koh argues that permissibility and opposability work together as the test for a reservation’s validity.<sup>91</sup> However, as examples of practice will show, neither approach is universally accepted nor do they seem to have much influence on a state formulating an impermissible reservation to a human rights treaty.

By far the most controversial option for a defined consequence of invalidity is the principle of severability which effectively severs the reservation from the consent to be bound and holds the reserving state bound as if the reservation had never existed.<sup>92</sup> Redgwell argues that severability is closest to the regime envisioned by the ICJ in the *Genocide Opinion*.<sup>93</sup> States seem reluctant to press the issue of severability or any other legal effect or consequence in the field of human rights in any meaningful way because the traditional concept of reciprocity does not apply. Because there is no dedicated rule to provide finality as to the legal status of the reservation the status of contentious reservations continue to hang in the balance. The

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<sup>87</sup> Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’; Koh, ‘Reservations to Multilateral Treaties’, 76; Hylton, ‘Default Breakdown’, 431-32; Redgwell, ‘Reservations and General Comment No. 24(52)’, 405.

<sup>88</sup> Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’; Koh, ‘Reservations to Multilateral Treaties’, 97-103.

<sup>89</sup> Hylton, ‘Default Breakdown’, 438-39; Koh, ‘Reservations to Multilateral Treaties’, 76.

<sup>90</sup> Koh, ‘Reservations to Multilateral Treaties’, 102.

<sup>91</sup> *Ibid.*, 76.

<sup>92</sup> Redgwell, ‘Reservations and General Comment No. 24(52)’, 407

<sup>93</sup> *Ibid.*, 410.

reality is that states have little incentive to take a great interest in how other states treat their own citizens.<sup>94</sup>

Some have proposed to fill the gaps in the Vienna Convention rules,<sup>95</sup> though none have managed to tease-out a solution to address precisely what happens when there is a clearly incompatible reservation. Marks questions whether the Vienna Convention is the ‘most viable regime’<sup>96</sup> and Klabbers has suggested an ‘overhaul’<sup>97</sup> might be in order. What is clear is that a reconsideration of the current regime is in order. There is a great opportunity to continue to imbed human rights into the international legal order through the UN human rights system. Bayefsky, who is generally less optimistic about the UN system, has acknowledged that the current implementation mechanisms are ‘relics of the past’ that were created when states were most unwilling to permit any form of interference in their domestic matters.<sup>98</sup> This point has been conceded by numerous authors<sup>99</sup> though they are far more positive about the opportunities to improve the system. It is with a positive outlook that this thesis sets upon its examination of reservations to human rights treaties.

This thesis will focus on three specific lacunae in the Vienna Convention including the vagueness of the object and purpose test, the lack of a defined legal effect for invalid reservations and the failure to designate the consequence of invalid reservations. It avoids engaging the debate about universality versus integrity and certainly does not argue that reservations should be altogether prohibited. Nor does it consider the reasons behind why states make reservations. Situating this project amidst the existing literature this thesis posits that the gaps in the Vienna Convention do not prevent the use of the reservations rules to govern reservations to human

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<sup>94</sup> See, e.g., Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 1946-47; Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’, 533; Y.K. Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’ (2000) 71 BYBIL 181, 215; Lijnzaad, *Ratify and Ruin*, pp. 70, 397; B. Clark, ‘The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women’ (1991) 85 AJIL 281; R. Higgins, ‘The United Nations: Still a Force for Peace’ (1989) 52 MLR 1, 11-12.

<sup>95</sup> Redgwell, ‘Reservations and General Comment No. 24(52)’; Marks, ‘Three Regional Human Rights Treaties’, p. 35.

<sup>96</sup> Marks, ‘Three Regional Human Rights Treaties’, p.35.

<sup>97</sup> J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 Nordic Journal of International Law 179, 191.

<sup>98</sup> A. Bayefsky, ‘Making Human Rights Treaties Work’ in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community: Issues and Action*, 3d ed. (University of Pennsylvania Press, Philadelphia 2006), p. 316.

<sup>99</sup> For example, Klabbers, ‘Accepting the Unacceptable?’; Hylton, ‘Default Breakdown’; Schabas, ‘Time for Innovation and Reform’.

rights treaties and argues that designating an organ to provide definitive guidance on reservation validity can cure the inherent ambiguities of the default reservations regime. In light of recent developments in the area of reservations, particularly the culmination of the ILC study on reservations to treaties, discussed below, this thesis serves to provide further elucidation on the specific legal issues surrounding reservations to human rights treaties.

### 1.1 REVISITING RESERVATIONS

A survey of the available literature is not complete without introducing the two most comprehensive studies on the subject of reservations under the direction of the ILC and the human rights treaty bodies. The ILC considered reservations to treaties on four previous occasions including in 1951 in association with the *Genocide Opinion* and within the framework of developing the 1969 Vienna Convention, 1978 Vienna Convention on Succession of States in Respect of Treaties<sup>100</sup> and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations<sup>101</sup>.<sup>102</sup> Beginning in 1993, the ILC launched an in-depth analysis of the existing reservations system under the Vienna Convention and how the opportunity to make reservations fit into the overall effectiveness of international treaties.<sup>103</sup> Particularly the ILC indicated that it would attempt to clarify the special position of human rights treaties within the regulatory framework of the Vienna Convention's reservations system.<sup>104</sup> At the helm of this study was the Special Rapporteur, Alain Pellet, who was appointed to undertake the task in 1994.<sup>105</sup>

From the outset of the study the major problem was noted as the reconciliation of two imperatives: 'the need to maintain the essential elements of the treaty on the one hand, and the need to facilitate as far as possible accession to multilateral treaties of general interest,'<sup>106</sup> thus the integrity versus universality debate shaped much of the early debate. The project was not envisioned as a

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<sup>100</sup> 1946 UNTS 3, 23 Aug. 1978.

<sup>101</sup> UN Doc. A/CONF.129/15, 21 Mar. 1986 (not yet in force).

<sup>102</sup> ILC Yearbook 1995, vol. II (Part Two) UN Doc. A/50/10 (1995), para. 412.

<sup>103</sup> ILC Yearbook 1993, vol. II (Part Two) UN Doc. A/48/10 (1993), para. 440.

<sup>104</sup> A. Pellet, *First report on the law and practice relating to reservations to treaties*, UN Doc. A/CN.4/470 (1995), paras. 138-42.

<sup>105</sup> ILC Yearbook 1994, vol. II (Part Two), UN Doc. A/49/10 (1994), p. 179, para. 381.

<sup>106</sup> ILC, UN Doc. A/50/10 (1995), para. 413.

complete redraft of the Vienna Convention but was driven by the necessity to fill the existing lacunae in contemporary treaty law as well as to give guidance on related issues, such as interpretative declarations.<sup>107</sup> There was debate within both the Commission and the UN Sixth Committee as to whether Pellet's work should produce a convention, an additional protocol, a restatement of the law on the topic or guidelines for practice.<sup>108</sup> The ILC indicated early in its work that they would not call into question the 1969, 1978 or 1986 Vienna Conventions, a contention that has been frequently reiterated,<sup>109</sup> but would try and fill the obvious gaps and ambiguities; furthermore, it was ultimately decided that the work would culminate in a 'Guide to Practice' with guidelines and model clauses that could be used in tandem with the existing rules on treaty law in the development of future treaties.<sup>110</sup>

In 1995 Pellet prepared and sent a questionnaire to states and international organisations with the purpose of ascertaining the practice and problems relating to reservations.<sup>111</sup> This move was supported by UNGA resolution 50/45 of 11 December 1995 which urged states to promptly respond to the Special Rapporteur's questionnaire.<sup>112</sup> The detailed questionnaire methodically queried the practice of states in making reservations and objections to reservations, including the potential effect and whether an objection stimulated withdrawal of an invalid reservation. The phrasing sought to assess whether the states were motivated by politics, law or a combination of both. The questionnaire also directly addressed the determinative function of judicial organs and treaty organs with respect to reservations. By the end of 1996, only twelve states<sup>113</sup> had responded with another twenty<sup>114</sup> joining by April 1998. As of July 2010, only thirty-three states had responded to the questionnaire and

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<sup>107</sup> Note by the Special Rapporteur on draft guideline 3.1.5, UN Doc. A/CN.4/572 (2006), para. 4.

<sup>108</sup> ILC, UN Doc. A/50/10 (1995), paras. 467-70, 483; Pellet, UN Doc. A/CN.4/470 (1995), paras. 170-179.

<sup>109</sup> See, for example, ILC, UN Doc. A/50/10 (1995), paras. 428, 430; ILC Yearbook 1997, UN Doc. A/52/10 (1997), para. 157; ILC, UN Doc. A/53/10 (1998), para. 482; ILC, UN Doc. A/64/10 (2009), para 53.

<sup>110</sup> ILC, UN Doc. A/53/10 (1998), para. 482.

<sup>111</sup> A. Pellet, *Second report on reservations to treaties*, UN Doc. A/CN.4/478 (1996) Annex II, pp. 98-106. For the text of the relevant portions of the Questionnaire to States, see Annex III.

<sup>112</sup> UNGA, Resolution 50/45, UN Doc. A/RES/50/45 (1996), paras. 5-6.

<sup>113</sup> Chile, Denmark, Ecuador, Estonia, Finland, San Marino, Slovakia, Slovenia, Spain, Switzerland, United Kingdom and United States. UN Doc. A/CN.4/478 (Annex II), (1996), p. 97.

<sup>114</sup> Argentina, Bolivia, Canada, Colombia, Croatia, France, the Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia, Mexico, Monaco, Panama, Peru, Republic of Korea and Sweden. See A. Pellet, *Third report on reservations to treaties*, UN Doc. A/CN.4/491 (1998), para. 6, fn. 7.

those responding were mainly European or Western states.<sup>115</sup> The meagre responses resulting from the consultation with states revealed that there remained staunch support for the idea that states alone were competent to determine reservation permissibility though some progressive states favoured allowing the treaty bodies determine permissibility.<sup>116</sup> As disappointing as the feedback to the questionnaire was, it highlighted an integral problem with the practice of reservations in that states are generally unconcerned with the topic.

In 2005 the ILC once again sought input from states in the Sixth Committee on the issue of what effect objecting states expected their objections to have if the objection is based on incompatibility with the object and purpose of the treaty but the objection does not preclude the entry into force of the treaty between themselves and the reserving state.<sup>117</sup> There was no conclusive answer among the states who did respond. It further appears from the views expressed in the Sixth Committee that the issue of reservations remained divided in much the way that they have been since the debate surfaced prior to the *Genocide Opinion*,<sup>118</sup> as will be discussed in Chapter Two.

In 2007, despite having formulated a large number of the draft guidelines Pellet once again sought the input of states on the question of reservations. Particularly he questioned what conclusions states drew in the event that a reservation was deemed invalid due to contravention of Article 19 of the Vienna Convention and whether states favoured the severability doctrine, the opposability doctrine or a combination of the two.<sup>119</sup> It further asked states to provide the legal or practical considerations for the response to the initial set of questions. The third question posed to the states was framed as follows: *Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification,*

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<sup>115</sup> ILC Yearbook 2007, vol. II (Part Two), UN Doc. A/65/10 (2010), p. 10, fn. 13. The questionnaires were directed both to states and international organisations serving as depositaries for multilateral treaties, however, because the focus of research deals specifically with reservations to UN human rights treaties, which are open only to states, the discussion is limited to responses by states though the percentage of responses was much higher from the organisations.

<sup>116</sup> UN Doc. A/53/10 (1998), paras. 483-84.

<sup>117</sup> Draft Guide to Practice, 4.5.2, commentary para. 19; see also ILC Yearbook 2005, vol. II (Part Two), UN Doc. A/60/10 (2005), para. 29.

<sup>118</sup> UN Doc. A/60/10 (2005), para. 355.

<sup>119</sup> UN Doc. A/62/10 (2007), para. 23(a), the questionnaire did not use the terms severability or opposability but instead outlined the consequences of both.

etc.)?<sup>120</sup> This question attempted to elicit some information on the plausibility of separate specialised reservations regimes; however, the responses were less than illuminating.

In addition to states generally neglecting to provide information on their reservations practices, they have been reticent to address problems associated with broad or culturally based reservations. Several efforts have been made to investigate states' views on the compatibility of reservations in the context of specific human rights treaties.<sup>121</sup> The UN Secretary-General initiated an open forum as part of the third meeting of State Parties to CEDAW in 1986 in an effort to garner states' opinions on reservations to that convention in a less contentious manner than they might express via reservations. Disappointingly, only seventeen states responded and most were ambivalent on the issue of reservation compatibility.<sup>122</sup>

Latterly in the ILC study and following the adoption of UNGA resolution 61/34, the ILC availed itself of its right of consultation<sup>123</sup> and initiated a series of meetings with UN experts in the field of human rights, including the human rights treaty bodies.<sup>124</sup> Meeting with the chairpersons of the human rights treaty bodies was intended to facilitate further information exchange related to the practice of the treaty bodies with regard to reservations.<sup>125</sup> These exchanges appear to have been successful in that the final guidelines adopted by the ILC were endorsed by the chairpersons of the human rights treaty bodies and the opinions coming from the treaty bodies' special working group on reservations tend to reflect the ILC work.

The draft guidelines forming the Guide to Practice on Reservations to Treaties with commentary (Draft Guide to Practice) were provisionally adopted at the sixty-second session of the ILC in 2010 and sent out to governments for

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<sup>120</sup> The complete text of the questions submitted by the Special Rapporteur and recorded in UN Doc. A/62/10 (2007), pp. 10-11, can be found in Annex IV.

<sup>121</sup> e.g. UN Secretary-General, *Status of the Convention on the Elimination of all forms of Discrimination Against Women*, UN Doc. A/41/608 (1986), paras. 8 -10; UNGA, Res. 42/60, UN Doc. A/RES/42/60 (1987).

<sup>122</sup> *Ibid.*, para. 10 and following state reports; see, also, Clark, 'The Vienna Convention Reservations Regime', 283-84.

<sup>123</sup> Statute of the ILC (1947), Art. 25(1).

<sup>124</sup> UNGA, Res. 61/34, UN Doc. A/RES/61/34 (2006).

<sup>125</sup> See Chairpersons of the human rights treaty bodies, *Report on Reservations*, UN Doc. HRI/MC/2007/5/Add.1 (2007), UN Doc. HRI/MC/2008/5 (2008) and UN Doc. HRI/MC/2009/5 (2009).

comment shortly thereafter.<sup>126</sup> The Draft Guide consists of four parts meant to assist in interpreting both reservations and interpretative declarations. The first deals with definitions, the second with rules for assessing validity, the third with rules for assessing permissibility and the final part addresses the determination of legal effects. To encourage feedback from states, the UNGA also appealed to them to provide feedback on the Guide as an important step toward concluding the ILC's lengthy study.<sup>127</sup> State feedback was compiled in February 2011 and, not unsurprisingly, only ten states responded.<sup>128</sup>

During its sixty-third session from April to August of 2011 the ILC working group on reservations adopted the finalized text of the guidelines.<sup>129</sup> Several linguistic and structural changes were made to the Draft Guidelines based on the observations received from states as well as debate in the UN Sixth Committee.<sup>130</sup> A few of the more controversial guidelines in the Draft Guide were also deleted. These changes and the Finalized Guidelines will be discussed throughout the following chapters, particularly Chapters Five and Six.

Collectively, the chairpersons of the human rights treaty bodies also have been a driving force for reassessment of the reservations rules. The CERD Committee first proposed that a study be undertaken on reservations to human rights treaties in 1997.<sup>131</sup> A working paper was delivered to the ECOSOC Sub-commission on Prevention of Discrimination and Protection of Minorities in 1999 exploring the following question: *In applying the reservations regime to a particular reservation, are there special characteristics of human rights treaties which have an impact on the interpretation of the reservation?*<sup>132</sup> The UNHCHR Sub-Commission on Human Rights then appointed Hampson, the working paper's author, as Special Rapporteur for the purpose of preparing a comprehensive study on reservations to human rights

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<sup>126</sup> UN Doc. A/65/10 (2010).

<sup>127</sup> UNGA, Res. 65/26, UN Doc. A/RES/65/26 (2010).

<sup>128</sup> Australia, Austria, Bangladesh, El Salvador, Finland, Germany, Norway, Portugal, Switzerland and the United States.

<sup>129</sup> *Reservations to Treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties*, UN Doc. A/CN.4/L.779 (2011).

<sup>130</sup> *Oral report by the Chairman of the Working Group on Reservations to Treaties*, ILC, 63rd sess. (20 May 2011) at <http://untreaty.un.org/ilc/sessions/63/ReservationsToTreatiesReport20May2011.pdf> <accessed 1 Sept. 2011>.

<sup>131</sup> UNHCHR Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1997/31 (1997) Annex.

<sup>132</sup> Hampson, *1999 Working paper*, p. 5(f).



treaties that would not duplicate Pellet's study.<sup>133</sup> In close association with the treaty bodies, Hampson prepared multiple working papers on the subject with the final submitted in 2004. Hampson's findings will be introduced as part of the analysis of the Vienna Convention rules.

While both the ILC and treaty body studies have proved invaluable sources on what the law could, and in some instances should, be, this thesis seeks to fill in the gaps as to why the law on reservations must progress in specific reference to human rights treaties. It does so by analysing the entire body of reservations and objections to human rights treaties, paying particular attention to the progression of state practice over the past three decades. The application of the current reservations regime leaves many questions regarding the legal effect and consequence of invalid reservations unresolved and these lacunae are highlighted throughout this work. Therefore, this thesis is timely in light of the conclusion of the ILC work as it further explores points passed over by the ILC study which was directed toward addressing general treaty law rather than engaging questions specific to the particular nature of human rights treaties.

## 2 THESIS MAP

To conduct a doctrinal analysis of the Vienna Convention reservations regime there must first be a review of the development of the rules governing reservations. Chapter Two introduces the historical foundations of the Vienna Convention residual reservations regime and pays particular attention the early opinion and law on reservations. Primarily this involves reviewing the law leading up to the 1951 advisory opinion on the possibility of making reservations to the Genocide Convention. The work of the ILC on the law of treaties that took place in tandem and subsequent to the *Genocide Opinion* is also chronicled. The ILC was heavily involved in the development of the reservations rules and its work was ultimately the basis of the 1969 Vienna Convention, including the reservations rules examined by this thesis.

Chapter Three demonstrates that the nature of human rights treaties, including the non-reciprocal obligations which they are designed to protect, render the Vienna

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<sup>133</sup> UNHCR Sub-Commission on Human Rights, Res. 2000/26, *Reservations to Human Rights Treaties*, UN Doc. E/CN.4/2001/2 (2000), pp. 15-16.

Convention reservations regime ineffective. Initially it highlights the various rights protected by the core human rights treaties and defines the prevailing types of reservations formulated by states. Using the core UN human rights treaties as a case study this research highlights that the past thirty years have revealed the normative ambiguity created when the reservations rules of the Vienna Convention are used to regulate reservations to human rights treaties. The nine treaties designated as ‘core’ that form the case study are as follows (in order of adoption): the Convention on the Elimination of all forms of Racial Discrimination<sup>134</sup> (CERD), the International Covenant on Civil and Political Rights<sup>135</sup> (ICCPR), the International Covenant on Economic, Social and Cultural Rights<sup>136</sup> (ICESCR), the Convention on the Elimination of all forms of Discrimination Against Women<sup>137</sup> (CEDAW), the Convention on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>138</sup> (CAT), the Convention on the Rights of the Child<sup>139</sup> (CRC), the International Convention for the Protection of the Rights of Migrant Workers and Their Families<sup>140</sup> (ICRMW), the Convention on the Rights of Persons with Disabilities<sup>141</sup>(CRPD) and the International Convention on the Protection of All Persons from Enforced Disappearance<sup>142</sup> (ICED). Notably absent are human rights conventions that serve the specific, singular function of preventing and criminalising certain activities including the Genocide Convention and the Convention on the Suppression and Punishment of the Crime of Apartheid<sup>143</sup>. These treaties are purposely omitted as they fall out-with the typology identified by this study and, as such, do not encounter the same practical difficulties in the application of the Vienna Convention reservations rules. The overarching purpose of Chapter Three serves to underscore the prevalence of unacceptable reservations in the human rights treaty system by providing examples of the reservation formulas most commonly

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<sup>134</sup> 660 UNTS 195, 7 Mar. 1966.

<sup>135</sup> 999 UNTS 171, 16 Dec. 1966.

<sup>136</sup> 993 UNTS 3, 16 Dec. 1966.

<sup>137</sup> 1249 UNTS 13, 18 Dec. 1979.

<sup>138</sup> 1465 UNTS 85, 10 Dec. 1984.

<sup>139</sup> 1577 UNTS 3, 20 Nov. 1989.

<sup>140</sup> 2220 UNTS 3, 18 Dec. 1990.

<sup>141</sup> UN Doc. A/61/611, 13 Dec. 2006.

<sup>142</sup> UN Doc.A/61/488. C.N.737.2008.TREATIES-12, 20 Dec. 2006.

<sup>143</sup> 1015 UNTS 243, 30 Nov. 1973.

employed. It further notes the tension caused by reconciling the pursuit of universal treaty adherence against the sovereign right of states to make reservations.

The ambiguities resulting from applying the residual reservations rules to human rights treaties in the context of reservation review are outlined in Chapter Four. The Vienna Convention envisions two methods of reservation monitoring. The first entails a system of objection exercised by state parties and the second contemplates resort to an international dispute resolution mechanism, such as the ICJ,<sup>144</sup> to provide a final view on the validity of a reservation. The system of state objections is the political feature of the Vienna Convention reservations regime and is premised on the assumption that reservations formulated by states are valid. Once again resorting to the core human rights treaties the chapter moves the analysis to the objections made by non-reserving states to illustrate the lack of clear legal effect and absence of a consequence when a reservation is deemed invalid by another state party. Because the Vienna Convention operates on the assumption that treaty obligations are reciprocal and a definite legal effect and consequence will result from a state objection, such as the relations between the reserving state and objecting state being modified, there is no guidance on how to produce a legal effect when the obligations are not reciprocal, particularly when there may be no agreement among state parties as to the validity of the reservation. An undefined legal effect cannot produce a concrete consequence thus the invalid reservation hangs in the balance and normative incoherence ensues. The response to objections by reserving states proves there is little impetus to remove offending reservations due to the absence of a legal effect. The chapter then proceeds to demonstrate that these ambiguities can be resolved if a dispute resolution mechanism is utilised to provide a final determination on reservation validity. This piece of the analysis reviews the contributions of the ICJ and the regional human rights tribunals to the assessment of reservations. Ultimately, this chapter, coupled with Chapter Three, demonstrates the lacunae in Vienna Convention guidance as applied in practice to invalid reservations to human rights treaties.

With the assessment of the practice of reservations to human rights treaties and the demonstration of the practical limitations of the Vienna Convention

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<sup>144</sup> Vienna Convention, Art. 66; Statute of the ICJ, Art. 36.

reservations regime complete, Chapter Five turns to a doctrinal analysis of the actual reservation rules. Contemporary practice and commentary on the reservations rules indicate that something is missing in the Vienna Convention regime. The chapter will respond to the primary research question: does the Vienna Convention reservations regime adequately govern reservations to human rights treaties? In pursuit of an answer to the research question the analysis pays particular attention to the object and purpose test, the legal effect of invalid reservations and the consequence of invalid reservations. Though the one-size-fits-all approach outlined by the Vienna Convention has widespread support, it is abundantly clear that there is room for clarifying the greatest gaps in the regime. Thus this chapter will look at the regime's ambiguities both in general and in specific relation to human rights treaties as the international community at large could benefit from normative coherence in the reservations system. Importantly the chapter will examine the approaches to dealing with invalid reservations that have been developed in concert with and tangentially to the Vienna Convention. Specific note will be taken of the principles advanced by states to respond to the question of legal effect in the face of an objection, including permissibility and opposability, yet these approaches will be shown to be ineffective in the context of human rights treaties. Options for defining a concrete consequence for an invalid reservation will be appraised, including the controversial severance doctrine. The primary purpose of the chapter is to outline the lacunae in Vienna Convention reservations regime and to confirm that despite the ambiguity that has heretofore resulted in practice, there is ample evidence to suggest that the central feature of the regime—the object and purpose test—can be employed to determine validity. Thus at the conclusion of Chapter Five, the primary unresolved normative issue with the regime is designated as the lack of a competent final arbiter on the validity of a reservation.

As the final substantive chapter, Chapter Six reflects on the gaps in the Vienna Convention reservations regime, the current state of reservations practice in the UN human rights treaty system and the unique supervisory organs (treaty bodies) attached to the core treaties. Proceeding from the concluding position taken in Chapter Five, this chapter asserts the opportunity to be had in utilising the treaty bodies to determine reservation validity. Specifically it replies to the second research

question: are the treaty-specific supervisory mechanisms competent to serve a determinative function with respect to reservations to the core UN human rights treaties? In answering this question the chapter first examines the purpose for which the treaty bodies were designed and contemplates their perceived legitimacy. This initial inquiry is followed by an overview of the remits of each of the treaty bodies thereby grounding their functions in law. These overviews include a general synopsis of the individual treaty body's experience in dealing with reservations. The core of the analysis examines the involvement of the treaty bodies in the reservations debate to date and the international response to this involvement. Contemporary academic writing and the work of the ILC, as well as evidence of state acquiescence, reflect a gradual acknowledgement of the determinative role treaty bodies can play thus assisting in curing the impasse that currently exists when using the Vienna Convention rules to evaluate reservations to human rights treaties. Chapter Six proposes that as part and parcel of every monitoring role recognised under the treaty body remits there is a necessity for the treaty bodies to interpret treaty obligations and the fulfilment of those obligations. This necessarily implies that the determinative function extends to each of these roles as it is only in determining the validity of a reservation that a state party's commitments under human rights treaties can be effectively examined.

## CHAPTER TWO

### RESERVATIONS: HISTORY OF THE GENERAL REGIME

Despite intense and prolonged negotiation on the part of many states during treaty development, it is all but impossible to create one document that reflects completely the terms preferred by every negotiating party. As often noted, treaties are effectively an agreement to disagree or a disagreement reduced to writing.<sup>1</sup> This is where reservations enter as a tool for achieving an agreeable result after negotiations cease. The debate surrounding reservations to human rights treaties is most often framed as a contest between maintaining treaty integrity and encouraging universal participation—the integrity versus universality debate.<sup>2</sup> This framing of the debate reflects the tension between maintaining the integrity of the treaty to which the parties have ultimately agreed and allowing unilateral modifications in order to encourage a wider number of treaty participants.

Only in the past century have reservations been a concern as prior to this the practice of making reservations was rare. The United States is credited with the first reservation to a bilateral treaty in 1794 and the Sweden-Norway reservation to the Act of the Congress of Vienna in 1815 is acknowledged as the first to a multilateral treaty.<sup>3</sup> Globalisation, world-wide social and environmental movements, the large number of nation-states and the desire for stronger international relationships have all contributed to the growing number of treaties and the increased inability to create a one-size-fits-all agreement. This reality has stimulated the use of the reservation as a means of adjusting a state's obligations so that it can join a treaty without accepting all of the obligations in full.

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<sup>1</sup> Though probably not the first to express the concept, Lauterpacht is often credited with the early 1900s articulation of the role of treaties in the international community. See H. Lauterpacht, *The Function of Law in the International Community* (first published by Clarendon Press, Oxford 1933, Lawbook Exchange, Union, NJ 2000), p. 72.

<sup>2</sup> See, generally, H.B. Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments' in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004), p. 17; C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties' (1993) 64 BYBIL 245.

<sup>3</sup> W.W. Bishop, Jr., 'Reservations to Treaties' (1961) 2 *Recueil des cours* 249, 260-62.

This chapter introduces the historical foundations of the residual reservations regime as set forth in the Vienna Convention on the Law of Treaties<sup>4</sup> (Vienna Convention). To assess whether the Vienna Convention reservations regime adequately governs reservations to human rights it is essential to introduce the early opinion and law surrounding the development of the contemporary rules on reservations. For the most part, this involves an advisory opinion by the International Court of Justice on the possibility of making reservations to the Genocide Convention<sup>5</sup> which was delivered in 1951. The Court went to great lengths to examine existing state practice regarding reservations prior to delivering its opinion thus the debates of the international community will be summarised as the lack of common practice had an obvious impact on the Court. During the period in which the Court was deliberating the question of reservations to the Genocide Convention and for many years following, the International Law Commission was also heavily involved in the reservations question. Set against this background the 1969 Vienna Convention on the Law of Treaties was born and today remains the primary governor of reservations when a treaty does not contain its own specific reservations rules. For the purposes of this research, the primary points to keep in mind when contemplating the history of the reservations regime include: (1) what rules are applied to evaluate reservations, (2) who determines which reservations violate the Vienna Convention rules, (3) what is the legal effect of a reservation following a determination of invalidity, and (4) do the rules provide a clear normative consequence for an invalid reservation?

## 1 PRACTICE INFORMING THE INTERNATIONAL COURT OF JUSTICE

Until 1951, there had been no international judicial activity in the area of reservations. States had exercised their sovereign right to attach reservations to treaties as and when necessary in the course of binding their governments to international obligations with no generally applicable rules to guide them. Views on reservations tended to vary by region and type of government, though standardisation

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<sup>4</sup> 1155 UNTS 331, 23 May 1969 (Vienna Convention).

<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 Dec. 1948 (Genocide Convention).

of formal articles of multilateral treaties was on the rise.<sup>6</sup> Disputes regarding the acceptability of reservations were generally dealt with through diplomatic channels, namely the League of Nations Secretary-General or exchange of diplomatic letters, as the number of parties was relatively small.<sup>7</sup>

This changed with adoption of the Genocide Convention. In response to reservations formulated by states upon accession, such as the Philippines and Bulgaria which made reservations regarding the automatic dispute resolution mechanism found in Article IX,<sup>8</sup> non-reserving states found themselves perplexed as to how to react to the various reservations formulated to the Convention. The 1951 *Advisory Opinion on Reservations to the Genocide Convention*<sup>9</sup> (*Genocide Opinion*) was the result of a request submitted to the International Court of Justice (ICJ) by the UN General Assembly (UNGA) on 17 November 1950 which asked the following:

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

- I. Can the reserving State be regarded as being a party to Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
  - a. The parties which object to the reservation?
  - b. Those which accept it?
- 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>10</sup>

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<sup>6</sup> For summaries of reservations practices prevailing in the early 20th century see M.O. Hudson, 'Reservations to Multipartite International Instruments' (1938) 32(2) AJIL 330; W. Sanders, 'Reservations to Multilateral Treaties Made in Act of Ratification or Adherence' (1939) 33 AJIL 488; Owen (n 3); H.W. Malkin, 'Reservations to Multilateral Conventions' (1926) 7 BYBIL 141. For a more recent summary ending with contemporary practice, see E.T. Swaine, 'Reserving' (2006) 31 Yale Journal of International Law 307, 312 et seq.

<sup>7</sup> Hudson, 'Reservations to Multipartite International Instruments'.

<sup>8</sup> Both states made other interpretive declarations in addition to the reservations to the automatic referral to the ICJ in the event of a dispute among states. Bulgaria ultimately withdrew its reservation on 24 June 1992, see 78 UNTS 318, the Philippines maintains the reservation.

<sup>9</sup> 1951 ICJ Reports 15, 28 May 1951 (*Genocide Opinion*).

<sup>10</sup> T. Lie, Secretary-General of the UN to the President of the ICJ, Request for Advisory Opinion, (Leg. 46/03 (6)) New York, 17 Nov. 1950.



The opportunity availing itself to the ICJ was one of two-fold importance. Firstly, it was an opportunity to provide definitive guidance on the issue of reservations, an area that appears to have been of concern to some states out-with the context of the Genocide Convention.<sup>11</sup> The second notion of import concerned the protection of human rights, namely the prevention and punishment of genocide, and it is this concern, being fresh on the minds of states following the horrors of the Second World War, that seems to have diverted attention away from what could have been a defining moment for treaty law. Though the advisory opinion request clearly limited the scope of the request to reservations pertaining to the Genocide Convention—a law-making treaty with human rights as the subject matter—the Court’s opinion ultimately served as the preamble to a lengthy discourse on reservations which continues today.

#### 1.1 RESERVATION PRACTICE EXISTING PRIOR TO 1951

During consideration of the issue of reservations to the Genocide Convention on the UNGA floor there were three lines of thought that materialised from the discussions in relation to the first question posed to the ICJ regarding whether a state can be considered a party while maintaining a reservation to which at least one party to the convention maintains an objection. First was the unanimity principle which required any proposed reservation be given unanimous consent by interested parties and was based on the concept of maintaining the integrity of a treaty. Second was the extreme sovereignty position which asserted that making reservations was a sovereign act of the state, a right which was absolute and necessary to exercising sovereignty. Finally, there was a compromise between the two.

The then-practice of the UN Secretary-General as depositary was to exercise what it considered accepted principles of international law which required that a reservation to a treaty would only be valid if all other parties consented to that reservation,<sup>12</sup> following the unanimity principle. This involved the Secretary-General

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<sup>11</sup> See Written Statement by The Organization of American States (14 Dec. 1950), *Genocide Opinion*, Pleadings, Oral Arguments, Documents, 28 May 1951, pp. 15-20 (OAS Statement to the ICJ), p. 15.

<sup>12</sup> Written Statement of the UN Secretary-General, *Genocide Opinion*, Pleadings, Oral Arguments, Documents, 28 May 1951, pp. 77-180 (UN Statement to the ICJ), p. 104. See also Redgwell ‘Universality or Integrity?’, 246.

circulating the proposed reservation and seeking approval of the reservation from all existing state parties to the treaty. However, states such as the Union of Soviet Socialist Republics challenged this practice of asking states which had previously ratified the Genocide Convention to express their opinion on reservations carried by new ratifications.<sup>13</sup> In addition to the dissent among certain states regarding the Secretary-General's practice, another factor that may have led the UNGA to seek the advice of the ICJ was the potential problem regarding entry into force of the Genocide Convention due to uncertainty of the status of states who had submitted reservations along with their ratifications. These uncertainties, coupled with the eager eyes of the world as it watched the infant UN and its first comprehensive attempt to eradicate genocide, spurred the UNGA into action and set the state of the law surrounding treaties onto the course it travels still today.

Following the request for the advisory opinion, the ICJ surveyed the existing practices of states with respect to reservations and observed principles that generally followed traditional contract law concepts. As an issue of first impression, the Court welcomed comment by interested parties on the practice employed by states up until that date. Written statements were received by the Organization of American States, USSR, Jordan, United States of America, United Kingdom, Israel, the International Labour Organization, Poland, Czechoslovakia, the Netherlands, Romania, Ukraine, Bulgaria, Byelorussia and the Philippines and the Court heard oral statements from the United Kingdom, France and Israel.<sup>14</sup> The main lines of thought expressed on the UNGA floor regarding reservations were echoed in the reports submitted to the ICJ. Each of the views was supported with a variety of legal arguments which have been distilled below. Once again it must be underlined that the debate on the UNGA floor was centred on the Genocide Convention, however, when the ICJ requested information on state practice on the question of reservations it did not limit the request to only reservations to the Genocide Convention but sought information into state's views on reservations generally.

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<sup>13</sup> G.G. Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 ICLQ 1, 10-11, fn 20, citing Report of the Secretary-General, UN Doc. A/1372, para. 20.

<sup>14</sup> Pleadings, Oral Arguments, Documents, *Genocide Opinion*, Minutes of the Sittings held 10-14 May 1951 and 28 May 1951, p. 301.

The following provides a brief summary of the prevailing practices prior to 1951 and highlights the differences between the various practices, including the legal reasoning supporting each position. The summaries point out the emphasis placed on the type of treaty as well as the subject matter of the treaty which was a primary concern of the *Genocide Opinion*.

#### 1.1.1 UNANIMITY

With only six years of experience at the time of the advisory opinion request, the UN Secretary-General's practice<sup>15</sup> regarding reservations employed a strict rule whereby a state depositing a ratification instrument with a proposed reservation would not become a state party to a convention if any single *previously* ratifying state objected to the reservation, the so-called 'unanimity rule'. At the time, this rule was believed by many to be a universally recognised principle of international law.<sup>16</sup> However, according to some states, the unanimity practice 'extended the veto' into the UN system because a single state could prevent another state from becoming a party to a multilateral treaty even where all other state parties to the same agreement accepted the reservation.<sup>17</sup> The unanimity rule as exercised by the Secretary-General reflected a tightening of the previous League of Nations rules<sup>18</sup>—which had allowed even non-state parties to reject reservations—and paid deference to the 'law-making' character of treaties because the agreements embodied the rules of law adopted by states which were to be enforced by the government of each<sup>19</sup>. Procedurally, the Secretary-General would receive the instrument of ratification or accession with the accompanying reservation and immediately circulate the reservation to the previously ratifying parties asking that any objections be submitted by a certain day—usually the anticipated date of entry into force—and if no objection was received by

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<sup>15</sup> For a brief summary of the UN Secretary-General's practice prior to 1952 see Treaty Section of the Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, UN Doc. ST/LEG/7/Rev.1 (1999), paras. 168-72.

<sup>16</sup> H. Lauterpacht, 'Some Possible Solutions of the Problem of Reservations to Treaties' (1953) 39 *Transactions of the Grotius Society* 97, 97.

<sup>17</sup> OAS Statement to the ICJ, p. 19, referencing a memorandum from Uruguay to the Sixth Committee of the UNGA.

<sup>18</sup> The League of Nations rules were adopted following the Second Opium Convention of 1925 (concluded 19 Feb. 1925).

<sup>19</sup> 'Note: The Effect of Objections to Treaty Reservations' (1951) 60 *Yale Law Journal* 728, 731.

that date then the state party was deemed to have accepted the reservation.<sup>20</sup> Thus, the rule utilised by the Secretary-General was as follows:

A State may make a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have theretofore ratified or acceded.<sup>21</sup>

In response to the questions submitted to the ICJ with respect to the Genocide Convention, the Secretary-General's practice answered the first question posed—*Can a reserving State be regarded as being a party to Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?*—in the negative. This left the consideration of questions II and III unnecessary in light of the unanimity rule, as it focused on complete uniformity of obligations for treaties of the law-making type. The Secretary-General's practice was only concerned with objections made by previously *ratifying* states and not those signatories who had yet to ratify, though signatory states were also informed of reservations. Under this approach, uniformity of obligations, especially in the instance that obligations were not reciprocal, was considered of primary importance for the purposes of ensuring equity and efficient enforcement since the only return states actually received from signing up to law-making type treaties was the assurance that that other treaty parties will do the same, thereby enhancing the peace and security of the international community.<sup>22</sup>

The core problem for the Secretary-General as the depositary was that there was no unanimous agreement on either the procedure to obtain consent from the treaty members when a subsequently ratifying state proposed a reservation or the legal effect of an objection when made.<sup>23</sup> In the 1950 Report of the UN Secretariat to the UNGA, the Secretary-General argued in favour of unanimous consent to reservations, which reflected its practice and the practice of the former League of Nations, noting:

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<sup>20</sup> *Report of the Secretary-General: Reservations to Multilateral Conventions*, UN Doc. A/1372 (1950), Annex I, para. 6.

<sup>21</sup> UN Doc. A/1372 (1950), Annex I, para. 46.

<sup>22</sup> 'Note: The Effect of Objections to Treaty Reservations', 731, citing the UN Secretary-General, UN Doc. A/1372 (1950), Annex I, paras. 32-35.

<sup>23</sup> C.G. Fenwick, 'Reservations to Multilateral Treaties' (1951) 45(1) AJIL 145, p. 146.

While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State objecting to a reservation.<sup>24</sup>

The Secretary-General viewed the Genocide Convention as a legislative convention that was not adaptable by reservation because it created rules of law for identical operation in the different states adopting the convention.<sup>25</sup> This view lent support to its position of maintaining a stricter form of the League of Nations reservations practice. While acknowledging in its report the advantages of compromise approach, such as the Pan-American approach which will be discussed below, the Secretary-General noted that the differences between a regional association and the UN, being open to the world at large, rendered the practice unsuitable.<sup>26</sup>

The United Kingdom supported the Secretary-General's view that a reserving state could not become a party to a treaty in the face of an objection to the reservation. Though the United Kingdom had not yet signed the Genocide Convention,<sup>27</sup> it offered its juridical view in light of its interpretation of treaty law in order to elucidate its understanding of the law and assist the ICJ in its search for an answer to the advisory opinion request. Essential to the United Kingdom's position that the reserving state could not become a party in the event of an objection to its reservation was the incongruous relationship that would result between the objecting state and the reserving state if the reserving state were allowed to be a treaty party. Material to its evaluation was the type of convention involved such as whether the convention was a technical agreement, commercial in character, system-changing, social or law-making in nature.<sup>28</sup> The United Kingdom viewed the Genocide Convention as the law-making type of treaty and as such it was meant to be accepted as a whole or not at all.<sup>29</sup> It argued that allowing minority governments to alter the convention unilaterally through reservations would, in effect, impose the will of the

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<sup>24</sup> UN Doc. A/1372 (1950), Annex I, para. 2.

<sup>25</sup> UN Statement to the ICJ, para. 32.

<sup>26</sup> Fenwick, 'Reservations to Multilateral Treaties', 147.

<sup>27</sup> The UK acceded to the Convention on 30 Jan. 1970.

<sup>28</sup> Written statement by the United Kingdom (Jan. 1951), *Genocide Opinion*, Pleadings, Oral Arguments, Documents, 28 May 1951, pp. 48-76 (UK Statement to the ICJ), p. 49.

<sup>29</sup> *Ibid.*, p. 54.

minority upon the majority,<sup>30</sup> which would defeat the point of the negotiation process. Though the United Kingdom did not illuminate the class of ‘concerned’ parties, it pointed out that a treaty was much like a contract and, following the Secretary-General’s unanimity principle, once adopted it could not be altered without the consent of all concerned.

Interestingly, the United Kingdom pointed out that it was not necessarily the making of reservations to which it was opposed but more the fact that there was a ‘failure to adopt the proper methods and procedures for doing so’<sup>31</sup> in the Genocide Convention therefore the effect of unilateral reservations in the absence of a provision for such was an entirely different proposition than making a reservation when the process was specifically outlined in a convention. It was also concerned that unchecked reservations would impede finality of the text as the negotiated terms would always be subject to variation in light of subsequently made reservations. The concern over no definitive text was largely based on contract theory:

...[A]n essential element of *any* contractual system, that, save in so far as the contract itself created or provided for differences in the position of the parties, or in the obligations to be carried out by them, *all* the parties were, and must be, in the same position and subject to the same obligations.<sup>32</sup>

Conventions that are essentially contractual in both form and operation consist of mutual reciprocal rights and obligations which, as noted by the UN Secretary-General, create ‘a complex of bilateral agreements’<sup>33</sup> despite the multilateral form. Where reciprocal obligations are involved, the adjustment between parties of those obligations owed is a relatively easy process of negotiation defined by reservations, acceptances and objections.

But this is not the case where conventions of the United Nations type are concerned, because the obligations they contain exist and have to be carried out *universally*, once they are assumed. They do not consist of duties owed specifically to, and to be carried out towards and for the benefit of, the other parties to the convention. In brief they are not

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<sup>30</sup> Ibid., p. 54.

<sup>31</sup> Ibid., p. 54, n. 1.

<sup>32</sup> Ibid., p. 58, emphasis original. See, also, Redgwell ‘Universality or Integrity?’, 246-47.

<sup>33</sup> UK Statement to the ICJ, p. 63, citing UN Secretary-General, UN Doc. A/1372 (1950), Annex I.

fundamentally contractual. Their *operation* is not dependent on the existence of a contractual tie with other States.<sup>34</sup>

Because the Genocide Convention falls into the category of universally applicable, law-making treaty, the United Kingdom argued that the implication of a unilateral adjustment of obligations owed defeated the point of the convention because the premise of a law-making treaty is that all parties are equally bound by exactly the same obligations.<sup>35</sup> It also noted that the lack of sanction, relief or remedy that would generally be operable in the case of a contractual treaty has no potential with respect to a social, law-making or system-creating type of treaty.<sup>36</sup> Therefore, the United Kingdom also answered the first question put to the ICJ by the UNGA in the negative.

#### 1.1.2 ABSOLUTE STATE SOVEREIGNTY

The second approach to reservations was the absolute sovereignty principle which asserted that making reservations was a sovereign act of the state, a right which was absolute and necessary to exercising sovereignty. This position was mainly advocated by the USSR<sup>37</sup> and some members of the Slav language group of states.<sup>38</sup> This approach was not concerned with the type of treaty as it viewed all treaties as subject to the whim of the ratifying state party. In support of this extreme view of sovereign power exercise it was asserted that because conventions were the written expression of the will of the majority due to majority voting being the accepted practice for treaty adoption, reservations were the only method by which minority views could achieve fruition. If the minority states were not allowed reservations then they were forced to choose to subscribe to a convention expressing the will of the majority or to not become a party at all. This argument also reflected the shift in treaty negotiation which for most of the nineteenth century had been typically conducted between a very small number of states and with the exercise of the

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<sup>34</sup> UK Statement to the ICJ, p. 64, emphasis original.

<sup>35</sup> Ibid., p. 63.

<sup>36</sup> Ibid., p. 64.

<sup>37</sup> Fitzmaurice, 'Reservations to Multilateral Conventions', 10-11, fn 20, citing Report of the Secretary-General, UN Doc. A/1372, para. 20.

<sup>38</sup> UK Statement to the ICJ, p. 53; Y. Liang, 'The Third Session of the International Law Commission: Review of Its Work by the General Assembly' (1952) 46 AJIL 483, 492, citing UNGA, 6th Sess., Official Records of the Sixth Committee, 273rd meeting, paras. 34 and 36.

unanimity rule. As noted by Fitzmaurice, this theory was entirely untenable since it 'would make obvious nonsense of the whole process of negotiating and drawing up the texts of multilateral Conventions.'<sup>39</sup> The Genocide Convention represented the new super-treaty where the number of negotiating states increased multi-fold.

### 1.1.3 THE COMPROMISE APPROACH

Some of the written statements submitted to the ICJ demonstrated a reservation practice by states which sought to strike a balance between strictly maintaining treaty integrity and adherence to the long-standing traditions of state sovereignty. Drawing upon the experience of concluding over 100 multilateral treaties within the Pan-American Union, the Organization of American States (OAS) explained the difficult situation in which the reservations question sat because it was a matter of drawing a line between two extremes. On the one hand was the adoption of a strict rule prohibiting all reservations except those with unanimous consent and on the other was to admit reservations without any limitation, a practice that would effectively render futile the practice of subscribing to conventions.<sup>40</sup>

As reflected in the OAS statement, there was also a range of practice in between the two extremes which had evolved within the Pan-American system. From 1928 the OAS followed the practice consistent with the Hague Conferences which is summarised as follows:

In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation.<sup>41</sup>

This practice allowed the reserving state to become a party to all aspects of the treaty with the exception of the subject of the reservation. The natural consequences of the reservation, such as the effect of reservation on the other obligations or the possibility of invalidating the convention, were solely the responsibility of the ratifying states. The OAS statement suggested that the Hague Conventions practice

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<sup>39</sup> Fitzmaurice, 'Reservations to Multilateral Conventions', 10-11.

<sup>40</sup> OAS Statement to the ICJ, p. 15.

<sup>41</sup> OAS, Convention on Treaties, Art. 6 (3), Havana Conference (1928), reprinted in OAS Statement to the ICJ, p. 15.



seemed to apply to conventions where the articles could be segregated and work independently,<sup>42</sup> thus in line with the traditional contract idea of a treaty as a set of reciprocal obligations.

Recognising that not all treaties contain separable obligations, the OAS abandoned the practice in 1932 opting instead for the following rules which guided the juridical status of treaties whose obligations were the subject of a reservation:

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.
2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.
3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.<sup>43</sup>

It is the third rule that signalled the OAS departure from the Hague Conventions practice. However, there was still no clear indication as to whether the original treaty would be valid between those parties ratifying without reservations in the event that the reserving states hampered the minimum number of parties required for entry into force, nor did it address what action subsequently ratifying states could employ with regard to previously ratifying and reserving state parties.

A few years later, the OAS went further to adopt a practice where reserving states would first circulate reservations to existing state parties and obtain comment on proposed reservations prior to submitting an instrument of ratification or adherence. This additional feature tracked contract law more closely and was employed in order to encourage states proposing an unpopular reservation to revise or reconsider the reservation in order to conform to the popular will of the other parties. Thus, the Pan-American approach, as outlined in the OAS statement, encouraged a high ratification rate while assuming that ‘reservations may frequently be technical qualifications of a treaty rather than substantial limitations of its

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<sup>42</sup> OAS Statement to the ICJ, p. 16.

<sup>43</sup> Governing Board of the Pan-American Union, Rules of Procedure Regarding Ratification of Multilateral Treaties, 4 May 1932, reprinted in OAS Statement to the ICJ, p. 17. See also, Fenwick, ‘Reservations to Multilateral Treaties’, 146.

obligations'<sup>44</sup> and was touted as the best rule to accommodate 'the use of treaties both for purposes of a contractual character and for the development of general principles of international law'<sup>45</sup>. The OAS was adamant that there were certain state policies of such importance that even the promise of promoting the development of international law or common political and economic interests was not a strong enough incentive for them to abandon these very individual national policies, even if the price was the inability to join a multilateral convention. The Pan-American approach neither contemplated a particular number of objections to a reservation that would impede ratification nor did it outline exactly when a state might not be considered a treaty party due to subsequent objections to a reservation. They were, in fact, without experience to guide the issue having had only one instance where a state that was already party to a treaty objected to a reservation made by a subsequently ratifying state.

The written statement offered by the United States of America initiated its discussion with a state-centric mantra advancing 'the principle of consent as an element of a contract and the principle of purpose and intention as essential elements in determinations regarding treaties'<sup>46</sup> as generally accepted principles of international law that should be observed. The prevailing US view at the time of the request was that two options were available when reservations were proposed. The first option reflected the UN Secretariat practice of the day and excluded the reserving state from treaty participation while the second, reflecting the Pan-American practice, permitted the reserving state to engage in treaty relations with the accepting states and gave the treaty no effect in relation to the objecting states.<sup>47</sup> The second option was premised largely on the concept of a 'new offer' in contract law and the mandatory acceptance by the other party (non-reserving state) of the change of terms.<sup>48</sup> The US espoused the application of contract principles to support the unanimity rule arguing

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<sup>44</sup> OAS Statement to the ICJ, p. 18; see also Fenwick, 'Reservations to Multilateral Treaties'.

<sup>45</sup> OAS Statement to the ICJ, p. 20.

<sup>46</sup> Written Statement by The United States of America, *Genocide Opinion*, Pleadings, Oral Arguments, Documents, 28 May 1951, pp. 23-47 (US Statement to the ICJ), p. 24.

<sup>47</sup> Fenwick, 'Reservations to Multilateral Treaties', 145-46.

<sup>48</sup> See 'Note: The Effect of Objections to Treaty Reservations', 728 and fn. 3.

... that a multilateral treaty is one whole and single offer, and that a reservation is a counter-offer which, before it can vary any terms of the treaty, must be accepted by all the offerors. This argument presupposes that there is some obligation binding the offerors not independently or bilaterally to vary the contract terms *inter se* or *vis-à-vis* an offeree. Whether or not such a limitation exists depends, of course, on the intention of all the offerors, not the assertions of one, and in deciding the question the same general considerations must play a part...<sup>49</sup>

However, the US went on to reason that the unanimity rule was inappropriate for the law-making character of the Genocide Convention, though it could very easily apply to other types of treaties, such as an organisational treaty which might set forth the charter or constitution of an organisation.<sup>50</sup> The US supported the idea that the purpose of the Genocide Convention would be best achieved by gathering a large number of parties even if this meant that many of the parties made reservations. Preferring the more liberal OAS practice which allowed a reserving state to become a party to a convention despite an objection, the US advocated a system which provided flexibility for those states whose hands might be tied due to constitutional or other legal obstacles, such as in the case of its constitutional democracy. It even went as far as to argue that the only way to defeat a state's instrument of ratification that included an unacceptable reservation was to secure the objection of every party to the convention,<sup>51</sup> something akin to a negative unanimity rule. The default legal consequence of the approach advocated by the US was that the failure of a state to object to a reservation would result in the legal equivalent of an acceptance,<sup>52</sup> known as 'tacit acceptance'.

The US also rejected the Secretary-General's view that the only benefit received by a state party to an agreement involving non-reciprocal obligations was the assurance that all other state parties would owe identical obligations. American observers considered that the merit in joining an international treaty was to support the principles found in the agreement and that this could be best achieved by maximum participation, not uniformity of obligation, as if mutual agreement on all

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<sup>49</sup> US Statement to the ICJ, p. 32.

<sup>50</sup> Ibid., pp. 33-34.

<sup>51</sup> Ibid., p. 46.

<sup>52</sup> Ibid., p. 45.

terms would surely reduce the number of parties.<sup>53</sup> The struggle to gain domestic support for international conventions was one of the key drivers behind the US reservation practice as rarely could its legislature obtain absolute agreement due to the strength of individual constituencies.

The US statement, unlike the OAS, drew largely on the purpose of the Genocide Convention to counter the existing UN reservations practice advocating instead that '[f]rom the terms, nature, history and purpose of the Genocide Convention, it follows that States entitled to ratify or accede may do so subject to reservations even if these are objected to by one or more other parties to the Convention'.<sup>54</sup> The US relied heavily, as it continues to do today, on the intention of the parties and on the specific facts surrounding the history of the Genocide Convention, including the order of ratifications. It is important to note that due to the timing of ratifications, including those by the Philippines and Bulgaria which included reservations, it was ultimately not necessary for the Secretary-General to address the potential problem of the date of entry into force that could have resulted if the two reservation-laden instruments of ratification had been met by objections, which would have resulted in dropping the number of twenty mandatory ratifications to eighteen. Under the then-existing Secretary-General practice, the Genocide Convention would have not entered into force and it was this potential dilemma that instigated the advisory opinion request via the UN General Assembly.<sup>55</sup>

The main opposition to a compromise approach was that it effectively set up a system of establishing a series of bi-, tri- and quadrilateral agreements that were broadly similar, therefore promoting an entirely different concept than a single multilateral agreement.<sup>56</sup> The United Kingdom also argued that the Pan-American system could not be applied to the Genocide Convention retrospectively as it was an approach that had been agreed specially within the context of the OAS; thus, in the absence of a special agreement on reservations by the UN Member States there was no general principle of international law that would allow application of such a

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<sup>53</sup> 'Note: The Effect of Objections to Treaty Reservations', 731-32; Fitzmaurice, 'Reservations to Multilateral Conventions', 10-11.

<sup>54</sup> US Statement to the ICJ, p. 25.

<sup>55</sup> For a discussion of this potential problem see US Statement to the ICJ, pp. 26-27. See also Swaine, 'Reserving', 312-13.

<sup>56</sup> UK Statement to the ICJ, pp. 60-61.

system to the Genocide Convention.<sup>57</sup> To further illustrate why the Pan-American system could not logically apply to the Genocide Convention, the United Kingdom reasoned that a party to the Convention assumes an obligation to prevent and punish all acts of genocide regardless of the nationality of the victims. Therefore, it would be unconscionable to think that a state would use the lack of membership in the Genocide Convention as a reason to deny jurisdiction over crimes addressed by the Convention but committed against the nationals of a non-member state. The point of the Convention is that the enumerated obligations ‘are of a general, self-existent, and non-contractual character, and do not consist of something that has to be done specifically towards another country. If assumed at all, they are assumed for all and towards all, by mere act of becoming a party.’<sup>58</sup>

## 1.2 SUMMARY

The primary approaches informing the ICJ as they contemplated reservations to the Genocide Convention provided a deep well of information not only on the division of states with respect to reservations but also on states views toward international law generally. In addition to the extreme ends and the Pan-American compromise rules there were also a number of states which argued that it was impossible to apply one rule to all multilateral conventions. These states argued that there should be different rules applicable to different types of conventions.<sup>59</sup> These views hinted at the future divisions that would influence debates about both reservations practice and the implications of general international law long after the ICJ delivered its opinion.

## 2 THE ICJ GENOCIDE ADVISORY OPINION

The invitation to the ICJ for an advisory opinion left the Court to navigate between the two extremes of the unanimity rule and unbridled exercise of state sovereignty through reservations. The request was couched in the fact that there was no reservations provision in the Genocide Convention nor was there otherwise universally accepted international guidance on the issue. The advisory opinion was

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<sup>57</sup> Ibid., p. 62.

<sup>58</sup> Ibid., p. 65.

<sup>59</sup> H. Waldock, *First report on the law of treaties*, Appendix, UN Doc. A/CN.4/144 (1962), reprinted in ILC Yearbook, Vol II, UN Doc. A/CN.4/SER.A/1962/Add.1 (1962) (*1962 Report on the Law of Treaties*), p. 77.

meant to be limited to the scope of reservations to the Genocide Convention<sup>60</sup> pursuant to the request made of the Sixth Committee to the UNGA and several states<sup>61</sup> thought that the advisory opinion would ideally reflect only the practice specific to that convention.

Recognising the rarity of objections to reservations in practice at the time,<sup>62</sup> the Court felt that none of the submitted views on reservations could provide definitive proof of an international customary rule. In fact, the views generally tended to represent administrative practices rather than legal interpretations and the Court noted that when the Sixth Committee debated reservations to multilateral conventions there was also a ‘profound divergence of views’ ranging from absolute integrity of a treaty to an extremely flexible approach which would maximise participation.<sup>63</sup> A flexible approach was favoured to address the precise questions asked regarding the Genocide Convention,<sup>64</sup> a treaty that was both normative and humanitarian and unlike any that had come before it. Because no settled practice could be extracted from the various debates and views examined, the Court, by a slim seven to five majority,<sup>65</sup> chose to forge a new principle of law and ultimately answered the first question posed in the affirmative with the caveat that the answer would vary depending upon the particular circumstances of each individual case.<sup>66</sup> Reservations would be subject to the objections of other state parties but an objection would not necessarily defeat the reserving state’s treaty party status, which departed from the Secretary-General’s unanimity rule and reflected the OAS approach. Thus, in the particular case of the Genocide Convention,

...a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by

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<sup>60</sup> Fenwick, ‘Reservations to Multilateral Treaties’, 147.

<sup>61</sup> e.g., see US Statement to the ICJ, p. 31.

<sup>62</sup> *Genocide Opinion*, p. 25.

<sup>63</sup> *Ibid.*, p. 26; For a historical summary of the debate about integrity versus universality see Redgwell ‘Universality or Integrity?’, 246-49; Fitzmaurice, ‘Reservations to Multilateral Conventions’ (1953) 2 ICLQ 1, 8.

<sup>64</sup> R. Higgins, ‘Introduction’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. xix.

<sup>65</sup> The majority opinion was supported by Judges Basdevant, Winiarski, Zoričić, de Visscher, Klaestad, Badawi and Pasha. There were dissenting opinions by Judges Guerrero, McNair, Read, Mo and Alvarez. Alvarez filed a separate dissenting opinion.

<sup>66</sup> *Genocide Opinion*, p. 26.

others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.<sup>67</sup>

The introduction of the ‘object and purpose’ test was the ground-breaking aspect of the *Genocide Opinion*. The test created a system of tiered rights which had previously not existed by allowing states to choose among the rights enumerated by the treaty and only prohibiting those reservations that violated the object and purpose of the treaty. The glaring problem is that the determination as to whether the reservation overcomes the object and purpose test is left to each state to decide. This highly flexible criterion for compatibility drew criticism across a wide-range of states in the Sixth Committee.<sup>68</sup>

In light of the assumption that a state should generally aim to preserve the essential object of the treaty,<sup>69</sup> the Court presumed a reserving state would not intentionally make a reservation that was incompatible with the object and purpose test and if it did, then it would be assumed that the state failed to recognise the incompatibility. Otherwise, as noted by the Court, the ‘Convention itself would be impaired’.<sup>70</sup> The Court’s reasoning took into account the special characteristics of the Genocide Convention as a universally applicable convention that was of a mainly humanitarian and civilizing purpose without individual advantages or disadvantages for the contracting parties, as well as the fact that the crime and punishment of genocide was recognised by most nations even without a convention indicating such. The Court reiterated that the reservations practice it advanced was limited to conventions with a humanitarian subject-matter and that states could exercise their sovereign rights as long as the object and purpose of the convention was not contravened.

As it answered the remaining questions, the Court’s analysis was grounded in the particular circumstances of the Genocide Convention. Borrowing from the Pan-American practice, the answer to question II—regarding the effect of the relationship between a reserving state and the other treaty parties—introduced into the mainstream

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<sup>67</sup> Ibid., p. 29.

<sup>68</sup> Liang, ‘The Third Session of the International Law Commission’, 485, fn 10. Critics including Brazil, China, Dominican Republic, France, Greece, Israel, The Netherlands, USSR, and Yugoslavia.

<sup>69</sup> *Genocide Opinion*, p. 27.

<sup>70</sup> Ibid., p. 27.

the legal oddity that if a reservation was objected to on grounds of incompatibility with the object and purpose test then the objecting state did not need to regard the reserving state as a party to the Convention though, simultaneously, any state accepting the reservation could consider the treaty in force between the two.

The Court's hybrid approach has been attributed to the potential 'accounting problem' that arose as to at what point the Genocide Convention would enter into force since there were states that had ratified with reservations to which there had been objections.<sup>71</sup> As mentioned above, at the time of the advisory request reservations still needed the assent of every state that had previously ratified the *Genocide Opinion* thus clarifying the status of the reserving state in the event of an objection was necessary in order to determine whether the requisite number of valid ratifications had been reached in order for the treaty to enter into force. This mathematical certainty could not be achieved if the treaty was in force between some states and not among others. Without reciprocal obligations to be enforced among the parties, many states were unconcerned about reservations made to the automatic interstate dispute resolution procedure, which represented the bulk of the reservations in question, as it was unforeseeable that obligations owed to third parties would give rise to an interstate dispute.

The major flaw in the Court's decision was that it failed to elucidate that the relationship between the states was not the object of the Genocide Convention, thus the legal conundrum resulting from its answer to question II in reality lay not in the relationship between the states but in the status of the reservation once a state made an objection based on incompatibility with the object and purpose of the treaty. The effect of this particular point of the opinion will be discussed in the following chapters. The Court offered only the dispute settlement procedures arising under the Genocide Convention as a remedy in the event that there were different views among states as to the compatibility of a reservation. This is an interesting point in that it was precisely the issue of reservations to the dispute resolution procedure, as previously mentioned, that spurred the opinion in the first place. In practice it would

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<sup>71</sup> See UN Secretary-General, UN Doc. ST/LEG/7/Rev.1 (1999), para. 173; Swaine, 'Reserving', 312-13; W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 *Canadian Yearbook of International Law* 39, 45; Redgwell 'Universality or Integrity?', 248; Fitzmaurice, 'Reservations to Multilateral Conventions', 2.



be the beneficiaries—the individuals in the states’ jurisdictions—of the obligations established under the Genocide Convention that would be the most affected by a reservation. For the purposes of this thesis, it is unnecessary to consider the implications of the third question asked of the Court.

## 2.1 DISSENTING OPINIONS

The joint dissenting judges (Guerrero, McNair, Read and Hsu Mo) contended that there was a firmly established rule embodied in and illustrated by the Secretary-General’s practice in that all parties must consent in order for a proposed reservation to become effective and only then would the reserving state become a party to a convention. Alternatively, they argued that states in the process of negotiating a multilateral treaty should include an express provision on reservations, as illustrated by the Pan-American states. Both the Court’s majority opinion and the dissenting opinion noted that an express provision inserted into a treaty would best serve the situation of reservations pursuant to the particular intention of convention drafters. However, as the Genocide Convention had no such provision the dissenting opinion noted with concern the potential for wider, unintended effects that might result from the opinion<sup>72</sup> despite the Court’s constant reiteration that it was limited to that particular convention.

Relying heavily on the Secretary-General’s comments accompanying the draft of the Genocide Convention, the dissenting opinion noted that there was no proposition related to reservations in the original draft as it was considered that reservations of a general scope would not be in line with a convention that dealt with the maintenance of international order as opposed to a convention dealing with private interests.<sup>73</sup> The notes had further provided that if the members of the UNGA ultimately wanted to provide a framework for reservations during the course of negotiations then they would do so. During the subsequent ad hoc sub-committee review of the draft it was determined that there was ‘no need for any reservations’.<sup>74</sup> The sub-committee clearly paid no deference to the opinions voiced by a minority of states.

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<sup>72</sup> *Genocide Opinion*, Joint Dissenting Opinion, p. 31.

<sup>73</sup> *Ibid.*, p. 40.

<sup>74</sup> *Ibid.*, p. 41, quoting UN Doc. E/AC/25/10, p. 5.

The joint dissenting opinion highlighted that there was nothing to indicate that the negotiating states had contemplated a compatibility test based on the object and purpose of the Convention. It is on this point that the dissenting judges warned of the many problems which were to arise as a result of the assessment of reservations as espoused by the majority. Effectively, the majority created two classes of human rights and left it up to each individual state to determine which rights fell into the major or minor category. The minority challenged this use of the object and purpose test as

...a new rule for which [they] could find no legal basis. [They could] discover no trace of any authority in any decision of [the ICJ] or of the Permanent Court of International Justice or any other international tribunal, or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a State to make such a distinction and base a reservation upon it. Nor [could they] find any evidence, in the law and practice of the United Nations, of any such distinction or power.<sup>75</sup>

The minority opinion further argued that had the intention of the parties been to allow reservations under the 'compatibility' criterion then they would have included such a clause within the text of the Convention as it was clear from the UNGA records that the issue had been discussed on several occasions. The minority grounded its main opposition in the fact that there was no evidence to support the contention that the negotiating governments intended for

...any State, when signing, ratifying or acceding to [the Convention] would be at liberty to divide its provisions into those which do, and those which do not, form part of 'the object and purpose of the Convention' and to make reservations against any of the latter, which would thereupon take effect without the consent of the other parties.<sup>76</sup>

Foreshadowing the problem that continues to plague the reservations regime today, especially in the context of human rights treaties, the minority opinion noted that the new 'object and purpose' test was so difficult to apply that it was

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<sup>75</sup> Ibid., p. 43.

<sup>76</sup> Ibid., p. 43.

...inconceivable that the General Assembly could have passed the matter over in silence and assumed that all the contracting States were fully aware of the existence of such a test in international law and practice and were capable of applying it correctly and effectively.<sup>77</sup>

The primary reasons given for why the majority's new rule would not work were because it was not easy to apply nor would it result in easily calculable or consistent results because it was not necessarily straightforward as to precisely which articles constituted the 'object and purpose' of the Convention. The minority also alluded to what it perceived as great difficulty in limiting the new object and purpose rule to the Genocide Convention as it deemed it a difficult task to establish it as unique among other potential humanitarian conventions that might be negotiated under the United Nations and that, consequently, the majority opinion would only serve to encourage reservations in the future.<sup>78</sup> It was viewed that the new rule would prevent any type of certainty as to the status of a reserving state and/or its reservation due to the fact that it allowed individual states to draw their own conclusions. The opinion also pointed out that this type of subjective determination, both on the part of a reserving state and other state parties, did not support any determination at law as to when a reserving state would or would not be considered a party.<sup>79</sup> Thus, a circle of normative inconsistency would continue with some states viewing the reserving state as a party while others viewed the state as a non-party.

In response to questions about treaty relations between states in the event of a reservation that was determined not incompatible but to which there remained an objection the minority reasoned that multilateral treaty membership should not be a private affair between pairs of states. The minority also concluded—correctly as time would tell—that there would likely be little probability that states would resort to the Article IX facility for judicial resolution as to the compatibility of a reservation.<sup>80</sup> The opinion also duly noted the tendency of the time for all international activities to focus on the promotion of the common welfare of the international community, however, it maintained that this did not equate to 'universality at any price' but rather

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<sup>77</sup> Ibid., pp. 43-44.

<sup>78</sup> Ibid., p. 47.

<sup>79</sup> Ibid., p. 45.

<sup>80</sup> Ibid., p. 45.

‘acceptance of common obligations—keeping in step with like-minded States—in order to attain a high objective for all humanity, that [was] of paramount importance’<sup>81</sup>.

An additional, separate dissenting opinion was filed by Judge Alvarez focusing on the type of treaty the Genocide Convention could be characterised as, which, in his eyes, was a convention establishing new international law and, also, a convention intended to regulate social or humanitarian matters embodying the ‘new orientation of the legal conscience of the nations.’<sup>82</sup> His dissent recognised that these types of conventions were of general interest, rather than private, and imposed obligations on states without granting them any rights, unlike traditional reciprocal obligation treaties. A point reiterated often in the reservations debate as will be revealed throughout this thesis.

Though Alvarez perhaps overstated the potential of the UNGA to serve as an international legislative body, the premise of his argument was that multilateral treaties as negotiated and adopted on the UNGA floor were akin ‘to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard’<sup>83</sup> and this is why it did not matter what the preparatory work surrounding the reservations issue had been. The key was that the finalised document failed to include a facility for making reservations thus regardless of the positions for or against, the treaty as it stood did not accommodate reservations. He also disagreed with any parallels being drawn between international law of the particular nature under discussion and domestic contract law. He took the view that conventions of the following types should not allow reservations unless they provided strict guidance on their admissibility and legal effect: treaties which establish organisations, treaties which determine boundaries, treaties which establish new international law and treaties which regulate social or humanitarian matters. However, Alvarez also felt that allowing reservations, even under restricted rules, would cause a treaty such as the Genocide Convention to lose its status as a fundamental convention of international law.<sup>84</sup>

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<sup>81</sup> Ibid., p. 47.

<sup>82</sup> *Genocide Opinion*, Dissenting Opinion M. Alvarez, p. 51.

<sup>83</sup> Ibid., p. 53.

<sup>84</sup> Ibid., p. 55.

## 2.2 SUMMARY

The legacy of the *Genocide Opinion* is the introduction of the ‘object and purpose’ test as a method of evaluating reservations to multilateral treaties. The failure of the opinion to address the legal status of a reservation once it is determined incompatible under the test created a lacuna in the law surrounding reservations. Despite expressly limiting its opinion to reservations to the Genocide Convention the ICJ set an arbitrary judicial standard for the evaluation of reservations to treaties that has been applied to all multilateral treaties as a default mechanism as a result of the rule’s subsequent adoption as part of the Vienna Convention on the Law of Treaties.

## 3 INTERNATIONAL LAW COMMISSION DEVELOPS THE VIENNA CONVENTION

In the very same resolution initiating the request for an advisory opinion by ICJ in 1950, the UNGA also invited the International Law Commission (ILC) to ‘study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law.’<sup>85</sup> The Law of Treaties had been chosen as one of three topics for study with a view toward codification at the first meeting of the ILC which was held from 12 April – 9 June 1949.<sup>86</sup> Having been tasked previously with examination of international law, the inclusion of reservations followed naturally and, as the reservations to the Genocide Convention illuminated, there was no settled international practice thus the area was ripe for consideration in the progressive development of international law.<sup>87</sup>

During the initial development of the International Bill of Human Rights,<sup>88</sup> it was noted that by making human rights international the UN Charter had imposed upon member states positive obligations.<sup>89</sup> These positive obligations would eventually be codified in the various human rights treaties concluded throughout the following sixty years. As introduced by the situation surrounding the Genocide Convention, reservations would continue to be a pivotal issue in the context of norm-

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<sup>85</sup> UNGA Res. 16 XI 50, Reservations to Multilateral Conventions (1950).

<sup>86</sup> *Report of the ILC*, UN Doc. A/CN.4/13 (1949).

<sup>87</sup> The progressive development and codification of international law was one of the primary reasons for the establishment of the ILC. Statute of the ILC, Art. 1.

<sup>88</sup> The International Bill of Human Rights is generally recognised as referring collectively to the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

<sup>89</sup> General views expressed in the Third Committee, *Yearbook of the United Nations: 1948-49* (UN, New York 1950), p. 527.

developing multilateral treaties. The value of normative treaties would be shaped definitively by the creation of a concrete international rule of law for evaluating and interpreting reservations.

Professor James L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock were the successive Special Rapporteurs appointed to study not only the Law of Treaties but, more importantly for focus of this research, the specific question of reservations. It should be pointed out that membership on the ILC is voluntary and entirely unremunerated with the exception of costs. Thus, though there are continuous reports covering the Law of Treaties and reservations within that remit, the nature of the Commission does not lend itself to continuous attention to a subject-matter. Each change in Special Rapporteur brought with it slight differences in attitude toward reservations. Their personal views, as well as those of the sitting ILC throughout the process, are evident throughout the successive reports filed on the topic leading up to the adoption of the Vienna Convention on the Law of Treaties. Despite knowing the final product of their years of study, the following examines the approaches of the successive rapporteurs and their influence on the Vienna Convention reservations regime.

Following the 1950 UNGA request, the ILC commenced its systematic review of the practice surrounding reservations to multilateral treaties under the supervision of the initial Special Rapporteur, Brierly, who was appointed during the first session of the ILC.<sup>90</sup> As noted above, the special topic of reservations within the overall umbrella of the law of treaties was recognised prior to the request for a specific review by the UNGA. The ILC's study was limited to multilateral treaties and to those reservations made at the time of signature, ratification or accession. In his first report, Brierly was careful to note that his findings on reservations were tentative pending the final outcome of the ICJ advisory opinion.<sup>91</sup> The preliminary report found an unhelpful 'lack of unanimity'<sup>92</sup> among treaty law observers and writers. State practice was also unsettled on the matter and it was noted that the

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<sup>90</sup> *Report of the ILC on its First Session 12 April – 9 June 1949*, UN Doc. A/CN.4/13 (1949), para. 21.

<sup>91</sup> Brierly's first report was filed on 6 April 1951 and the *Genocide Opinion* was published the following month on 28 May.

<sup>92</sup> J.L. Brierly, *Report on Reservations to Multilateral Conventions*, UN Doc. A/CN.4/41, reprinted in ILC Yearbook, Vol. II, UN Doc. A/CN.4/SER.A/1951/Add.1 (1951) (*1951 Report on Reservations*), p. 3, para 8.

existing UN and Pan-American practices were both of recent growth in light of the fact that multilateral conventions were a relatively new phenomenon having only appeared in the latter part of the nineteenth century.

Brierly contended that the ILC's ultimate challenge in developing a rule of general applicability was reconciling the two main principles overshadowing the debate which were the desirability of maintaining the integrity of the convention and the desirability of the widest possible application.<sup>93</sup> He also noted that '[n]o single rule on the subject of reservations [could] be satisfactory in all cases because treaties are too diversified in character.'<sup>94</sup> Brierly reported that the very nature of some treaties, such as the UN Charter, would not accommodate reservations at all because states must become parties on an equal and unqualified basis while conventions establishing 'detailed regulations of a technical or humanitarian character' might allow very narrowly limited reservations.<sup>95</sup> Thus the Commission report provided model reservation clauses and also suggested that it provide 'guidance as to the practice which should be followed...when the text of a treaty is silent on the subject' as appropriate in light of the ICJ's impending opinion.<sup>96</sup>

After considering the initial ILC report on reservations together with *Genocide Opinion*, the UNGA requested that for future conventions the UN Secretary-General should 'continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents' and then to communicate the documents to concerned states leaving each of them 'to draw legal consequences' about the reservations, thus departing from the ILC's suggestion to retain the UN Secretary-General's former practice with minor modifications.<sup>97</sup> In light of this move by the UNGA, the ILC appears to have grabbed the opportunity to be proactive in its review of reservations and its subsequent reports indicated a greater depth of review of the topic.

The ILC's remit from the UNGA had asked for its opinion 'both from the point of view of codification and from that of the progressive development of

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<sup>93</sup> Brierly, *1951 Report on Reservations*, pp. 3-4, paras. 11-13, foreshadowing the integrity versus universality debate which continues to this day.

<sup>94</sup> *Ibid.*, p. 4, para. 14.

<sup>95</sup> *Ibid.*, p. 4, para. 15.

<sup>96</sup> *Ibid.*, p. 4, para. 16.

<sup>97</sup> Waldock, *1962 Report on the Law of Treaties*, p. 77.

international law' thus, unlike the ICJ, it was not strictly limited to review of reservations to the Genocide Convention and the Commission therefore felt 'at liberty to suggest the practice which it consider[ed] the most convenient for States to adopt for the future.'<sup>98</sup> In its 1951 report to the UNGA following the delivery of the *Genocide Opinion*, the ILC indicated the difficulty in applying the subjective 'object and purpose test' created by the majority in the *Genocide Opinion* and determined that it was not suitable to apply generally to multilateral conventions due largely to the fact that it was 'reasonable to assume that...parties regard the provisions of a convention as an integral whole, and that a reservation to any of them may be deemed to impair its object and purpose.'<sup>99</sup> The intrinsically subjective nature of drawing such distinctions between provisions of a convention seemed, in 1951, an insurmountable obstacle to the application of the object and purpose test to the Commission with Brierly at the helm of its investigation into reservations.

In the early days of the study the ILC proposed that negotiating states should include in the text of a treaty the following information:

- (a) How and when reservations may be tendered;
- (b) Notifications to be made by the depositary as regards reservations and objections thereto;
- (c) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;
- (d) Time limits within which objections are to be made;
- (e) Effect of the maintenance of an objection on the participation in the convention of the reserving State.<sup>100</sup>

There was a clear desire to put the onus of providing a detailed, treaty-specific reservation regime on the negotiating states. Notably absent from the list above was a facility for evaluating the compatibility of reservations. This omission reflects the inexperience of the international legal community with reservations.

Lauterpacht succeeded Brierly in 1952 with the *Genocide Opinion* still fresh on the mind of the international community. Lauterpacht's primary draft for a general reservations rule prohibited all reservations except those agreed to by all

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<sup>98</sup> *Report of the ILC to the UNGA on the work of its third session*, UN Doc. A/1858, in ILC Yearbook, vol. II, A/CN.4/48 (1951) (*1951 Report on third session*), p. 126, para.17.

<sup>99</sup> ILC, *1951 Report on third session*, p. 128, para. 24.

<sup>100</sup> *Ibid.*, p. 129, para.27.



parties to the treaty.<sup>101</sup> This rule reflected the preference for integrity of a convention and encapsulated what Lauterpacht viewed as existing law in light of the Secretary-General's practice. However, recognising the ILC's role in progressing international law he included alternative draft rules that offered a solution somewhere between the unanimity rule practiced by the Secretary-General and the absolute sovereignty principle advocated by many states. His draft rules provided greater safeguards against the misuse of power by states in formulating reservations. These safeguards were evident in the Pan-American rule and each of Lauterpacht's alternative draft proposed a tacit acceptance rule whereby a state would be deemed to have accepted the reservation if it had not objected within three months.<sup>102</sup>

Following Lauterpacht's election to the ICJ, the Special Rapporteur mantle was taken up by Fitzmaurice in 1955. Unable to find entirely common ground across the work already completed by his predecessors on the general topic of the Law of Treaties, he reviewed the same materials on reservations that had been utilised before to develop his own thoughts on the issue. He specifically indicated that the previous work had been far too general in nature and would not suffice to handle situations that tended to arise in practice.<sup>103</sup> Fitzmaurice had previous experience addressing the reservations issue as the agent for the United Kingdom who submitted its written statement to the ICJ on legal issues surrounding reservations to the Genocide Convention. The United Kingdom's position was reflected in his initial report which indicated that as a fundamental rule, reservations should only be allowed if tacitly or expressly accepted by all interested states and under no circumstances should reservations pertaining to dispute resolution procedures be allowed.<sup>104</sup> Fitzmaurice also promoted the idea of 'acquiescence *sub silentio*', which equated to tacit acceptance in the absence of an objection within three months of circulating a reservation.<sup>105</sup> Under his draft articles on reservations an objection would prevent the reserving state from becoming a party to the convention unless the reservation was withdrawn, thus though the time within which a non-reserving state could object was

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<sup>101</sup> H. Lauterpacht, *Report on the Law of Treaties*, UN Doc. A/CN.4/63 (1953), reprinted in ILC Yearbook, 1953, Vol. II, UN Doc. A/CN.4/SER.A/1953/Add.1 (1953) (*1953 Report on the Law of Treaties*), p. 91 art. 9.

<sup>102</sup> Lauterpacht, *1953 Report on the Law of Treaties*, pp. 91-92.

<sup>103</sup> ILC Yearbook, vol. II, UN Doc. A/CN.4/101 (1956), p. 106, para 3.

<sup>104</sup> *Ibid.*, Art. 37(4).

<sup>105</sup> *Ibid.*, p. 115, Art. 39(2).

shortened an objection had far greater effect. Fitzmaurice advocated the use of the ICJ or another named international tribunal as a means of settling differences on the permissibility of reservations and his draft articles prohibited all reservations to dispute settlement procedures.<sup>106</sup>

A key to determining the derivative value of a reservation is establishing what type of treaty is being subjected to the reservation. Of the Special Rapporteurs, Fitzmaurice was by far the most concerned with the idea of classifying treaties according to their form, subject matter or object as well as whether they were law-making or normative,<sup>107</sup> though his preoccupation seems to have stemmed from his micro-analysis of the legality of the object of a treaty. As noted by Fitzmaurice in his third report on the law of treaties there are three different types of treaties: (1) treaties made up of reciprocal obligation ‘with rights and obligations for each [state] involving specific treatment at the hands of and towards each of the others [states] individually’<sup>108</sup> (reciprocal treaties); (2) treaties made of interdependent obligations which were non-reciprocal ‘where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties’<sup>109</sup> (interdependent treaties); and (3) treaties whose entire schedule of obligations are integral to the agreement and non-reciprocal ‘where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others’<sup>110</sup> (integral obligation treaties). Each of these was further dependent on considerations of the subject matter or object and whether they were law-making or normative. Human rights treaties today tend to be characterised as ‘collective interest’ treaties, which would fall into the final ‘integral obligation’ category outlined by Fitzmaurice.

Under Fitzmaurice the ILC also began to move away from the idea of a binding law on treaties as the end product of the years of study dedicated to the subject preferring instead ‘a code of a general character’<sup>111</sup> which would embody

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<sup>106</sup> G.G. Fitzmaurice, *Report on the Law of Treaties*, UN Doc. A/CN.4/101 (1956) (1956 Report on the Law of Treaties), p. 115, art. 37, para. 4.

<sup>107</sup> Fitzmaurice, *1956 Report on the Law of Treaties*, p. 108, art. 8.

<sup>108</sup> G.G. Fitzmaurice, *Third Report on the Law of Treaties*, UN Doc. A/CN.4/115 (1958) (*1958 Report on the Law of Treaties*), p. 27, Art. 18, para. 2.

<sup>109</sup> Fitzmaurice, *1958 Report on the Law of Treaties*, pp. 27-28, Art. 19.

<sup>110</sup> *Ibid.*, pp. 27-28, Art. 19.

<sup>111</sup> Waldock, *1962 Report on the Law of Treaties*, p. 29.

extremely detailed rules addressing every eventuality pertaining to the Law of Treaties. Other changes during Fitzmaurice's tenure as Special Rapporteur included a reversion to the more liberal Pan-American rule with respect to the juridical effects of ratifications subject to reservations and the affirmation of reservations as acts inherent to state sovereignty,<sup>112</sup> however, the Commission later changed its mind under Waldock and in 1962 reported that the Pan-American rule would not be suitable for application to multilateral conventions generally<sup>113</sup>.

In 1961 Waldock was appointed the fourth (and what would be final) Special Rapporteur on the Law of Treaties following Fitzmaurice's election to the ICJ. Concurrent with the appointment of Waldock, the ILC departed from the previously held idea that the Law of Treaties study would culminate in merely an expository statement on the law surrounding treaties and instead began to envisage that its efforts would serve as the basis for a multilateral convention.<sup>114</sup> As Waldock immediately noted in his first report, the topic of reservations was 'of special complexity and difficulty' as evidenced by the preoccupation of the ICJ, the ILC, the UNGA and the OAS with the topic for the previous eleven years. He also noted that despite limiting its opinion to the specifics of the Genocide Convention, the ICJ had expressed its general attitude on several issues surrounding reservations in its *Genocide Opinion* and these should be duly considered in the Commission's work; the general points relevant for the present purposes were:

- (a) In its treaty relations a State cannot be bound without its consent and consequently no reservation can be effective against any State without its agreement thereto.
- (b) The traditional concept, that no reservation is valid unless it has been accepted by all the contracting parties without exception, as would have been required if it had been stated during the negotiations, is of undisputed value.
- (c) Nevertheless, extensive participation in conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected

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<sup>112</sup> ILC Yearbook, vol. I, UN Doc. A/CN.4/124 (1959), p. 116, para. 49.

<sup>113</sup> Waldock, *1962 Report on the Law of Treaties*, p. 75.

<sup>114</sup> *Ibid.*, pp. 29-30.

- by certain States, go so far as to admit the reserving State as a party to the convention *vis à vis* those States which have accepted it.
- (d) In the present state of international practice it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the Contracting States are prohibited from making certain reservations. The character of a multilateral convention, its purposes, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.
  - (e) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits it to be stated that such a rule exists; indeed, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.<sup>115</sup>

Using these general principles derived from the *Genocide Opinion* and the vast amount of views accumulated, Waldock quickly set about the task of finalising a draft convention on the Law of Treaties that would include default rules for the interpretation of reservations. The Law of Treaties study had been continually sidelined for the previous eleven years due to the urgency of other topics being considered by the ILC. However, in 1962 the first comprehensive draft convention was completed. Unfortunately for subsequently developed human rights treaties, Waldock departed from Fitzmaurice's concentration on the type of treaty except to the extent that the final document would address only multilateral treaties irrespective of whether they were made up of reciprocal, interdependent or integral obligations and also without taking into account the subject matter or object or whether they were law-making or normative.

### 3.1 SUMMARY

The draft articles on reservations ultimately submitted to the UNGA in 1966 addressed reservations in Articles 18 – 22, the complete text of which can be found in Annex I. In developing the rules guiding reservations, the ILC ultimately expanded the ICJ's approach outlined in the *Genocide Opinion* by taking the Court's

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<sup>115</sup> Ibid., pp. 74-75.

tiered system under the object and purpose test and applying it to *all* multilateral treaties. Thus, the ILC rejected the idea that the subject-matter or type of treaty required different considerations and took the completely opposite view from its thoughts on the object and purpose test expressed a decade before when it commenced its review of the law of treaties. The change in the views of the ILC that resulted in shifts in its approaches over the course of the study can be attributed to both the change of rapporteurs and also a change in state preferences.<sup>116</sup> The Commission's ultimate position specifically ignored the ICJ's limitation of the *Genocide Opinion* to law-making treaties with a humanitarian subject-matter. The next section will introduce the residual reservations rules ultimately adopted as part of the new convention that would become the universal governor of the law of treaties.

#### 4 THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES

The many years of research, analysis and debate within the ILC and UNGA culminated in the 1969 Vienna Convention on the Law of Treaties<sup>117</sup> (Vienna Convention) and was followed by the 1978 Vienna Convention on Succession of States in Respect of Treaties<sup>118</sup> and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations<sup>119</sup>. Because the reservations regime as applied in the context of this research project deals with conventions between states, the analysis is limited to the 1969 Vienna Convention and will not address any particularities associated with the subsequent conventions. To be precise in defining the parameters of this project, the problems associated with reservations will rarely arise in the context of treaties embodying reciprocal obligations thus the treaties in which the gap in the reservation regime reveals itself are those types embodying non-reciprocal obligations which are typically social, law-making or institution building treaties where there are no rights or obligations owed between states. Non-reciprocal treaties often include the following subject-matter: environmental, human rights, organisational, etcetera, and generally fall into the

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<sup>116</sup> Swaine, 'Reserving', 314; Redgwell 'Universality or Integrity?', 253.

<sup>117</sup> 1155 UNTS 331, 23 May 1969.

<sup>118</sup> 1946 UNTS 3, 23 Aug. 1978.

<sup>119</sup> UN Doc. A/CONF.129/15, 21 Mar. 1986 (not yet in force).

‘integral obligation’ treaty as described by Fitzmaurice. As noted by the ILC in numerous reports leading to the development of the Vienna Convention, its application is limited to multilateral treaties. Because bi-lateral treaty negotiations operate much like contract negotiations, the default regime of the Vienna Convention is not necessary, especially in the context of reservations as there is no question as to whether a reservation has been accepted or not because a bi-lateral treaty will not be binding unless the other state party to the treaty accepts the reservation.

#### 4.1 THE VIENNA CONVENTION RESERVATIONS REGIME

Vienna Convention Articles 19–23 constitute the modern approach to reservations under international law and are the rules that are the focus of this thesis in their application to reservations to human rights treaties. The term ‘modern’ is used because prior to the adoption of the Vienna Convention the rules of international law with respect to reservations were markedly different as discussed in the previous sections. It is also important to note that though the reservations rules are found in a treaty that does not have universal membership,<sup>120</sup> the Vienna Convention is generally acknowledged as the codification of customary international law governing treaties.<sup>121</sup> The Convention operates under the presumption that ‘a treaty in force is binding upon the parties and must be performed by them in good faith’ (Article 26). This presumption is based on the principle of *pacta sunt servanda* which is a general principle of international law.

Reservations are generally not prohibited by the Vienna Convention—a state may seek to adjust certain provisions of a treaty in their application to itself. This is often a requirement of a domestic parliament or legislature.<sup>122</sup> If a treaty does not specifically address reservations then the fall-back rules are the Vienna Convention articles. Most pertinent to this study are the following articles, but the complete text of the reservations regime can be found in Annex II:

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<sup>120</sup> As of Jul. 2011 there were 111 States Parties with Libya being the most recent to accede on 22 Dec. 2008, see UN Treaty Collection at <http://treaties.un.org>.

<sup>121</sup> W.A. Schabas, ‘Time for Innovation and Reform’, 46.

<sup>122</sup> A. Aust, *Modern Treaty Law and Practice*, 2d ed. (CUP, Cambridge 2007), pp. 133-34; Swaine, ‘Reserving’, 312; O. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935, 1952.

*Article 19 – Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

*Article 20 – Acceptance of and objection to reservations*

1. A reservation expressly authorized 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 organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

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 a 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.

*Article 21 – Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

- (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

- (b) modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
  3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

As can be seen from the text of the reservations rules, the Vienna Convention is indifferent to particular subdivisions of international law and creates a 'one-size-fits-all' approach for addressing reservations. It specifically 'attempts to enunciate principles of treaty law that are applicable to all types of treaty...and is concerned primarily with the instrument in which the obligation is expressed, rather than with the content of those obligations.'<sup>123</sup> This thesis is specifically concerned with the following aspects of these reservation articles as it is the situation which results once they have been applied that facilitates the lacuna in the law that bears upon the ultimate answer as to whether the Vienna Convention rules adequately govern reservations to human rights treaties. Article 19 outlines that a state may generally formulate a reservation when the reservation is not prohibited by the treaty and is compatible with the object and purpose of the treaty. Reflecting on the observations of Ruda,<sup>124</sup> Redgwell points out that Article 19 is a restraint upon state action because a reservation that is incompatible cannot be made.<sup>125</sup> In practice, however, this view has been less clear-cut than Redgwell observes.

Acceptance of and objection to reservations are governed by Article 20 which provides that an objection does not preclude entry into force of the treaty between the objecting and reserving states unless expressly indicated by the objecting state (Article 20(4)(b)). Article 20(5) further notes that unless the treaty provides an alternative, all reservations will be deemed accepted if there are no objections at the end of twelve months thus incorporating the tacit acceptance rule. Article 21 governs the legal effect of reservations and provides that a reservation will modify the

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<sup>123</sup> M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL 489, 494.

<sup>124</sup> J.M. Ruda, 'Reservations to Treaties' (1975-III) 97 Recueil des cours 146.

<sup>125</sup> C. Redgwell, 'The Law of Reservations in Respect of Multilateral Conventions' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 8; see also Hathaway, 'Do Human Rights Treaties Make a Difference?', 1952 et seq.



relations between the reserving state and the state parties accepting the reservation to the extent of the reservation and that the provision affected by the reservation will not apply between the reserving state and any objecting state not opposing entry into force of the treaty between the two, reflecting the Pan-American approach.

The reservation articles adopted as part of the Vienna Convention made a few minor grammatical changes to several paragraphs and two important changes to the text that was proffered by the ILC.<sup>126</sup> Article 20(4)(b) and Article 21(3) each reversed the presumption of admissibility of a reservation by placing the onus on the non-reserving states to formulate an objection in order to prevent a state that has formulated an impermissible reservation from becoming a party to the treaty and an incompatible reservation from being accepted. The draft text of Article 20(4)(b) (draft Article 17(4)(b)) proposed that '[a]n objection by another contracting State to a reservation *precludes* the entry into force of the treaty as between the objecting and the reserving States unless a contrary intention is expressed by the objecting State' (emphasis added). The adopted text corresponding to this draft phrase inserted 'does not preclude' in place of the draft version using 'precludes'. Therefore, a treaty will automatically enter into effect between reserving and objecting states unless the objecting state specifically indicates the opposite.<sup>127</sup> Similarly, the wording proposed by draft text of Article 21(3) (draft Article 19(3)) read '[w]hen a State objecting to a reservation agrees to consider the treaty in force 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,' however, the adopted text replaced 'agrees to consider the treaty in force' with 'has not opposed the entry into force'. Both changes reflect the increasingly liberal view of the growing UNGA<sup>128</sup> which diverged from the more conservative ILC though it, too, had radically changed its reservations stance over the course of its sixteen year review. This point as to whether a treaty is in force between two states and the ease with which a reserving state can become a treaty party is not particularly revolutionary, yet the impact of the reversed

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<sup>126</sup> See Annex I for the *Revised Draft Articles on the Law of Treaties*, UN Doc. A/CN.4/L.117 and Add.1, reprinted in ILC Yearbook, Vol. II, UN Doc. A/CN.4/SER.A/1966/Add.1 (1966).

<sup>127</sup> Discussed in Chapter 3.

<sup>128</sup> 110 states were represented at the second session of the UN Conference on the Law of Treaties held in Vienna, 9 Apr.- 22 May 1969. See *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, 2nd session, UN Doc. A/CONF.39/11/Add.1 (1969), pp. ix-xx.

presumption (in the context of non-reciprocal treaties with a human rights focus) and its facilitation of incompatible reservations are very significant and will be examined in the following chapters.

The Vienna Convention rules outline the object and purpose test as an objective test that must be employed in order to ascertain the compatibility of a reservation with Article 19(c). No direct guidance on what entity is to apply the test is provided by the Vienna Convention rules. Articles 20 and 21 illustrate the options *inter se* for non-reserving states and the legal effects of a reservation on the basis of an acceptance or an objection by another state. The effects, however, are premised on the fallacy that only valid reservations will produce such an effect. As will be demonstrated in Chapters Three and Four, this false assumption has resulted in an evolution in the rules that may not have been intended and created a normative gap in the law related to reservations. Bearing in mind that no guidance on the application of the test is provided, it is interesting to note that states have assumed the role of final arbiter in light of the concept of objections to *valid* reservations and thereby, almost unwittingly, validated the existence of invalid reservations as will be demonstrated in Chapter Three.

#### 4.2 TERMS OF ART

As defined by the Vienna Convention, a ‘reservation’ is:

[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 the treaty in their application to that State.<sup>129</sup>

Seemingly straightforward, this definition encompasses two elements that are essential to the undertaking of this research. First, the unilateral nature of a

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<sup>129</sup> The definition of a ‘reservation’ as defined in the 1969 Vienna Convention, Art. 2(1)(d) was reaffirmed by the ILC as part of text of the guidelines constituting the *Guide to Practice on Reservations to Treaties*, guideline 1.1, UN Doc. A/CN.4/L.779 (2011) (Finalized Guidelines). As the Guide to Practice is meant to serve international organisations as well, the definition is expanded to include such. See *Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC* at its 62nd session (see UN Doc. A/65/10 (2010)) at [http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations\\_commentaries\(e\).pdf](http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations_commentaries(e).pdf) (Draft Guide to Practice and references to ‘draft guidelines’), commentary to 1.1. Guideline 1.1.2 of the Finalized Guidelines clarifies that a reservation may be formulated in conjunction with any method of expressing consent so as to rectify the non-exhaustive list offered by the Vienna Convention definition.

reservation means, just as the term implies, that it is in relation only to the state formulating the reservation that obligations under a treaty will be modified, subject to the rules of acceptance and objection, not the treaty as a whole. Treaty law<sup>130</sup> and ICJ jurisprudence<sup>131</sup> outline that states accepting the reservations will also benefit from the reservation in dealings between the reserving and accepting states commensurate with the traditional concept of reciprocity.<sup>132</sup> This situation results from the nature of multipartite treaties and their enumeration of reciprocal obligations and consequential analogy to contract law. Due to the unique circumstances of human rights treaties and the fact that the very nature of multilateral, inter-state treaties does not afford non-states negotiating power, the beneficiaries of human rights treaty obligations are immediately put at a disadvantage because they cannot counter the state's modification of obligations.

The second element is that the statement must be made in concert with a state's consent to be bound to the treaty. Thus, the act of the state binding itself to the treaty occurs simultaneously with its reservation of obligations. The significance of this point will be discussed in later chapters.

To clarify exactly which reservations perpetuate the problem addressed by this research it is necessary to illustrate the key terms of reference to reservations in light of Vienna Convention articles for without understanding the nuances of the terminology, which are oftentimes admittedly limiting, a technical analysis of treaty law related to a very fine point of law would be rendered somewhat futile. During its eighteen year study on 'Reservations to Treaties' there were exhaustive discussions within the ILC over the use of terms regarding reservations. While accepting the original Vienna Convention definition of 'reservation' (discussed above) it was made clear in the commentary on draft guideline 1.6 that any statement meeting the definition, whether valid or invalid, permissible or impermissible, would still retain

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<sup>130</sup> Vienna Convention, Art. 21(1)(b). See Annex II for complete text.

<sup>131</sup> *Norwegian Loans*, 1957 ICJ Reports 9, 6 Jul. 1957, p. 27: 'The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949.'

<sup>132</sup> See also Finalized Guidelines, guideline 4.2.4 which reflects the principle of reciprocal application of the effects of reservations.

the designation of ‘reservation’.<sup>133</sup> This is important in that it is necessary for a statement to be designated a ‘reservation’ as a precondition for the application of the Vienna Convention reservations regime established by Articles 19-23 or a treaty specific reservations regime. The designation as a reservation has no preconceived notion of its validity, permissibility or compatibility.

In its re-examination of the Vienna Convention reservations regime, the ILC revisited the use of ‘formulate’ and ‘make’ and ultimately left these terms to be assessed as they have been throughout the existence of the Vienna Convention. Remaining true to the definition of reservation under Article 2(1)(d) but contemplating its examination under Article 19, a state ‘formulates’ a reservation at the time of signature or instrument ratification and this term has no bearing upon whether it will be otherwise acceptable under the other reservations rules. The Vienna Convention rules are automatically engaged if a treaty is silent as to the ability to formulate reservations. Therefore, the designation as a reservation must occur before a decision can be taken as to ‘whether it is valid, that its legal scope can be evaluated and its effect can be determined’<sup>134</sup> under Articles 19-23.

A reservation is ‘established’ or ‘made’ for purposes of Vienna Convention Article 21, thus inducing a legal effect, if three conditions are met: (1) it must meet the conditions of formal validity as set out in Vienna Convention Article 23; (2) it must be permissible pursuant to Article 19; and (3) it must have been accepted by another Contracting State.<sup>135</sup> Thus, ‘established’ or ‘made’ reservations are valid, permissible and accepted. A notable problem with established or made reservations is that condition number two requires a definitive answer and condition three can be satisfied by silence. Thus from the outset of the reservation question there are shortcomings with the ILC terminology.

Once a statement has been identified as a reservation, the next step toward its establishment is to then determine whether the reservation is ‘valid’. There was

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<sup>133</sup> A. Pellet, *Tenth report on reservations to treaties*, UN Doc. A/CN.4/558 (2005) (*Tenth report on reservations*), p.2, para. 3; see also J. Rainne, ‘Elements of Nordic Practice 2004: The Nordic Countries in Co-ordination’ (2006) 75 *Nordic Journal of International Law* 121, 134.

<sup>134</sup> Draft Guide to Practice, guideline 1.6, commentary, para. 4. See previous reports: Pellet, *Tenth report on reservations*, p.2, para. 3, recalling his observations in ILC Yearbook 1999, vol. II (Part Two), pp. 133-34, para. 3 of the commentary; ILC Yearbook 1998, vol. II (Part Two), para. 3 of the *Third Report*, UN Doc. A/CN.4/491/Add.3 (1998), paras. 158, 179.

<sup>135</sup> ILC Yearbook 2010, UN Doc. A/65/10 (2010), ch. IV, para. 48; see, also, Guide to Practice, 3.1, commentary para. 6, and 4.1.

debate within the ILC regarding the use of ‘impermissible’ or ‘permissible’ to characterise reservations examined under the Vienna Convention due to a concern that the term ‘impermissible’ could be interpreted as leading to the author state’s responsibility as contemplated by the draft articles on the state responsibility for internationally wrongful acts.<sup>136</sup> In 2005 the Special Rapporteur opted to use the terms ‘invalid’ or ‘valid’ in lieu of ‘impermissible’ or ‘permissible’ to discuss the viability of reservations formulated and examined under the Vienna Convention rules and it is the perceived neutrality of ‘valid’ that carried through to the final Guide to Practice.<sup>137</sup> Validity is the objective standard of assessment as to whether a formulated statement is in fact a reservation pursuant to the definition found in Vienna Convention Article 2(1)(d). Validity/invalidity/valid/invalid are the terms adopted by the ILC to:

...describe the intellectual operation consisting in determining whether a unilateral statement made by a State ... and purporting to exclude or modify the legal effect of certain provisions of the treaty in their application to that State ... was capable of producing the effects attached in principle to the formulation of a reservation.<sup>138</sup>

The Vienna Convention operates from a presumption that all formulated reservations are valid.<sup>139</sup> Validity of a reservation depends on whether it satisfies the procedural conditions stipulated by Articles 21(1) and 23 and is generally a non-issue as these preconditions are overseen by treaty depositaries and not subject to the will of other states. For a reservation to be valid it must also be permissible under Article 19.

The permissibility test includes evaluating the reservation under 19 (a), (b) and (c) as applicable.<sup>140</sup> This is the basis of the flexible Vienna Convention reservations system.<sup>141</sup> Most pertinent to the present research is the determination of

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<sup>136</sup> ILC Yearbook 2002, UN Doc. A/57/10 (2002), p. 114, para. 7; Pellet, *Tenth report on reservations*, paras. 1-9; Draft Guide to Practice, guideline 1.6, commentary, para. 2 and guideline 2.1.8, commentary, para. 7. The terms ‘admissible’ and ‘inadmissible’ induced equal debate over the assumption of the engagement of state responsibility, see Pellet, *Tenth report on reservations*, p. 3,-4, paras. 5, 7.

<sup>137</sup> Pellet, *Tenth report on reservations*, p. 4, para. 8; Draft Guide to Practice, guideline 1.6, commentary, para. 2.

<sup>138</sup> ILC Yearbook 2006, UN Doc. A/61/10 (2006), p. 324, para. (2) of the general introduction to Part 3 of the Draft Guide to Practice.

<sup>139</sup> Draft Guide to Practice, 3.1, commentary para. 5.

<sup>140</sup> *Ibid.*, 3.1.3 and commentary.

<sup>141</sup> *Ibid.*, 3.1.3, commentary paras. 2, 3.

compatibility pursuant to Article 19(c). A reservation must be compatible with Article 19(c) in order to be permissible. This is true even if the reservation is permissible with respect to Articles 19(a) or (b). Thus, if a reservation is incompatible with 19(c), it will be impermissible and, arguably, without legal effect.<sup>142</sup>

In the literature on reservations the terms *admissible*, *permissible* and *valid* have all been used to describe those reservations that are not prohibited by a convention (Article 19(a)) or are not out-with the subject-matter of those specifically permitted by a convention (Article 19(b)). Conversely, *inadmissible*, *impermissible* and *invalid* have each been used to designate reservations formulated when a convention specifically prohibits reservations full-stop or where the reservation is outside the scope of those that are allowed by the convention and are *per se* void. The reservations encompassed by paragraphs (a) and (b) of Article 19 are not the focus of this research therefore it will not address potential validity issues of reservations formulated under these circumstances even though the clarity of these rules is open to discussion as noted by Pellet.<sup>143</sup>

It is Article 19(c) where the legal impasse persists when there is a reservation to a non-reciprocal obligation that is deemed permissible by some states and impermissible by others as there is no definite conclusion as to whether it will create the intended legal effect nor will there be concrete consequences as to what happens to the reservation. Reservations that are compatible<sup>144</sup> with the object and purpose test are permissible and therefore the terms *admissible*, *permissible* and *valid* have been used by various authors to describe these reservations. Those reservations that do not overcome the test are *incompatible* and therefore have been described as *inadmissible*, *impermissible* or *invalid*. For the purposes of this research, the terms ‘permissible/impermissible’ or ‘compatible’/‘incompatible’ will be used to the extent possible when discussing reservations formulated and examined under Article 19(c). Clearly there will be many references to other works published prior to the ILC’s

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<sup>142</sup> This is a contested point. Not all observers are convinced by the automatic nullity of an impermissible reservation, see, J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 *Nordic Journal of International Law* 179; compare with D.W. Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976-77) 48 *BYBIL* 67.

<sup>143</sup> Pellet, *Tenth report on reservations*, pp. 10-24.

<sup>144</sup> ‘Compatible’ is a term derived directly from Vienna Convention, Art. 19(c).

decision on terminology to be used in the Guide to Practice on Reservations to Treaties, however, where possible terms will conform to the terms indicated but no assumption as to legal effects should be derived unless expressly stated.

In the context of reservations to human rights treaties it is not only reservations that are incompatible with Article 19(c) that lead to normative ambiguity. Sweeping reservations and reservations which subordinate treaty obligations to domestic law also cause incoherence in the treaty system. These reservations are generally challenged on the basis of incompatibility with Article 19 due to the imprecise reference to domestic law. These types of reservations will be referred to under the umbrella of ‘invalid’ reservations as necessary. To keep terminology in line with the current ILC position, throughout this work the term *formulate* and its derivatives will be used to identify any reservation regardless of this author’s preliminary thoughts on validity. *Established* or *made* will be used if the reservation is deemed valid and has been accepted in some form, a topic that will receive much attention in subsequent chapters due to issues surrounding the permissibility of reservations under Article 19(c) thus the use of ‘valid’ will not necessarily imply that the reservation is permissible due to the inconclusiveness surrounding this test.

#### 4.3 OTHER POINTS OF NOTE REGARDING THE VIENNA CONVENTION

##### 4.3.1 UN SECRETARY-GENERAL AS DEPOSITARY

As noted previously, prior to the *Genocide Opinion*, the presumption exercised by the UN Secretary-General was that reservations were not allowed unless there were specific references to them in the text of a treaty or where all previously ratifying parties accepted the proposed reservation. By including a default reservations regime to accommodate reservations made in the absence of treaty-specific guidelines, the Vienna Convention effectively reversed the presumption.<sup>145</sup>

As depositary, the Secretary-General should allow the provisions of the specific treaty to guide his acceptance of an instrument of ratification, such as if all reservations are prohibited or specific reservations are allowed,<sup>146</sup> however in practice these are not the instances which implicate the default reservations regime.

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<sup>145</sup> Pellet, *Tenth report on reservations*, p. 5, para. 10.

<sup>146</sup> Aust, *Modern Treaty Law*, p. 157.

Where the reservations are specifically addressed by a treaty, the Secretary-General will allow the pertinent provisions to guide his practice.<sup>147</sup> A more stringent practice is set forth in the *Summary of Practice* of the Secretary-General whereby the Secretariat will not accept (not allow deposit of the instrument containing the reservation) nor transmit any reservation to states parties if the treaty forbids any reservation or if the reservation has been made contrary to a specific prohibition against reservations but there must be *prima facie* evidence that the reservation specifically contravenes such a treaty-specific rule.<sup>148</sup>

It is treaties without a specific reservations provision that create uncertainty and as recently as 1999 the Secretary-General questioned whether it behoved the office to follow the 'flexible' system over a more 'rigid' system.<sup>149</sup> Though technically the Secretary-General could question compliance of a reservation with the object and purpose test the reality is that states have objected to this as a function of the depositary therefore the common practice is that all reservations are forwarded to states parties with no preliminary determination of compatibility or comment except as noted above.<sup>150</sup> Though not necessary to evaluate for the purposes of this research, it is interesting to note that Secretary-General also seems to disregard the twelve-month time limit imposed by Vienna Convention Article 20(5) on objections to reservations and continues to circulate those objections made even after the time limit, though calling them 'communications'.<sup>151</sup> As noted by Swaine, this questions whether a lack of objection within the time limit is no more than a presumption of acceptance rather than actual acceptance.<sup>152</sup> The Secretary-General also generally ignores the possibility that a potentially impermissible reservation could negate the reserving state's consent to be bound and what this effect might have on the entry into force of a treaty.<sup>153</sup> The possibility of consent to be bound to the treaty being

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<sup>147</sup> UN Secretary-General, UN Doc. ST/LEG/7/Rev.1 (1999), paras. 189-96;

<sup>148</sup> *Ibid.*, paras. 191-93.

<sup>149</sup> *Ibid.*, paras. 165-167. For an overview of recent practice see P.T.B. Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations' (2005) 99 AJIL 433.

<sup>150</sup> Aust, *Modern Treaty Law*, p. 158.

<sup>151</sup> See UN Secretary-General, UN Doc. ST/LEG/7/Rev.1 (1999), p. 49, para. 167.

<sup>152</sup> Swaine, 'Reserving', 319, relying on F. Horn, *Reservations and Interpretive Declarations to Multilateral Treaties* (North-Holland, Amsterdam 1988).

<sup>153</sup> Aust, *Modern Treaty Law*, p. 158



voided upon the determination that a reservation is invalid is another issue avoided by the Secretary-General.<sup>154</sup>

#### 4.3.2 RESERVATIONS BY ANOTHER NAME

In addition to reservations states will often attach ‘declarations’, ‘understandings’ or ‘explanations’ to their instruments of ratification. These sometimes complex statements do have a legitimate legal purpose and are typically meant to be statements of clarification or explain the state’s interpretation of the pertinent provision though they may amount to a reservation if the statement modifies the legal effect of the treaty in its application to that state (Article 2(1)(d)–definition of a reservation).<sup>155</sup> States often have political reasons for not referring to a statement attached to its instrument of ratification as a ‘reservation’,<sup>156</sup> which is why the key to determining whether a statement is a reservation or a genuine interpretative declaration,<sup>157</sup> understanding or explanation is to examine the substance. These statements by another name that result in a reservation in practice are sometimes referred to as ‘disguised reservation’ or a ‘qualified interpretative declaration’.<sup>158</sup> Rather than parsing the legal nomenclature of particular statements, using the ordinary rules of interpretation this research focuses on the substantive content and effect of unilateral statements that alter the obligations of states when acceding to or ratifying a treaty and will collectively refer to these statements as ‘reservations’ in keeping with the Vienna Convention definition.

#### 4.3.3 DEROGATION

‘Derogation’ is a term of art and effectively refers to a legal manoeuvre by a state seeking to suspend its obligations once a treaty is already in force between states

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<sup>154</sup> Ibid., p.129; C. Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’ (1997) 46 ICLQ 390, 410.

<sup>155</sup> See M. Coccia, ‘Reservations to Multilateral Treaties on Human Rights’ (1985) 15 California Western International Law Journal 1, 10.

<sup>156</sup> R.St.J. Macdonald, ‘Reservations under the European Convention on Human Rights’ (1988) 21 *Revue belge de droit international* 429, 439.

<sup>157</sup> The ILC addresses the distinction between a reservation and an interpretative declaration in the Finalized Guidelines, guidelines 1.2 and 1.3.

<sup>158</sup> See generally, D.M. McRae, ‘The Legal Effect of Interpretative Declarations’ (1978) 49 *BYBIL* 155.

parties<sup>159</sup> due to an extreme situation within its borders such as a national emergency. Derogation is a matter of treaty interpretation and there is no test to determine at what point the threshold necessary to warrant derogation is met. In the UN human rights treaty system states appear to have an unfettered right to decide what constitutes an emergency for purposes of derogation. There are no specific articles governing derogation in the Vienna Convention. However, Articles 41 (modification between certain parties) and 53 (peremptory norms) do mention derogation though the more pertinent articles are Articles 57 (suspension of treaty obligations), 61 (supervening impossibility of performance) and 62 (fundamental change of circumstances). Derogation is mentioned here because the act of derogation suffers a similar predicament to that of reservations in that there is no defined mechanism for review for determination as to whether derogation is unlawful under a treaty.<sup>160</sup> In fact, at least one Special Rapporteur on the Law of Treaties, Fitzmaurice, considered derogation as an integral part to determining exactly what constituted a reservation.<sup>161</sup>

## 5 FINAL OBSERVATIONS

Because all domestic 'legal systems correspond to some extent to the prevailing climate of opinion in the society in which they operate'<sup>162</sup> there is a valid and essential role played by reservations in order for governments to participate in the international arena which is increasingly regulated by treaties. It might even be said that reservations are an absolute necessity in the multilateral treaty process. However, the reservations regime that exists today was built upon a series of missed opportunities to provide greater guidance to facilitate the appropriate use of reservations. Employing one general rule to evaluate treaties of all types fails to take into account the nuances between different types of multilateral treaties.

The ICJ played a seminal role in establishing the current regime with its introduction of the arbitrary object and purpose test in the *Genocide Opinion*. This

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<sup>159</sup> A. Aust, *Handbook on International Law*, 2d ed. (CUP, Cambridge 2010), pp. 228.

<sup>160</sup> See generally R. Higgins, 'Derogations under Human Rights Treaties' (1976-77) 48 BYBIL 281.

<sup>161</sup> Fitzmaurice, *1956 Report on the Law of Treaties*, p.115-16, Art. 37, para. 1 and Art. 40.

<sup>162</sup> J.F. Murphy, *The United States and the Rule of Law in International Affairs* (CUP, Cambridge 2004), p. 71, quoting M. Akehurst, *A Modern Introduction to International Law*, 5th ed. (Allen and Unwin, London 1984), p. 8.

test was all but absent from ILC reports during the years that it studied the Law of Treaties with the exception of the concluding reports under the final Special Rapporteur, Waldock. Notwithstanding, the object and purpose test ultimately played a pivotal role in the draft reservation articles that were submitted as part of what would become the Vienna Convention on the Law of Treaties. Unfortunately, the application and effects of the test were not continued to their logical end and this created a lacuna in the rules governing reservations. In the next chapter the Vienna Convention rules are examined specifically in their application to non-reciprocal, normative treaties that were developed as part of the UN human rights treaty regime in order to determine whether this regime adequately governs reservations to human rights treaties.

### CHAPTER THREE

#### RESERVATIONS IN PRACTICE

The previous chapter introduced the rules which are applicable to reservations to all multilateral treaties, including human rights treaties. The current chapter serves to illuminate the uncertainty surrounding the application of these rules to the core UN human rights treaties. Specifically it will examine different types of reservations and the response to each in light of the application of the default reservations regime in order to assess whether the Vienna Convention adequately governs reservations to human rights treaties. Applying the Vienna Convention rules to the different types of commonly made reservations to human rights treaties reveals that in many instances there is no clear legal effect and no consequence for a determination of impermissibility, both essential issues in pursuit of an answer to the primary research question: does the Vienna Convention adequately govern reservations to human rights treaties?

Many commentators have declared that reservations are a necessary evil and one that the human rights movement must learn to accept as at least treaty membership brings many countries into the fold that would otherwise be out-with any margin of accountability for human rights protection.<sup>1</sup> However, this view fails to consider the reality that many states, even with treaty ratification, remain largely outwith the accountability regime specifically due to reservations. To appreciate the magnitude of the systematic problems associated with reservations it is necessary to examine not only the number of reservations made but also, and arguably more importantly, the types of reservations being made. Many reservations currently in place are phrased so that the extent of a state's commitment is entirely unable to be ascertained.

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<sup>1</sup> A. Seibert-Fohr, 'The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties' in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004); M. Morris, 'Few Reservations about Reservations' (2000) 1 *Chicago Journal of International Law* 341; J. McBride, 'Reservations and the Capacity to Implement Human Rights Treaties' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997).

Despite declarations that human rights are ‘universal, indivisible and interdependent and interrelated’<sup>2</sup> it cannot be claimed that all provisions of human rights treaties carry the same weight, which was a primary contention in the ICJ’s *Genocide Opinion*.<sup>3</sup> However, there is a strong argument that in order to accomplish the goal of a human rights treaty there must be adherence to a large number of separate provisions and a reservation to even one of the obligations might thwart this goal.<sup>4</sup> Before a reservation can be evaluated it is essential to determine the nature of the right protected and the extent to which this obligation of protection may be altered by a reservation. Once the right affected is determined, the most obvious problematic situation is where a reservation is clearly contrary to the object and purpose of the related convention. No less troublesome are reservations which are sweeping or generally cite the incompatibility of a certain obligation with domestic law and/or custom. Additionally, as indicated in Chapter Two, specifically indicated ‘declarations’ will often actually be disguised reservations<sup>5</sup>, which adds a further layer of jargon through which reservations must be assessed. Thus reservations practice must be concerned with the rights subject to the reservation and the formulation of the reservation, as well as the legal effect of a determination on the permissibility of a reservation which will be addressed in Chapter Five.

The first section of this chapter introduces the various types of rights set forth in human rights treaties and is followed by an analysis of different reservations and how they affect these rights. The third section provides a brief overview of the reservations attached to the core human rights treaties. Section four considers the sovereignty conundrum which bears on the effect of invalid reservations. For the purposes of developing the primary research question addressed by this thesis,

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<sup>2</sup> See, for example, Vienna Declaration and Programme of Action, UN World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993), Art. 5.

<sup>3</sup> See, generally, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ Reports 15, 28 May 1951 (*Genocide Opinion*); P.-H. Imbert, ‘Reservations and Human Rights Conventions’ (1981) 6 Human Rights Review 28, 28.

<sup>4</sup> F. Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Final working paper*, UN Doc. E/CN.4/Sub.2/2004/42 (2004) (*2004 Final working paper*), para. 50.

<sup>5</sup> The ILC has suggested that no less than one-third of ‘interpretative declarations’ were actually disguised reservations. See ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 447, but has attempted to clarify the distinction between reservations and interpretative declarations in its Guide to Practice, see *Reservations to Treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties*, UN Doc. A/CN.4/L.779 (2011) (Finalized Guidelines), guidelines 1.2 and 1.3.

particular attention in this chapter is paid to which types of reservations violate the Vienna Convention and whether the rules provide finality with respect to an invalid reservation?

## 1 GENERAL HUMAN RIGHTS OBLIGATIONS AND PROTECTIONS

Inherent in the international human rights regime is a level of flexibility which is necessary so that the expression of rights can be successfully integrated into the various structures of government and society. Recognition of this flexibility is typically expressed by permissible limitations to rights, protections and freedoms as set forth by the wording of the obligation or the absence of wording indicating restrictions may be made. The majority of rights, protections and freedoms found in human rights treaties fall into this category of general human rights. Thus they will be susceptible to limitation pursuant to the domestic laws of the state party as long as the general object and purpose of the treaty is not contravened and the limitation is no greater than necessary. Additionally, these rights may be subject to derogation during states of emergency that threaten the life of a nation and they may be the subject of a reservation.

There is a great deal of overlap among the core treaties with respect to a large number of rights. This is no doubt a reflection of the overlapping and interrelated characteristics of human rights as envisioned by the Universal Declaration on Human Rights. Non-discrimination and equal recognition before the law are threaded into the text of each of the treaties. Equality between men and women was established as a free-standing international right by the ICCPR, as well as ICESCR, many years prior to the conclusion of CEDAW. Freedom from torture, in addition to being a peremptory norm enshrined in customary international law, is a recurring obligation and is protected not only by the CAT but also by ICCPR Article 7, CRC Article 37, CRPD Article 15, and ICRMW Article 10. Protection of the freedoms of thought conscience and religion are found in CERD Article 5(vii), ICCPR Article 18 and ICRMW Article 12. Though these are just a few of the rights repeatedly appearing in the core treaties, the message is clear: human rights considerations permeate every aspect of governance.

In many instances it is not enough for the state to refrain from violating a right. It must also actively work to imbed human rights obligations into domestic law and prevent third parties from violating these rights. This idea is typically referred to as the difference between positive and negative obligations of the state and this idea, as well as the fact that obligations are imposed on states, not individuals, must be recognised. A positive obligation will require the state to take action with a statement framed similar to the following: ‘State parties shall accord to women equality with men before the law’ (CEDAW Article 15(1)). Thus it is incumbent on State Parties to take action, most likely in the form of introducing or repealing legislative measures, to ensure equality among the sexes. Alternatively, a negative obligation will mandate that a state refrain from engaging in certain behaviour, for example: ‘State parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’ (CRC Article 37). The state in this example must not engage in behaviour amounting to that which is prohibited and it must also prevent third parties from engaging in such behaviour. Recognising the difference between positive and negative obligations owed by the state reinforces the reality that states must be proactive in preventing violations on both the public and the private level.<sup>6</sup>

### 1.1 NON-GENERAL HUMAN RIGHTS

There are several ways to classify rights set forth in human rights treaties. The ICJ initiated the idea that all rights were not equal in the 1951 *Genocide Opinion* when contemplating reservations to obligations under the Genocide Convention. The Court ultimately determined that rights could be classified as major or minor.<sup>7</sup> As indicated

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<sup>6</sup> See, for example, the discussion by the CAT Committee, *General Comment No. 2*, UN Doc. CAT/C/GC/2 (2008), para. 15: ‘The Convention imposes obligations on State parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State Party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.’

<sup>7</sup> Chapter 2, section 2.

previously in Chapter Two, this distinction was important with respect to reservations for the simple fact that major rights were those against which no reservation could be made. However, as further human rights treaties were concluded the simplicity of this two-tiered distinction developed in response to the *Genocide Opinion* proved untenable.

Rights, protections and freedoms are expressed independently and, also, as inter-related, tangible obligations. While it is obvious that there are a number of stand-alone rights that could be termed ‘major’ and ‘minor’, a much more attractive method of distinction lays in categorising by the nature of the potential limitations. It is by assessing this potential that the significance of the right can be framed within the reservations debate. Absolute rights and non-derogable rights, and the variations within both categories, provide important points of reference against which the validity of reservations can be measured.

## 1.2 ABSOLUTE RIGHTS

As with all legal writing, each word of a human rights treaty is carefully chosen in order to convey a certain legal meaning. The flexibility found in general human rights obligations does not, however, extend to all rights. There are certain rights which states may not limit in any way, make reservations which would vitiate the right, nor from which they may derogate even in a state of emergency. It is these ‘absolute’<sup>8</sup> rights that citizens of the world rely upon in times of peace and, more importantly, in times of crisis. The key to assessing whether a right is absolute is found in the wording as it will be phrased so that it will be incapable of being interpreted in a way that allows any limitation upon the right.<sup>9</sup> ICCPR Article 8 presents a definitive example of an absolute right from which there is no deviation allowed in any form whether by reservation or derogation: ‘No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.’<sup>10</sup> The wording leaves no room for alternative interpretation and it is clear that slavery in

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<sup>8</sup> Many commentators also refer to these as fundamental rights but for the sake of clarity and to avoid confusion with preconceived notions based on the idea that all human rights are fundamental this category of rights will be discussed as ‘absolute’ rights.

<sup>9</sup> A. Conte and R. Burchill, *Defining Civil and Political Rights: the Jurisprudence of the United Nations Human Rights Committee*, 2d ed. (Ashgate Publishing, Surrey, UK 2009), p. 41.

<sup>10</sup> This prohibition is also found in ICRMW Art. 11.



any form is prohibited. The same conclusion must be drawn from the wording of the positive obligation found in ICCPR Article 16 which provides that '[e]veryone shall have the right to recognition everywhere as a person before the law.' ICCPR State Parties are therefore obligated to ensure that all persons are given legal recognition. Absolute rights are most prominent within the ICCPR but there is no lack of examples in other conventions.<sup>11</sup>

In *General Comment No. 2* of 2008, the CAT Committee, the treaty body which oversees the CAT, addressed several issues regarding the implementation of the CAT including the status of the absolute rights protected by Article 2, the positive obligation on states to prevent torture, and Article 16, the positive obligation to prevent cruel, inhuman or degrading treatment or punishment. The Committee reiterated that the CAT specifies that there are no circumstances, no matter how exceptional or exigent, which will justify the use of torture, including a state of emergency or a state of war, and that torture may never be used to protect the public safety or avert emergencies.<sup>12</sup> Largely inspired by the treatment of individuals pursuant to post-11 September 2001 anti-terrorism measures, the CAT Committee left no room for movement on the issue of this absolute right by unambiguously stating that torture can never be employed even if the aim is to prevent a terrorist inspired catastrophe. Whether in regard to the CAT, the ICCPR or another convention, absolute rights as set forth in human rights treaties may not be compromised for any reason.

### 1.3 NON-DEROGABLE RIGHTS

A non-derogable right must be distinguished from an absolute right. Non-derogable rights may not be *suspended* in any situation, including states of emergency, though certain non-derogable rights may be *limited* by law in some circumstances when it is necessary to protect other members of society or the life of a nation. It must be noted that absolute rights are also non-derogable but are not subject to limitation. In the instance that a right is termed non-derogable but may be subject to limitation, the term may seem somewhat a misnomer; however, the full right may not be suspended and the limitations must be included in any notice of derogation filed with the UN

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<sup>11</sup> Further examples include CRPD, Art. 15; CAT, Art. 2(1); CRC, Art. 37; ICCPR, Arts. 15, 16.

<sup>12</sup> UN Doc. CAT/C/GC/2 (2008), para. 5.

Secretary-General, the depositary for all of the core human rights treaties. The core treaties will often indicate non-derogable rights within one of the treaty articles as exemplified by ICCPR Article 4(2) which specifies eight non-derogable obligations under that covenant.<sup>13</sup> Other treaties also contain these provisions yet some give far less guidance regarding derogation, such as ICESCR Article 5(2) which provides:

No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Not all of the core treaties include a derogation provision thus those which are silent on the issue, such as CRC and CEDAW, must resort to Vienna Convention provisions<sup>14</sup> and address the topic as necessary on a case-by-case basis. Due to the nature of these rights they are most often the subject of complaints.

Outwith the treaty texts themselves the concept of non-derogable rights was tackled by the 1984 Siracusa Principles<sup>15</sup> and though they primarily addressed rights protected by the ICCPR the general idea is easily transferable to each of the core treaties. In part, the Siracusa Principles outlined the basic non-derogable rights:

No State Party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.<sup>16</sup>

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<sup>13</sup> No derogation is permitted from Arts. 6, 7, 8(1), 8(2), 11, 15, 16 or 18.

<sup>14</sup> Vienna Convention Arts. 41 (modification between certain parties) and 53 (peremptory norms) specifically mention derogation, however, more pertinent articles are Arts. 57 (suspension of treaty obligations), 61 (supervening impossibility of performance) and 62 (fundamental change of circumstances).

<sup>15</sup> Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1984) Annex.

<sup>16</sup> *Ibid.*, para. 58.

A further attempt to clarify the concept of non-derogable rights was made by the CAT Committee in 2008 in the aforementioned *General Comment No. 2* (above, section 1.2). Though the CAT contains no derogation provision, the CAT Committee took up the non-derogation issue declaring the non-derogable status of Article 2 (prohibition against torture, which is also an absolute right), Article 15 (prohibiting confessions extracted by torture from being admitted as evidence, except against the torturer) and Article 16 (the positive obligation to prevent cruel, inhuman or degrading treatment or punishment).<sup>17</sup> The Committee's main emphasis was that certain rights, no matter what the situation or the cost, were not to be trodden upon and, therefore, were non-derogable.

On the relationship between non-derogable obligations and reservations it has been viewed as 'reasonable to assume...that if derogations are not permitted, reservations are not permitted either',<sup>18</sup> however, this has not proved to be the case in practice and it cannot be said that 'reservations are prohibited *because* derogations from the article in question are not permitted'<sup>19</sup> unless a treaty specifically indicates such a rule. In her report on reservations to human rights treaties, Hampson concedes that equating non-derogable rights to non-reservable rights is an 'oversimplification'.<sup>20</sup> The fact that a right may be non-derogable at its core will not necessarily preclude a reservation to the application of the right.

In 1983, the Inter-American Court of Human Rights opined that a reservation that would suspend a non-derogable fundamental right must be deemed incompatible with the American Convention on Human Rights yet it conceded that restrictions to non-derogable fundamental rights would not necessarily fail the object and purpose test.<sup>21</sup> Where a derogation provision exists it will be important to determine whether the obligations indicated as non-derogable are capable of limitation. Non-derogable rights which may not be limited will include absolute rights that may also be

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<sup>17</sup> UN Doc. CAT/C/GC/2 (2008), para. 6.

<sup>18</sup> Imbert, 'Reservations and Human Rights Conventions', 31. Imbert ultimately rejects the automatic correlation between non-derogability and incompatibility, see next note.

<sup>19</sup> *Ibid.*, 32 (emphasis original).

<sup>20</sup> Hampson, *2004 Final working paper*, para. 52.

<sup>21</sup> *Restrictions on the Death Penalty (Articles 4(2) and (4) of the American Convention on Human Rights)*, Advisory Opinion, OC-3/83 (8 Sept. 1983), IACtHR (Ser. A) No. 3 (1983), para. 61.

peremptory norms,<sup>22</sup> such as the prohibition against slavery, while other rights, such as the right to life<sup>23</sup> protected by ICCPR Article 6, will be susceptible to limitation during states of emergency despite being non-derogable.

Limitations contemplated during derogation from a treaty must be distinguished from those limitations already allowed pursuant to conditions set forth in an article. In *General Comment No. 29* the Human Rights Committee (HRC), the treaty body which oversees the ICCPR, noted the importance of recognising the two distinct concepts involved in a limitation pursuant to derogation and a limitation pursuant to normal implementation of an obligation.<sup>24</sup> Article 18 of the ICCPR illustrates the point in paragraph 3 which indicates that the non-derogable right to freedom of thought, conscience and religion may be limited by law as necessary to protect the public and the freedom of others at any time; however, in the event of a state of emergency, this particular right may be the subject of further limitations though it cannot be discarded entirely. Thus, in a proclaimed and recognised state of emergency, the derogating state may place restrictions upon a non-derogable right but only as far as necessary and in proportion to the exigencies of the situation when the right is not also an absolute right. It is this idea of proportionality, an all but unchecked limitation, which has given the HRC pause in many instances where past derogations have been irreconcilable to the circumstances and this has been noted in their views and observations on State Parties' reports. Regardless of the limitations or the proportionality factor, the HRC has stressed that the primary goal of a derogating state should be the 'restoration of a state of normalcy where full respect for the Covenant can again be secured,'<sup>25</sup> a goal which is applicable to all of the core treaties in the event of derogation. An interplay between non-derogability and reservations is not an entirely untenable assertion despite some commentators' views

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<sup>22</sup> This thesis does not enter the debate specifically on the ability of states to make reservations to rules of customary international law or peremptory norms. See the ILC discussion in the Draft Guide to Practice, *Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC* at its 62nd session (see UN Doc. A/65/10 (2010)) and can be found at [http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations\\_commentaries\(e\).pdf](http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations_commentaries(e).pdf) (Draft Guide to Practice), 3.1.9 and commentary. See also Finalized Guidelines, 4.4.3.

<sup>23</sup> The right to life is also protected by CRC, Art. 6; ICRMW, Art. 9; CRPD, Art. 10.

<sup>24</sup> UN Doc. CCPR/C/21/Rev.1/Add.11, (2001).

<sup>25</sup> *Ibid.*, para 1.

to the contrary,<sup>26</sup> however it is not a topic to be taken further here and has been introduced only to reinforce the difficulty in clarifying which obligations may legitimately be subject to reservations.

#### 1.4 DEROGABLE RIGHTS

The alternative of a provision expressly defining a non-derogable right is one which permits derogation during a state of emergency where the life of a nation is expressly threatened. ICCPR Article 4(1) presents one example where a human rights treaty expressly recognises derogation to general rights during a state of emergency but emphasises the caveat that the derogation may only be to the extent absolutely necessary for the exigent situation. Derogation must also adhere strictly to the principle of non-discrimination in that no distinction may be made solely on the basis of race, colour, sex, language, religion or social origin though distinctions based on citizenship may be allowed. The concepts of necessity and non-discrimination pertaining to derogation extend to the remaining core treaties even where derogation is not specifically addressed. If and when derogation is proposed by a state party, notice of precisely which rights the derogation will affect and the duration of the derogation must be communicated to the treaty depositary so that it may be circulated to all state parties.

#### 1.5 SUMMARY

The range of rights enumerated in human rights treaties is highly varied with some being subject to limitation while others are, arguably, not. With this simplified explanation of the different types of rights susceptible to reservations, the different types of reservations made to such rights will next be examined. Particular attention must be paid to the fact that the validity of a reservation is often questionable for a variety of reasons, not the least being the existence of contrary views on compatibility with Article 19(c) of the Vienna Convention. As will be revealed in the following section, structural ambiguity, as well as unascertainable effect, also mar

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<sup>26</sup> C.A. Bradley and J.L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149 *University of Pennsylvania Law Review* 399, 425, fn. 121. The HRC also addressed this in *General Comment No. 24* and rejected an automatic conclusion of incompatibility of reservations made to non-derogable provisions, see UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 10. The ILC has attempted a more nuanced view, see Finalized Guidelines, 3.1.5.4.

the determination of reservation validity when applying the Vienna Convention rules to reservations to human rights treaties.

## 2 RESERVATIONS<sup>27</sup>

It is generally accepted that the law of treaties is premised on reciprocal contractual relationships between state parties.<sup>28</sup> However, because human rights treaties embody obligations towards individuals, whose well-being is the responsibility of the state, rather than obligations between state parties, there has been a general apathy by states in their duty to guard the integrity of these instruments.<sup>29</sup> Where states anticipate difficulty in guaranteeing every article of a human rights treaty the possibility of making reservations presents the opportunity for them to join the treaty without being held responsible for compliance with the agreement in its entirety.<sup>30</sup> As noted by the HRC, full compliance is more desirable 'because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being'.<sup>31</sup> Acknowledging that reservations facilitate agreement on many levels, it has also been suggested that they splinter multilateral agreements into a network of bilateral and plurilateral agreements.<sup>32</sup> Though true when considering general multilateral treaties, the picture is not entirely accurate in the context of human rights treaties. The beneficiaries of human rights treaties are people, not states, thus there are no revised reciprocal agreements and states will not treat reserving states differently from non-reserving states. This is true even in the event that an invalid reservation is formulated, as will be discussed below.

Conceding that the practice of making reservations cannot be entirely eliminated it is important to understand how various types of reservations work in

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<sup>27</sup> Unless otherwise noted, all reservations and objections introduced in this chapter can be found in the UN Treaty Collection under *Status of Treaties* at <http://treaties.un.org> (UN Treaty Collection).

<sup>28</sup> E.T. Swaine, 'Reserving' (2006) 31 *Yale Journal of International Law* 307, 342; C. Redgwell, 'The Law or Reservations in Respect of Multilateral Conventions' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 18; L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995), pp. 65-72; Imbert, 'Reservations and Human Rights Conventions', 33.

<sup>29</sup> Noted by Theo van Boven, member of CERD in the forward of Lijnzaad, *Ratify and Ruin*, p. v-vi.

<sup>30</sup> McBride, 'Reservations and the Capacity to Implement Human Rights Treaties'.

<sup>31</sup> HRC, *General Comment No. 24*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 4.

<sup>32</sup> D. Hylton, 'Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations' (1994) 27 *Vanderbilt Journal of Transnational Law* 419, 440.

practice within the current international regime. Practice has shown that acceptance of reservations to human rights treaties is entirely by tacit acceptance, not by a positive statement of acceptance.<sup>33</sup> The legal tension exists where a reservation has been both the subject of an objection and an acceptance by tacit acceptance. International law is ‘characteristically diffident as to the peculiarities of human rights conventions as a specific class of treaties’<sup>34</sup> despite the fact that international human rights law is generally accepted to be a distinct sub-discipline of international law. This must be understood from both the point of view of the reserving state and the other state parties, including those who object to a reservation. The interrelationships between the obligations, reservations and states’ treatment of both represents an amalgamation of rules of customary international law, treaty law, state practice, and, an aspect that must not be forgotten, international relations. Changing the domestic status quo is decidedly easier said than done. This is reflected by states in a multitude of situations including failure to ratify a treaty and anticipatory implementation problems as evidenced by reservations. A genuine conflict arises when states use reservations as a means of avoiding the obligations altogether.<sup>35</sup> Recognising that the status quo is not easily changed, the overarching purpose of a human rights treaty is to advance these rights on the domestic level and this objective is clear to all potential state parties from the outset thus change should be anticipated.

The Vienna Convention reservations regime recognises that not all reservations are prohibited and states are free to make permissible reservations. Permissible reservations may, however, still be the subject of an objection though this will generally be a political objection rather than a substantive objection based on invalidity. It is objections to permissible reservations that are envisioned by Articles 20 and 21 of the Vienna Convention regime. States often make reservations in order to bide time until changes on the domestic level can be implemented or to maintain specific features of domestic law and provided there is ample specificity, these will not necessarily offend the object and purpose of a treaty. The Vienna Convention only proscribes reservations which are prohibited by the treaty itself,

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<sup>33</sup> HRC, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 17.

<sup>34</sup> M. Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 EJIL 489, 492.

<sup>35</sup> See, e.g., Y. Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’ (2000) 71 BYBIL 181, 209-12.

reservations made contrary to a treaty provision indicating only specified reservations may be made and reservations which contravene the object and purpose of the treaty.<sup>36</sup> The initial and second conditions placed upon a state's ability to make reservations are rather easily recognised and explicitly fail for want of compliance with the rules of treaty law as well as the treaty itself. It is the third condition provided by Article 19(c) of the Vienna Convention that breeds multifarious permutations of reservations that either blatantly contravene the object and purpose of a treaty—even in the eye of the most casual observer—or that, on their face, appear not to violate specific reservations rules but in practice present dilemmas as to actual obligations owed and, consequently, enforcement issues.

In light of the various categories of rights, the application of specific types of reservations to the various rights reveals the interesting lacunae in reservations practice with respect to human rights. Initially there are those reservations which can easily be said to violate the object and purpose of a treaty and are the reservations to which objections are most often made. Two further detrimental categories of reservations to human rights treaties include those broad or vague references to application of a treaty only so far as it will be in concert with domestic law or local custom and those which subordinate specific obligation to existing domestic laws or customs. For clarity's sake, the former category will be classified as 'sweeping' reservations and the latter as 'subordination' reservations. The various assessment difficulties resulting from states' reservation practices, however, are not limited to these two reservation categories. The following presents a text based assessment of reservations juxtaposed against various rights and highlights examples of how the disarray resulting from applying the Vienna Convention reservations rules to human rights treaties undermines the international human rights regime.

## 2.1 TREATY GUIDANCE ON RESERVATIONS

Before analysing the different types of reservation it is important to introduce the guidance, or lack thereof, provided by the core human rights treaties on reservations. CERD Article 20, CEDAW Article 28, CRC Article 51, ICRMW Article 91 and CRPD Article 46 each impose restrictions on the ability of states to make

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<sup>36</sup> Vienna Convention, Art. 19; D. Shelton, 'State Practice on Reservations to Human Rights Treaties' [1983] Canadian Human Rights Yearbook 205, 209.



reservations to those treaties while the remaining four treaties are silent on the issue. These five reservation provisions generally prohibit reservations that are contrary to the object and purpose of the treaty. However, CERD goes a step further to include any reservation ‘which would inhibit the operation of any of the bodies established by this Convention’ or that is considered incompatible by two-thirds of the State Parties (the mathematical test). For treaties without a reservation provision, the Vienna Convention articles will be the fall-back guide as to how to interpret reservations. Regardless of whether there is a treaty-specific article guiding reservation evaluation or, as is the case with four of the treaties, the Vienna Convention rules serve as the fall-back rules, the test is the same: reservations contrary to the object and purpose of the treaty are prohibited.

Thus it is left to the states to work out what the object and purpose of a treaty is because, as will be discussed in Chapter Five, it is rarely explicitly defined. It can therefore be said that the guidance offered by the treaties that do have reservation provisions is not particularly useful. Considering the various types of rights a logical assumption would be those rights framed as absolute would go directly to the heart of the treaty—the *raison d’être*<sup>37</sup>—and therefore be incapable of being the subject of a reservation. Distilling the *raison d’être*, which practically speaking is another term referring to the object and purpose of the treaty, is generally guided in large part by the preamble and the wording of the obligations themselves. When evaluating the CAT, for example, the object and purpose, or *raison d’être*, is easy to ascertain. The purpose is the prevention of torture and cruel, inhuman or otherwise degrading treatment or punishment and each of the obligations is designed to further the objective of the CAT to eliminate these activities. Thus, reservations affecting rights framed in absolute terms, or those rights that are more peripheral but important in providing a means of fulfilling the over-arching obligations, are equally important.

Contrasting CEDAW with the CAT, it is clear that the *raison d’être* is to establish equality among women and men. To realise this aim, the first sixteen

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<sup>37</sup> The term was originally employed by the ICJ, see *Genocide Opinion*, p. 21, but has since been referenced whenever the compatibility of reservations with human rights treaties are discussed. See, for example, S. Linton, ‘ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children’ (2008) 30 *Human Rights Quarterly* 436, 446; R. Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’ (2002) 96 *AJIL* 531, 534.

articles set out a veritable laundry list of areas where governments should be compelled to eradicate discrimination pursuant to the Convention. Depending on the state, a particular obligation, such as equal access to social security programmes (Article 14(c)), may decidedly be a goal to which a state aspires, not only in the context of women, but also of men; however, it may be entirely unobtainable at the time of ratification, thus the state will make a reservation against said article. If the state maintains the other obligations then it would seem to be sustaining the object and purpose of the treaty. Other obligations, however, such as Article 10 on equal access to education, is an obligation that is tenable if the state has a functioning education system already in place but it has previously limited access to males, such has often been the case in developing countries. Allowing females equal access would be essential to achieving gender equality and reservations against this obligation would not be acceptable. The notable point regarding the treaties use of the object and purpose test as a ‘guide’ on reservations is that the test has effectively been ignored in practice, as states continue to formulate reservations without regard for the object and purpose of the treaty, which will be demonstrated below.

## 2.2 PERMISSIBLE RESERVATIONS

Though universal acceptance and implementation of all obligations set forth in human rights treaties is the goal to which the human rights movement aspires, the reality is that perfect compliance cannot always be immediately effected. Permissible reservations are those which do not offend Vienna Convention Article 19 or any other provision of the convention that might render the reservation invalid. To this extent the ILC’s proposal to ensure reservations are detailed sufficiently so as to give guidance as to the implications on the domestic level must be observed.<sup>38</sup> This accommodates reservations made by states which have legitimate domestic reasons for reserving against an obligation, such as the will of the domestic population or compliance with specific laws enacted by a legitimate, functioning government.

The reservation made by Belize to ICCPR Article 12(2) is a good model of this practice: ‘The Government of Belize reserves the right not to apply paragraph 2 of Article 12 in view of the statutory provisions requiring persons intending to travel

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<sup>38</sup> *Commentary upon proposed Reservations to Treaties, Draft Guideline 3.1.11*, UN Doc. A/62/10 (2007), p. 109; *Draft Guide to Practice, commentary to 2.1.9*; *Finalized Guidelines*, 2.1.2.

abroad to furnish tax clearance certificates.’ Belize thus provides the precise domestic legal reason why it cannot comply with the obligation in full. The restriction is minimal and corresponds to a legislative measure in operation in the state. Austria also provides a succinct and detailed reservation to ICCPR Article 10(3) whereby it reserves the right to detain juvenile prisoners together with adults under 25 years of age who give no reason for concern as to their possible detrimental influence on the juvenile. Both examples are detailed enough to provide complete information as to how the state will comply with the obligation. In these instances, the state party’s compliance is altered but the object and purpose of the treaty remains intact.

### 2.3 CLEARLY INCOMPATIBLE RESERVATIONS

Though typically rare in other types of multilateral treaties, there are instances in the area of human rights treaties where a state formulates a reservation that is clearly incompatible with the object and purpose of the treaty and is therefore impermissible. Such was the case with one of the reservations made by Pakistan when it ratified the ICCPR on 23 June 2010. Among its reservations to nine articles of the ICCPR, Pakistan included the following reservation to Article 40: ‘The Government of the Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant.’ Article 40 establishes the periodic reporting supervision of the HRC and outlines the requirements of the State Parties to submit reports. The establishment of the periodic reporting system is a core feature of the UN human rights treaty system therefore there can be no doubt as to the incompatibility of this reservation with the object and purpose of the treaty. As stated by Austria:

...the Committee provided for in Article 40 of the Covenant has a pivotal role in the implementation of the Covenant. The exclusion of the competence of the Committee is not provided for in the Covenant and in Austria’s views incompatible with the object and purpose of the Covenant.<sup>39</sup>

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<sup>39</sup> UN Treaty Collection, ICCPR, Objection by Austria with regard to the reservations made by Pakistan (24 Jun. 2011).

Other objections<sup>40</sup> echo the fundamental and essential role of the periodic reporting system in the implementation and overall operation of the ICCPR and question Pakistan's commitment to the Covenant.

Pakistan also reserved against Articles 6, 7 and 18, which according to ICCPR Article 4(2), are non-derogable and, as indicated above in section 1.3, also raises the spectre of incompatibility. Several states have objected to this catalogue of reservations made by Pakistan based on incompatibility with the object and purpose of the treaty.<sup>41</sup> The largest number of objections made to any formulated reservation to the ICCPR have been recorded against Pakistan's reservations and the objecting states include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, the United Kingdom and the United States. None of the objecting states precluded the entry into force of the treaty with Pakistan and four states, Canada, Latvia, Slovakia and Sweden, indicated that Pakistan would not benefit from its reservations in its relations with these states.<sup>42</sup> Herein lays the most significant problem in practice, the ICCPR obligations are not for the benefit of the State Parties but instead flow directly to the citizens of the State Party. Therefore, there is no change in the relations between the states. Notably, notwithstanding its objection based on the incompatibility of the reservations with the object and purpose of the ICCPR, the US included that the treaty would be enforce between the two 'except to the extent of Pakistan's reservations'<sup>43</sup> which effectively places Pakistan in the same position in which it would be if the reservations were valid.<sup>44</sup> This introduces another of the inconsistent effects of the application of the Vienna Convention rules to reservations

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<sup>40</sup> UN Treaty Collection, ICCPR, objections to Art. 40 by Pakistan by Australia, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Netherlands, Portugal, Slovakia, Spain, Sweden, Switzerland, UK and US.

<sup>41</sup> UN Treaty Collection, ICCPR, objections to the reservations by Pakistan based on incompatibility with the object and purpose of the treaty: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, UK and US (including those objections filed outwith the twelve-month time-limit specified for notification of objections under Vienna Convention, Art. 20(5)).

<sup>42</sup> This indicates adherence to the severability doctrine which will be discussed in Chapter 5.

<sup>43</sup> UN Treaty Collection, Objection by the US with regard to the reservations made by Pakistan (29 June 2011), (technically, the US objection was outwith the twelve-month time-limit specified in Vienna Convention, Art. 20(5)).

<sup>44</sup> This position will be addressed in Chapter 5.

to human rights treaties. It must be noted that Pakistan made a similar catalogue of reservations to CAT which met with almost identical tide of international rebuke as discussed here.<sup>45</sup>

Even without the objections by states it would be difficult to argue that a reservation to ICCPR Article 40 is consistent with the object and purpose of the treaty. Pakistan has not responded to the objections nor has it withdrawn any of the reservations despite the overwhelming opposition. While the objecting states have in some instances detailed their views on the legal effect of the reservations on the relations *inter se*, the Vienna Convention lacks any guidance on the consequence for such determinations of incompatibility when the benefits and obligations do not flow between state parties.

#### 2.4 SWEEPING RESERVATIONS

A frequently used reservation formula is a brief statement limiting the application of the treaty as a whole insofar as the obligations are compatible with domestic law or customs, including religion and religious law. These are often referred to as 'sweeping' reservations.<sup>46</sup> As noted by the ILC in 2007, states often put these forward to preserve the integrity of specific norms of their internal law despite the fact that reservations based on general reference to internal law, or sections of the law, make determining compatibility of the reservation with the treaty impossible.<sup>47</sup> Sweeping reservations prohibit any successful analysis by another state party as to whether the reservation complies with the object and purpose of the treaty. These

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<sup>45</sup> See UN Treaty Collection, Pakistan's reservations to CAT and objections made by a multitude of states.

<sup>46</sup> The term 'sweeping' used to identify this particular type of reservations is attributed to Redgwell, see C. Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)' (1997) 46 ICLQ 390, 391, but is echoed by other writers including F. Hampson, *Working paper submitted pursuant to Sub-Commission decision 1998/113*, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (1999 *Working paper*), para. 25(iii). Other authors have referred to this type of reservation as an 'across-the-board' reservation, see, for example, K. Zemanek, 'Alain Pellet's Definition of a Reservation' (1998) 3(2) *Austrian Review of International & European Law* 295. The ILC also references the 'across-the-board' reservation in its Draft Guide to Practice, 1.1.1 and accompanying commentary.

<sup>47</sup> ILC, UN Doc. A/62/10 (2007), p. 109; see also K. Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations' [2000] *Max Planck Yearbook of United Nations Law* 1, 4; Redgwell, 'Reservations and General Comment No. 24(52)', 397-98.

reservations effectively result in the reserving state taking on no actual international obligations, which is one of the serious problems with the practice.<sup>48</sup>

El Salvador's reservation to the CRPD represents a prime example of a sweeping reservation that thwarts any determination as to the extent to which it complies with the object and purpose of the treaty:

The Government of the Republic of El Salvador signs the present ...to the extent that its provisions do not prejudice or violate the provisions of any of the precepts, principles and norms enshrined in the Constitution of the Republic of El Salvador, particularly in its enumeration of principles.<sup>49</sup>

The indeterminate scope of such a reservation is unacceptable for many reasons but most importantly because it would be almost impossible for another state party or a treaty body, not to mention a person subject to the jurisdiction of the author state, to ascertain precisely how the obligations will be recognised on the domestic level.<sup>50</sup> Despite the aforementioned commentary by the ILC and the obvious difficulty resulting from trying to interpret such a reservation, a large percentage of reservations to human rights treaties rely precisely on broad reservations invoking general domestic laws as a commitment escape route. These sweeping reservations denote an apathetic approach to treaty observance and have been employed time and again by a multitude of state parties to the core UN human rights treaties.

Almost as frequent as the sweeping reservation limiting compliance as far as allowed by domestic law are reservations limiting application of all treaty obligations to the extent they are permitted by local customs and/or religious practices. As pointed out by Lijnzaad, reservations based on traditional custom or religion are detrimental because they leave compliance up to the author state's discretion.<sup>51</sup> One example is Malawi's original reservation to CEDAW indicating that it would not

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<sup>48</sup> HRC, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 12; See also S. Marks, 'Three Regional Human Rights Treaties and their Experience of Reservations' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 61.

<sup>49</sup> El Salvador, Reservations to the CRPD, UN Doc. A/61/611 (2006). Austria, Czech Republic, the Netherlands, Portugal and Sweden objected to El Salvador's reservation.

<sup>50</sup> W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 *Canadian Yearbook of International Law* 39, 56-57.

<sup>51</sup> Lijnzaad, *Ratify and Ruin*, p. 86.

consider itself bound to certain articles of the Convention due to the deep-rooted nature of certain practices of Malawians where obligations would require immediate eradication of those traditional customs and practices.<sup>52</sup> This sweeping reservation exemplified the indefinite nature of Malawi's commitment to CEDAW. Fortunately, Malawi withdrew the reservation following Mexico's objection noting that the reservation impaired the treaty's purpose.

In predominantly Islamic states a sweeping reservation will often employ domestic law in conjunction with religious practice as an exception to obligation implementation. Reservations made by Oman and Malaysia to CEDAW clearly illustrate the problematic vagueness intrinsic to sweeping reservations combining the two contingencies. The first of five reservations made by Oman indicates that it will reserve the application of '[a]ll provisions of the Convention not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman'.<sup>53</sup> Any CEDAW State Party wishing to evaluate the reservation for purposes of objection would need to be well-versed in the intricacies of both Sharia and the laws of Oman in order to make an informed decision as to whether Oman is upholding its treaty obligations. An equally ambiguous reservation is the initial reservation made by Malaysia to CEDAW:

The Government of Malaysia declares that Malaysia's accession (to CEDAW) is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia law and the Federal Constitution of Malaysia.<sup>54</sup>

Malaysia went on to further specify that in light of this general reservation it was specifically not bound to a multitude of articles.<sup>55</sup> In both instances, such sweeping references to general domestic law and Sharia law clearly cannot be viewed as an attempt to fulfil CEDAW gender equality commitments, especially when it has been acknowledged by Morocco, also a primarily Islamic country, that '[e]quality of this

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<sup>52</sup> Malawi, Reservations to CEDAW, 12 Mar. 1987.

<sup>53</sup> Oman, Reservations to CEDAW, 7 Feb. 2006.

<sup>54</sup> Malaysia, Reservations to CEDAW, 5 Jul. 1995.

<sup>55</sup> Particularly Malaysia did not consider itself bound by the provisions of Articles 2(f), 9(1), 9(2), 16(1)(a), (b), (d), (e), (f), (g) or (h).

kind is considered incompatible with the Islamic Sharia<sup>56</sup> and in most situations these states' 'representative' voices are those of males.

To illustrate the perplexity caused by sweeping reservations consider the Malaysian reservation and its application to the right of equality of women before the law found in CEDAW Article 15. Malaysian federal and civil law applies to all but Sharia applies only to the country's Muslim population and the civilian authorities readily hand Sharia violators over to the Islamic court<sup>57</sup> for adjudication and the meting out of punishment. Under Sharia law women and men do not have equal rights in many areas of the law including marriage and divorce. Women may only marry Muslim men while Muslim men may marry any woman 'of the book' and a woman must have the consent of her husband to divorce while a man may divorce his wife at any time. Thus because a woman is Muslim she does not appear to be able to obtain relief in the instance that she wishes to divorce her husband and the husband will not consent. This specifically contravenes CEDAW Article 16 which establishes the equality of women and men in matters related to marriage and family. In the context of Malaysian civil law the discrepancy would be an obvious violation of CEDAW Article 16 (though it also specifically made reservations against most of the provisions of this article), and also Article 15; however, the country's deference to Sharia law, a law which does not recognise this type of equality, for a Muslim woman seeking a divorce would clearly not afford her equal recognition before the law. It must also be pointed out that Sharia law is not uniform across Muslim communities and has countless interpretations, thus further complicating interpretation of such reservations. CEDAW Article 2(f), against which Malaysia also reserved, mandates that State Parties abolish laws and customs which constitute discrimination against women but it is clear that a reservation necessitating Sharia compliance is used to avoid addressing discrimination in countries practising Sharia law. Finland and France, as well as other State Parties, objected to the Malaysian reservation on the basis that invoking internal law was a violation of international law<sup>58</sup> and because the reservation violated the object and purpose of the treaty. With or without the objections, it would be a difficult, albeit impossible, task to compare

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<sup>56</sup> Morocco, Reservations to CEDAW, 21 Jun. 1993.

<sup>57</sup> In Malaysia this is the *Syariah* Court.

<sup>58</sup> Specifically Vienna Convention, Art. 27.



each CEDAW obligation with the entirety of Sharia and general domestic law to determine exactly where the conflicts occur. Therein lays the primary problem with sweeping reservations. Malaysia's reservation to Article 2(f) was ultimately withdrawn, along with reservations to Articles 9(1), 16(b), 16(d), 16(e) and 16(h), in 1998 and at the same time it also modified certain of its previous reservations.<sup>59</sup> However, as will be demonstrated in the next paragraph, the extent to which these reservation withdrawals have made a difference are questionable, though outwith the limits of this thesis.

A further problem with sweeping reservations is that the state itself may not have a hold on how to delegate certain rights within its own domestic system. Once again referring to the Malaysian reservations to CEDAW, a recent court ruling there indicates that Malaysian federal law appears to defer to the Islamic courts when a party to a case is Muslim. Religious freedom is one such instance as seen in the case of Lina Joy, a Malay born Muslim who converted to Christianity in 1998. In May 2007, the Federal Court of Malaysia rejected her appeal to have her religion changed on her national identity card stating that renouncing the Islamic religion was a matter specifically for the Islamic court to decide.<sup>60</sup> Freedom to profess and practice religion is specifically protected by Article 11(1) of the Malaysian Federal Constitution, however, Article 160 of the same assigns all Malays the requirement of professing Islam. How then, will the Malaysian government, the entity which owes its people the obligations protected by CEDAW, approach issues of equality for Muslim women when it sends issues relating to Muslims to the Islamic courts and, as noted by Morocco, gender equality is considered incompatible with Islam? It appears from the federal ruling that Muslim women in Malaysia will not enjoy any equality that is not envisioned by the Islamic faith.

CEDAW is not the only treaty to suffer under the burden of such reservations. Qatar made a virtually identical reservation to CAT prohibiting any interpretation of the Convention that is incompatible with Islamic law. One must again beg the question how the provisions pertaining to the prohibition against torture might be qualified by Islamic law, especially considering the fact that the

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<sup>59</sup> Both France and the Netherlands objected to the modifications.

<sup>60</sup> *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & 2 Ors* 2005 [CA], Judgment, Federal Court of Malaysia, 19 Sept. 2005.

prohibition is not only an absolute right but is also enshrined in customary international law. The CAT Committee has addressed using religion or tradition as a justification for the use of torture or ill-treatment and has definitively indicated that these excuses will not in any way alter the absolute prohibition against their use.<sup>61</sup>

While it has been argued that this type of reservation is not a true reservation,<sup>62</sup> the reality is that it is precisely this formulation that is often used by states when ratifying human rights treaties. Sweeping reservations permeate the core treaties and Bayefsky has noted the substantive quandary presented by sweeping reservations related to Islamic Sharia law as they specifically counter the main purpose of human rights treaties which is to identify universal international human rights standards.<sup>63</sup> Sweeping reservations requiring compliance with domestic constitutions are no less problematic. Determining whether such reservations are compatible with the object and purpose of the treaty is all but impossible in these instances and is highly contingent on each treaty obligation in relation to every law, a potentially infinite number of tangents.

Addressing the importance of detailed references to distinct domestic laws that must be distinguished by the reservation is one of the aims of ILC's proposed Guide to Practice on Reservations to Treaties.<sup>64</sup> The types of reservations contemplated by the ILC have historically provided critical information about the constraints imposed by domestic audiences in the context of human rights, such as Islamic states' Sharia reservations and constitutional reservations made by the federated states. Sweeping reservations seriously inhibit efforts to determine how treaty obligations play out on the domestic level. While a state may argue that its sweeping reservation is in keeping with the object and purpose of a treaty it is difficult to see how any review mechanism, whether another state party, a court or a treaty body, could exercise its judgment in any way except to conclude that these types of reservations are invalid as a result of incompatibility with the object and

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<sup>61</sup> UN Doc.CAT/C/GC/2 (2008), para. 5.

<sup>62</sup> Zemanek, 'Alain Pellet's Definition of a Reservation', 296. Zemanek argues that including this type of unilateral statement under the umbrella of 'reservations' a false legitimacy is conferred where theoretically these statements are *ipso facto* incompatible with a standard setting convention.

<sup>63</sup> A.F. Bayefsky, 'Making Human Rights Treaties Work' in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community: Issues and Action*, 3d ed. (University of Pennsylvania Press, Philadelphia 2006), p. 319.

<sup>64</sup> See ILC, UN Doc. A/62/10 (2007), p. 109

purpose of a treaty or based on the general principle of law that prohibits a state from invoking internal law as a justification for non-performance of treaty obligations.

## 2.5 SUBORDINATION OF INTERNATIONAL OBLIGATIONS

In addition to sweeping reservations, another common reservation formula entails reservations subordinating specific treaty obligations to domestic law and represents another defeatist reservation practice plaguing human rights treaties. This practice is an ongoing challenge due in large part to the uncertainty inherent in some domestic systems and their lackadaisical approach to recognition of international obligations and it contributes to the reservations chasm.<sup>65</sup> Vienna Convention Article 27 specifically provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'; thus when reservation is so imprecise in its reference to internal law as to make the extent of the reservation unascertainable, objecting states will invoke Article 27 in addition to incompatibility under Article 19(c). Though reliance on Article 27 as a basis for objecting to a reservation is contested,<sup>66</sup> it is worth noting that it is not an uncommon practice<sup>67</sup>. Vienna Convention Article 26 reiterates the 'good faith' element inherent in the treaty law concept of *pacta sunt servanda*. Reading these two articles together it follows that a state party invoking a domestic law to avoid the application of a particular human rights treaty provision might not only be contrary to Article 27 but also violate the good faith principle. This obvious reading, however, is precisely that which is ignored repeatedly by a large number of states. Conflict with internal law is the incompatibility that forms the basis of many reservations.<sup>68</sup>

Subordination reservations effectively water down the reserving state's obligations and, depending on the actual realisation of the reservation on the domestic level, could equate to non-performance of treaty obligations. These policy decisions evidence the fact that states are wary of commitments that would necessitate changes to their constitutions or existing laws when in reality if becoming

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<sup>65</sup> See Hampson, 2004 *Final working paper*, para. 56.

<sup>66</sup> Finalized Guidelines, 3.1.5.5, commentary, esp. para. 4.

<sup>67</sup> See e.g., UN Treaty Collection, ICCPR, objections to reservations made by Pakistan by Australia, Austria, Belgium, Canada, Czech Republic, Finland, France, and Greece; see also Hampson, 2004 *Final working paper*, para. 56.

<sup>68</sup> *Ibid.*, para. 56; Y. Tyagi, 'The Conflict of Law and Policy on Reservations', 190 et seq; Schabas, 'Time for Innovation and Reform', 59.

a state party in both name and practice was truly the ambition of the governments they would push through the necessary changes prior to ratification.<sup>69</sup> Otherwise, the state's participation in the treaty is likely more a mere formality rather than an attempt to bring its legislation into conformity with the treaty.<sup>70</sup>

Fiji's reservation to CERD presents a common example of a subordination reservation and illustrates the blatant disregard for adherence to the Vienna Convention principles:

To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in Article 5 (c), that any law relating to land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in Article 5 (d) (v), or that the school system of Fiji may not fulfil the obligations referred to in Articles 2, 3, or 5 (e) (v), the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

Under the umbrella of this reservation, Fiji may still discriminate based on race in the areas of elections, alienation of land and in the school system. In this example, Fiji does not contemplate a future change in the law and appears unwilling to entertain progressive development in these areas though it clearly recognises the opportunity to do so as reflected in another reservation it made to CERD.

The Peruvian delegation at the UN Vienna Convention on the Law of Treaties noted the 'inadmissibility' of these types of reservations and it proposed that a subparagraph addressing this type of reservation be added to what would become Article 19, though this clearly did not find support despite early concerns that these reservations 'were tantamount to a negation of the consent to be bound'.<sup>71</sup> Shelton points out that 'general subordination reservations are the most questionable because they deny the very reason for adoption of human rights treaties: the establishment of minimum standards with which domestic laws should be brought into conformity.'<sup>72</sup> Pellet has reiterated that a state 'should not use its domestic law as a cover for not

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<sup>69</sup> Lijnzaad, *Ratify and Ruin*, p. 78.

<sup>70</sup> Imbert, 'Reservations and Human Rights Conventions', 28.

<sup>71</sup> UN Conference on the Law of Treaties, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, First session, UN Doc. A/CONF.39/11 (1969), p. 109, para. 25.

<sup>72</sup> Shelton, 'State Practice on Reservations to Human Rights Treaties', 227.

actually accepting any new international obligations'<sup>73</sup> in his commentary on the draft guideline on reservations relating to the application of domestic law despite the guideline allowing such reservations as long as the object and purpose of the treaty is not contravened.<sup>74</sup>

In theory, this problem should be dealt with by enacting the appropriate laws on the domestic level in order to provide at least the minimum protections set forth in the relevant treaty. When this objective is not achieved, however, it is more a wait-and-see approach that must be taken. Issues of compatibility are not always initially obvious and this is true in all legal systems. Reservations subordinating obligations to domestic law create a 'smoke screen' between the treaty bodies and actual implementation on the domestic level.<sup>75</sup> Therefore, the importance of having proper violation review procedures in place becomes imperative.

It must be acknowledged that some subordination reservations will be in place only as long as it takes the state to enact the appropriate domestic measures to bring the law into conformity with international obligations, sometimes referred to as a 'transitional'<sup>76</sup> reservation. Barbados' reservation to the ICCPR exemplifies this particular situation:

The Government of Barbados states that it reserves the right not to apply in full, the guarantee of free legal assistance in accordance with paragraph 3 (d) of Article 14 of the Covenant, since, while accepting the principles contained in the same paragraph, the problems of implementation are such that full application cannot be guaranteed at present.

By its reservation Barbados intimates that at some point in the future it will pursue full implementation of Article 14.<sup>77</sup> Redgwell notes that:

A temporary derogation from the full rights and obligations of the State under the treaty pending the realignment of national law does not fall

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<sup>73</sup> *Tenth report on reservations to treaties*, UN Doc. A/CN.4/558/Add.1 (2005), para. 105.

<sup>74</sup> Pellet, UN Doc. A/CN.4/558/Add.1 (2005), para. 106, draft guideline 3.1.11 'Reservations relating to the application of domestic law'; see Finalized Guidelines, 3.1.5.5 'Reservations relating to internal law'.

<sup>75</sup> Lijnzaad, *Ratify and Ruin*, p. 88.

<sup>76</sup> E.A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 *Berkeley Journal of International Law* 277, 311.

<sup>77</sup> It must be noted, however, that Barbados acceded to the ICCPR in 1973 but has yet to withdraw this reservation.

foul of the basic international law prohibitions, embodied in Article 27 of the Vienna Convention, against invoking the provisions of internal law as justification for the failure to perform international obligations...<sup>78</sup>

Legislation on the domestic level is clearly outside the scope of international law though pursuant to the obligations set forth by human rights treaties there is generally a positive obligation on state parties to develop new laws or repeal existing laws in order to bring domestic law into conformity with the international agreement. Though the aim of a human rights treaty is to improve protection, new legislation also presents a difficulty in that its implications will be more complex to assess compared to existing legislation with a track-record of implementation.<sup>79</sup>

One of the many problems arising from state parties indicating that treaty obligations will be carried out to the extent possible under the existing domestic constitution or federal law is the fact that the law on many issues will be unclear. Consider Botswana's reservation against CAT Article 1, the prohibition against torture: 'Botswana considers itself bound...to the extent that 'torture' means the torture and inhuman or degrading punishment or other treatment prohibited by Section 7 of the Constitution of...Botswana.' Botswana made an almost identical reservation to ICCPR Article 7, the prohibition against torture. Section 7 of the Constitution of Botswana provides no definition of torture and allows treatment done under the authority of any law as long as the punishment was lawful in the country immediately before the Constitution went into effect.<sup>80</sup> The prohibition against torture is an absolute right and is non-derogable under both the CAT and ICCPR. The problem with subordinating international obligations is evident in this instance as it is unclear exactly the extent to which treatment engaged in under the cloak of the state authority of Botswana operating pursuant to past lawful action will be considered in conflict with the prohibition on the international level. There is nothing to indicate whether victims of torture under international standards have the right of

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<sup>78</sup> Redgwell, 'Reservations and General Comment No. 24(52)', 400.

<sup>79</sup> Lijnzaad, *Ratify and Ruin*, p. 85.

<sup>80</sup> Section 7 reads: 'Protection from inhuman treatment: (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of this Constitution.'

redress if the activity was considered lawful in the recent history of Botswana. The HRC has urged Botswana to withdraw the reservation to the ICCPR due to its incompatibility with the object and purpose of the treaty and the fact that it offends the peremptory norm prohibiting torture.<sup>81</sup> There have also been multiple objections to the reservations based on the principle reflected in Vienna Convention Article 27; however, the reservations remain today because there is not a procedure in place under the Vienna Convention reservations regime to force Botswana's hand to comply with an incompatibility determination by another state party.

A corroborating example demonstrating the tenuous situation created by subordination reservations is the reservation made by Bangladesh (though framed and titled a declaration) against CAT Article 14 (1) indicating that it would only apply Article 14(1) in consonance with the existing laws and legislation in the country. Several states, including Finland, France and Sweden, among others, objected to this reservation based on its incompatibility with the object and purpose of the Convention. Article 14 ensures the right of victims of torture the right in law to redress, compensation and rehabilitation. Bangladesh ratified the CAT on 5 October 1998 and its constitution prohibits torture under Article 35(5) but to date there has been no availability of redress for victims of torture. A bill<sup>82</sup> aimed at correcting this legal void was introduced at the Bangladesh National Parliament in early 2009 though it was subsequently shelved in September of that year.<sup>83</sup> Encouragingly, the bill was revived and eventually pushed through the parliamentary approval committee; it was recommended for passage in March 2011 with special note taken of Bangladesh's commitments under CAT.<sup>84</sup> This example supports the contention

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<sup>81</sup> UN Doc. HRI/MC/2008/5 (2008) Annex I, p. 3.

<sup>82</sup> A Private Member's Bill to Give Effect to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and for Matters Connected therewith or Incidental Thereto, submitted by Saber Hossain Chowdhury, at <http://bangladesh.ahrchk.net/docs/TortureandCustodialDeathBill2009.pdf> <accessed 11 Aug. 2011>.

<sup>83</sup> 'Bangladesh: A Bill against torture is introduced in Bangladesh,' Asian Human Right Commission Press Release No. AHRC-PRL-011-2009, 19 February 2009, <http://www.humanrights.asia/news/press-releases/AHRC-PRL-011-2009/?searchterm=Bangladesh> <accessed 11 Aug. 2011>.

<sup>84</sup> Bangladesh National Parliament, Fourth Report of the Committee on Private Members' Bill and Resolutions, and Annex A *A Private Member's Bill to Give Effect to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and for Matters Connected therewith or Incidental Thereto* (Torture and Custodial Death (Prohibition) Bill, 2011) (originally introduced by Mr Chowdhury), see

that pressure from the international community can have a positive impact on effecting change on the domestic level, of course, there must also be a will on the part of the nation. The above examples, of which there are many more, substantiate the undermining effect that subordinating an international obligation to domestic law has on absolute rights but general rights are also left in a state of uncertainty in these instances of subordinating reservations.

Despite the fact that incompatible reservations made to general rights receive less attention in the context of reservations it is still worth noting that these, too, are important in the grand design of human rights. If only absolute and non-derogable rights are the focus of objections, the overall aims of the UDHR and the international human rights system will be threatened, but the human rights regime is also susceptible to failure if subordination reservations persist to general rights. The evaluation of a general right in a domestic context is just as difficult to assess when it is subordinated to domestic law. The reservation by Mauritius to CRPD Article 11 specifies that it does not consider itself bound to take measures under the Article unless permitted by domestic legislation. Article 11 obligates the state to ensure protection of persons with disabilities in situations of risk and humanitarian emergencies. Though Article 11 constitutes a general right, the realisation of the right is entirely contingent on domestic law on the matter, if there is one. Subordinating international obligations to domestic law creates a ping-pong effect where the right is volleyed perpetually between the level of an international obligation and potential recognition on the domestic level.

Federal states typically make reservations subordinating treaty obligations to domestic law as it is restricted in a federal-state system. As indicated by the US in one of its reservations to the ICCPR, the federal government only obligates itself to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the treaty. Covenant obligations are otherwise left to the state and local governments to implement. The difficulty with this type of subordination is that the bound party is the US federal government, not the federated states.<sup>85</sup>

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<http://www.humanrights.asia/countries/bangladesh/laws/legislation/CommitteeReportOnBillCriminalizingTorture10Mar2011-English.pdf> <accessed 11 Aug. 2011>.

<sup>85</sup> For an overview of the US position see Bradley and Goldsmith, 'Treaties, Human Rights, and Conditional Consent'; S. Grant, 'The United States and the International Human Rights Treaty System: For Export Only' in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty*



Recognition of the problematic situation with distribution of powers between the federal government and state governments in the context of international obligations has been the subject of prior international disputes as noted in the *LaGrand*<sup>86</sup> case. Though *LaGrand* was not directly related to a human rights treaty,<sup>87</sup> the premise upon which the US sought to obviate its obligations to comply with ICJ-issued provisional measures implicates the major problem inherent in a federal law subordination reservation. The US argued that ‘the character of the United States of America as a federated republic of divided powers’<sup>88</sup> constrained the ability of the federal government to act, even where an international obligation was implicated. In this instance, the State of Arizona failed to heed an order of the ICJ indicating a stay of execution for Walter LaGrand, a German citizen, but it is not a great leap to see how this argument could be applied in the context of human rights obligations subordinated by a federal reservation. A similar fact pattern based on a consular rights violation was addressed more recently in the case of *Medellín v. Texas*<sup>89</sup>. Following the 2004 ICJ decision in *Mexico v. United States*<sup>90</sup> the President of the United States issued an order to the State of Texas to comply with the ICJ decision and therefore give effect to Article 36(1)(b) of Vienna Convention on Consular Relations<sup>91</sup> which would result in a stay of execution and the possibility of reconsideration of Medellín’s case. Texas resisted and the case ultimately went to the US Supreme Court which in a six to three decision held that a non-self-executing treaty without the necessary implementing legislation could not bind state courts unless the compliance was in some other way recognised through Constitutional

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*Monitoring* (CUP, Cambridge 2000), pp. 317-29; D.P. Stewart, ‘U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understanding and Declarations’ (1993) 14 Human Rights Law Journal 77; alternatively, for a discussion of the US approach to reservations to a non-human rights treaty, see, G.F. Jacob, ‘Without Reservation’ (2004-05) 5 Chicago Journal of International Law 287.

<sup>86</sup> *LaGrand (Germany v. United States of America)*, Judgment, 2001 ICJ Reports 466, 27 Jun. 2001.

<sup>87</sup> The *LaGrand* case dealt with the breach of Vienna Convention on Consular Relations, Art. 36(1)(b).

<sup>88</sup> *LaGrand*, para. 95.

<sup>89</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>90</sup> *Case Concerning Avena and other Mexican Nationals (Mexico v. United States)*, Judgment, 2004 ICJ Reports 12, 31 March 2004. Following the Medellin decision, Mexico once again brought the issue to the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the case concerning Avena and other Mexican Nationals (Mexico v. United States)* (Judgment), 2009 ICJ Reports 3. For a discussion on the US federal v. state tension over enforcing international law see E.T. Swaine, ‘Taking Care of Treaties’ (2008) 108 Columbia Law Review 331.

<sup>91</sup> 596 UNTS 261, 24 Apr. 1963.

measures, thus reinforcing the legal conundrum of how to apply international obligations in federal states particularly when there is a reservation based on the lack of ability to bind states due to the nature of a federation.

As one of the most latterly convened treaties, the CRPD picked up on the federal state reservations to previous conventions and explicitly included in Article 4(5) that all provisions would 'extend to all parts of federal states without any limitations or exceptions'. This purports to take a strong stance against those states relying on the excuse that certain obligations are not supervised on the federal level; however, the reality seems to be that there is little that can be done to alter the practical implications of the federal system in light of these types of reservations as the issue is really one that must be dealt with on the domestic level.

A further impediment to protection resulting from subordination of international human rights obligations to domestic law arises in the context of derogations. Due to serious discrepancies between definitions found in the conventions and those that exist under domestic laws, either incorporating the treaty or otherwise, there exists a potential loophole for impunity, as pointed out by the CAT Committee.<sup>92</sup> This potential loophole is underlined by the reservation made by Botswana. The Committee has specifically called upon State Parties to give assurances that domestic definitions, in its case for torture and cruel, inhuman or other degrading treatment, are at a minimum in concert with those as contemplated under the CAT.

In considering subordination reservations states have argued that these reservations are invalid due both to the contravention of Vienna Convention Article 27 and for incompatibility with the object and purpose test.<sup>93</sup> Both arguments yield the same result due to the non-reciprocal nature of human rights treaties; reserving states maintain the offending reservation and there is no legal effect or consequence that results.

## 2.6 NUMEROUS RESERVATIONS TO A SINGLE TREATY

It is not merely sweeping or incompatible reservations based on general references to domestic laws that are a concern. State parties who record a high number of

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<sup>92</sup> UN Doc. CAT/C/GC/2, (2008), para. 9.

<sup>93</sup> See above, ftns. 66 and 67.

reservations to specific rights due to incompatibility with identifiable domestic laws or local customs create the same concern wherein an unwillingness to entertain progressive human rights protections evidences aims contrary to those embodied in the treaty. Because human rights treaties contain multifarious obligations, in applying the object and purpose test it is often difficult to tell exactly which obligation will tip the scale in the event that a reservation is made against it. Even more difficult is assessing at what point a large number of otherwise marginal reservations will, by the sum of their parts, violate the object and purpose of the treaty. If the object and purpose is contravened there is no definitive path of action to take to rectify the offending reservation other than to urge the author state to withdraw it.

The Republic of Niger demonstrates the multiple reservations practice by making such a large number of obligation specific reservations to CEDAW that it creates a serious threat to the realisation of human rights obligations and prompts the question, why join? CEDAW Article 28 prohibits reservations incompatible with the object and purpose of the Convention; yet more reservations have been made to it than any other human rights convention. Niger reserved against eighteen of the commitments pointing to its ‘regard to the modification of social and cultural patterns of conduct of men and women’ and due to the fact that the indicated provisions were contrary to the existing customs and practices within the country which could be modified only with the passage of time and the evolution of society and thus, could not be abolished by an act of authority.<sup>94</sup> Article 5 of CEDAW specifically identifies the purpose of the treaty is:

To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

With the purpose of CEDAW being the elimination of all forms of discrimination against women, reserving against a large number of the commitments does nothing to support Niger’s status as a State Party as it appears to exist only in name. Niger’s

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<sup>94</sup> Niger, Reservations to CEDAW, 8 Oct. 1999.

blatant contravention of CEDAW aims was challenged by objections by both France and the Netherlands.<sup>95</sup> The objections have thus far had no effect on the government of Niger as it appears that its only commitment is the perpetual non-attainment of gender equality. In 1987 and 1992, CEDAW Committee General Recommendations addressed the acute problem with reservations to the Convention in light of the perceived invalidity and detrimental legal effect of a large number of the existing reservations.<sup>96</sup> Urging states to evaluate the reservations of other State Parties and reconsider their own reservations, the Committee suggested a move toward a common procedure on reservations commensurate with other human rights treaties.<sup>97</sup> Unfortunately, the other core human rights treaties appear to be in the same situation.

Perhaps a better alternative approach is that taken by Chile in its declaration made upon signing CEDAW in 1980 where it contended that at the current time many provisions of CEDAW were not compatible with Chilean legislation but that it had established a law reform committee to assist in rectifying the incompatible terms. Chile did not ratify the Convention until 1989 but when it did it made no reservations indicating persisting incompatibility issues.

## 2.7 SUMMARY

There are several types of reservations that hinder the fulfilment of obligations set forth in the core human rights treaties. Pursuant to the Vienna Convention reservations regime as well as other principles espoused by the Vienna Convention, reservations must not contravene the object and purpose of a treaty nor may they employ domestic law as a justification for failure to comply with international obligations. These conditions for reservation validity have yielded patchy compliance with the core human rights treaties due to the ambiguity and incompleteness of the Vienna Convention regime. The above analysis of different types of reservations attests to the difficulty in defining exactly which reservations are invalid and alluded to the gaps in the rules even in the event of an invalidity

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<sup>95</sup> UN Treaty Collection, CEDAW, *End Note*, Objections to Reservations made by Niger to CEDAW by France, 14 Nov. 2000, and Netherlands, 6 Dec. 2000.

<sup>96</sup> *General Recommendation No. 2, Reservations to the Convention*, UN Doc. A/42/38 (1987) and *General Recommendation No. 20, Reservations to the Convention*, UN Doc. A/47/38 (1992).

<sup>97</sup> UN Doc. A/47/38 (1992), para. 2.

determination by another state party. The following section presents an overview of the reservations attached to the core UN human rights treaties.

### 3 OVERVIEW OF THE CORE TREATIES<sup>98</sup>

Every one of the 193 UN Member States is a party to two or more of the core human rights treaties. This wide-subscription mandates some attention to detail in the field of reservations. Though not all of the treaties elicit a large number of incompatible reservations, focusing on the regularity of the problem misses the point. If human rights are to be realised every effort must be made to curtail any potential loophole states may use to ignore international obligations. Briefly reviewing the core human rights treaties it is clear that universal compliance is the exception, rather than the rule, when it comes to reservations. The implication of such manipulation of obligations is not a testament to the aim of advancing human rights no matter what justification is given.

The following provides an overview of the reservations to the core human rights treaties in order of entry into force of each treaty. CERD currently catalogues reservations by fifty-three of the 174 State Parties. There are objections by twenty-six states to one or more of the reservations. Of the 167 State Parties to the ICCPR, forty-six maintain reservations with twenty-two objecting states. There are forty-one reserving State Parties to the ICESCR with only fourteen objecting states out of a total of 160 State Parties. CEDAW currently has 186 State Parties and it is the second most subscribed to human rights treaty following the CRC. Though the number of parties to CEDAW is great, the level of agreement is far from it. Of the 186 states ratifying or acceding to the agreement, fifty-nine retain a combined number of over 180 reservations despite an unusually high number of objections to those deemed incompatible with the treaty. This number excludes the dozen or so states which have withdrawn their reservations either unilaterally or subsequent to objections by other State Parties.

Despite reinforcing a customary rule of international law, the CAT retains thirty-eight reservations among its 147 State Parties, the majority of which address procedural issues such as automatic referral of disputes to the ICJ and the necessity

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<sup>98</sup> Reservations information updated 27 Jul. 2011, see UN Treaty Collection., *Status of Treaties*.

of state approval before procedures of inquiry may take place within a state's territory. The CRC is subject to reservations by sixty-two of its 193 State Parties with twelve objecting states. The ICRMW has forty-four State Parties with thirteen states maintaining reservations and no objections. The CRPD maintains the lowest reservation numbers in relation to its number of parties with only fourteen of the 103 State Parties maintaining reservations though there are also several interpretative declarations. The ICED boasts the lowest number of reservations but this corresponds to the fact that it has the smallest number of parties and only entered into force in December of 2010. Only three of its twenty-nine State Parties have made reservations, two of whom titled them as 'declarations'.

The acute problem surrounding reservations to CEDAW was the focus of general recommendations made by the CEDAW Committee in 1987 and 1992. The HRC and CAT Committee have also addressed the issue of reservations in general comments. The main problem is that to ascertain the specific obligations undertaken by each of the reserving states it is necessary to evaluate each individual reservation and any objections thereto, a task that the average man, or woman in the case of the protections created by the reservation-riddled CEDAW, is unlikely to be able to decipher on his/her own. These instances are when state parties must rebut the presumption that they 'care little about reservations affecting how another state treats its own citizens' and object to reservations that thwart the 'high purpose' of the treaty.<sup>99</sup>

#### 4 THE SOVEREIGNTY CONUNDRUM

It is obvious from the outset that the 193 Member States of the UN are highly diverse on cultural, religious, political and economic levels. However, in the face of diversity it is still important to acknowledge that there are some rights which exist by virtue of being born a human being, no matter where that might be. As with all concepts in international law, each advance in universality is limited by the sovereignty of states. Peculiar to human rights is that the heart lies with the people while the head lies with the sovereign. Thus it is a great conundrum how to reconcile the advancement of human rights treaty obligations with the current reservations practice.

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<sup>99</sup> Swaine, 'Reserving', 327, commenting on R. Higgins, 'The United Nations: Still a Force for Peace' (1989) 52 MLR 1, 11-12.

One of the oldest rules of international law is the concept that a state may only be bound to a treaty to the extent to which they have given consent. This is based on the long-standing concept of absolute sovereignty. However, implicit to international human rights is the challenge to the traditional Westphalian concept of state sovereignty. It can be framed no other way when one of the primary aims of the movement is to create a less state-centric basis for individual protections by ensuring that states be held accountable for violations of rights. As noted by Claude and Weston, the classical international law doctrine of state sovereignty and its corollary of non-intervention are the central props of the state-centric system that this generation has inherited.<sup>100</sup>

The values associated with this doctrine (a legal license to 'do your own thing') and corollary (an injunction to 'mind your own business') rest in uneasy balance with human rights concerns (which seem to tell us that 'you are your brother's and sister's keeper').<sup>101</sup>

This makes it difficult to determine when it is appropriate for one state to criticise another for its human rights performance. What must be curbed is the idea that human rights recognition involves a set of choices between sovereignty and rights. Though to some extent this will always be marginally true, if the current prolific reservation practice is not curtailed there is no hope of building an effective protection system.

Many states persist in treating human rights agreements as, in the words of Boyle and Chinkin, an à la carte menu which results in very different agreements when it is time for ratification.<sup>102</sup> The inability of some states to break-away from the stalwarts of complete, self-effacing sovereignty is evident not only by the modification of obligations pursuant to reservations but also in blatant statements made in various declarations such as those of Cuba and Indonesia made upon ratifying the CAT indicating that Article 20 would have to be invoked in strict compliance with the principle of the sovereignty of states. Article 20 concerns CAT Committee inquiries into systematic torture and could include territory visits with the consent of the State Party. Understandably, territorial integrity is one of the

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<sup>100</sup> Claude and Weston, *Human Rights*, p. 5.

<sup>101</sup> *Ibid.*

<sup>102</sup> A.E. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford 2007), p.159.

cornerstones of state sovereignty however this particular show of reluctance in the face of grave treaty violations seems incongruous for states claiming to deplore acts of torture.

Some authors view the pursuit of universal compliance with identical human rights treaty obligations as a waste of time and prefer to adopt instead a 'margin of appreciation' that provides flexibility on marginal issues while maintaining a stronger compliance agenda with respect to core rights.<sup>103</sup> This ill-advised path tends to focus on the rights in a national context but misses the point that state parties rarely have the facilities to explore the scope of obligations of other state parties on that level as they are already burdened with ensuring that their own house is in order. The further states depart from the agreed treaty texts, the less meaningful the human rights treaty system as a whole becomes.

## 5 FINAL OBSERVATIONS

Whether reservations are essential to international treaty practice is a non-issue due to the fact that they are here to stay. The true issue lays in the lacuna that exists in guidance when these residual reservations rules are applied to reservations to human rights treaties due to the normative ambiguity that is created. Human rights obligations, in all of their forms, necessitate a concerted effort on the part of states to realise the protections embodied in the core human rights treaties. The objects of these obligations, the people, deserve nothing less.

Recognising the different types of rights protected by human rights treaties and the categories of reservations that manipulate these rights illuminates discordant state practice. Sweeping reservations create an indeterminable maze that can in no way be navigated by other state parties. Reservations subordinating obligations to domestic law or custom also blind other states as to how obligations are actually implemented on the domestic level, thus depriving them of a true view into human rights protections by other treaty members. States rely upon the promotional aspect of ratification because on an international level that is what will be remembered, regardless of the shoddy implementation on the domestic level.<sup>104</sup>

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<sup>103</sup> Morris, 'Few Reservations About Reservations', 345.

<sup>104</sup> Lijnzaad, *Ratify and Ruin*, p. 86; see also Zemanek, 'New Trends in the Enforcement of Erga Omnes Obligations', 4.



It is the lack of guidance on reservations that enables substandard implementation on the domestic level yet it is not merely the implementation that suffers. The corpus of international law is also affected by the disjointed practice because the meagre rules that currently exist can be easily disregarded by states choosing their own interpretation of Vienna Convention articles. Though it would seem that the Vienna Convention reservations rules are ill-suited to govern reservations to human rights treaties in light of the reservation practice illustrated above, the next chapter will highlight that designated review mechanisms, including states and judicial organs, are capable of applying the rules to evaluate reservations if and when they have the opportunity.

## CHAPTER FOUR MECHANISMS OF REVIEW

The previous chapter illustrated the variety of reservations made to human rights treaties and the normative uncertainty caused by many of them. The acceptability of reservations as envisioned by the Vienna Convention—based on the acceptance or objection to reservations by other state parties—presents another unsettled aspect of the Vienna Convention regime. The Vienna Convention prohibition of reservations incompatible with Article 19 has done nothing to quell the stream of arguably invalid reservations to human rights treaties. The Vienna Convention recognises two options for resolving the acceptability of reservations. The first is the opportunity for states to either accept or object to reservations formulated at the time of ratification by new state parties; the second is a general principle of international law which provides resort to a dispute settlement body, such as the ICJ,<sup>1</sup> in the event of a dispute between states as to the fulfilment of treaty obligations. To be clear, however, there is a difference between acceptability of a reservation and permissibility of a reservation, a point that will be examined in more detail below.

The current practice of states making objections based on incompatibility is not specified in the Vienna Convention rules yet it has developed as the primary policing mechanism for reservations. Due to the lack of guidance on such a practice, objections have provided relatively little impetus to reserving states to remove offending reservations. Recalling Chapter Two, invalid reservations include those that are impermissible due to incompatibility with Vienna Convention Article 19 as well as those reservations that fail for other reasons, whether structural or procedural, and include reservations that violate other principles of treaty law set forth in the Vienna Convention. Some observers argue that impermissible reservations are void *ab initio*<sup>2</sup> and therefore objections are unnecessary, however, this view does not have universal acceptance as will be discussed in Chapter Five. Reserving states have only been compelled to act on their invalid reservations when the issue has been addressed

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<sup>1</sup> Recognised in Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (Vienna Convention), Art. 66; Statute of the ICJ, 26 June 1945, Art. 36.

<sup>2</sup> E.T. Swaine, 'Reserving' (2006) 31 Yale Journal of International Law 307, 315; D.W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties' (1976-77) 48 BYBIL 67, 84; see also ILC Yearbook, 1995, UN Doc. A/50/10 (1995), para. 418.

by an alternative dispute settlement mechanism, such as a court of law. However, history has proven that states are reluctant to bring court actions against other states when they have no vested interest at stake even where a reserving state seems to be violating the object and purpose of a treaty. An inter-state application requesting the ICJ to evaluate the permissibility of a reservation using the object and purpose test as outlined in the *Genocide Opinion* has yet to materialise. Regional human rights systems are the more probable fora for a reservation challenge to arise as it is before the regional supervisory organs that individuals have been invested with an international personality which enables them to apply to have their rights enforced. Nonetheless, the contribution of international organs has assisted in shaping the debate surrounding reservations to human rights treaties by proving that the Vienna Convention reservation rules can be used to render an opinion on reservation validity.

This chapter reviews states and international organs as mechanisms of review of reservation validity. Section one will examine the contemporary practice of states as self-declared arbiters of reservation permissibility. The role of the judiciary in the development of reservations practice and the potential of the courts to provide review will be explored in section two.

## 1 REGULATING RESERVATIONS THROUGH STATE OBJECTIONS

Just as states have the right to make reservations they also have the right to object to reservations made by other states. The Vienna Convention reservations regime sets up a state-policing system in an effort to keep reservations in check. Article 20 outlines the parameters of acceptance and objection to reservations but it is Article 21 that has been interpreted as the loose basis of the state-policing system by delineating the legal effect of reservations and objections (see Annex II). Present practice allows states to object on any grounds, including political considerations or incompatibility with the convention. The striking omission in the actual reservations rules is the lack of acknowledgement of invalid reservations, thus the practice of objecting to reservations based on invalidity has developed in conjunction with the rules rather than as the exercise of a specific rule. Article 19 attempts to stave off any reservation that is non-compliant with its three sub-paragraphs. This, however, serves

as the basis of the problems surrounding reservations to human rights treaties as the subsequent reservations articles address the legal effect of valid reservations and only in the context of relationships between states which has little relevance to human rights treaties.

The focus of this research deals expressly with reservations to which objections based on incompatibility have been made but, as pointed out by Seibert-Fohr, objections to admissible reservations might also be formulated.<sup>3</sup> She logically contends that Article 21 applies only to objections made to admissible reservations as it expressly states in paragraph 1 that it applies to reservations made ‘in accordance with articles 19, 20 and 23’.<sup>4</sup> This contention is also supported by Aust as he points out that ‘[t]he rules in Article 21 on the legal effects of reservations refer to reservations ‘established’ in accordance with Articles 19, 20 and 23, and it is hard to see how one could validly establish a reservation when it is prohibited by Article 19’.<sup>5</sup> This point highlights that there is no contemplation of how to resolve competing views on incompatibility in the Vienna Convention regime. Article 21 is the only provision addressing the legal effect of reservations and objections thus there remains nothing but silence on the issue of incompatible reservations. The apparent assumption that incompatible reservations would be null and void has proved to be an ill-conceived notion as will be discussed in Chapter Five.

The lack of guidance in Article 19 as to who is the arbiter on permissibility and in Article 21 on the ‘Legal effects of reservations and of objections to reservations’ gives birth to the wide-ranging problems which exist with reservations to the non-reciprocal obligations found in human rights treaties. Furthermore, it has been suggested that Article 20 is not contingent upon the object and purpose test and therefore states may accept reservations even if the reservation fails the object and purpose test,<sup>6</sup> which is another contingency that exacerbates the normative

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<sup>3</sup> A. Seibert-Fohr, ‘The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties’ in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation*, (Martinus Nijhoff, Lieden/Boston 2004), p. 203.

<sup>4</sup> *Ibid.*, p. 204.

<sup>5</sup> A. Aust, *Modern Treaty Law and Practice*, 2d ed. (CUP, Cambridge 2007), p. 146, citing R.D. Kearney and R.E. Dalton, ‘The Treaty on Treaties’ (1970) 64 AJIL 495, 512.

<sup>6</sup> C. Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ (1993) 64 BYBIL 245, 276; C.A. Bradley and J.L. Goldsmith, ‘Treaties, Human Rights, and Conditional Consent’ (2000) 149(2) *University of Pennsylvania Law Review* 399, 436.

ambiguities addressed by this thesis. In theory, the Vienna Convention allows state parties to come to their own conclusion regarding the acceptability of reservations,<sup>7</sup> and a contraindication on acceptability is articulated by issuing an objection to the offending reservation. Under this system, objections serve as a form of insurance whereby non-reserving states are able to ‘recapture some of the insurance benefits that reserving states capture in exempting their future conduct’.<sup>8</sup> This is the basis of the reciprocal function of treaty obligations envisioned by the Vienna Convention.

However, this practice, as previously noted in Chapter Two, has developed on the back of the fallacy imbedded in the Vienna Convention that reservations formulated are valid-compliant with Article 19—and otherwise cannot be made and that the obligations of the treaty are reciprocal. Objections based in invalidity or impermissibility were not specifically addressed by the Vienna Convention, thus tangential doctrines<sup>9</sup> on the legal effects of objections based on invalidity have also developed as a form of *lex ferenda*, though practice has proved that these doctrines produce less than definitive results. For the most part, states have been reluctant to address the normative lacunae in the reservations system due largely to contentions grounded in sovereignty debates. Bayefsky has stressed that the current reservation mechanisms are relics of the past and were created when the arguments about interference in domestic jurisdiction, a necessary sacrifice in the human rights regime, were at their peak and to which there are still a large number of states who advocate the persisting loopholes.<sup>10</sup>

Therefore the purpose and value of objections based on invalidity must be considered. The Vienna Convention text does not contemplate what happens to a reservation in the instance it has been the object of an objection based on incompatibility with Article 19 or invalidity based on another general principle of law. It has been suggested that an objection creates a bilateral relationship between

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<sup>7</sup> Swaine, ‘Reserving’, 311.

<sup>8</sup> *Ibid.*, 311.

<sup>9</sup> The effect of these state judgments typically play out under one of three doctrines—permissibility, opposability or severability—that purport to address the legal effect of the opposed reservation and will be examined in Chapter 5.

<sup>10</sup> A.F. Bayefsky, ‘Making Human Rights Treaties Work’ in R.P. Claude and B.H. Weston (eds.), *Human Rights in the World Community: Issues and Action*, 3rd ed. (University of Pennsylvania Press, Philadelphia 2006), p. 316.

the reserving and objecting states,<sup>11</sup> however this point is not necessarily felicitous when considering reservations to human rights treaties since the states receive no reciprocal benefits from one another. In fact, Swaine cites the communicative value of objections as a main reason for objecting in light of the inadequate legal incentives to do so in a human rights treaty.<sup>12</sup>

The legal effect anticipated by the Vienna Convention is the entry into force (or not) of the treaty between the reserving state and other state parties and the exemption of obligations to the extent of reservations between states based on acceptance or objection. As indicated in Article 21(3), if the objecting state has not opposed entry into force of the treaty between itself and the reserving state then the subject provisions of the reservation will not be applied between the two states in their relations with one another to the extent that the reservation has limited them. For an accepting state, the treaty will be modified between the two states to the extent of the reservation in its relations with the reserving state (Article 21(1)(b)), which creates the form of ‘insurance’ for the accepting state suggested by Swaine.<sup>13</sup> This is an ideal and logical outcome when there are mutual obligations between states. However, when the treaty type is not one which establishes mutual obligations or duties owed between states the significance of the reservation pales for the class of potential objecting states. There is no legal duty to a potential objector that is being curtailed, nor will the objector’s legal obligations be affected. As noted by Schabas:

Where the legal value of objections is discounted, the real issue is not whether a human rights instrument enters into force between reserving and objecting states, or between a reserving state and all other parties. Rather, it is whether the instrument enters into force between the reserving state and ‘all individuals within its territory and subject to its jurisdiction,’ to cite the formulation used in the [ICCPR] and employed with slight variation in the other human rights instruments.<sup>14</sup>

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<sup>11</sup> C. Chinkin, ‘Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), pp. 75-76.

<sup>12</sup> Swaine, ‘Reserving’, 340.

<sup>13</sup> *Ibid.*, 311.

<sup>14</sup> W.A. Schabas, ‘Reservations to Human Rights Treaties: Time for Innovation and Reform’ (1994) 32 *Canadian Yearbook of International Law* 39, 72; see also Y. Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’ (2000) 71 *BYBIL* 181, 181.

Under the Vienna Convention and the practice that has developed in light of its reservations regime, it is entirely incumbent upon state parties to review and object to reservations that do no more than perpetuate non-attainment of human rights obligations whether it be by reservations that clearly contravene Article 19(c), are sweeping or which subordinate international obligations to domestic law or customs. Whether states will actually take the time and political step of monitoring reservations to human rights treaties is the prevailing question. Despite the increasing number of objections to such reservations, Hylton notes the tacit acceptance provision of Vienna Convention Article 20(5) ensures that reserving states, even those authoring incompatible reservations, will almost always become a party to the treaty because most states lack the resources and official capacity to object.<sup>15</sup> Furthermore, because ‘objections to reservations may be viewed as politically unfriendly acts which States may be unwilling to make (objections) towards States with whom they have significant trading, strategic or other interests’.<sup>16</sup>

Fortunately, time is proving that states are slowly taking up the task and the ILC has observed that ‘[i]t is the area of human rights that the most reservations have been made and the liveliest debates on their validity have taken place.’<sup>17</sup> Despite the lively debate, the 2007 ILC Report to the General Assembly pointedly referred to the small number of states which actually formulate objections to reservations and it sought input from a broader swath of states as part of its research in preparation for its proposed general guidelines on reservations.<sup>18</sup> Ultimately, the ILC received minimal input from states, signifying apathy for the topic.<sup>19</sup> The typical situation surrounding treatment of reservations by most states, as summarised by Aust, fails to accommodate the practical constraints of the domestic administrative system:

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<sup>15</sup> D. Hylton, ‘Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations’ (1994) 27 *Vanderbilt Journal of Transnational Law* 419, 439.

<sup>16</sup> Chinkin, ‘Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women’, p. 76; see also Swaine, ‘Reserving’, 343.

<sup>17</sup> ILC, *Commentary on Draft Guideline 3.1.12 on Reservations to Treaties*, Report to the General Assembly, UN Doc. A/62/10 (2007), p. 113.

<sup>18</sup> *Ibid.*, para. 25, as noted in Chapter 1. Imbert has also commented on the reluctance of states to make objections although his comments were specifically referring to the ECHR, P.-H. Imbert, ‘Reservations to the ECHR Before the Strasbourg Commission: the *Temeltasch* Case’ (1984) 33 *ICLQ* 558, 592-93.

<sup>19</sup> Discussed in Chapter 1, section 1.1.

Every week foreign ministries will be notified of new reservations. They will have to consider whether they are acceptable and, if not, what to do about them. Officials, including legal advisers, can be hampered by the misunderstandings and uncertainties which surround the subject...The other side of the coin is that foreign ministries will also have to consider carefully whether their state should make reservations to treaties which they wish to ratify.<sup>20</sup>

The reality is that most states do nothing to contradict an invalid reservation because they have little incentive to do so<sup>21</sup> and, thus, invalid reservations stand. Under the Vienna Convention there is no designated final arbiter on the compatibility of invalid reservations. States claim that determining validity is their right alone. Treaty bodies, as will be discussed in Chapter Six, insist that reservation evaluation is integral to their remit. The point is that exactly who should, and who does, evaluate reservations is ambiguous therefore reservations have no common reference point against which they can currently be measured. This is undoubtedly a reflection of the nature of human rights treaties and the fact that the obligations are not reciprocal between state parties. States lose nothing when another state party makes an incompatible reservation to a human rights treaty whether they object or not. The true losers are those subjects of the reserving state.

#### 1.1 OBJECTIONS AND THEIR EFFECTS IN CONTEMPORARY PRACTICE<sup>22</sup>

It must be acknowledged that the number of objecting states and frequency of objections to incompatible reservations is steadily increasing as states begin to take a more human rights-centred approach to policy decisions. This section provides examples of state objections in contemporary human rights treaty practice in order to illustrate the normative gaps persisting in the Vienna Convention system. It is by no means exhaustive but intended primarily to reflect the wider problem associated with the normative value of the state-policing system.

Despite the traditionally apathetic treatment of reservations by many states, the power of objections cannot be overlooked. The reservation made by Yemen to

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<sup>20</sup> Aust, *Modern Treaty Law*, pp. 125-26; see also R. Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 AJIL 531, 537.

<sup>21</sup> Swaine, 'Reserving', 324; Goodman, 'Human Rights Treaties, Invalid Reservations and State Consent', 533.

<sup>22</sup> Unless otherwise noted, all reservations and objections introduced in this chapter can be found in the UN Treaty Collection under *Status of Treaties* at <http://treaties.un.org> (UN Treaty Collection).



CERD Article 5 elicited objections from fourteen State Parties on the basis that it was incompatible with the object and purpose of the treaty because the provisions it reserved were fundamental rights and would result in discrimination to the detriment of certain sectors of the population.<sup>23</sup> Though this does not invoke the two-thirds minimum necessary to automatically invalidate a reservation pursuant to CERD Article 20(2), the point was made and Yemen withdrew the reservation. This is not the only example where a concerted effort has resulted in the withdrawal of a reservation viewed as failing to pass the object and purpose test and though the examples are few and far between, efforts by states to encourage withdrawal of offending reservations can be seen across the core treaties.

Upon ratifying the CAT, Chile made a reservation indicating that it would not apply the provisions of Article 2(3) to subordinate personnel where a superior officer insisted on continuing with acts referred to in Article 1 following a challenge by the subordinate, pursuant to the Chilean domestic law principle of ‘obedience upon reiteration’ as enshrined in the Chilean Military Code of Justice. The purpose of Article 2(3) is expressly to prevent any officer, at any level, recourse to a defence that he was acting under orders to perpetrate torture and it is a fundamental obligation expressed in the Convention. The Chilean reservation to Article 3 claimed the article was drafted in a ‘discretionary and subjective nature’. The Article 3 reservation further left the door open for Chile to implement obligations on a whim, contrary to the purpose of the CAT. Twenty State Parties objected to Chile’s reservations indicating that they were incompatible with the object and purpose of the CAT and several noted that the reservations also violated Article 19(c) of the Vienna Convention. Chile ultimately withdrew its reservations to Articles 2(3) and 3 of the CAT which was the goal of the objecting states.

The Netherlands, Denmark and Sweden each objected to a reservation made by Djibouti to the CRC which professed the state’s intent to not consider itself bound by any of the articles that were incompatible with its religion or traditional values. With only three objections Djibouti withdrew the reservation in December 2009.<sup>24</sup>

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<sup>23</sup> Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Mexico, Netherlands, New Zealand, Norway, Sweden and the United Kingdom objected. For the text of the objections see CERD, *Objections*, 660 UNTS 195.

<sup>24</sup> See CRC, *Endnote*, 1577 UNTS 3, n. 27.

Questions will clearly remain as to whether this has had any impact on the implementation on convention rights in Djibouti, or any other state which withdraws a reservation, however this question is outwith the scope of the current thesis and generally rests with the treaty bodies as monitors of convention rights. These examples indicate that objections have a tangible value, especially when the invalid reservation is withdraw, however, when an invalid reservation is not withdrawn, there is no hard and fast rule to indicate where the reservation and its author stand in the wake of an invalidity determination by another state party.

Unfortunately, the successful campaigns to get incompatible reservations withdrawn are overshadowed by the large number of incompatible reservations that remain attached to the core treaties. Botswana's reservation against the CAT, as set forth in Chapter Three, section 2.5, was the object of an objection by Denmark, among others, impressing the unacceptability of the vague nature of the reservation due to the fact that Botswana gave no information regarding what constitutes torture in Botswana. Denmark included that the Convention would be in force in its entirety between the two states without Botswana benefiting from the reservation, an assertion of the severability doctrine which will be discussed in Chapter Five. The statement indicating that Botswana will not receive the benefit of the reservation implies that Demark is the final arbiter of the extent to which Botswana consents to be bound by the CAT. However, this does not align with contemporary rules of international law whereby a state has the sole power to determine the extent of its consent to be bound. The importance of this point is that the recognised treaty obligations of Botswana and the validity of the reservation are left in limbo.

Finland's objection to Bangladesh's reservation to CAT Article 14 echoed the position that the reservation violated the principle that a state may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations and that the treaty would remain in force between the two without Bangladesh benefiting from the reservation.<sup>25</sup> It is apparent from the nature of the rights reserved against that reservations affecting absolute rights, especially the prohibition against torture, attract the highest number of objections. As Aust has pointed out, the compatibility test must be applied objectively and if a reservation

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<sup>25</sup> CAT, *Objections*, 1465 UNTS 85.

has been objected to by even one state on the grounds of failure to satisfy the object and purpose test then the reserving state is obliged by the principle of good faith to reconsider the reservation.<sup>26</sup> However, observation of the good faith principle is rarely, if ever, responsible for the withdrawal of a reservation.

The Government of the Kingdom of the Netherlands is one of the most active reservation monitoring states and particularly is the state most attentive to CEDAW reservations it deems contrary to aims of the treaty having objected to reservations made by thirty states. In short, the Netherlands objected to reservations—or interpretive declarations resulting in reservations—it deemed vague and centred on the idea that national law or Islamic Sharia law would prevail in any instance where these may be in conflict with CEDAW. To underline its point, the Netherlands stated:

[T]hat such reservations, which seek to limit the responsibilities of the reserving State under the Convention by invoking the general principles of national law and the Constitution, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover contribute to undermining the basis of international treaty law. It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties.<sup>27</sup>

The Netherlands' objection to general references to Islamic Sharia law were echoed by a many CEDAW State Parties, however, to date none of the State Parties maintaining reservations based on general incompatibility with Sharia law have withdrawn these reservations. In each instance, the Netherlands specified that the objection would not prevent the treaty from going into force between it and the reserving state. There the situation remains. Reservations which are clearly contrary to the object and purpose of the treaty are maintained despite objections. In light of the reservation being maintained, the question of purpose and value must be asked. Clearly the Netherlands does not intend to exclude the provisions against which the other states have reserved, however all states have been put on notice that Netherlands does not consider these types of reservations valid which could, if a

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<sup>26</sup> Aust, *Modern Treaty Law*, pp. 144-45.

<sup>27</sup> *Declaration by the Government of the Kingdom of the Netherlands with respect to reservations made by Malaysia* (1 November 1996), *Fiji* (20 November 1996), *Pakistan* (1 July 1997), and *Algeria* (15 May 1998) to CEDAW, all in the UN Treaty Collection.

dispute was ever taken to a dispute settlement body, provide support for a final decision on the invalidity of the reservations.

Of the two options for legal effect provided by the Vienna Convention, the first allows the reserving state to become a party to the treaty when there are no objections since in the absence of objections states are deemed to have accepted the reservation;<sup>28</sup> the second option is that the objecting state can negate entry into force between itself and the reserving state.<sup>29</sup> In the above example it is inconsequential in a practical context for the Netherlands to preclude entry into force of the treaty between it and a reserving state because the Sharia reservation in no way affects the people of the Netherlands. Additionally, the Vienna Convention gives no guidance as to what happens to the reservation in the event of objections. In the Netherlands example, the incompatible reservations have been maintained. These examples demonstrate that the law governing reservations is violable at its best and, at its worst, is in complete disarray due to lack of guidance.

## 1.2 FORWARD THINKING EFFORTS

Several European states have put in place special monitoring arrangements in order to normalise responses to invalid reservations, particular the Nordic states.<sup>30</sup> The Council of Europe (COE) has also called upon its Member States to take a coordinated approach in objecting to reservations.<sup>31</sup> In 1999, out of concern over ‘the increasing number of inadmissible reservations to international treaties, especially reservations of a general character,’ the COE adopted a recommendation on responses to inadmissible reservations to international treaties highlighting that the Vienna Convention did not envisage ‘the formulation of reservations of a general character’.<sup>32</sup> The recommendation set out model responses to both reservations of a general nature, including sweeping and subordination reservations, and those that

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<sup>28</sup> Vienna Convention, Art. 20(4)(a) and 20(5).

<sup>29</sup> Vienna Convention, Art. 20(4)(b).

<sup>30</sup> J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 *Nordic Journal of International Law* 179; L. Magnusson, ‘Elements of Nordic Practice 1997: The Nordic Countries in Co-ordination’ (1998) *Nordic Journal of International Law* 350.

<sup>31</sup> COE Ad Hoc Committee on Legal Advisors on the International Public Law, COE Doc. CM(2000)50 (6 April 2000), appendix IV, para. 7.

<sup>32</sup> COE Committee of Ministers, Recommendation No. R(99)13 on Responses to Inadmissible Reservations to International Treaties (18 May 1999).

were specifically deemed to contravene the object and purpose of the treaty. Subsequently, COE states do seem to have adopted this general approach as evidenced in the formulation of the objections to Pakistan's ICCPR reservations to the ICCPR and CAT. The effect of the concerted efforts on the withdrawal of reservations remains to be seen.

### 1.3 SUMMARY

While it is clear in practice that objections often serve a valuable communicative purpose and occasionally lead to the withdrawal of invalid reservations, the fact is that the practice of making objections to invalid reservations to human rights treaties has developed outwith the Vienna Convention rules. The Vienna Convention did not envision invalid reservations as the subject of the acceptance and objection system set up in Articles 20 and 21, thus states have adapted the rules as necessary to convey their views on the validity of reservations. This has increased the normative uncertainty surrounding invalid reservations as states tend to have their own views on the legal effect of invalid reservation. Nonetheless, objection activity does signal a desire on the part of states to keep invalid reservations in check which can only strengthen the human rights treaty system.

## 2 INTERNATIONAL JUDICIAL ORGANS

There are relatively few cases that have required a court to evaluate the validity of a reservation. This is not surprising considering that the primary way that a reservation would come under the examination of a court is in the course of a contentious case which on the international level can happen only where a state has consented to the jurisdiction of the adjudicating organ. Political considerations combined with the fact that states are not the beneficiaries of human rights treaties have created an apathetic atmosphere where states are not willing to bring concerns about invalid reservations to the fore outwith the closed treaty system where a state can freely make an objection with minimal effect. Thus, while in theory an international court is the ideal forum for reservations review, the reality of the practice once again reveals that the Vienna Convention default system stymies any corrective procedure because there is no compelling reason for a state to take an adversarial position.

Together, the ICJ, the European Court of Human Rights and the Inter-American Court of Human Rights have contributed to the reservations debate not only with their decisions but also because their decisions have inspired prolific academic writing on the issues taken up when considering reservations to international conventions. Though not entirely on the point of UN human rights treaties examined by this thesis, the region-specific treaty organs have enriched the arguments surrounding the evaluation of reservations pursuant to the Vienna Convention and its application to human rights treaties.

It has been suggested that ‘the right of a tribunal to determine the validity of a reservation is not completely clear in international law because of the possibility of infringement on a state’s sovereignty’.<sup>33</sup> However, if state sovereignty was an automatic and complete bar to judicial review neither the ICJ nor regional human rights courts would have cause to exist since their purpose is to adjudicate disputes among states, including those involving treaty interpretation. As will be discussed below, the question of the right of a judicial organ to determine the validity of reservations is largely resolved by state consent to the jurisdiction of one or more of the judicial organs examined herein. The past three decades of adjudication by international tribunals has advanced the law of reservations and also provided precedents for interpreting particular aspects of reservations. Unfortunately, the capable international courts are limited by the refusal of states to hold fellow sovereigns to account.

## 2.1 INTERNATIONAL COURT OF JUSTICE

There are issues that should not be left to the state to decide, especially when there is a dispute between states, and the interpretation of the terms of a reservation is one of these instances.<sup>34</sup> On the international level, the ICJ is the primary judicial organ competent to entertain disputes between states regarding interpretation of a treaty and/or a breach of an international obligation, such as breach of a human rights treaty

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<sup>33</sup> R.St.J. Macdonald, ‘Reservations under the European Convention on Human Rights’ (1988) 21 *Revue belge de droit international* 429, 442.

<sup>34</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, 1984 ICJ Reports 392, 26 Nov. 1984, para. 75. When considering the US multilateral treaty reservation the Court stated, ‘Certainly the determination of the States “affected” could not be left to the parties but must be made by the Court.’

obligation.<sup>35</sup> Special Rapporteurs on the topic of treaty law—recall the discussion of Brierly, especially, in Chapter Two—as well as many authors and governments at the time of the preparation of the Vienna Convention favoured resort to the ICJ to settle disputes over the validity of reservations<sup>36</sup> but this desire was not a harbinger of practice that would come to pass. Five of the core UN human rights treaties incorporated articles designating the ICJ as the automatic forum for dispute resolution in the instance that state parties have unresolved issues regarding one of these treaties.<sup>37</sup> Disputes arising under the treaties without express dispute provisions may still be referred to the ICJ pursuant to Article 36 of the Statute of the Court.

The cornerstone of ICJ jurisdiction is state consent. Because states must consent to ICJ jurisdiction either *ipso facto*<sup>38</sup> or on an *ad hoc*<sup>39</sup> basis, a state formulating an invalid reservation will not necessarily be subjected to review by the ICJ even if another state attempts to bring an action to have the validity of a reservation determined. Regardless of the type of right being violated, the legal personality of the holder of the right or the nature of obligation, there can be no review of a reservation affecting these at the international level unless the allegedly violating state has consented to jurisdiction.

The ICJ has played a relatively small role in the reservations debate since delivering its *Genocide Opinion* in 1951. It is not that the ICJ has not addressed

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<sup>35</sup> Statute of the ICJ, Art. 36(2).

<sup>36</sup> See P.-H. Imbert, 'Reservations and Human Rights Conventions' (1981) 6 Human Rights Review 28, 45.

<sup>37</sup> CERD, Art. 22; CEDAW, Art. 29; CAT, Art. 30; and ICED, Art. 42, all contain clauses similar to the following as outlined in the ICRMW, Art. 92:

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

The CERD does not contain an equivalent para. 2. It must also be noted that there are often steps taken to resolve disputes prior to resorting to the ICJ, for example, the inter-state dispute mechanisms set forth in CERD, Arts. 11-16.

<sup>38</sup> Statute of the ICJ, Art. 36(2).

<sup>39</sup> Statute of the ICJ, Art. 36(1).

reservations in any form as reservations have featured in several decisions<sup>40</sup> by the Court; however, for the purpose of this research, the principles of law discussed in relation to reservations in many of these cases departs from that which is under examination here. More relevant to the subject under review are the cases in which the Court has had occasion to reinforce its opinion that reservations to human rights treaties are permitted as long as they do not contravene the object and purpose of the convention. These occasions have thus far arisen in the form of reservations to Article IX of the Genocide Convention (compulsory jurisdiction of the ICJ over disputes arising under the Convention). Most recently, the Court upheld the validity of the Rwandan reservation to Article IX thereby dismissing a petition by the Democratic Republic of the Congo due to ‘a manifest lack of jurisdiction’<sup>41</sup> despite the fact that the alleged violations breached not only the Genocide Convention but also customary international law.<sup>42</sup>

Other examples include the 1999 dismissals of Yugoslavia’s complaints against the United States and Spain for alleged genocide in connection with the Kosovo conflict. The Court reiterated its 1951 opinion that reservations to the Genocide Convention are generally permitted and that reservations to Article IX are not contrary to the Convention’s object and purpose.<sup>43</sup> Though these cases dealt with the compatibility of a reservation with the object and purpose of the Genocide Convention the decisions gave little guidance on the application of the object and purpose test. This is not a shocking revelation considering that the ICJ had already contemplated just such a reservation in the *Genocide Opinion*. Furthermore, the response to a reservation against the automatic jurisdiction of the ICJ was not unforeseen as it is a reservation which is quite often repeated to both the Genocide Convention and the other human rights treaties with automatic dispute resolution clauses. Thus, while setting the stage for the tumultuous story of reservations, the ICJ has in the past sixty years had no occasion to actually utilise the test it developed to

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<sup>40</sup> e.g. *Case of Military and Paramilitary Activities in and Against Nicaragua; North-Sea Continental Shelf Cases (Germany v. Denmark/Netherlands)*, 1969 ICJ Reports 3, 20 Feb. 1969; *Interhandel Case (Switzerland v. United States)*, Preliminary Objections, 1959 ICJ Reports 6, 21 Mar. 1959.

<sup>41</sup> *Armed Activities (Democratic Republic of the Congo v. Rwanda)*, New Application: 2002, Jurisdiction and Admissibility, 2006 ICJ Reports 6, 3 Feb. 2006, para. 25.

<sup>42</sup> *Ibid.*, paras. 66, 67

<sup>43</sup> *Legality of the Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, 1999 ICJ Reports 916, 2 Jun. 1999, paras. 22, 25; *Legality of the Use of Force (Yugoslavia v. Spain)*, Provisional Measures, 1999 ICJ Reports 761, 2 Jun. 1999, paras. 32-33.



ascertain the validity of a reservation to one of the obligations found in the core UN human rights treaties. It has only repeated the fundamental point of its *Genocide Opinion* that states may make reservations that do not contravene the object and purpose test, such as with regard to an Article IX reservation.

Were a state not to have made a reservation to Article IX, the next issue to consider would be the nature of the obligation and to whom the obligation is owed. When considering the viability of a claim in international law it must be recalled that ‘only the party to whom an international obligation is due can bring a claim in respect of its breach’.<sup>44</sup> As discussed in previous chapters, human rights obligations, with a few exceptions, are due to individuals under the jurisdiction of the state, not other states. Though ‘the principles underlying the (Genocide Convention) are principles which are recognised by civilised nations as binding on States even without any conventional obligation’<sup>45</sup> it is clear that all human rights obligations as set forth in the many UN human rights conventions are not of the same unquestionable nature. This idea was a primary contention of the Court in its opinion.<sup>46</sup> Thus the nature of the right allegedly violated should be examined to ascertain whether an inter-state suit could be brought to the ICJ in the event that consent to jurisdiction is given.

The proliferation of human rights treaties has increased the catalogue of obligations and it is untenable to suggest that there are not differences among these. In the *Barcelona Traction* case the ICJ made clear that some obligations are owed towards the international community as a whole because the nature of the rights are so important as to concern all states—obligations *erga omnes*.<sup>47</sup> As outlined by the Court, *erga omnes* obligations are derived from international law and include the prevention of the crime of genocide and the obligation to protect people from slavery and racial discrimination,<sup>48</sup> though not all derived from peremptory norms.<sup>49</sup> While

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<sup>44</sup> *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 ICJ Reports 174, 11 Apr. 1949, pp. 181-82.

<sup>45</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, 1951 ICJ Reports 15 (*Genocide Opinion*), p. 23.

<sup>46</sup> *Ibid.*, p. 29.

<sup>47</sup> *Barcelona Traction (Belgium v. Spain, Second Phase)*, Judgment, 1970 ICJ Reports 3, 5 Feb. 1970, p. 32, para. 33.

<sup>48</sup> *Ibid.*, p. 32, para. 34. These particular obligations are derived from the *Genocide Opinion*, the Genocide Convention and CERD, among further international agreements. The Court went on to say

breach of these particular rights allow any state to invoke the breach of *erga omnes* obligations as a basis for a contentious case, many of the rights protected by the core UN human rights treaties do not qualify as obligations *erga omnes* outwith the relationships established under a self-contained treaty regime thus the ability to bring an action to resolve a dispute will be limited accordingly. As pointed out by the Court, ‘the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality’.<sup>50</sup> Unless the complaining state is the entity to which the allegedly offending state owes a duty,<sup>51</sup> which is rarely the case in the context of reservations, there will be no basis upon which the state may successfully bring a complaint at the ICJ. Furthermore, Zemanek observes that the existence of differing opinions evidenced by a reserving state and an objecting state makes it ‘doubtful which obligations the reserving state has accepted *erga omnes*, and in respect of which contracting parties relations under the convention exist’.<sup>52</sup> This point underscores the difficulty in determining invalid reservations since many states may have different views about the same reservation.

The ‘*erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’<sup>53</sup>, a legal reality that makes the issue of impermissible reservations no easier to address. The requisite consent to jurisdiction will not be ignored simply because the right allegedly violated is one that is a matter of *jus cogens* or an obligation *erga omnes*. Though the ‘crucial aspect of *erga omnes* obligations is...the manner in which they may eventually be enforced’<sup>54</sup> in international law, in practice the opportunity is not taken up by states in the context of human rights. The separate opinion filed in *Armed Activities* (Judges Higgins, Kooijmans, Elaraby, Owada and Simma) sought ‘to draw attention to the significance of certain recent aspects of the Court’s jurisprudence in the matter of

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that other *erga omnes* rights ‘are conferred by international instruments of a universal or quasi-universal character’.

<sup>49</sup> K. Zemanek, ‘New Trends in the Enforcement of Erga Omnes Obligations’ [2000] Max Planck Yearbook of United Nations Law 1, 6-8

<sup>50</sup> *Barcelona Traction*, p. 47, para. 91. The Court was referring specifically to the protection against denial of justice.

<sup>51</sup> *Reparation for Injuries Advisory Opinion*, pp. 181-82, as relied upon in *Barcelona Traction*, p. 33, para. 35.

<sup>52</sup> Zemanek, ‘New Trends in the Enforcement of Erga Omnes Obligations’, 4.

<sup>53</sup> *East Timor (Portugal v. Australia)*, Judgment, 1995 ICJ Reports 90, 30 Jun. 1995, para. 29.

<sup>54</sup> Zemanek, ‘New Trends in the Enforcement of Erga Omnes Obligations’, 10.

reservations'<sup>55</sup> and implied that perhaps consent based jurisdiction does not square with the evolving concept of obligations that are owed to the world community at large. Specifically the separate opinion pondered 'the underlying reason for the Court's repeated finding that a reservation to Article IX of the Genocide Convention is not contrary to the object and purpose of that treaty'.<sup>56</sup> The consideration shown by the five judges seems to reflect a growing unease with the nonchalant attitude of states toward reservations to human rights treaties, especially those embodying *jus cogens* norms.<sup>57</sup>

There have been efforts by various UN bodies to get the ICJ to issue an advisory opinion on the validity and legal effect of reservations.<sup>58</sup> The Women's Committee has been particularly proactive in this campaign during the past twenty years, due in large part to the vast number of reservations to CEDAW. As of yet, neither the UNGA nor the Security Council has been persuaded to authorise such a request. An advisory opinion could provide states and treaty supervisory organs with much needed guidance on this issue though it is unlikely that it would resolve all of the issues that trouble reservations to human rights treaties.

With rights and obligations of varying a nature being implemented in multifarious states it is logical to conclude that an independent court would be better-placed to evaluate the positions of states to a disagreement about treaty interpretation and implementation. However, states have shown no enthusiasm for resort to the ICJ for a determination of reservation validity. Disputes over reservation validity seem to be battles not worth fighting at the ICJ level. In summary, the primary contribution of the ICJ was to introduce the object and purpose text, a test that seems to be a faceless judge whose rulings have yet to be defined even by its maker.

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<sup>55</sup> *Armed Activities*, Separate Opinion, 2006 ICJ Reports 63, 3 Feb. 2006, para. 3.

<sup>56</sup> *Ibid.*, para. 3.

<sup>57</sup> Especially with respect to Judge Higgins whose publications prior to her election to the Court tended to take a dim view of reservations to human rights treaties. See, for example, R. Higgins, 'Introduction' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997); R. Higgins, 'Human Rights: Some Questions of Integrity' (1989) 15 Commonwealth Law Bulletin 598.

<sup>58</sup> H.B. Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments' in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004), pp. 16-17; Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women', p. 81; W.A. Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 Human Rights Quarterly 472, 490; Schabas, 'Time for Innovation and Reform', 79.

## 2.2 EUROPEAN COURT OF HUMAN RIGHTS

Unlike the ICJ, the European Court of Human Rights (ECtHR) has compulsory jurisdiction over disputes arising under the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>59</sup> (ECHR). The ECHR was the first multilateral treaty to feature compulsory jurisdiction of its treaty organs over disputes arising under it and also to provide the opportunity for individuals to act on the international level to have their ECHR enumerated human rights enforced. Primarily the court has reviewed individual applications,<sup>60</sup> however inter-state cases<sup>61</sup> are allowed by ECHR Article 33 though they make up only a small percentage of actual applications, unlike the ICJ which *only* reviews inter-state cases.<sup>62</sup> Thus, the issue of consent to jurisdiction that might thwart a case at the ICJ is not a problem for ECtHR with respect to adjudicating upon rights protected by the ECHR and, importantly, its decisions are automatically binding<sup>63</sup> on the State Party.

The automatic jurisdiction of ECtHR has enabled the court to enrich the reservations debate through several cases where it was necessary to evaluate a reservation. Much of the attention by the ECHR treaty organs has focused on the non-reciprocal nature of human rights treaties. In *Ireland v. the United Kingdom*, the ECtHR emphasised that:

...unlike international treaties of the classic kind, the [ECHR] comprises more than mere reciprocal engagements between Contracting States. It creates over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.<sup>64</sup>

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<sup>59</sup> ETS No. 005, 213 UNTS 221, 4 Nov. 1950, as amended by Protocol Nos. 11 and 14, entry into force 1 Jun. 2010 (ECHR). Art. 32 (1) provides: 'The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.'

<sup>60</sup> Prior to the entry into force of Protocol 11 to the ECHR on 1 Jun. 2010, individual applications were first reviewed by the European Commission on Human Rights. Between 1959 and 2010 the ECtHR reached 13,697 judgments. See Registry of the European Court of Human Rights, *European Court of Human Rights Annual Report 2010* (COE, Strasbourg 2011), p. 157.

<sup>61</sup> For example, *Ireland v. the United Kingdom*, Series A, No. 25, 18 Jan. 1978; *Cyprus v. Turkey* [GC], No. 25781/94, § 78, ECtHR 2001-IV.

<sup>62</sup> R. Higgins, 'Speech to the European Court of Human Rights on the occasion of the opening of the judicial year' (30 Jan. 2009) in *European Court of Human Rights Annual Report 2009* (COE, Strasbourg 2010), p. 42.

<sup>63</sup> ECHR, Art. 46.

<sup>64</sup> *Ireland v. United Kingdom*, para. 239.

In other words, the obligations are important not only because the individual states bind themselves but also because the collective of states has undertaken to promote and protect the entirety of the ECHR. The Court distinguishes human rights treaties from other types of treaties based on the subject matter and non-reciprocal nature, an argument common to those who oppose unfettered reservations to human rights treaties.<sup>65</sup>

The basis of reservation analysis under the ECHR is found in Article 57—formerly Article 64<sup>66</sup>—which requires that reservations not be of a ‘general character’ (Article 57(1)) and must ‘contain a brief statement of the law concerned’ (Article 57(2)). The structural requirements of ECHR Article 57 have allowed the Court to declare reservations impermissible for want of Article 57 compliance rather than having to always engage the object and purpose test. The Court has continued to impress upon states the necessity of complying with the structural requirements of Article 57 most often finding that those reservations that do provide references to the specific law as well as an indication of the subject matter of the law will not be adjudged invalid. *Chorherr v. Austria* exemplifies the ECtHR’s application of Article 57 where it found no violation of either article complained about because Austria’s reservation made it ‘possible for everyone to identify the precise laws concerned and to obtain...information regarding them’.<sup>67</sup> <sup>68</sup>

Most notably the ECtHR has continued to advocate the severance principle<sup>69</sup> in the context of establishing the consequence of an invalid reservation. In *Belilos v. Switzerland*,<sup>70</sup> the Court succinctly outlined that if a reservation was determined invalid then it was without effect and would be severable with the result that the obligation against which the invalid reservation was directed would still be in effect

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<sup>65</sup> e.g. C. Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’ (1997) 46 ICLQ 390; L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995); Imbert, ‘Reservations to the ECHR Before the Strasbourg Commission’, 585.

<sup>66</sup> The change of article number was effected with the amendments adopted in Protocol Nos. 11 (ETS No. 155) and 14 (CETS No. 194) which entered into force 1 Jun. 2010.

<sup>67</sup> ECtHR Series A, No. 266-B, 25 Aug. 1993, para. 21.

<sup>68</sup> See S. Marks, ‘Three Regional Human Rights Treaties and Their Experience of Reservations’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 45.

<sup>69</sup> Discussed in more depth in Chapter 5, section 4.1.

<sup>70</sup> *Belilos v. Switzerland*, (App. No. 10328/83), [1988] ECHR 4, 10 EHRR 466, 29 Apr. 1988.

in its entirety for the reserving state.<sup>71</sup> The case was, in fact, the first time an international tribunal had determined a reservation to be invalid.<sup>72</sup> Despite Switzerland's contention that the ECHR State Parties had accepted the declaration/reservation by virtue of their silence the Court pointedly clarified that '[t]he silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.'<sup>73</sup> The Court ultimately determined that the reservation in question (to ECHR Article 6(1)) was invalid and severable because it was not only of a general nature, contrary to Article 57(1), but also because there was no 'brief statement of the law concerned' as required by Article 57(2).<sup>74</sup>

Marks notes that in *Belilos* the ECtHR had four options once it determined that the Swiss reservation was invalid: firstly, the invalidity would have no effect; secondly, the invalid reservation would cause the applicable article (ECHR Article 6) to be inapplicable to Switzerland; thirdly, the invalid reservation would be ignored (severed) with Article 6 remaining applicable to Switzerland; or, finally, the Swiss ratification would be treated as a whole invalid resulting in Switzerland no longer being considered a party to the ECHR.<sup>75</sup> Choosing the third option, the Court gambled that membership to the ECHR was more important to Switzerland than the exclusion of the provision against which it had reserved and thus severed the reservation<sup>76</sup> from its ratification.<sup>77</sup> Counsel for Switzerland had actually admitted the prevailing importance of ECHR membership during the hearing,<sup>78</sup> which arguably made the Court's decision easier. The application of the severability

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<sup>71</sup> Ibid., para. 60. For a discussion, see generally, H.J. Bourguignon, 'The *Belilos* Case: New Light on Reservations to Multilateral Treaties' (1988-89) 29 *Virginia Journal of International Law* 347; Macdonald, 'Reservations under the European Convention on Human Rights'.

<sup>72</sup> Bourguignon, 'The *Belilos* Case', 380.

<sup>73</sup> *Belilos*, para. 47.

<sup>74</sup> The Court referred to then Art. 64 as was in force in 1988. See Bourguignon, 'The *Belilos* Case', 362 et seq.

<sup>75</sup> Marks, 'Three Regional Human Rights Treaties', pp. 48-49.

<sup>76</sup> The reservation was actually titled a declaration however as applied it created a reservation. For an analysis of the distinctions, see D.M. McRae, 'The Legal Effect of Interpretative Declarations' (1978) 49 *BYBIL* 155. For further comment on terminology distinction see S. Marks, 'Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights' (1990) 39 *ICLQ* 300; I. Cameron and F. Horn, 'Reservations to the European Convention on Human Rights: The *Belilos* Case' (1990) 33 *German Yearbook of International Law* 69; Imbert, 'Reservations to the ECHR Before the Strasbourg Commission'.

<sup>77</sup> *Belilos*, para. 60.

<sup>78</sup> Schabas, 'Time for Innovation and Reform', 73.

doctrine ultimately led to the state's culpability in *Belilos*. Switzerland subsequently redrafted and resubmitted an amended reservation to the same article. This exercise in reformulation of reservation introduced a novel approach to rectifying impermissible reservations that will be discussed in the Chapter Five.

The severance principle was confirmed by two subsequent European cases. In *Weber v. Switzerland*<sup>79</sup> the Court examined the revised Swiss reservation to Article 6(1) and found that due to the failure of the Swiss government to append 'a brief statement of the law concerned' as required by then-Article 64(2), the reservation was invalid.<sup>80</sup> Recalling its *Belilos* judgment, the Court severed the reservation and applied the ordinary meaning of Article 6.<sup>81</sup> *Loizidou v. Turkey*<sup>82</sup> further cemented the Strasbourg approach<sup>83</sup> when the ECtHR noted the special character of the ECHR and stated that the Convention regime 'militates in favour of severance'<sup>84</sup> and that Turkey's 'impugned restrictions [could] be severed from the instruments of acceptance...leaving intact the acceptance of the optional clauses'<sup>85</sup>. These 1990 and 1995, respectively, decisions put all ECHR State Parties on notice that a reservation, or any statement amounting to a reservation, must comply with the structural requirements for reservations as set forth in the Convention.

Higgins notes that while some viewed the *Loizidou* case as departure from the ICJ jurisprudence on reservations,

...any perceived bifurcation depends on what one believes to have been the scope of the International Court's judgment in the 1951 advisory opinion on *Reservations to the Genocide Convention*, in particular whether it precluded a court from doing anything other than noting whether a particular State had objected to a reservation.<sup>86</sup>

Her opinion supports the reality that each case where a court must address the issue of reservations to a human rights treaty is an opportunity to further refine the

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<sup>79</sup> *Weber v. Switzerland* (App. No. 10/1989/170/226), ECtHR Ser. A, No. 177, 22 May 1990.

<sup>80</sup> *Ibid.*, paras. 37, 38.

<sup>81</sup> *Ibid.*, para. 38.

<sup>82</sup> *Loizidou v. Turkey*, Preliminary Objections, (App. No. 40/1993/435/514), ECtHR Series A, No. 310, 20 EHRR 99, 23 Mar. 1995.

<sup>83</sup> Severability is often referred to as the 'Strasbourg approach' as a result of the Court's continued stance on continued applicability of reserved articles of the ECHR when a reservation to the article is deemed invalid.

<sup>84</sup> *Loizidou*, para. 96.

<sup>85</sup> *Ibid.*, para. 97.

<sup>86</sup> Higgins, 'Speech to the European Court of Human Rights', p. 45.

application of the vague test created by the *Genocide Opinion* and promulgated by the Vienna Convention reservations regime.

It must be pointed out that the ECtHR's approach of severing an invalid reservation and leaving the reserving state bound to the reserved article is different from the Vienna Convention approach typically applied to the UN treaties examined in this thesis. Under the Vienna Convention approach, because only states determine validity amongst themselves, the invalid reservation may be applicable between the reserving state and accepting states while simultaneously being inapplicable between the reserving state and an objecting state. In the second scenario, the entirety of the article that is the object of the reservation will not be in effect as between the reserving and objecting states. This, however, proves an irrelevant point between the states in the context of non-reciprocal treaties, a point discussed earlier in Chapter Three and which will be further addressed in Chapter Five.

The *Belilos* decision signified a crucial moment in the reservations debate as it departed from the state-centric view of states as the sole arbiters of validity. Furthermore, despite the recognition in both customary international law and the Vienna Convention of a state's role in assessing a reservation either by acceptance or objection to, the *Belilos* Court also excluded consideration of other Contracting Parties' reactions, or lack thereof, when it, as a convention organ, was evaluating the validity of a reservation.<sup>87</sup> With these decisions the ECtHR has been effective in bolstering the idea that when a supervisory organ is created specifically to oversee a convention, states are relieved of absolute control over reservation compatibility.

### 2.2.1 EUROPEAN HUMAN RIGHTS COMMISSION

The reservations cases addressed by the now defunct<sup>88</sup> European Commission on Human Rights (the Commission) merit consideration primarily because they laid the groundwork for the ECtHR's seminal reservations decisions. As the organ to which individual applications alleging violations of the ECHR were first submitted, the

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<sup>87</sup> *Belilos*, para. 47: 'The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment.'

<sup>88</sup> The dissolution of the Commission as an ECHR supervisory organ was effected with the adoption of Protocol No. 11 (ETS No. 155), see Section II of the Protocol on the European Court of Human Rights.



Commission was not only a supervisory organ set up specifically to oversee aspects of the ECHR but it also served as the gateway to the ECtHR.

Some of the decisions by the Commission can be best described as inconsistent with both the ECtHR and its own catalogue of precedents. However, in the 1982 *Temeltasch v. Switzerland* case the Commission was successful in reinforcing its competence to evaluate reservations even in the event that other states may have accepted a reservation pursuant to Section III of the ECHR stating:

...even assuming that some legal effect were to be attributed to an acceptance or an objection made in respect of a reservation to the Convention, this *could not rule out the Commission's competence* to decide the compliance of a given reservation or an interpretative declaration with the Convention.<sup>89</sup>

This principle was cemented five years later by the ECtHR's *Belilos* decision and reinforced in the Commission when in 1991 it ruled that Turkey's reservation to ECHR Article 25 was illegal in the joined cases *Chrysostomos, Papachrysostomou, and Loizidou*,<sup>90</sup> which ultimately found their way to the ECtHR as the *Loizidou* case.

The Commission also used *Temeltasch* as an opportunity to firmly establish the concept of a disguised reservation. Relying on the definition of a reservation in Article 2(1)(d), the Commission held that the interpretative declaration made by Switzerland regarding ECHR Article 6(3)(e) was in fact a reservation due to its effect on the rights protected by the article.<sup>91</sup> This paved the way for the *Belilos* Court to employ McRae's definition of a 'qualified declaration' and hold Switzerland's 'declaration' to have the same effect as a reservation.<sup>92</sup>

Marks suggests that the *Belilos* and *Temeltasch* decisions indicate that acceptance and objection to a reservation will have no bearing on the validity of a reservation regardless of whether grounds are based on ECHR Article 57 or

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<sup>89</sup> *Temeltasch v. Switzerland*, (App. No. 9116/80), ECommHR, 5 EHRR 417, 5 May 1982, para. 61 (emphasis added).

<sup>90</sup> *Chrysostomos, Papachrysostomou, Loizidou v. Turkey*, (Joined App. Nos. 15299/89, 15300/89, 15318/89), ECommHR, 3 Rev. U.D.H. 193, 68 ECommHR Dec. & Rep. 216, 242 (1991), 4 Mar. 1991.

<sup>91</sup> It is interesting to note that the Federal Court of Switzerland had also come to the same conclusion and used this determination to dismiss the domestic appeal brought by Mr Temeltasch in its judgment of 30 Apr. 1980. See Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 559.

<sup>92</sup> McRae, 'The Legal Effect of Interpretative Declarations'.

incompatibility with objects and purposes,<sup>93</sup> a conclusion that is supported by the dicta in both cases. Though not a central feature of the case, ECHR State Parties were put on notice that the convention organs, not the states, had the final authority on reservation compatibility.

Imbert points out that the assessment of the validity of reservations was tantamount to the interpretation of reservations as far as the Commission was concerned, though he questions the basis of the presumed competency and insists that they are two unrelated questions.<sup>94</sup> For its part, the Commission noted that it had on previous occasions interpreted reservations<sup>95</sup> and that this function was part and parcel to assessing validity, an argument echoed by the treaty bodies as will be discussed in Chapter Six. Key to the Commission's competency argument was that the ECHR did not embody 'reciprocal rights and obligations in pursuance of their individual national interests' coupled with the existence of supervisory organs specific to the Convention.<sup>96</sup> Imbert concludes that 'it is essentially the objective and non-reciprocal nature of the obligations undertaken by the Contracting Parties that justifies the competence of the supervisory organs'.<sup>97</sup>

Non-reciprocity of the ECHR was established previously in the 1961 Commission decision of *Austria v. Italy*<sup>98</sup>. In the case Italy argued that Austria could not bring the claim because at the time of the alleged violation Austria had not yet ratified the ECHR. The Commission deftly sidestepped the issue by noting the purpose of the ECHR was to establish a common public order under which State Parties undertook obligations

...essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.<sup>99</sup>

This mantra of non-reciprocity of the ECHR was reinforced by subsequent ECtHR decisions and has been reflected in a multitude of decisions outwith the European

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<sup>93</sup> Marks, 'Three Regional Human Rights Treaties', p. 52.

<sup>94</sup> Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 583-84.

<sup>95</sup> *Temeltasch*, para. 65.

<sup>96</sup> *Ibid.*, para. 63.

<sup>97</sup> Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 585.

<sup>98</sup> *Austria v. Italy*, (App. No. 788/60), ECommHR, 4 European YBHR 116 (1961), 11 Jan. 1961.

<sup>99</sup> *Ibid.*, p. 140.

system. The framework of the ECHR and its supervisory mechanisms is reflected in the international treaties and a concept easily transferred to the broader system. This thesis argues that it is precisely the combination of the non-reciprocal nature of human rights treaties and the fact that specific supervisory organs exist to oversee these treaties that allows the supervisory organs as a reservation review mechanisms.

### 2.3 INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American system set forth in the American Convention on Human Rights<sup>100</sup> (ACHR) is more procedurally complex than the European system with only the Inter-American Commission on Human Rights (IACCommHR) receiving individual applications<sup>101</sup> if its competency to do so is recognised by a State Party.<sup>102</sup> The Inter-American Court of Human Rights (IACtHR) receives applications either referred by the IACCommHR or direct applications from State Parties<sup>103</sup>. Both the IACCommHR and the IACtHR have had the occasion to issue rulings or advisory opinions on reservations. While the main contributions of the ECHR supervisory organs were to strengthen the legal effect of invalidity (severance) and to ferment their roles as mechanisms of reservation review regardless of state reaction to reservations, their Inter-American counterparts have primarily reinforced the fact that non-reciprocal human rights treaties fall out-with the normal reservations regime and the parameters used to evaluate validity.

Recalling the debates surrounding terminology of incompatible reservations in the introductory chapter, it must be noted that the Inter-American system typically opts to discuss reservations in terms of ‘permissibility’ rather than ‘validity’. Article 75 of the ACHR indicates that the Convention ‘shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties’. Thus reservations to the ACHR must conform to Vienna Convention Article 19, including the object and purpose test.

Though the IACCommHR has shown a tendency to defer to states on the subject of reservations by treating reservations questions as interpretation issues

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<sup>100</sup> 1144 UNTS 144, 22 Nov. 1969 (ACHR).

<sup>101</sup> ACHR, Art. 44. This is similar to the original system followed in the European system.

<sup>102</sup> ACHR, Art. 45.

<sup>103</sup> ACHR, Arts. 61-62.

rather than a validity question,<sup>104</sup> the IACtHR has been more inclined to take up the issue of reservations and views the interpretation of reservations integral to interpreting a treaty.<sup>105</sup> In 1982, the IACtHR issued an advisory opinion noting especially

...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 irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the 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>106</sup>

The effect of the non-reciprocal nature of human rights treaties on reservations was reinforced the following year in another advisory opinion by the IACtHR when it reiterated that ‘the question of reciprocity as it relates to reservations...is not fully applicable as far as human rights treaties are concerned’ in the *Restrictions on the Death Penalty Advisory Opinion*.<sup>107</sup> Reciprocity of obligation is the cornerstone of the Vienna Convention regime and the IACtHR has repeatedly insisted that this aspect of the reservations is questionable in the context of human rights treaties. The Court further concluded that ‘any meaningful interpretation of a treaty also calls for an interpretation of any reservation made thereto...by reference to relevant principles of general international law and the special rules set out in the Convention itself’.<sup>108</sup> Thus not only does the IACtHR look to the ACHR, but it also pulls from other sources of international law, which leaves room for progressive interpretation as international law itself evolves.

Interestingly, the IACtHR outlined a reservation’s compatibility with the object and purpose test of the Vienna Convention, not the acceptance of the

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<sup>104</sup> Marks, ‘Three Regional Human Rights Treaties’, p. 56.

<sup>105</sup> *Restrictions on the Death Penalty (Articles 4(2) and (4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83 (8 Sept. 1983), IACtHR (Ser. A) No. 3 (1983), para. 62.

<sup>106</sup> *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82 (24 Sept. 1982), IACtHR (Ser. A) No. 2 (1982), para. 29; see also *Hilaire v. Trinidad and Tobago*, Preliminary Objections, (1 Sept. 2001) IACtHR (Ser. C) No. 80 (2001), para. 95.

<sup>107</sup> *Restrictions on the Death Penalty*, para. 62.

<sup>108</sup> *Ibid.*, para. 62.

reservation by another State Party, as the key to evaluating reservations. The distinction between using the state to evaluate a reservation and the outlined adjudicatory and advisory mechanisms established by the ACHR was important in that the Court's dicta suggested that the Convention supervisory organs, not the states, would have the final say on the compatibility of reservations.<sup>109</sup> For purposes of this particular advisory opinion, the Court was merely indicating that a reservation, even without an evaluation of compatibility, would not preclude the entry into force of a treaty for a state whose instrument of ratification was accompanied by a reservation. This supports the severability principle as the IACtHR did not contemplate that a later determination of incompatibility would invalidate the state's consent to be bound without the benefit of the reservation.

The severability principle was affirmed in the 2001 *Hilaire* case despite Trinidad and Tobago's argument that if its reservation to the Court's jurisdiction was determined to be invalid then the state's declaration accepting the compulsory jurisdiction would be void *ab initio*.<sup>110</sup> The counter-argument highlighted that the reservation was excessively vague and made it impossible to determine its scope.<sup>111</sup> Further supporting the concept of severance, the IACCommHR argued that if the state's consent was voided rather than simply severing the reservation then the rights of the applicant would not be guaranteed, which is the point of the ACHR.<sup>112</sup> The IACtHR ultimately agreed with the IACCommHR and severed the reservation thereby holding Trinidad and Tobago bound to the ACHR without the benefit of the reservation which enabled them to proceed to an examination of the merits of the case.<sup>113</sup>

This is somewhat contradictory to the long-standing tradition premised on states using the object and purpose test to make a validity determination. However, that tradition is not expressly outlined in the Vienna Convention regime and thus in adopting the residual rules but also specifying that it is compliance with the test,

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<sup>109</sup> *Ibid.*, para. 45 et seq.

<sup>110</sup> *Hilaire v. Trinidad and Tobago*, para. 49.

<sup>111</sup> *Ibid.*, para. 53.

<sup>112</sup> *Ibid.*, para. 67.

<sup>113</sup> The IACtHR came to the same conclusion on invalidity of Trinidad and Tobago's reservation to the compulsory jurisdiction clause of the Court in several cases: *Benjamin et al. v. Trinidad and Tobago*, Preliminary Objections, (1 Sept. 2001) IACtHR (Ser. C) No. 81 (2001); *Constantine et al. v. Trinidad and Tobago*, Preliminary Objections, (1 Sept. 2001) IACtHR (Ser. C) No. 82 (2001).

assumingly as determined by the Court, rather than the acceptance by States Parties that bears on validity the IACtHR has successfully asserted its position as the final authority on compatibility of reservations to the ACHR. It also insists that states ‘have a legitimate interest...in barring reservations incompatible with the object and purpose of the Convention’ and that they should assert this interest through the ACHR mechanisms, such as the inter-state complaints procedure.<sup>114</sup>

In the *Restrictions on the Death Penalty Advisory Opinion* the IACtHR also weighed in on the relationship between non-derogable rights and reservations. Article 27 of the ACHR expressly allows for certain derogations. However, out-with the derogations outlined in the article, the IACtHR stated that a reservation (a reservation by Guatemala in this instance) to ACHR Article 4 (right to life)—an article from which no derogation is permitted—would be incompatible with the Convention: ‘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>115</sup> The Court conceded, however, that a mere restriction to a non-derogable right that did not deprive the right as a whole would not necessarily be incompatible with the object and purpose of the ACHR.<sup>116</sup>

Though the Inter-American system is specific to the ACHR, it has propagated the ideological distinction inherent in human rights treaties as treaties which encompass non-reciprocal obligations. The IACtHR also affirmed that states are not the final adjudicators on reservation compatibility when a human rights treaty is coupled with a specific supervisory mechanism, similar to the position of the ECtHR except that the IACtHR employs the object and purpose test of the Vienna Convention rather than a convention-specific regime. The other primary contribution of the IACtHR to the reservations debate is its contention that non-derogable rights

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<sup>114</sup> *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, para. 38. The Court did, however, indicate that the opinion was limited to reservations in the context of the question at hand: whether a reservation must be accepted before the instrument of ratification was considered valid and binding in order to determine the effective date of entry into force of the ACHR for a state ratifying with a reservation attached to its instrument of ratification.

<sup>115</sup> *Restrictions on the Death Penalty*, para. 61.

<sup>116</sup> In this particular opinion, the Court did not find Guatemala’s reservation impermissible but noted that the death penalty could nonetheless not be extended due to the construction of the reservation.

should also be non-reservable.<sup>117</sup> In light of the special situation of human rights treaties as reflected by both the ECtHR and the IACtHR, the traditional reservations rules as tempered by the concept of reciprocal obligations does not square when an invalid reservation is at issue.

### 3 FINAL OBSERVATIONS

Slowly states are taking up the task of policing reservations to human rights treaties but this practice has developed haphazardly as the Vienna Convention does not specify this role for states nor does it address the legal effect of invalid reservations. The interplay between invalid reservations and objections thereto leaves the status of the treaty between various parties and the status of an invalid reservation hanging in the balance. The current catalogue of reservations reveals that even incompatible reservations remain attached to the core treaties despite objections because there is no guideline indicating the consequence of an invalidity determination by a state. The overarching problem with the current system is that there is no definitive final arbiter unless the reservation is reviewed by a competent dispute settlement mechanism capable of defining the legal effect and consequence of an invalidity determination.

The obvious alternative review mechanism under the Vienna Convention is the judiciary. The ICJ, ECtHR and IACtHR have had occasion to review the validity of reservations at some point albeit often in a cursory fashion and most often simply to determine claim admissibility. Each of these courts was either expressly created to serve in this type of capacity or, in the case of the ICJ, is the ultimate authority on the interpretation of international obligations, including treaty law. The primary drawback, however, to sole reliance on a judiciary to evaluate the validity of reservations is that review can only take place if the judicial organ has competency to evaluate a dispute either based on automatic or consent-based jurisdiction. Due to the limits of ICJ jurisdiction and the reluctance of states to institute proceedings against one another when there is no compelling interest to seek redress of another state's reservations, the opportunity to assess the validity of a reservation to one of the core

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<sup>117</sup> Discussed in Chapter 3, section 1.3.

UN human rights treaties using the object and purpose test has not availed itself at the ICJ subsequent to the *Genocide Opinion*.

Though the regional systems do not specifically address the reservations quagmire suffered by the UN human rights treaties dealt with by this research, they do enrich the debate by progressing the discussion of reservations to human rights treaties in general and by drawing important parallels between the regional treaties and the treaties in the UN system. Both the ECtHR and the IACtHR have taken great pains to outline their reasons for concern over the non-reciprocal nature of human rights treaties, the role of a treaty-specific organ in reservation evaluation, and they have further refined ancillary issues related to invalid reservations. Though the regional human rights courts are conspicuously silent on many aspects of customary international law and the application of the Vienna Convention rules, these topics which evoke great concern in the context of human right treaties have also been largely neglected by general international law. As noted by Higgins both in the separate opinion to *Armed Activities* and in her 2009 speech to the ECtHR, the jurisprudence of the various courts on the issue of reservations to human rights treaties is ‘developing the law to meet contemporary realities’.<sup>118</sup> Thus the decisions not only of the ICJ, but also of the regional human rights courts can only generate more information regarding reservations to human rights treaties and therefore contribute to the developing corpus of customary international law on the subject as the international community continues to navigate the strengths and weaknesses of the treaty system.

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<sup>118</sup> *Armed Activities*, Separate Opinion, para. 23; Higgins, ‘Speech to the European Court of Human Rights’, p. 45.



## CHAPTER FIVE

### ANALYSIS OF VIENNA CONVENTION RESERVATIONS RULES

The previous chapters examined the development of the default reservations regime and how the regime works in practice with respect to human rights treaties. In Chapters Three and Four, examples from the core human rights treaties revealed the normative gaps inherent in the default reservations regime particularly in relation to assessing the most common forms of reservations to those treaties using the object and purpose test as well as the indefinite effect these assessments yield in the context of the state-to-state relationship of state parties. This chapter will narrow the focus to the actual lacunae in the reservations rules and evaluate the primary thesis research question in light of contemporary state practice, academic writings, the ILC study on reservations to treaties and the work of treaty bodies on reservations.<sup>1</sup>

Drawing upon positions formulated in the previous chapters and the contemporary efforts to address reservations to human rights treaties, this chapter will respond to the following question: does the Vienna Convention reservations regime adequately govern reservations to human rights treaties? To evaluate this question the following features of the ‘one-size-fits-all’ approach are analysed in general and in specific relation to human rights treaties:

- a. The object and purpose test
- b. The legal effect of invalid reservations
- c. The consequence of invalid reservations

In light of broad support for maintaining the reservations regime established

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<sup>1</sup> The effectiveness of the Vienna Convention reservations regime has been thoroughly examined by both the ILC and the treaty bodies. These studies, introduced in Chapter 1, incorporate, to the extent possible, the practice and views of states from both general law and human rights perspectives. Though several ILC reports leading to the ILC’s Finalized Guidelines on Reservations to Treaties will be referenced, both the draft Guide to Practice on Reservations to Treaties with commentary and the finalized document produced at the 63rd session of the ILC adopting the text and title of the draft guidelines will be referenced. The former document refers to the *Guide to Practice on Reservations to Treaties, with commentaries as provisionally adopted by the ILC* at its 62nd session (see UN Doc. A/65/10 (2010)) and can be found at [http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations\\_commentaries\(e\).pdf](http://untreaty.un.org/ilc/sessions/62/GuidetoPracticeReservations_commentaries(e).pdf) (Draft Guide to Practice) and the latter to ILC, *Reservations to Treaties, Text and title of the draft guidelines constituting the Guide to Practice on Reservations to treaties, as finalized by the Working Group on Reservations to Treaties...*, UN Doc. A/CN.4/L.779 (2011) (Finalized Guidelines). References to the treaty body documents will be to individual reports, including those studies concluded by François Hampson.

by the Vienna Convention, enthusiasm for the regime as a whole must be checked with the recognition of the flaws in the rules both generally and as applied to human rights treaties. While these flaws are not insurmountable obstacles to utilising the default system, they do highlight the unique nature of human rights treaties and the obligations they are designed to protect. The following will initially examine the viability of the Vienna Convention rules and highlight aspects of the rules which lack widespread common agreement or practice, including the application of the object and purpose test and the legal effect of invalid reservations. Finally, the potential consequences of a ruling of invalidity will be examined with special note taken that consequences are only ensured when there is a final determination on the validity of a reservation to a human rights treaty.

## 1 RECOGNISING THE NORMATIVE AMBIGUITIES IN THE VIENNA CONVENTION

As discussed in Chapter Two, the Vienna Convention reservations rules are rules of general applicability. The overarching purpose serves to balance the tension between two counterpoints, both of which are goals of international treaty law: universal treaty membership and the integrity of the treaty. The reservations rules are not concrete nor are they without flaws, two points underscored by the ILC's extensive Draft Guide to Practice on Reservations to Treaties and its commentary:

[T]he 1969 Vienna Convention has not frozen the law. Regardless of the fact that it leaves behind many ambiguities, that it contains gaps on sometimes highly important points and that it could not foresee rules applicable to problems that did not arise, or hardly arose, at the time of its preparation (...), the Convention served as a point of departure for new practices that are not, or not fully, followed with any consistency at the present time.<sup>2</sup>

Despite the fact that '[t]he default rules governing reservations in the [Vienna Convention] are complex, ambiguous, and often counterintuitive,'<sup>3</sup> each of the major studies on reservations concluded under the ILC and the treaty bodies has concluded that the general Vienna Convention reservations rules are the rules to be applied to

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<sup>2</sup> Draft Guide to Practice, 4.5, commentary para. 17, quoting A. Pellet, *First report on the law and practice relating to reservations to treaties*, UN Doc. A/CN.4/470 (1995), para. 161.

<sup>3</sup> L.R. Helfer, 'Not Fully Committed? Reservations, Risk and Treaty Design' (2006) 31 *Yale Journal of International Law* 367, 367.

all treaties, including human rights treaties.<sup>4</sup> However, as will be examined in the following sections, neither the ILC nor the treaty body work reconciled the disparate treatment of reservations by states in applying the Vienna Convention rules to human rights treaties.

The following sections consider the lacunae in the rules in their general application to multilateral treaties and pinpoint the further difficulties inherent in the specific interaction between the Vienna Convention rules and human rights treaties. Not only is there no settled approach to the object and purpose test or how it is to be applied, there are certain reservations to normative human rights treaties which cause just as many problems as reservations deemed impermissible under the Article 19(c) test. As submitted in Chapter Three, sweeping reservations and reservations which subordinate international obligations to domestic law cause a particular problem in determining the extent to which obligations are altered either by modification or abrogation. The *de minimis* effect of objections under the state-to-state reservation policing practice, examined in Chapter Four, will be briefly revisited to link the ambiguity of the object and purpose test to the inconclusive legal effect of an invalid reservations as determined by state parties.

Analysis of the gaps related to rules on legal effect reveals that there is no clear consequence resulting from a determination of invalidity when there is no clear final view taken on reservation validity. In examining this situation the most widespread views on the consequence of an invalid reservation, including nullity and severance, will be discussed as well as more nuanced approaches. Ultimately, the analysis concludes that if the residual rules of the Vienna Convention are widely accepted as those that should be applied to evaluate the validity of all reservations, including those to human rights treaties, then the shortcomings must be identified and a 'best practice' suggested.

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<sup>4</sup> See e.g., ILC, UN Doc. A/64/10 (2009), para 53; F. Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Final working paper*, UN Doc. E/CN.4/Sub.2/2004/42 (2004) (2004 *Final working paper*), paras. 6-7; see also Chairpersons of the Human Rights Treaty Bodies (Chairpersons of the HRTBs), *Report on Reservations*, UN Doc. HRI/MC/2007/5 (2007) (2007 *Report on Reservations*), para. 16(3).

The primary problem with the Vienna Convention is that regardless of treaty type the text imposes the very vague and subjective object and purpose test to determine the object and purpose of a treaty and therefore assess the validity of a reservation that is not covered by Article 19(a) or (b). Initially, there is an obvious difficulty in applying a subjective test to determine whether reservations defeat the object and purpose of a treaty especially considering that '[i]t is not normal practice in treaty drafting to spell out the "object and purpose" as if one were defining technical terms.'<sup>5</sup> Lijnzaad has characterised the object and purpose test as 'both transparent and opaque at the same time' because though the wording seems to provide a clear indicator of what reservations will be acceptable under a treaty, it is actually unclear in practice.<sup>6</sup> Due to the large amount of existing literature on the perceived shortcomings of the object and purpose test the arguments will not be fully rehashed here except to lay the foundation for the focus of this research.<sup>7</sup>

There is no clear definition as to exactly what is meant by 'object and purpose' and the Draft Guide to Practice does not elaborate. Scholars<sup>8</sup> have attempted to define it without success through the years and the ILC ultimately deferred to the other less-than-successful attempts by acknowledging that there was little assistance from the Vienna Convention preparatory notes to determine the intended meaning of 'object and purpose'.<sup>9</sup> Recalling that the object and purpose test stems from the *Genocide Opinion* and the Genocide Convention, a convention that was unique unto its own with an easily determinable object and purpose, it is difficult to accept that the object and purpose test remains without further guidance. The test

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<sup>5</sup> W.A. Schabas, 'Reservations to Human Rights Treaties: Time for Innovation and Reform' (1994) 32 *Canadian Yearbook of International Law* 39, 47.

<sup>6</sup> L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995), p. 4.

<sup>7</sup> For discussions regarding the object and purpose test see the following: I. Buffard and K. Zemanek, 'The "Object and Purpose" of a Treaty: an Enigma?' (1998) 3 *Austrian Review of International and European Law* 311; D. Hylton, 'Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations' (1994) 27 *Vanderbilt Journal of Transnational Law* 419; B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 *AJIL* 281.

<sup>8</sup> e.g., C.A. Bradley and J.L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149(2) *University of Pennsylvania Law Review* 399, 429-39; Hylton, 'Default Breakdown', 429-32; Buffard and Zemanek, 'The "Object and Purpose" of a Treaty', 342; G. Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2 *ICLQ* 1, 12.

<sup>9</sup> A. Pellet, *Tenth report on Reservations*, UN Doc. A/CN.4/558/Add.1 (2005), paras. 75-76.

is reflected Article 19(c) though at no point in the Vienna Convention is the test defined,<sup>10</sup> nor is this concept limited to reservations—it appears in six<sup>11</sup> other provisions of the Convention. The negotiating states appear to have embraced the complete vagueness of the concept and applied it in every instance where agreement on a more refined standard could not be reached. There has never been a settled approach to applying the object and purpose test in the context of reservations but generally most commentators have interpreted the test as focusing on the essence or overall goal of the treaty rather than parsing the individual articles, thus, the test has proven difficult to apply.<sup>12</sup> The ILC acknowledges that treaty parties might not be able to make the determination themselves thus they should resort to a dispute settlement body for a definitive determination,<sup>13</sup> though, despite their ready availability, in practice these have rarely been used to settle reservation disputes except in the context of regional human rights systems and even then only as a jurisdictional question or ancillary matter.

With no clear definition, perhaps deducing a method for determining the object and purpose of a treaty is the next best thing. Pellet, the Special Rapporteur leading the ILC study, went as far as to try and distil a ‘method’ for employing the test pursuant to ICJ interpretations of the test through the years in an attempt to provide guidance on determining the object and purpose of a treaty. Noting that this ‘method’ is at best disparate in its application by the Court, he also points out that it is largely based on empirical data from the treaty in question and includes such obvious considerations as the title, the preamble, the introductory articles, articles that demonstrate the major concerns of the Contracting Parties, the preparatory work and the overall framework of the treaty.<sup>14</sup> While Pellet is undoubtedly correct that the object and purpose ‘can be determined only by reference to the text and particular

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<sup>10</sup> Pellet, *Tenth report on Reservations*, para. 77; Hylton, ‘Default Breakdown’, 450.

<sup>11</sup> Reference to the object and purpose of a treaty is also made in Arts. 18, 31, 33, 41 and 58. It also appears in Art. 20(2), which is part of the reservations regime, however this article deals with the distinct situation where the application of the treaty in its entirety between all the parties is an essential condition of the consent and is not the backbone of the reservation rules against which compatibility is assessed.

<sup>12</sup> D. Harris, *Cases and Materials on International Law*, 7th ed. (Sweet & Maxwell, London 2010), p. 653; Helfer, ‘Not Fully Committed?’, 367; J. Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 *Nordic Journal of International Law* 179, 181.

<sup>13</sup> ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 454.

<sup>14</sup> Pellet, *Tenth report on Reservations*, para. 81.

nature of a treaty' and that there is 'some degree of subjectivity' in each case that must be limited,<sup>15</sup> the finalised guidelines on the test do not provide more than a recap of what has gone before. What is obvious is that the object and purpose is not static and thus must not be closed to review.<sup>16</sup>

The product of the treaty bodies added to the empirical elements set forth by Pellet. In Hampson's 2004 working paper there are three characteristics she designates as important when determining compatibility of a reservation to a human rights treaty under the object and purpose test: (1) the relationship between separate articles and the whole treaty, (2) the alleged *jus cogens* character of some of the norms, and (3) the distinction between derogable and non-derogable rights.<sup>17</sup> These additions to Pellet's method track the consistent statements of the treaty bodies in their evaluations of reservations. Hampson<sup>18</sup> and the treaty bodies<sup>19</sup> ultimately deferred to Pellet in anticipation of him developing a way to apply the object and purpose test to a human rights treaty. Unfortunately, as indicated above, this special test did not materialise. There remains a black-hole as to any definitive use of the test other than for those employing it to take into account all circumstances related to the reservation and treaty under consideration.

The situation is decidedly more bleak when the object and purpose test is applied to human rights treaties. Despite the ILC's inability to produce a definition for the object and purpose test, there was a nod of consideration extended to human rights treaties in the Draft Guidelines:

*3.1.12 Reservations to general human rights treaties*

To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.<sup>20</sup>

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<sup>15</sup> *Note by the Special Rapporteur on draft guideline 3.1.5*, UN Doc. A/CN.4/572 (2006), para. 5.

<sup>16</sup> Pellet, *Tenth report on Reservations*, para. 83.

<sup>17</sup> Hampson, *2004 Final working paper*, para. 49.

<sup>18</sup> *Ibid.*, para. 72.

<sup>19</sup> Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 16(6).

<sup>20</sup> Original text adopted at the 59th session of the ILC, ILC Yearbook, UN Doc. A/62/10 (2007), p. 65.

As noted by the original commentary on this guideline, Pellet uses the three elements most often deemed indicative of a human rights treaty—indivisibility, interdependence and interrelatedness—in an attempt to strike a delicate balance between the right that is the subject of the reservation and the effect that a reservation to the provision produces, including the impact of the reservation.<sup>21</sup> In a nutshell, states should consider the fact that a human rights treaty is a human rights treaty. This guideline specifically addressing reservations to human rights treaties was replaced by finalized guideline 3.1.5.6 which expunged direct reference to human rights treaties opting, instead, for more general terms and urging consideration of the specifics of the treaty under consideration.<sup>22</sup> In a similar vein, Seibert-Fohr argues that the Vienna Convention is well-suited to handle the ‘special exigencies’ of international human rights treaties as it encourages accommodation by noting that reservation evaluation is largely dependent on the type of treaty being considered.<sup>23</sup>

Bearing in mind the vast number of reminders about the indivisibility, interdependence and interrelatedness of human rights as well as the importance of the rights addressed and the negative effect that certain reservations might produce, the guidelines are not particularly instructive. Furthermore, it is widely recognised that these treaties ‘are essentially objective in character and are not based on reciprocal undertakings.’<sup>24</sup> Reciprocity is the cornerstone of the multilateral treaty system and is acknowledged as the first line of defence against states attempting to shirk convention obligations.<sup>25</sup> States gain no legal rights or protections by becoming

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<sup>21</sup> *Ibid.*, p. 113, *Commentary on Draft Guideline 3.1.12 on Reservations to Treaties*.

<sup>22</sup> *Oral report by the Chairman of the Working Group on Reservations to Treaties*, ILC, 63rd sess. (20 May 2011), p. 7, at <http://untreaty.un.org/ilc/sessions/63/ReservationsToTreatiesReport20May2011.pdf> <accessed 1 Sept. 2011> (*2011 Reservations Working Body Report*).

<sup>23</sup> A. Seibert-Fohr, ‘The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties’ in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004), p. 207.

<sup>24</sup> P.-H. Imbert, ‘Reservations and Human Rights Conventions’ (1981) 6 *Human Rights Review* 28, 35, citing H. Golsong, ‘Les reserves aux instruments internationaux pour la protection des droits de l’homme’ in *Les clauses échappatoires en matière d’instruments internationaux relatifs aux droits de l’homme*, Fourth Colloquy of the Human Rights Department of the Catholic University of Louvain (7 Dec. 1978) (1982); see also C. Chinkin, ‘Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 64; Schabas, ‘Time for Innovation and Reform’, 65; R.St.J. Macdonald, ‘Reservations under the European Convention on Human Rights’ (1988) 21 *Revue belge de droit international* 429, 434.

<sup>25</sup> Lijnzaad *Ratify and Ruin*, p. 67.

a member of a human rights treaty as the benefits flow solely to the human beings subject to the jurisdiction of the state.

In light of the one-size-fits-all approach employed by the Vienna Convention to assess reservations for all treaty types, the difficulties in using the test specifically in response to reservations to human rights treaties must be evaluated. The first difficulty develops when states disagree on the integral nature of specific articles and, therefore, disagree as to the validity of certain reservations. Practice has shown that treaties do not tend to outline which articles are central to the object and purpose of the treaty, especially when the various obligations contained within a treaty are viewed as inter-related and inter-dependent as is the case with the core human rights treaties.

Reflecting on *General Comment No. 24*<sup>26</sup> Hampson argues that human rights treaties have a ‘single goal (respect, protection and promotion of human rights) which is to be achieved by adherence to a large number of separate provisions’ therefore ‘[a] reservation to one provision may ... be incompatible with the object and purpose of the treaty.’<sup>27</sup> States tend to decide for themselves which articles are integral and this is evidenced by their reservations and/or objections. Even prohibited reservations will go into effect where states do not object to them because there is nothing in the Vienna Convention’s reservation scheme that prevents this situation.<sup>28</sup> As noted previously in Chapter Four, in the context of non-reciprocal treaties, states are less likely to expend energy evaluating other state’s reservations because their legal obligations remain unaffected. Thus, the one-size-fits-all approach applying the object and purpose test to treaties made up of non-reciprocal obligations has been particularly detrimental in the field of human rights.

As summarised by Hampson, when states apply the object and purpose test to reservations to human rights treaties results in ‘fragmentation of the treaty commitment’:

A reservation that some States object to on the grounds that it is incompatible with the objects and purposes of the treaty may appear to be accepted, expressly or through silence, by others. A question which

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<sup>26</sup> UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) (*General Comment No. 24*).

<sup>27</sup> Hampson, *2004 Final working paper*, para. 50.

<sup>28</sup> A. Aust, *Modern Treaty Law and Practice*, 2d ed. (CUP, Cambridge 2007), p. 144.



ought to have only one answer (whether a reservation is incompatible with the object and purpose of a treaty) appears to receive a variety of answers. Most of these questions arise in relation to any multilateral normative treaty.<sup>29</sup>

Though these questions may arise in a variety of multilateral treaties, the sections below will demonstrate the particular ill-effects for human rights treaties. Almost two decades of study by the ILC and the treaty bodies has not produced concrete guidance on the application of the object and purpose test. Thus, it seems that there is nothing new to contribute to the paralysis created by applying the central feature of the Vienna Convention reservations rules

## 2.1 THE *DE MINIMIS* EFFECT OF STATE OBJECTIONS

When the object and purpose test is applied to evaluate the reservations of state parties, states notify their opposition to reservations by depositing an objection with the treaty depositary. In Chapter Three the Article 21 objection system was examined. The Vienna Convention regime largely favours reserving states over non-reserving states.<sup>30</sup> The burden of examining appended reservations falls, in the first instance, entirely upon the states which are already party to the convention. Articles 20 and 21 rely on states to be vigilant in the assessment of reservations, yet the assessment contemplated is that of valid reservations. As evidenced by the examples given in Chapter Three, it is clear that objections have a *de minimis* effect on incompatible reservations.

Objections to reservations to non-reciprocal multilateral treaties have never prevented a state from becoming a party to this type of convention and rarely do they produce a tangible effect. Even in the event that a state objects to a reservation for being incompatible with the object and purpose of a treaty there is nothing but a positive expression by the objecting state to prevent the treaty from entering into force between the reserving and objecting states and there is no guidance on how to treat the remnant reservation that is considered invalid as other states may have accepted the same reservation. It is the situation surrounding a reservation which has

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<sup>29</sup> Hampson, 2004 *Final working paper*, para. 27.

<sup>30</sup> This point is recognised by many observers including: I. Boerefijn, 'Impact on the Law on Treaty Reservations' in Menno T. Kamminga and Martin Scheinin (eds.), *The Impact of Human Rights Laws on General International Law* (OUP, Oxford 2009), p. 85; E.T. Swaine, 'Reserving' (2006) 31 *Yale Journal of International Law* 307, 327.

been objected to on the basis of invalidity that presents the normative puzzle that remains to be solved. Where there are competing views on the validity of the reservation it is unlikely that the disagreement will ever go to independent adjudication for a final view on validity due to the fact that human rights treaties do not engage reciprocity in the same way as other multilateral treaties.

Though nothing in the Vienna Convention specifies that states are the primary or solitary arbiters of permissibility practice has created this commonplace order and as a result states have adopted it as the norm under the auspices of state sovereignty. Schmidt, and many of his contemporaries, agree that '[i]n the final analysis, it must be for each State party to decide whether a certain reservation meets that test (the object and purpose test of [Vienna Convention]19(c)).'<sup>31</sup> The Secretary-General circulates all reservations, even those deemed contrary to the convention, to the existing state parties. Thus the reserving state clears the first hurdle of becoming a state party and maintaining its reservation without effort as soon as the instrument of ratification is filed. Once the reservation is circulated, it can then sit back and await potential objections by state parties for whom the treaty is already in force. As discussed in Chapter Three, depending on the complexity or vagueness of a reservation, not to mention lack of familiarity of the law in another jurisdiction, it may be impossible for a state to determine the true depth of the obligations modified by a reservation therefore in many cases states simply take a passive view of reservations when its rights and obligations are not impacted, such as with a non-reciprocal human rights treaty.

## 2.2 SUMMARY

There is no settled definition of the object and purpose of a treaty. Due to the nature of the obligations enumerated in the core human rights treaties states often disagree as to which provisions are essential to the object and purpose of a treaty. The incoherence resulting from the ambiguous nature of the object and purpose test is exacerbated by the fact that the state-policing of reservations yields little result when state parties determine that a reservation is invalid under the Vienna Convention.

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<sup>31</sup> M.G. Schmidt, 'Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 21.

The uncertainty about how to apply the object and purpose bleeds into the next critical difficulty in the application of the Vienna Convention reservations rules to human rights treaties. The lack of determinable legal effect of an invalid reservation represents another gap in the reservations rules as there is no clear guide as to how to categorise the legal effect of an invalid or impermissible reservation. Recall that ‘invalid’ reservations include those that are impermissible for failure to clear Article 19 hurdles as well as those reservations that are deficient for procedural or structural reasons<sup>32</sup> and those reservations that violate other aspects of the Vienna Convention. If a reservation is invalid for structural or procedural deficiencies, the issue can be dispensed with more easily as it cannot be ‘established’ and therefore cannot have legal effect pursuant to Vienna Convention Article 21. Impermissible reservations, however, present a more difficult problem due to the imprecise nature of object and purpose test as noted above. Though the primary concern of this section is reservations that are impermissible specifically due to incompatibility with the object and purpose test of Article 19(c), the problem of determinable legal effect in the context of reservations to human rights treaties is also prevalent for sweeping<sup>33</sup> reservations and reservations that subordinate<sup>34</sup> international obligations to domestic law, both of which have been acknowledged to be contrary to Article 19(c) (impermissible) as well as structurally deficient (invalid) due to the indeterminable scope and breadth.

As examined in Chapter Two, Article 21 of the Vienna Convention specifically addresses the legal effect of a *valid* reservation and its modification of treaty relations between the reserving state and another state party based on its acceptance or objection thereto.<sup>35</sup> The article is premised on the fact that the reservation is valid as the ability of states to object to valid reservations is the political feature of the flexible reservations regime. There is no firm position on the legal effect of an *invalid* reservation in the Vienna Convention. The *travaux*

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<sup>32</sup> See Chapter 2, section 4.2.

<sup>33</sup> See Chapter 3, section 2.4. See also the Draft Guide to Practice, 1.1.1, commentary paras. 1-6, discussion of general ‘across-the-board’ reservations.

<sup>34</sup> See Chapter 3, section 2.5.

<sup>35</sup> N.B. this thesis does not address the separate issue of the effect of an acceptance or objection of a reservation on the reserving state’s consent to be bound to the treaty. See Vienna Convention, Art. 20 (Chapter 2, section 4.1).

*preparatoires* of the Vienna Convention do not make clear whether a reservation which has ‘fallen at the hurdle of Article 19(c) because of incompatibility with the object and purpose of the Convention is nonetheless open to acceptance or rejection by States under Article 20(4).’<sup>36</sup> According to the ILC, a reservation can only have a legal effect if it is established, which means that the reservation is valid (and permissible) and has been accepted<sup>37</sup> otherwise it is a nullity.<sup>38</sup> In other words, the legal effect is established between the reserving and accepting state to the extent the treaty obligations are modified or excluded (released from compliance)<sup>39</sup> *inter se* to the extent of the reservation.<sup>40</sup> Alternatively, between the reserving and objecting state the treaty obligations which are subject to the reservation will not be applicable between the two or the convention will be applicable in its entirety between the two—‘super-maximum effect’<sup>41</sup>—if the objecting state has indicated this effect. Thus, a reservation’s legal effect, or lack of legal effect, under the Vienna Convention rules is based on the reaction, whether an acceptance or objection, by another state party. For the purposes of examining legal effect in this section there is an assumption that a state has taken a view that a formulated reservation is invalid.

Under the Vienna Convention regime, if multiple states object to a reservation on the basis of invalidity, the fall-out for the reserving state will be tangible as it would be unlikely that the reserving state would be able to maintain the invalid reservation due to the reciprocal nature of rights and responsibilities in treaty law. The same cannot be said of normative human rights treaties; the obligations contained therein create a state-human being relationship and human beings do not get a look-in at the treaty formation process. The state-human being relationship,

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<sup>36</sup> C. Redgwell, ‘The Law of Reservations in Respect of Multilateral Conventions’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 8; see also C. Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ (1993) 64 BYBIL 245, 259 et seq.

<sup>37</sup> Draft Guide to Practice, 4.2, commentary para. 1, reflecting the principle set out in Vienna Convention 21(1)(a), which is set out in draft guideline 4.1. Note that the accepting state will not benefit from the reservation in its relations with other State Parties. See also Finalized Guidelines, 4.1.

<sup>38</sup> Swaine, ‘Reserving’, 315; see D.W. Bowett, ‘Reservations to Non-Restricted Multilateral Treaties’ (1976-77) 48 BYBIL 67, 75 et seq.

<sup>39</sup> N.B. this thesis does not examine the difference in effects created by modifying and excluding reservations.

<sup>40</sup> Draft Guide to Practice, 4.2.4, para. 1; Finalized Guidelines, 4.2.4.

<sup>41</sup> Draft Guide to Practice, 2.6.1, commentary paras. 24, 25.

recognised in the Draft Guide to Practice,<sup>42</sup> suffers detriment because individuals are unable to invoke the legal effect flowing normally from the traditional concept of reciprocity. Thus a determination of invalidity under the Vienna Convention system deprives the beneficiary of a human rights treaty from any benefit or redress such as that enjoyed among state parties. This is an unintended effect of the investing of the human being with rights under international law. The reserving state is the only party to enjoy the benefit of the reservation as the legal effect is only applicable to itself. The state-human being relationship is at the mercy of the state-to-state relationship that the Vienna Convention falsely assumes to be important in a human rights treaty.

The potential legal effect of a sweeping reservation poses a great threat to human rights treaties. There is little to remedy the effect of sweeping reservations which could deprive the treaty of its object and purpose primarily because it is difficult to ascertain the extent to which obligations are modified by these reservations. Pellet acknowledges that there are a number of such reservations to which no objections have been made thus, in theory, the reserving state has modified all aspects of the treaty which fall under the reservation and these effects could be enjoyed reciprocally by an accepting state.<sup>43</sup> This potential situation results from the establishment of the reservation through tacit acceptance, or silence, on the part of other state parties.<sup>44</sup> As noted by Boerefijn, ‘the ILC’s primary concern about vague and general reservations is that these cause problems for other contracting states in assessing the extent to which the reserving state is bound’ but it avoids addressing the consequences for the human beings affected by a reservation.<sup>45</sup>

Reservations that subordinate international obligations to domestic laws also create a problem as to the determinable effect of the reservation on the obligation. As discussed in Chapter Three, Vienna Convention Article 27 prohibits states from using internal law as a justification for failing to perform a treaty. Most authors employ Article 27 specifically in response to states attempting to use overly-broad references to internal law as a cover for not actually accepting new obligations.<sup>46</sup> The

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<sup>42</sup> Draft Guide to Practice, 4.2.5, commentary para. 4, recognising the existence of the state-human being relationship in human rights treaties.

<sup>43</sup> Draft Guide to Practice, 4.2.4, commentary para. 1.

<sup>44</sup> Vienna Convention, Art. 20(5).

<sup>45</sup> Boerefijn, ‘Impact on the Law on Treaty Reservations’, p. 95.

<sup>46</sup> Hampson, *2004 Final working paper*, para. 56.

ILC points out that it should ‘be borne in mind that national laws are “merely facts” from the standpoint of international law and that the very aim of a treaty can be to lead States to modify them.’<sup>47</sup> Once again, applying the object and purpose test is difficult for state parties if they are unfamiliar, which will most likely be the case, with the domestic laws of the reserving state. Therefore, the state policing system is underutilised and a great number of these reservations remain attached to the core human rights treaties.

The ILC suggests that reciprocity of legal effects may serve as a deterrent role because a reserving state ‘runs the risk of the reservation being invoked against it’ and thus this helps resolve the tension between flexibility and integrity.<sup>48</sup> This suggestion is moot, however, in the context of a human rights treaty as never has state attempted to invoke reciprocity of legal effect in relation to a reservation under this category of treaty. The Finalized Guidelines attempt to address the legal effects of treaties embodying non-reciprocal obligations:

*4.2.5 Non-reciprocal application of obligations to which a reservation relates*

Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligations or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

This attempt, however, only underscores that fact that treaties embodying non-reciprocal obligations are different while doing nothing to remedy the lack of concrete effect. As noted by the commentary,<sup>49</sup> the nature of human rights obligations do not engage the concept of reciprocity among the state parties and therefore the only logical conclusion even in the absence of the guideline is that an accepting (most likely in the form of tacit acceptance) state party would not seek to limit its obligations to the extent that the reserving state has done. Logic, however, does not clarify the legal effect of sweeping reservations or reservations that

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<sup>47</sup> Guide to Practice, 3.1.5.5, commentary para. 5.

<sup>48</sup> Draft Guide to Practice, 4.2.4, commentary paras. 31-32.

<sup>49</sup> Draft Guide to Practice, 4.2.5, commentary para. 4; see also Aust, *Modern Treaty Law*, p. 146, citing R.D. Kearney and R.E. Dalton, ‘The Treaty on Treaties’ (1970) 64 AJIL 495, 512.

subordinate obligations to domestic law as there is no guidance on how to assess their validity outwith the normal state-to-state application of the Vienna Convention rules.

To rectify questions about tacit acceptance, which is the primary way that invalid reservations have become ‘valid’, the Draft Guide also points out that an individual state’s acceptance of an impermissible reservation is a nullity.<sup>50</sup> Hampson’s expanded working paper of 2003 also concluded that states could not formulate reservations that are incompatible with the object and purpose of a human rights treaty nor could incompatible reservations be accepted.<sup>51</sup> This is in line with the view advanced by Pellet throughout the Draft Guide to Practice. The ILC insistence that acceptance, even of an invalid reservation, is a nullity is, however, practically inoperable as it fails to recognise the contemporary practice that the state initially determines permissibility under Article 19(c) unless an alternative rule requires otherwise. Even noting the ‘impossibility’<sup>52</sup> of accepting an impermissible reservation there is nothing outlined to counter the fact that by virtue of tacit acceptance, just this situation has arisen despite Pellet’s claim that ‘acceptance cannot change...impermissibility’.<sup>53</sup> Furthermore, this position lacks a basis in customary international law as noted by Germany in its response to the draft guidelines on reservations.<sup>54</sup>

Furthermore, the hard and fast nullity proposition posited by both Pellet and Hampson is contradicted almost immediately after its laborious introduction in the Draft Guide to Practice. The Draft Guide clearly indicates that acceptance *can* change impermissibility when, in guideline 3.3.3, it inserted an off-the-wall exception to the hard rule that it is impossible to accept an impermissible reservation by offering that collective acceptance of an impermissible reservation will render the reservation permissible. The commentary details that acceptance must be positive

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<sup>50</sup> Draft Guide to Practice, 3.3.2. Also reflected in Finalized Guidelines, 3.3.3.

<sup>51</sup> F. Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Expanded working paper prepared in accordance to Sub-Commission decision 2001/17*, UN Doc. E/CN.4/Sub.2/2003/WP.2 (2003) (*2003 Expanded working paper*), p. 19.

<sup>52</sup> Draft Guide to Practice, 3.3.2, commentary para. 4.

<sup>53</sup> Draft Guide to Practice, 3.3.2, commentary para. 5; Finalized Guidelines, 3.3.3. On tacit acceptance see, C. Redgwell, ‘Reservations to Treaties and Human Rights Committee General Comment No. 24(52)’ (1997) 46 ICLQ 390, 405-06.

<sup>54</sup> See comments by Germany, ILC, *Reservations to treaties, Comments and observations received from Governments*, UN Doc. A/CN.4/639 (2011), paras. 127-28.

and cannot be satisfied by silence, in other words tacit acceptance. This nod toward ‘progressive development of law’<sup>55</sup> only serves to confuse matters. If all of the parties to the treaty envision an amendment to the treaty which would mitigate the intervening impermissibility, the option already exists under Vienna Convention Article 39<sup>56</sup> and need not be addressed as part of the reservations regime. The commentary suggests that this guideline contemplates the situation whereby all other treaty members give their ‘express’ consent to the impermissible reservation. However, there is a discrepancy in the wording of the guideline as it says only it will ‘be deemed permissible *if no contracting State...objects* to it after having been expressly informed thereof’.<sup>57</sup> A simple reading of the guideline, without the commentary, suggests that the simple act of not objecting on the part of every other party to the treaty would fulfil the hitherto existing legal effect of tacit acceptance, thus creating further uncertainty and perpetuating the problematic situation most closely associated with reservations to human rights treaties. Several states expressed confusion as to the applicability of draft guideline 3.3.3 and the inconsistency it creates in relation to the other guidelines on impermissibility.<sup>58</sup> As a result, the guideline is ultimately not included in the Finalized Guidelines.<sup>59</sup> Over the years, the lack of settled approach has led some to call for an advisory opinion by the ICJ on the issue of the ability of states to accept impermissible reservations, though to date this idea has not come to fruition.<sup>60</sup>

The prevailing opinion for the ILC and treaty bodies<sup>61</sup> seems to suggest that no invalid reservation can create a legal effect that would modify or exclude otherwise binding obligations. Regardless of the reaction, or inaction, of a state to an impermissible reservation, the Draft Guide commentary reiterates that the view taken

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<sup>55</sup> Draft Guide to Practice, 3.3.3, commentary para. 6.

<sup>56</sup> Art. 39: General rule regarding the amendment of treaties provides: ‘A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.’

<sup>57</sup> Draft Guide to Practice, 3.3.3, commentary para. 1, emphasis added.

<sup>58</sup> See comments by Australia, Austria, Switzerland and the United States in ILC, UN Doc. A/CN.4/639 (2011), paras. 73, 75 and 79-87.

<sup>59</sup> *2011 Reservations Working Body Report*, p. 7.

<sup>60</sup> Redgwell, ‘Reservations and General Comment No. 24(52)’, 410, citing R. Jacobson, ‘The Committee on the Elimination of Discrimination Against Women’ in P. Alston (ed.), *The United Nations and Human Rights* (Clarendon Press, Oxford 1992), p. 469; Schabas, ‘Time for Innovation and Reform’, 78.

<sup>61</sup> Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 16(7).



by a state on the reservation—holding the reservation impermissible or permissible—will not prevent the reservation from being subjected to other normal mechanisms of review.<sup>62</sup> The problem with this idea is that a cyclical argument is advanced by the guidelines. An impermissible reservation is a nullity without regard to state acceptance or objection but determination of impermissibility is a competence shared equally by states, dispute resolution mechanisms and treaty bodies.<sup>63</sup> The opportunity for different bodies to assess permissibility seems to negate the idea that impermissibility exists without regard to state opinion or, at the very least, it minimises the role of states. Redgwell has commented that it precisely the lack of ‘a treaty mechanism for determining compatibility...or a supervisory organ competent to determine validity’ which perpetuates ‘the general inertia of States manifesting itself in tacit acceptance ensur[ing] that reserving States become parties to treaties even in circumstances where they have formulated incompatible reservations’.<sup>64</sup> As noted above, not all states accept the ILC’s assertion that an invalid reservation is a nullity that cannot be accepted as this has never been a confirmed rule under customary law<sup>65</sup> and the state practice of maintaining invalid reservations, detailed in Chapter Three, clearly counters the idea of reservation nullity and embraces the principle that ‘a state cannot be bound without its consent’.<sup>66</sup>

If the nullity of invalid reservations was such an obvious legal certainty then there should not be so many invalid reservations attached to the core human rights treaties. In the Draft Guide, the issue of states’ objections to invalid reservations is ultimately wheedled down to serving the singular purpose of initiating a reservations dialogue and calling the invalidity to the attention of potential assessors of validity, including courts and treaty bodies.<sup>67</sup> Thus it appears that the final word on legal effect of invalid reservations under the rules set forth in the Vienna Convention is that there is no final word.

State practice has developed two primary approaches addressing the legal effect of reservations, the principles of permissibility and opposability. In early

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<sup>62</sup> Draft Guide to Practice, commentary to 3.3.3, para. 5.

<sup>63</sup> Finalized Guidelines, 3.2, which will be discussed in depth in Chapter 6.

<sup>64</sup> Redgwell, ‘Reservations and General Comment No. 24(52)’, 405-06.

<sup>65</sup> See comments by Germany in contrast to comments by Finland in ILC, UN Doc. A/CN.4/639 (2011), paras. 127-28 and 129.

<sup>66</sup> *Genocide Opinion*, 1951 ICJ Reports 15, p. 21.

<sup>67</sup> Draft Guide to Practice, 4.5.3, commentary para. 10.

reports on reservations Pellet suggested that regardless of whether the permissibility or opposability doctrine was applied, the reserving state could not invoke an impermissible reservation to produce a legal effect: in the first instance, because the permissibility principle was based on the fact that an impermissible reservation is null and void regardless of the view of other states while under the opposability doctrine the reserving state could not invoke an impermissible reservation even if it had been accepted.<sup>68</sup> Either way, both doctrines proceed from the idea that a reservation that violates the object and purpose test is null and void regardless of state response and can, therefore, have no legal effect. In theory, the only difference between the doctrines occurs when the reservation is valid and therefore the state-to-state relationships will be modified as outlined below. Reflecting this idea, finalized guideline 4.5.1 indicates that '[a] reservation that does not meet the conditions of formal validity and permissibility...is null and void, and therefore devoid of legal effect.' This was the ILC's attempt to fill one of the major practical gaps in the Vienna Convention in that it suggests that 'nullity is not dependent on the reactions of other contracting States'.<sup>69</sup> While an ideal legal outcome for those opposed to invalid reservations to human rights treaties, neither the Vienna Convention, customary international law, the ILC Guide to Practice nor the work of the treaty bodies provide a clear answer despite the practices that have emerged among states.

### 3.1 PERMISSIBILITY

The permissibility doctrine argues that a reservation incompatible with the object and purpose test is invalid and without legal effect—and therefore a nullity—regardless of whether other states object. This view stems from the natural reading of Vienna Convention Article 19(c) and suggests that incompatible reservations are void *ab initio* or are not proper reservations.<sup>70</sup> However, the issue is not as clean-cut as the permissibility doctrine makes it seem.

Recalling the general wording of reservations articles found in several of the UN core human rights treaties that 'a reservation incompatible with the object and purpose of the convention shall not be permitted' it seems natural that a reservation

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<sup>68</sup> ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 418.

<sup>69</sup> Draft Guide to Practice, 4.5.1, commentary paras. 1-3.

<sup>70</sup> Swaine, 'Reserving', 315; Bowett, 'Reservations to Non-Restricted Multilateral Treaties', 84.

not compatible with the convention will not alter a state's obligations. If the reservation does not survive the object and purpose test then the reservation should not be up for debate full stop. The nullity is established regardless of objections or acceptances by other state parties and will have no bearing on the status of the reserving state as a party to the treaty. However, this neglects the fact that incompatibility is one of the primary reasons given when states object to reservations to human rights treaties,<sup>71</sup> thus intimating that some assessment must be made. This is problematic as reservation practice has demonstrated that not all states agree on the invalidity of reservations.

Austria illustrated its preference for the permissibility approach in its 1994 objection to the reservation to CEDAW made by the Maldives:

The reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties and shall not be permitted, in accordance with article 28 (2) of the [CEDAW]. Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto.<sup>72</sup>

The objection employs the language of permissibility and leaves no doubt as to the consequence anticipated in relations between the two parties from Austria's point of view. Though strictly speaking, under the permissibility approach an objection is unnecessary. A similar objection asserting the permissibility doctrine was lodged by Portugal in 1994 also with regard to the reservations by the Maldives.<sup>73</sup>

Another notable point is that under the permissibility doctrine the twelve-month rule that facilitates tacit acceptance of reservations should have no effect if a reservation is deemed impermissible.<sup>74</sup> States should not be able to accept impermissible reservations vis-à-vis other states yet tacit acceptance results in precisely this result.<sup>75</sup> The coupling of the twelve-month rule with the arbitrariness of the permissibility doctrine is a key practice that has added to the reservations

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<sup>71</sup> Swaine, 'Reserving', 316-17; see Chapter 3.

<sup>72</sup> UN Treaty Collection, *Objections to CEDAW*, at <http://treaties.un.org>, Status of Treaties (UN Treaty Collection).

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

<sup>74</sup> Swaine, 'Reserving', 317.

<sup>75</sup> Redgwell, 'Reservations and General Comment No. 24(52)', 405; see generally D.W. Bowett, 'Reservations to Non-Restricted Multilateral Treaties'.

quagmire. Members of the ILC acknowledge that while the permissibility approach is probably theoretically correct, it is the opposability approach that more accurately describes state practice,<sup>76</sup> though not necessarily in the context of human rights treaties.

### 3.2 OPPOSABILITY

The opposability doctrine in traditional treaty law proposes that if a reservation is objected to by another state party to an agreement then the reserving state will not be considered a party to treaty, the ‘super-maximum’ effect. The result is the same regardless of reservation validity—no treaty relations are established between the reserving and objecting state. Thus, the situation would seem to present one set of states, those who do not object to an reservation, with whom the reserving state will be seen as being a treaty party and another set of states, those who object to the same reservation either based on invalidity or another reason, for whom the reserving state will not be a party to the treaty. Historically, this was the position in the normal application of treaty law as discussed in Chapter Two.

Due to the nature of human rights treaties there is no pressing need to determine that the author state of an objected-to reservation be considered a non-state party.<sup>77</sup> The ‘super-maximum’ effect is rarely invoked and, most often, objecting states specifically articulate that the objection will not inhibit the entry into force of the treaty between the two states,<sup>78</sup> thus specifically discarding the opposability approach. Only rarely does any state articulate its adherence to the traditional opposability doctrine. As demonstrated in its reservation to CERD, Fiji purports to follow the opposability doctrine:

In addition it interprets article 20 and the other related provisions of Part III of the Convention as meaning that if a reservation is not accepted the State making the reservation does not become a Party to the Convention.<sup>79</sup>

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<sup>76</sup> ILC Yearbook 1995, UN Doc. A/50/10 (1995), para. 457.

<sup>77</sup> Though this was clearly a consideration of the UN Secretary-General and one of the reasons for referring the question regarding reservations to the Genocide Convention to the ICJ. See Chapter 2.

<sup>78</sup> Including a sentence that the objection will not prevent entry into force of the treaty between the reserving and objecting state is technically unnecessary due to the automatic assumption established by Vienna Convention, Art. 21(3).

<sup>79</sup> UN Treaty Collection, Fiji, *Reservations to CERD*.

Fiji may take this position but no states have publicised whether or not they agree with this interpretation of CERD. Another example of a state invoking traditional opposability comes from Sweden. Its objections made to numerous states' reservations to CEDAW specified that the reservations to which it objected 'constitute an obstacle to the entry into force of the Convention between Sweden and [the Maldives, Kuwait, Lebanon and Niger]'.<sup>80</sup> Proponents of the opposability approach are adamant that the Vienna Convention invests non-reserving states with the determinative function of assessing compatibility of reservations.<sup>81</sup>

The lack of objections to incompatible reservations utilising the opposability doctrine results in the unintended and illogical consequence that the reserving state always becomes a party to the treaty despite the unacceptable reservation which, as a result of the reserving state becoming a state party, becomes an acceptable reservation if there is no objection under the doctrine of tacit acceptance as set forth in Vienna Convention Article 20(5). Considering the unilateral actions of ratification and reservation formulation relating to human rights treaties and the fact that these actions are entirely independent of the other state parties, 'it makes little sense then to suggest that the reservation may be opposable,'<sup>82</sup> a view supported by the Inter-American Court of Human Rights in the 1982 *Effect of Reservations on the Entry into Force of the ACHR*<sup>83</sup> advisory opinion.

Even in the face of one objection, the opposability doctrine implies that the reserving state would not become a party to the convention. The 'super-maximum' effect envisioned by the opposability doctrine is rarely invoked and, most often, objecting states specifically articulate that the objection will not inhibit the entry into force of the treaty between the two states.<sup>84</sup> Thus, the opposability approach does not

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<sup>80</sup> UN Treaty Collection, *Objections to Reservations to CEDAW*, objections by Sweden made in 1994, 1996, 1998 and 2000, respectively.

<sup>81</sup> See Swaine, 'Reserving', 315; J.M. Ruda, 'Reservations to Treaties' (1975-III) 146 *Recueil des cours* 95, 101.

<sup>82</sup> M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 *EJIL* 489, 508.

<sup>83</sup> *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82 (24 Sept. 1982), IACtHR (Ser. A) No. 2 (1982), para. 29. See discussion in Chapter 4, section 2.3.

<sup>84</sup> Including a sentence that the objection will not prevent entry into force of the treaty between the reserving and objecting state is technically unnecessary due to the automatic assumption established by Vienna Convention, Art. 21(3).

effectively solve the problem of invalid reservations and, as noted by Craven, it ‘has little salience in the context of human rights treaties’,<sup>85</sup> especially in light of the goal of achieving universal ratification. The application of the opposability doctrine is indecisive and fails to give serious consideration to the issue of invalidity since the practice produces the same result no matter what the basis of the objection.<sup>86</sup> The gap in the Vienna Convention on the legal effect of an invalid reservation is not cured by this doctrine, especially in response to non-reciprocal human rights treaties.

### 3.3 SUMMARY

The Vienna Convention rules are difficult to apply in light of the vagueness of the object and purpose test as well as the lack of a legal effect if a reservation is determined to be invalid by another state. The uncertain validity of sweeping reservations and reservations which subordinate international obligations to domestic laws further diminishes the effectiveness of the rules and contributes to the unwillingness of states to take a view on reservations. Furthermore, the nature of human rights treaties renders the Vienna Convention’s self-policing reservation and objection system of little use even when states do fulfil their monitoring roles. One of the primary reasons is that there is no clear legal effect that results from a determination by a state that a reservation is invalid. The doctrines of permissibility and opposability have traditionally been used to define the legal effect of a reservation however these have little resonance in the context of human rights treaties.

## 4 CONSEQUENCES OF INVALIDITY

Reservation practice has shown that the legal effect between state parties and the legal effect on the state-human being relationship created by human rights treaties are not necessarily one and the same. The present analysis is concerned with the actual legal effect, or more accurately the *consequence*, produced as a result of a determination of invalidity by other state parties. Initially part four of the Draft Guide to Practice points out that reservations ‘are defined in relation to the legal

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<sup>85</sup> Craven, ‘Legal Differentiation’, 497.

<sup>86</sup> Under the opposability doctrine, objections to invalid reservations generate the same effect as objections to validly formulated reservations. See Swaine, ‘Reserving’, 315.

effect that their authors intend them to have on the treaty,<sup>87</sup> despite the fact that the statement may not produce the intended legal effect.

Recognition of the lack of consequences for an invalid reservation in the Vienna Convention is one unifying theme in the reservations debate. Both Pellet and Hampson concede that a determination of impermissibility under Vienna Convention Article 19(c) is ‘deprived of concrete effect’<sup>88</sup> and Pellet submits that the Guide will resolve this.<sup>89</sup> States also recognise the failure of the Vienna Convention to address the effect of invalid reservations as the major lacuna of the reservations regime.<sup>90</sup> The lack of consequence stems from the fact that nothing in the Vienna Convention compels a state to take view on a reservation and states rarely take issue with reservations to human rights treaties, as noted in Chapters Three and Four. Even where a state does determine a reservation to be invalid there is nothing in the Vienna Convention outlining a legal effect capable of creating a concrete consequence; as a result, a state formulating an invalid reservation simply maintains the invalid reservation and contributes to the continued variable interpretations of its treaty obligations.

Current reservation practice tends to favour either nullity or severance as the consequence of invalidity, though the effectiveness of both are limited in their application to human rights treaties due to the futility of such in the state-to-state relationship and the lack of complaints brought on the international level. On the international level, it is accepted that another state may assert the nullity of a reservation to which it has objected on the basis of invalidity and that this assertion may potentially prohibit the reserving state from benefiting from the reservation. Alternatively, some states adhere to the severability principle, or Strasbourg Approach, which also results in the consent of a reserving state remaining intact with the reservation severed as though it had never been formulated.

Determining a concrete consequence is a vital function of rules governing treaty interpretation so that obligations owed *inter se* can be determined. However,

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<sup>87</sup> Draft Guide to Practice, 4, commentary para. 2.

<sup>88</sup> Draft Guide to Practice, 3.3, commentary para. 7; F. Hampson, *Working paper submitted pursuant to Sub-Commission decision 1998/113*, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (*1999 Working paper*), paras. 24, 31.

<sup>89</sup> Draft Guide to Practice, 4, commentary para. 19.

<sup>90</sup> Observations by El Salvador, Finland, Norway and Portugal in ILC, UN Doc. A/CN.4/639 (2011), paras. 119, 121, 129 and 130. See also Swaine, ‘Reserving’, 322.

the third-party beneficiaries of the core human rights treaties, human beings, are less protected by assertions of nullity or severability when the reserving state disagrees and refuses to withdraw the reservation. From the domestic level the full expression of an obligation owed by the reserving state remains obscured by the reservation and recourse is limited without the intervention of another state or dispute resolution mechanism.

Finalized guideline 4.5 introduces the topic of consequences of an invalid reservation. It is this particular aspect of the reservations rules that is ripe for the progressive development of law especially in light of the adverse effect on human rights treaties. Pellet acknowledges that the lack of consequences is ‘one of the most serious lacunae in the matter of reservations in the Vienna Conventions’.<sup>91</sup> The ILC suggests that the normative gap may ‘have been deliberately created by the authors of the [Vienna] Convention.’<sup>92</sup> Whether deliberate or not, the current state of reservations, especially in the context of human rights treaties, necessitates that more pronounced rules be introduced to detail the consequence of an invalidity determination.

Though legal nullity is the desired consequence, particularly in a human rights treaty, the lack of finality on who decides permissibility destabilises the actual consequence intended by declaring a reservation a legal nullity. The ILC contends that nullity based on the impermissibility of a reservation is objective and not dependent on the reactions of other state parties,<sup>93</sup> yet this only addresses the state-to-state relationship. Furthermore, it fails to recognise that the acceptance and objection interplay is the entire basis of the reservation monitoring system created by the Vienna Convention and precisely the reason why so many invalid reservations remain attached to the core human rights treaties today. States claim the right to determine validity yet in the case of the normative human rights treaties the status of reservations has proved to be unclear even when one or multiple states have objected to reservations on the basis of invalidity.<sup>94</sup> The reserving state benefits from the presumption of validity and there is no legal imperative to withdraw a reservation

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<sup>91</sup> Draft Guide to Practice, 4.5, commentary para. 16.

<sup>92</sup> Draft Guide to Practice, 3.3, commentary para. 2.

<sup>93</sup> Draft Guide to Practice, 4.5.1, commentary para. 10.

<sup>94</sup> This stems largely from the fact that the reservations rules also represent a political feature to be optimised by states.



deemed invalid by another state as it is highly unlikely that an objecting state will press the issue.

The ILC's cautious approach to impermissible reservations during the early years of its study favoured the reserving state and placed the onus upon the reserving state to take action to redress the inappropriate reservation such as modifying or withdrawing the reservation or relinquishing membership in the treaty altogether.<sup>95</sup> The necessity of placing the burden on states to bring about a consequence, such as withdrawing the reservation, is because the Vienna Convention system lacks a control and annulment mechanism. Without an identifiable and tangible consequence the effect of the invalid reservation still hangs in the balance. As the Vienna Convention is silent on the issue of consequences, the potential to develop the subject should be viewed as an opportunity.<sup>96</sup> More detailed rules on what happens to a reservation that has been declared invalid would go a long way toward rectifying the ambiguity surrounding invalid reservations to the core human rights treaties. Presently, there exist two options establishing the legal consequence of an invalid reservation. The first is nullity which, as discussed above, results in the invalid reservation being void *ab initio*. Nullity by definition is both the legal effect and the consequence of an invalid reservation. Reiterating the argument above, the problem with nullity in the current context of the Vienna Convention regime is that the nullity is only invoked among states in their treaty relations with one another. In its relations with other states nullity equates to a reserving state 'shooting blanks', reservations which will never have a consequence for another state party to the treaty. Because invalid reservations to human rights treaties affect the state-human being relationship and human beings cannot invoke nullity, severability provides a more concrete consequence in response to a reservation that is determined to be invalid.

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<sup>95</sup> Text of the Preliminary Conclusions of the ILC on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, *Report of the ILC on the Work of its 49th Session*, UN Doc. A/52/10 (1997), Ch. V, para. 86. See discussions by R. Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11 EJIL 413, 418-19; Redgwell, 'Reservations and General Comment No. 24(52)', 408.

<sup>96</sup> Seibert-Fohr, 'The Potentials of the Vienna Convention', p. 209.

#### 4.1 SEVERABILITY<sup>97</sup>

The concept of severability of reservations has been developed both through court and treaty body jurisprudence, as well as observations by states. This doctrine articulates the idea that if an invalid or incompatible reservation is made then the author state will be bound to the treaty without the benefit of the reservation.

Redgwell highlights that:

Severance is conceptually closer to the regime envisaged by the Genocide [Opinion], where the International Court of Justice, in departing from the unanimity rule, was at pains to ensure that complete freedom to make reservations did not include the ability to formulate reservations striking at the core of the treaty; hence the compatibility test.<sup>98</sup>

The Vienna Convention, however, provides no guidance on the issue of severability. The ICJ's *Genocide Opinion* concluded that even in the event that a reservation had been objected to by a state party to the Genocide Convention the reserving state would still become a party to the Convention unless the reservation was not compatible with its object and purpose. The Court offered little guidance other than to suggest that an incompatible reservation would be severable. The advantage to this approach is that the state will remain bound to the treaty.<sup>99</sup>

Though case law on the subject of reservations is scant, the European Court of Human Rights solidified the principle of severability in the 1988 *Belilos* case, as discussed in Chapter Four. Opting to follow the severability principle in lieu of the opposability doctrine, in *Belilos* the Court found that Switzerland was bound to the ECHR despite having made an invalid reservation. The Court effectively severed the reservation<sup>100</sup> and held Switzerland bound without the benefit of the reservation and, therefore, unable to claim the reservation to avoid the ECHR obligation against

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<sup>97</sup> All reservations and objections in the remainder of this chapter can be found in the UN Treaty Collection, *Status of Treaties*, unless otherwise indicated.

<sup>98</sup> Redgwell, 'Reservations and General Comment No. 24(52)', 410.

<sup>99</sup> *Ibid.*, 407.

<sup>100</sup> The reservation was actually titled a declaration however as applied it created a reservation. See S. Marks, 'Reservations Unhinged: The *Belilos* Case Before the European Court of Human Rights' (1990) 39 ICLQ 300.

which it had reserved. The application of the severability doctrine ultimately led to the state's culpability in *Belilos*.<sup>101</sup>

The HRC rallied behind Strasbourg in the highly controversial *General Comment No. 24* (discussed in Chapter Six) supporting the position that 'a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation' in the event that an invalid reservation is made.<sup>102</sup> Not surprisingly, the severability principle has been refuted by many governments, particularly the US, UK<sup>103</sup> and France, as a violation of the fundamental principle of international law which conditions an international obligation on consent.<sup>104</sup> This is reflected in their objections to invalid reservations in that none of these states ever indicates that the reserving state will be bound without the benefit of its reservation.

The primary difficulty with severability is where a state's consent to be bound is tied to the acceptance of its reservations. For those states whose consent to be bound is facilitated through their domestic legislature and contingent upon the acceptance of reservations attached to instruments of ratification, the current system offers no governing principles on how to treat reservations that are invalid but integrally tied to consent to be bound. This lacuna is both a practical roadblock in

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<sup>101</sup> Severability is also followed by the IACtHR, see, for example, *Hilaire v. Trinidad and Tobago*, Preliminary Objections, (1 Sept. 2001) IACtHR (Ser. C) No. 80 (2001), paras. 78-95, discussed in Chapter 4.

<sup>102</sup> HRC, *General Comment No. 24*, para. 18.

<sup>103</sup> In the late 1970s and early 1980s and outwith the core human rights treaties the UK demonstrated a penchant for the principle of severability when it objected to the reservations of several states to the 1949 Geneva Conventions. In its ratification to the Geneva Conventions the UK declared that it held certain reservations to be invalid and therefore 'regard[ed] any application of any of those reservations as constituting a breach of the Convention to which the reservation relates' while also regarding the reserving states as parties to the Geneva Conventions. See UK ratification of the 1949 Geneva Conventions, 75 UNTS 973 (1949), ratification at 278 UNTS 259 (1957), pp. 266-268. The UK reiterated this position when objecting to subsequent reservations to the Geneva Conventions made by South Vietnam and Guinea-Bissau in 1976 and by Angola in 1985. Objection by the UK to reservations made by the Republic of South Vietnam and Guinea-Bissau, 995 UNTS 394 (1976), pp. 394-97, and to reservations made by Angola to the Geneva Convention on the Treatment of Prisoners of War, 1404 UNTS 337 (1985). See discussion by Hampson, *2004 Final working paper*, paras. 16-17.

<sup>104</sup> *Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations*, UN Doc. A/50/40 (1995); see also K. Korkelia, 'New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights' (2002) 13 EJIL 437, 462 et seq.; Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?', 417; E.A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 Berkeley Journal of International Law 277, 318-22.

interpretation in the event of a violation and detrimental to determining overall compliance with treaty obligations. States such as the US and the UK will often condition their consent to be bound to treaties upon ratification subject to the reservations as contemplated by their respective legislature and parliament. Under the severability principle the state would become a party without the benefit of any invalid reservation but this expressly ignores the conditional consent to be bound. It seems that states are cognizant of such conditional consent and are willing to maintain reservations without specifying severance. Consider the reservations to ICCPR made by the US which indicate that the ratification of the treaty is expressly subject to acceptance of the reservations attached to the instrument of ratification.<sup>105</sup> In 1993 Sweden objected to six of the reservations made by the US indicating that ‘reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to domestic legislation’ and therefore contrary to the treaty.<sup>106</sup> The US reservations have not been removed and Sweden included in its statement that the objection did not preclude entry into force between the two countries. Sweden did not specifically cite that the US would not benefit from the reservations, as it did when objecting to reservations by a multitude of states to CEDAW. Where does this leave the status of the reservations made by the US? Under the current regime there is no straightforward answer.

It could be argued that the nuanced approach to the US reservations compared to the objections to CEDAW reservations where Sweden specified that ‘[t]he Convention enters into force in its entirety between the two States, without

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<sup>105</sup> Three of the reservations read as follows: (1) That Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States. (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. (3) That the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

<sup>106</sup> *Declaration by the Government of Sweden with respect to reservations made by the United States of America* (18 Jun. 1993) to ICCPR. Many other states, including Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal and Spain also objected.

Bahrain [and others]<sup>107</sup> benefiting from its reservation', took into account the conditioned US consent factor. However it is more likely a simple fact of timing in the development of the severability doctrine.<sup>108</sup> Prior to 1994 Sweden generally only noted the incompatibility of reservations and their undermining effect on international law in the course of objecting to reservations without specifying any legal effect but in all cases noting that the reservations would not prevent the entry into force of the treaty between itself and the reserving state.<sup>109</sup> However, between 1994 and 2001 Sweden generally opted to follow the opposability doctrine, at least in relation to states making reservations to CEDAW.<sup>110</sup> The notorious *General Comment No. 24* whereby the HRC indicated that it would sever incompatible reservations was published in 1994 and possibly opened the eyes of states to the option. Interestingly, Sweden did not readily subscribe to the severability approach until 2001,<sup>111</sup> but has since remained true to the principle,<sup>112</sup> though it did technically indicate severance of Kuwait's reservation to the ICCPR in 1997 albeit in a less clear formula than that subsequently used. Sweden's practice is merely used by way of example to note the development of the doctrines of legal effect and eventual recognition that a more concrete consequence must be attached to states' objections.

In reviewing reservations to the ICCPR it is evident that Sweden is not alone in moving toward the severability approach. Objections to reservations to the ICCPR made by Denmark (to Botswana, 2001), Finland (to Maldives and Pakistan, among others), Greece (to Turkey, 2004), Latvia (to Mauritania, 2005; to Pakistan, 2011), Norway (to Botswana, 2001), Slovakia (to Pakistan, 2011), to identify a few,<sup>113</sup> indicate that states are gradually opting for a more clear indication of the

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<sup>107</sup> The same statement was made *mutatis mutandis* in response to reservations made by Saudi Arabia, North Korea, Mauritania, Syria, Micronesia, United Arab Emirates, Oman, Brunei Darussalam and Qatar.

<sup>108</sup> There is also a strong argument that political considerations play into the use of severance, and objections generally, but it is not a theme to be pursued in this thesis.

<sup>109</sup> See particularly its objections to reservations to CEDAW.

<sup>110</sup> Prior to 1994 Sweden had generally only noted the incompatibility of reservations with the object and purpose test.

<sup>111</sup> The same can be said generally of the other Nordic states. See Klabbbers, 'Accepting the Unacceptable?'; L. Magnusson, 'Elements of Nordic Practice 1997: The Nordic Countries in Co-ordination' (1998) *Nordic Journal of International Law* 350.

<sup>112</sup> Sweden has indicated severance of incompatible reservations to the ICCPR by Botswana, Turkey, Mauritania, Maldives and Pakistan; and in response to incompatible reservations made to CEDAW by Micronesia, United Arab Emirates, Syrian Arab Republic, Bahrain, Mauritania, among others

<sup>113</sup> See UN Treaty Collection, *Objections to Reservations to the ICCPR*.

consequence of invalidity in the form of severability. The same uptake of the approach can also be seen in the patterns of states' objections to reservations to ICESCR,<sup>114</sup> CEDAW,<sup>115</sup> CAT<sup>116</sup> and, to a lesser extent, in CERD<sup>117</sup>.

A review of states which frequently file objections reflects the progression between more stringent approaches, sometimes between permissibility to opposability to severance (Sweden, for example), other times simply jumping from permissibility to severability, as evidenced by Austria's 1994 objection to the reservations by Maldives to CEDAW (purporting permissibility) contrasted against subsequent objections to reservations to CEDAW by Pakistan, Lebanon, North Korea, among others (opting for severance). The delay in adherence to the severability approach is not surprising as it reflects the reticence with which states accept the concept especially in light of its direct challenge to a reserving state's sovereignty. Responding to the early uptake of the severance approach, Bradley and Goldsmith argue that it is incorrect to conclude that a state continues to be bound by articles to which it has made reservations even if the reservations are deemed by some states to violate the object and purpose test.<sup>118</sup> Their position basically asserts, for example, that if the offending US reservations were actually treated as severed in an adversarial procedure, the literal application of the US position, pursuant to its ratification and reservation, would be that consent to treaty membership would be nullified, thus mooted any cause of action brought under the treaty.

It has been suggested that the invalidation of the reservation negates consent to be bound to the treaty thus the state is not longer bound to the treaty at all or, less drastically, the invalidation negates the obligation that was the subject of the invalid

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<sup>114</sup> See objection to reservations to the ICESCR by Denmark (to Pakistan, 2005), Finland (to Bangladesh, 1999; Pakistan, 2005), Greece (to Turkey, 2004), Italy (to Kuwait, 1997), Latvia (to Pakistan, 2005), Netherlands (to Pakistan, 2005), Norway (to China, 2002; to Pakistan, 2005), Pakistan (to India, 2005), Slovakia (to Pakistan, 2009), and Sweden (to Bangladesh, 1999; to China, 2002; to Turkey, 2004; to Pakistan, 2005).

<sup>115</sup> The objections to reservations to CEDAW are numerous thus the following is only a small sample and does not include those states noted for advocating severance in their objections to reservations to the ICESCR (previous footnote): Austria (examples in text); Belgium (to Brunei Darussalam and Oman, 2007; to Qatar, 2010); Canada (to Brunei Darussalam, 2007), Czech Republic (to Oman and Brunei Darussalam, 2007; to Qatar, 2009), and Estonia (to Syria, 2004; to Qatar, 2010).

<sup>116</sup> Czech Republic (to Pakistan, 2011), Denmark (to Botswana, 2001), Finland (to Bangladesh, 1999; to Qatar, 2001; to Pakistan, 2011), Latvia (to Pakistan, 2011), Norway (to Qatar and Botswana, 2001; to Pakistan, 2011), Slovakia (to Pakistan, 2011), Sweden (to Qatar, 2000; to Botswana, 2001, to Thailand, 2008; to Pakistan, 2011).

<sup>117</sup> See specifically Sweden's objections.

<sup>118</sup> Bradley and Goldsmith, 'Treaties, Human Rights, and Conditional Consent', 436.

reservation, effectively erasing it from the catalogue of obligations owed.<sup>119</sup> Goodman and Macdonald argue that completely invalidating the consent to be bound to the treaty gives disproportionate weight to the invalid reservation and invalidating the entire obligation that was subjected to the reservation is not appropriate when the obligations are non-reciprocal.<sup>120</sup>

In a bid to fill the consequences gap and with the support of the treaty bodies,<sup>121</sup> the ILC put forth their most progressive guideline detailing the status of a state that has formulated an invalid reservation. Departing from previous views on regional human rights approaches to invalid reservations,<sup>122</sup> the Finalized Guidelines indicate that the reservation will be severed.

#### *4.5.3 Status of the author of an invalid reservation in relation to the treaty*

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

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<sup>119</sup> R. Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 AJIL 531, 535 et seq; Macdonald, 'Reservations under the European Convention on Human Rights', 448.

<sup>120</sup> Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent'; Macdonald, 'Reservations under the European Convention on Human Rights', 449.

<sup>121</sup> Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 16(7).

<sup>122</sup> ILC, UN Doc. A/52/10 (1997), para. 84. In the report Pellet suggested that the Strasbourg approach was a form of regional customary law that did not otherwise impact customary law on reservations.

In essence, this guideline applies a rebuttable presumption that the author state formulating an invalid reservation will remain bound by the treaty without the benefit of the reservation unless the state expresses an alternative intention.<sup>123</sup>

Thus the guideline adheres to the principle of severability, without using the specific term except in the commentary, but allows room for movement in the instance that the author state's consent to be bound is tied to the acceptance of its reservation. This position pays great deference to the practice of regional human rights courts<sup>124</sup> as well as the HRC<sup>125</sup> and marks a sharp departure from Pellet's early views on severability. It also reflects the growing recognition of the principle by states. The commentary also advocates the doctrine of 'divisibility' or 'severability' if a reservation is formulated which clearly contravenes Article 19(a) or (b).<sup>126</sup> There is increasing support for severance among observers as well.<sup>127</sup>

While this step to cure the consequences lacuna perpetuated by the Vienna Convention is undoubtedly one in the right direction, there is still a question as to whether the proposal will pass muster in the larger international community of states. Early indicators suggest that a 'severance rule' will not sit easily with all states.<sup>128</sup> The lack of a consistent practice by states as to how invalid reservations should be handled has consistently impeded resolution of the issue despite the clear growth in the recognition of the severability principle by states noted above. Outwith the ILC and the treaty bodies the one point that is undisputed about the consequence of an invalid reservation is that there is no settled practice or common agreement on how to resolve the issue particularly in the context of state-to-state treaty relations.

There is another cause for hesitation regarding the ILC's new predilection for severance. Notably, in the intervening period between adoption of the draft guidelines and the finalized guidelines several states commented on the consequences of an invalidity determination on a state's consent to be bound, a

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<sup>123</sup> See Draft Guide to Practice, commentary to 4.5.2.

<sup>124</sup> See Chapter 4.

<sup>125</sup> HRC, *General Comment No. 24*.

<sup>126</sup> Draft Guide to Practice, 3.3, commentary para. 6.

<sup>127</sup> Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent'; Redgwell, 'Reservations and General Comment No. 24(52)', 411.

<sup>128</sup> Comments by Germany and the United States in ILC, UN Doc. A/CN.4/639 (2011), paras. 149-50 and 170-82 and compare with, Comments by El Salvador and Finland, in paras. 135-36 and 138-45; UN Treaty Collection, Sweden's objection to El Salvador's reservation to the Disabilities Convention; *Observations by the Governments of the United States and the United Kingdom on Human Rights Committee General Comment No. 24 (52) relating to reservations*, UN Doc. A/50/40 (1995).



problem that has been recognised throughout the debate on severability. From the viewpoint of states, the main concerns envision issues with the status of the reserving state,<sup>129</sup> which would be evaluated following severance of a reservation under 4.5.3. Reading finalized guideline 4.5.3 alone there seems to be at least initial closure on the issue of consequence for an invalid reservation. However, in the commentary to draft guideline 4.3.7 Pellet makes clear that a state may not be compelled to comply with a treaty without the benefit of its reservation. Relying on the logical application of the principle of mutual consent he insists that a state cannot be bound—the reservation severed—any further than it is willing to be.<sup>130</sup> Both the draft guideline (4.3.7) and the finalized guideline (4.3.8) specifically address valid reservations, however the commentary to draft guideline 4.3.7 implies that due to the principle of mutual consent even an impermissible reservation cannot be severed. In an attempt to reconcile the existence of invalid reservations and the principle of mutual consent Pellet relies on the permissibility doctrine to establish that the concrete consequence of an impermissible reservation is that it is null and void,<sup>131</sup> a position supported by the treaty bodies<sup>132</sup> as previously indicated. Thus the ILC guidelines provide a dizzying cyclical debate that continues the question definitive consequence.

The work of the treaty bodies has not proved to advance an alternative resolution to the consequences issue as it follows the views of the ILC. In multiple reports, the working group on reservations, which was established to examine the practice of human rights treaty bodies, discarded other options for consequences of an invalidity determination and voiced solidarity with the ILC conclusion that the invalid reservation would be severed unless a contrary intention could be proved:

*The consequence that applies in a particular situation depends on the intention of the State at the time it enters its reservation. This intention must be identified during a serious examination of the available information, with the presumption, which may be refuted, that the State*

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<sup>129</sup> See, e.g., comments by Australia, Austria, Bangladesh and Finland in ILC, UN Doc. A/CN.4/639 (2011), paras. 113-18, 131 and 133.

<sup>130</sup> Draft Guide to Practice, 4.3.7, commentary paras. 1-3.

<sup>131</sup> Swaine, 'Reserving', 352-53.

<sup>132</sup> Chairpersons of the HRTBs, *Report on their nineteenth meeting: Report of the sixth inter-committee meeting of human rights treaty bodies*, UN Doc. A/62/224 (2007), Annex, para. 48(v), endorsing the recommendations of the working group recorded in Chairpersons of the HRTBs, *2007 Report on Reservations*, para. 18.

would prefer to remain a party to the treaty without the benefit of the reservation, rather than being excluded.<sup>133</sup>

Despite fervent commitment to the issue in the late 1990s, the treaty bodies seem to have happily let the ILC maintain the lead in sorting out the problems with the Vienna Convention.

Schabas points out that there is an ambiguity to severability principle in that it does not always clearly state, at least as evidenced by states' objections, that the reserved provision will actually be enforced as part and parcel of the treaty.<sup>134</sup> The exception would be those objections indicating that the treaty in its entirety will be in effect without the benefit of the offending reservation which is the phrasing used most often in the years subsequent to Schabas's observation. Without specifying that the invalidly reserved provision was to be enforced, severability would actually give full effect to the reservation.<sup>135</sup> States appear to have noted this incongruous approach and remedied it to the extent possible in their objection formulation.

Ultimately, the consequence of an invalid reservation remains unsettled. The ILC, the treaty bodies and many states favour severability. While this is a welcomed result for human rights advocates, it remains to be seen whether a majority of states will fall in line with this point of view. One thing is clear and that is that unless a definitive view is taken on invalidity of a reservation, it seems that there can be no resolution of the issue of consequence. The competing ideas signify uneasiness with the rules as they exist and a lack of settled practice on the international level, highlighting an area ripe for development.

The best way to easily address concrete consequences is to establish a final arbiter on reservation validity. Clearly the first step will be the most difficult in light of the competing organs which are competent to assess reservations. Reconciling the potential organs will be addressed in Chapter Six. Here, in specific relation to invalid reservations, it is more important to note that the stark position of nullity and severance could benefit from more nuanced approaches. The following procedural options draw upon the work done by Hampson and others<sup>136</sup> and offer simple ways

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<sup>133</sup> UN Doc. HRI/MC/2006/5 (2006), para. 16 (emphasis added).

<sup>134</sup> Schabas, 'Time for Innovation and Reform', 72.

<sup>135</sup> Macdonald, 'Reservations under the European Convention on Human Rights', 449.

<sup>136</sup> Hampson, *2003 Expanded working paper*, p. 19; Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent'; Lijnzaad, *Ratify and Ruin*.

to cure invalid reservations while encouraging adherence to treaties in the aftermath of a concrete consequence being determined. In turn, curing the hanging invalid reservation and alleviating normative ambiguity will help better define human rights obligations in the context of the state-human being relationship.

#### 4.2 ADDRESSING THE HANGING RESERVATION: ALTERNATIVES

Ultimately, even reservations viewed as invalid will often remain attached to multilateral treaties due to the lack of guidance as to whether the conclusion of invalidity by one state will defeat the reservation. Validity is not always easily determined especially in the confines of the state-to-state treaty relationship. This is recognised by Lijnzaad's astute observation that 'the claim that a particular reservation is contrary to the object and purpose is easier made than substantiated'.<sup>137</sup> Had a mandatory dispute mechanism for evaluating reservations been included in the Vienna Convention the problem of the 'hanging reservation' could have easily been avoided because a clear determination would be adjudged and definite consequence outlined. However, as discussed in Chapter Two, Brierly's suggestion of mandatory resort to the ICJ as a dispute mechanism when there was disagreement on the admissibility of a reservation was resoundingly defeated and treaty articles requiring mandatory resort to the ICJ as a mechanism of review for treaty disputes are typically reserved against.

Nonetheless, when a court is given the opportunity to rule on reservation validity several options to cure the invalid reservation have been suggested: firstly, the state may withdraw the offending reservation; secondly, the state may amend the defective reservation *a posteriori* so as to comply with the opinion of the adjudicating court; or, finally, the state may denounce the convention (where possible) with the possibility of re-acceding with a compliant reservations (where possible).<sup>138</sup> These options offer a more nuanced approach to strict severance by allowing the state to choose how to resolve the unacceptable reservation which

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<sup>137</sup> Lijnzaad, *Ratify and Ruin*, pp. 82-83.

<sup>138</sup> Golsong, 'Les reserves aux instruments internationaux pour la protection des droits de l'homme', cited in Imbert, 'Reservations and Human Rights Conventions', 45; see also Macdonald, 'Reservations under the European Convention on Human Rights', 448.

allows the state to maintain its claims to sovereignty while keeping any questions about invalidating the consent to be bound at bay.

#### 4.2.1 WITHDRAWAL

Vienna Convention Article 22 (Annex II) outlines the procedural aspects for withdrawing reservations. These guidelines are mere practicalities in the event that a state *chooses* to withdraw a reservation following an objection. In the event that a final determination is made on invalidity, nullity and severance are clearly preferred yet the same result can be achieved by inviting the reserving state to withdraw its reservation. Withdrawal is the more state-sensitive approach to eliciting a consequence for a reservation and is most often employed by the treaty bodies when they review periodic reports. Though the legal effect is precisely the same as severance, the more genteel terminology allows the reserving state to take control of the situation and ‘elect’ to withdraw the invalid reservation rather than have it severed.

During the third inter-committee meeting of the human rights treaty bodies in 2004 it was decided that treaty bodies could request withdrawal of a reservation deemed incompatible with the object and purpose of the treaty just as they could generally make this request even with regard to a compatible reservation pursuant to their monitoring function.<sup>139</sup> By limiting the number of reservations the process of moving human rights obligations into the realm of customary law is facilitated, a point which has not gone unnoticed.<sup>140</sup> States have withdrawn a number of reservations to the various treaties as noted in Chapter Four. It is not possible to hypothesise as to the reasons behind withdrawals but the efforts of states in their objections as well as treaty bodies reiteration of the need to withdraw reservations can only underscore the preference of this option over the potential of strict severance. A state would surely elect to withdraw rather than to have its reservation severed if for no other reason than to save political face.

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<sup>139</sup> Hampson, *2004 Final working paper*, para. 65.

<sup>140</sup> Swaine, ‘Reserving’, 330.

#### 4.2.2 REFORMULATION

While no rule exists in either the Vienna Convention<sup>141</sup> or customary international law to support reformulation, practice has shown that this is a viable option. This was the approach followed by the ECtHR in *Belilos*<sup>142</sup> and on another occasion by Liechtenstein<sup>143</sup> to amend reservations to the ECHR. Despite the ‘bizarre novelty’<sup>144</sup> of this approach, reformulation seems the most viable alternative to the strict rule that a reservation must be formulated simultaneously with the consent to be bound.<sup>145</sup> This approach would create a ‘new rule of international law’ which would allow for ‘subsequent modification of reservations in order to render them compatible with the object and purpose of the instrument.’<sup>146</sup>

Allowing reformulation of a reservation following a declaration of incompatibility would ‘promote ratification of human rights treaties by assuring new parties a degree of certainty as to the consequences and effects of any reservations’<sup>147</sup> in that a state would have the opportunity to correct any deficiencies. Both the CEDAW Committee<sup>148</sup> and the Children’s Committee<sup>149</sup> have voiced support for the prospect of modifying the errant reservations and the potential of the practice has also been recognised by ICCPR State Parties in their objections to invalid reservations<sup>150</sup>. Even without a binding protocol, the treaty bodies could adopt this

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<sup>141</sup> Korkelia, ‘New Challenges to the Regime of Reservations’, 460; Schabas, ‘Time for Innovation and Reform’, 76.

<sup>142</sup> Reformulation was actually suggested by Swiss counsel during the course of the case and Switzerland did produce a revised declaration following the final judgment on the case. See (1988) 31 Yearbook European Convention on Human Rights 5. It subsequently modified the reservation once again, see Doc. H/INF (89) 2, Information Sheet No. 24, 7-8.

<sup>143</sup> See Liechtenstein’s reformulation of its reservation to ECHR, Art. 6(1), Doc. H/INF(92) 1, Information Sheet No. 29, p. 1.

<sup>144</sup> H.J. Bourguignon, ‘The Belilos Case: New Light on Reservations to Multilateral Treaties’ (1988-89) 29 Virginia Journal of International Law 347, 383.

<sup>145</sup> Korkelia, ‘New Challenges to the Regime of Reservations’, 460-61; Schabas, ‘Time for Innovation and Reform’, 77-78.

<sup>146</sup> Schabas, ‘Time for Innovation and Reform’, 77. This idea was supported by Judge Valticos of the ECtHR in his dissenting opinion to the *Chorherr v. Austria*, (Case No. 22/1992/367/441), ECtHR (Ser. A) No. 266-B (1993), para. 42.

<sup>147</sup> Schabas, ‘Time for Innovation and Reform’, 78; see also M.G. Schmidt, ‘Reservations to United Nations Human Rights Treaties—The Case of the Two Covenants’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 33.

<sup>148</sup> *Statement on reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. A/53/38/Rev.1 (1998), p. 49, para. 18.

<sup>149</sup> Chairpersons of the HRTBs, *Report on Reservations*, UN Doc. HRI/MC/2009/5 (2009), p. 4.

<sup>150</sup> See, for example, the UK’s objection (28 Jun. 2011) to the reservations made to the ICCPR by Pakistan where it suggest that it would reconsider its objections if Pakistan modified its reservations.

practice and see how states react. As recognised by Vienna Convention Article 31(3)(b), it could become a subsequently agreed practice that assists in interpreting the treaty. Some treaty bodies seem to have done just this.

The reformulation approach was employed by Malaysia in relation to the original reservations it made to CEDAW. On 6 February 1998 it notified the UN Secretary-General that it was withdrawing its reservations to CEDAW Articles 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h) and at the same time modifying its reservations to Articles 5(a), 7(b), 16(1)(a) and 16(2).<sup>151</sup> The Secretary-General's response to the modifications suggests that reformulation is a potential despite no acknowledgement in the Vienna Convention:

In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998.<sup>152</sup>

On 20 July 1998, France filed its objection to the modifications on the basis of incompatibility with the object and purpose of the treaty and as a result the modifications were not accepted. The Netherlands also filed a response but did not expressly reject the modifications. Neither objection addressed the actual procedure of reformulating or modifying existing reservations, thus it seems that reformulation is a viable option.

The following year the Maldives also submitted a modification to its original reservations to CEDAW. Responding in the same vein as to the Malaysian modification, the Secretary-General set a date of 23 June 1999 as the final date upon which objections to the modification could be received. No objections were received by the deadline and the reformulated reservations were accepted for deposit. Subsequent to the deadline, both Finland and Germany responded by way of objection but only Germany specifically indicated its rejection of the modification insisting that the modification was in fact a new reservation to Article 7. However, in light of the expiration of the deadline for objections, the reformulated reservations

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<sup>151</sup> On 19 Jul. 2010 Malaysia withdrew the reservations to Arts. 5 (a), 7 (b) and 16 (2).

<sup>152</sup> UN Treaty Collection, CEDAW, n. 36.

are now in place. Notably, the reservations for which both Malaysia and the Maldives sought modification were ones to which objections highlighting their incompatibility had previously been filed.

Surprisingly, the ILC has had little to say on the concept of reformulation. In draft guideline 2.5.11 indicates that states may not object to a partial withdrawal unless it is discriminatory.<sup>153</sup> Most importantly the ILC recognises, at least in relation to the succession of states, that the Vienna Convention is flexible enough to accommodate a wide variety of practices and has generally allowed states succeeding in interest to treaties to reformulate reservations originally made by their predecessors in interest.<sup>154</sup>

Though technically a reservation must be made at the time of ratification or accession, a progressive dimension seems to slowly be creeping into reservations practice with regard to modification as indicated both by the reaction to notices of modification by the UN Secretary-General as well as practice within the European regional system. As noted by the Council of Europe Secretariat it must be understood that the reformulation cannot expand the original reservation.<sup>155</sup> The ILC view aligns with this restriction as noted in draft guideline 2.3 which outlines that after a state has consented to be bound it may not 'by means of the interpretation of a reservation shirk certain obligations established by a treaty'.<sup>156</sup>

Reformulation is a particularly appealing possibility in light of the individual complaints procedure within the treaty body system whereby a state may only be notified of the invalidity of its reservation years after making it. Reformulation would provide the state the opportunity to refine its reservation in order to achieve the original or narrowed objective of the reservation though this will not preclude any existing claim falling under the umbrella of an invalid reservation. These modifications would obviously remain subject to the existing standards of review on validity and, unlike reservations made at the time of ratification, would not be

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<sup>153</sup> Draft Guide to Practice, guideline 2.5.11 and commentary para. 5.

<sup>154</sup> Draft Guide to Practice, guideline 5.1 and commentary para. 19. Specifically referring to the 1978 Vienna Convention.

<sup>155</sup> P.T.B. Kohona, 'Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations' (2005) 99 AJIL 433, 435; Jörg Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publishing, Strasbourg 1999), p. 96

<sup>156</sup> Draft Guide to Practice, guideline 2.3, commentary para. 2, see also guideline 2.3.5.

accepted by the depositary in the event of a single objection, as was the case with Malaysia's reformulated reservation.

Another technical point is that reformulation could only apply to previously validly formulated reservations. From a procedural standpoint this includes only those reservations made simultaneous to ratification of a treaty and does not include late reservations. Bahrain attempted to file a reservation to the ICCPR over two months after it ratified the Covenant in September 2006. Fifteen State Parties<sup>157</sup> objected to this attempt to file a late reservation<sup>158</sup> and the objections were primarily based on the violation of the Vienna Convention requirement that a reservation be made upon ratification (Article 2(1)(d)) but most also noted the general incompatibility of the reservation with the object and purpose of the treaty.

Marginally departing from the traditional Vienna Convention approach, the ILC appears to accept the possibility of formulating late reservations in its Finalized Guidelines.

### *2.3. Late formulation of a reservation*

A State...may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty, unless the treaty otherwise provides or none of the other contracting States...opposes the late formulation of the reservation.

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

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<sup>157</sup> Objecting states included: Australia, Canada, Czech Republic, Estonia, Hungary, Ireland, Italy, Latvia, Mexico, Netherlands, Poland, Portugal, Slovakia, Sweden and the UK. Four of the objections were outwith the twelve month period for filing objections though it is unclear that this would matter since in any event the attempted reservation did not comply with the Vienna Convention.

<sup>158</sup> On late reservations see E. Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 751, 775-78.



#### 4.2.3 DENUNCIATION

The least attractive option, but an option nonetheless, would be denunciation of the treaty if the reserving state deemed the reservation an essential feature of its consent to be bound but it could not otherwise prove such using the ILC guidelines indicated above. If the state formulating an invalid reservation chooses not to withdraw or reformulate the offending reservation then the state could denounce or the reservation will be severed. The obvious problem for the denunciation option will be that not all human rights treaties include a provision for denunciation, such as the case with the ICCPR. For this reason, the legality of a denunciation pursuant to international law is questionable for those treaties not contemplating the potential of denunciation.<sup>159</sup>

On 25 August 1997, North Korea notified the Secretary-General of its intent to withdraw completely from the ICCPR. Having no denunciation provision to guide it, the following month the Secretary-General informed North Korea via an *aide-mémoire* that its withdrawal would only be valid if all other State Parties to the Covenant agreed to the withdrawal.<sup>160</sup> This exchange reflects the practice of the Secretary-General to allow the treaty provisions to guide its responses to instruments deposited in relation to the treaties for which it is gate-keeper. To date the required unanimous consent has not been granted and it follows the North Korea is still bound by the ICCPR.<sup>161</sup> However, it has not since provided a periodic report to the HRC.<sup>162</sup>

The potential to denounce and re-accede with a reservation has been bandied about and has been done at least once in practice. In 1998, Trinidad and Tobago denounced and re-acceded to the Optional Protocol to the ICCPR with a reservation that the HRC would not be competent to consider communications by any prisoner under the sentence of death in respect of any matter relating to the prosecution, detention, trial, conviction, sentence or carrying of the of the sentence.<sup>163</sup> Seven State

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<sup>159</sup> Ibid.

<sup>160</sup> See UN Doc. C.N.467.1997.TREATIES-10, 12 Nov. 1997.

<sup>161</sup> During its review under the Universal Periodic Review, many states urged North Korea to comply with its obligations under the ICCPR and file its delinquent report. HRCouncil, *Report of the Working Group on the Periodic Universal Review, Democratic People's Republic of Korea*, UN Doc. A/HRC/13/13 (2010).

<sup>162</sup> Ibid.

<sup>163</sup> See UN Treaty Collection, OP-ICCPR, n. 1. Trinidad and Tobago acceded to the OP on 14 Nov. 1980 and denounced the OP on 26 May 1998. It then re-acceded with a reservation on 26 Aug. 1998. Following the HRC decision in *Rawle Kennedy* (below n. 163), it denounced the OP on 27 Mar. 2000.

Parties objected to the reservation on the basis of incompatibility with the ICCPR as well to the ‘propriety of the procedure’ used by Trinidad and Tobago to make the reservation.<sup>164</sup> In a divided opinion, the HRC declared the application by Kennedy, a prisoner on death row, admissible despite the reservation thus severing the reservation in *Rawle Kennedy v. Trinidad and Tobago*.<sup>165</sup> It is not clear if the reservation had been valid that it would have been unacceptable on otherwise ‘proprietary’ reasons. Following this, Trinidad and Tobago once again denounced the Optional Protocol, this time without re-accession. Bates notes that at the cost of Trinidad and Tobago’s membership in the Optional Protocol, ‘the HRC arguably upheld the integrity of the system of human rights supervision’.<sup>166</sup> Though it may be questionable<sup>167</sup> whether this course is preferable to accepting an invalid reservation it must not be forgotten that there are many reasons for joining human rights treaties and thus it is ultimately up to the individual state to determine which sacrifices are most important, a reservation or treaty membership.

These instances of denunciation led the HRC to issue *General Comment No. 26* on issues relating to the continuity of obligations to the ICCPR.<sup>168</sup> The HRC outlined that denunciation was guided by the provisions of each specific treaty and where there was no provision on denunciation the applicable rules of international law as reflected in the Vienna Convention were applicable. It pointed out that while the Optional Protocol to the ICCPR did specifically allow denunciation, as did other conventions such as CERD, as part of the ‘International Bill of Human Rights’ the ICCPR does ‘not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted’<sup>169</sup> where no such provision is provided. It continued:

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<sup>164</sup> UN Treaty Collection, citing the Netherlands objections. Many have argued that denunciation with re-accession does not comply strictly with the Vienna Convention but that particular question is out-with the parameters of the present research.

<sup>165</sup> *Rawle Kennedy v. Trinidad and Tobago*, HRC Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999 (1999), 31 Dec. 1999.

<sup>166</sup> Bates, ‘Avoiding Legal Obligations Created by Human Rights Treaties’, 763.

<sup>167</sup> M. Scheinen, ‘Reservations by States under the International Covenant on Civil and Political Rights and its Optional Protocols, and the Practice of the Human Rights Committee’ in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004), pp. 50-51.

<sup>168</sup> HRC, *General Comment No. 26: Continuity of obligations*, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (1997).

<sup>169</sup> *General Comment No. 26*, para. 3.

The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

Thus the HRC closed the door on the potential of denouncing the ICCPR even if accompanied by re-accession.

The experience of the HRC with Trinidad and Tobago can be contrasted with the ECtHR which took the same gamble in the *Belilos* decision but with the opposite result. As noted previously, Switzerland took the position that membership in the ECHR was more important than maintaining its reservation thus it reformulated its reservation rather than denouncing the treaty. Actual denunciation and re-accession with a reservation may constitute an abuse of rights,<sup>170</sup> though the topic remains unsettled. The human rights system has strong support and there are decidedly more reasons for a state to remain a treaty party than to give up that membership.

#### 4.3 SUMMARY

Following determining the validity of a reservation, establishing the consequence of an invalid reservation is the most important issue when the reservation is to a human rights treaty. To date there has been no international rule of law mandating severance, withdrawal or any alternative consequence, for an invalid reservation. The ILC and the treaty bodies assert nullity as the single consequence of a determination of invalidity and stipulate that this will be achieved by severing the reservation. Though legal nullity and severance may abrogate the invalid reservation in the state-to-state relationship when an invalidity determination is made by another state party, it is less clear the impact it will have on the protection of rights-holders unless there is a final determination on validity. Furthermore, due to questions regarding the impact of severing a reservation from an instrument of consent other options should

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<sup>170</sup> Polakiewicz, *Treaty-Making in the Council of Europe*, p. 96; see also Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties', 783-86.

be proffered, such as withdrawal and reformulation so that a state may maintain control of its consent to obligations.

## 5 CONCLUDING REMARKS

The flexibility of the default reservations regime has led some to suggest an ‘overhaul’<sup>171</sup> of the Vienna Convention. This chapter set out to analyse the Vienna Convention reservations regime in order to assess whether it could adequately govern reservations to human rights treaties. Rather than an overhaul, this thesis insists that stock be taken of the lacunae in the system and posits avenues by which these lacunae might be resolved. This chapter advances the heretofore undefined object and purpose test as the first challenging feature of the reservations regime which is reflected by the disparate treatment of problematic reservations by state parties to the core UN human rights treaties. The second challenge lies in the lack of defined legal effect for a reservation that has been determined invalid, particularly in the context of the reservation-policing practice whereby states object to reservations. The final challenge is the failure of the Vienna Convention to specify a consequence for an invalid reservation.

Despite the ambiguity of the object and purpose test, states have proven that they can apply the test to determine the validity of a reservation. Unfortunately, due to the lack of guidance on legal effect and the consequence of an invalid reservation, reserving states have largely ignored other state parties’ determinations of invalidity. The ILC asserts nullity and severance as the legal effect and consequence of an invalid reservation, however, in practice there remains resistance to these concepts especially in the state-to-state relationships created in the course of accepting and objecting to reservations. States that have formulated invalid reservations continue to maintain the validity of their reservations because there is no definitive rule enunciating at what point the validity of a reservation can no longer be in doubt. Unfortunately, even objections purporting to sever the incompatible reservations rarely bear effect on the reserving states as it is unlikely that an objecting state would pursue a reserving state in an international arena, such as the ICJ, merely to have confirmation that the reservation is invalid and, therefore, severable.

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<sup>171</sup> Klabbers, ‘Accepting the Unacceptable?’, 191.

While the increased acknowledgement of severability is a boon to the human rights system as a whole, its actual impact is rather limited in the state-to-state context as states do not enjoy reciprocal rights and obligations under the core human rights treaties. The rights-holders who are affected are not recognised under the Vienna Convention. This situation illuminates the ineffectiveness of the objection practice for producing a tangible legal effect or consequence in the face of an invalid reservation. As outlined by Swaine,

...the suggestion that states are inadequate [to be the sole arbiter of reservations] calls into question a premise more or less common to the permissibility and opposability approaches—the acceptance of state appraisals, through objections or otherwise, govern the acceptance of reservations—and creates doubt as to whether the Vienna Convention is a complete regulatory system.<sup>172</sup>

While the Vienna Convention regime may not be complete, the flexibility of the system and the recognition that the tools for interpreting a treaty might expand (Article 31) suggests that progressive practices have the potential to better guide the effects of invalid reservations to human rights treaties. The ambiguities of the Vienna Convention reservations regime could be more appropriately addressed if an arbiter of reservation validity outwith the state parties were designated to provide final review of questionable reservations. The core UN human rights treaties are uniquely situated to designate a competent reservation review mechanism in light of the treaty-specific supervisory mechanisms which already play a central role in monitoring treaty implementation by state parties.

Reservations to human rights conventions should not, in the words of Golsong, be left to ‘the play of objection and acceptance on the part of other Contracting States’.<sup>173</sup> The beneficiaries of obligations established by the core human rights treaties are deprived of the full benefits of these treaties due to the normative gaps in the Vienna Convention regime. As will be examined in the next chapter, recognising the treaty bodies as competent arbiters of reservation validity would be a step-forward in providing coherence in the normative order that oversees international human rights. Therefore, while it is clear that the Vienna Convention

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<sup>172</sup> Swaine, ‘Reserving’, 322. Recall the discussion of permissibility and opposability in Chapter 3.

<sup>173</sup> Golsong, ‘Les reserves aux instruments internationaux pour la protection des droits de l’homme’, cited in Imbert, ‘Reservations and Human Rights Conventions’, 35.

reservations regime *can* adequately regulate reservations to human rights treaties, this conclusion is only correct as long as the specific nature of human rights treaties, including their content and availability of monitoring mechanisms, is fully taken into account.

## **CHAPTER SIX**

### **TREATY BODIES: AN EVOLVING OPPORTUNITY**

As demonstrated in Chapter Four, the monitoring model of state objections developed alongside the Vienna Convention for controlling incompatible reservations has not been effective because states rarely object to reservations and even states that do object to reservations on the basis of incompatibility with Vienna Convention Article 19(c) generally accept the reserving state as a treaty member despite the invalid reservation. This acceptance perpetuates the existence of invalid reservations as practice has shown that the reserving state will not necessarily withdraw an invalid reservation even in the face of an objection because there is no tangible legal effect due to the non-reciprocal nature of human rights treaties and the ambiguities of the Vienna Convention regime. This situation is a direct result of the fact that there is no final determination of validity contemplated by the state monitoring system in the Vienna Convention.

As concluded in Chapter Five, the Vienna Convention rules can adequately govern reservations to human rights treaties despite the gaps that persist in the reservations regime. Responding to the second research question posed at the outset of this thesis, this chapter examines whether the treaty bodies are competent to determine the validity of reservations. It begins with a review of the specific role for which the treaty bodies were designed and briefly contemplates their perceived legitimacy. This is followed by an introduction to each of the bodies associated with the treaties examined by this thesis with the aim of substantiating the monitoring purpose of these bodies. The crux of the analysis is reached by examining the involvement of the treaty bodies in the reservations debate to date and the international response to this involvement. Specifically this chapter will reply to the following question: are the treaty-specific supervisory mechanisms competent to serve a determinative function with respect to reservations to the core UN human rights treaties?

#### 1 THE ROLE OF THE HUMAN RIGHTS TREATY BODIES

The primary purpose of the treaty-specific monitoring organs of the core UN human rights treaties (the treaty bodies) is the review of state parties' fulfilment of treaty

obligations pursuant to their remits as indicated by their respective treaties. In the first instance, all of the treaty bodies examine state parties' periodic reports. Additional quasi-judicial functions have been established and widely accepted as part of the UN human rights regime in an effort to further realise the rights set forth in the UDHR and the core UN human rights treaties. The point of contention between states and treaty bodies is who between them has the ultimate power to determine whether a state party is fulfilling its obligations. Treaty interpretation is integral to the treaty bodies' remits if they are to legitimately evaluate state compliance with treaty obligations. These bodies were designed with that very purpose in mind and the constitution of the bodies, including both the electoral processes and mandatory multicultural considerations, serves to ensure that state parties receive an unbiased, treaty-centric review in their interaction with the treaty bodies.

Using arguments and realisations from other fields of international law, the following will briefly address concepts of legitimacy surrounding the growing use of international institutions in implementing cross-cultural standards and governing increasingly complex societies. The next section sets forth the remits of the treaty bodies and the acceptance of their competencies through ratification of treaty texts, thereby grounding their functions in law.

### 1.1 INDICATORS OF LEGITIMACY

Legitimacy in governance has been simply described by Franck as 'the aspect of governance that validates institutional decisions as emanating from right process'.<sup>1</sup> Therefore if the correct processes are established and followed, then the execution of those processes will be deemed legitimate even if the outcome is not that about which all people agree. Institutions, on the other hand, are generally viewed as legitimate if the people over whom they exercise authority accept that authority. Thus combining the two it could be argued that a governing institution must both be established by, and operate pursuant to, the correct process and be accepted by the governed. At the domestic level these are widely established socio-political concepts, especially in the context of representative democracies. When the focus turns to international institutions, however, these simplistic indicators are less tenable.

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<sup>1</sup> T.M. Franck, 'Democracy, Legitimacy and the Rule of Law: Linkages,' (1999) New York University School of Law, Public Law and Legal Theory Working Paper Series, Working Paper 2, 1.



Decisions on the international level are often viewed as too remote from the ordinary citizen and thus out-with the indicators that are essential to assess legitimacy.<sup>2</sup> In the context of international human rights treaties, the ordinary citizen benefits from state recognition of the international law as set forth therein despite not directly being the object of governance. The purpose of this section is not to debate the origins and theoretical concepts of legitimacy, rather the following serves as a back-to-basics, positivist use of simple indicators, including proper process, evidenced by legal texts, and consent to governance, evidenced by voluntary ratification of treaties, to evaluate human rights treaty bodies as mechanisms for review.

#### 1.1.1 PROPER PROCESS: ESTABLISHING INTERNATIONAL INSTITUTIONS

Human rights treaty bodies are the embedded international institutions of the UN human rights treaties and the primary enforcement mechanism of the texts' obligations. Each of the treaties provides processes for the execution of the competencies of its respective treaty body, which may include review of periodic reports, receipt of inter-state and/or individual communications and procedures of inquiry. Prior to becoming a state party, states spend a great deal of time assessing how the obligations included in the text will affect the status quo in their jurisdiction. Thus, the choice to become a party to a human rights treaty necessarily implies consent to the obligations found therein, including the exercise by a treaty body of its enumerated functions.

In addition to the specific supervisory remits of the treaty bodies, each of their membership election processes are crafted to guarantee that an unbiased authority exercises oversight. Each of the treaties seeks to achieve equitable geographical distribution in addition to representation of different types of civilisations and legal systems among the state parties, which helps ensure that no one region or culture dominates. Essential to the execution of their duties is the requirement that members act in their personal capacities, not as representatives of their governments despite being nominated by them. The language establishing

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<sup>2</sup> S. Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *International Journal of Constitutional Review* 457, 458-59, *noting* Robert A. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View' in I. Shapiro and C. Hacker-Cordón (eds.) *Democracy's Edges* (CUP, Cambridge 1999), p. 19.

human rights treaty bodies, both the physical make-up of the bodies and their supervisory attributes, is painstakingly drafted to avoid any confusion as to their purpose. Though no two of these treaty bodies are identical, they each play an essential role in ensuring the realisation of the obligations under the treaties and their specific remits will be detailed in section 2.

#### 1.1.2 CONSENT OF THE GOVERNED

Contrasted with international institutional legitimacy, the traditional theory of treaty legitimacy is embodied in the fact that treaties are representations of consensual, mutually reciprocal obligations between parties, a concept known as ‘consent of the governed’.<sup>3</sup> It is a long-accepted principle that states are bound only to those obligations to which they have consented.<sup>4</sup> In the context of non-reciprocal human rights treaties, however, this model takes on a new life. Unlike treaties governing other aspects of international law, human rights treaties are created for the benefit and protection of third parties—the people affected by actions of the state parties—who do not have a direct role in negotiating the obligations, nor are they the subjects which are directly governed. The state parties are manifestly ‘the governed’ as they are the objects that must fulfil the obligations embodied in the treaty articles and the ‘beneficiary’ is the world at large in the form of the human beings in each state party’s jurisdiction. From a purely normative view of treaty law, the reciprocity deficit largely facilitates the relaxed approach to human rights compliance by many state parties, a phenomenon not as obvious in other types of international treaties. It is the lack of reciprocal beneficial obligations, a concept which is integral to traditional treaty law, which require human rights treaties to look out-with reciprocity as a legitimising factor.

Fortunately, ‘consent of the governed’, at the most basic level, rests on an easily identifiable factor which is, incidentally, the key to engaging duties pursuant to a treaty: consent, which in treaty law equates to becoming a state party. It has been argued that ‘[s]tates consent to commit themselves (to treaties) because doing so is

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<sup>3</sup> D. Bodansky, ‘The Legitimacy of International Governance: a Coming Challenge for International Environmental Law?’ (1999) 93 AJIL 596, 597.

<sup>4</sup> *S.S. Lotus case (France v. Turkey)*, 1927 PCIJ (Ser. A) No. 10 (7 Sept. 1927), p.18: ‘The rules of law binding upon States therefore emanate from their own free will...’

the only way to achieve certain goals.’<sup>5</sup> Treaty ratification or accession by definition, and pursuant to the principle of *pacta sunt servanda*, demands that a state party fulfil all obligations set forth in the treaty text, save those to which it has made reservations. A UN commissioned study determined that the threat to the status quo is the most common reason for non-ratification of human rights treaties while ratification alternatively suggests that a state is willing to increase access to information on domestic human rights practices which simultaneously increases the legitimacy of human rights concepts.<sup>6</sup> As pointed out by Bodansky in 1999 when examining legitimacy in international environmental law, the legitimacy of international institutions and their ability to influence states was not a bigger issue before the late 1990s due to the weakness of institutions coupled with the fact that their authority derived from the consent of the states to which they applied.<sup>7</sup> Thus, outwith the narrow purview of the institution the idea of influence upon non-consenting parties was relatively obsolete. The difference in 2011 is that the number of states consenting to oversight of treaty bodies is growing, thus their sphere of influence is also growing.

Despite the increasing level of consent to treaty body practice, detractors from the treaty body phenomenon include states opposed to any institution which might challenge aspects of sovereignty and individuals who view them as acting something akin to world government. In reality, human rights treaty bodies do neither. In the aftermath of the collapsed Third WTO Ministerial Conference, Mike Moore, the former secretary of the World Trade Organisation (WTO), delivered a very apt summary of the relationship between the WTO and state governments which is mutually applicable to the relationship between human rights treaty bodies and states:

We are not a world government in any shape or form. People do not want a world government, and we do not aspire to be one. At the WTO, government decides, not us. But people do want global rules. If the WTO did not exist, people would be crying out for a forum where

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<sup>5</sup> O. Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 Yale Law Journal 1935, 1950.

<sup>6</sup> R. Goodman and D. Jinks, ‘Measuring the Effects of Human Rights Treaties’ (2003) 14(1) EJIL 171, 176, noting Heyns and Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 HRQ 483, 487-88.

<sup>7</sup> Bodansky, ‘The Legitimacy of International Governance’, 596-97.

governments could negotiate rules, ratified by national parliaments...And they would be crying out for a mechanism that helps governments avoid coming to blows over trade disputes. That is what the WTO is. We do not lay down the law. We uphold the rule of law. The alternative is the law of the jungle, where might makes right and the little guy doesn't get a look in.<sup>8</sup>

Human rights treaty bodies do not lay down the law. States have negotiated and debated the intricacies of the treaty texts and chosen to include mechanisms which apply the rule of law equally to those states that have chosen to recognise the authority of these bodies by consenting to become state parties. This does not equate to 'world government' as has been forecasted by opposition to the treaty body system. The aim has never been to create a world government that is an adjudicator above the state; it is to ensure that there is a rights-centric forum that can serve as a check system to ensure all state parties are abiding by their human rights commitments.

### 1.1.3 FOCUSED EXPERTISE

In addition to proper process and consent to authority, the expertise factor must not be overlooked when evaluating human rights treaty bodies as mechanisms of review. It has been suggested that experts working together in the international context 'can facilitate the resolution of global policy issues by narrowing the range within which political bargains could be struck'.<sup>9</sup> In addition to expertise being a requirement for committee membership generally, human rights treaties often deal with very specific rights and a thorough knowledge of the field covered by the treaty is essential in order to ascertain the realisation of these rights on the ground. Thus, for example, members of the Women's Committee have been active in the areas of gender equality and women's issues and this is reflected by their curriculum vitae. The same may be said for members of the Migrants Committee, etcetera. Picciotto observes that 'delegating specific issues to specialists who would deal with them in a depoliticized fashion...is a means of implementing policies that have been

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<sup>8</sup> M. Moore, 'The Backlash against Globalization?' (speech presented in Ottawa, Canada on 26 Oct. 2000) at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm39\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm39_e.htm) <accessed 31 Aug. 2011>.

<sup>9</sup> Picciotto, 'Constitutionalizing Multilevel Governance?', 459.

formulated through political processes...[and] understood as a response to the problems of governing ever more complex societies'.<sup>10</sup>

Treaty bodies serve an essential function as the guardians of their individual treaties. They alone are completely devoted to monitoring state implementation of obligations undertaken as treaty members. The flexibility of the Vienna Convention warrants some form of a back-stop to prevent the rules from being bent too far. As argued by Åkermark and Mårsäter, 'the more treaty flexibility is available, the more important it is to have institutionalised mechanisms...for a continuous re-evaluation of the flexibility devices'.<sup>11</sup> Treaty bodies are the independent, institutionalised mechanisms that were created specifically to fulfil such a role.<sup>12</sup> As noted by Alston, the treaty bodies are distinguished by

...a limited clientele, consisting only of State parties to the treaty in question; a clearly delineated set of concerns reflecting the terms of the treaty; a particular concern with developing the normative understanding of the relevant rights; a limited range of procedural options for dealing with matters of concern; caution in terms of setting precedents; consensus-based decision-making to the greatest extent possible; and a non-adversarial relationship with State parties based on the concept of a 'constructive dialogue'.<sup>13</sup>

The treaty bodies exist to ensure specific rights are implemented into a variety of social, cultural and political arenas. The combination of a highly varied membership and specialists in the field, both mandated by committee election guidelines, further

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<sup>10</sup> Ibid., 459.

<sup>11</sup> S. S. Åkermark and O. Mårsäter, 'Treaties and the Limits of Flexibility' (2005) 74 *Nordic Journal of International Law* 509, 509.

<sup>12</sup> The independence of the treaty bodies is an essential characteristic and integral to successfully fulfilling their duties. See *Poznan Statement on the Reforms of the UN Human Rights Treaty Body System*, Poznan, Poland, 28-29 Sept. 2010 (Poznan Statement), paras. 19-21; CEDAW Committee, *Report on its 41<sup>st</sup> session, Decision 44/1*, UN Doc. A/63/38, Supp. 38 (2008), chap. I, p. 88; CERD Committee, *General Recommendation No. 9: Independence of Experts*, (1990), UN Doc. HRI/GEN/1/Rev.9: 'Alarmed by the tendency of the representatives of States, organizations and groups to put pressure upon experts...Strongly recommends that they respect unreservedly the status of its members as independent experts of acknowledged impartiality serving in their personal capacity.' The author acknowledges that the independence and expertise of treaty body members has been questioned. However, this examination is limited to the indicia set forth by the treaties themselves thus the line of inquiry into the true nature of those who sit on the treaty bodies is outwith its scope.

<sup>13</sup> P. Alston, 'Appraising the United Nations Human Rights Regime' in P. Alston (ed.), *The United Nations and Human Rights* (Clarendon Press, Oxford 1992), p. 5; see also, 'Chapter 10: Treaty Bodies: The ICCPR Human Rights Committee' in H. Steiner, P. Alston, R. Goodman (eds.), *International Human Rights in Context*, 3d ed. (OUP, Oxford 2008), pp. 845 et seq. for a discussion of the powers and function of the HRC in particular.

legitimises the work of the treaty bodies. As legal institutions and the products of ‘rational design through codification’ treaty bodies can be viewed as ‘rational, negotiated responses to the problems international actors face’.<sup>14</sup>

## 1.2 LEGITIMACY SUMMARY

Legitimacy on the international level depends on expertise of the decision makers and the increased legalisation of the institutions in which they operate.<sup>15</sup> Within the context of international human rights treaty bodies, the adopted texts of the treaties not only specify the various authoritative procedures for the treaty bodies, but also establish election processes designed to ensure equitable representation by experts amongst the state parties to the treaties. Furthermore, these texts are ratified by states which indicates consent to those processes as detailed by the treaties. Admittedly, the treaty bodies only oversee the implementation of rights by state parties to their respective treaties, however, several of these treaties enjoy the membership of a super-majority of the states of the world thus the opportunity to influence cannot be ignored.

## 2 TREATY BODY REMITS<sup>16</sup>

The embedded oversight bodies comprised of experts in the field specific to each treaty is a unique feature of the core UN human rights treaties. Their main purpose is to ensure that the standards established by the texts are upheld. As noted in previous chapters, unlike traditional treaties which draw their strength from the existence of reciprocal obligations, human rights treaties are standard-setting and non-reciprocal. The necessity of supervisory mechanisms for human rights treaties results from the absence of substantive reciprocal obligations.<sup>17</sup> Without the treaty bodies supervising implementation, human rights treaties would be in danger of becoming merely aspirational and without a compelling legal reason for states to act. Each treaty body will be examined in subsequent sub-sections, including a cursory comment on the

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<sup>14</sup> B. Koremenos, C. Lipson and D. Snidal, ‘The Rational Design of International Institutions’ (2001) 55 *International Organization* 761, 768.

<sup>15</sup> Picciotto, ‘Constitutionalizing Multilevel Governance?’, 459.

<sup>16</sup> All information on treaty body activity can be found on the UN Treaty Collection website, <http://treaties.un.org> (UN Treaty Collection), and is current as of 30 Jul. 2011.

<sup>17</sup> L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995), p. 110.

treaty body's approach to reservations, after the following general introduction about the potential functions of the treaty bodies.

The texts of the various human rights treaties outline the respective treaty body competencies, including reviewing periodic reports, consideration of individual communications, consideration of inter-state communications and/or initiation of inquiries. For state parties recognising a treaty body's competencies there is a general duty of good faith to cooperate with the treaty body as recognised by general principles of treaty law.<sup>18</sup> To determine whether the treaty has been effectively implemented commensurate with the obligations of each state party, it is essential that treaty bodies interpret the obligations in light of the domestic situation on the ground, including introduction of new law or reconciliation with existing law.

Reviewing periodic reports of the state parties and issuing general comments are the common features shared by all of the treaty bodies. The importance of reviewing periodic reports must not be undervalued; it creates an avenue for the treaty bodies to develop a dialogue with state parties. Thus, at the very least, each of the treaty bodies is obligated to do the following:

1. Receive *reports on measures* [the state parties] *have adopted which give effect to the rights recognized* by the corresponding treaty;
2. *The Committee shall study the reports submitted by the State parties...It shall transmit its reports, and such general comments as it may consider appropriate.*

The italicised language above is taken directly from ICCPR Article 40 but is repeated almost verbatim in the other eight treaties, with the most notable difference being that in a majority of the treaties the use of 'general recommendations' is substituted for 'general comments'. The practice of issuing general comments has developed into perhaps one of the most significant, and subsequently controversial, functions of the treaty bodies. The value of the general recommendation/comment must be identified as a distinct form of communication from the other ways in which the treaty bodies engage with a state. Unlike monitoring reports or reviewing individual communications, these represent the primary opportunity of the treaty bodies to enunciate their interpretation of treaty obligations to the entirety of states,

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<sup>18</sup> Vienna Convention, Art. 26. Also typically noted within each of the treaty texts.

rather than in a bi-lateral communicative process.<sup>19</sup> General comments are directed to all state parties, summarise the experience the committee has gained reviewing the periodic reports and focus the attention of the state parties on matters that would improve implementation of the treaty obligations.<sup>20</sup> Though several general comments have been issued on the specific topic of reservations, as will be examined in section 3, reservations are most often a feature of reviewing periodic reports<sup>21</sup> as this is the only mandatory supervisory function of each treaty body in its relation to the state parties that does not require a further recognition of competency by the states. Without the reporting mechanisms of the human rights treaties, it would be difficult to begin to determine compliance and its effects on the law and people within a state party's jurisdiction and/or territory, therefore this primary function is indispensable.

One of the key problems for the over eighty-percent<sup>22</sup> of states that have ratified more than four of the core treaties is the various forms of periodic reporting required by each treaty. Multiple separate reports create a burden on states, especially smaller or developing countries with limited resources, which stymies the essential monitoring feature of the treaties. In 2009, the culmination of years of studying this problem were addressed when the UN Secretary-General issued the *Harmonized Guidelines on Reporting Under the International Human Rights Treaties, Including Guidelines on a Core Document and Treaty-Specific Documents*.<sup>23</sup> The *Harmonised Guidelines* not only provide a method of easing the paperwork strain on states but at the same time create more stringent reporting standards which address reservations and require that states provide the following information on reservations when submitting their harmonised report:

1. The nature and scope of reservations

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<sup>19</sup> On this point see N. Rodley, 'United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementary or Competition?' (2003) 25 *Human Rights Quarterly* 882, 887; E.A. Baylis, 'General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties' (1999) 17 *Berkeley Journal of International Law* 277, 282.

<sup>20</sup> P. Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in H.J. Steiner, P. Alston and R. Goodman, *International Human Rights in Context: Law, Politics, Morals*. 3d ed. (OUP, Oxford 2008), p. 876.

<sup>21</sup> I. Boerefijn, 'Impact on the Law on Treaty Reservations' in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Laws on General International Law* (OUP, Oxford 2009), p.63.

<sup>22</sup> OHCHR website: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> <accessed 31 Aug. 2011>.

<sup>23</sup> UN Doc. HRI/GEN/2/Rev.6 (2009). Report issued in response to UNGA resolutions 52/118 and 53/138.



2. The reason why such reservations were considered to be necessary and have been maintained;
3. The precise effect of each reservation in terms of national law and policy;
4. In the spirit of the World Conference on Human Rights and other similar conferences which encouraged States to consider reviewing any reservations with a view to withdrawing it, any plans to limit the effect of reservations and ultimately withdraw them within a specific time frame.<sup>24</sup>

The guidelines specific to reservations seek to achieve that which the treaty bodies have thus far not been equally successful in doing: getting states to elaborate upon and withdraw their reservations. The reporting rounds for the next few years will be telling as to whether the *Harmonised Guidelines* achieve this goal and produce a more effective periodic report monitoring system.

Consideration of individual communications is a quasi-judicial function available to eight of the nine treaty bodies upon the requisite recognition of competency.<sup>25</sup> This authorises the treaty body to receive communications—also termed ‘complaints’—from individuals or groups of individuals (such as those brought by NGOs). Generally, this competency must be affirmed by a state party by a declaration of consent pursuant to the articles of the treaty or by the ratification of an optional protocol that supplements the original treaty. It is in the process of evaluating individual complaints that a treaty body might also have occasion to evaluate the validity of a reservation.

Though the language varies slightly from treaty to treaty, the general requirements that must be met in order for a treaty body to consider an individual communication admissible are:

1. The state party alleged to have violated the right which is the subject of the communication must have declared that it recognises the competency of the respective committee to receive individual communications;

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<sup>24</sup> Ibid., p. 10.

<sup>25</sup> Due to the high volume of individual communications received, three of the Committees’ petitions are filtered in the first instance through the Petitions Team of the OHCHR. The Petitions Team services the HRC, the CAT Committee and the CERD Committee. See *Report of the Human Rights Committee to the General Assembly*, 63rd Session, Supp. 40, (Vol. I), UN Doc. A/63/40 (2008), p. 92, para. 88; See also OHCHR website, <http://www2.ohchr.org/english/law/cedaw-one.htm> <accessed 31 Aug. 2011>.

2. All domestic remedies available must have been exhausted prior to filing the communication except where the application of domestic remedies is unreasonably prolonged or unlikely to bring effective relief (exhaustion rule);
3. The fact(s) alleged must not have been the subject of a prior or current international investigation or settlement;
4. The communication must not be anonymous;
5. The facts of the subject of the communication must not have occurred before recognition of the committee's competence took effect for the state party (the *ratione temporis* rule).

The individual communications procedure allows advocates, lawyers and victims to frame violations in the international language of human rights law and seek redress when domestic remedies are ineffective or unavailable. The HRC's summary of its role in receiving individual communications effectively communicates the purpose of this procedure for the treaty bodies:

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.<sup>26</sup>

The individual communications regime has evaluated over 2500 complaints since its inception.<sup>27</sup>

The inter-state communications procedure provides a method by which a state party may bring a complaint alleging violations of treaty obligations by another state party. The communication will only be allowed if both the complaining state and the alleged violating state have made positive declaration that they recognise the competency of the treaty body to receive such communications. The other admissibility requirements for an inter-state communication are identical to those of the individual communication. Inter-state communications proceedings are confidential and the details are not made public without the consent of all involved

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<sup>26</sup> *General Comment No. 33*, UN Doc. CCPR/C/GC/33 (2008), para 11.

<sup>27</sup> Specific figures by treaty body will be given in subsequent sections.

state parties. To date this procedure has never been used under any of the treaties.

A procedure of inquiry is the final of the four standard functions available to assist treaty bodies in assessing the fulfilment of treaty obligations. Only three treaties, CEDAW, CAT and ICED, present the opportunity to carry out a procedure of inquiry. The competency of the treaty body to initiate a procedure of inquiry must have been either affirmed or not denied, depending on the relevant text, by the state party alleged to be violating the treaty rights. Upon receipt of reliable information indicating 'grave and systematic violations' of treaty obligations, treaty bodies with this competency may unilaterally initiate an investigation into the alleged violations. Initially, the treaty body will invite cooperation by requesting the allegedly offending state party to submit information on the situation within its territory. Upon review of the information, including observations by the state party on its domestic situation, an inquiry may be initiated with the request to 'urgently' report back to the treaty body. The findings will be communicated to the state party along with recommendations. All proceedings made under the inquiry will be confidential and only the state party being investigated will be notified. The findings are not made public except in the instance that the state party subject to the investigation consents to the findings being published in the committee's annual report. In some instances, the treaty body may visit the territory to gather first hand information when the circumstances so require, however this will be limited according to territorial sovereignty of a state. Even where some state parties have accepted the competency of a treaty body to utilise this procedure they often file a reservation prohibiting the entry of investigators without the specific consent. This procedure has had success of late and will be reviewed below under the pertinent treaty body.

The election procedures, committee make-up and specific remits firmly ground the authority of the treaty bodies in international law as set forth by their respective treaties. The following treaty bodies will be discussed below according to the date of entry into force of the parent treaty: Committee on the Elimination of Racial Discrimination, Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Discrimination Against Women, Committee Against Torture, the Committee on the Rights of the Child, the

Committee on Migrant Workers, the Committee on the Rights of Persons with Disabilities and, finally, the Committee on Enforced Disappearances.

## 2.1 COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination (CERD Committee) was established under part II, Article 8, of the 1966 Convention on the Elimination of All Forms of Racial Discrimination<sup>28</sup> (CERD), which entered into force in 1969. It is composed of ‘eighteen experts of high moral standing and acknowledged impartiality’ elected by secret ballot. Each State Party may only nominate one person for consideration and the person must be a national of the nominating state. A quorum—two-thirds in the case of the State Parties to CERD—must participate in the vote and the candidates must receive the largest number, as well as an absolute majority, of the votes cast in order to be elected. Equitable geographical distribution in addition to representation of different types of civilisations and legal systems are also taken into consideration. The members act in their personal capacities, not as representatives of their governments.

The CERD Committee’s primary function is to review reports submitted by State Parties as outlined by Article 9. The article further provides that the CERD Committee ‘may make suggestions and general recommendations based on the examination of the reports and information received from the State Parties’ which are then reported to the UN General Assembly and often published as general comments. The Committee has published thirty-three general comments since issuing its first on State Parties’ obligations under Article 4 in 1972.

Articles 11 and 12 set forth the procedure for receipt of inter-state communications. No positive declaration is necessary for this competency to take effect and no State Party has made a reservation denying the CERD Committee’s competency in this area. Article 11 initially encourages bilateral negotiation between the State Parties on either side of the communication, but provides for the establishment of an ad hoc Conciliation Commission if the matter is not resolved within six months after the initial communication is made to the alleged violating State Party. For the communication to be admissible it must be ‘ascertained that all

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<sup>28</sup> 660 UNTS 195, 7 Mar. 1966.

available domestic remedies have been invoked and exhausted in conformity with the generally recognized principles of international law'.<sup>29</sup>

Unlike inter-state communications, State Parties must make a positive declaration in order for the CERD Committee's competency to receive individual communications.<sup>30</sup> Fifty-four of the current 174 State Parties have declared the competency of the CERD Committee to receive individual communications pursuant to Article 14.<sup>31</sup> Upon receipt of any communication the CERD Committee will confidentially notify the State Party against whom the communication is directed, which triggers procedural time frames within which the exchange of observations surrounding the facts alleged must be concluded. Though the communication may not be made anonymously, in the case of alleged CERD violations the complainant will not be identified to the State Party without their consent. Forty-five individual communications have been reviewed by the Committee.<sup>32</sup> In both the case of inter-State and individual communications the proceedings are closed, which means only communications which have been fully considered and upon which recommendations have been made by the CERD Committee will be reported to the UNGA. As will be discussed in section 3, the CERD Committee was initially reticent to show strength on the issue of reservations to CERD. However, over time it has more aggressively addressed reservations and urged the withdrawal of such as was evidenced in *General Recommendation No. 33*.<sup>33</sup>

## 2.2 HUMAN RIGHTS COMMITTEE

The Human Rights Committee (HRC) was established to carry out the functions set forth in Articles 28 through 45 of the 1966 International Covenant on Civil and Political Rights<sup>34</sup> (ICCPR), which entered into force in 1976. Mirroring the CERD Committee, the HRC is composed of eighteen nationals from State Parties to the Covenant who serve in their personal capacity and are of 'high moral character and

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<sup>29</sup> Art. 11, para 3.

<sup>30</sup> Art. 14.

<sup>31</sup> See UN Treaty Collection, CERD, *Declarations and Reservations*.

<sup>32</sup> Statistical survey of individual complaints considered under the procedure governed by Art. 14 of the CERD, 14 Mar. 2011, available at <http://www2.ohchr.org/english/bodies/docs/CERDSURVEYArt14.xls> <accessed 30 Jul. 2011>.

<sup>33</sup> UN Doc. A/64/18, (2009), p. 161.

<sup>34</sup> 999 UNTS 171, 16 Dec. 1966.

recognized competence in the field of human rights'.<sup>35</sup> Each State Party may nominate up to two persons to stand for the election and choice is made by secret ballot. A quorum—two-thirds in the case of the ICCPR—must participate in the vote and the candidates must receive the largest number, as well as an absolute majority, of the votes cast in order to serve on the Committee. No two Committee members may be of the same nationality and geographical distribution, as well as legal experience, is taken into consideration. Each selected Committee member must also take an oath to perform his duty impartially and conscientiously.<sup>36</sup>

ICCPR Article 40 enumerates the powers of the Committee as a mechanism for review of periodic reports that are required of State Parties. In addition to the initial report required by the ICCPR, State Parties are required to submit reports 'whenever the Committee so requests' pursuant to Article 40(1)(b). This implies a sense of flexibility and autonomy of the HRC. Thus the initial function provided by Article 40 is that the Committee receive and examine periodic reports then 'transmit ... such general comments, as it may consider appropriate, to State parties.' Having published thirty-four General Comments since 1981, the HRC is the most prolific, and also most controversial, in exercising its review and comment role.

Article 41 outlines the second function of the Committee by allowing for State Parties who so choose to declare the competency of the Committee to receive and consider inter-state communications. For this function to be triggered, State Parties must be proactive and declare their acceptance of this function of the Committee.<sup>37</sup> To date, forty-eight<sup>38</sup> of the 167 State Parties have so declared. Once a matter is referred to the HRC, it will first determine whether all available domestic remedies have been exhausted in accordance with principles of international law. The Committee's involvement is only triggered in the instance that the involved State Parties do not come to a satisfactory resolution of the alleged failure to fulfil ICCPR obligations during bilateral negotiations.

The adoption of the Optional Protocol<sup>39</sup> to the ICCPR further expanded the HRC as a mechanism for reviewing fulfilment of treaty obligations by establishing

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<sup>35</sup> Art. 26.

<sup>36</sup> Art. 38.

<sup>37</sup> Art. 41 entered into force 28 Mar. 1979 in accordance with paragraph 2.

<sup>38</sup> UN Treaty Collection.

<sup>39</sup> 999 UNTS 171, 16 Dec. 1966 (OP-ICCPR).

its competency to receive and review communications of alleged victims of violations of any of the ICCPR rights. The Optional Protocol will only be applicable to State Parties taking the affirmative step of becoming a party to the Optional Protocol, in addition to the ICCPR, and the complainant must have first exhausted all available domestic remedies as well as fulfilled the other general requirements of admissibility. Proceedings are closed and communications confidential though final views will be published in the Committee's annual report. Including the most recent accession of Brazil, deposited on 25 September 2009, the Optional Protocol is widely supported by 111<sup>40</sup> State Parties.

The individual communications process strengthens the position of individual subjects of the State Parties' jurisdiction by allowing them an unbiased forum for review of the obligations as applied by the State Parties. Since 1977, the Committee has received 2,034 individual communications regarding eighty-two State Parties of which 867 made it to final views with 718 concluding that a violation had taken place.<sup>41</sup> Except for the cases still under consideration, the remaining communications were either dismissed as inadmissible or were discontinued<sup>42</sup> and thousands more that have been received by the Petitions Team have been sent back with requests for further information. The HRC has played a notable role in the development of the reservations dialogue in the international community, particularly through its general comments and individual communications which will be discussed in section 3.

### 2.3 COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

When the 1966 International Covenant on Economic, Social and Cultural Rights<sup>43</sup> (ICESCR) entered into force in 1976, it did not have its own specialised committee. Article 16 of the ICESCR details State Parties' periodic reporting requirements and indicates that they are to be submitted to the UN Economic and Social Council (ECOSOC). Under Article 19, the Council may submit general recommendations

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<sup>40</sup> Two states, Jamaica and Trinidad and Tobago, denounced the OP-ICCPR and the denunciations went into effect in 1998 and 2000 respectively, thus the number of participating states was 113 at its highest.

<sup>41</sup> Statistical survey of individual complaints dealt with by the HRC under the Optional Protocol to the ICCPR, 6 Apr. 2011. <http://www2.ohchr.org/english/bodies/hrc/docs/SURVEYCCPR101.xls> <accessed 30 Jul. 2011>.

<sup>42</sup> Ibid.

<sup>43</sup> 993 UNTS 3, 16 Dec. 1966.

based on the State Parties' reports to the Commission on Human Rights<sup>44</sup> and Article 21 provides that the Council may also submit 'recommendations of a general nature' to the UNGA. Article 23 further provides that the State Parties agree that 'adoption of recommendations' is necessary to achieve the rights set forth in the ICESCR. None of the 160 State Parties to the ICESCR have negated this obligation by reservation. Unlike the eight other treaty bodies the Committee on Economic, Social and Cultural Rights (ESCR Committee) was established in 1985 by an ECOSOC resolution<sup>45</sup> in order to assist the Council in fulfilling its role as an advisory organ to the UNGA with respect to international economic, social, cultural, educational, health, and related matters as indicated by Chapter X of the UN Charter. The 'general recommendation' language of Article 19 was repeated in the resolution establishing the ESCR Committee.

The ESCR Committee consists of eighteen members who are competent in the field of human rights and serve in their personal capacities. Pursuant to the resolution establishing the ESCR Committee, during election of the members, due consideration is given to equitable geographical distribution and to the representation of different forms of social and legal systems. To achieve the optimal representation, fifteen seats are equally distributed among the regional groups and the three additional seats are allocated in accordance with the increase in the total number of State Parties per regional group.<sup>46</sup> Under the ICESCR the Committee's only existing supervisory function is to review and comment upon periodic reports.

On 10 December 2008, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights<sup>47</sup> was adopted by the UNGA as it celebrated the 60<sup>th</sup> anniversary of the UDHR. The Optional Protocol establishes the parameters under which the ESCR Committee would gain competency to initiate procedures of inquiry and to review both individual and inter-state communications.<sup>48</sup> To date there are thirty-three signatories and three ratifications of the Optional Protocol.

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<sup>44</sup> Now the Human Rights Council.

<sup>45</sup> ECOSOC, Resolution 1985/17, 28 May 1985.

<sup>46</sup> Ibid.

<sup>47</sup> UN Doc. A/63/435 (2008).

<sup>48</sup> Though Art. 10 requires that a further declaration of competency is required for the inter-State competency to be triggered.



The adoption of the Optional Protocol reflects the reality that the treaty body regime is here to stay despite past opposition. Small tweaks to the new remit of the ESCR Committee confirm that the Working Group on the Optional Protocol to the ICESCR was paying attention to historical sticking points for State Parties in regards to treaty body functions. The most progressive aspect of the Optional Protocol is the specification of interim measures when deemed necessary prior to a determination on the merits. This feature has previously been established in Committees' rules of procedure, such as the HRC, but the incorporation into the treaty text will significantly bolster the recognition of this measure. It is also important to note that the Working Group's composition—including China, Poland, India, Korea, Russia, Venezuela, Mexico, Argentina, Serbia, Austria, Ghana, Italy and Senegal, just to name a few and all of whom have previously recognised and/or made a reservation against a treaty body function—signalled a concerted effort across the globe to establish a treaty body that is endorsed by the largest number of states while maintaining the integrity of the treaty body's functions.<sup>49</sup>

The telling aspect of the Optional Protocol is the reflection in its articles of the reservations that have been made to previously adopted treaty body communications regimes such as the CERD Committee and the HRC as discussed above. The rules regarding exhaustion of local remedies and the facts must not be the subject of a prior/current international investigation or settlement from the previous individual communications regimes are mirrored here. In addition, Article 3 explicitly limits competency to review by deeming inadmissible communications whose *subject matter* took place prior to the entry into force of the Optional Protocol for the alleged offending State Party—a rule that had not been explicit in past treaties—and establishes a time bar on complaints whose exhaustion of local remedies was prior to one year before submission, except where the author can prove that it was impossible to submit the complaint within the one year time frame. The clarification that the mechanism would have no retrospective applicability has been the focus of reservations to previous individual communications mechanisms.<sup>50</sup> The inclusion of

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<sup>49</sup> See e.g., *Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, UN Doc. A/HRC/8/7 (2008).

<sup>50</sup> See e.g., UN Treaty Collection, OP-ICCPR, declarations/reservations by Chile, Croatia, El Salvador, Germany (no retrospective application to acts or omissions prior to the entry into force of the OP-ICCPR).

these items indicates that that negotiation process has considered the contentious topics associated with recognition of treaty body competencies in the past. However, the inclusion of the interim measures procedure indicates a more aggressive and authoritative role for the ESCR Committee.

The additional competencies introduced by the Optional Protocol are inter-state communications and the procedure of inquiry. Inter-state communications would be allowed pursuant to Article 10. State Parties must make a declaration of competency of the ESCR Committee to receive such communications in addition to joining the Optional Protocol however no minimum number of declarations is required for the provision to take effect. The procedure reflected in Article 10 mirrors the inter-State procedures of other treaty bodies. An inquiry procedure is outlined in Article 11 which would allow the ESCR Committee to instigate an inquiry into alleged violations of ICESCR upon receipt of ‘reliable information indicating grave or systematic violations...of any economic, social and cultural rights set forth in the Covenant’.<sup>51</sup> This competency also requires a further declaration of competence in the ESCR Committee over and above mere assent to the Optional Protocol. The Optional Protocol, and therefore the complaints and inquiry procedures, have yet to take effect as there are not the requisite number of ratifications. Thus, other than within the context of periodic reports the ESCR Committee has not yet addressed reservations.

#### 2.4 COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of all Discrimination against Women<sup>52</sup> (CEDAW) established the Committee on the Elimination of Discrimination against Women (CEDAW Committee) for the purpose of considering reports on legislative, judicial, administrative or other measures taken by State Parties to effect the obligations set forth in the treaty.<sup>53</sup> In keeping with the remit of the previously established treaty bodies, Article 21 further compels the CEDAW Committee to annually report suggestions and general recommendations to the UNGA based on the State Parties’ reports. The CEDAW Committee consists of twenty-three experts of

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<sup>51</sup> UN Doc. A/63/435 (2008), Art. 11.

<sup>52</sup> 1249 UNTS 13, 18 Dec.1979.

<sup>53</sup> Art. 18.

‘high moral standing and competence in the field covered by the Convention’.<sup>54</sup> Other criterion, including nationality from among the State Parties, geographical distribution, representation of different civilisations and representation of different legal systems, echo prior treaty body requirements and seek to take into account the various cultural differences among women.<sup>55</sup> Each State Party may only nominate one individual to the list of candidates. Despite no requirement that CEDAW Committee members be female, only four men out of 104 experts have served since the first election in 1982, including one currently serving a term set to expire in December 2012.<sup>56</sup>

Of the current 187 State Parties to CEDAW, 102 have subscribed to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women<sup>57</sup>. The Optional Protocol entered into force on 22 December 2000 and established the competency of the CEDAW Committee to receive individual communications. As of 2 March 2011, only twenty-seven petitions had been considered with six reaching final views.<sup>58</sup>

Articles 8 and 9 establish the competency of the CEDAW Committee to initiate inquiries upon the receipt of reports of ‘grave or systematic violations’ of CEDAW rights by a State Party to the Optional Protocol, however, these articles may be reserved against. Four states have made such reservations.<sup>59</sup> Encouragingly, the Committee concluded its first investigation under Article 8 in July 2004 following an NGO complaint against Mexico and the state has responded positively to the procedure.<sup>60</sup> The CEDAW Committee does not have a provision related to the receipt of inter-state communications.

The vast number of reservations to CEDAW have been the focus of much academic attention.<sup>61</sup> Unlike other of the human rights treaties it has a ‘single,

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<sup>54</sup> Art. 17, para 1.

<sup>55</sup> Ibid.

<sup>56</sup> <http://www2.ohchr.org/english/bodies/cedaw/membership.htm> <accessed 30 Jul. 2011>.

<sup>57</sup> 2131 UNTS 83, 6 Oct. 1999.

<sup>58</sup> CEDAW–Optional Protocol, Status of Registered Cases, 2 Mar. 2011. <http://www2.ohchr.org/english/bodies/docs/CEDAWOPSURVEY48th.xls> <accessed 30 Aug. 2011>

<sup>59</sup> UN Treaty Collection.

<sup>60</sup> *Report on Mexico*, UN Doc. CEDAW/C/2005/OP.8/MEXICO (2005). The Committee is currently carrying out another inquiry according to one of its former members, however, in keeping with the confidential nature of the procedure, the state has not been named.

<sup>61</sup> e.g. H.B. Schöpp-Schilling, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments’ in I. Ziemele

paramount objective which is identified in its first five articles' which makes evaluating reservations pursuant to the object and purpose test relatively easier by comparison with other more general human rights treaties.<sup>62</sup> Primarily the Committee has voiced its concerns through response to periodic reports and has been able to keep the dialogue regarding reservations open through its questioning of State Parties.<sup>63</sup> It has also made attempts through the years to instigate studies into the effect of Islamic reservations, one of the most common categories of reservations to CEDAW, on the status of women and to find out states' views on these reservations, though both attempts proved unsuccessful.<sup>64</sup> As will be discussed below in section 3, the CEDAW Committee has addressed reservations in three of the twenty-eight general recommendations it has issued.

## 2.5 COMMITTEE AGAINST TORTURE

The Committee against Torture (CAT Committee) was created by Article 17 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>65</sup> (CAT). The treaty entered into force on 26 June 1987 and the first CAT Committee was elected<sup>66</sup> in November of that year by the then twenty-nine<sup>67</sup> State Parties. As with the other human rights treaty bodies, its primary purpose is receive, consider and comment upon periodic reports of the State Parties regarding their implementation and observance of the obligations set forth in the CAT. The selection process is the similar to the process followed by the previously established

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(ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (Martinus Nijhoff, Lieden/Boston 2004); C. Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women' in J.P. Gardner (ed.), *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997); B. Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women' (1991) 85 AJIL 281.

<sup>62</sup> Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women', pp. 66, 68.

<sup>63</sup> See, for example, *Concluding observations of the CEDAW Committee, Bangladesh*, UN Doc. CEDAW/C/BGD/CO/7 (2011), paras. 11-12; *Concluding observations...*, Israel, UN Doc. CEDAW/C/ISR/CO/5 (2011), paras. 8-9, 'The Committee is of the view that the reservation to Art. 16 is impermissible as it is contrary to the object and purpose of the Convention.'

<sup>64</sup> For a discussion of both initiatives, see Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', pp. 16-17; Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women', pp. 77-78.

<sup>65</sup> 1465 UNTS 85, 10 Dec. 1984.

<sup>66</sup> UN Doc. CAT/SP/SR.1 (1987).

<sup>67</sup> *Report of the CAT Committee*, Supp.No. 46, UN Doc. A/43/46 (1988).

treaty bodies, though there are only ten experts which serve on the Committee. The requirements that they serve in their personal capacity, are of high moral standing and are recognised as being competent in the field of human rights follows the treaty body archetype as does the nomination and election processes—one nominee holding the nationality of the nominating State Party and secret ballot voting.

An inquiry procedure is automatically established by CAT Article 20, thus the CAT Committee has automatic competency to initiate inquiry proceedings upon receipt of reliable information that ‘torture is being systematically practiced in the territory of a State Party’.<sup>68</sup> Twelve of the 149 State Parties have either opted-out of the inquiry procedure completely by reservation or have qualified their acceptance of the article provisions by filing a reservation requiring that the article be, for example, ‘implemented in strict compliance with the principles of the sovereignty and territorial integrity of States’.<sup>69</sup>

The CAT Committee has concluded seven reports under the Article 20 inquiry procedure including inquiries into alleged torture in Brazil, former Yugoslavia, Mexico, Sri Lanka, Peru, Egypt and Turkey. The final reports on Turkey, Mexico and Brazil, representing the first, fifth and seventh inquiries respectively, testify to the increased focus of the Committee on developing detailed recommendations as to how states can advance the implementation of CAT obligations as well as the growing sophistication of the treaty body.<sup>70</sup> These reports facilitate a constructive dialogue on how states can improve their implementation of not only CAT obligations but also obligations related to other treaties. As noted by Brazil, the inquiry process creates an ongoing dialogue that will progress the realisation of human rights.<sup>71</sup>

In keeping with the general rules regarding receipt of communications, the CAT Committee’s competency to receive both inter-State and individual communications, Articles 21 and 22 respectively, is limited to State Parties who have made affirmative declarations recognising the authority of the Committee to do so.

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<sup>68</sup> Art. 20(1).

<sup>69</sup> See UN Treaty Collection, reservations by Indonesia and Cuba to CAT.

<sup>70</sup> See, respectively, UN Docs. A/48/44/Add.1 (1993), CAT/C/75 (2003) and CAT/C/39/2 (2009), incidentally these are the only full reports available. All other reports are summarised as part of the Committee’s annual report to the UNGA.

<sup>71</sup> UN Doc. CAT/C/39/2 (2009), para. 200.

State Parties may declare recognition of the competency for either or both inter-State and individual communications. Only sixty State Parties have declared the competency of the CAT Committee with respect to receiving inter-state communications and sixty-four regarding individual communications. Since the inception of the individual communications procedure, 462 complaints have been registered with sixty out of 181 admissible cases reaching final conclusions that a violation had occurred.<sup>72</sup>

The bulk of the monitoring activity for the CAT Committee results from its receipt and review of periodic reports and its review of individual communications. It has, however, also issued two general comments.<sup>73</sup> The vast majority of the reservations made to the CAT are in relation to the automatic dispute resolution system established in Article 30.<sup>74</sup> There are, however, several reservations still in effect that have been addressed by the CAT Committee<sup>75</sup> and also challenged by other State Parties,<sup>76</sup> as discussed in Chapters Three and Four. Interestingly, the CAT Committee seems disinclined to invoke language of impermissibility under the Vienna Convention while the objecting states have almost uniformly referred to the incompatibility with the Vienna Convention either specifically referencing Article 19(c) or employing the language of the object and purpose test. Of late, the Committee has also extended its observations about withdrawing reservations to other associated conventions but without pronouncing on compatibility.<sup>77</sup>

## 2.6 COMMITTEE ON THE RIGHTS OF THE CHILD

The Committee on the Rights of the Child (Children's Committee) is the supervisory body attached to the Convention on the Rights of the Child<sup>78</sup> (CRC), which entered

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<sup>72</sup> Status of Communications Dealt with By CAT under Art. 22 Procedure, 6 Jun. 2011, <http://www2.ohchr.org/english/bodies/cat/docs/CATSURVEY46.xls> <accessed 30 Jul. 2011>.

<sup>73</sup> *General Comment No. 1, Refoulement and Communications* (1996), reprinted in UN Doc. HRI/GEN/1/Rev.9 (Vol.II) and *General Comment No. 2, the Implementation of Art. 2 by States Parties*, UN Doc. CAT/C/GC/2 (2008).

<sup>74</sup> As of Jul. 2011, twenty-two State Parties maintain reservations to Art. 30 which invokes automatic referral to the ICJ to resolve disputes related to implementing the CAT.

<sup>75</sup> For example, the CAT Committee addressed Qatar's general reservation subordinating its obligations under the convention to Islamic law in the concluding observations following its initial periodic report in 2006, UN Doc. CAT/C/QAT/CO/1 (2006), para. 9.

<sup>76</sup> See UN Treaty Collection, reservation by Qatar and associated objections.

<sup>77</sup> See e.g. UN Doc. CAT/C/TUR/CO/3 (2010), para. 15(b), referring to reservations to the 1951 Geneva Convention Relating to the Status of Refugees.

<sup>78</sup> 1577 UNTS 3, 20 Nov. 1989.

into force on 2 September 1990 and has 193 State Parties, the largest of any of the core treaties. The eighteen members of the Children's Committee must comply with the 'high moral standing and recognised competence in the field' covered by the CRC according to Article 43 which sets forth the election criteria. As with the other committees the members serve in their personal capacity and are elected by secret ballot.

The Children's Committee's functions include only receipt and review of periodic reports and the transmission of general recommendations pursuant to Articles 44 and 45. As with the other committees, the Children's Committee publishes its interpretation of the CRC obligations in the form of general comments and has issued thirteen such comments with the most recent issued in April of 2011. In this recent comment it urged states to '[r]eview and withdraw declarations and reservations contrary to the object and purpose of the Convention or otherwise contrary to international law.'<sup>79</sup> This is in keeping with the continued efforts of the Committee to get the sixty-two State Parties maintaining reservations to the CRC to withdraw them and provide greater adherence to the Convention.

## 2.7 COMMITTEE ON MIGRANT WORKERS

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>80</sup> (ICRMW) entered into force on 1 July 2003 and has forty-four State Parties. The Committee on Migrant Workers (Migrants Committee) established pursuant to Article 72 has been active since March 2004. The fourteen<sup>81</sup> Committee members of 'high moral standing' are elected by secret ballot and each State Party may nominate one person from among its nationals. Specific to the Migrants Committee, equitable geographic distribution must also take into account states of origin and states of employment of the nominees. The only further consideration for membership is representation of the principal legal systems.

Article 74 outlines the mandate of the Migrants Committee to review and 'transmit such comments as it may consider appropriate' based on the periodic

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<sup>79</sup> *General Comment No. 13*, UN Doc. CRC/C/GC/13 (2011), para. 41(b).

<sup>80</sup> UN Doc. A/RES/45/158, 18 Dec. 1990.

<sup>81</sup> Pursuant to ICRMW, Art 72(1)(b) the number of the of Committee members increased from ten to fourteen upon the ratification of the forty-first State Party and this increase was effected at their meeting in Dec. 2009.

reports of the State Parties. Completing this function has proved difficult for the Committee due to the fact that as of their 2007 annual report only seven of the State Parties had submitted their initial reports and all were a minimum of one year delinquent, with the exception of Syria which was only one month behind schedule,<sup>82</sup> though as of writing the Committee has reviewed a nineteen initial reports.<sup>83</sup> The Migrants Committee adopted its first General Comment on Migrant Domestic Workers in 2010.<sup>84</sup>

A State Party may declare the competency of the Migrants Committee to receive inter-State communications under Article 76. The Committee will only review the communication if after six months of the initial communication the State Parties concerned have not reached a satisfactory conclusion. The article goes on to provide more extensive guidelines for utilising this function. This competency is not currently effective as only one State Party, Guatemala, has made the Article 76 declaration and the article will only be effective upon the tenth State Party declaring that it recognises this competency in the Migrants Committee in this capacity.

The procedure outlining the Migrants Committee's competency to receive individual communications is outlined in Article 77. Communications must comply with the general admissibility requirements. As with the inter-state communication function, the competency to receive individual communications will only be effective upon the tenth declaration by a State Party to the Migrants Convention recognising this competency. As of writing, only Guatemala and Mexico have made declarations recognising the Migrants Committee's competency to receive individual communications. Thus far the Migrants Committee has only addressed the issue of reservations in the course of reviewing the initial reports it has received and, in keeping with its Guidelines, it does intend to question states on the basis of their reservations with the aim of moving them toward withdrawal.<sup>85</sup> Following through with this intention, in response to the initial reports of Colombia and El Salvador the

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<sup>82</sup> *Report of the Migrants Committee*, Supp. No. 48, UN Doc.A/62/48 (2007).

<sup>83</sup> See documents of the Migrants Committee, <http://tb.ohchr.org/default.aspx> <accessed 8 Feb. 2012>.

<sup>84</sup> UN Doc. CMW/C/GC/1 (2011).

<sup>85</sup> See *Guidelines for the Periodic Reports to be Submitted by States Parties under Art. 73 of the Convention*, UN Doc. CMW/C/2008/1 (2008) para. 5(c).



Committee urged both states to withdraw reservations it deemed contrary to the object and purpose of the Convention.<sup>86</sup>

## 2.8 COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

The Committee on the Rights of Persons with Disabilities (Disabilities Committee) was established under Article 34 of the Convention on the Rights of Persons with Disabilities<sup>87</sup> (CRPD), which entered into force in 2008. It is composed eighteen<sup>88</sup> experts of high moral standing and experience in the field of disabilities who will serve in their personal capacities. In addition to equitable representation on the basis of geography, civilization and principal legal systems, State Parties should consider balanced gender representation and participation of experts with disabilities.<sup>89</sup>

The primary function of the Disabilities Committee is to review the State Parties' periodic reports and to 'make such suggestions and general recommendations on the report as it may consider appropriate'.<sup>90</sup> Furthermore, where a State Party is significantly overdue in submitting a report Article 36 provides that the Disabilities Committee may notify the delinquent state that an examination of the State Party's convention implementation is necessary and may initiate such if the State Party does not submit its report within three months of the notification of examination. This procedure loosely follows the procedure of inquiry though the trigger lies with a significantly overdue report, rather than a report of 'grave and systematic violations' of convention rights. This approach is somewhat a backdoor to monitoring the implementation of other human rights treaties and could prove to be a powerful tool. The Disabilities Convention also specifically encourages the Committee to maintain a working relationship with other treaty bodies and specialised agencies in order to 'foster the effective implementation' of its obligations.<sup>91</sup>

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<sup>86</sup> Report of the Migrants Committee–9th and 10th sessions, UN Doc. A/64/48 (2009).

<sup>87</sup> UN Doc. A/61/611, 13 Dec. 2006.

<sup>88</sup> Originally twelve members but increased to eighteen following the eightieth ratification, CRPD, Art. 34.

<sup>89</sup> Art. 34(4).

<sup>90</sup> Art. 36(1).

<sup>91</sup> Art. 38.

The Optional Protocol to the Convention on the Rights of Persons with Disabilities<sup>92</sup> establishes the competency of the Disabilities Committee to receive individual communications and to initiate inquiry procedures, pursuant to Articles 1 and 6, respectively. The Optional Protocol entered into force simultaneous to its parent convention and sixty-two of the 103 State Parties to the original treaty have joined the Optional Protocol. Thus far, only Syria has reserved against the Article 6 ability of the Disabilities Committee to initiate inquiries based upon information alleging serious violations of the Disabilities Convention (as allowed under Article 8). Due to the small number of reservations to the CRPD, the Committee has not yet dealt with reservations as none were made by any of the State Parties it has thus far reviewed.

## 2.9 COMMITTEE ON ENFORCED DISAPPEARANCES

The most recent addition to the active human rights treaty body system is the ten-member Committee on Enforced Disappearances (ICED Committee), established by Article 26 of the International Convention for the Protection of All Persons from Enforced Disappearance<sup>93</sup> (ICED) which entered into force on 23 December 2010. As with the other committees, election of the ten experts is by secret-ballot from a candidacy list composed of nominees of high moral standing and recognised competence in the field of human rights as outlined in Article 26. Election also takes into account equitable geographical distribution and balanced gender representation. Recognising the inter-relatedness of the human rights treaties, Article 28 requires the Committee to consult with the other treaty bodies and in particular the HRC. Unlike the other committees, Article 27 indicates a review of the ICED Committee is anticipated between four and six years following the entry into force of the Convention to determine whether to transfer monitoring of ICED to another appropriate body. Due to the infancy of this Committee, its first meeting on 31 May 2011 is the only one that has been held at the time of writing.

Article 29 sets up the periodic reporting requirement of the State Parties and as with the other committees the ICED Committee is bound to communicate its observations on the report. Pursuant to Article 31, State Parties may declare their

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<sup>92</sup> UN Doc. A/61/611, 13 Dec. 2006.

<sup>93</sup> UN Doc. A/61/488.C.N.737.2008.TREATIES-12, 20 Dec. 2006.

recognition of the competency of the ICED Committee to consider individual communications. Article 32 sets out the inter-state communication function and Article 33 a procedure of inquiry. As outlined in Article 34, well-founded indications that enforced disappearances are being practised in a State Party's territory could also lead the Committee to 'urgently bring the matter to the attention' of the UNGA after attempting to gather information from the State Party concerned.

A unique function set forth in Article 30 allows the Committee to consider urgent requests for a disappeared person to be sought and found and it may request the State Party to provide information on the situation of the person sought if the request:

- (a) Is not manifestly unfounded;
- (b) Does not constitute an abuse of the right of submission of such requests;
- (c) Has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations, where such a possibility exists;
- (d) Is not incompatible with the provisions of this Convention; and
- (e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature.

The request may include time limits for state response and may be followed up with a request for interim measures as well as request for the state to follow up with the Committee. At the time of writing, the only reservations to ICED were those by Cuba and Venezuela to the automatic referral of disputes to the ICJ and the Committee had not yet received any initial reports thus the Committee has not yet addressed reservations.

## 2.10 SUMMARY

It has been suggested that treaty body effectiveness can be measured in relation to the different purposes they set out to achieve through their different functions which include: 'doing justice in individual cases, creating a deterrent and encouraging behaviour modification, and interpreting and explaining human rights law beyond the

individual case or particular set of state actors’.<sup>94</sup> Periodic report monitoring and concluding observations, issuing general comments and reviewing individual communications all play to the strengths of the treaty bodies which include their specific knowledge of the treaty obligations and their ability to create human rights dialogues with state parties. Though the opinions, comments and statements issued by treaty bodies are not binding, it has been acknowledged that these could be viewed as forms of soft law, a phenomenon that is being realised in a range of courts on both the international and domestic level.<sup>95</sup> The documents produced by the treaty bodies are publicly available through the OHCHR, which provides an opportunity for states and their citizens to track the development of human rights law implementation. The body of work produced by the treaty bodies does not stand alone and must be examined in conjunction with the work of the various UN human rights organs, including the OHCHR, the UNHRC and the international courts mentioned above.

Mertus suggested that ‘treaty fatigue’ contributes to the negative attitude toward treaty bodies due to the multiple and often overlapping reporting processes which are often viewed as ineffective and inefficient.<sup>96</sup> The recent implementation of the *Harmonised Guidelines* should go a long way toward relieving this fatigue and encourage states who are party to multiple human rights conventions to submit more thorough reports, especially in the area of reservations. Time delays in processing individual applications, another procedural bugbear in the system, were significantly reduced when a dedicated Petitions Team was created in 2000 to deal with

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<sup>94</sup> J. Mertus, *The United Nations and Human Rights: A Guide for a New Era* (Routledge, London 2005), p. 113.

<sup>95</sup> A.E. Boyle and C. Chinkin, *The Making of International Law* (OUP, Oxford 2007), p. 156. The ECtHR, the European Court of Justice and the African Commission on Human Rights, as well as a multitude of other domestic courts, have made reference to treaty body jurisprudence, including general comments. See, for example, *Riad and Idiab v Belgium*, (App. Nos. 29787/03 and 29810/03), ECtHR, 21 Jan. 2008, para. 56, noting HRC, *Concluding observations, Belgium*, UN Doc. CCPR./CO/81/BEL (2004); *Hirst v. United Kingdom*, (App. No. 74025/01), ECtHR (GC), 6 Oct. 2005, para. 27, specifically noting HRC *General Comment No. 25*; *Öcalan v. Turkey*, (App. No. 46221/99), ECtHR (GC), 12 May 2005, para. 60; *Bressol and Others v. Gouvernement de la Communauté Française (of Belgium)*, (Case C-73/08) [2010] 3.C.M.L.R. 20 (ECJ-GC), 13 Apr. 2010, para. AG136; African Commission on Human and Peoples’ Rights, *Re Communication 155/96*, ACHPR/COMM/A044/1, 27 May 2002; *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSCA (United Kingdom), para. 23; *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others* (CCT 22/08) (2009) (South Africa), paras. 36-37, noting ESCR Committee general comments.

<sup>96</sup> Mertus, *The United Nations and Human Rights*, pp. 80-81.

applications specific to the ICCPR, CERD and CAT.<sup>97</sup> With these administrative issues seemingly resolved it is hoped that the treaty bodies can perform their functions more consistently and economically.

### 3 THE DETERMINATIVE FUNCTION OF TREATY BODIES

Conceding that the problem of invalid reservations was not widespread in the early days of the UN treaty system, in 1983 in response to the passive approach being taken toward invalid reservations Shelton emphasised that ‘silence in the face of such cases undermines respect for international human rights law and impedes progress in implementing the rights guaranteed’.<sup>98</sup> Since Shelton’s observation, the situation surrounding invalid reservations has only worsened and the need for an alternative to the traditional model of state objections as the primary mechanism of determining reservation validity has increased. When a treaty does not create reciprocal obligations and/or rights and has no specific reservation regime outlining the effect of a determination of invalidity there must be an alternative mechanism with the competency to assess the permissibility of reservations.<sup>99</sup> An alternative mechanism of review would combat the apathy of state parties who have no vested interest in the obligations avoided by other state parties as well as provide a clear indication of whether a state may rely on its reservation in the context of its state to state and state to human being relationships.

Though human rights treaties do not warrant a special residual reservations regime outwith the Vienna Convention, they do represent a discrete category of treaties which necessitates resolving the question of reservation validity more directly. The problem with the system as it stands today is that there is no final arbiter, no hierarchy between states, treaty bodies or dispute resolution mechanisms and their views on validity or consequence of invalidity. As discussed above, the treaty bodies operate under mandates specific to each treaty but one role that they all

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<sup>97</sup> Commission on Human Rights, *Effective Functioning of Human Rights Mechanisms Treaty Bodies*, UN Doc E/CN.4/2004/98 (2004), para 13.

<sup>98</sup> D. Shelton, ‘State Practice on Reservations to Human Rights Treaties’ (1983) 1 *Canadian Human Rights Yearbook* 205, 234.

<sup>99</sup> Boerefijn, ‘Impact on the Law on Treaty Reservations’, p. 84 et seq.; D. Hylton, ‘Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations’ (1994) 27 *Vanderbilt Journal of Transnational Law* 419, 448-49; P.-H. Imbert, ‘Reservations to the ECHR Before the Strasbourg Commission: the *Temeltasch* Case’ (1984) 33 *ICLQ* 558, 585.

share is the duty to monitor the compliance with treaty obligations. This function necessitates assessing the validity of reservations, the determinative function, as the treaty bodies interpret treaty obligations and state compliance therewith. When interpreting treaties, Vienna Convention Article 31(2)(b) requires consideration of ‘any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty’, which should naturally extend to reservations as accompaniments to instruments of ratification or accession.<sup>100</sup> The determinative function can be served in conjunction with the multiple roles carried out by treaty bodies as they examine periodic reports, initiate procedures of inquiry or evaluate individual or state communications.

As the ‘central pillars in the United Nations human rights system’<sup>101</sup> it is crucial to the human rights system that treaty bodies actively fulfil their monitoring function since it is only recently that some states appear to have begun to systematically monitor reservations. As noted by Hampson, ‘the principal way of ensuring compliance [with human rights treaties] is through monitoring’ because the treaty bodies ‘are, in a sense, representing the interests of all States when they exercise their functions’.<sup>102</sup> Thus, the state-policing system envisioned by the Vienna Convention is most often replaced by treaty body monitoring in the context of human rights treaties due to the problems which permeate the monitoring system envisioned by applying the Vienna Convention alone.

### 3.1 VIENNA CONVENTION SILENCE ON TREATY BODIES

Neither the ICJ in its *Genocide Opinion* nor the ILC in its development of the Vienna Convention contemplated the proliferation of treaty bodies and their potential as adjudicators of treaty compliance, including evaluating the validity of reservations. There is no mention of the function of treaty-specific monitoring mechanisms within the Vienna Convention.<sup>103</sup> Treaty bodies had not begun to operate at the time the

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<sup>100</sup> This point is noted by Baylis, ‘General Comment 24’, 314.

<sup>101</sup> *Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System*, Marrakech, Morocco (2010) (*Marrakech Statement*), para. 5.

<sup>102</sup> F. Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Final working paper*, UN Doc. E/CN.4/Sub.2/2004/42 (2004) (*2004 Final working paper*), para. 47.

<sup>103</sup> Noted by Shelton, ‘State Practice on Reservations to Human Rights Treaties’, 229.

Vienna Convention was adopted thus it had no cause to address such mechanisms.<sup>104</sup> This underscores the point that international law and human rights law, particularly, are dynamic and evolving and thus updates must be considered in order to maintain a coherent system. The treaty bodies offer an alternative to state parties in the policing of treaty obligations which is essential in light of the nature of human rights treaties and the reluctance of states to bring actions to enforce the obligations therein.

### 3.2 ANALYSIS OF EVOLVING PRACTICE

Evaluating the validity of reservations is inherent in the consideration of periodic reports as reviewed by all of the treaty bodies introduced above. In analysing the reports and recommendations of the treaty bodies from their inception to the present it is obvious that reservations were a domain approached with caution in the early days of the periodic reporting system. Time has increased the vociferousness of the treaty bodies in their assessment of reservations though it must be impressed that this increased sensitivity toward reservations has been extremely measured and, as will be explored below, in keeping with the general progression of the international community on the issue.

In 1978, the CERD Committee considered the question of reservations and determined that it

...must take the reservations made by the State parties at the time of ratification or accession into account: [because] it had no authority to do otherwise. A decision—even a unanimous decision—by the Committee that a reservation is unacceptable could not have any legal effect.<sup>105</sup>

The CERD Committee's then-reluctance to assume competency over reservation compatibility was undoubtedly based on several factors prevailing at that time. Shelton points to the limiting text of the CERD with respect to the enumerated responsibilities of the Committee and the reservations compatibility test of CERD Article 20.<sup>106</sup> She suggests that the treaty body was a 'considerable innovation' at the time, thus it was not surprising that the CERD Committee was subject to more

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<sup>104</sup> Though the treaty bodies were functioning, albeit in their infancy, prior to the entry into force of the Vienna Convention in 1980.

<sup>105</sup> *Report on the 17th Session*, UN Doc. A/33/18 (1978), para. 374.

<sup>106</sup> Shelton, 'State Practice on Reservations to Human Rights Treaties', 230.

stringent textual and interpretive restrictions than latterly created human rights treaty bodies.<sup>107</sup> Over time, however, the CERD Committee has developed a stronger position toward reservations and continues to call them to the attention of State Parties and urge them to '[c]onsider withdrawing their reservations to the Convention, if any, taking into account the evolution in the field of human rights since its adoption'.<sup>108</sup>

Reservations were also addressed by the CEDAW Committee in its 1987 *General Recommendation No. 4* when it '[e]xpress[ed] concern in relation to the significant number of reservations that appeared to be incompatible with the object and purpose of the Convention'.<sup>109</sup> Seeing little progression on the issue it issued another call for states to reconsider withdrawing reservations to CEDAW in 1992 in preparation for the World Conference on Human Rights.<sup>110</sup> State objections specifically in relation to CEDAW reservations have intensified in the past decade by more than three-fold.<sup>111</sup> This has been accompanied by the withdrawal of reservations by states such as Algeria, Brazil, Egypt, New Zealand and Switzerland, to name a few.<sup>112</sup>

The competence of the treaty bodies to assess the validity of reservations is derived directly from the reporting procedure<sup>113</sup> and is a concept that has been gaining momentum during the past two decades.<sup>114</sup> Arguably, state parties, at least to the ICCPR, had generally accepted the HRC's authority to evaluate reservations in the early 1990s as it had been engaged in such activity for several years without objection from states.<sup>115</sup> The tipping-point that brought the issue to the fore was a controversial general comment issued by the HRC in 1994. *General Comment No. 24*<sup>116</sup> on issues relating to reservations to the ICCPR was the HRC's 'bold step

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<sup>107</sup> Ibid., 230.

<sup>108</sup> *General Recommendation No. 33*, p. 161.

<sup>109</sup> *General Recommendation No. 4*, UN Doc. A/42/38 (1987).

<sup>110</sup> *General Recommendation No. 20*, reprinted in UN Doc. HRI/GEN/1/Rev.9 (2008) (Vol. I), p. 200.

<sup>111</sup> UN Treaty Collection, *Objections to reservations to CEDAW*.

<sup>112</sup> UN Treaty Collection, see *notes to CEDAW ratifications*.

<sup>113</sup> Boerefijn, 'Impact on the Law on Treaty Reservations', p. 86.

<sup>114</sup> L. Magnusson, 'Elements of Nordic Practice 1997: The Nordic Countries in Coordination' (1998) 67 *Nordic Journal of International Law* 345, 349 (recognising that the subject of treaty body competency should be further discussed).

<sup>115</sup> Baylis, 'General Comment 24', 278.

<sup>116</sup> UN Doc. CCPR/C/21/Rev.1/Add.6 (1994). The CEDAW Committee had issued a previous general recommendation on reservations to CEDAW but it did not take a view on its determinative role, see *General Recommendation No. 4*.



towards the articulation of a new and separate reservations regime in respect of human rights treaties'.<sup>117</sup> While it is not advocated here that a new and separate regime is necessary, it is important to recognise that *General Comment No. 24* stands as an identifiable point of departure from the traditional view that the Vienna Convention regime alone adequately addresses the nuances of analysing reservations to human rights treaties.

*General Comment No. 24* was formulated in specific response to the great number of reservations that were attached to the ICCPR, which was, at the time, 150 reservations of varying significance made among forty-six of the then 127 State Parties.<sup>118</sup> First addressing the types of reservations threatening the coherence of the treaty regime, the HRC indicated that reservations offending peremptory norms or customary international law were not compatible with the object and purpose of the ICCPR and it provided a laundry list of ICCPR protections against which no reservation could be deemed valid.<sup>119</sup> Specifically invoking principles of general international law and particularly the Vienna Convention, the HRC then outlined that the traditional reciprocal nature of treaties was not present in human rights treaties and therefore 'the role of State objections in relation to reservations is inappropriate to address the problem of reservations to human rights treaties,'<sup>120</sup> which is an essential point of this thesis and a point that has been frequently reiterated.

The most radical feature of the comment was the assertion that treaty bodies were competent to determine the permissibility of reservations.

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions.<sup>121</sup>

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<sup>117</sup> C. Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No. 24(52)' (1997) 46 ICLQ 390, 392.

<sup>118</sup> HRC, *General Comment No. 24*, para. 1.

<sup>119</sup> *Ibid.*, para. 8.

<sup>120</sup> *Ibid.*, para. 17; an opinion echoed by many, see Baylis, 'General Comment 24'; Boerefijn, 'Impact on the Law on Treaty Reservations', p. 85;

<sup>121</sup> HRC, *General Comment No. 24*, para. 18; The HRC reiterated this point in *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999 (1999), para. 6.4.

By grounding the necessity of evaluating reservations in the enumerated functions they were created to serve, the Committee strengthened their position as the legal basis of this competency was somewhat tenuous.<sup>122</sup> States had accepted previously elaborated strictures of the Committee, such as the format and content of state reports as well as the practice of the HRC of inquiring about reservations,<sup>123</sup> thus the HRC's comment was partially aimed at further refining their monitoring function and in keeping with acknowledged state compliance with this function. Vienna Convention Article 31(3)(b) acknowledges 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' as a general rule of interpretation. As argued by Baylis, 'the acquiescence of the states parties in this development of the Committee's function bolsters the Committee's claim to the role of evaluating reservations, on both functional and legal grounds' in light of Vienna Convention Article 31(3)(b).<sup>124</sup>

This development seemed to shock many observers and states yet by examining the purpose of treaty bodies as set forth in the treaties, the recognition of this competency should not have been such a revelation. The legacy of the HRC's opinion is that it was singularly responsible for catapulting the debate surrounding reservations to human rights treaties into the foreground of international human rights law. It is from the ideas posited in *General Comment No. 24* that much of the progress on the question of reservations has stemmed.

Despite intense criticism of *General Comment No. 24* by the US, UK and France,<sup>125</sup> Redgwell noted in 1997 that it 'should be welcomed as a constructive response to the real problem of reservations to human rights treaties'.<sup>126</sup> It should also be acknowledged that the convention specific treaty bodies are increasingly taking great pains to ground their pronouncements on state compliance in the terms of their respective treaties, unlike other Charter-based organs of the UN human rights

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<sup>122</sup> See discussion by Baylis, 'General Comment 24', 296-300.

<sup>123</sup> *Ibid.*, 299, 311.

<sup>124</sup> *Ibid.*, 299.

<sup>125</sup> See *Observations by the Governments of the US and the UK on General Comment No. 24 (52) relating to reservations*, UN Doc. A/50/40 (1995); see also R. Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?' (2000) 11 EJIL 413, 417; Baylis, 'General Comment 24', 318-22; A. Pellet, *Second report on Reservations to Treaties*, UN Doc. A/CN.4/477/Add.1 (1996), paras. 146-47.

<sup>126</sup> Redgwell, 'Reservations and General Comment No. 24(52)', 411.

regime, such as the Human Rights Council,<sup>127</sup> which often fail to base their condemnation of human rights violations on any normative order.<sup>128</sup> This reiteration of the accepted normative order strengthens the argument when there has been a view taken that reservation is invalid.<sup>129</sup> It has been suggested that it is unnecessary for a treaty body to actually ‘determine’ validity as they can otherwise clarify their concerns over reservations through their dialogue,<sup>130</sup> however, this suggestion serves to perpetuate the inactivity in the area of withdrawal of a reservation. The strength of the opinion on invalidity is that it provides a clear view on the shortcomings of the reservation.

*General Comment No. 24* led to an equally controversial decision taken by the HRC when exercising its function to review individual communications in the 1999 *Rawle Kennedy v. Trinidad and Tobago*<sup>131</sup> case. The year before, Trinidad and Tobago had denounced and re-acceded to the Optional Protocol to the ICCPR with a reservation that the HRC would not be competent to consider communications by any prisoner under the sentence of death in respect of any matter relating to prosecution, detention, trial, conviction, sentence or carrying of the of the sentence.<sup>132</sup> In a divided opinion, the HRC declared the application by Kennedy, a prisoner on death row, admissible despite the reservation. Resorting to the Vienna Convention rules to determine the validity of the reservation, the HRC determined that the reservation was contrary to the object and purpose of the Optional Protocol to the ICCPR<sup>133</sup> as the ‘function of the Optional Protocol is to allow claims in respect of the [ICCPR’s] rights to be tested before the Committee’<sup>134</sup> and the reservation in question sought to lessen the procedural protections of a particular group of people.<sup>135</sup> McGrory notes that the HRC ‘appeared to have abandoned the state-

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<sup>127</sup> The UN Human Rights Council was established by UNGA, *Resolution 60/251*, UN Doc. A/RES/60/251 (2006), to succeed the UN Commission on Human Rights.

<sup>128</sup> See Alston, *The United Nations and Human Rights*, p. 2.

<sup>129</sup> *Marrakech Statement*, para. 16(c).

<sup>130</sup> Boerefijn, ‘Impact on the Law on Treaty Reservations’, p. 86.

<sup>131</sup> *Rawle Kennedy v. Trinidad and Tobago*, HRC Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999 (1999), 31 Dec. 1999.

<sup>132</sup> See UN Treaty Collection, OP-ICCPR, n. 1. Trinidad and Tobago acceded to the OP on 14 Nov. 1980 and denounced the OP on 26 May 1998. It then re-acceded with a reservation on 26 Aug. 1998. Following the HRC decision in Kennedy, it denounced the OP on 27 Mar. 2000.

<sup>133</sup> *Rawle Kennedy*, para. 6.5.

<sup>134</sup> *Ibid.*, para. 6.6, citing HRC, *General Comment No. 24*, para. 13.

<sup>135</sup> *Ibid.*, para. 6.7.

centred, pre-General Comment 24 approach to assessing reservations to human rights treaties'.<sup>136</sup> However, in abandoning the state-centred approach the Committee committed to maintaining the integrity of both the Optional Protocol and the ICCPR.<sup>137</sup> It was just this type of controversial decision on the back of *General Comment No. 24* that catapulted reservations, once again, into the limelight and gave a great sense of urgency to the ILC's ongoing study on reservations.

In addition to their individual efforts in the course of reviewing periodic reports, issuing general comments and assessing individual communications, the treaty bodies have driven other initiatives aimed toward redressing the effect of reservations to human rights treaties under the Vienna Convention regime. Through meetings of the chairpersons of the human rights treaty bodies and Inter-Committee meetings of the human rights treaty bodies, the treaty bodies have further enhanced the understanding of reservations practice specific to each treaty as well as across the entire treaty regime.

In 1997 the CERD Committee proposed that a study be undertaken on reservations to human rights treaties.<sup>138</sup> A working paper questioning whether in applying the default Vienna Convention reservations regime to a particular reservation, are there special characteristics of human rights treaties which have an impact on the interpretation of the reservation was delivered to the ECOSOC Sub-commission on Prevention of Discrimination and Protection of Minorities in 1999.<sup>139</sup> The author of the working paper, Hampson, was then appointed as Special Rapporteur for the purpose of preparing a comprehensive study on reservations to human rights treaties by the UNHCHR Sub-Commission on Human Rights. Relying on the Vienna Convention and customary rules of international law ten years after *General Comment No. 24*, Hampson paralleled the function of a treaty body to that of a judicial or quasi-judicial body that has the inherent jurisdiction to determine its

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<sup>136</sup> G. McGrory, 'Reservations of Virtue? Lessons from Trinidad and Tobago's Reservation to the First Optional Protocol' (2001) 23 Human Rights Quarterly 769, 808. McGrory generally disagreed with the HRC's actions in *Rawle Kennedy*.

<sup>137</sup> E. Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008) 57 ICLQ 751, 763.

<sup>138</sup> UNHCHR Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1997/31, Annex (1997).

<sup>139</sup> F. Hampson, *Working paper submitted pursuant to Sub-Commission decision 1998/113*, UN Doc. E/CN.4/Sub.2/1999/28 (1999) (1999 Working paper), p. 5 at (f).

own competence to unequivocally conclude that a treaty body has the inherent authority to determine:

1. Whether a statement is a reservation or not: and
2. If so, whether it is a valid reservation; and
3. To give effect to a conclusion with regard to validity.<sup>140</sup>

Thus confirming the HRC's position that the treaty bodies are competent to determine compatibility of reservations with their specific treaties.<sup>141</sup>

A working group on reservations was established at the request of the chairpersons of the human rights treaty bodies and the inter-committee meeting of the human rights treaty bodies following the submission of Hampson's final report on *Specific Human Rights Issues, Reservations to Human Rights Treaties*<sup>142</sup>.<sup>143</sup> From the beginning of the working group it was clear that there was little coordination among the treaty bodies on the issue of reservations thus it was determined that the working group should attempt to harmonise the treaty bodies' approaches to reservations. The working group's latest report on reservations, issued in 2008, indicated that the treaty bodies were concerted in their efforts—especially in the course of reviewing periodic reports—to see impermissible reservations withdrawn.<sup>144</sup>

Despite minor, temporary waivers<sup>145</sup> since the adoption of *General Comment No. 24*, the treaty bodies have been increasingly vociferous about their competency to evaluate the validity of reservations. The initial reasons for asserting this competency were based largely on the theory that a quasi-judicial body has the jurisdiction to determine its own jurisdiction and the fact that the Vienna Convention does not elaborate on what to do when a state maintains an invalid reservation following a determination of invalidity by another state party, both reasons advanced

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<sup>140</sup> Hampson, *2004 Final working paper*, para. 37. A point also acknowledged by Boerefijn, 'Impact on the Law on Treaty Reservations', p. 86.

<sup>141</sup> *2004 Final working paper*, para. 71.

<sup>142</sup> *Ibid.*

<sup>143</sup> Chairpersons of the human rights treaty bodies (Chairpersons HRTBs), *The Practice of Human Rights Treaty Bodies with Respect to Reservations to International Human Rights Treaties*, UN Doc. HRI/MC/2005/5 (2005), para. 2.

<sup>144</sup> Chairpersons HRTBs, *Report on Reservations*, UN Doc. HRI/MC/2008/5 (2008).

<sup>145</sup> See statement by the HRC chairperson in Chairpersons HRTBs, *Report on Reservations*, UN Doc. HRI/MC/2007/5 (2007), paras. 4-6 and 12, especially para. 12, 'It may be that the Committee is now less inclined to come to the conclusion that a reservation is valid or not, in the context of the review of periodic reports.'

in Hampson's study.<sup>146</sup> In keeping with this argument, the treaty bodies, both individually and through joint efforts, resolved to combat the existence of invalid reservations.<sup>147</sup>

In 2008, the CEDAW Committee adopted decision 41/1 which discussed compatibility of reservations with the object and purpose of the Convention.<sup>148</sup> The decision indicates that the issue of validity falls squarely within its function in relation to not only the reporting procedure but also in relation to the communication and inquiry procedures under the Optional Protocol. In its recent review of Israel under the periodic reporting scheme, the CEDAW Committee took the view that Israel's reservation to Article 16 was impermissible due to it being contrary to the object and purpose of the Convention.<sup>149</sup> There remains no guidance on what should happen if a complaint about a violation of Article 16 is brought in any forum but it appears that if the question was put to a competent dispute resolution organ then that organ would have the final word on validity regardless of the positions taken by the treaty body or state party, however, the CEDAW Committee's opinion would undoubtedly provide guidance as would state objections. At present, there is no definite answer to the question as to whether Israel's refusal to remove the offending reservation prevails over the finding of impermissibility by the monitoring mechanism. The ILC Finalized Guidelines (guideline 3.2.3) indicates that the state should give 'consideration' to the view of the treaty body but ultimately, the guidelines are just that, a guide, and have no binding force.

The most recent general comment by the HRC, or indeed any of the treaty bodies addressing reservations, was published in July 2011. Once again the Committee drew attention to reservations and the incompatibility of certain reservation with the object and purpose of the ICCPR. Specifically the HRC

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<sup>146</sup> Hampson, *2004 Final working paper*, para. 37; F. Hampson, *Specific Human Rights Issues, Reservations to Human Rights Treaties, Expanded working paper prepared in accordance to Sub-Commission decision 2001/17*, UN Doc. E/CN.4/Sub.2/2003/WP.2 (2003), p. 19.

<sup>147</sup> See, for example, Chairpersons HRTBs, UN Doc. HRI/MC/2007/5 (2007), para. 16(5).

<sup>148</sup> *Report on its 41<sup>st</sup> session*, UN Doc. A/63/38, Supp. 38 (2008), chap. I, p. 88

<sup>149</sup> *Concluding observations...*, Israel, UN Doc. CEDAW/C/ISR/CO/5 (2011), paras. 8-9

surmised that any reservation to Article 19(1)<sup>150</sup> would be incompatible with the object and purpose test as would any general reservation to Article 19(2)<sup>151</sup>.<sup>152</sup>

The treaty body working group on reservations has endorsed reservation provisions in the *Harmonized Guidelines* that were developed to assist states in filing multiple reports under the range of core human rights treaties.<sup>153</sup> The common core document does not address the competency of the treaty bodies to assess reservations. It does, however, mandate that state parties address sweeping reservations and calls on states to report on the interpretation and ‘precise effect’ of those particular reservations.<sup>154</sup> This reflects calls previously made by both the HRC and the ILC.<sup>155</sup>

It has been suggested that the very fact that human rights treaty bodies still subject formulated reservations to the residual Vienna Convention rules implies the exclusion of the organs’ competency to evaluate the validity of reservations;<sup>156</sup> however, this blurs two separate questions. The first is what rules to apply when determining validity and the second is what organ is competent to make this determination. In response to the first question it is clear that in the UN human rights treaty regime there is no other rule available to assess reservation validity other than the object and purpose test found in the Vienna Convention. As noted in previous chapters, the Vienna Convention does not specifically invite *only* states to make this determination in the first instance, thus there is no reason to assume that a state’s acceptance (tacit or otherwise) or objection pursuant to the Vienna Convention rules will preclude a court or the attached treaty body from taking up the issue,<sup>157</sup> a point

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<sup>150</sup> ICCPR, Art. 19(1) reads: ‘Everyone shall have the right to hold opinions without interference.’

<sup>151</sup> ICCPR, Art. 19(2) reads: ‘Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

<sup>152</sup> *General Comment No.34*, UN Doc. CCPR/C/GC/34 (2011), para. 5.

<sup>153</sup> UN Doc. HRI/MC/2007/5 (2007), para. 8.

<sup>154</sup> UN Secretary-General, *Compilation of guidelines on the form and content of reports to be submitted by States Parties to international human rights treaties*, UN Doc. HRI/GEN/2/Rev.6 (2009), para. 41(b), Chp. 3(C.2), Chp. 4(A.4), Chp. 5(C.3), Chp. 7(I.10)

<sup>155</sup> See *General Comment No. 24*, para. 19; *Commentary upon proposed Reservations to Treaties, Draft Guideline 3.1.11*, UN Doc. A/62/10 (2007), p. 109.

<sup>156</sup> Imbert, ‘Reservations to the ECHR Before the Strasbourg Commission’, 585; see also, Chinkin, ‘Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women’, pp. 78-79.

<sup>157</sup> The language of Vienna Convention, Art. 20(2), points to ‘states *and* the object and purpose’ but does not indicate that states alone determine compliance with the object and purpose (emphasis

noted frequently by the regional human rights organs as discussed in Chapter Four. Even if there was reluctance on the part of both the convention drafters and supervisory organs to address the reservations issue directly in the early days of the UN human rights regime, time has revealed the need to address the question of who is competent to adjudge the validity of reservations out-with the traditional state-centred approach and treaty bodies have, in fact, increasingly asserted their right to review reservations for compatibility.

Part of the idea behind submitting the assessment of reservations to independent, specialist bodies is to avoid the inevitable political concerns of states.<sup>158</sup> It has been suggested that the state system of assessing reservations and the separate supervisory organ assessment of the same can not easily exist side by side as the possibility of review by the supervisory organ would weaken the consent given by other state parties to the treaty,<sup>159</sup> however, this is not a plausible conclusion to draw in light of the reality that ‘consent’ to reservations to human rights treaties is generally facilitated by tacit acceptance evidenced by a lack of actual objections to reservations under the present regime. Shelton contends that the treaty bodies are best suited to serve as an alternative mechanism for review of reservations,<sup>160</sup> and this position is easy to support when the other options are limited to states with their various political concerns and the judicial organs with varying jurisdictional impediments. The treaty bodies are the one constant for each of the human rights treaties. The processes of the treaty bodies are largely indifferent to the positions of other state parties as they, through their various functions, address states individually in relation to their obligations under specific treaties.<sup>161</sup> The growing pains accompanying the development of the international human rights system indicate that when there are so many different views to be taken into account independent, expert supervisory organs may provide the greatest opportunity for a competent

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added). See full text in Annex II. See the discussion by the ECtHR and the IACtHR on this issue in Chapter 4, sections 2.2 and 2.3.

<sup>158</sup> Imbert, ‘Reservations to the ECHR Before the Strasbourg Commission’, 591, specifically referring to the ECHR.

<sup>159</sup> *Ibid.*, 591, fn. 96.

<sup>160</sup> Shelton, ‘State Practice on Reservations to Human Rights Treaties’, 228-29; see also Redgwell, ‘Reservations and General Comment No. 24(52)’.

<sup>161</sup> M. Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 EJIL 489, 510-11.



assessment of treaty obligation implementation, which undoubtedly includes giving opinions on these 'living instruments'<sup>162</sup>.

In 2009, the ILC affirmed the long-standing treaty body assertion that in addition to Contracting States, treaty bodies could serve in a determinative capacity in evaluating reservation permissibility.<sup>163</sup> The Finalized Guidelines, however, took special care to not give precedence to one assessment organ over another:

*3.2 Assessment of the permissibility of reservation*

The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:

- Contracting States or contracting organizations
- Dispute settlement bodies
- Treaty monitoring bodies

Thus these organs share a determinative capacity and may not determine validity to the exclusion of one another, which makes sense considering the varying relationships each will have with a reserving state. Unfortunately, the ILC attempt to provide guidance on the issue of legal effect flowing from a reservation assessment by a treaty body serves only to reinforce the current limits of any legal effect rather than to clarify:

*3.2.1 Competence of the treaty monitoring bodies to assess the permissibility of reservations*

1. A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.
2. The assessment made by such a body in the exercise of this competence shall have no greater legal effect than that of the act which contains it.<sup>164</sup>

For treaties of general applicability composed of reciprocal obligations the even playing field envisioned by this guideline is suitable because the legal effect is more easily ascertained. However, in the context of human rights treaties, the absence of hierarchy coupled with the lack of concrete consequence for invalid reservations results in a futile confirmation of that which has been widely accepted without

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<sup>162</sup> Boyle and Chinkin, *The Making of International Law*, p. 155.

<sup>163</sup> ILC, *Reservations to Treaties*, UN Doc. A/CN.4/L.744 (2009), p. 3-4, draft guideline 3.2.

<sup>164</sup> Finalized Guidelines.

addressing the more important question of how the different assessment organs should work together. By limiting the determinative function of each organ with the phrase ‘within their respective competences’ without elaborating on the effect of a determination by a treaty body, the ambiguous situation of the human rights treaty bodies is perpetuated. Development of this aspect would have gone above and beyond a mere survey and analysis of existing law and ventured into ‘progressive development of the law’, however, the ILC chose to maintain the status quo which has not provided any resolution on the issue.<sup>165</sup>

Thus, for example, if a treaty body takes the view that a reservation is impermissible in the course of assessing an individual complaint then it has the same impact on the reserving state as if it had made the same observation in the course of examining a periodic report. The two guidelines reflect the practice of the treaty bodies in that they are increasingly taking views on reservation validity in the course of carrying out all of their monitoring roles. To have taken any other view would have been to ignore the evolving practice of the treaty bodies and increased acceptance of the practice by states.<sup>166</sup> The point made previously by the CEDAW Committee in relation to the determinative function being not only incidental to the reporting procedure but also to the communication and inquiry procedures<sup>167</sup> is important to recall here in that it is a function necessary in relation to all monitoring and quasi-judicial roles of the treaty bodies, thus all treaty bodies, regardless of their individual remits, are competent in this respect.

The obvious caveat in confirming that treaty bodies are competent to assess reservations but the effect is limited to that derived from the normal performance of its monitoring role is that not all states take heed of the monitoring mechanisms. The ILC guidelines remind states that have formulated reservations to a treaty with a treaty monitoring body that they are ‘required to cooperate with that body and should give full consideration to that body’s assessment of the validity of the reservations’.<sup>168</sup> This requirement, easily derived from the concept of *pacta sunt servanda*,<sup>169</sup> has always existed despite evidence to the contrary in the field of human

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<sup>165</sup> As noted by Boerefijn, ‘Impact on the Law on Treaty Reservations’, pp. 87 et seq.

<sup>166</sup> On this point see, Boyle and Chinkin, *The Making of International Law*, p. 193.

<sup>167</sup> See *Report on its 41<sup>st</sup> session*, UN Doc. A/63/38, Supp. 38 (2008), chap. I, p. 88.

<sup>168</sup> ILC, UN Doc. A/CN.4/L.744 (2009), p. 4, draft guideline 3.2.3.

<sup>169</sup> Vienna Convention, Art. 26.

rights. Hampson also notes that the principle should always guide states in their reactions to treaty body findings.<sup>170</sup> There is no point in including a treaty monitoring body within a treaty framework if its views, at the very least, are not meant to be fully considered in good faith. Otherwise the existence of the treaty body is futile.

Treaty bodies are clearly at liberty to assess reservations as part of the periodic reporting procedure. This is supported by Vienna Convention Article 31 as well as the evolving practice of the treaty bodies as recognised by states. Though this is an essential and effective role, in most cases it is clear from the reports issued by each of the bodies that compliance with the reporting procedures are far from perfect and their observations on the reports often fall on deaf ears. The disparity among the treaty bodies in their approaches to reservations over the past thirty years highlights the ambiguity of the Vienna Convention rules. The lack of options regarding legal effect available to the treaty bodies as constituent organs as opposed to state parties does not, without further clarification, leave them many options as permissibility and opposability are not available choices.

The existence of the treaty bodies is more readily comparable to the supervisory organs of the ECHR and the ACHR addressed in Chapter Four. Thus the roles of the treaty bodies must be strengthened and this can only be done effectively by refinement and state recognition of their competencies. '[T]he integrity of human rights treaties calls for the recognition of the role that international supervisory machinery can play in monitoring reservations filed by states, as a step toward more effective implementation of human rights norms.'<sup>171</sup> In her examination of the CEDAW Committee's crusade on reservations during the past two decades, Schöpp-Schilling notes that no actor was specified to decide on the compatibility of reservations and though 'the Committee's efforts...had proven successful in bringing the issue onto the agenda and into the final documents of the World Conference on Human Rights, the issue...remain[s] unresolved.'<sup>172</sup> The tools exist to rectify decisions on reservation compatibility, but there are some progressive steps that must

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<sup>170</sup> Hampson, *2004 Final working paper*, para. 39.

<sup>171</sup> Shelton, 'State Practice on Reservations to Human Rights Treaties', 234.

<sup>172</sup> Schöpp-Schilling, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women', pp. 17-18.

be taken in order for the entirety of states to recognise the value of the system already in place.

As it stands with the ILC, a treaty body's competence to assess reservations does not prejudice the competence of a contracting state,<sup>173</sup> which returns to the cyclical debate between the state and a treaty body as to which decision trumps on the view of reservations invalidity. There has been state concern that allowing multiple entities to assess the validity of reservations will only cause more complications in interpreting obligations affected by reservations.<sup>174</sup> Hampson, too, expressed trepidation over the potential problem of states (not the reserving state) and treaty bodies coming to different conclusions.<sup>175</sup> This apprehension is grounded in the reality that separate entities operating in tandem to assess the same reservation are not strictly bound to recognise the findings of others, whether it be assessments by multiple states or a state and a treaty body. The overarching goal should be to reconcile the various entities.

### 3.3 RESPONSE TO TREATY BODY OPPOSITION

As with lack of universal views on resolutions for the lacunae of the Vienna Convention, there is also no universal agreement on the competency of treaty bodies to serve in determinative capacity. In the 1980s Imbert suggested that '[b]y committing themselves in the examination of [reservations]...the supervisory organs run the risk of weakening their authority and prestige'<sup>176</sup> and that 'pronouncing on the validity of reservations could be a cause of major inconvenience for the control organs of treaties'.<sup>177</sup> It can no longer be said that addressing reservations will weaken the authority of the treaty bodies nor will it be an inconvenience. The haze surrounding the validity of certain reservations has undoubtedly done more to hamper the work of the treaty bodies and investing the treaty bodies with the ultimate authority to make these determinations would resolve these issues. The main

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<sup>173</sup> Finalized Guidelines, 3.2.4. This point has been emphasised by others, see Boerefijn, 'Impact on the Law on Treaty Reservations', p. 87.

<sup>174</sup> See comments by Austria, *Reservations to treaties, Comments and observations received from Governments*, UN Doc. A/CN.4/639 (2011), para. 63.

<sup>175</sup> Hampson, *1999 Working paper*, paras. 21-22. There also appears to be confusion within the treaty bodies themselves, see, for example, UN Doc. HRI/MC/2007/5 (2007), paras. 4-6.

<sup>176</sup> Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 589.

<sup>177</sup> P.-H. Imbert, 'Reservations and Human Rights Conventions' (1981) 6 *Human Rights Review* 28, 45.

opposition surrounding the investing of treaty bodies with the competency to determine the validity of reservations generally falls into one of the following categories: outright opposition based on state sovereignty arguments or positions based on the incoherence of the Vienna Convention system on the whole and the lack of guidance for reconciling state and treaty body views.

Some question the idea that treaty bodies might have the final word on the validity of reservations and instead view them as mainly a repository for periodic reports.<sup>178</sup> The US and UK have expressed absolute opposition to treaty bodies and their determinative function with respect to reservations.<sup>179</sup> The most telling opposition to this idea, however, is evident in the lack of acknowledgement or action on the part of states once a treaty body indicates its opposition to a reservation as well as the large number of invalid reservations that remain attached to the core treaties.

Another argument made against treaty bodies determining the validity of reservations is that by allowing them to review the validity of reservations years after ratification prejudices states which ratified in the early days of a convention without the benefit of time to better research the impact of a well-defined reservation.<sup>180</sup> This argument may also be deflected by looking to the regional systems and their approach to reservations which have been ruled as impermissible. The positive aspect of the flexibility found in the Vienna Convention is that it allows for the evolution of the law. This concept is reflected in Article 31(3)(b) where subsequent practice accepted by the parties is acknowledged as a tool of treaty interpretation. As human rights norms become more engrained in the mainstream international legal project it is logical to assume that reservations made in the early days of core human rights treaties will have lost their original purpose.

It has been questioned whether interpretation necessarily implies competency to determine the validity of reservations. Attempting to draw a parallel between

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<sup>178</sup> e.g. C.A. Bradley and J.L. Goldsmith, 'Treaties, Human Rights, and Conditional Consent' (2000) 149(2) *University of Pennsylvania Law Review* 399, 429; see acknowledgement of the opposition by Baratta, 'Should Invalid Reservations to Human Rights Treaties Be Disregarded?', 417-18.

<sup>179</sup> *Observations by the US and UK...*, UN Doc. A/50/40 (1995).

<sup>180</sup> R.St.J. Macdonald, 'Reservations under the European Convention on Human Rights' (1988) 21 *Revue belge de droit international* 429, 432; Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 589, specifically referring to the ECHR; Imbert, 'Reservations and Human Rights Conventions'.

domestic courts and the plausibility of international organs to assess the validity of reservations, Imbert claims that '[o]ne need only think of domestic judges who are often required to interpret texts without being competent to determine their validity.'<sup>181</sup> This parallel is ill-conceived. Unlike domestic courts, the treaty bodies under discussion here are specifically invested with the power to monitor the treaties. Due to the flexibility inherent in the core human rights treaties, measuring adherence to treaty obligations is highly dependent on interpretation of both the treaty and its implementation in the state.

Swain suggests that it is the failure of the treaty bodies to develop an objective test for the object and purpose of a treaty that has led to confusion.<sup>182</sup> This seems a banal argument as there is no compelling reason why the treaty bodies should develop a further test to apply a test, albeit a vague one, when there is ample evidence that despite its ambiguities, the object and purpose test can be successfully applied to determine reservation validity. The point of having a supervisory body in place to monitor and interpret treaty compliance is that all manifestations for implementing, or in the case of certain reservations failing to implement, treaty obligations must be examined outwith the state to state relationship. States individually opting for either the permissibility approach or opposability approach as an effect based on an objection to a reservation has no bearing on the fulfilment of human rights treaty obligations. It is fair enough to say that invalidly formulated reservations are impermissible and void *ab initio* but, as discussed in Chapters Three and Five,<sup>183</sup> one would assume that states would not purposefully formulate an impermissible reservation triggering a response that would prevent it from becoming a party to the treaty. Because the permissibility and opposability practices neither square nor solve the issue of the impermissible reservation, the natural legal step would be to have the reservation evaluated by a designated mechanism that would not only determine validity but also pronounce on the legal effect of the reservation. It is a failure of both the permissibility and opposability approaches that neither designates a consequence and thus leave invalid reservations hanging in the balance.

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<sup>181</sup> Imbert, 'Reservations to the ECHR Before the Strasbourg Commission', 584. Imbert was specifically referring to the European Commission on Human Rights in this instance.

<sup>182</sup> E.T. Swaine, 'Reserving' (2006) 31 *Yale Journal of International Law* 307, 317.

<sup>183</sup> Chapter 2, section 3 on the ICJ *Genocide Opinion* and Chapter 5.

As many point out, an important purpose of the treaty bodies has always been and remains to open and maintain a human rights dialogue with states.<sup>184</sup> However, it has been suggested that treaty bodies ‘play down’ their constructive dialogue approach when carrying out their remits and instead indicate stronger disapproval of a state’s behaviour.<sup>185</sup> Whether discussing reservations in the context of periodic reports or determining validity in the course of reviewing an individual communication, treaty body competence to address reservations has yet to gain universal appeal though time appears to be on the side of the treaty bodies.

#### 4 CONCLUDING REMARKS

International human rights law and the competencies of the human rights treaty bodies are evolving to meet the demands of an expanding and inter-connected world society. The non-reciprocal nature of human rights treaties coupled with the ambiguities of the Vienna Convention reservations rules necessitate resort to a review mechanism other than the state-policing objection system developed in conjunction with the Vienna Convention. The eighteen-year ILC study, the work of the treaty bodies, comments from observers and, to some extent, the acquiescence of states point to the treaty bodies as competent arbiters of the validity of reservations. What is less certain is the legal effect of a determination that a reservation is invalid, but this also appears to be the case for states in the context of reservations to human rights treaties.

If treaty bodies are to serve their intended purpose, to interpret a treaty in order to monitor state parties, then the competency to determine the validity of reservations pertinent to the obligations must come within their purview. In the course of monitoring periodic reports states have accepted that treaty bodies will address reservations as is clearly evidenced by the state-treaty body dialogues that have been taking place during last two decades. The Vienna Convention recognises that any instrument incidental to the conclusion of a treaty that is accepted by state

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<sup>184</sup> See discussions by M. Scheinin, ‘International Mechanisms and Procedures for Monitoring’ in C. Krause and M. Scheinin (eds.) *International Protection of Human Rights: A Textbook* (Åbo Akademi University Institute for Human Rights, Åbo, Finland 2009), pp. 604 et seq; Swaine, ‘Reserving’, 360; L. Helfer, ‘Not Fully Committed? Reservations, Risk, and Treaty Design’ (2006) 31 *Yale Journal of International Law* 367, 381.

<sup>185</sup> Alston, ‘Appraising the United Nations Human Rights Regime’, p. 5.

parties may be employed to interpret a treaty (Article 31(2)(b)). A reservation, by definition, squarely falls into this category as a ‘unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty...’ (Article 2(1)(d)). The ambiguous nature of many reservations (discussed in Chapter Three) necessitates interpretation of the reservation in order to determine the obligations accepted by the reserving state. Furthermore, state practice recognises, or at the very least has acquiesced to, this function of the treaty bodies.<sup>186</sup> This point invokes another aspect of the Vienna Convention regarding treaty interpretation which recognises any subsequent practice in the application of a treaty to which the parties agree regarding its interpretation as a tool of interpretation (Article 31(3)(b)). State practice of engaging with the treaty bodies in the course of the periodic reporting process signifies acceptance of the determinative function of treaty bodies, albeit tacitly in most instances. As noted by Boerefijn, ‘[d]etermining the validity of reservations and attaching consequences to this finding is perfectly in line with other developments in the monitoring machinery.’<sup>187</sup> Interpreting treaty obligations and the fulfilment of those obligations is part and parcel of every monitoring role recognised under the treaty body remits and, therefore, the determinative function extends to each of these whether reviewing a periodic report, commencing a procedure of inquiry or assessing an individual communication.

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<sup>186</sup> Boerefijn, ‘Impact on the Law on Treaty Reservations’, p. 95; Baylis, ‘General Comment 24’, 299.

<sup>187</sup> Boerefijn, ‘Impact on the Law on Treaty Reservations’, p. 96.



## CHAPTER SEVEN CONCLUSION

The international human rights system has evolved in many ways not contemplated at its inception. The most obvious evidence of this evolution is the proliferation of core UN human rights treaties. Human rights treaties are designed to create tangible, legally enforceable human rights. In order to realise the full potential of this endeavour, the ambiguities resulting from invalid reservations must be acknowledged and a course of action taken to redress the normative gaps that result when the Vienna Convention reservations rules are applied to evaluate reservations to human rights treaties.

Using the core UN human rights treaties as a case study this research highlights that the past thirty years have revealed a practical impasse in treaty law when the default reservation rules are relied upon to regulate reservations to human rights treaties. Reservations of questionable validity gain the same status as valid reservations because the Vienna Convention rules do not address the consequence for a reservation determined to be invalid outwith the traditional *inter se* application of the reservation between the reserving and objecting states, which is not logical in the context of a human rights treaty.

States have a duty under international law to ensure that their domestic laws are consistent with their international obligations pursuant to both customary international law and treaty law. This includes incorporating into domestic law the norms established by the human rights treaties to which a state may be a party and often involves implementing changes to laws through legislative action or a change to administrative procedures.<sup>1</sup> As well as ensuring obligation-appropriate minimum standards reflected in the treaties there must also be effective review and remedy procedures in place on the domestic level. Providing adequate and nonbiased review and remedy for breaches of these obligations is a fundamental aspect of all human rights treaties. Effectively, the onus lies on the state party to ensure that at a minimum domestic law ensures the same level of human rights protection as the

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<sup>1</sup> *General Comment No. 34*, UN Doc. CCPR/C/GC/34/CRP.5 (2011), para. 7.

obligations they have accepted under international law both in the context of prevention and victim access to a remedy.

Reservations allow states to avoid taking on particular obligations under a treaty by unilaterally modifying the agreement which exculpates states from bringing domestic law into conformity with a treaty in its entirety. This practice is fraught with disparate views about the potential undermining effect it has both on the subject treaties and the international legal project as well as more practical debates about the technical legal effects of these exercises of state sovereignty. The unilateral nature of reservations is the one element that seems to achieve consensus among observers,<sup>2</sup> a characteristic that rears its head time and again in the reservations debate. As mentioned in the introductory chapter, reservations are often a highly political practice at the very least but they also represent the substantive constraints of many governments in their ability to effect change on the domestic level. This phenomenon has led reservations to be viewed as akin to a ‘tax on treaty integrity’<sup>3</sup>.

From a practical standpoint, reservations provide a great deal of insight into a state’s true commitment to advancing the human rights agenda and information on the impact of reservations can only serve to allow a better grasp of the state of domestic human rights protections.<sup>4</sup> Though at the outset of this thesis it was made clear that the reason why states make reservations would not be taken up in this analysis, it is worth noting that the potential reasons cover a broad spectrum of concerns ranging from internal politics to economic impossibility. Some reservations represent a complete failure to bring domestic laws into conformity with treaty obligations in the run up to ratification while others reflect a state’s unwillingness to enter into treaty relations with another state. Additional reasons why states may not be able to fully adhere to the articles of a treaty include the fact that the internal governmental system is disrupted, such as with a post-conflict state or because of the nefarious nature of the government in charge. It must also be acknowledged that there are certain obligations in human rights treaties that would entail significant

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<sup>2</sup> L. Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, Dordrecht 1995), p. 30.

<sup>3</sup> E.T. Swaine, ‘Reserving’ (2006) 31 *Yale Journal of International Law* 307, 331; Y.K. Tyagi, ‘The Conflict of Law and Policy on Reservations to Human Rights Treaties’ (2000) 71 *BYBIL* 181, 255.

<sup>4</sup> For a recent discussion of the positive informational value of reservations, see Swaine, ‘Reserving’, 328-41.

monetary expenditures,<sup>5</sup> thus allowing reservations to account for the gradual implementation of expensive changes to domestic systems is a legitimate use of a reservation.<sup>6</sup> Complete compliance may also be prevented due to a *functioning* governmental system, such as the United States, which, as demonstrated, often makes reservations pursuant to the restrictions imposed upon the legislative branch by its Constitution.<sup>7</sup>

As a default regime, the Vienna Convention is designed to operate only in the absence of treaty-specific reservations regime. Clearly a treaty-specific regime is the ideal solution for addressing the legal effect and consequences of invalid reservations yet the inherently political process of treaty negotiation has yet to bow to this solution. CERD is the only core human rights treaty to have advanced a treaty-specific reservations regime and that regime has proved untenable. The ‘collegiate’ solution to reservation evaluation set forth in CERD Article 20 seems to have failed for a multitude of reasons,<sup>8</sup> not the least that the nature of the human rights treaty lends itself to ineffective application of the reservations rules. If the process of negotiating a treaty does not facilitate the adoption of a treaty-specific regime then a more nuanced approach to human rights treaty reservations could assuage the ambiguity presented by the Vienna Convention reservations regime.

As noted in the introduction, the issue of reservations has been widely acknowledged as one of the most difficult to resolve in international treaty law. However, the strength of the law of treaties is its extreme flexibility and the fact that it can accommodate departures from normal practice providing there is a good reason

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<sup>5</sup> J. McBride, ‘Reservations and the Capacity to Implement Human Rights Treaties’ in J.P. Gardner (ed.), *Human Rights as General Norms and a State’s Right to Opt Out: Reservations and Objections to Human Rights Conventions* (BIICL, London 1997), p. 128. For example, the positive obligations pointed out by the ESCR Committee in *General Comment No. 13, the Right to Education (Art. 13)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 63, para. 6, especially, and HRC, *General Comment No. 20, Prohibition of Torture, etc. (Art. 7)*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 200, paras. 10, 14, especially, are expensive and might require the creation of a completely new infrastructure.

<sup>6</sup> See, generally, discussion in McBride, ‘Reservations and the Capacity to Implement Human Rights Treaties’, pp.136-45 noting that in practice lack of resources is rarely given as the reason for a reservation

<sup>7</sup> Recall discussion in Chapters 3 and 5. For an overview of the US position see, for example, S. Grant, ‘The United States and the International Human Rights Treaty System: For Export Only’ in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (CUP, Cambridge 2000), pp. 317-29; D.P. Stewart, ‘U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understanding and Declarations’ (1993) 14 *Human Rights Law Journal* 77.

<sup>8</sup> Human Rights Treaty Bodies, *Report of the working group on reservations*, UN Doc. HRI/MC/2007/5 (2007), paras. 4-6.

for departure and it is done with the full knowledge and implications of such a departure.<sup>9</sup>

## 1 THE VIENNA CONVENTION AND HUMAN RIGHTS TREATIES

The 1951 *Genocide Opinion* introduced the concept of a tiered system of rights. The attendant test for determining into which category a right fell was the object and purpose test. The object and purpose test overturned the long-standing international practice requiring unanimous consent to reservations. This legacy was ultimately included in the 1969 Vienna Convention on the Law of Treaties and today remains the sole method of determining reservation permissibility in the absence of a treaty-specific reservations regime.

The validity of the residual reservations regime of the Vienna Convention is challenged in several ways when applied to human rights treaties. Human rights treaties are comprised of a wide variety of rights and each category of rights protected throws up questions as to whether limitations or suspensions are possible. Initially there are numerous types of reservations which negatively impact human rights treaties. As examined in Chapter Three, in addition to clearly invalid reservations, sweeping reservations and reservations which subordinate treaty obligations to domestic law are most often deemed invalid due to the uncertain impact these reservations have on the reserving state's obligations. Numerous reservations to a treaty also flag up the unwillingness of a state to actually implement a human rights treaty to which it has agreed. The current catalogue of reservations attached to the core UN human rights treaties suggests an indeterminable maze of obligations rather than a coherent system of protection. Due to the potentially far-reaching scope of the most common types of reservations to human rights treaties, the Vienna Convention reservations rules are employed as an attempt to keep these reservations in check.

As examined in Chapter Four, states have slowly begun to take up the role of policing reservations through the objection system outlined in Vienna Convention Article 21. Though Article 21 technically appears to only apply to valid reservations, states have developed a practice of objecting to invalid reservations using this

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<sup>9</sup> A. Aust, *Modern Treaty Law and Practice*, 2d ed. (CUP, Cambridge 2007), p. 16.

vehicle. Because the Vienna Convention rules operate from an assumption that states will only formulate valid reservations the rules fail to outline the legal effect when a state objects on the basis of invalidity. As state objections to invalid reservations have increased over the past fifteen years, an obvious lacuna has become evident in the application of the residual regime to human rights treaties. The state-to-state ‘remedy’ envisioned by the Vienna Convention objection system only outlines the legal effect of a valid reservation between the reserving and the objecting state. This outcome has no impact upon other state parties to a non-reciprocal obligation treaty, thus there is little incentive to object. Because the obligations in human rights treaty are not reciprocal, the state-to-state modification of treaty relations is ineffective and has no bearing on the relationship that these treaties are designed to protect, the state-to-human being relationship. Furthermore, when a non-reserving state objects on the basis of invalidity, there is no consequence defined by the Vienna Convention and no rule of customary international law mandates that the reserving state withdraw its invalid reservation. The continued existence of an invalid reservation contributes to the inability of states and rights-holders to assess exactly to which norms the reserving state has agreed.

While the Vienna Convention state-policing system has not yielded clearly defined legal effects or consequences for an invalid reservation, it is clear that the reservation/objection interaction serves an important communicative value. Objections to particular types of reservations or to reservations against particular rights enriches the international community’s understanding of human rights by helping to define rights in a way that transcends national borders. This serves to aid the recognition of rights as customary norms in addition to their recognition as treaty rights. This evolution of rights underpins the international human rights system and is integral to the continued progress of rights-based governance.

In some instances the reservation review deficit in the human rights system has been remedied by international tribunals exercising their competence to determine the validity of reservations. The ICJ, the European Court of Human Rights and the Inter-American Court of Human Rights have each reviewed the validity of reservations at some point albeit often in a cursory fashion and most often simply to determine claim admissibility. In applying the residual rules, international tribunals

have reiterated the unique characteristics of human rights treaties in that they do not contain reciprocal obligations enforceable between state parties but instead enumerate the rights and obligations owed to third parties, human beings. This specific characteristic is that which curtails the effective execution of the state-focused, self-policing rules flowing from the Vienna Convention reservations regime. The drawback to relying on international tribunals to evaluate the validity of reservations is that review can only take place if the organ has competency to evaluate a dispute either based on automatic or consent-based jurisdiction and rarely do states take action on the issue of an invalid reservation outwith the objection system. The purpose of Chapter Four was to highlight that both states and international tribunals have effectively applied the Vienna Convention rules successfully to determine the validity of reservations. The overarching problem, however, is that there is no definitive final arbiter unless the reservation is reviewed by a competent dispute settlement mechanism capable of defining the legal effect and consequence of an invalidity determination.

The flexibility of the default reservations regime points to the necessity to reconsider the adequacy of the Vienna Convention rules. Chapter Five analysed the Vienna Convention reservations regime in order to assess whether it could adequately govern reservations to human rights treaties in light of the normative ambiguity evidenced by the core UN human rights treaties. The undefined object and purpose test is the initial challenge of the reservations regime which is reflected by the disparate treatment of problematic reservations by state parties to the core treaties. The second challenge is the lack of defined legal effect for an invalid reservation, particularly in the context of the state objection system. The final challenge of the Vienna Convention regime is its failure to specify a consequence for an invalid reservation.

Despite the inherent difficulty of applying the subjective object and purpose test, states have proven that they can and are willing to apply the test to determine the validity of a reservation. Unfortunately, due to the lack of guidance on legal effect and the consequence of an invalid reservation, non-reserving states' views on reservations validity are largely ignored by reserving states. The doctrines of permissibility and opposability are clearly inadequate to resolve the issue of legal

effect of invalid reservation to human rights treaties because these doctrines singularly govern state-to-state relationships. The ILC asserts nullity and severance as the legal effect and consequence when a reservation is determined invalid, however, in practice there remains resistance to these concepts especially in the state-to-state relationships created in the course of accepting and objecting to reservations. States that have formulated invalid reservations continue to maintain the validity of their reservations because there is no definitive rule enunciating at what point the validity of a reservation can no longer be in doubt. Even objections purporting to sever the incompatible reservations have little consequence for the reserving state as never has an objecting state pursued the sole issue of an invalid reservation in an international tribunal in order to establish a concrete consequence, as noted above.

The increased recognition of severability as the remedy for invalidity is a boon to the human rights system as a whole, though its actual impact is limited in the state-to-state context as states do not enjoy reciprocal rights and obligations under the core human rights treaties. The state-to-human being relationship is that which is affected yet this relationship is not recognised under the Vienna Convention. This situation illuminates the ineffectiveness of the Vienna Convention system to produce a tangible legal effect or consequence in response to an invalid reservation.

While the Vienna Convention regime may not be complete, the flexibility of the system and the recognition that the tools for interpreting a treaty might expand (Article 31) suggest that progressive practices have the potential to better guide the effects of invalid reservations to human rights treaties. The ambiguities of the Vienna Convention reservations regime could be more appropriately attended if an organ outwith the state were designated to provide a final view on the validity of a reservation. The core UN human rights treaties are uniquely situated to designate a competent reservation review mechanism in light of the treaty-specific supervisory mechanisms which already play a central role in monitoring treaty implementation by state parties. Therefore, while it is clear that the Vienna Convention reservations regime *can* adequately regulate reservations to human rights treaties, this conclusion is only correct as long as the specific nature of human rights treaties, including their content and availability of monitoring mechanisms, is fully taken into account and a final arbiter on reservation validity is designated.

## 2 TREATY BODIES AS ASSESSORS OF RESERVATION VALIDITY

International law and human rights law in particular are evolving to meet the demands of today's world society. The competencies of the human rights treaty bodies have simultaneously been expanding in response to the paradigm shifts in the international community which sees human rights permeating all aspects of international and, arguably, domestic governance. The lacunae in the Vienna Convention reservations rules coupled with the non-reciprocal nature of human rights treaties necessitates resort to a review mechanism other than the state-policing objection system developed in conjunction with the Vienna Convention. The eighteen-year ILC study, the work of the treaty bodies, comments from observers and, to some extent, the acquiescence of states point to the treaty bodies as competent arbiters of the validity of reservations.

In order to serve their intended purpose, to interpret a treaty in order to monitor state parties, treaty bodies must be recognised as competent to serve in a determinative capacity so that the issue of invalid reservations can be fully addressed. Most states accept that treaty bodies will address reservations in the course of reviewing periodic reports as is clearly evidenced by the state-treaty body dialogues that have been taking place during last two decades. All indicators suggest that the treaty bodies are willing to exercise this capacity in relation to each of their monitoring functions.

The Vienna Convention recognises that any instrument incidental to the conclusion of a treaty that is accepted by state parties may be employed to interpret a treaty (Article 31(2)(b)). A reservation, by definition, squarely falls into this category thus treaty body interpretation of reservations seems a natural part of interpreting states' obligations under a treaty. State practice recognises, or at the very least has acquiesced to, this exercise by the treaty bodies. Vienna Convention Article 31(3)(b) also recognises any subsequent practice in the application of a treaty to which the parties agree regarding its interpretation can be used as a tool of interpretation. State practice of engaging with the treaty bodies in the course of the periodic reporting process signifies acceptance of the treaty-body driven reservations dialogue, albeit tacitly in most instances.



What is less clear is the effect a determination of invalidity by a treaty body will have. The lack of outcry from ICCPR State Parties (other than by Trinidad and Tobago) following the HRC decision in the *Rawle Kennedy v. Trinidad and Tobago* case suggests that the competence of the treaty bodies to determine a legal effect and consequence is not entirely unexpected by states. Interpreting treaty obligations and the fulfilment of those obligations is part and parcel of every monitoring role recognised under the treaty body remits and, therefore, the determinative function should extend to each of these whether it be reviewing a periodic report, commencing a procedure of inquiry or assessing an individual communication. Periodic report monitoring and concluding observations, issuing general comments and reviewing individual communications all play to the strengths of the treaty bodies which include their specific knowledge of the treaty obligations and their ability to create human rights dialogues with State Parties. Though the opinions, comments and statements issued by treaty bodies are not binding and generally viewed as forms of soft law, these products are increasingly being referenced in a range of courts and are available to examine by anyone with internet access.

Treaty bodies must take advantage of the developments in reservations law, particularly those set forth in the ILC Finalized Guidelines. Exercising the determinative function and further developing their monitoring roles requires that they be very clear about the impermissibility of a reservation rather than resort to vague terms that are inconclusive as to the validity and legal effect of a reservation. More stringent pronouncements using the language of invalidity or impermissibility would better serve the ultimate goal—withdrawal—rather than perpetuate a stagnant reservation as has been the case for many arguably invalid reservations to the core human rights treaties. The strength of a clearly defined, convention-based opinion on impermissibility is that it provides an uncompromising view on the shortcomings of the reservation, a view that may be relied upon by those working to embed rights-based governance. Failure to clearly invoke the language of impermissibility has been a weakness of the treaty bodies, yet it can be viewed as a valuable step in the evolution of the determinative function and, more importantly, for the goal of bringing States on board; the heretofore measured approach to invalidity determinations reflects an awareness that rampaging like a rogue elephant with

unrestrained authority posturing would do more harm than good in the pursuit of encouraging global human rights. However, the time has come for the treaty bodies to collectively and unambiguously develop and entrench their views on reservation validity. It is only with clear guidance from the treaty bodies that states, human rights advocates and rights-holders can continue to progress the human rights project as the treaty bodies are solely responsible for ensuring that the core human rights treaty obligations are realised by states parties.

### 3 FINAL REMARKS

For many years there has been a lack of impetus to redress the problems with the Vienna Convention rules. The ILC and treaty body efforts, as well as objection activity on the part of states, indicate that the age of apathy has passed. There currently exists a palpable disparity between the ‘indivisible and inter-related’ obligations undertaken by states at the international level. As noted by Navi Pillay, ‘We need to close the gap between rhetoric and good intent on the one hand, and measurable results on the other.’<sup>10</sup> More nuanced approaches to evaluating reservations must be articulated to fill the normative gaps that exist when applying the Vienna Convention residual reservations rules to human rights treaties.

The Vienna Convention’s underlying misconceptions regarding the power of an objection as well as the automatic nullification of an invalid reservation are particularly ill-suited to provide normative clarity for treaties formed of non-reciprocal obligations as they do not involve the assumption of duties or obligations between states thus objecting states suffer no detriment as a result of a hanging reservation. Reservations to human rights treaties elicit even further challenges in light of the rights protected by these non-reciprocal, norm-creating treaties.

There is tension over who decides whether reservations are compatible: states, international tribunals or treaty bodies. Unlike the Vienna Convention regime which has enabled states to evaluate reservations as a residual measure, international tribunals and supervisory mechanisms set up specifically by human rights treaties

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<sup>10</sup> N. Pillay, United Nations High Commissioner for Human Rights, Introduction of the Annual Report at the 16<sup>th</sup> session of the Human Rights Council, Geneva, 3 Mar. 2011, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10794&LangID=E> <accessed 30 Aug. 2011>.

have been steadfast in their recognition of the non-reciprocal nature of human rights treaties and the types of rights subjected to reservations. Unfortunately, the opportunity for tribunals to review reservations is curtailed by jurisdictional limitations and apathy on the part of states to pursue claims based on invalid reservations. Unlike tribunals, whether domestic or international in nature, treaty bodies are the natural offspring of treaties and thus, with the treaty-appropriate consent of the state parties, are the institutions of governance to which state parties have assented. These mechanisms offer viable and preferable alternative mechanisms of reservation review that can help normalise the treatment of reservations and establish the legal effects of invalid reservations. It is therefore essential that treaty bodies be recognised as competent to assess the validity of reservations.

As indicated by the President of the Human Rights Council at the adoption of the Optional Protocol to the ICESCR,

...humanity today no longer lacks the human rights instruments to promote, protect and defend human rights and fundamental freedoms. However, what is sorely needed is for State parties to existing human rights instruments to take the practical steps necessary to implement their provisions for the benefit of all mankind.<sup>11</sup>

The human rights treaty bodies were created by states upon ratifying the international treaties which constitute the corpus of state parties' obligations to the common man. Their roles are defined by the treaty texts as adopted by state parties yet they have evolved alongside international human rights law. As bodies of experts they are better placed to concentrate their deliberations in the language of the rights embodied in their respective treaties. Both public opinion and state opinion are increasingly supportive of an integrated and indivisible human rights regime. The role of treaty bodies in reviewing periodic reports and individual communications pursuant to their respective treaties has manifestly supported the increased, albeit incremental, recognition of human rights which is evident not only in the increased acceptance of these bodies by states but also the recognition of their opinions as soft law. Their determinative role is mutually reinforcing when considered as both a counterpoint

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<sup>11</sup> M.I. Uthmaniyah, President of the Human Rights Council, *Statement to the UN General Assembly at its 65<sup>th</sup> plenary meeting*. UN Doc. A/63/PV.65 (2008).

and concurrent mechanism of interpretation in conjunction with states and courts in the assessment of reservation validity.

Recognising the competency of the treaty bodies to interpret human rights obligations is an essential step toward providing the impetus for states on the periphery of the human rights regime to take the gradual steps toward joining the majority of the civilisations of the world in fulfilling their UN human rights treaty obligations. Considerations of treaty integrity demand that the treaty bodies be recognised as reservation monitors as they are the key to ensuring effective implementation across all states for which a treaty is in force. The realities of state reservation practice, limitations on the courts and the special position of the treaty bodies culminate to underline the importance of human rights treaty bodies as mechanisms of review in the international human rights system.

The opportunity to improve the law surrounding reservations to human rights treaties has not passed. If the Vienna Convention reservations rules are the rules to be applied to evaluate reservations to all types of treaties, the special nature of human rights treaties must inform their execution when applied to those treaties. The absence of a defined legal effect or consequence for an invalid reservation to a human rights treaty could be easily addressed if the treaty bodies are recognised as competent to not only determine the validity of a reservation but also to steer a ruling of invalidity toward a concrete consequence based on a determined legal effect. So, too, must the treaty bodies be willing to take this authoritative step. They must work to provide clearly defined determinations of reservation validity using the stringent language of determination. Consistent application of the normative vocabulary indicative of impermissibility and invalidity will provide unambiguous guidance on reservations and the extent to which human rights obligations are altered by such. Perhaps it is only now that a new tipping-point regarding reservations has been reached. Perhaps now, too, the international community will react by recognising that the ambiguities in the Vienna Convention can be checked by allowing the human rights treaty bodies to serve the purpose for which they were created. This work set out to analyse the lacunae in the Vienna Convention reservations rules and to assess the opportunity for the treaty bodies to correct the normative deficit resulting from the application of the reservation rules to human rights treaties and, thereby, provide

an end to the incoherent story of reservations to human rights treaties that has unfolded over the last sixty years.

## ABBREVIATIONS

ACHR	American Convention on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR	European Commission on Human Rights
ECOSOC	UN Economic and Social Council
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HRCouncil	Human Rights Council
IACommHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICED	International Convention for the Protection of All Persons from Enforced Disappearance
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Rights of Migrant Workers' and their Families
ILC	International Law Commission
ILO	International Labour Organisation
NGO	Non-governmental Organisation
OHCHR	United Nations Office of the High Commissioner for Human Rights
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review

## TREATY BODIES ATTACHED TO HUMAN RIGHTS CONVENTIONS - SHORT FORM

CAT	CAT Committee
CEDAW	CEDAW Committee
CERD	CERD Committee
CRC	Children's Committee
CRPD	Disabilities Committee
ICCPR	Human Rights Committee (HRC)
ICED	ICED Committee
ICESCR	ESCR Committee
ICRMW	Migrants Committee

## ANNEX I

### DRAFT ARTICLES ON RESERVATIONS TO TREATIES UN Doc. A/CN.4/L.117 and Add.1 (1966)

#### Section 2: Reservations to multilateral treaties

##### *Article 18 – Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty authorizes specified reservations which do not include the reservation in question; or
- (c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

##### *Article 19 – Acceptance of an objection to reservations*

1. A reservation expressly or impliedly authorized by the 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 negotiating States and the object and purpose of the 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, a reservation requires acceptance by all the parties.
3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.
4. In cases not falling under the preceding paragraphs of this article:
  - (a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;
  - (b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;
  - (c) An act expressing the 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 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 a 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.

##### *Article 20 – Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other States entitled to become parties to the treaty.
2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally

confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An objection to the reservation made previously to its confirmation does not itself require confirmation.<sup>8</sup>

*Article 21 – Legal effects of reservations*

1. A reservation established with regard to another party in accordance with articles 18, 19 and 20:

(a) Modifies for the reserving State 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 such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty in force 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.

*Article 22 – Withdrawal of reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative only<sup>9</sup> when notice of it has been received by the other contracting States.



## ANNEX II

### VIENNA CONVENTION ON THE LAW OF TREATIES 1155 UNTS 331, 23 May 1969

#### ARTICLES ON RESERVATIONS TO TREATIES

##### *Article 19 -- Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

##### *Article 20 -- Acceptance of and objection to reservations*

1. A reservation expressly authorized 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 organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
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 a 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.

*Article 21 -- Legal effects of reservations and of objections to reservations*

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

*Article 22 – Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.
2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.
3. Unless the treaty otherwise provides, or it is otherwise agreed:
  - (a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
  - (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

*Article 23 -- Procedure regarding reservations*

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.
2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.
3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.
4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

### ANNEX III

QUESTIONNAIRE ON THE TOPIC OF RESERVATIONS TO TREATIES  
ADDRESSED TO STATES MEMBERS OF THE UNITED NATIONS OR OF A  
SPECIALIZED AGENCY OR PARTIES TO THE ICJ STATUTE  
Annex II of the Second Report on Reservations to Treaties by A. Pellet  
UN Doc. A/CN.4/478 (1996), pp. 98-106.

#### QUESTIONNAIRE

Period covered in principle by replies: 19..–19..

##### I. Formulation and withdrawal of reservations

- 1.1 How many multilateral treaties has the State become party to during the period under consideration?
- 1.2 How many of these treaties have been the subject of reservations by the State? (Please list the treaties and attach the text of the reservations)
- 1.3 Which of the treaties to which the reservations apply contain provisions concerning reservations? (Please list the treaties and, if possible, attach the text of the relevant provisions)
- 1.4 Has the State formulated reservations to bilateral treaties? (Please list the treaties and attach the text of the reservations)
- 1.5 What were the reasons for each of the reservations mentioned in the replies to questions 1.2 and 1.4:
  - (i) Political considerations? Were such considerations internal or international in nature?
  - (ii) Desire to maintain the application of the national rules currently in force?
  - (iii) Doubts about the soundness of the provision to which the reservation refers?
  - (iv) Other reasons?
- 1.6 Were or are some or all the State's reservations formulated for a specific period of time?
  - 1.6.1 If so, what was/were the reason/reasons for specifying that period of time?
  - 1.6.2 If not, has the State withdrawn or modified some reservations? (Please attach the text of the documents notifying the withdrawals)
    - 1.6.2.1 If so,
      - (i) What period of time elapsed between the State's expression of consent to be bound and the withdrawal?
      - (ii) What was/were the reason/reasons?
- 1.7 At the internal level, which authority or authorities decide(s) that the State will formulate a reservation:
  - The Head of State?

- The Government or a government body?
- The parliament?

1.7.1 If it is not always the same authority which has competence to decide that a reservation will be formulated, on what criteria is this competence based?

1.7.2 If the decision is taken by the Executive, is the parliament informed of the decision? A priori or a posteriori? Invited to discuss the text of the intended reservation(s)?

1.8 Is it possible for a national judicial body to oppose or insist on the formulation of certain reservations?

1.8.1 If so, which authority and how is it seized of the matter?

1.8.2 What reason(s) can it invoke in taking such a decision? (Where appropriate, please attach the relevant decisions)

1.9 Do reservations appear in an official national publication?

1.9.1 If this publication is not issued on a regular basis, what are the criteria for its issuance?

1.10 Of the reservations mentioned in the replies to questions 1.2 and 1.4, which were formulated:

- At the time when the treaty was signed?
- At the time when definitive consent to be bound was expressed?
- After the treaty entered into force with respect to the State? If so, according to which procedure?

1.10.1 Was the timing of the formulation of the reservations based on any particular considerations? If so, what considerations?

1.10.2 If reservations were formulated at the time when the treaty was signed, were they formally confirmed when the State expressed its definitive consent to be bound? If so, which reservations?

1.10.2.1 If not, does the State consider that the foundation of those reservations was valid?

## II. ACCEPTANCE OF RESERVATIONS AND OBJECTIONS TO RESERVATIONS, EFFECTS OF RESERVATIONS

2.1 *Acceptance of reservations formulated by the State and objections to those reservations*

2.1.1 Have any of the reservations mentioned in the replies to questions 1.2 and 1.4 been formally accepted? (Please list the reservations and attach the text of the acceptances)

2.1.2 Have objections been made to any of the reservations mentioned in the replies to questions 1.2 and 1.4? (Please list the reservations and attach the text of the objections)

2.1.2.1 If so, have the objecting States or international organizations expressed the intention that the objection should preclude the entry into force of the treaty between the author of the objection and the reserving State?

2.1.3 If there have been formal acceptances of or objections to the reservations mentioned in the replies to questions 1.2 and 1.4, were such acceptances or objections preceded or followed by diplomatic discussions or exchanges of notes between the two States, between the State and the international organization or between the State and the depositary? (If possible, please attach the text of the relevant documents)

2.1.3.1 Following such discussions or exchanges of notes, has the other State or the international organization concerned ever decided not to raise an objection which it had originally envisaged?

2.1.4 Has the interpretation or implementation of the reservations mentioned in the replies to questions 1.2 and 1.4 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

2.1.4.1 In particular, have those difficulties:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)

- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)

2.1.4.2 Has a judicial body or other national authority ruled on the meaning or effects of the reservations? (Please attach the text of the relevant decisions)

2.1.5 If any of the reservations mentioned in the reply to question 1.2 were formulated in relation to the constituent instrument of an international organization, were those reservations accepted by an organ of that organization? (Please attach the text of the relevant deliberations)

2.1.6 Has the withdrawal of a reservation formulated by the State (see reply to question 1.6.2) given rise to any particular difficulties? If so, what difficulties?

2.1.7 Have any of the objections mentioned in the reply to question 2.1.2 been withdrawn? (Please attach the text of the instruments of notification of the withdrawals)

2.1.7.1 If so, have the withdrawals given rise to any particular difficulties? What difficulties?

2.2 *Acceptance by the State of reservations formulated by another State or by an international organization and objection by the State to those reservations*

2.2.1 Has the State formally accepted any reservations formulated by another State or by an international organization? (Please list, and provide the text of, the formal acceptances)

2.2.1.1 In the absence of a formal acceptance, does silence on the part of the State imply that it accepts the reservation(s) in question?

2.2.2 Has the State made objections to any reservations formulated by another State or by an international organization? (Please list, and provide the text of, the objections)

2.2.2.1 What were the reasons for each of the objections:

(i) Political considerations? Were such considerations internal or international in nature?

(ii) Desire to ensure the integrity of the treaty?

(iii) Incompatibility of the reservation with the purpose and object of the treaty?

(iv) Other reasons?

2.2.2.2 At the internal level, which authority or authorities take(s) the decision to make objections to reservations formulated by other Contracting Parties?

2.2.2.3 Do objections to reservations appear in an official national publication?

2.2.2.4 How much time elapsed between the notification of the reservation and the formulation of the objections mentioned in the reply to question 2.2.2?

2.2.3 In formulating the objections mentioned in the reply to question 2.2.2, did the State express the intention that the objection should preclude the entry into force of the treaty between itself and the reserving State or international organization?

2.2.3.1 If so, what were the reasons for that position:

(i) Political considerations? Were such considerations internal or international in nature?

(ii) Desire to ensure the integrity of the treaty?

(iii) Incompatibility of the reservation with the purpose and object of the treaty?

(iv) Other reasons?

2.2.3.2 If not, what were the reasons for that position? And what effects did the objections have?

2.2.4 Were the formal acceptances or objections mentioned in the replies to questions 2.2.1 and 2.2.2 preceded or followed by diplomatic discussions or exchanges of notes with the reserving State or international organization or with the depositary of the treaty? (If possible, please attach the text of the relevant documents)

2.2.4.1 Following such negotiations or exchanges of notes, has the State ever modified, or decided not to raise, an objection which it had originally envisaged?

2.2.5 Has the interpretation or implementation of the objections mentioned in the reply to question 2.2.2 given rise to any particular difficulties in the application of the treaty? If so, what difficulties?

2.2.5.1 In particular, have those objections:

- Given rise to diplomatic protests? (If possible, please attach the text of the protests)
- Been examined by an international judicial body or a body monitoring the application of the treaty? (Please attach the text of the relevant decisions and/or opinions)

2.2.5.2 Has a judicial body or other national authority ruled on the meaning or effects of the objections? (Please attach the text of the relevant decisions)

2.2.6 Has the State withdrawn or modified any of the objections mentioned in the reply to question 2.2.2?

2.2.6.1 If so, which ones and why?

*[Sections III Interpretative Declarations and IV Succession of States omitted.]*

## V. PRACTICE OF THE STATE AS A DEPOSITARY

5.1 Is the State a depositary of multilateral treaties? (Please list the treaties)

5.2 In its capacity as depositary, has the State encountered any particular difficulties with regard to reservations, objections to reservations, interpretative declarations or responses to interpretative declarations? If so, what difficulties?

5.2.1 When such difficulties arose, did the State:

- Refer the problem to the Contracting Parties?
- Itself take a position with regard to the difficulties? (Please attach the relevant documents)

5.3 In particular, did problems arise in respect of the entry into force of the treaty because of the formulation of reservations or objections to reservations?

5.3.1 If so, how were such problems resolved? (Please attach the relevant documents)

5.4 In its capacity as depositary, has the State encountered any particular difficulties with regard to reservations, objections, interpretative declarations or responses to interpretative declarations, which arose in connection with one or more instances of succession of States? If so, what difficulties? (Please attach the relevant documents)

## VI. MISCELLANEOUS OBSERVATIONS

6.1 In the State's view, what are the main problems arising in connection with reservations to treaties that are not resolved, or not resolved satisfactorily, by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1969 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations?

6.2 Please add here any relevant information on the practice of the State relating to reservations to treaties which could not be included in the replies to the above questions.

## ANNEX IV

2007 QUESTIONS ON RESERVATIONS TO TREATIES FOR STATES MEMBERS  
UN Doc. A/62/10 (2007), pp. 10-11, paras. 23-25.

### CHAPTER III: SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

#### A. Reservations to Treaties

23. The Special Rapporteur on reservations to treaties proposes to complete his presentation of problems posed by the invalidity of reservations next year. With this in view, the Commission would welcome replies from States to the following questions:

- (a) What conclusions do States draw if a reservation is found to be invalid for any of the reasons listed in article 19 of the 1969 and 1986 Vienna Conventions? Do they consider that the State formulating the reservation is still bound by the treaty without being able to enjoy the benefit of the reservation? Or, conversely, do they believe that the acceptance of the reserving State is flawed and that that State cannot be considered to be bound by the treaty? Or do they favour a compromise solution and, if so, what is it?
- (b) Are the replies to the preceding questions based on a position of principle or are they based on practical considerations? Do they (or should they) vary according to whether the State has or has not formulated an objection to the reservation in question?
- (c) Do the replies to the above two sets of questions vary (or should they vary) according to the type of treaty concerned (bilateral or normative, human rights, environmental protection, codification, etc.)?
- (d) More specifically, State practice offers examples of objections that are intended to produce effects different from those provided for in article 21, paragraph 3 (objection with minimum effect), or article 20, paragraph 4(b) (maximum effect), of the Vienna Conventions, either because the objection State wishes to exclude from its treaty relations with the reserving State provisions that are not related to the reservation (intermediate effect), or because it wishes to render the reservation ineffective and considers the reserving State to be bound by the treaty as a whole and that the reservation thus has no effect (“super-maximum” effect). The Commission would welcome the views of States regarding these practices (irrespective of their own practice).

24. The Commission would note that it is aware of the relative complexity of the above questions, which are related to problems that are themselves highly complex and take into account a wide range of practice. The commission suggests that the replies to these questions be addressed to the Special Rapporteur in writing through the Secretariat. It would be particularly useful if the authors could include with their replies as precise a description as possible of the practice they themselves follow.



25. The Commission has noted that, in the main, the formulation of objections to reservations is practised by a relatively small number of States. It would thus be particularly useful if States that do not engage in this practice could transmit their views on these matters, which are fundamental to the topic of “Reservations to treaties”.

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