

RESERVATION TO A HUMAN RIGHT TREATTY

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Abstract

The many different constitutions, legal systems, cultures, languages and religions, and different national policies, of negotiating states pose problems for the successful negotiation of even a bilateral, let alone a multilateral treaty regime². Hence, a state may be willing to accept most of the provisions of a treaty, but it may, for various reasons, object to the some provisions of the treaty. In such cases states often make reservations when they become parties to a treaty.³

Reservations to treaties in general, and in particular to human rights treaties are one of the very few aspects of the law of treaties that have sparked intense discussions reflecting very conflicting views, both in the doctrine and practice of international law. Basically, the discussion on reservation of treaty tries to reconcile two opposite interest that are at stake.⁴ The first interest is desire that the convention to be ratified by the largest possible number of states.⁵ The other concern relates to the integrity of the convention: the same rule should apply to all parties.⁶

As far as human rights treaties are concerned, the matter is extremely complex. The complexity is the balance to be struck between the legitimate role of States to protect their sovereign interests and the legitimate role of the treaty bodies to promote the effective guarantee of human rights.⁷ As we all know, treaties are binding by virtue of the will of States to be bound by them.⁸ The rules applicable to

¹ Lecture at Debere Markos University Law School, Ethiopia

² Aust Anthony, hand book to international law Cambridge university press,2005, page 68

³ AKCHURST's 'modern introduction to international law' the seventh edition, published by Taylor and Francis e-library, 2000

⁴ M. FITZMAURICE, 'on the protection of human right, the Rome statute and reservation to multilateral treaties', Singapore Year Book of International Law and Contributors, page 134).

⁵ Law and practice relating to reservations to treaties, Extract from the Yearbook of the International Law Commission: - 1996, vol. II (1), A/CN.4/477 & Corr.1 & 2 and Add.1 & Corr.1 page 56.

⁶ year book of international law page 57, as cited from, Bastid, *Les traités dans la vie internationale: conclusions et effets*,pp.71–

⁷ Ibid

⁸ Id. at 58

reservations must therefore, on one hand, strike a dual balance between (a) the requirements of universality and integrity of the treaty; and (b) the freedom of consent of the reserving State.⁹

This article tries to approach, the question to reservations, particularly human rights treaties reservation and its effects. In doing so, section I analyzes a short overview of international practices on the issue of reservation prior to the Vienna convention on the law of treaty. In Part II the provisions of the Vienna convention on law of treaty that are relevant to the law of reservation are explored. Section III discusses issues on reservation to human right treaties. This is part heart of all the discussion. Inter alia, the writer thoroughly discuss questions such as ‘who shall be competent to determine validity of reservation to human right treaties and the legal effects of invalid reservations. Finally, Section IV explores the concluding thoughts and briefly pin points alternative frameworks with regard to reservation to human rights and legal effect of invalid reservations.

Key words: *Reservation, unanimity rule, human right treaty, invalid reservation, effect of reservation, competency of deciding reservation.*

⁹ Id .a page 59

PART ONE: INTRODUCTION

1.1.THE LAW OF RESERVATION TO A TREATY PRIOR TO THE VIENNA CONVENTION ON THE LAW OF TREATY

1.1.1. Unanimity Rule

The traditional rules applicable to reservations relied upon the requirement of unanimous consent among the other parties to a treaty. A reservation was only valid [if] it was accepted by all the contracting parties without exception.¹⁰ If the reservation was objected to by any party, it had to be withdrawn, or would prevent the reserving state from becoming a party to the treaty. On this basis, a reservation constituted a counteroffer that required a new acceptance, failing which the state making the counter offer had the option of withdrawing the reservation or refraining from becoming party to the treaty.¹¹ The validity of reservations was dependant on a subjective standard of opposability, by which the uniformity of obligations was maintained and the integrity of the treaty protected.

This system was merit full in preserving the integrity of the treaty and guarantying control by the States parties on the validity of reservations.¹² Nonetheless, it was a very inflexible rule, which

¹⁰ PIERRICK DEVIDAL , RESERVATIONS, HUMAN RIGHTS TREATIES IN THE 21ST CENTURY: FROM UNIVERSALITY TO INTEGRITY ,Under the Direction of Professor Gabriel M. Wilner, available <http://www.austlii.org/au/journals/AUYrBkIntLaw/1995/2.pdf> Page ,9)

¹¹ Nina Anderson, reservation and objection to multilateral treaties to human right, master thesis unpublished, 2001, page 9

¹² Commentary of Vienna convention on law of treaty volume1, excerpt from a book named introduction to modern international law, seventh edition by published in Tlor and Francis 2002 page ,410)

although securing the integrity of the treaty, did not attract wider participation of states.¹³ Hence, as pragmatic matter, the unanimity rule became increasingly unworkable owing to the rising number of states involved in treaty negotiations and the quest for universal ratification of important treaties.¹⁴

1.1.2. The Pan-American System

In the 1930's, the Pan-American Union broke the traditional obedience to the Unanimity rule by creating its own system governing the effects of reservations.¹⁵ The rules created provided another subjective system solely based on the independent acceptance of the reservation by each party to the treaty, and a reserving state could become a party to the convention, even though other parties objected to their reservations, as long as one other contracting state had accepted them.¹⁶ Thus, the Validity of a reservation was variable and could only be analyzed on a reciprocal basis.¹⁷ Unlike the former unanimity rule, the Pan-American system clearly protected state's sovereignty in preventing any reservation to have effect on an objecting state. It also provided for a large flexibility and created "possibilities of maximum participation."¹⁸

1.1.3. The Genocide Case

The confrontation between the unanimity rule and the flexible Pan- American system strongly arose within the Sixth Committee of the United Nations General Assembly which, along with the International Law Commission, was charged with the determination of the legal consequences of the multiple reservations to the Genocide Convention and its entry into force.¹⁹ Facing

¹³ FITZMAURICE, Supra note 5 at, page 135

¹⁴ Ryan Goodman, HUMAN RIGHTS TREATIES, INVALID RESERVATIONS, AND STATE CONSENT, , page 534 available at <http://www.unhchr.ch/pdf/report.pdf>.

¹⁵ Pierrick Devidal , Reservations: human right treaty in the 21st century from universality to integrity, 2002 unpublished , page 45 available at <http://www.austil.org/au/journal/AUrBr/Int'law/1195/2pdf>

¹⁶ INTER-AMERICAN JUDICIAL COMMITTEE, REPORTS ON THE JUDICIAL EFFECTS OF RESERVATIONSTO MULTILATERAL TREATIES 3, 1955, as quoted by pierrick at Id

¹⁷ Id .quoted from Ruda, at 121

¹⁸ Pierrick Devidal supra note 14 at 16

¹⁹ Ibid at page 14

“profound divergence of Views” within the Committee,²⁰ the General Assembly finally adopted a resolution requesting an advisory opinion of the ICJ.

Asked by Resolution 478 (V) of 16 November 1950 whether a State which has formulated a reservation to the Convention on Genocide can 'be regarded as being a party to the 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,²¹ the Court responded in the affirmative with a majority of seven votes against five,²² if the reservation is compatible with the object and purpose of the Convention. The Court said that if it finds the reservation to be incompatible with the object and purpose of the treaty, the objecting state may consider that the reserving state is not a party²³. Thus, the world court introduced the now famous “compatibility test,” which permits a reserving state to become a party to a treaty, notwithstanding objections by other parties, as long as the reservation was “compatible with the object and purpose of the convention²⁴.

In sum, while searching for the reconciliation between universal acceptance and treaty integrity, the ICJ created a presumption favoring ratification and wide participation to the treaty but also instituted an objective test of ‘compatibility’ designed to protect the integrity of the treaty on the basis of its object and purpose.²⁵

PART TWO: THE VIENNA CONVENTION ON THE LAW OF TREATY AND ITS AMBIGUITY ON RESERVATIONS

2.1. Meaning of Reservation

The relevant provisions concerning to reservations and objections to these reservations can be found in the Articles 2 and 19-23 of the Vienna Convention on the Law of Treaty (hereinafter called VCLT).

²⁰ Liang, *Notes on Legal Questions Concerning the United Nations*, 46 . J. INT’L L.

²¹ *ICJ Reports* (1951), P 29, available at <http://www.venus.unive.it/matdid.php>

²² *Ibid* at page 27

²³ Niina Anderson, reservation and objection to multilateral treaties to human right, master thesis unpublished, 2001, page,10

²⁴ Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human, cited by Pierricl*

²⁵ *Supra* note 9 page 15

The term reservation is defined under Article 2, paragraph. 1 (d) of the VCLT, which reads:

“Reservation” means 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.”

The wording of this provision provides three basic points. In the first place, reservation is a unilateral statement and it seems a statement formulated jointly is not a reservation. With regarding this issue this writer believes nothing would stop states from formulating a reservation jointly as long as they deemed it necessary. Hence, when two or more state formulates reservation jointly it may be considered as a unilateral statement falling under article 2 paragraph 1(d).

The other point to note about this definition is that a distinction between an exclusionary reservation and a modifying reservation has been put. State can formulate a statement either to exclude or to modify the legal effect of a certain provisions of the treaty. The former purports to exclude, in whole or in part, the operation of a particular treaty obligation or provision. Examples of this type are provided by the reservations made by various countries, principally of Eastern Europe to the Genocide Convention 1948, excluding the jurisdiction of the International Court as provided for in Article IX.²⁶ A modifying reservation, on the other hand, is one which is designed to qualify or alter the meaning, and therefore the application, of a treaty or of any of its provisions between the reserving State and other parties.

The last point is regard to timing in which the convention comes up with a number of options. A State may, when signing, ratifying, accepting, and approving or acceding to a treaty, formulate a reservation. However, before 1951, a reservation was only effective if it had been formulated usually before signature.²⁷

2.2. Permissible Reservations in the Vienna Convention on the Law to Treaty

²⁶D W Greig ,Reservation Equity as a balancing factor, Australia year book of international law page 29, available at <http://www.austill.org/journal//AUyrB/int'l law/1995/>

²⁷ Anthony Aust, supra note 1 at 157

Under the Vienna convention on the law of treaty, reservation to a treaty is a rule. Article 19 of the Convention allows a State to formulate a reservation "when signing, ratifying, accepting, approving, or acceding to a treaty".²⁸

However, there are three main exceptions to this rule. The first is when is prohibited by the treaty, article 19(a).The secondly is when the treaty provides that only specified reservations, which do not include the reservation in question article 19(b). In this case all other reservation which is not specifically provided considered as prohibited. The third limitation lies where the reservation is incompatible with the object and purpose of the treaty article 19(1) (c) of the VCLT.

Where the treaty is silent on the question of reservations, the permissibility issue becomes difficult. The difficult question, on which the Vienna Convention barely sheds any light, is to know whether the validity of the reservations is an objective question or whether it resorts under the subjective appreciation of the other States parties.²⁹ There are two opposing arguments regarding this matter. The supporters of the admissibility thesis argued that in the silence of treaty states are granted to submit their reservation to the parties concerned provided that the reservation does not defeat the purpose and objet of treaty. They argued, if this way had been blocked, in particular by interpreting silence of a treaty as being decision against the admissibility of reservation, the unanimity rule would have been reintroduced through the back of the door.³⁰ The point is expressed in the following terms by Sir Derek Bowett:

*The issue of permissibility is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether as matter of policy, other Parties find the reservations acceptable or not. In other words, when a treaty is silent about permissibility of reservation state can formulate reservation as of right. And other states do not have the right to confirm such reservation.*³¹

²⁸ Article 19 of the VCLT

²⁹ Supra note 11 at 426

³⁰ Christian Tomuschat, 'admissibility and Legal Effects of Reservations to Multilateral Treaties', available at <http://www.zaervy>.

³¹ D. W. Bowerr, 'Reservations to Non-Restricted Multilateral Treaties', BYIL, 1976-77, vol. 48, pp 67, 88

On the contrary side, however, opposability school considers that in the system retained by the Vienna Convention, the validity of a reservation depends solely on the acceptance of the reservation by another contracting State. Consequently, Article 19 was described as a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations. Therefore, when a treaty is silent on the question of reservation, a state can accept or reject other's act of reservation. For the advocates of the opposability thesis, the permissibility of a reservation depends on whether the reservation is or is not accepted by another State. This approach is reflected in states practices. For example, the restatement of the Foreign Relations Law of the United States expressly states that "[t]he fact that a reservation is permissible under [Article 19] does not imply that other states are required to accept it, or to accept the reserving state as a party to the treaty."³² Quite clearly, the Restatement expresses the view that, "states could reject even a permissible reservation let alone in the silence of treaty. It logically follows from this statement that the ground of objection is not confined to matters specified under article 19 of the Vienna convention on the law of treaty.

2.3. Prohibited Reservation

Though the principle is to formulate a reservation belongs to in virtue of state sovereignty, this principle is not without exception. For various reasons the principle to make reservation is prohibited. From the reading of Vienna convention, there are about four possibilities whereby the right to make reservation may be limited.

Firstly, the right is procedurally limited in a sense that reservation can only occur at the time of signing, ratifying, acceding to or accepting a treaty, article 2(1) (d). Any other reservation formulated out of this time limit is deemed as prohibited by virtue of article 2(1) (d) of the VCLT.

Secondly, a reservation may be explicitly prohibited as provided under Article 19(a) of the text of the Vienna convention on the law of treaty. For instance, Article 120 of the Rome Statute of the International Criminal Court of 1998 stipulates: '*No reservations may be made to this Statute.*'

³² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)

The third one relates to implicit prohibition to reservations, the permissibility of specific reservation. The treaty may provide that only specific reservation could be made, which do not include the reservation in question, article 19(b). In those cases where the treaty itself permits certain specifies reservations, or a class of reservations, to *be* made, there is a presumption that any other reservations are excluded and cannot be accepted.³³

Lastly, any form of reservation which is incompatible with object and purpose of treaty is prohibited. The object and purpose test as codified in article 19(c) of the Vienna Convention is only a safety valve, a last resort solution to prohibit reservation to multilateral treaties.³⁴ However, there are principal difficulties with Article19(c).³⁵ Some of the ambiguities are stated herein in blow:-

- i. The primary ambiguity is that of identifying the term object and purpose of a treaty against which the assessment of compatibility is to be made,
- i. Who Determines Whether a reservation is incompatible with the object and purpose of a treaty? and;
- ii. What consequences follow from an alleged failure to comply with the requirement?

There is no consensus among commentators regarding these concerns. For instance, concerning the first question, Waldock, who can without exaggeration be considered as the ‘inventor’ or at least, the midwife to reservation to treaty in Vienna convention failed to come up with precise definition of the term.³⁶ But we may get of little help from the opinion of ICJ on reservation to the genocide convention. Although the court did not define the very term of object and purpose of treaty, it pointed out elements from which the notion of object and purpose of treaty could be deduced.³⁷ Hence, as per the opinion of the court, one can discover the object and purpose of treaty:

- ✓ From its title ;
- ✓ From its preamble ;

³³ First Report international law commission (NCNA/I01), para. 95.)

³⁴ PIERRICK DEVIDAL, *supra* note 9 at 21

³⁵ *D W Greig, supra note 25 at 66*

³⁶ *Supra* note 11 at 448

³⁷ *Id*

- ✓ From an Article placed at the head of the treaty which must be regarded as fixing an objective, in the light of which the other treaty provisions are to be interpreted and applied;
- ✓ From a treaty Article which shows the major concern of each Contracting Party at the time of conclusion of the treaty;
- ✓ From its *travaux préparatoires* or
- ✓ From its general architecture

Besides, in its general comment No.24 (52) the human Committee stated that reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Accordingly, provisions in the Covenant that represent customary international law may not be the subject of reservations.³⁸Therefore, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment and other rights which attain the status of customary international law. From the general comment it logically follows that any reservation which is contrary to customary international law is deemed to be incompatible with object and purpose of treaty.³⁹

Here, the writer would argue that, given the diversity of situations and their susceptibility to change over time, it seems impossible to devise a single set of methods for determining the object and purpose of a treaty, and admittedly a certain amount of subjectivity is inevitable.

2.4. Acceptance of or Objection to Reservations, Article 20 of VCLT

Reservations may be accepted, according to the Vienna Convention, in the following

Ways:

- ❖ In advance, by the terms of the treaty itself, in accordance with Article 20(1)⁴⁰;
- ❖ Where the reservation is accepted by all parties, article 20(2). We may take Antarctic Treaty 1959 as an example, which had only fifteen negotiating states and created a

³⁸ The General comment of the human right committee, on the issue of reservation to human right treaty .The the committee is established after the conclusion of international covenant on civil and political right. HRC comment is available at <http://www.unhchr.ch/tbs/doc.nsf>

³⁹ Id

⁴⁰ A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides, article 20(1) of the Vienna convention

- special regime, for which the integrity of the Treaty is vital⁴¹. In this case the former unanimity principle will be applicable;
- ❖ If the treaty is the constitution of an international organization the reservation to such treaty requires acceptance of the organ concerned, Article 20(3) or;
 - ❖ With tacit or implied consent under Article 20(5).

The dispute that the convention left unanswered is the question of whether prohibited reservation under Article 19(a), (b) or (c) are susceptible to acceptance as per article 20. For instance, is it possible for states to accept impermissible reservation, or do they have to object to impermissible reservations?

Although some argued that reservations can only be accepted if they are permissible and that the concept of acceptability is distinct from that of permissibility, these contentions are flawed for a number of reasons.⁴² Consequently, there are two different “schools” with different views on the on acceptance of impermissible reservations.⁴³ The first group bases their argument on the right of the sovereign state to accept or object to the reservation.⁴⁴ This line of argumentation leads to the fact that no difference is made in the view of permissible and impermissible reservations, concerning acceptance of reservation. A state can, as it sees fit, accept an impermissible reservation just as it can object to a permissible reservation⁴⁵. Consequently, impermissible under article 19 would only play an inspirational role⁴⁶ and are not mandatory. Thus, it appears that states are told on the one hand that they are forbidden from making certain reservations and on the other hand it appears also that the prohibition to have effect depends upon the reaction of the other contracting parties, who are free to accept or reject any reservation regardless of its content.

Moreover, considering the lack of any independent adjudication mechanism in the Vienna Convention as it stands now, the objective standard set forth in article 19 cannot be used

⁴¹ DW Geig supra note 11 at 119

⁴² Id

⁴³ Nina supra note 10 at 22

⁴⁴ Id

⁴⁵ Id page 23

⁴⁶ Pierrick Devisdal supra note 14 at 29 as quoted from Kyongun Koh, at 98

“objectively.” Thus, states make the determination of the permissibility subjectively, and the practicability of a one-tier test (tests attached to article 19) is therefore questionable.⁴⁷ This flexible system is very convenient for states as it protect consent of state and its sovereignty. However, this line of interpretation would affect integrity of treaties. Especially with respect to human rights treaties, the system is obsolete and inadequate. As I will discuss in part III of this article, this argument is against integrity of human right treaty. And state should not be given a chance to accept impermissible reservation as they wish so. They should rather reject reservations which are impermissible as per article 19 of the VCLT.

Other school of thought, whom the writer belongs to, argued that reservations, which are deemed impermissible according to article 19 VCLT, are also invalid and cannot be accepted. According to this view incompatibility with the object and purpose of the treaty vitiates the reservation, which is “immediately and incurably invalid reservations.”⁴⁸ This idea is based on the Advisory Opinion of the ICJ in the Genocide Conventions Case, meaning that the state’s right to formulate reservations is restricted to the reservations that are compatible with the object and purpose of the treaty.⁴⁹ According to the opinion of the court, an acceptance by other parties to a prohibited reservation “is a matter of policy”⁵⁰ and does not play any role in the validity of the reservation. Support for this argument may also be found in the commentary of the ILC in the draft article on the law of treaty in which the ILC pointed out that article 16 on the draft (article 19 of the Vienna convention) has to be read within close conjunction with the provision of article 17(article 20 of the VCLT) regarding acceptance of and objection to reservation.⁵¹ Consequently, reservations, which are directly or indirectly prohibited under article 19 VCLT, cannot be accepted by the other state parties.

2.5. Legal effect of Reservation to Treaties

2.5.1. Legal Effect of Admissible Reservation

The legal effect of admissible reservation is clearly pointed out under article 21 of the VCLT.

⁴⁷ Peirrick, supra note 14 at 28

⁴⁸ Id , page 27 as quoted from, Kyongun Koh,

⁴⁹ Nina supra note 10 at 27

⁵⁰ Bowett supra note 30 at 88

⁵¹ Yearbook of international law commission volume 2,(1966) 270

The article underlines the concept of reciprocity where by the reservation will modify relationship between the reserving and other state to the extent of reservation. The effect is limited to a reciprocal degree, because it “does not modify the provisions of the treaty for the other parties to the treaty *inter se*.”⁵²

Articles 21 (3) has described objections not precluding the entry into force of the treaty. This provision rendered “the difference between acceptance and objection rather obscure.”⁵³ Indeed, “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 does not apply as between the two states to the extent of the reservation.” Thus, the objected reservation has the same effect with accepted one.

2.5.2. Legal Effect of Inadmissible Reservation

Once it is admitted that the three paragraphs of Article 19 have the same function and that a State cannot formulate a reservation which goes against these provisions, the question arises of what happens if a State formulates a reservation in spite of these prohibitions. Neither Article 19 nor any other provision of the Vienna Convention gives a clear answer to this question.⁵⁴

This gap to the Vienna convention gives rise to different argument with regard to the effect of inadmissible reservation.⁵⁵ Generally, there would seem to be two main possibilities as per the commentators view.⁵⁶

The first commentators estimate that a reservation formulated in spite of a conventional prohibition is null and void,⁵⁷ and assume that its formulation entails the invalidity of the expression of consent to being bound.⁵⁸ The supporters of this view go on saying that if a State

⁵² Article 21(2) of the VCLT

⁵³ Pierrick Devisdal *supra* note 14 at 26

⁵⁴ Vienna convention commentary *supra* note 11 at 442

⁵⁵ Konstantin Korckelia ,the new challenge to the regime of reservation under international covenant on civil and political right ,European Journal of international law volume 1 no.2,page 452 available at <http://www.ejil.org/pdfs/13/2/479.pdf>

⁵⁶ Reservation as a balancing factor Australia year book of international law page ,52 available at <http://www.austlii.org/au/journals/AUYrBkIntLaw/1995/2.pdf>

⁵⁷ See eg D. W. Bowett, *supra* n 138, p 84. For a more nuanced analysis, see D. W. Greig, *supra* n 114, pp 56-7. 267 as quoted by the commentary of the Vienna convention.

⁵⁸ DW. Bowett, *ibid*; G. Gaja, *supra* n 139, p 314. See also C. Tomuschat, *supra* n 22, p 467; see the references to the debates of the *Ilc* *ibid*, page 12.

does reservation regardless of prohibition, the reservation cannot produce the legal effects which Article 21 clearly subordinates to its 'establishment' 'in accordance with Articles 19.⁵⁹

On the other hand there are commentators who argued based on severability doctrine. As per the view of this commentator, the reservation is invalid but it can be severed from the act of acceptance in a sense that reserving State becoming a party to the treaty including the provision to which the invalid reservation related. The proponents of this argument takes the human right committee General comment No.24 (52) as a point of reference. The committee pointed out that the normal consequence of inadmissible or impermissible reservation is not that the covenant will not be ineffective at all for reserving party.⁶⁰ Instead such reservation will general be severable in a sense that the convention will be operative for reserving party without the benefit of reservation.⁶¹ But this approach of the committee is criticized saying that it is at odd with established legal practice, against the consent of state and its sovereignty.

PART THREE: RESERVATION TO HUMAN RIGHT TREATY

The Vienna Convention is for all treaties, so it is applicable to the human rights treaties as well. However, human rights treaties have some basic features that differentiate it from the others treaties.

Due to its unique nature, it appears that the present system of reservations is inadequate for human rights treaty.⁶²

3.1. Why a Special Organ is needed to determine the Validity of Reservations to Human Right Treaty?

The following reason can be mentioned to show inadequacy Vienna convention and thereby the need to have special organ. First of all, human rights treaties do not create reciprocal relationships between states parties, but install some obligations upon the states in the interest of individuals, in order to create an objective regime of protection of human rights. In other words

⁵⁹ Konstantin Korlkelia, supra note 55 at 46

⁶⁰ Ibid

⁶¹ Ibid

⁶² Pierrick Devisdal, supra note 14 at 46

individuals are the recipients of duties imposed on states.⁶³ The non reciprocity of human right is also emphasized by the VCLT itself when it deals with the consequence of breach to human right treaties. The fact that a breach of human right treaties does not make possible for other state to do likewise is confirmed in Article 60(5) of the VCLT. This article clearly excluded the possibility of suspension or termination of a treaty humanitarian character by other states as a result of a material breach of a treaty by one of the parties. The second reason is human right treaties are distinguished from contractual treaty agreement because they deal with general obligation of international community as a whole, not with the “reciprocal exchange of rights for the mutual benefit of the contracting states. In human rights treaties, states remain the subject of the agreements, but are not the beneficiaries anymore at least directly. Thirdly, States are influenced by political or extralegal motives in accepting of or objecting to reservations. Indeed, some states are protected against objections to their reservations by their economic power or political influence.⁶⁴ Fourthly, the need for the integrity of human right, the integrity of human rights treaties is essential to their existence. The ICJ has rightly explained that the goal of integrity should not be sacrificed for the sake of universality.⁶⁵ In human right treaty it is nonsense to have a great participation parties with lesser integrity. It is also impracticable to pretend that absolute universal participation to international human rights agreements will be obtained on the basis of a maximum flexible use of reservations. Even some, Commentators have been arguing that the conclusion that flexible system of reservation is as a way for universal adherence lacks statistical confirmation.⁶⁶ The supporter of this view adduced ICCPR as an example. ICCPR has applied the flexible system of the Vienna Convention, however, it has experienced, 44 reservations.⁶⁷ Hence, if integrity is this much vital reservation to human right treaty should be determine by an independent arbiter.

⁶³ Nurullah Yamali ,judge, the adequacy of human right treaty reservation, page,7 available at <http://www.justice.gov.tr/e-journal/pdf/LW7090.pdf>

⁶³ The Effect of Reservations to human right treaty, Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, Judgments and Opinions, No. 2, para.14 (1982.)

⁶⁴ Pierrick Davidal, supra note 14. The reservations of the United States are usually far reaching enough to be questionable under the compatibility test, however, they are rarely objected, and if so, not on compatibility grounds. For instance, only 11 States objected to the U.S. reservations on the International Covenant on Civil and Political Rights, but none invoked the compatibility test to prevent the entry into force of the Covenant for the United State.

⁶⁵ ICJ advisory opinion on reservation of the convention on prevention and punishment of crime of genocide

⁶⁶ OSCAR SCHACHTER, M. NAWAZ & J. FRIED, TOWARDS WIDER ACCEPTANCE OF UN TREATIES, AUNITAR STUDY, 147 (1971), in LIJNZAAD, at 105..

⁶⁷ William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States still a party?*,21 BROOK. J. INT’L L. 277, 286-296 (1995).

3.2. Who Shall Determine Validity of Reservation to Human Right Treaty?

In treaty practice two conflicting view may be identified. On one hand it is maintained that, as consent remains the governing principles of existing regime of reservation, state parties to human right treaty have the discretionary power to determine the admissibility of reservation to treaty.

On the other hand, it is argued that because of the special nature of human right treaty, an independent organ is needed to decide on validity of reservation to human right.⁶⁸ Then the difficult question will be which organ shall decide on the validity of a reservation to human right treaty. There is no agreement to this issue as well. The following can be mentioned as prevailing world practice regarding competency to determine validity to human right:

3.2.1. Experience of the former European Commission on Human Right

The commission of European human right, in its decision in the *Temeltasch V.s Switzerland case* in 1982⁶⁹, considered reservation made invalid.⁷⁰ The issue was whether Switzerland could invoke its declaration to Article (6(3) (e) of EHRC to remove the obligation to provide free assistance of interpreter if a person charged with a criminal offence cannot understand or speak the language used in the court.⁷¹ The court without hesitation alleged its competency to decide on the validity of reservation made by Switzerland and thereby rendered Switzerland's reservation invalid. The strength of this precedent was illustrated six years later, when the European Court of Human Rights itself embraced the controversial issue of reservations and followed the path opened by the Commission. In the case before the European court of human right, Mrs. Belilos had been charged with participation to an illegal demonstration and condemned to pay a fine by an administrative tribunal. She argued that her right to be judged by a judicial tribunal, according to Article 6 of the European Convention, had been violated by Swiss government. However, the Swiss government objected to her complaint arguing that it entered a valid reservation to article

⁶⁸ ,supra note 55 at 337

⁶⁹ The case concerned a Dutch citizen of Turkish origins who has been arrested for drug possession and later released after acquittal by the Swiss court. Mr. Temeltasch was however requested to pay the cost of the remuneration of the interpreter who assisted him during the trial, and he argued that this was in contradiction with article 6(3)(c) of the European

⁷⁰ *Temeltasch Vs Switzerland* (1982) DR 31 120

⁷¹ Konstantin kolrlkelia quoted from Mac Donald , reservation under European convention on human right ,21 *Revue belge de deroit international*(1988),429 at 435-436

6, releasing it from the obligation to provide more than an administrative adjudication to certain criminal accusations. In its decision, the Court affirmed its competence to review the legality of the Swiss reservation, and declared it invalid.⁷² Both decisions have clearly diverged from the rule of the Vienna convention on the law of treaties which provides that state individually determine permissibility and validity of reservation.

3.2.2. Human Right Committee Practice, General Comment NO.24(52)

The most relevant practice which illustrate that treaty bodies have the appropriate competence and a functional jurisdiction to deal with reservations issues is that of the Human Rights Committee⁷³ (hereinafter HRC). In its general comment No.24 (52), the human right committee affirmed its sole competence to determine the legality of reservations to the ICCPR and attempted to create a new reservation regime for human rights treaties. The committee comes to this conclusion basing on special nature of human right treaty. In the view of the committee, because of special characteristics such as human right treaties; it is not safe to give power for member state to determine on the effect of reservation. The committee further pointed out that special status of treaty body's members; their various national, cultural, religious and professional backgrounds combined with their singular independence are all advantages that give these special organs a very unique competence to deal with reservations issues.

Although the human right committee in its general committee No.24 states that it falls to the committee to determine the admissibility of reservation, it is not expressly stated whether the determination of admissibility will binding on a reserving state.⁷⁴ Pertaining to this point, the committee suggested that if the state parties do not follow the view of the human right with regard to reservation, the committee may bring the matter to the UN general assembly, as it does in the case of failure by the state to submit state report under Article 40 of the covenant.⁷⁵ Be

⁷² Belilos case, April 29 1988, 132 Eur.Ct.H.R. (ser.A) (1988)

⁷³ The Human Rights Committee is the supervisory body of the International Covenant on Civil and Political Rights, ICCPR and was established after the adoption of the Covenant. The Committee is composed of 18 members, elected by the state parties, but serving in their individual capacity, not as government representatives.

⁷⁴ Ando, Reservation to multilateral treaties the general comment on human right committee and the critique of the comment , 1998 at 177 as cited by Konstantin on page 456.

⁷⁵ Cameron and Horn, "Reservation to European convention on human right" the Belilo case, GYIL (1990) , 69 at 96 cited by Konstantin on page 456 Cameron and Horn, "Reservation to European convention on human right" the Belilo case, GYIL (1990) 69 at 96 cited by Konstantin on page 456 .

that as it may, the committee has introduced a new system of determination of admissibility of reservation to human right which departs from the rule envisioned under Vienna convention law of treaty i.e. determination by the separate committee.

3.3. The consequences of Invalid Reservation to Human Right Treaty

Once the competent body to determine the validity reservation has indentified, the debate with reservation of human right is not over. Continuing debate in international human rights law concerns the result of invalid reservations to human right treaties.⁷⁶ Indeed, the Vienna Convention is silent in the issue of the consequences of impermissible reservations – it neither denies nor supports the severability doctrine.⁷⁷

There seems different solution to this bottleneck. The first solution consist to consider the incompatible reservation as void, and to regard the reserving state as bound by the treaty, with the exception of the disposition to which the invalid reservation was related to. However, this solution appears implausible. Under this option, the state would remain in the same position, and the reservation would be given full effect, notwithstanding its illegality. It also affects the integrity of treaty. Simply speaking, reservations that are apparently incompatible with object and purpose of treaty have been given effect. As a result I can argue that this option is not viable under current international law.

Secondly, the invalidity of the reservation affects the ratification of the treaty as a whole, and therefore, the reserving state is not a party to the treaty anymore. This seems more appropriate solution to invalid reservation. Because if a reservation is prohibited alleging to be contradictory with object and purpose of treaty, it is fair to restrict reserving from being a party to a treaty up until the later modifies or withdraw invalid reservations.

Finally, the invalid reservation is separated, or severed, from the instrument of ratification, and the state remain bound by the treaty as a whole, without the benefit of the reservation. In its

⁷⁶ Ryan Goodman, HUMAN RIGHTS TREATIES, INVALID RESERVATIONS, AND STATE CONSENT, THE AMERICAN JOURNAL OF INTERNATIONAL LAW [Vol. 96:531, available at page 531] <http://www.unhchr.ch/pdf/report.pdf>

⁷⁷ Martin Scheinin, Reservations to ICCPR and Its Optional Protocols – Reflections on State Practice (page 7) available at <http://www.article19.org/data/files/pdfs/conferences/iccpr-links-between>),

General Comment 24(52), the Human Rights Committee adopted the severability option. For the HRC, “the normal consequence of an invalid reservation is not that the Covenant will not be ineffective at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.⁷⁸ Practically, however, so far the HRC has abstained from severing any reservation, even the reservations that he has found incompatible with the object and purpose of the ICCPR.⁷⁹ The explanation is simple: the decisions of the HRC and other human rights treaty bodies have no binding authority.⁸⁰

State practice seems also to represent severability approach.⁸¹ For instance, Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway and Spain objected to at least some of the reservations made by USA as being incompatible with the object and purpose of the ICCPR but stating that the objection did not preclude the entry into force of the ICCPR between the reserving and the objecting state.⁸² They said that, although their objections do not preclude the entry into force of the Convention between them and the reserving state, it would do so without the latter benefiting from the reservation. The objections that in the clearest way spelled out the idea of severability were those by France and Italy:

France and Italy argued: “*This United States reservation [to article 6, paragraph 5] is not valid, inasmuch as it is incompatible with the object and purpose of the Convention. Such objection does not constitute an obstacle to the entry into force of the Covenant between France and the United States.*”⁸³

Some of the objections made *subsequent* to the adoption of the severability doctrine by the Human Rights Committee in its General Comment No. 24 in 1994, have been even more explicit. As an example, an objection in respect of reservations by Turkey can be quoted:

⁷⁸ General Comment 24, at paragraph 18 available at <http://www.unhchr.ch/tbs/doc.nsf>

⁷⁹ Concluding observations of the Human Rights Committee: United States of America reservation to ICCPR/C/Add.50; A/50/40, 3 October 1995, at para.279

⁸⁰ Ibid

⁸¹ Martin Scheinin, *Supra* note 77 at page,4

⁸² Magnusson, L., *Elements of Nordic Practice 1997*: Sweden, NJIL, Vol. 67, 1998, p.343)

⁸³ *Supra* note 77 at page 5

Sweden argued that: “This objection shall not preclude the entry into force of the Covenant between the Republic of Turkey and Sweden. The Covenant enters into force in its entirety between the two States, without the Republic of Turkey benefiting from its reservations.”⁸⁴

Alike of the above proposal this severability doctrine is not also free from criticisms. For one thing it mainly affects the most important principles of international law, state consent.

Under the general maxim ‘*pacta sunt servanda*’, a state is presumed to be bound only by what it has agreed to. By formulation of reservation, states are showing absence of consent to a particular provision(s). Thus, applying severability is in contradiction with the principle of state consent because a state ends up being bound by a disposition of a treaty that it has especially rejected.⁸⁵ Under the text of Vienna Convention on the law of treaty, the will of state is the superior element of treaty law which has a consensual nature.⁸⁶ Therefore, it should not suffer contradictory presumptions such as severability doctrine. On the other hand states might simply refrain from becoming a party to human rights treaty regimes with harsher reservations policies.

⁸⁴ Ibid

⁸⁵ Nina supra note 48 at 456

⁸⁶ Article 11 of Vienna convention

PART FOUR: CONCLUSIONS AND THE WAY FORWARDS

Having discussed its historical account, through discussion on Vienna's convention on reservation regime, different case laws and state practice it is pretty clear that Reservation to human right treaty is a necessary evil. All in all the following conclusion may be drawn from the discussion of this paper:

The traditional rules applicable to reservations relied upon the requirement of unanimous consent among the other parties to the treaty. Later on the Pan-American Union made paradigm shift from unanimity rule by creating its own system governing the effects of reservations, reciprocity rule. The Vienna convention is found to be ambiguous to regulate reservation. The convention gives status of reservation only to unilateral statements. But, the writer strongly believes that two or more states can formulate reservation jointly and this form of statement should be given the status of reservation. If the Vienna Convention is to be amended, considerations need to be given to clarifying the consequences of an infringement of Article 19. As a solution this writer proposes that any acceptance by other states to prohibited reservation under article 19 should not be given effect. Failures to comply with these provisions automatically invalidate reservation. Other states shall not be given the chance to accept reservation which has already been prohibited explicitly.⁸⁷

The writer is also of the opinion that the tacit consent rule of article 20(5) needs to be amended. The suggestion is based on the idea that States should play a more active role with the preservation of the integrity of the treaty. Hence, the period of 12 month limit must be replaced by 'a reasonable period of time'. Because, it is unlikely that small or developing countries will ever be able to "watch the clock" and respect the deadline placed in 20(5). A delayed reaction may be made by third world countries due to lack of staff with the expertise to deal with such arcane matters.⁸⁸

⁸⁷ Supra note 56 at page 156

⁸⁸ Ibid

In sum, as long as the reacting State can provide a reasonable excuse for its delay, and the reserving State is not inequitably disadvantaged by the delay, Article 20(5) should not be treated as preventing an objection being raised at a much later stage than that envisaged by that provision.

The conclusion resulting from the preceding remarks also emphasizes that competency to determine the compatibility or other wise of reservation with object and purpose of human right treaty should not rely on states. Though various solutions can be forwarded, none of them would reconcile the interest of state sovereignty and the need to have integrated human right treaty law. At this juncture, this writer would argue that the functional justification of human right committee to determine the compatibility of reservation with object and purpose of treaty is convincing and it is recommended to hand the “compatibility test” over to the supervisory organs in order to get a fair and objective judgment of the validity of the reservation. Therefore, at regional level, European court of human right (ECHR), the Inter-American Court of Human Rights and the African Commission on Human Rights are best suited to deal with the issue of reservation to human right treaty.⁸⁹ At the international level the same power must be given to human right committees. For example, the Covenant on Civil and Political Rights has created the Human Rights Committee (article 28 of ICCPR) and so did the Covenant on Economic, Social and Cultural Rights, (Article 16 ICSECR) and these organs shall take the task to determine reservations to human right treaty. In doing so, the writer knows there are of course some practical difficulties with the suggested change on the consent and sovereignty of states. To reconcile this difficulty the function of the treaty supervisory organ should not go beyond determination of the compatibility of reservation with object and purpose of the human right treaty. As rightly pointed out by human right committee in its general comment the consequence of inadmissible reservation should be determine by the state concerned.

Regarding the consequence invalid reservation to human right treaty, as consent remains the fundamental principle of international law, state concerned should have the option either to withdraw an incompatible reservation, to modify it in order to make it compatible with object and purpose of covenant, or withdraw from participation of the covenant. But, in case failures by reserving state, the treaty supervisory organ should be able to adopt a final decision on the consequence of invalid reservation. In sum, the writer proposes that states, in order to achieve a better and more consistent approach towards reservations, give up some of their sovereignty and give this power to the supervisory bodies of the treaties. The suggestion made implies that the compatibility test will be better performed by an independent and autonomous monitoring body than by the state parties.

⁸⁹ Id at 73

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