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Reservations and Objections
to Multilateral Treaties on
Human Rights

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Summary

Treaties are the most important source of international law, but treaties are only binding when in force, and only with respect to the nations that have expressly agreed to become parties to them. The Vienna Convention on the Law of Treaties, from 1969, is the "treaty on treaties". The rules on reservations in the Vienna Convention, articles 19 to 23, govern the situation where provisions on reservations in a particular treaty are left out.

Prior to the Vienna Convention, the rule concerning reservations in international practice was that unanimous consent of the other state parties was a requirement for admitting a reservation. In the Genocide Convention case, the ICJ, in its Advisory Opinion, introduced the "object and purpose" test, or the compatibility test, to be used by the other state parties when assessing the admissibility of reservations. If a reservation is incompatible with the object and purpose of the treaty, it is inadmissible, and states are not allowed to lodge such a reservation. The compatibility test found its way into the Vienna Convention, and is regulated in article 19(c). Article 20.4(b) stipulates that the general rule is that an objection to a reservation does not preclude the entry into force of the treaty between the reserving and the objecting states. Such preclusion requires a definitely expressed intention by the objecting state.

Critical voices have been raised, claiming that the objectivity is impaired when the compatibility test is performed by the individual state parties, who might have, besides the legal, also extralegal considerations in mind when deciding on the admissibility of a reservation. The critics have furthermore stressed their disapproval with the fact that an objection as a general rule has the same legal effect as accepting a reservation, i.e. establishment of treaty relations.

International law, and treaty law as part of such law, is in constant progressive development. New trends have occurred in recent practice. An example of such a trend is that certain states object without allowing the reserving state to benefit from its reservation. This new practice is called the Nordic "No Benefit" Approach and appears to be an inspiring and hopefully an effective method to re-open the discussion on inadmissible reservations.

Universality and integrity are important goals, but seem to be interrelated in an unfriendly balance, in which achieving one is necessarily at the expense of the other. It is important to emphasise that reservations are a natural part of the treaty-making process. Drafting of the instruments under the auspices of the United Nations takes place on the basis of consensus. Occasionally states may not want to disagree with the final result, in spite of disagreeing with a particular provision. Reservations are a reaction to drafting based on the political wishes of majority and compromising. Another way of expressing this is to say that

reservations are the price to be paid for striving for universality, in the sense of widespread participation.

Ideas that have been articulated in the debate suggest making the compatibility test a task for the monitoring bodies, in order to achieve more certainty in the outcome of the test. The by the present author proposed changes were inspired by this thought, and would result in a tilt of the balance in favour of the integrity of the treaty text.

Preface

The choice of a topic for this paper was not difficult for me to make. Indisputably, human rights is a very interesting topic in many aspects. They are a particular phenomenon in international law. I have earlier in various courses studied human rights from different perspectives. The course “International and European Protection of Human Rights” focused on the protection provided for in the conventional framework. Another course, “Human Rights and Foreign Policy”, gave me insight in/to the deliberations of a state when forming its policies concerning human rights and other international law issues. Inspiration to write about reservations to human rights treaties came after a series of lectures on the universality of human rights held in the course “Philosophy of Human Rights”.

The question of reservations to human rights treaties involves a combination of the law of treaties with its merely instrumental rules for the creation of *‘lex scripta’* and the human rights law, which is normative and standard setting in nature. This evident divergence made me curious, and eager to learn more.

I owe special thanks to my friends and family for helpful remarks and support, particularly David for assistance with the philological, or linguistic problems I have encountered. Finally, I wish to express my gratitude for the very useful advice and comments on my work given by my supervisor Gregor Noll.

Lund, May 2001

Niina Anderson

Abbreviations

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| AdV | Archiv des Völkerrechts |
| AJIL | American Journal of International Law |
| ARIEL | Austrian Review of International and European Law |
| BYIL | British Yearbook of International Law |
| CalWILJ | California Western International Law Journal |
| CAT | Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) |
| CEDAW | Convention on the Elimination of all Forms of Discrimination Against Women (1979) |
| CERD | Convention on the Elimination of All Forms of Racial Discrimination (1965) |
| CRC | Convention on the Rights of the Child (1989) |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) |
| EJIL | European Journal of International Law |
| GA Res. | General Assembly Resolution (UN) |
| HarvILJ | Harvard International Law Journal |
| HRR | Human Rights Review |
| ICCPR | International Covenant on Civil and Political Rights (1966) |
| ICESCR | International Covenant on Economic, Social and Cultural Rights (1966) |
| ICJ | International Court of Justice (UN) |
| ICJ Rep. | International Court of Justice Report (UN) |
| ICLQ | International and Comparative Law Quarterly |
| ILC | International Law Commission (UN) |
| ILO | International Labour Organisation (UN) |
| NJIL | Nordic Journal of International Law |
| RdC | Recueil des Cours (de L'Academie de Droit international de la Haye) |
| UN | United Nations |
| VCLT | Vienna Convention on the Law of Treaties (1969) |

1. Introduction

The present work tries to approach, as the title reveals, the question of reservations and objections to multilateral treaties, particularly human rights treaties. The thought has been to first describe the historical background of the question in a short overview of international practice and the well-known Advisory Opinion of the ICJ in the Genocide Convention Case. This was a case that made it very clear to the states and the international community, that there was a need for a change in the international practice, as well as a need for a codification of the existing rules on reservations. The Vienna Convention on the Law of Treaties (VCLT) was adopted in 1969, and is after over 30 years still the applicable law for questions on the reservations regime. For quite some time, though, the Vienna Convention has been criticised by those who think that a clarification of the concept of reservations in the convention needs to take place. It has been said that such a clarification is essential in order to facilitate the implementation of the rules on reservations now laid down in the Vienna Convention. The provisions of the convention are allegedly deficient to a certain degree, and this could be remedied by clarifying the very concept of reservations. States present a variety of statements when giving their consent to be bound by a treaty, and it is, in the author's mind, interesting to take a closer look upon this practice, in a theoretical sense. This means that the main focus will be placed upon the phenomenon of making reservations and objections. As a consequence, only a small part of the work has been dedicated to the practical part of the issue.

1.1 The Purpose of the Thesis, its "Key Questions" and Delimitations

The aim of this thesis is to attempt to clarify the legal situation regarding reservations and the occasional following objections thereto. To do this, the applicable rules, found in the Vienna Convention on the Law of Treaties, particularly articles 2 and 19-23 VCLT, have been examined. The work was initiated on my behalf after being inspired to find out more about the legal effects of the reservations and objections made to some of the reservations. The second reason for, or purpose of this thesis is to attempt to answer the question if there is a point for states to keep objecting to reservations made by other state parties to a certain treaty.

- To present the applicable rules in the Vienna Convention on the Law of Treaties relating to reservations and objection, and
- To give some thoughts on the answer to the subsequent question "is there any point for states to keep objecting to reservations deemed impermissible".

In order to be able to answer these questions, the first part, giving an overview of the reservations regime, is absolutely necessary. The articles which have received most attention are articles 19 VCLT, especially 19(c) VCLT, which is the “object and purpose rule”, 20(4) VCLT, that deals with the reaction by other state parties to the treaty on the reservations, and article 21 VCLT about the legal effect of both reservations and objections.

There are many questions related to the questions I intend to address, but due to the scope of this thesis, I have to limit the questions to the named above. Therefore, there will not be any exploring of the difference between reservations and interpretative declarations, to name an example of an issue omitted. I have also decided to leave it up to someone else to make a comprehensive overview of relevant case law. There will be a part on conventions, to which extensive or sweeping reservations have been made, but these examples are far from the only conventions facing the dilemma of general or far-reaching reservations. It would be impossible to give a complete picture of this, so that has not been my aim.

1.2 Method and Material

The method used in writing this thesis has mainly been to study works by academic scholars, works written in different times and in various countries, and therefore represents a variety of views and perspectives, in order to get a general view of the topic. A large part of the preparatory work consisted of finding and choosing the “right” articles and books in order to get a full and comprehensive view of the question. Hopefully the literature chosen covers the subject in a satisfactory way. The vast majority of the material used was written directly or indirectly as contributions to the since a long time ongoing international discourse on the subject.

The two main monographs used are written by Frank Horn; *Reservations and Interpretative Declarations to Multilateral Treaties*¹ and by Liesbeth Lijnzaad; *Reservations to UN Human Rights Treaties- Ratify and Ruin?*². Both are very thorough works, even if the latter deals with the question I am interested in in a more explicit way. Among the articles used are Belinda Clark, Jan Klabbers, P.-H. Imbert, J. K. Koh and Rosalyn Higgins, all well-known names in the international debate.

¹ Horn, F., *Reservations and Interpretative Declarations to Multilateral Treaties*, Uppsala University Press, 1986. (Doctoral thesis)

² Lijnzaad, L., *Reservations to UN Human Rights Treaties- Ratify and Ruin?*, T.M.C. Asser Instituut, 1994. (Doctoral thesis)

1.3 The State of the Debate

Many academic scholars have paid attention to the subject of reservations to treaties over the years, both prior and after the adoption of the VCLT in 1969. The majority, if not all, of the works chosen are from the period after the adoption of the “treaty on treaties”. As a result of this ongoing debate, with participants not only among the scholars, but also among the member states of the UN, the ILC decided to appoint a Special Rapporteur to conduct a thorough examination. The Committee appointed Alain Pellet, and his mandate was given him in 1994.³ So far, the Special Rapporteur has released five separate reports, each and everyone followed by a number of addendums and corrections in separate documents, which at first gave the impression of taking the shape of a boundless, unlimited and endless work. In a passage below there will be a presentation of the work of the Special Rapporteur.

At approximately the same time as Alain Pellet was appointed Special Rapporteur, the Human Rights Commission, the supervisory body of the International Covenant on Civil and Political Rights, ICCPR, adopted its General Comment on reservations to the ICCPR.⁴ This is also only one year after the Second World Conference on Human Rights, held in Vienna, in 1993. In the document adopted at this summit, “the Vienna Declaration and Programme of Action”, the participating states undertook to look over and, if possible, withdraw their reservations made to human rights treaties. By taking these separate events into account, I think it is safe to assume that the international community was set to at least try to make a change in the practice of making reservations to treaties.

1.4 Disposition of the Thesis

Due to the fact that these are two at least partly separate purposes or aims with this thesis (as stated above under “purpose of this thesis and key question”), the thesis is divided into two main parts. The first part, consisting of chapters 2 to 4, is generally descriptive, while the second part, with the three remaining chapters, 5 to 7, has a more analytic character. In the latter the author will try to take a stand as to what has to be done in terms of law reform, that is if there is a need to introduce rules especially for reservations to human rights treaties, as has been discussed in the international discourse.

³ The GA, in its resolution 48/31 of 9 December 1993, endorsed the decision of the ILC to include in its agenda the topic “The law and practice relating to reservations to treaties”. The ILC appointed, at its 46th session in 1994, Mr. Alain Pellet Special Rapporteur for the topic. Official Records of the GA, 49th session, Supplement No. 10 (A/49/10) para. 382.

⁴ *General comment on issues relating to reservations made upon ratifications or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant CCPR/C/21/Rev.1/Add.6.*

The first chapter concerns, in more detail, the practice prior to the VCLT, and is followed by a chapter on the applicable rules, namely articles 2, 19-23 VCLT, and some thoughts on whether the convention can be seen as international customary law in its entirety. If it cannot be seen as such, perhaps the reservation regime in itself nevertheless could be assumed to form part of such international rule of law. In the final chapter of the first part the treaty relations between the reserving and objection states are analysed, even if not in a great depth.

The second part of the paper begins with an inquiry into the specific characteristics of the human rights treaties, and is followed by the second and subsequent question whether there is any point for a state in making objections to reservations the state believes are contrary to the treaty's object and purpose. At this point, I will try to consider as many perspectives as possible when analysing the presented issues. The last chapter contains, as an end of the work, a conclusion and my final remarks.

2. Historical Background

In the following, a short overview of the system that prevailed before the League of Nations and the system in operation during the period up until the famous Genocide Convention case in 1951 given as an Advisory Opinion by the ICJ, are presented. There was thus no automatic adoption or development of a new regime caused by the formation of the United Nations directly after the end of the Second World War. Although the Advisory Opinion of the ICJ did not set forth a system of reservations, it clearly merits attention here not only as a background for the system to be analysed below, but also because it represents the historical moment at which the rhetoric and reasoning of all discussion of reservations fundamentally changed. The adoption of, and the rules in the Vienna Convention are dealt with after this retrospection, in chapter 3 below.

2.1 Practice Prior to the Vienna Convention

Prior to The League of Nations in 1914, the rule was that (unless the treaty itself provided otherwise) the unanimous consent of the other signatories was required for a reservation to be admitted,⁵ the so-called *Unanimity rule*. The reservation was valid only if the treaty concerned permitted them and if it was accepted by all the other parties. On this basis, a reservation constituted a counteroffer that required a new acceptance, failing which the state making the counteroffer had the option of withdrawing the reservation or refraining from becoming party to the treaty. This view rested on a contractual conception of the absolute integrity of the treaty as adopted.

This rule of unanimity was certainly accepted in Western Europe, and Sir William Malkin wrote in 1926 that after a thorough examination of contemporary practice, it was clear that the rule was established as international practice, customary law.⁶ But, to say that it was a settled rule of customary international law would not be entirely true. Some states, principally in the eastern of Europe, put more emphasis on the view that all states had the sovereign right to make reservations unilaterally and at will, and to become a party to treaties subject to such reservations even if they were objected to by other contracting states.⁷ The U.S. had their own

⁵ Clark, B., *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, AJIL, Vol. 85, 1991, p. 289, (referring to Sinclair, *The Vienna Convention on the Law of Treaties* 55 2nd ed., 1984, Kearney & Dalton, *The Treaty on Treaties*, AJIL, Vol. 64, p. 495, 509 (1970) etc.)

⁶ Malkin, referred to in Clark, p. 290

⁷ The USSR maintained this position in their submission to the ICJ on the Genocide Convention Case, Clark, p. 290, note 61.

regional system in the Pan American Union⁸, but they did clearly accept the unanimous rule, according to Malkin. Nonetheless, the rule was applied in the practice of the League of Nations. The UN Secretariat followed League practice until the Genocide Convention Case in 1951.

2.2 The Genocide Convention Case

This case⁹, from the beginning of the 1950's, arose from the question whether the UN Secretary-General should count the instruments of ratification or accession accompanied by reservations among the twenty such instruments required for the convention to enter into force. The Secretary-General asked the General Assembly (GA) for advice, and submitted a report in which he recommended the practice of requiring unanimous consent to reservations should continue, but that only state parties, not signatories, should have the right of objection.¹⁰ In the discussion that followed, several different opinions were expressed and several draft resolutions submitted. The east states maintained their view that states had an inalienable right to make reservations and yet become party to the treaty. Provisions covered by the reservation would simply not apply between the reserving state and the states that objected to the reservation. The Latin American states wanted their regional system to be the applicable rules, and the United Kingdom and Australia favoured a collegiate or majority system, that would require acceptance of reservations by a given proportion of the other states. They believed that signatories as well as parties should have the right of objection.¹¹

While this discussion was in progress, five new submissions of ratification, without any complicated reservations, came to the Secretary-General, and the Convention could enter into force even if the question about the reservations remained unsolved. The GA adopted a resolution, requesting an advisory opinion from the ICJ on the effect of the reservations to the Convention.

⁸ The Pan American Union was established in 1910. The *Pan-American System* was a regional system established by the Union as a particular system of their own regarding the admissibility of reservations to the multilateral treaties drawn up under the auspices of the Organization of American States. "This method [...] has had considerable influence in bringing about the changes which were due to take place to the basic and very well-established norm in force in the 1920s, that a reservation to be admissible had to be accepted by all signatories, according to some, or by all state parties, according to others, i.e., the so-called unanimity rule." Ruda, p. 115. For more on the Pan –American System, see i.e. Ruda, pp. 115-133.

⁹ ICJ Rep. 1951 28 May.

¹⁰ Secretary-General's Report, 5 UN GAOR Annex 2 (agenda item 56) at 2-16, UN Doc. A/1372 (1950).

¹¹ Mr Fitzmaurice for the U.K., and Mr Ballard for Australia, in their submissions to the ICJ on the case, Clark, p.292, note 72.

The Court adopted its advisory opinion by seven to five. It found that the classical theory of unanimous consent could not be applied to the Genocide Convention. "The character of a multilateral convention, its purpose [...] and adoption, are factors which must be considered in determining [...] the possibility of making reservations."¹² In the preparatory works of the convention the Court found evidence to support the fact that reservations had been contemplated, and since it was the GA's and the state parties' intention that as many states as possible would participate, it was inconceivable to enable an objection to a minor reservation to exclude one or more states, and thus to restrict the scope of the Convention and detract from the authority of the principle upon which it was based.¹³

The Court rejected an interpretation that would result in excluding a state for making a minor reservation, and said: "But even less could the contracting parties have intended to sacrifice the very object of the Convention in favor (sic!) of a vain desire to secure as many participants as possible."¹⁴ The object and purpose of a convention limited both the freedom to make reservations and the freedom to object to them. The Court identified two evils between which the application of the "object and purpose test" would steer. Reservations are accepted that frustrates the purpose of the treaty. Objections have the effect of excluding the reserving state even when the reservations are minor and compatible with the purpose of the treaty. By saying "but even less", the Court implied that the evils are not equal, implying that the former is somewhat greater. The conclusion of the Court was that there was no absolute answer. The answer depended on the circumstances of each case.¹⁵

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 party. Each state is entitled individually to appraise the validity of a reservation, and since no state can be bound by a reservation to which it has not consented, each objecting state will consider either that the reserving state is a party to the treaty or that it is not. This decision will only affect the relationship between the objecting and the reserving states. Thus, in the opinion of the Court, the objection of a single contracting party could not prevent another contracting party from formulating a valid reservation. States were deemed to have authorised the making of "compatible" reservations and to have accepted their validity in advance. "It must be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention. Should this desire be absent, it is quite clear that the Convention itself would be impaired both in its principle and its application."¹⁶

¹² 1951 ICJ Rep. at 22.

¹³ 1951 ICJ Rep. at 23.

¹⁴ Ibid.

¹⁵ 1951 ICJ Rep. at 26.

¹⁶ 1951 ICJ Rep. at 27.

In rejecting the notion that each state party must assent to a reservation, the Court said this theory rested on a contractual concept of the absolute integrity of the treaty as adopted. However, this contractual view could not prevail if it could be established that the parties intended to admit reservations. This is how the Court came to the conclusion that a more flexible application of the principle was proper with respect to the Genocide Convention. Treaties of a legislative nature in which widespread participation was intended and whose object is a humanitarian one common to all the parties are not suited to rules on reservation that assume the function of the instrument to be a contract. The dissenting judges feared that there would be no legal certitude if every state could arrive at the conclusion most convenient to itself. They anticipated that chaos would result from the fact that that a treaty could enter partly between the objecting and the reserving parties, and that some states might consider a reserving state a party while others do not.¹⁷

The most striking feature of the opinion was its enunciation of the “object and purpose” test, or as it also is called, the *compatibility* test. Simply stated, the doctrine declared a reservation valid or invalid by reference to its compatibility with the object and purposes of the treaty.¹⁸ Many prominent writers were critical of the Advisory Opinion. The GA nevertheless adopted a resolution requesting that the Secretary-General conform with the opinion of the Court with respect to the Genocide Convention, and that, in the future, he communicate the texts of reservations and objections to all states concerned, "leaving it to each State to draw legal consequences from such communications".¹⁹

This flexible system eventually found its way into the Vienna Convention and evolved partly in response to the increasing desire to establish a world order, and partly in response to a parallel development, the growth of legislative or normative, as opposed to contractual, treaties. The Genocide Convention and other human rights treaties are agreements between states, but the beneficiaries of the agreements are the individuals under the jurisdiction of the contracting states.²⁰

¹⁷ 1951 ICJ Rep. at 45 (joint dissenting opinion of Guerrero, McNair, Read and Hsu Mo, J. J.).

¹⁸ Koh, J.K., *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, HarvILJ, Vol. 23, 1982, p. 85.

¹⁹ GA Res. 598 (VI) 12 January 1952.

²⁰ More on the specific features of Human Rights Treaties in chapter 5.

3. The Vienna Convention on the Law of Treaties

In this chapter, an overview is given of the general rules applicable to reservations. The relevant rules can be found in the Vienna Convention on the Law of Treaties, hereafter the Vienna Convention or VCLT, from 1969. As the rules on withdrawal are the same for both reservations and objections, I will cover that topic only once, in part 3.1.4. The formality requirements are also applicable both to reservations and to objections, and will be presented briefly in chapter 3.1.7, about article 23 VCLT.

Before examining the relevant provisions on the reservations regime, it could be useful to be aware of the general rule on applicability concerning the VCLT. It is found in article 4 VCLT, which states that “the convention applies only to conventions and treaties concluded after the entry into force of the present convention with regard to such states”.²¹ This gives the impression that the convention is not a codification of the existing rules.²² This is a somewhat disputed standpoint, but whatever intention the legislators had at the time, the convention is at present most probably an important part of the international customary law. There is a short passage on this below, in chapters 3.1.5 and 3.1.6.

3.1 Reservations

The relevant provisions when talking about reservations and objections to these reservations can be found in the Articles 2 and 19-23 of the VCLT. If a state is willing to accept most of the provisions of a treaty, but it for various reasons has problems and wants to object to other provisions of that treaty, it is possible for the state to make a reservation/s/.²³

Article 2.1(d) VCLT defines a reservation as:

*"[...] a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."*²⁴

²¹ Article 4 VCLT.

²² Lijnzaad, p. 74.

²³ Malanczuk, P., Akehurst's Modern Introduction to International Law, 7th rev. ed., Routledge, 1997, p. 135.

²⁴ Article 2.1(d) VCLT

3.1.1 The Right to Formulate Reservations and “the Object and Purpose rule”, article 19 VCLT

As the Vienna Convention is based on the maxim of the consensual character of norms of international law, and reservations intend to introduce a different set of norms in lieu of the norms as adopted in the final treaty text, the replacing norms must receive the consent of the other parties to become operative just as the original treaty norms and amendments thereto. According to the basic principle of the Vienna Convention, no reservation may become binding on another party before it has accepted the reservation.²⁵ A reservation has to be both acceptable and accepted before entering into operation. Article 19 VCLT contains the provision that determines the admissibility, or the acceptability.

Article 19 VCLT allows states to make²⁶ reservations on certain conditions. A state can thus formulate a reservation if a) it is not prohibited by the treaty, or b) the treaty provides that only specified reservations may be made, and c) the reservation is not incompatible with the object and purpose of the treaty.

The two first conditions are not causing so much confusion. An example of the first kind, under paragraph a) could be for instance ILO Conventions. Reservations to them are, as a rule, not admitted.²⁷ Another example is the 1952 Universal Copyright Convention, which holds a provision that prohibits any reservations to it. Some treaties allow reservations only to certain of its provisions, and an example of such a treaty is the Convention Relating to the Status of Refugees.²⁸ The two first conditions, (a) and (b), have not caused too much dispute in the doctrine. However, there are a few remarks on article 19 (c) VCLT that are worth mentioning. This provision is sometimes referred to as the *compatibility test*.

The introduction of this test in order to determine the compatibility (admissibility or acceptability) of the reservation in those cases where the treaty is silent was believed to satisfy the strongly manifested demands for safeguarding the integrity of the treaties. It was a common view that wide and/or sweeping reservations were jeopardising the operation of the treaty norms. The less modifications inflicted upon the treaty the more effective it was supposed to become. In the Advisory Opinion in the Genocide Convention Case, the ICJ expressed that an

²⁵ Horn, p. 199.

²⁶ The word “make” is not entirely correct in this context, and in the treaty text the word “formulate” is used. According to Horn, the word “make” would imply that the reservation would become valid and effective from the moment of its communication, an assumption, which is not true. Horn, pp. 199-200.

²⁷ Horn, p. 202.

²⁸ Horn, p. 203.

unlimited liberty to present reservations was not desirable. The compatibility test was therefore introduced, making a reservation's compatibility with the treaty's object and purpose a condition for the admissibility.²⁹

Lijnzaad says about article 19(c) VCLT: "Within the law of treaties with its overriding formal character, the rule is unusual because of its emphasis on substance. It is that aspect through which a connection between the law of treaties and human rights law could have been established."³⁰ She continues by stating that an obligation implied in the object and purpose rule is that it necessarily leads to distinguishing the core and the non-core obligations in the treaty. If reservations contrary to the object and purpose of the treaty are prohibited, this implies that reservations not detrimental to the object and purpose are permitted. The distinguishing is necessary if Article 19(c) VCLT is to have any meaning at all, yet it is a process that appears to be complicated and occasionally subjective. Especially when distinguishing between core and non-core human rights.³¹

She concludes that there are no formal mechanisms available to ensure that the obligation be fulfilled. The object and purpose rule is a rule without safeguard. This does not mean that it is not a rule of international law, as has been suggested before about rules without enforcement measures if breached.³² Enforcement is generally not one of the stronger aspects of international law.

3.1.2 Opposability of the Reservation, article 20 VCLT

Article 20 VCLT regulates the acceptance as a relative condition for the validity of a reservation. A reservation that is both admitted and accepted becomes valid. Being admitted means only that a reservation is acceptable- but not that it as such would become binding on the other parties. As well as being admitted a reservation must also be accepted before being opposable. A reserving state whose reservation has been accepted may oppose this reservation to the other parties, who will have to recognise it as valid, legally binding on them.³³ Every contracting state that is confronted with an admissible reservation has the discretion to chose between accepting or objecting to the reservation,³⁴ thus, the issue of opposability presupposes that the reservation is permissible.

²⁹ Horn, pp. 205-206.

³⁰ Lijnzaad, p. 405.

³¹ More on the specific features of the Human Rights Treaties, see chapter 5.

³² The Dutch author Vierdag for instance, has taken this position, when talking about the ICESCR. He is, though, not accompanied by many others. Source: lecture with Prof. Zwaak, SIM/ Utrecht University, 11 February 2000.

³³ Horn, p. 215.

³⁴ More on objections in chapter 3.2 below.

3.1.3 The Legal Effect of Reservations, article 21 VCLT

The legal effects of reservations (and objections) are dealt with in article 21 VCLT, which gives detailed account of the treaty relations established on the basis of accepted reservations and reservations objected to. As a basic notion of the law of treaties, the article underlines the concept of reciprocity. States intending to modify³⁵ their treaty relations will face the same modification by other states against them.³⁶ The reservation thus is a new clause, which modifies the scope of certain provisions of the treaty.³⁷

The modification thus established will only be valid between the states concerned, as article 21.2 VCLT provides for. As said above, article 21 VCLT deals with both acceptance of and objection to a specific reservation. Article 21.1 VCLT deals with modifications on the basis of an accepted reservation, while article 21.3 VCLT applies to reservations objected to, but which do not preclude entry into force of the treaty.

The great similarity between the two provisions should be noted, and consequently one has to ask if there is a difference between accepting and objecting to reservations, as far as the legal effects are concerned. As there seem to be no distinction between the two responses it has been suggested that objections not precluding entry into force of the treaty are merely an atypical form of acceptance.³⁸

Seen in a practical sense, this seems to be true. Authors and scholars are not certain about the reasons why objections should be made when these will have the same effects as acceptance. Objections no longer preclude entry into force, unless this intention is explicitly expressed along with the objection. According to Lijnzaad, this does not mean, however, that objections not precluding entry into force are without significance. The objections are used by states to express their disagreement with a reservation, while still not precluding treaty relations to be established. These objections might be political declarations, but it is conceivable that they also serve the purpose of preventing the possible formation of customary law opposable to them, on the basis of the reservation.

³⁵ In this case the word used by me; modify, includes both modifications and entire exclusion of legal effects of a certain treaty provision.

³⁶ Cf. articles 21.1(a) and 21.1(b), as well as article 21.3 final phrase, Lijnzaad, p. 47.

³⁷ Clark, p.304 and Ruda, J.M., *Reservations to Treaties*, 146 RdC 1975 III, p. 190.

³⁸ Lijnzaad, p. 48 and Clark, p. 310.

3.1.4 Withdrawal of Reservations and Objections, article 22 VCLT

According to article 22 VCLT, the general rule is that a reservation or an objection may be withdrawn at any time, and without the consent of other states that have accepted the reservation earlier, if this was not agreed upon. The VCLT attaches no conditions to withdrawals, which is to stress the view that there is a general wish to see as many reservations as possible withdrawn.³⁹ This is a practical and pragmatic approach, but still leaves the legal situation rather unsystematic since the reservations are considered additional bilateral agreements. Would not then logic give that a withdrawal of the very same reservation, which required consent when lodged, necessitate consent or acceptance by the other state parties?⁴⁰ There is thus nothing preventing states from withdrawing their objections, and still withdrawals are extremely rare, if not non-existent. When withdrawing a reservation (or an objection), the state leaves a written notice with the Secretary-General.⁴¹ Withdrawals need no subsequent approval by the other state parties, as stated earlier and enter into force the moment the other state parties are notified.⁴²

3.1.5 The Vienna Convention, or the Reservations Regime as International Customary Law

Treaties have always played a highly important role in the inter-state relations, and remain one of the primary sources of international law. For centuries, the rules applicable to the treaty-making process, the entry into force, the interpretation, the validity and the duration of treaties were either expressed in non-legal principles, of a political and diplomatic nature, or they formed part of customary international law. In the 20th century, efforts have been made to draft and enact codes on the law of treaties. The ILC of the UN started on the work on the law of treaties in 1949 and submitted its draft convention in 1966. The VCLT was adopted in 1969. The provisions contained in the VCLT are widely considered to express rules, which were already part of customary law.⁴³ Only states that have ratified the convention are formally bound by it, but a good number of the convention's provisions reflect pre-existing practice and prevailing *opinio juris*.

³⁹ This wish was reaffirmed in “the Vienna Declaration and Programme of Action”, which was adopted at the 2nd World Conference on Human Rights in 1993. The participating states undertook to look over and try to find ways to withdraw their reservations to Human Rights documents. (A/Conf.157/23 Part II A para. 5.)

⁴⁰ Lijnzaad, p. 50.

⁴¹ See more on the formal requirements below in chapter 3.1.7.

⁴² Aust, A., *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 127.

⁴³ Encyclopedia of Public International Law, Vol. 7, p. 459 (entry: treaties).

Thus, it seems the VCLT is of importance even in the relations between and with states not parties to it. However, not all of the provisions in VCLT are identical with customary norms; “[...] doubts can be raised in this regard for some rules contained in Arts. 34 to 38 (treaties and third states) and Arts. 65 to 68 (Procedure in case of alleged invalidity or suspension of treaties).”⁴⁴ In cases of doubt, the Encyclopedia recommends a careful analysis of state practice, in order to find out whether customary law rules conform to the provisions contained in the VCLT.⁴⁵ By this presentation of VCLT in the Encyclopedia of Public International Law it should be safe to assume that the VCLT is part of international customary law. It is though, not a universal view that the convention forms part of the customary law.

“The rules on reservations contained in VCLT will be considered essential guidelines in the matter of reservations to Human Rights treaties.”⁴⁶ With this statement Lijnzaad begins a chapter in her book relating to the application of the VCLT, and the relevant time element of this question. The convention is ratified by 70 (odd) states, which would clearly indicate that the treaty provisions are not universally accepted. Also, even if the convention would be universally accepted, if it is not certain that it is merely a codification of existing customary law, it will not lead to the conclusion that the convention would be applicable to treaties concluded prior to the VCLT itself. Moreover, it is questionable according to Lijnzaad, whether the convention, which was intended to be a codification of the pre-existing customary Law of Treaties, really was such a codification or not, especially concerning the provisions on reservations.⁴⁷ Both are problems concerning the application of the convention with a distinct time-element.

Is it true to say that the reservations regime of the VCLT is to be considered as customary law? This question is prompted by the fact that there are substantial differences between the states parties to the VCLT and the human rights treaties dealt with. Lijnzaad considers that it would be far too complicated and confusing to distinguish between states that are parties to the VCLT, and those who are not, even if that might be necessary unless it is established that articles 19-23 VCLT are applicable as customary law.⁴⁸ Besides this, it might be of support to the view that the reservation rules are binding by force of customary law, when considering the decisions by the ICJ in the North Sea Continental Shelf Cases.⁴⁹ Taking those cases into account, there has to be considerable proof for the assumption that a convention would become binding upon third state through customary law, shortly

⁴⁴ Encyclopedia of Public International Law, Vol. 7, p. 459 (entry: treaties).

⁴⁵ Encyclopedia of Public International Law, Vol. 7, p. 460 (entry: treaties).

⁴⁶ Lijnzaad, p. 72.

⁴⁷ Ibid.

⁴⁸ This is clear through articles 34 and 38 VCLT, stating that rules, recognised as customary rules of international law, are binding upon states, no matter if these rules are formulated in a convention or not.

⁴⁹ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) ICJ Rep. Judgement of 20 February 1969.

after its entry into force.⁵⁰ Lijnzaad thinks, on the basis of the case law following the entry into force of the VCLT, in particular the United Kingdom- French Continental Shelf Arbitration⁵¹ and the Belilos Case before the European Court of Human Rights⁵² that it may be concluded that the provisions of the VCLT on reservations are taken to be binding as customary law. She gets support in this view by Coccia, who writes that regarding the provisions relating to reservations, scholars and practitioners have considered them closer to codification of existing customary rules rather than progressive development.⁵³ He goes on to state that the fact that the VCLT has been referred to by both state parties and the ICJ as international customary law⁵⁴ gives more weight to the argument that at least the reservations regime in VCLT is considered as international customary law.

Notwithstanding the difficulty of classifying every provision, “the practice of states and the decisions of international tribunals show a definite trend towards greater acceptance of the Vienna Convention as the expression of the present status of the customary international law of treaties.”⁵⁵ This all leads to the conclusion that even though these provisions, articles 19 to 23 VCLT, were progressive development rather than codification at the time of drafting the convention, they have now been accepted as the law to be applied to reservations also for non-state parties.⁵⁶

3.1.7 Formalities, article 23 VCLT

The final article of the part of the VCLT regarding reservations deals with the procedural aspects. It is stipulated in the first paragraph that reservations, express acceptance and objections must be in written form, as is required for the withdrawal of a reservation or an objection. This is quite natural, given the fact that reservations and objections lead rules of law in the shape of *lex scripta*.⁵⁷

⁵⁰ Lijnzaad, p. 75, quoting the ICJ in its decision in the North Sea Continental Shelf Cases, ICJ Rep. 1969, para. 28, which reads: “*In principle, when a number of States,, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested – namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a state which has not carried out these formalities, though at all times able and entitled to do so, has nevertheless somehow become bound in another way.*”

⁵¹ Lijnzaad, p. 75.

⁵² The Belilos Case, Judgement of 29 April 1988, (Case number 10328/83, ECHR Ser. A. Vol. 132)

⁵³ Coccia, M., *Reservations to Multilateral Treaties on Human Rights*, CalWILJ Vol. 15, No.1, 1985, p. 13.

⁵⁴ In the Anglo-French Continental Shelf Arbitration Case (United Kingdom v. France) 18 R. International Arbitration. Awards of 30 June 1977, and the Temeltesch case, Year book ECHR, Report of May 5, 1982.

⁵⁵ Coccia, p. 11.

⁵⁶ Lijnzaad, p. 76.

⁵⁷ Lijnzaad, p. 50.

The second paragraph stresses that a reservation made when signing subject to ratification, need to be confirmed at the moment of expressing consent to be bound. Objections to, or express acceptance of reservations formulated prior to expressing consent to be bound do however not require confirmation according to the same paragraph.

3.2 Objections

3.2.1 Reactions on Reservations, article 20 VCLT

Objections are formal disapprovals of reservations and knowledge of them is essential for acquiring a correct picture of the legal relations between parties to a treaty. Thus objections are so called subsequent actions. The provisions on objections are to be found in the same part of the VCLT as the reservations, as has been said above. Article 20 VCLT lays down the “expected” reactions on a reservation, giving the other state parties the choice between accepting and objecting to the reservation made. But this is not the whole truth, since a reservation expressly authorised by the treaty does not require any subsequent acceptance by the other contracting states, unless the treaty has acceptance as a requirement for the approval of the reservation. This means that “inaction” is an accepted response to the reservation.

3.2.2 The Time Factor and the Legal Effect of the Objection, articles 20 and 21 VCLT

A related and quite interesting issue is the time factor in article 20.5. If a state has not raised any objections to a reservation by the end of a period of twelve months after the reservation was notified, the state is considered to have accepted the reservation. This gives that states have a year to formulate their objection or else an acceptance, or approval of the reservation, is assumed.⁵⁸

The general rule that a reservation does not preclude the entry into force of the treaty between the objecting and the reserving states is regulated in article 20.4(b) VCLT⁵⁹. This is one of many specific features of the VCLT that has given rise to the debate about how the VCLT is so to speak reservation-friendly. States can pick and choose what provisions they want to be bound by, sign the treaty and

⁵⁸ This rule is also referred to as the “Twelve-Month Tacit Consent Rule”, see Clark, p. 312.

⁵⁹ There will be a discussion of somewhat more depth on this specific topic in chapter 4 below.

become state parties to a treaty even if they have not agreed to be bound by the obligations of the “original” treaty.

Consequently, a natural question is if it is worthwhile for the objecting states to keep objecting to reservations they assess to be inadmissible. Are there any differences in the legal consequences between accepting and objecting to a reservation made by another state party? According to many authors, the distinction between acceptance and objection disappears as far as the legal effects are concerned.⁶⁰ The same authors have even said that objections that don't preclude entry into force are an atypical form of acceptance. Thus, it is difficult, *prima facie*, to see the difference, if any, between the legal effects of an objection to and an acceptance of a reservation. In both cases the reciprocal treaty relations between the two states concerned are modified “to the extent of the reservation”.⁶¹ When, as in most cases, the treaty remains in force between the reserving and the objecting states, it can be argued, that “ultimately, the legal effects of an objection to and an acceptance of a reservation are identical”.⁶²

3.3 Some Concluding Reflections on State Behaviour Concerning Reservations and Objections

There is no unanimity in the jurisprudence on how states should decide whether a reservation is impermissible or what legal effect should be given to the objection.⁶³ Depending on how the issue is approached, at least two different “schools” have developed with different views on the validity of reservations. The first group makes no significant difference between the admissible/ permissible reservations and the impermissible, and gives the emphasis to the reaction, i.e. the objection.⁶⁴ An impermissible reservation's validity would in this case depend on the objecting/reacting states' wish to accept it. Advocates of this approach seek their support in the practice of the League of Nations and the *Unanimity rule*. They base their argument on the right of the sovereign state to accept or object to the reservation. This line of argumentation leads to the fact that no difference is made in the view of permissible and impermissible reservations, concerning the legal effects. The result would be indifference between accepting and objecting to reservations. This view puts the state above the objective analysis of the law in that it gives the state a fair amount of discretion to react as it wishes to the

⁶⁰ Clark, Kuhner, Coccia and Imbert among others, taken from Lijnzaad, p.48.

⁶¹ See article 21.1 and 21.3 VCLT.

⁶² Ruda, p. 200, Cassese, A., *A New Reservations Clause*, Recueil d'études de droit international. En Hommage à Paul Guggenheim, Geneva, 1968, pp.280-281 and Coccia, p. 35.

⁶³ Mårsäter O. & Åkermark A.S., *Otillåta Reservationer*, in *Mennesker & rettigheter*, Vol. 13, No 4, 1995, p. 385.

⁶⁴ One of the most important spokesmen of this view is J.M. Ruda according to Mårsäter & Åkermark, p. 385, note 14.

inadmissible reservation. A state can, as it sees fit, accept an inadmissible reservation just as it can object to an admissible.⁶⁵

Other scholars urge that one must separate the question of admissibility of reservations (article 19 VCLT) from the rules in the convention on acceptance and opposability of admissible reservations (articles 20 and 21 VCLT). These scholars think that reservations, which are deemed inadmissible according to article 19(c) VCLT, are also invalid. 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. But this does not say anything about the legal effect of such a reservation. Bowett is the foremost advocate of this view,⁶⁶ and he sees the states' reaction to a reservation as a two-step process. This view, contrary to the first mentioned, puts the emphasis on the analysis of the law, and thereby limits the number of possible reactions the other state parties have when dealing with an inadmissible reservation. The state has, according to Bowett and other advocates of this school, considerably less freedom than the first view, referred to in the paragraph above, gave it. It is not, they say, entirely up to the state to decide how to respond. The Vienna regime on reservations does not provide states with this great freedom to randomly choose the response on an inadmissible reservation.⁶⁷

The first step is to objectively decide on the admissibility of the reservation, with the compatibility test. If the reservation is deemed admissible, the second step is for the state to decide how to react upon the reservation. The state has the choice of accepting or objecting to the reservation. In objecting, the state has to choose what legal consequences the objection shall have, either allow the treaty to enter into force or to preclude the entry into force of the treaty between the reserving and the objecting states. If the state finds the reservation to be inadmissible in the first step, the legal effect could be either that the reservation *per se* is invalid, which means that it cannot be accepted by a state deeming it inadmissible, or that the inadmissible reservation precludes the reserving state's admission to the treaty.⁶⁸ Bowett seem to make a distinction between two cases of inadmissible reservations. On the one hand he has reservations that are invalid, but which do not preclude the entry into force of the treaty for the reserving state, while on the other hand he sees some reservations as so gravely and fundamentally incompatible with the object and purpose of the treaty that they preclude the admission to the treaty for the reserving state.⁶⁹

⁶⁵ Coccia, p. 23 and Clark, pp. 303-304.

⁶⁶ Bowett, D. W., *Reservations to Non-Restricted Multilateral Treaties*, BYIL Vol. 48, 1976/77, p. 77, and Mårsäter & Åkermark, p.385.

⁶⁷ Clark, p. 305.

⁶⁸ Bowett, p.77, and Mårsäter & Åkermark, p. 386.

⁶⁹ More on this below in chapter 4.1.

There have been proposals to limit the right to formulate objections by making this right subject to the compatibility test. Objections were only to be allowed in the case where the reservation was believed to be incompatible with the object and purpose of the treaty. If this was not the case, the objection would be of no effect.⁷⁰ However, the view urging for a wide freedom in making the objections prevailed. The right of objection was to be kept distinct from the criterion of compatibility, and it still seems to be possible to object to compatible reservations.⁷¹ There appears to be a problem in reconciling the provisions in VCLT. The compatibility test in article 19(c) and the rules on the acceptance of and objecting to reservations in article 20.4 are difficult to read together without becoming somewhat confused. Article 19(c) provides that a state may not formulate a reservation if it is incompatible with the object and purpose of the treaty concerned. However, no consequences for such an act are provided for. Article 20.4 provides that a reserving state becomes a party to the treaty vis-à-vis all the accepting, non-objecting and “relatively objecting” (i.e. those states that object, but do so without precluding the treaty relations⁷²) states. Article 20 does not consider the content of the reservation and its consistency with the object and purpose of the treaty. Thus, it appears that states are told on the one hand that they are forbidden from making certain reservations, and on the other hand that their participation in the treaty depends only upon the reaction of the other contracting parties, who are free to accept or reject any reservation regardless of its content. This is rather peculiar, one might say, and definitely not a desired legal situation according to the present author.

The question one has to ask after reviewing the provisions on reservations and objections is: Why make objections to the reservations, if they have no legal effect or rather the same effect as an acceptance? What does the objection say?

It usually expresses the opinion of the state about the compatibility of the reservation, with regards to the object and purpose of the treaty in question. It also expresses that the objecting state does not accept the reservation. Finally, the objecting state has to decide what legal effect their objection should have. As a rule, the objection does not preclude the entry into force of the treaty, but if it is explicitly expressed that it is intended to preclude the entry, this is also possible.⁷³ This has all been said above. What is more interesting is when a state objects to an admissible reservation, or when the state refrains from objecting to a clearly

⁷⁰ This idea was advanced at the 1962 session of the ILC by for instance Rosenne, see Horn, p. 251, note 678.

⁷¹ I will touch upon this issue some more in the concluding remarks, chapter 7, as it is part of the changes proposed by the present author.

⁷² The term “relatively objecting” is used by Coccia to separate the objecting states that preclude the establishment of treaty relations from those objecting states that let the treaty enter into force between itself and the reserving state. The latter group of states are the “relatively objecting” states.

⁷³ Article 20.4(b) VCLT. This will, as stated above, though, only affect the relations between the two concerned parties. See more in the next chapter, below.

inadmissible reservation. What are the deliberations behind such a decision? State practice shows that it is not unusual that states accept inadmissible reservations. The reason for the states to chose to accept some and object to others are usually extralegal, i.e. politically motivated.⁷⁴

What these reasons are, and how the governments of the state parties have argued when deciding on how to act is difficult to give a simple answer to, and is also slightly beyond the scope of the present work. I will, however, still in the following chapters touch upon these reasons and considerations that states might face in their line of work. My first thought was to leave it completely up to others to consider this topic, but at the same time I find it very interesting and finally decided to give the question a little bit of time and space here in the end of this chapter.

The end of the Second World War and the establishment of the United Nations in 1945 was, as I have understood it, the starting point for the formation of the body of public international law as it looks today. The formation of the new set of laws and the practice by the member states of the UN was highly affected by the power balance between the east and the west, the so called Cold War. The legal climate of each state was indisputably affected by this context, and therefore a decisive factor for how the states behaved and reacted upon other states' international actions. Furthermore, or rather, in other words, the military alliances, NATO and the Warsaw Pact, and on what side of the Iron Wall a state was situated, played an important role in the political play that took place in the period between the Second World War and the fall of the communist regime in the Soviet Union and end of the Cold War.

A state could not freely react upon other state parties' reservations and other international state actions, since there was a power balance, a political status quo to be considered at all times. The armaments race between the eastern and the western states, or blocks, was a constant reminder of the strive for a political, and military balance between the two super powers, the United States and the Soviet Union, and their allies, in different parts of the world. The named political situation and the economic context in which the states operated did surely have some bearing on the growth of the state practice, which is still to be seen now, approximately ten years after the end of the Cold War. In recent time, the east versus west conflict has lost its great importance, and new conflict areas are evolving. Lately, the conflict has rather been between the northern and southern states and the new world versus the old world, i.e., industrial countries versus developing countries and former colonial states versus the relatively "young" independent states in for instance Africa and Asia. These are a few, in the present author's mind, plausible political and other extralegal considerations that are taken

⁷⁴ Clark, p. 304 and Ruda, p. 190.

into consideration, or have been taken into consideration, by the states in their deliberations on how to react upon the other state parties' actions.

4. Treaty Relations Between the Reserving and the Objecting States

The legal effects of permissible reservations and objections to reservations are, as mentioned above, regulated in article 21 VCLT. It gives a detailed account of the treaty relations, established on the basis of accepted reservations and reservations objected to. As a basic notion of the law of treaties, the article underlines the concept of reciprocity. This means that states that intend to modify their treaty relations will face the same modifications by other states against them.⁷⁵ These modified treaty relations will only be valid between the reserving and objecting states. In other words, the treaty will enter into force between the two states, except for the reserved provisions, which will not apply between the two state parties.⁷⁶ Would the objecting state on the other hand explicitly preclude the entry into force, there would simply be no treaty relation at all between the reserving and the objecting states.⁷⁷

After the expiration of the time limit, set out in article 20.5 VCLT, the reservations are considered to be accepted, even though there has been no explicit acceptance of the reservation.⁷⁸ In cases where the objecting state wishes to preclude the entry into force of the treaty between itself and the reserving state, it has to state this wish explicitly in its objection, according to article 20.4(b) VCLT.

4.1 Permissible and Impermissible Reservations

Acceptance of an impermissible reservation is, according to Horn, theoretically not possible. Reservations, that are directly or indirectly prohibited under article 19.1(a) and (b) VCLT cannot be accepted by the other state parties.⁷⁹ Such reservations and acceptances will not have any legal effect, unless there is an agreement between the parties to suspend or rescind that prohibition.⁸⁰ Similarly, an incompatible, or impermissible reservation under article 19.1(c) VCLT should

⁷⁵ See articles 21.1(a), 21.1(b) and 21.3 (*in fine*) VCLT.

⁷⁶ Article 21.3 of the VCLT.

⁷⁷ Mårsäter & Åkermark, p. 384.

⁷⁸ See articles 20.4(a) and (b) together with 20.5 VCLT.

⁷⁹ Horn, p. 215.

⁸⁰ Horn, pp. 215-216. Whether there really are such agreements between state parties to the different treaties is beyond the present author's knowledge. If so, these agreements must be tacit, since there are no formal records of them.

be regarded as incapable of acceptance and as *eo ipso* invalid and without legal effect.⁸¹ This is where the problem lies. As far as no objective procedure is available for the determination of the compatibility of the reservation, every party will make this evaluation individually. This individual appraisal of the compatibility will not affect the position of the other parties. The consequence of this is that a reservation can be considered permissible by some states and impermissible by others.

One of the flaws with the VCLT is that it does not explicitly regulate impermissible reservations in any other way other than that it states that a state may not formulate reservations incompatible with the object and purpose of the treaty.⁸² It says nothing about how states should react to these sorts of reservations, nor does it say anything about its legal effect. Even if there are scholars with thoughts about these issues,⁸³ many questions arise. For instance, is it possible for states to accept this kind of reservation, or do they have to object to impermissible reservations? In the latter case, can the state, even though its reaction, a) let the treaty enter into force in its entirety, or b) declare that a treaty relationship between the reserving state and itself is impossible? The complicating factor is, as said above, that the decision whether a reservation is permissible or not, as well as the decision how to react, is entirely up to the state.⁸⁴ It has been said that these judgements are made on an almost bilateral basis, between the reserving state and the other state parties “one on one”. That more or less cuts the multilateral treaty into bilateral relations between the reserving state and all the other parties to the treaty, where they decide upon the legal status of their treaty relations.⁸⁵

The acceptance of a permissible reservation is an individual act. It does not prejudice the position of the other state parties that might decide to object to the same reservation. The VCLT thus paves the way for what has been called a “fragmentation” of a multilateral compound of norms into an agglomeration of bilateral relationships. Such a disintegration of multilateral into bilateral relationships brings chaos into treaty relations according to the unanimity rule propagators. The situation regarding reservations and their legal effect might not

⁸¹ Horn, p. 216.

⁸² What the Vienna Convention does is that it gives state parties to a convention the right to object to reservations that are considered permissible according to article 19. The objections to permissible reservations are based on other considerations than the objective decision on the permissibility. In these cases political considerations may be predominant according to Mårsäter, Mårsäter & Åkermark, p. 385, note 12.

⁸³ Horn, among others, see above, this chapter.

⁸⁴ There are exemptions from this general practice, see for instance the Convention against Racial Discrimination article 20.2, which states that the state parties to the treaty decide together whether a reservation is allowed. See also the European Convention on Human Rights and its American counterpart, and the control that their supervisory bodies perform concerning the permissibility/validity of reservations made to those treaties. Mårsäter & Åkermark, p.385 note.13.

⁸⁵ For more on this topic, see chapter 5.2.3 below.

be chaotic, but it is not far from it. It is practically impossible to get a comprehensive overview of a treaty, its state parties and the obligations each state has accepted when the treaty relations are individual and separate between all the state parties to the treaty.

Horn explains how there are two conditions that have to be fulfilled for a reservation to become binding between treaty parties.⁸⁶ The two requirements are admissibility and opposability⁸⁷, which both have to be ascertained before deciding upon the validity of a reservation. The two are, as stated above, treated separately in articles 19 and 20 VCLT.

⁸⁶ Horn, p. 215.

⁸⁷ See above in Chapter 3.1.

5. Specific Characteristics with Human Rights Treaties

5.1 Non-Reciprocity

There is a great difference between human rights treaties and other "standard" treaties, for example trade relations or borders between states. The overriding principle in that sort of agreement is the reciprocity. The human rights treaties differ from the standard treaties as far as the content and the beneficiaries of the norms are concerned. The object of human rights treaties is not the exchange of reciprocal obligations between the states, but rather objective obligations towards the individuals under the jurisdiction of the states parties.⁸⁸ The individuals are the beneficiaries, but they are not party to the treaty. The provisions are of an objective nature, suggesting a validity far beyond the bounds of reciprocity. The substantive provisions of the treaty will have to be fulfilled between a state and its subjects, whereas the treaty obligations are between different states.

This does not mean, however, that there are not any benefits exchanged between the state parties. The most essential benefit is the fact that human rights will be regulated on an international level. This is a benefit to the international community as a whole, but has also been the aim of the participating states. There is also the reputation of the state at stake, and as an active human rights defending and promoting state, they prove that they are respectable members of the international community. The fact that the principle of reciprocity does not work in its usual way does not mean that there is a difference in the legal structure of human rights treaties and other multilateral treaties. Technically they are the same.⁸⁹ There is, however, a psychological difference, which resides in the motivation of states according to Coccia. He explains that when their own interests are not at stake states usually do not have as much incentive to request other states to comply with the treaty. Human rights treaties are less contractual than other treaties. An objection to a reservation by a state, in the context of a treaty concerning the treatment of its own citizens, is not an effective countermeasure that can be used to place pressure on the reserving state. It furthermore leaves the objecting state with a sense of frustration because it still must comply with all the treaty provisions vis-à-vis the other parties. Such an objection might, however, have some

⁸⁸ Dupuy, in Lijnzaad, p. 111.

⁸⁹ Coccia, p. 37.

symbolic value as a statement of policy on certain matters according to the same author.⁹⁰

It is difficult to conceive how the principle of reciprocity would operate with respect to the material norms of a human rights treaty. Breaches and violations of human rights are unlawful derogations from treaty obligations. A breach against a human right by one party does not free the other parties from their respective obligations. This is an important principle confirmed by article 60.5 VCLT and also by certain specific treaties such as the 1949 Geneva Conventions on the humanitarian law of war. There is an imminent danger of retaliation where a party has violated the rights of individuals being nationals of another state party. Individuals should not become the object of retaliatory measures for the violation incurred by their home countries.⁹¹

A reservation resembles a breach in that it also constitutes a derogation from an obligation. In this case a legitimate derogation. The case of illegal derogation through a breach and the case of legitimate derogations by reservation are to be treated similarly with regard to the principle of reciprocity.⁹² Reservations, which deny completely or restrict the liberties and rights of individuals, will not constitute a permission for the other state parties to allow a similar circumvention. Their obligations under the treaty will not be affected by the reservations of other states. This concerns all persons under the jurisdictions of the state parties, that is, also residents being nationals of the reserving state. The reserving state by presenting a reservation considers it impossible to safeguard certain rights with regard to any person under its jurisdiction. The other state could possibly respond to such a reservation by denying these rights to residents on its territory being nationals of the reserving state. However, this action would be different from the step taken by the reserving state. The reservation hits all persons under the jurisdiction of the reserving state, while the responding state's action would be of limited scope and as such of a discriminatory, if not retaliatory nature.⁹³

The principle of non-discrimination is fundamental in human rights law, and a deviation from human rights with respect to the nationals of the reserving state would also be contrary to the duty not to resort to retaliatory measures through non-application of provisions for the protection of the human person. A further argument against any effort to apply the reciprocity principle in order to free oneself from an obligation of a humanitarian kind may be found in the wording of the VCLT itself.

The VCLT lays, as stated above, down formal reciprocity, creating a formal balance between the rights and the obligations of the state parties. At the same

⁹⁰ Coccia, p. 38.

⁹¹ Horn, p. 278.

⁹² Ibid.

⁹³ Horn, p. 279.

time, a substantive balance may be completely absent. As concerns reservations, the VCLT is equally formalistic. When the reserving state restricts its obligations, the recipient states are equally allowed to do so towards the reserving state. A reservation to a human rights treaty may harm people, and will only affect moral rights connected to the other states. A reciprocal restriction on obligations on the basis of article 21.1 VCLT thus serves no purpose. When analysing the aspects of reciprocity, the problem of reservations to human rights treaties becomes clear. The absence of directly detrimental consequences of reservations for the other state parties (enhanced by the tacit acceptance in article 20.5 VCLT) leads to states accepting the reservations.⁹⁴

5.2 Core and Non-Core Rights, the Object and Purpose of the Human Rights Treaty

As stated in chapter 3.1.1 the object and purpose rule is a test to decide the admissibility of a reservation to a treaty. One problem is that the object and purpose of a treaty can be quite hard to extract from the treaty text, in cases where it has been left unregulated in the treaty text. But even when it has been explicitly regulated in the treaty text, as in the Women's Convention⁹⁵, there are problems with reservations. This convention has more reservations than usual, in comparison with other UN treaties.⁹⁶ Many of the reservations made to this convention are made specifically against article 2, the so-called "portal paragraph" of the treaty.⁹⁷ The most obvious examples of this are the reservations made by Muslim countries. When signing and or ratifying the convention, they agree to the obligations therein as long as they are not in conflict with Islamic law, Shariah. A clearly defined object and purpose of a treaty is a step in the right direction, but is far from a guarantee for the integrity of the treaty text, when reservations are concerned.

"The standards enshrined in the treaties on human rights belong properly to the domain of *jus cogens* and rule out restrictions and derogations of any kind."⁹⁸ He continues to quote the judgement of ICJ in the Genocide Convention case, which in 1951 ruled that "the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any

⁹⁴ Lijnzaad, p. 112.

⁹⁵ Convention on the Elimination of all Forms of Discrimination Against Women, also referred to as CEDAW, adopted in 1979.

⁹⁶ Clark, p. 283-284.

⁹⁷ Article 2 CEDAW lays down the prohibition of discrimination against women in general terms, also stating that the participating states undertake to take necessary steps, including legislative measures, in order to achieve the goals put out in the convention.

⁹⁸ Professor P. H. Imbert made this statement in his Report presented at the Fifth International Colloquy on the European Convention on Human Rights, in Frankfurt, 9-12 April 1980.

conventional obligation”⁹⁹, and, in its judgement of the 5 February 1970 in the case concerning the Barcelona Traction Company, “they are obligations *erga omnes*”.¹⁰⁰ Whether Imbert considers all the rights in the human rights treaties as core norms, and consequently any reservations impacting upon them therefore would be deemed inadmissible, or not, is a question prompted by the above quoted statement. As perceived by the present author, this is not what the professor means at all. He thinks that it would be a mistake to take the abovementioned ideas and apply them to the whole of the treaties in question, when they actually are relevant only to certain principles and certain obligations in the named treaties.¹⁰¹ This is probably the most plausible conclusion one can draw; that not all of the rights in a human rights convention are core norms.¹⁰²

5.3 A Special Reservations Rule for Human Rights Treaties?

In the case of human rights treaties there may be weighty political reasons why a state is reluctant to object to the entry into force of the treaty between it and the reserving state, even when it has objected to a reservation on the ground that it fails the compatibility test. It is understandable that most objecting states are reluctant to take the position that the treaty will not be in force between them and the reserving state unless and/or until the reservation is withdrawn. Particularly for human rights treaties, this creates not only a network of bilateral undertakings for the parties, but also norms of behaviour for the parties in their treatment of persons for whom they are responsible, including aliens.¹⁰³ The basic question concerning human rights treaties is whether or not they are to be considered as a category separate from other multilateral treaties, and in particular, whether the rules on reservations apply to them with equal force. State practice does not seem to differentiate, from the legal point of view, human rights treaties from other multilateral treaties.¹⁰⁴

There is reference throughout the Human Rights Committee’s General Comment¹⁰⁵ to the special character of the human rights norms, where obligations

⁹⁹ ICJ Rep. 1951, para. 23.

¹⁰⁰ Higgins, R., *Derogations under human rights treaties*, BYIL, 1976/77, pp. 281-282.

¹⁰¹ Imbert, P. H., *Reservations and Human Rights Conventions*, HRR, Vol. 5-6, 1980/81, p. 28.

¹⁰² The discussion about core and non-core rights and obligations is very interesting, but there is a risk that this alternative approach leads to problems, even if not the same as the object and purpose debate encounters. Being aware of this, one can easier take in these new ideas.

¹⁰³ Aust, p. 120.

¹⁰⁴ Coccia, p. 16.

¹⁰⁵ *General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under article 41 of the Covenant*, CCPR/C/21/rev.1/Add.6. adopted by the Committee at its 52nd session on 2 November 1994. Hereinafter called G.C. No.24(52).

are by and large not owed reciprocally between states but, rather, by states to their populations in respect of the observance of human rights standards. The Committee views the VCLT regime as “inappropriate” in respect of objections to reservations to human rights treaties, partly because the Vienna regime is said to permit states freely to accept or reject reservations.¹⁰⁶ The Committee’s criticism of the VCLT seems to be valid.

Others have also expressed their dissatisfaction with the reservations regime in the VCLT. In a statement on behalf of the Swedish Government in the Sixth Committee in November 1997, the Swedish representative laid down the Swedish position that there exists one unitary reservation regime only, namely the Vienna regime. This regime is, in principle, applicable in all situations, i.e. also to normative multilateral treaties such as human rights treaties. However, this regime, the spokesman continued, is residual in character, meaning that it has lacunae, and that it is not without complications with regard to the normative treaties, such as human rights treaties. The solution suggested by the Swedish Government at this point was to keep the Vienna regime applicable as a general rule, but subject to exceptions through agreements in particular treaties. This is, the spokesman explained, an arrangement sometimes found in regional treaties, and may well, in the future, be included in global instruments of a binding nature.¹⁰⁷ Whether this is going to be the future development of the human rights treaties or not is difficult to predict, but it seems everyone is agreeing that a change of some kind is needed.

According to Redgwell, the two-tier test is not working as it should, since states can accept inadmissible reservations, as well as object to admissible ones. Moreover, when the objecting state does find a reservation to be inadmissible, it often still does not preclude the entry into force of the treaty relations between the reserving state and itself. There may be many good reasons for this, but it shows that the Vienna regime is not working like it was thought to function. The approach advocated by the Human Rights Committee is the method used by the European Court of Human Rights in the *Belilos* case,¹⁰⁸ and reaffirmed in the *Loizidou* case:¹⁰⁹ severance of the offending reservation with the provision to which it attaches unaffected by it.¹¹⁰

The severance approach nullifies the reservation but leaves the consent to be bound unaffected,¹¹¹ and this is said to be the advantage of the severance

¹⁰⁶ Redgwell, C. J., *Reservations to Treaties and Human Rights Committee General Comment No.24(52)*, ICLQ, Vol. 46, 1997, p. 404, note 88, referring to G.C. No.24(52), para. 17. About G.C. No.24(52) see more in chapter 5.4 below.

¹⁰⁷ Magnusson, L., *Elements of Nordic Practice 1997*, NJIL, Vol. 67, No. 63, 1998, p. 349.

¹⁰⁸ The *Belilos* case, (*Belilos v. Switzerland*) Judgement of the European Court of Human Rights, of 29 April 1988 (Case number 10328/83, ECHR Ser. A. Vol. 132).

¹⁰⁹ Case of *Loizidou v. Turkey*, Judgement of the European Court of Human Rights, of 23 March 1995 (preliminary objections made by Turkey, Application number: 00015318/89).

¹¹⁰ G.C. No.24(52) para. 18, referred to by Redgwell, p. 407.

¹¹¹ Redgwell, p. 407.

approach; that the reserving state remains bound by the treaty. If, however, the reservation is at the heart of a state's consent to be bound, then it has the option to denounce the treaty, but that is hardly a pleasant option given the increasing importance of being seen to adhere to human rights treaties. The severance approach may be seen as a derogation from the general and residual rule embodied in the Vienna regime, and could be an alternative to the same. Undoubtedly, severance as a general principle applicable to incompatible reservations to all types of treaties poses considerable difficulties of application.¹¹² In the absence of a supervisory organ it adds yet another difficult stage to the individual assessment by the states of reservations. Still, Redgwell concludes, and the present writer agrees, this alternative approach should be welcomed as a constructive response to the real problem of reservations to human rights treaties. The present writer is aware of the difficulties with the severance approach, as for instance the need for a powerful supervisory mechanism, like the European Court is for the European Convention. Nonetheless, the severance approach might be useful in the quest for a good solution to the problem at hand.

Another participant in the debate on this subject is Klabbers, and he thinks that the whole law of treaties may need an overhaul.¹¹³ The contractual origins of the law of treaties necessitate a rethinking of the law of treaties on those points where a contractual approach leads to unjust or perverse results. The Nordic initiative¹¹⁴ to proclaim that reserving states shall not benefit from their reservations where those are difficult to reconcile with the treaty's object and purpose is, according to him, "at best seen as a modest but highly interesting attempt to influence the development of the law on reservations to treaties and indicate that the contractual way of thinking has its limits."¹¹⁵ It seems as Klabbers is convinced that a change is needed in the law of treaties, especially concerning the reservation regime. Yet, in his concluding remarks, he holds that a change in the law is a secondary matter, and stresses that it very well may be that the honest debate on the subject matter is of greater importance than the outcome thereof.

Lastly, a third scholar, Baratta¹¹⁶, holds that a special reservation regime for invalid reservations to human rights treaties is a desirable prospect for the progressive development of international law.¹¹⁷ Any closer remarks on how this new and special regime should be designed for best result is not revealed. Baratta concludes though, that the very existence of convention bodies make states more willing to conform to the decisions of these supervisory bodies, whether the

¹¹² Redgwell, p. 411.

¹¹³ Klabbers, p. 192.

¹¹⁴ For a presentation of the Nordic "No Benefit" Approach, see below in chapter 5.6.2.

¹¹⁵ Klabbers, p. 192.

¹¹⁶ Baratta, R., *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, EJIL, Vol. 11, No.2, 2000.

¹¹⁷ The creation of a specific reservations regime applicable to human rights treaties is, though, a development that many states are opposed to. Baratta, p.425, note 44, quoting the Fourth Report on Reservations, A/CN.4/499, at 10, para. 24, and at 15, para. 41.

decisions are binding or not.¹¹⁸ If this is true, Baratta argues, the possibility certainly exists that, regardless of the binding nature of the decision taken by the supervisory body that an invalid reservation (invalid meaning incompatible with the object and purpose test in article 19(c) VCLT) is to be considered as not formulated, the interested states will conform to this decision.¹¹⁹ This approach has similarities with the Nordic “No Benefit” Approach, where the reservation deemed impermissible is simply overlooked, treaty relations are established between the reserving and the objecting states and the reserving state ends up not getting what it wanted.¹²⁰

5.4 The Work of the Human Rights Committee and its General Comment No.24(52)

5.4.1 Supervisory Body of the ICCPR

The Human Rights Committee is the supervisory body of the International Covenant on Civil and Political Rights, ICCPR¹²¹, 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. This distinguishes the Committee from the UN Human Rights Commission. There is only one compulsory mechanism under the Covenant, and that is the reporting system (article 40, ICCPR), requiring states to submit reports on the national human rights situation every five years.¹²² These reports are thereafter studied and commented upon by the Committee.

Another task of the Committee is to care for an optional procedure, in which states may grant other states to bring a complaint against them before the Committee alleging the violation of human rights.¹²³ One condition for the procedure is that both states concerned must have accepted the procedure, another that all local remedies must be exhausted before this procedure can be invoked. “The procedure lacks teeth because it can ultimately only lead to a conciliation attempt and there is no reference to a judicial body which could take

¹¹⁸ Baratta, p. 421.

¹¹⁹ Baratta, p. 421-422.

¹²⁰ More about the Nordic “No Benefit” Approach below in chapter 5.6.2.

¹²¹ ICCPR was concluded on 16 December 1966, and entered into force on March 23 1976. As of March 28 2001, there were 148 State Parties to the Covenant. “Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001”, Source: <http://www.unhcr.ch/pdf/report.pdf> (23 April 2001, at 17.45).

¹²² Malanczuk, p.215.

¹²³ As of the 28 March 2001, 98 States had accepted the procedure, by signing the First Optional Protocol. “Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001”, Source: <http://www.unhcr.ch/pdf/report.pdf> (23 April 2001, at 17.45).

a binding decision.”¹²⁴ Another problem arises from the large number of various kinds of reservations entered by the contracting states to their acceptance of the obligations of the Covenant, which tend to undermine its effective implementation. Therefore, the Human Rights Committee adopted the *General Comment No 24(52)*,¹²⁵ relating to reservations made on ratification or accession to the ICCPR, on the 2 November 1994.

5.4.2 The General Comment on Reservations

The fact that the Committee has issued a general comment on the topic of reservations is a clear expression of the Committee’s concerns regarding the number and scope of reservations made. In its view, these threaten to undermine the effective implementation of the Covenant, as well as impair the performance of the Committee in respect of the subject matter to which the reservations apply.¹²⁶ Though the Covenant is not as seriously affected by reservations as for instance the Women’s Convention and the Child’s Convention,¹²⁷ the Covenant has nevertheless been the object of some sweeping reservations to which few objections have been made. Redgwell shows concern that the integrity of the Covenant may have been sacrificed to ensure widespread participation, and she receives support for this fear by Prof. Rosalyn Higgins, member of the Human Rights Commission, who claims that “[...] one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged.”¹²⁸

The Human Rights Committee’s G. C. No.24(52) takes a bold step towards the articulation of a new and separate reservations regime in respect of human rights treaties, explicitly departing from what has been characterised as the unsatisfactory operation in relation to such treaties of the classical provisions on reservations embodied in articles 19 to 23 VCLT. In particular, the General Comment “supposes very strict limits to the power of states to make reservations”.¹²⁹ This is evident in, *inter alia*, the discussion of the application of the compatibility with the object and purpose of the treaty test to different

¹²⁴ Malanczuk, p. 215.

¹²⁵ *General comment on issues relating to reservations made upon ratifications or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant CCPR/C/21/Rev.1/Add.6*. The Comment was adopted by the Committee under Article 40(4) ICCPR, in 1994. I will call this comment *G.C. No. 24(52)* in the forthcoming.

¹²⁶ Redgwell, pp. 390-391.

¹²⁷ CEDAW and CRC are pointed out as seriously afflicted by reservations by Redgwell. Redgwell, p. 391.

¹²⁸ This is of course a very bold thing to accuse the international community of, and worth a more thorough investigation, but that will have to be the subject of another paper, as it goes somewhat beyond the scope of the present essay.

¹²⁹ Redgwell, p. 392, referring in particular to G.C. No.24(52) para. 8.

categories of reservations to the Covenant.¹³⁰ It is also asserted that it is for the Committee to determine the compatibility of reservations with the object and purpose of the Covenant, a responsibility not assumed by other UN human rights bodies, such as the Committee on the Elimination of Discrimination Against Women and the Committee on the Elimination of All Forms of Racial Discrimination.

The Committee expresses their view that they find it appropriate that the Committee gets to decide whether a reservation is compatible with the object and purpose of the Covenant, in order to obtain the most objectivity in the assessment of the admissibility. The Committee sees itself as most suitable for this assignment.¹³¹

5.5 The Work of the ILC's Special Rapporteur

5.5.1 The First Report

The Human Rights Commission's General Comment No.24(52), was as quoted above, adopted in 1994, the same year the International Law Commission, ILC, appointed a Special Rapporteur, Alain Pellet, to review the topic. This is a laborious and time-consuming task, and there have already been five reports,¹³² but it is still uncertain when to expect the last and "final" report. In his first report, the Special Rapporteur briefly examined the problems to which the topic gives rise, noting that where reservations are concerned there are gaps and ambiguities in the relevant Vienna Conventions,¹³³ which meant that the topic should be considered further in the light of the practice of states and international organisations.

To have a clear picture of such practice, the Special Rapporteur prepared two questionnaires on reservations to treaties, to ascertain the practice of states and international organisations and the problems encountered by them. In a resolution in December 1995,¹³⁴ the GA invited states and international organisations,

¹³⁰ Redgwell, p. 392.

¹³¹ G.C. No. 24(52) (CCPR/C/21/Rev.1/Add.6/para. 20).

¹³² As far as I know at least. These five reports have come during the period 30 May 1995 to 29 March 2000, disregarding the numerous addendums and corrections to the reports, just counting the main reports.

¹³³ Convention of 1969 on the Law of Treaties, Convention of 1978 on Succession of States in respect of Treaties, and Convention of 1986 on the Law of Treaties between States and International Organisations or between International Organisations. See A/CN.4/491, chapter II, paras. 91-149.

¹³⁴ GA Res. 50/45 of 11 December 1995, para. 5.

particularly those that are depositaries of conventions, to answer the questionnaires promptly. The invitation was reiterated by the GA in late 1996.¹³⁵

The Special Rapporteur is well aware that the Commission's questionnaires are burdensome for the legal departments of Ministries of Foreign Affairs and international organisations, but nevertheless has urged states and organisations that had not yet replied to do so. Some states have, by means of statements by their representatives in the Sixth Committee, informed the Commission of problems they have encountered and of their expectations. The Special Rapporteur has appreciated this input, but still stressed that they are no substitute to replies to the questionnaire.¹³⁶ The replies are necessary in order to guide the Commission in its task of progressively developing and codifying international law, and that cannot be achieved on the basis of oral statements, which are necessarily brief.

5.5.2 The Second Report

The ILC considered the second report at its session in 1997, and thereafter adopted "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties".¹³⁷ The Commission also decided to transmit its preliminary conclusion to the human rights treaty-monitoring bodies. Therefore, the Special Rapporteur sent the text of the preliminary conclusions to the chairmen of human rights bodies with universal membership,¹³⁸ and to the presiding officers of a number of regional bodies,¹³⁹ requesting them to transmit the text to the members of the bodies in question and to inform him of any comments they made. Here too, the replies have not been that numerous.

Having read the second Report, Redgwell meant that Pellet's Report endorses the appropriateness of the general regime for all types of treaty and the balance achieved therein between flexibility encouraging participation and the integrity of the treaty text.¹⁴⁰ Such endorsement is consistent with the position of the ILC,

¹³⁵ GA Res. 51/160 of 16 December 1996, para. 7.

¹³⁶ Fifth Report on Reservations, A/CN.4/508, para. 6.

¹³⁷ Official Records of the GA, Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

¹³⁸ Letters were sent to the Chairmen of the Committee on Economic, Social and Cultural Rights, the Commission on Human Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination on Discrimination Against Women, the Committee Against Torture and the Committee on the Rights of the Child. See A/CN.4/508, para. 9.

¹³⁹ Letters were sent to the presiding officers of the African Commission on Human and People's Rights, the European Commission on Human Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. See *ibid*/ A/CN.4/508, para. 9.

¹⁴⁰ Redgwell, p. 392.

which was set forth in adopting for its long-term programme of work the topic of reservations to treaties. The ILC indicated that it “is aware of the need not to challenge the regime established in articles 19 to 23 of the 1969 Vienna Convention of the Law of Treaties”. It is such a challenge the Human Rights Committee has mounted, in so far as human rights treaties are concerned. There is increasing concern that the flexible reservations system under the VCLT, designed to facilitate widespread participation in treaties, has achieved this goal at the expense of the integrity of treaties that are subject to sweeping reservations.

5.5.3 The Third and Fourth Reports

The Special Rapporteur indicated in the third Report that the work of considering the substantive questions concerning the regime of reservations to treaties would be completed by the year of 2000, or by 2001 at the latest.¹⁴¹ At that point, the Special Rapporteur proposes to submit draft final conclusions on the issues dealt with in the preliminary conclusions; if necessary, those conclusions could be incorporated in the Guide to Practice (although they may not lend themselves to such inclusion). The Commission considered the third Report at its fiftieth and fifty-first sessions in 1998 and 1999. The Special Rapporteur had by that time already submitted a fourth Report,¹⁴² which contained only a single chapter recapitulating the new elements introduced since the consideration of the second Report and proposing a reconsideration of the draft guideline concerning “statement of non-recognition”.¹⁴³ At the end of the fiftieth session, the Special Rapporteur also submitted the part of his third Report, which dealt with the distinction between reservations and interpretative declarations.¹⁴⁴

Following the plenary debate at the fiftieth session, in 1998, the Special Rapporteur stated that he had been on the wrong track in considering initially that what was at issue were reservations in the legal sense of the term.¹⁴⁵ Accordingly, in his fourth Report, he proposed a draft guideline which reflected the position of the vast majority of members of the Commission and which was, with a few amendments, adopted by the Commission as draft guideline 1.4.3.¹⁴⁶

For the reasons stated above, about the necessity of replies from the Member States, the Special Rapporteur suggested in his fourth Report¹⁴⁷ that the ILC should recommend to the GA that it should appeal once more to the member

¹⁴¹ Third Report on Reservation, A/CN.4/491, para. 23.

¹⁴² Fourth Report on Reservations, A/CN.4/499.

¹⁴³ Fifth Report on Reservations, A/CN.4/508, para. 21.

¹⁴⁴ See A/CN.4/SR.2551 and the corresponding report of the Commission (Official Records of the GA, Fifty-third Session, Supplement No. 10 (A/53/10), paras. 505-519).

¹⁴⁵ See A/CN.4/491/Add.3, paras. 168-181.

¹⁴⁶ A/CN.4/499, paras. 44-54, and A/CN.4/508, para. 25.

¹⁴⁷ Fourth Report on Reservations, A/CN.4/499, para. 6.

states that had not yet replied. The ILC did so in its report during its fifty-first session,¹⁴⁸ but the GA transmitted that appeal only implicitly at its fifty-fourth session,¹⁴⁹ and no replies have been received by the Secretariat since the end of that session. In his fifth Report, the Special Rapporteur contemplates the necessity of reiterating that request.¹⁵⁰

5.5.4 The Fifth Report

By the time of the fifth Report, March 2000, 33 States and 24 international organisations had replied either partially or fully to the questionnaires. The Special Rapporteur regards this number of replies, which represent a higher response than normal for Commission questionnaires, as encouraging, assuming that there is a great interest in the topic and confirms that studying it meets a real need. But still, the number of replies is nonetheless unsatisfactory; replies have been received by only 33 of the 188 member states of the United Nations to which the questionnaires were sent. Likewise, only 24 of all the international organisations that received the questionnaires have replied. Moreover, the replies are not evenly distributed geographically: they are mainly from European and Latin American States (20 and 8 replies respectively), while only a few Asian States (5 replies) and no replies from any African countries. Furthermore, one of the most active treaty-making international organisations, the European Community, has not yet replied to the questionnaire sent to it.¹⁵¹

5.5.5. Concluding Notes About the Work of the Special Rapporteur

The work of the Special Rapporteur will most probably not be completed by any time soon. So far five reports have been published since the Special Rapporteur got his mandate by the ILC. His work is dependent on the participation and support of the member states of the UN, and in order to receive their input a number of questionnaires have been distributed. Unfortunately, the replies have not been numerous (considering the number of questionnaires distributed and number of possible participants to the inquiries), and the answers received are regrettably not evenly divided among the member states. However, it seems to me that there is an aversion to actually address the issue of reservation, even though it appears that everybody agree that the issue is problematic. It appears that no state is happy about the current situation, but no state is prepared to forgo any of its privileges of the current system, i.e. the wide discretion to formulate reservation and objection, in order to improve the situation.

¹⁴⁸ Official Records of the GA, Fifty-fourth Session, Supplement No. 10 (A/54/10) para. 30.

¹⁴⁹ GA Res. 54/111, para. 3.

¹⁵⁰ Fifth Report on Reservations, A/CN.4/508, para. 7.

¹⁵¹ Fifth Report on Reservations, A/CN.4/508, para. 5.

The present writer believes that this unwillingness is held generally among the UN member states. No state wants to renounce more of its own sovereignty, i.e. in this case the right to review and decide on the legal status of reservations. High participation has been emphasised by the international community, and this notion was a decisive factor when the regime on reservations, embodied in VCLT, was drafted. The ILC has stressed the will to keep the Vienna regime unchallenged. The Special Rapporteur has an important and difficult task to complete. There are still many questions that await answers, and the following reports of the Special Rapporteur will be received with great anticipation.

5.6 A New Approach

5.6.1 The First Steps

Articles 20.4(b) and 21.3 VCLT together give a clear picture: the reserving state gets what it wants (i.e. the exclusion or modification of the legal effect of a provision of the treaty), whether that reservation is objected to or not.¹⁵² In light of this, it was perhaps just a matter of time before states started to rethink the way to handle reservations. Among the first attempts to change the practice on reacting on reservations was the Portuguese objection to a reservation made by the Maldives to CEDAW. Portugal stated in its objection, lodged in November 1994, that the reservation “cannot alter or modify in any respect the obligations arising from the Convention for any state party thereto.”¹⁵³ Austria launched a somewhat different idea when confronting sweeping, non-specific reservations to human rights treaties. Austria claimed to find itself unable to make a final assessment as to the admissibility of the reservation, and invited the reserving state to clarify its position, and perhaps specify, or even withdraw the reservation. The legal effect of this “preliminary objection” was that it would not preclude the entry into force in its entirety of the convention between the reserving state and Austria.¹⁵⁴ Thereby Austria’s attempt fell short of trying to change the regime relating to objections.

Other states, inspired by the Portuguese and Austrian first steps, went further and would object to certain reservations, adding that the reservation would be “null

¹⁵² Lijnzaad, p. 44 and Klabbers, J., *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, NJIL, Vol. 69, 2000, p.181.

¹⁵³ Klabbers, p.183, note 26: quoting from the Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1995.

¹⁵⁴ Klabbers, p. 184.

and void”,¹⁵⁵ “devoid of any legal effect”¹⁵⁶ or “should be considered invalid”.¹⁵⁷ These sort of statements depart from the earlier practice based on the Vienna reservations (and objections) regime, in that they indicate an intention on behalf of the objecting state that the reserving state will not end up getting its will through. Klabbers considers though, that the objecting states have gone slightly too far. The VCLT leaves it up to the states to individually consider the compatibility of a reservation, but it does not grant the states the power to declare objectionable reservations null and void. Klabbers considers that this might have been a reason for the Nordic states, among others, to push for a new interpretation of the Vienna rules.

5.6.2 The Nordic “No Benefit” Position

The Swedish Government was one of the first to stipulate that with respect to objectionable reservations, the conventions concerned would become operative “...without the reserving State benefiting from the reservation”.¹⁵⁸ The other Nordic countries followed in this new approach towards the reservations deemed to be in conflict with the object and purpose with the human rights treaties and other normative conventions. That both the Danish objection to a reservation made by Guatemala when ratifying the VCLT, and the Finnish objection to the same reservation, contained an additional “thus”, which indicate an automaticity of the treaty relations that would still come about between the reserving and the objecting states is noteworthy.¹⁵⁹ The Nordic initiative strikes Klabbers as a good thought, as he likes the idea to “tilt the balance of benefits to the advantage of the community interest rather than give the reserving state what it wants. Would the world not be a better place if states were not allowed to get away with sweeping (non-specific) or even downright unacceptable reservations to treaties of such obvious and undisputed importance as those aiming to protect human rights?”¹⁶⁰

Indeed, this is a desirable/deserving cause, but the VCLT says nothing about this reaction on reservations. This means that what the Nordic states are doing could at any time be questioned by the reserving states, stating that that the objecting state’s objection is not envisaged in the Vienna Convention, and therefore runs

¹⁵⁵ A phrase in the Italian objection to a U.S. reservation to the ICCPR, Klabbers, p. 184, referring to Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1995.

¹⁵⁶ A phrase from the Finnish objection to a reservation made by Iran to the Convention on the Rights of the Child, P. Kaakoranta, as quoted by Klabbers, p. 184, note 30.

¹⁵⁷ From Mexico’s objection to a reservation made by Mauritius to CEDAW, Klabbers, p. 184, referring to Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1995.

¹⁵⁸ Magnusson, L., *Elements of Nordic Practice 1997*: Sweden, NJIL, Vol. 67, 1998, p.343.

¹⁵⁹ The Council of Europe has included this formula in its recommendations to their member states on responses to inadmissible reservations to international treaties; see Klabbers, p.186, notes 38 and 39.

¹⁶⁰ Klabbers, p. 186.

counter to the text of the VCLT. The reserving state could continue by stating the fact that a single state party to the Convention naturally is not entitled to unilaterally alter the regime on reservations envisaged in the original VCLT.

The VCLT gives the objecting state two options when the admissibility issue has been decided upon. Either the objection precludes the entry into force of the treaty between the two states, or the objection does not preclude the entry into force of the treaty. A third response, like the Nordic countries have given, has no legal support in the VCLT. As Klabbers put it: “Thus, where the law stipulates that a reservation may meet with two responses, the reserving state’s intention must be seen as guided by the desire to elicit one of those responses, but not any third, unmentioned, response.”¹⁶¹ I believe that no one state has a right to unilaterally change a legally binding system, not even in the name of protection of the human rights standards. On the other hand, one can say that any lawmaking process starts off with some kind of lawbreaking, otherwise customary law would never have developed.

In the state practice report of the Nordic countries, written by Magnusson for Sweden,¹⁶² the new Nordic approach is commented upon. The Swedish representative to the Sixth Committee argues (in his statement) that in the event of the inadmissibility of a reservation, it is the reserving state that has the responsibility for taking action by modifying its reservation or withdrawing it, or foregoing becoming a party. It should be added though, that also other state parties and monitoring bodies have a role to play in bringing about such a desired result. And what happens if the reserving state does not take action? At this point the spokesperson stressed the importance of analysing the legal effects of inadmissible reservations when the reserving party stays inactive, and referred to the practice adopted by Sweden, along with the other Nordic countries, among other states.¹⁶³ In some cases, particularly in connection with human rights treaties,¹⁶⁴ certain countries have made reservations of a general nature, referring in an unspecified manner to domestic legislation or other normative systems, some of them of a religious origin. This has raised doubts about the commitment of those countries to the object and purpose of the treaty in question. In other cases, states have made specific reservations against central provisions of a treaty, which must be considered to be against its object and purpose.

In both types of cases, the Nordic countries have maintained that the reservation cannot modify the treaty. The Nordic countries have objected to the reservations, but done so without precluding the entry into force of the treaty. The conventions have become operative between the states in question without the reserving state

¹⁶¹ Klabbers, p. 187.

¹⁶² Magnusson, L., *Elements of Nordic Practice 1997*: Sweden, NJIL, Vol. 67, No. 3, 1998, p. 350.

¹⁶³ The practice is referred to as the Nordic “No Benefit” Approach.

¹⁶⁴ Human rights treaties such as CRC and CEDAW just to name two examples.

benefiting from its reservation. The Swedish representative reasons that it is obvious that it should not be permitted for a state to accede to a normative multilateral treaty and, at the same time, through reservations nullify central provisions of that treaty. Reservations of that kind are inadmissible and should not influence the legal effect of the adherence to the treaty.¹⁶⁵ Sweden has also expressed the view that these sorts of inadmissible reservations not only casts doubt on the commitment of the reserving state, but also, and maybe more importantly, contributes to undermine the basis of international law. It is in the common interest of states' that treaties, to which they have chosen to become parties, also are respected, as to the object and purpose, by other parties. Furthermore, it is essential that these states are prepared to undertake the legislative changes necessary to comply with such a treaty.¹⁶⁶

If correctly understood by the present writer, the new approach by the Nordic countries is not a suggested solution, but a method to give more energy to the debate about the Vienna reservation regime. It may be acceptable that a reserving state benefits from its reservations with regards to multilateral treaties based on reciprocity, but such desirability is decidedly less obvious when it concerns human rights treaties or other normative treaties. How to prevent the reserving state in such a situation from benefiting from its reservation is a yet unanswered question, if one wants to avoid breaches of the international law as it reads today. It is not acceptable to unilaterally invent new solutions to be applicable in international law, i.e. applicable to the Vienna regime on reservations, and it is surprising that other states, as well as other scholars, have not reacted more strongly. On the other hand, this might be a hasty statement, considering that the Nordic states initiated this new approach as late as 1997. In an international law perspective, this is a relatively short period of time, and more reactions are perhaps to be expected in the future.

5.7 Examples of Treaties “Suffering” with Numerous Reservations

In the following, a brief presentation is made of the International Covenant on Civil and Political Rights, ICCPR, and of the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW. Both of these treaties have numerous reservations lodged to them, and in the present presentation, one particular reservation to each treaty has been chosen to demonstrate the phenomenon of reservations. The choices are made since the two examples very

¹⁶⁵ Magnusson, L., *Elements of Nordic Practice, 1997: Sweden*, NJIL, Vol. 67, No. 3, 1998, p. 350.

¹⁶⁶ Magnusson, L., *Elements of Nordic Practice, 1996: Sweden*, NJIL, Vol. 66, No. 2-3, 1997, p. 359.

clearly show what sorts of reservations are being lodged by the states willing to become state parties.

5.7.1 Reservations to ICCPR and the Example of the US's Reservations

As of 1 November 1994, there were a total of 150 reservations made by 46 out of the Covenant's 127 state parties, which means that 36 % of the state parties to the Covenant had made some sort of reservation.¹⁶⁷ Both the Covenant and the First Optional Protocol are silent in respect of reservations, and therefore give no guidance on the making of and relating to the numerous reservations to the treaty. This is notwithstanding the General Assembly's "express demand in 1952 that concrete provisions on the permissibility and legal effect of reservations be adopted in the two Covenants, as well as various [UK] initiatives in this direction".¹⁶⁸ Imbert attributes this reticence in part to the desire of the majority to ensure that the general rules of treaty law, as reflected in the then recently adopted ILC's Draft Articles on the Law of Treaties (which were adopted in 1966), would apply to the Covenant.¹⁶⁹ As a consequence of the lack of any guidance in the Covenant, the "compatibility with the object and purpose" test of the validity of reservations applies as a matter of general international law, as it is stipulated in article 19(c) VCLT and enunciated earlier by the ICJ in the Genocide Convention Case of 1951, regarding reservations.

The Human Rights Committee considers that the object and purpose of the Covenant "is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those states that ratify; and to provide an efficacious supervisory machinery for the obligations undertaken".¹⁷⁰

The reservations that have been made to the Covenant vary significantly. The Committee has in the G.C. No.24(52) divided the reservations into three categories, all likely to impair an effective implementation of the Covenant. These are:

- 1) reservations excluding the duty to provide and guarantee particular rights in the Covenant;

¹⁶⁷ These were the figures as of November 1994, upon which Redgwell based her article. As of the 28 March 2001 there were 148 state parties to the ICCPR, "Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001" Source: <http://www.unhchr.ch/pdf/report.pdf> (23 April 2001, at 17.45).

¹⁶⁸ Imbert, pp. 42-43.

¹⁶⁹ Redgwell, p. 393.

¹⁷⁰ G.C. 24(52) p.3, n.3.

- 2) reservations couched in general terms “often directed to ensuring the continued paramountcy of certain domestic legal provisions; and
- 3) reservations affecting the competence of the Human Rights Committee.¹⁷¹

A relatively recent and controversial example of reservations falling within each of these three categories are the five reservations, five understandings and three declarations made by the United States upon ratification of the Covenant in June 1992.¹⁷² Redgwell quotes Shelton, who foresaw a number of objections to the U.S. reservations, “[...] because the Covenants are deemed to constitute minimum standards of state conduct toward individuals and groups [...]”.¹⁷³

There have been objections; by the end of December 1993 there were objections made by 11 other state parties, but none of them were made within the 12 months of communication of the U.S. reservations, i.e. the time limit in VCLT.¹⁷⁴ Article 20(5) VCLT stipulates that if a state has not indicated its objection to a reservation within 12 months of the notification of it, then it is considered to have accepted the reservation. The 12 months start running when the state parties are notified by the depositary of receipt of communications relating to the treaty.¹⁷⁵

The U.S. explanation for attaching conditions to the ratification was to make reservations wherever incompatibilities between the Covenant(s) and domestic law were found. The Human Rights Committee, as well as a couple individual state parties of the Covenant, was critical of the U.S.’s approach. One of the objecting state parties was Sweden, who lodged a very strongly worded objection, which stated, *inter alia*, “Reservations of this nature contribute to undermining the basis of international treaty law.”¹⁷⁶ As indicated, one of the explicit rationales for the U.S. reservations was to ensure the continued paramountcy of certain domestic provisions, where these differ from the Covenant. This is exactly one of the Committee’s three points that it fears will impair the implementation of a human rights treaty (see above). It is perhaps not necessary to stress that the very purpose of becoming a state party to the standard setting human rights treaties is to ensure a higher standard or protection than the state offered previous to such signing and ratification.

¹⁷¹ G.C. 24(52), para.1.

¹⁷² Redgwell, pp. 394-397.

¹⁷³ Redgwell, p. 394 (quoting D. Shelton in “*Issues Raised by the United States Reservations, Understandings and Declarations*” in H. Hannum & D. Fischer (eds) *U.S. Ratification of the International Covenants on Human Rights* (1993)).

¹⁷⁴ Redgwell, p. 406.

¹⁷⁵ See article 78(c) VCLT.

¹⁷⁶ Redgwell, p. 396.

5.7.2 Reservations to CEDAW and the Example of the Maldives' Reservation

The Women's Convention, CEDAW, has a considerable number of participating states.¹⁷⁷ It has more state parties than other human rights treaties¹⁷⁸ and this is perhaps because of all the publicity it has received.¹⁷⁹ CEDAW is also a convention with a high rate of reservations made to it.¹⁸⁰ The drafters of CEDAW restated the general rule in article 19(c) VCLT, the compatibility test, in article 28(a) CEDAW. Scholars have discussed the reasons for the fact that there are so many reservations lodged to the convention. They have come up with various explanations, mostly concerning culture, tradition, customs of different countries, and called it cultural relativism.¹⁸¹ Some States have suggested that CEDAW should be afforded a lesser status than other treaties because its subject matter is culturally sensitive, even if not articulated in these terms in the debate. The standpoint is made clear though through their responses to the Secretary-General, arguments in the debate and through some of the reservations made.¹⁸² It has been said that the Convention was thought to be a mere statement of intent or other document of rhetoric, rather than as establishment or codification of international legal norms. Japan and Turkey are pointed out as examples of states with the tolerant view referred to above, and who therefore held the position that some reservations seemed "quite reasonable".¹⁸³

The reservations with the broadest scope seem to have been entered by Muslim states and concern the conflict with Shariah (Islamic law).¹⁸⁴ An example of a reservation of this kind to CEDAW is entered by the Maldives.¹⁸⁵ The reservation

¹⁷⁷ As of the 28 March 2001 there were 167 state parties to CEDAW, according to "Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001", Source: <<http://www.unhchr.ch/pdf/report.pdf>> (23 April 2001, at 17.45).

¹⁷⁸ CEDAW has more state parties than the "Twin Covenants", i.e. ICESCR and ICCPR, CERD and CAT. Only the CRC, the Convention on the Rights of the Child, has more state parties to it than CEDAW, according to "Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001", Source: <<http://www.unhchr.ch/pdf/report.pdf>> (23 April 2001, at 17.45).

¹⁷⁹ Mårsäter & Åkermark, p. 382.

¹⁸⁰ Clark, p. 282.

¹⁸¹ Clark, pp. 286-288.

¹⁸² Clark, p. 286.

¹⁸³ UN Doc. A/41/608, at 14, referred to in Clark, p. 286, note 35.

¹⁸⁴ Clark, p. 284.

¹⁸⁵ The wording of the reservation lodged by the Maldives; "*The Government of the Republic of the Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Shariah upon which the laws and traditions of the Maldives is founded. Furthermore, the Republic of the Maldives does not see itself bound by any provisions of the Convention which oblige to change its constitution and laws in any manner.*" Source: United Nations Treaty Collection, As of 19 March 2001, <http://www.unhchr.ch/html/menu3/b/treaty9_asp.htm> (21 May 2001, at 13.45)

lodged by the Maldives was objected to by Sweden firstly since it was deemed to free the Maldives from the responsibility to actively take all necessary steps, including legislative measures, to eliminate discrimination based on gender.¹⁸⁶ The reservation was based on both Shariah and domestic legislation. Secondly, Sweden thought the reservation was incompatible with the object and purpose of CEDAW due to its general and sweeping nature. On the basis of this, Sweden felt unable to accept the reservation and thought it necessary to preclude the entry into force of the treaty relations between itself and the reserving state.¹⁸⁷ Sweden has entered objections to reservations of a general nature lodged by Thailand, Bangladesh, Iraq, Malawi and Libya to name a few other reserving states. Furthermore Sweden has reacted upon reservations made by Egypt and the Cook Islands/ New Zealand, although these objections have come in after the twelve-month time limit set out in article 20.5 and therefore cannot be called objections in a technical sense.¹⁸⁸

Sweden, among other states, is pointed out as a state party that responded to the tolerant view (described above) by reminding the other state parties that incompatible reservations undermine the basis of international law because “[...] it is in the common interest of States that treaties to which they have chosen to become parties also are respected as to object and purpose by other parties.”¹⁸⁹ The Swedish representative furthermore stated that there is no reason to apply less stringent treaty law requirements to a convention against discrimination against women, than to other international treaties. Referring to Clark, the present author wants to stress the fact that the convention is based on the public international law principle that individuals have certain inalienable rights, which states cannot justify overriding by the imperatives of culture, tradition, expediency, economic advantage or other such factors.¹⁹⁰

¹⁸⁶ Mårsäter & Åkermark, p. 382.

¹⁸⁷ Mårsäter & Åkermark, p. 383.

¹⁸⁸ This statement presupposes that the time limit rule in article 20.5 also covers impermissible or inadmissible reservations. Mårsäter & Åkermark have taken the position that articles 20 and 21 VCLT are applicable only to permissible/admissible reservations, which would lead to the situation that there is no time limit rule applicable to inadmissible reservations. Mårsäter & Åkermark mean that their view is supported by the General-Secretary's Treaty Collection practice where Sweden's belated objection was placed under the heading “objections”. They furthermore state that their view is supported by other scholars, referring to Horn and Redgwell. Mårsäter & Åkermark, p. 389, note 34 and Aust, p.127.

¹⁸⁹ UN Doc. A/41/608, at 15, in Clark, p. 286, note 36.

¹⁹⁰ Clark, p. 286.

6. Is There Any Point in Making Objections?

In this chapter, I want to summarise what has been said, and come to some sort of conclusion regarding the state practice in the field of international treaty law, especially concerning the reservations and objections to reservations. If the objections made have had no significant legal effect, why do states keep objecting? What makes it worthwhile? I will touch upon some conceivable reasons, such as the purpose of hindering something from becoming accepted in international law, and the fact that the international community explicitly or tacitly expresses the wish to get as many signatories as possible, and therefore are willing to “sacrifice” the integrity of the treaty text to gain that aim. In the authors' mind, these are all political actions, as the international community is a political experiment and not a legal cooperation in the sense that states take account only of the legal aspects of their rights and obligations on the international arena.

So, is there any point in making objections to the reservations? Are there any differences in the legal consequences between accepting and objecting to a reservation made by another state party? According to many authors, the distinction between acceptance and objection disappears as far as the legal effects are concerned.¹⁹¹ The same authors have even said that objections that do not preclude entry into force are an atypical form of acceptance. From a practical point of view this seems to be true, so why make objections, if they have no legal effect or rather the same effect as an acceptance?

States may use the objections to express their disagreement with the reservation, without precluding the establishment of treaty relations. They are used as political instruments, but are also very important as legal tools, to avoid establishment of new international customary law. On the other hand, there can be a variety of reasons for states not to make objections to reservations that seem to be inadmissible. For instance, there is usually a shortage of time, especially when the reservations are vague and their legal effects have to be thoroughly examined, but also political and economic considerations can cause states to withhold their objections.

It could be interesting to examine the reasons states have for reserving to certain provisions, but perhaps even more interesting to look into the reasons for objecting to certain reservations. There seem to be a hand full of countries that keep objecting to what they perceive as inadmissible or invalid reservations. One of these countries is Sweden, along with the other Nordic states. Other states in

¹⁹¹ Lijnzaad, p.48.

this group are the Netherlands, Germany and Mexico. In the process of the present work, I have learned that whilst reservations lodged by certain states have been objected to, reservations of the same character lodged by other countries have “escaped” and have not met any objections. It would probably be wrong of me to point out for instance the Muslim states as “victims” of the scrutinising objecting states, but the facts do make one think. There are evidently more aspects than the mere reservation to consider when the decision on whether to react or not is to be taken.¹⁹² The political, economic and other extralegal considerations seem to be just as important.

I will in the following give some examples of how other considerations play an important part in the decision-making. The first example concerns a reservation to the Women’s Convention, CEDAW, made by Brazil. The very active objecting states, as mentioned above; Germany and Sweden objected to it, but Mexico did not. Nor did Mexico object to the reservations lodged by Tunisia, although Mexico did object to similar ones entered by Mauritius, Jamaica, Cyprus, Turkey, Egypt, Bangladesh and the Republic of Korea. Similarly, Sweden and Mexico objected to the New Zealand reservation on behalf of the Cook Islands involving conflicts between the provisions of the Convention (CEDAW) and the islander’s customs pertaining to the inheritance of chiefly titles.¹⁹³ Yet, neither Sweden nor Mexico objected to reservations entered by Belgium, Luxembourg, The United Kingdom and Spain, concerning royal succession and privileges. A distinction in the reaction between those reservations and the one made by New Zealand can have no logical basis. The only explanation the present writer can come up with is that at least Sweden has more in common with the latter group of states, both culturally and economically, and therefore finds it harder to object to their reservations. Objections can be, or rather are, perceived as not the friendliest of acts, and perhaps the peace and quiet in the neighbourhood is rated higher than the need to object.

The named states are by no means alone in the practice of not being totally consistent in their state practice. It was not my intention to point out a “bad guy”, or particularly badly behaving states. On the contrary, as I have understood it, this is a fact for most, if not all states. International law is to a far extent dependent on extralegal consideration, and what I have highlighted is no exception. It has become clear to the present author that political and economical considerations play an important, if not a decisive role in the deliberations the states do before acting upon another state’s reservation. These political and economical factors referred to, might be for instance, that the reserving state is a neighbour state with whom the other state has significant connections to, both trade wise and culturally. Before objecting to an inadmissible reservation, the objecting state has to evaluate the positive and negative consequences of such action. If the risk of loosing trade,

¹⁹² Mårsäter & Åkermark, note 36. Clark gives more examples of political and economical considerations in her article. Clark, pp. 301-302.

¹⁹³ Clark, p. 302.

i.e. import or export business, which is of importance for the national economy, or if the relations between the two states are tense of other reasons, an objection might not be an alternative. The objecting state has to decide if whether the objection is worth making, or not, considering the risks it involves. This is, though, an issue one should consult the social science and/or economy scholars in order to receive an adequate answer. What I have given are only a few ideas that to me seem feasible deliberations of the objecting state during the process of reaching a decision on the matter.

I hope to have shown the three different aspects of articles 19-23 of the Vienna Convention: compatibility, acceptability and the legal effects (of both reservations and objections). To sum up, it must be assumed that any reservation is either compatible or incompatible. State parties have to react to any reservation, and they have two alternatives: accepting it or objecting to it. The States will also have to decide on the legal effects of their response to the reservation. Acceptance (whether explicit or tacit) will lead to entry into force of the treaty between the concerned states, while objection may or may not lead to entry into force, depending on the will of the objecting state.

This all seems quite logical, but there are some complications. For instance, it is possible for States to object to reservations that are compatible with the object and purpose of the treaty, as it is possible for the states to accept incompatible reservations. The reasons for States to choose to accept some and object to others are often extralegal, that is, often politically motivated.¹⁹⁴ Objections are considered to be unfriendly acts, which might make States "think twice" before using it towards another state. Also, there are reasons such as states misunderstand the meaning of a certain reservation and therefore does not object. Finally, the time limit in article 20.5 VCLT (which gives states twelve months to react on a reservation, otherwise the state is considered to have accepted the reservation) can be an explanation to why a considerable number of incompatible reservations are left without reactions from other States.

By the state reports and through comments made by representatives for the Swedish Government, it is easy to understand that Sweden not only finds it necessary, but also worthwhile to stay active and examine the contents of reservations to human rights treaties, and in cases of deemed inadmissible reservations, object to them. Fortunately, Sweden is not the only active "objector", and it is a well-known fact that the more states that take an interest in these issues, the more pressure can be placed upon the undesired behaviour. The Nordic countries have, by means of their "No Benefit" Approach, if not found the solution to this difficult and complex issue, introduced a new idea in the debate. Any such new influence must be seen as a positive step forward in the process, and welcomed as a petition /notion/ in the quest for the final solution, if such solution really exists.

¹⁹⁴ Clark, pp. 304 and 307 and Ruda, p. 190.

7. Concluding Remarks

International law, including human rights law, is primarily applicable to states rather than to individuals. Consequently, these international rules generally become a source of domestic legal obligations for a state's officials and of domestic rights for that nation's citizens only through their incorporation in some manner into the state's own internal law.

International treaties are the most important source of international law, but treaties are only binding when in force, and only with respect to the nations that have expressly agreed to become parties to them. The state has also a possibility of picking and choosing which provisions it wants to be bound by. So, even if five of the six major human rights treaties are ratified by three-quarters of the UN member states, these figures conceal the fact that there are hundreds of reservations to these treaties, which purport to limit the scope of the actual obligations of the ratifying state.¹⁹⁵ Reservations are to a certain extent the price to be paid for drafting the human rights treaties in the UN, the price for striving for universality. Drafting of these instruments takes place on the basis of consensus. States may not want to disagree with the final result, in spite of disagreeing about a particular provision. Reservations are the result of the drafting process based upon the political wishes of majority and compromises.

The Islamic states, for example, that have ratified the human rights treaties, often only do so with the caveat that assumed obligations must be compatible with the Islamic law, the Shariah. Criticism against states that have objected to these reservations have been raised, and the objecting states have been accused of objecting as a pretext for doctrinaire attacks on Islam, cultural imperialism and religious intolerance.¹⁹⁶ The Bangladeshi reservation to article 2 of CEDAW is a "good" example of a reservation lodged by a Muslim state. Such reservations negate the treaty's central purpose of identifying overriding international human rights standards. This widespread practice of states making reservations to fundamental provisions in the instruments is apparently tolerated, as is the failure of states generally to fulfil their obligations under the instruments. The international human rights community has emphasised universal ratification as the primary goal. Reservations have been tolerated in order to achieve that goal.

¹⁹⁵ For example, there are 167 state parties, but 119 reservations and declarations (from 47 States) to CEDAW and 148 state parties, but 166 reservations and declarations (from 48 States) to ICCPR. Source: "Status of Ratifications of Principal International Human Rights Treaties As of 28 March 2001", <<http://www.unhchr.ch/pdf/report.pdf>> (23 April 2001, at 17.45).

¹⁹⁶ Clark, pp. 284 and 288. I have no specific knowledge regarding this, but sincerely hope that this is not the case.

However, eighty-five percent of all existing multilateral agreements have no reservations entered, and of the 15 percent that do, most do not relate to substantive provisions but to dispute resolution provisions. The comparatively high reservations rate of human rights treaties therefore justifies *sui generis* treatment in assessing the reservations regime of the Vienna Convention.¹⁹⁷

Derogations, made possible by the subjective application of the compatibility criterion, i.e. the states' right to decide for themselves what reservations they wish to object to, is a problem, as it strikes at the very purpose of a standard-setting instrument. The function of legislative treaties is to contribute to world order by providing regulation and consistency in specific areas. If derogations are numerous, or if individual derogations are extensive, this function is impaired. Derogations from human rights instruments are serious because there is no sanction attached, other than criticism by other states, and therefore no great disincentive to derogate. In making reservations to reciprocal rights treaties, parties are necessarily aware of the reaction they may provoke from other states and must suffer the consequences of that reaction, such as losing the benefit of a provision, as well as being freed from the obligations it imposes. Derogations from the norms of a human rights instrument can be effected by a reserving state at comparatively little cost. This is where the problem lies. As the system works today, there is little that discourages states from making reservations, nothing that encourages other states to object to the reservations, and even less stimuli to withdraw already made reservations.

Lijnzaad makes the remark that there is a possible "truth" in the statement of the old, and nowadays almost forgotten, socialist theory of international law (and particular in its version of the law of treaties) that suggest that reservations represent the interest of the ruling class in the reserving state. She suggest that this point of view might explain a number of reservations made, and continues with the rather controversial (but never the less most probably correct) statement that "the political elite takes care of its own interest when in power"¹⁹⁸. This does not necessarily coincide with the interest of human rights protection. As an example, she points at the males as society's privileged class may, for instance, account for the majority of the reservations to CEDAW. In more general terms, one can claim that there is no coincidence that when looking at the substantive scope of the reservations to human rights treaties, the most fundamental ones aim at the least respected groups in society, such as aliens, prisoners and women. To put it cynically, reservations are used to kick the weakest out of the system of human rights protection. When viewing the notion of reservations from this perspective, it is obvious that this issue is not only a question of an adequate functioning human rights law, but also an issue with distinct moral aspects to it.

Trying to evaluate the Nordic "No Benefit" Approach seems a difficult task for anyone at this stage, since it was first initiated in the late 1990's. Therefore, what I

¹⁹⁷ For further reading, see for instance Clark.

¹⁹⁸ Lijnzaad, p. 397 (with reference to Gubin, as quoted by Göttling).

intend to do is just to give a few of my thoughts concerning it and its effects as I have perceived them. Firstly, I strongly believe that this initiative from the Nordic countries was desperately needed. Reservations to treaties has during the 1990's become an agenda item in many important international organisations, such as the UN and its sub-organisations the ILC and the Human Rights Committee, but also on a regional, in contrast to the global level, the Council of Europe has had this topic on its agenda.

The present writer believes that the Nordic countries' initiative is a positive step towards a change of some kind. It is not a solution, and was most likely never intended to be one, but was thought to be an indication that the regime on reservations is in need of a reform. It is a tool to get the international community's attention to focus on this topic. This initiative should be seen as a contribution to the discourse, with the object to open the way for new solutions, inspiring to re-thinking of the existing legal system applicable to reservations and objections.

The solution suggested by the present author is inspired by the Human Rights Committee's ideas.¹⁹⁹ The Committee has suggested in its General Comment No. 24(52) to get the responsibility to decide on the admissibility of reservations.²⁰⁰ What I suggest is to make some changes in the Vienna regime on reservations and objections that resemble what the Committee has had in mind. I propose 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 idea is to make it one of their tasks to evaluate the admissibility of reservations made to "their" convention, i.e. let the supervisory body perform the "object and purpose" test. When the legal status of the reservations is made clear, the states can decide how to react.

The suggestion made implies that the present author believes that the compatibility test will be better performed by an independent and autonomous monitoring body than by the state parties. However, there are of course some practical difficulties with the suggested change. A supervisory organ or monitoring body with this new task naturally needs experts in the field of public international law in general, and treaty law and interpretations of treaties in particular, in order to perform in a for the state parties satisfactory way. The whole concept would be based upon the states trusting the monitoring bodies with the new task. With no such trust, the idea is impossible to implement. Now, the problem is not that there is a lack of trustworthy scholars around the world; the problem lies in the costs these new and expanded expert panels would result in. The financing would have to be the states' responsibility, and the extra expenses might suffice as reason for the negative states to vote in favour of the existing practice. Contrary, one could

¹⁹⁹ Scholars, such as Lijnzaad, Mårsäter and Åkermark, Redgwell have, if I have understood them correctly, expressed similar views concerning an expansion of the tasks of the monitoring bodies.

²⁰⁰ See above in chapter 5.4.

argue, that the costs are considerable in the present system as well, even if non-pecuniary in the same sense. The international community, one might argue, pays a high price for the flexible system provided for by the Vienna regime. The human rights standard of the world is not what it could have been, had reservations been scrutinised in a more thorough manner. Also, the state parties invest a great deal of money in the legal machinery of their Ministry of Foreign Affairs each year; money that could be invested elsewhere, i.e. in the budget of the monitoring bodies, if the suggested changes were implemented.

A next step would be to make it unacceptable/forbidden to accept an inadmissible reservation, or to object to admissible ones. It should be viewed as just as bad to accept an inadmissible reservation as to formulate it yourself. Hopefully a change such as the one suggested will be the incentive, which will succeed to cause a reform/revolution/ in the state practice. This would clearly cut into and limit the rights of the sovereign state, but perhaps these are necessary steps in order to move away from the present state practice.

Thus, what I suggest is to give priority to the integrity of the treaty text, and let the rights of the sovereign state stand back to achieve this aim. As has been said earlier, the integrity of the treaty text is especially important for the standard setting human rights treaties, and other treaties of a normative nature. A legislative treaty is necessarily somewhat defeated by any system that allows parties to choose to adhere to some parts of the treaty and not to others. Still, despite its flaws, the Vienna reservations regime manages to avoid the extremes of the unanimity rule and the chaos a total lack of rules would bring, and is in the authors mind simply in need of an amendment concerning the provisions on reservation, especially to human rights treaties.

It is in the common interest of the international community as a whole, and should therefore be pursued as a goal by the international organisations, most importantly the UN. Another thought that has struck me is how a cooperation between states, in the way the Nordic states have coordinated their policies, and the way the European Community is trying to organise its foreign policy, seem to be the best way to accomplish the goals.

This means that I do support the idea to introduce a special set of rules for human rights treaties and other treaties of a normative nature. Exactly how these rules should be designed is a too complicated issue for the present writer to address at this moment. Still, what I would recommend as the first reform of the present situation is, as has been notified earlier in this chapter, to hand the “compatibility test” over to the supervisory organs, in order to get a fair and objective judgement of the admissibility of the reservation. As it works now, with the test being performed by each and every state party individually, the risk is that extralegal considerations, such as political and economic concerns, play a significant role in

the determination, if not of the legal status of the reservation, at least on how to respond to it.

If the changes suggested came to be implemented, it would hopefully lead to a higher awareness and more active objectors. The time limit in article 20 VCLT would no longer constitute a problem, or not cause the same difficulty for the states, as it appears to do now. Perhaps the time limit could start running after the supervisory body has given its decision. Lack of time would no longer be a reason for states not to object. There would be ample time for the states to decide on a response, and furthermore, if things changed as have been proposed by the present writer, there will not be too many options for the responding state to choose between. It would just be a matter of formulating the objection to the inadmissible reservation. A consequence of it might be that fewer reservations are formulated in the future, as the attention on the reservation most probably would grow with the new reservations regime.

Being aware of facts, such as the costs of a reform of the Vienna regime, and that higher requirements might lead to a lower participation in the human rights standards treaties (or the risk of no treaty at all if the drafting process collapses), cannot be a reason to ignore the discussion of a needed reform. Universality and integrity are important goals, but seem to be interrelated in an unfriendly balance, in which achieving one is necessarily at the expense of the other. The proposed changes would tilt the balance in favour of integrity of the treaty text.

These are just a few of my thoughts that have sprung to mind, but I am aware of the complications relating to this topic. The international discourse has yet to find a feasible solution, so it is with great humbleness I give my own thoughts on the subject.

Supplement

THE VIENNA CONVENTION ON THE LAW OF TREATIES

Signed at Vienna: 23 May 1969
Entry into force: 27 January 1980

Extract

Article 2

Use of terms

1.(d) '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;

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

SECTION 2. RESERVATIONS

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.

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