



uOttawa

L'Université canadienne
Canada's university

FACULTÉ DES ÉTUDES SUPÉRIEURES
ET POSTDOCTORALES



FACULTY OF GRADUATE AND
POSTDOCTORAL STUDIES

Yingliang Huang

AUTEUR DE LA THÈSE / AUTHOR OF THESIS

LL.M.

GRADE / DEGREE

Faculty of Law

FACULTÉ, ÉCOLE, DÉPARTEMENT / FACULTY, SCHOOL, DEPARTMENT

Reservations to Multilateral Human Rights Treaties

TITRE DE LA THÈSE / TITLE OF THESIS

Professor Donald McRae

DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

Professor John Currie

Professor Craig Forcese

Mr. Rodney Neufeld

Gary W. Slater

Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

Reservations to Multilateral Human Rights Treaties

Yingliang Huang

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the LL.M. degree

Graduate Studies in Law
Faculty of Law
University of Ottawa

© Yingliang Huang, Ottawa, Canada, 2006



Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 978-0-494-25787-6

Our file Notre référence

ISBN: 978-0-494-25787-6

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.


Canada

Table of Contents

Legend.....	iv
Abstract	v
Acknowledgements	vi
Chapter I Overview	1
1. Topic Introduction.....	1
2. The Approach.....	3
3. Definitions of Key Terms.....	4
Chapter II The Significance of and Reservations to Human Rights Treaties	9
1. The significance of Human Rights Treaties.....	9
A. The Reliable Source	9
B. The Preferable Source	12
C. The source of Customary Law	13
2. The Characteristics of Human Rights Treaties	15
3. The Motives to Formulate Reservations to Human Rights Treaties	18
A. Avoid Conflicts between Domestic Laws and Treaty Provisions.....	19
B. Difficulty in Satisfying Human Rights Standards in the Future.....	22
C. Maintain Religious or Cultural Tradition.....	24
D. Reject the Jurisdiction Exercised by some International Tribunals	26
4. Conclusion.....	28
Chapter III The Permissibility of Making Reservations	29
1. The Legal Problems of Reservations to Human Rights Treaties	29
2. The 1951 ICJ Advisory Opinion	33
3. The ILC Study.....	37
A. Majority Votes.....	37
B. Extensive Participation.....	43
C. Current Study by the ILC	47
4. Conclusion.....	50
Chapter IV The Current Reservations Mechanism	51
1. Various Rules	51
A. Unanimity Rule	52

B. Sovereignty Rule	56
C. Pan-American Rule	60
2. The Compatibility Principle.....	63
A. The Logical Relation between the Two Standards.....	63
B. The Problems of the Compatibility Principle.....	66
3. The Current Reservations Mechanism.....	74
A. Analysis of Article 19	74
B. Analysis of Article 20.....	76
C. The Loss of the Logical Relation between the Two Standards	78
4. Conclusion.....	83
Chapter V Objective Application of the Criterion of Compatibility.....	85
1. Orientation of the Competent Body	85
2. Responsibility of the Competent Body	91
A. Interpreting the Object and Purpose.....	92
B. Seeking and Confirming the Provisions Providing for Reservations.....	95
C. Objectively Determining the Compatibility of Reservations	100
3. Suggestions on Competent Bodies.....	104
A. Treaty Monitoring Bodies	104
B. International Court of Justice	111
Chapter VI Conclusion.....	121
Appendices	124
I. The Summary of the 1951 ICJ Advisory Opinion.....	124
II. “Reservations” Section of the 1969 Vienna Convention	128
Bibliography.....	131
I. Books & Collections.....	131
II. Reports & Documents	132
III. Cases & Decisions.....	134
IV. Legislations & Conventions.....	134
V. Articles & Thematic Comments.....	136

Legend

CEDAW Convention on the Elimination of all Forms of Discrimination against Women

CRC Convention on the Rights of the Child

ECHR European Court of Human Rights

Genocide Convention Convention on the Prevention and Punishment of the Crime of
Genocide

HRC Human Rights Committee

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice

ILC International Law Commission

OAS Organization of American States

PRC People's Republic of China

Racial Discrimination Convention International Convention on the Elimination of All
Forms of Racial Discrimination

Torture Convention Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment

UDHR Universal Declaration of Human Rights

UK United Kingdom of Great Britain and Northern Ireland

UN United Nations

US United States of America

1969 Vienna Convention Vienna Convention on the Law of Treaties

Abstract

Key Words:

the compatibility principle; the objective determination of compatibility

The title of my (LL.M.) thesis is *Reservations to Multilateral Human Rights Treaties*.

Reservations to multilateral human rights treaties have become an important issue since the case of the Genocide Convention in 1951. Although the compatibility principle upheld by the International Court of Justice (ICJ) was codified in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention), the current reservations mechanism is problematic and detrimental to human rights treaty-making.

I will argue that the logical relation between the two standards comprising the compatibility principle has been lost under the Vienna Convention and it should be reintroduced by a competent body.

For this purpose, I will analyze the characteristics of human rights treaties, clarify the permissibility of making reservations, go through the origin and development of the compatibility principle, and identify the problem of the current reservations mechanism, namely that the determination of the compatibility of reservations is left to individual States. The solution I will propose is that the ICJ should be conferred the competence to objectively determine the compatibility of reservations.

Acknowledgements

I am pleased to express my appreciation of the supervision undertaken by the Faculty of Law at the University of Ottawa. Although I am indebted to more people than I can take the space to thank here, I must acknowledge my gratitude to a limited number of individuals who have made remarkable contributions to this thesis.

First of all, I must take this opportunity to extend my gratitude to my supervisor, Professor Donald M. McRae, for his insightful comments, constructive criticism and ongoing invaluable support in the development of this thesis. Before I wrote this thesis, he taught me how to express and construct my own ideas in a Directed Research paper. Without his continuous encouragement, it would have been impossible for this crude student to finish the LL.M. program. While I was writing this thesis, he respected and nourished my ideas, and established a basis for doing my own research in the future.

In addition, I acknowledge Ms. Rebecca Adell's helpful advice on my use of English language and her careful editing of my drafts. Ms. Adell is the Principle Advisor of the Student Academic Success Service. Meanwhile, I would like to thank Professor Alan Fleichman, who is the Librarian of the Human Rights Research and Education Centre. He helped collect certain important documents and provided me with very good working conditions. Finally, the assistance of the administrative staff of the Office of Graduate Studies in Law is also highly appreciated.

Yingliang Huang

July 2006

Chapter I Overview

1. Topic Introduction

The topic of my thesis is *Reservations to Multilateral Human Rights Treaties*. Generally speaking, multilateral human rights treaties have two common objectives. One is universality, which means extensive participation by States. The other is uniformity, which means the consent of States to be bound by the whole treaty. However, in practice, these two objectives conflict with each other. States possibly would like to accept some but not all the provisions. Thus, States may formulate reservations to specific provisions of the treaty when signing, ratifying, or acceding to it. As a result, many questions arise. For example, when the depositary of a treaty is counting the number of deposited instruments for its entry into force, should he/she consider an instrument of ratification with reservations as valid? After the entry into force of the treaty, if a State submits an instrument of accession accompanied by reservations, can it be regarded as a party to the treaty?

Traditionally, there was no uniform mechanism on reservations. After the Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention; 1951 Advisory Opinion)¹ was issued by the International Court of

¹*Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15 [Hereinafter 1951 ICJ Advisory Opinion]. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) [Genocide Convention].

Justice (ICJ) in 1951, the compatibility principle, or the “object and purpose”² test, became dominant. This principle consists of an objective standard and a subjective standard. The objective standard prescribes that a reservation is not legally valid unless it is compatible with the object and purpose of the treaty. The subjective standard prescribes that another contracting State³ or a State party, in the light of the compatibility of the reservation, may accept it and thus both the accepting State and the reserving State would be parties to the treaty subject to the reservations, or object to it and oppose the entry into force of the treaty between itself and the reserving State.

Subsequently, the International Law Commission (ILC) of the United Nations (UN) spent nearly 20 years codifying this principle, as a part of its codification of treaty law. Finally, the principle was embodied in the *Reservations* Section (Part II, Section 3, Articles 19-23) of the *1969 Vienna Convention on the Law of Treaties* (1969 Vienna Convention).⁴ This is the current reservations mechanism. However, it is problematic. The standards comprising the compatibility principle are taken separately. There is not a neutral third party to decide on the compatibility of reservations. It is actually self-assessed by individual States and thus unforeseeable. Also, the manner and effect of objections to reservations are arbitrary and unpredictable.

Under the current reservations mechanism, the logical relation between the objective and subjective standards has been lost, and that it should be reintroduced through a third party. I

² *Ibid.*

³ “‘Contracting State’ means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force”. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980), Art. 2 (f) [1969 Vienna Convention].

⁴ *Ibid.*

will propose several international tribunals and treaty monitoring bodies which are suitable to be such a third party.

2. The Approach

First, I will situate human rights treaties in the development of international law. I will discuss their characteristics and will illustrate the motives for States to make reservations thereto. Then, I will identify human rights treaties as a special category of treaties.

Second, I will address the problems of reservations to human rights treaties by referring to the case of the Genocide Convention. I will raise a question on the permissibility of making reservations. The ICJ Advisory Opinion and the ILC preparatory work demonstrate that the acts of making reservations should be permitted.

Then, based on the permissibility of making reservations, I will review the logical relation between the two standards of the compatibility principle. They were codified in the 1969 Vienna Convention. I will analyze the relation between Articles 19 and 20 of the Convention to demonstrate that the logical relation has been lost.

Finally, I will argue that the current reservations mechanism needs reform by reestablishing the logical relation between the two standards. Accordingly, I will propose that a neutral third party be introduced into multilateral human rights treaty-making. This third party will be in charge of the application of the objective standard, prior to contracting States'

application of the subjective standard. The International Court of Justice will be suitable for this purpose.

3. Definitions of the Key Terms

Before proceeding to the main body of the thesis, it is necessary to define two key terms which will be used frequently. First of all, what is a “reservation?” Article of the 1969 Vienna Convention provides as follows:

‘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.⁵

It is restated by the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*.⁶ The vital factor to distinguish a reservation from the other statements made by a contracting State in a treaty-making process is the intent to modify or exclude the application of one or more specific provisions to it. Besides, this definition indicates that a reservation is a unilateral product, made by a contracting State, in some specific phases of a treaty-making process. This definition is publicly recognized by the international law academics.⁷

⁵ 1969 Vienna Convention, *supra* note 3, Art. 2(d).

⁶ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, UN Doc. A/CONF.129/15, 25 I.L.M. 543 (Not yet in force).

⁷ See D. M. McRae, “The Legal Effect of Interpretive Declarations” (1978) 49 *British Yearbook of International Law* 155. Also see Paul Reuter, *Introduction to the Law of Treaties*, trans. by José Mico and Peter Haggenmacher (London & New York: Printer Publishers, 1989), at 60.

It is also necessary to distinguish between a reservation and the act of formulating a reservation. Article 19 of the 1969 Vienna Convention provides that,

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.⁸

This provision in fact indicates how to formulate a reservation. When there is a provision in a treaty providing for reservations, a reservation can be formulated only if it is explicitly permitted, or not explicitly forbidden by that provision. In the absence of such a provision, as sub-paragraph (c) provides, a reservation can be formulated only if it is consistent with the spirit of the treaty. Otherwise, those reservations formulated are invalid. Thus, from a legal perspective, Article 19 provides that only valid reservations should be formulated.

Nevertheless, from a practical perspective, it is difficult for a depositary, States parties, or even the reserving State itself to adjudicate the validity of a reservation, especially in the absence of a provision providing for reservations. For example, the reservations formulated by the United States of America (US) to Articles 6 and 7 of the *International Covenant on Civil and Political Rights* (ICCPR),⁹ provoked objections from eleven European States

⁸ 1969 Vienna Convention, *supra* note 3, Art. 19.

⁹ These reservations were formulated upon the US accession on 8 June 1992. They read as follows: "Reservations: ... (2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age. (3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United

considering them as invalid. The Human Rights Committee (HRC) as the treaty monitoring body found the incompatibility of these US reservations with the object and purpose of the ICCPR.¹⁰ The validity of these reservations has also been questionable for academics.¹¹ As a result, when the validity of potential reservations is not provided *prima facie* by a treaty, States might in fact formulate invalid reservations. Hence, in this thesis, the term “reservation” will be used without implication of its validity.

The other key term for this thesis is “multilateral human rights treaties.” It is no doubt that a uniform definition of “treaty”¹² is provided by the 1969 Vienna Convention and human rights treaties should be an inferior concept thereto. Imitating the Vienna Convention, I would like to define “multilateral treaties” as international agreements concluded between more than two States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. However, “human rights” itself is a developing concept. As Kamenka notes,

States.” UN, *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 2004, Vol. I, Part I, Chapter I to XI (New York: UN, 2005) [Multilateral Treaties], at 184-185. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force on 23 March 1976) [ICCPR].

¹⁰ *Concluding Observations of the Human Rights Committee: United States of America*, Human Rights Committee, 53d Sess., 1413th Mtg., UN Doc. CCPR/C/79/Add.50 (1995) at para.279.

¹¹ See Ved P. Nanda, “The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights” (1993) 42 DePaul L. Rev. 1311; Edward F. Sherman, Jr., “The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation” (Winter 1994) 29 Tex. Int’l L.J. 69; William A. Schabas, “Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?” (1995) 21 Brooklyn J. Int’l L. 277 [William A. Schabas, “Invalid Reservations”]; Markus G. Schmidt, “Universality of Human Rights and the Death Penalty: the Approach of the Human Rights Committee” (Winter 1997) 3 ILSA J Int’l & Comp L 477; Elizabeth A. Reimels, “Playing for Keeps: The United States Interpretation of International Prohibitions against the Juvenile Death Penalty – The U.S. Wants to Play the International Human Rights Game, but only if it Makes the Rules” (Spring 2001) 15 Emory Int’l L. Rev. 303; Annika K. Carlsten, “Young Enough to Die? Executing Juvenile Offenders in Violation of International Law” (Summer/Fall 2001) 29 Denv. J. Int’l L. & Pol’y 181; Curtis A. Bradley, “The Juvenile Death Penalty and International Law” (December 2002) 52 Duke L.J. 485, etc.

¹² “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” 1969 Vienna Convention, *supra* note 3, Art. 2(a).

The concept of human rights ... seeks or claims a form of endorsement that transcends or pretends to transcend specific historical institutions and traditions, legal systems, governments, or national and even regional communities...Like moral claims more generally, it asserts in its own behalf moral and sometimes even logical priority --- connection with the very concept (treated as morally loaded) of what it means to be a human being or person, or of what it means to behave morally.¹³

Thus, the intension of such a concept is hard to determine. In contrast, its extension, at least part of it, can be specified. For example, a number of rights were proclaimed in the *Universal Declaration of Human Rights* (UDHR).¹⁴ As Rehman says,

[These] varied perceptions of human rights have also led to claims that there are 'three generations' of human rights. The so-called 'first generation' of human rights is represented by civil and political rights...The social, economic and cultural rights are equated with the 'second generation' of human rights...the 'third generation' of rights includes collective group rights and such rights as the right to development, the right to self-determination and the right to environment.¹⁵

Therefore, there are certain rights which are publicly recognized as human rights. In this connection, the multilateral treaties which provide for these rights shall be considered as human rights treaties. The treaties recorded in the Chapter IV *Human Rights* of the *Multilateral Treaties Deposited with the Secretary-General* (Multilateral Treaties)¹⁶ are typical human rights treaties, such as the ICCPR. Those multilateral treaties of regional human rights protection are also included, such as the *American Convention on Human*

¹³ Eugene Kamenka, "Human Rights, People's Rights" in James Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press; New York: Oxford University Press) 127, at 128. See also David, Makinson, "Rights of Peoples: Point of View of a Logician", *ibid.*, 69.

¹⁴ *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR]. For those rights enumerated, see also Javid Rehman, *International Human Rights Law: A Practical Approach* (New York: Longman, Pearson Education Ltd., 2003), at 55.

¹⁵ *Ibid.*, at 6-7.

¹⁶ Multilateral Treaties, *supra* note 9, at 125-355.

Rights (Pact of San José, Costa Rica).¹⁷ In this thesis, I will primarily focus on the multilateral human rights treaties concluded under the UN framework. They are widely participated in and subject to reservations by States. Meanwhile, I will also refer to some treaties and case law under the systems of regional human rights protection.

¹⁷ *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 143, O.A.S.T.S. No. 36 (entered into force 18 July 1978). See also *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force 3 September 1953); *African Charter on Human and People's Rights*, 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982) (entered into force 21 October 1986), etc.

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.¹⁹

Although the provision does not refer to the term “sources”, it is beyond a doubt a kind of enumeration of sources. The common theme between all is that they are subject to the condition that the (contesting) States agree thereto. In other words, international law is created through state consent.

Not all these sources enumerated in this article are easily identifiable. For example, as to the description of “general principles of law”²⁰ in the above article, it is hard to define “civilized nations,”²¹ and therefore difficult for States to have mutual consent to those “principles of law.”²² Similarly, it is hard to say who the mentioned “most highly qualified publicists” are and States can hardly agree on the authority of “teachings.”²³ For customary law, concerning the “evidence of a general practice accepted as law,”²⁴ Professor Brownlie says,

The material sources of custom are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals to military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of

¹⁹ *Ibid.*, Art. 38. Article 59 reads, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” *Ibid.*, Art. 59. For in depth study on the sources of international law, also see Francisco Forrest Martin, “Human Rights and the Hierarchy of International Law Sources and Norms: Delineating a Hierarchical Outline of International Law Sources and Norms” (2002) 65 Sask. L. Rev. 333.

²⁰ The ICJ Statute, *ibid.*, Art. 38.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.²⁵

In contrast with these indefinite sources such as customs, principles and teachings, treaties as “international conventions”²⁶ is a mere easily identifiable source of law. “Whatever its purpose or character, the international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant.”²⁷ After all, it is quite rare for States to dispute whether a certain legal instrument is a treaty.²⁸

The consent of States to be bound by a treaty or some parts of it, can be indicated by its signature, instruments of ratification or accession, which are reliable demonstrations of States’ acceptance of international law. Therefore, “[e]ven if, as a matter of treaty law, treaties only bind states parties, the reality of modern treaty-making is that treaties serve as the primary vehicle through which general rules of law are now elaborated (or, in the case of customary international law, codified).”²⁹ In other words, treaties serve as the main and most reliable source of law, from the perspective of development of international law,

²⁵ Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003), at 6 [footnotes omitted].

²⁶ See the ICJ Statute, *supra* note 18, Art. 38.

²⁷ Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (New York: Oxford University Press, 2000), at 105.

²⁸ For the definition of “treaty”, see 1969 Vienna Convention, *supra* note 3, Art. 2 (a).

²⁹ Duncan B. Hollis, “Why State Consent Still Matters-Non-State Actors, Treaties, and Changing Sources of International Law” (2005) 23 Berkeley J. Int’l L. 137, at 172.

B. The Preferable Source

In fact, after World War II, “[h]uman rights law specifically, and international law generally, has been marked by a progressive codification process, beginning with non-binding declarations and progressing towards binding obligations when and if support exists in the international community.”³⁰ Since treaties serve as the most reliable source of law, they are also preferable to the codification of custom and other sources. As Article 15 of the *Statute of the International Law Commission* (ILC Statute)³¹ reads,

In the following articles the expression “progressive development of international law”³² is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression “codification of international law” is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.³³

Furthermore, in the subsection B *Codification of International Law* of Chapter II *Function of the International Law Commission* of the same Statute, Article 23 provides that,

1. The Commission may recommend to the General Assembly:
 - (a) To take no action, the report having already been published;
 - (b) To take note of or adopt the report by resolution;
 - (c) To recommend the draft to Members with a view to the conclusion of a convention;
 - (d) To convoke a conference to conclude a convention.³⁴

³⁰ Jason Mogan-Foster, “Third Generation Rights: What Islamic Law can Teach the International Human Rights Movement” (2005) 8 Yale H.R. & Dev. L. J. 67, at 101.

³¹ *Statute of the International Law Commission*, G.A. Res. 174 (II), U.N. GAOR, 3d Sess., 123rd Mtg., UN Doc. A/519 (21 November 1947) 105 [the ILC Statute].

³² *Ibid.*, Art. 1 (1).

³³ *Ibid.*, Art. 15.

³⁴ *Ibid.*, Art. 23 (1).

substantive norms therein have been binding those non-party States. As Meron points out, given the wide participation of States in the human rights treaties, there is,

a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The 'ought' merges with the 'is,' the *lex ferenda* with the *lex lata*...⁴¹

Perhaps because of the strong moral claim for the application and observance of the norms in instruments relating to international human rights and humanitarian law (to which these comments are confined), and because of the different kinds of evidence of state practice involved, both scholarly and judicial sources have shown reluctance to reject as candidates for customary law status, because of contrary practice, conventional norms whose content merits such status.⁴²

As early as 1994, the HRC pointed out that some provisions of the ICCPR already “represent customary international law.”⁴³ In contemporary international human rights law, multilateral human rights treaties have not only been the most reliable source of law, but also become the source of customary law. Therefore, multilateral human rights treaties have played a fundamental role in the development of human rights law.

⁴¹ Theodor Meron, “The Geneva Conventions as Customary Law” (April 1987) 81 A.J.I.L. 348, at 361 [emphasis added].

⁴² *Ibid.*, at 368-369.

⁴³ Human Rights Committee, *General Comment No. 24 (52) and General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.65, in *Report of the Human Rights Committee (Volume I)*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40 (vol. 1) (1994) 119, at para.8 [General Comment 24].

2. The Characteristics of Human Rights Treaties

Despite their different respective contents, multilateral human rights treaties have some common characteristics, of which some are applicable to all kinds of treaties, but the others are not. They are governed by the law of treaties. A State cannot be bound without its consent. These treaties are to prescribe natural and inalienable rights for individuals in the world. They obligate the States parties to promise, promote, realize, and protect these rights within their respective territories. As Brownlie pointed out, “[t]he classical and still general method of enforcement is by means of the duty of performance of treaty undertaking imposed on the States Parties.”⁴⁴ Thus, state consent to treaty obligations is still necessary. Furthermore, “[t]he maxim *pacta sunt servanda* is at the core of treaty law. It embodies a widespread recognition that commitments publicly, formally, and (more or less) voluntarily made by a nation should be honoured.”⁴⁵ It is inconceivable to exempt the human rights treaties from this general rule.

However, in contrast with other treaties, multilateral human rights treaties purport to protect and advance the interests of the individual person rather than those of States. In other words, they usually do not involve the exchange of interests between States. As the HRC noted, “[s]uch [human rights] treaties, and the Covenant specifically, are not a web of inter-state exchange of mutual obligations. They concern the endowment of individuals with rights.

⁴⁴ Ian Brownlie, *supra* Note 25, at 536.

⁴⁵ Henry J. Steiner and Philip Alston, *supra* note 27, at 105.

The principle of inter-state reciprocity has no place...”⁴⁶ Basically, this non-reciprocal characteristic can be utilized to define the treaty relation between the States parties of a human rights treaty.

On the one hand, such a characteristic means that there should be no political or commercial deals concerned by States under a human rights treaty. On the other hand, it does not in any respect deny that, even under a human rights treaty, there are still conflicts of interest concerned. Regardless of those conflicts between States, there are possible conflicts between a government and the individuals within its jurisdiction, between international human rights standards and domestic economic situation, between international law and domestic law, etc.

As regards the former aspect, reservations to human rights treaties seem unnecessary. For example, concerning the Genocide Convention, the ICJ discussed its special characteristics in two cases. For the first time, in the 1951 Advisory Opinion, the Court said,

The [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose...In such a convention the contracting States do not have any interests of their own; they merely have, on and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.⁴⁷

⁴⁶ General Comment 24, *supra* note 43, at para. 17. For in depth study on this point, see Matthew Craven, “Legal Differentiation and the Concept of Human Rights Treaty in International Law” (September 2000) 11 E.J.I.L.489.

⁴⁷ 1951 ICJ Advisory Opinion, *supra* note 1, at 23 [emphasis in original].

45 years later, this paragraph was cited by the Court in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*.⁴⁸ The Court considered human rights treaties in the following terms

Human rights and humanitarian treaties do not represent an exchange of interests and benefits between contracting States in the conventional sense, and in this respect may also be distinguished from the generality of multilateral treaties, many of which are concerned with the economic, security or other interests of States. Human rights and humanitarian treaties represent, rather, a commitment of the participating States to certain norms and values recognized by the international community.

Stated another way, the personality of the sovereign is not the essence of such an agreement. Multilateral treaties are most often concluded with the object of protecting and benefiting the international community as a whole, and for the maintenance of world order and co-operation, rather than of protecting and advancing one particular State's interests.⁴⁹

Thus, apart from the general characteristics under the framework of treaty law, multilateral human rights treaties also possess special ones.

The non-reciprocal characteristic has not been successful in attracting universal participation of States to the treaties. Conversely, most of the human rights treaties are widely reserved by the State parties. Given this reality, those judicial considerations seem idealist. As Professor Bruno Simma points out,

Governments remain not only the makers but also the potential breakers of international human rights law; thus, they will always bear a similarity with foxes guarding the chickens. For this reason, we must constantly be aware that, in principle, human rights constitute a permanent threat --- or, at least, a considerable nuisance, ---

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, [1996] I.C.J. Rep. 595, at 646.

⁴⁹ *Ibid.*

to the holders of political power. This fundamental tension inherent in efforts to internationalize human rights is responsible for many gaps and weakness in contemporary international human rights law.⁵⁰

By formulating reservations thereto, many States have shown their reluctance to accept in full the human rights standards provided in those treaties. Since all multilateral human rights treaties are concerned with persons within different sovereign territories, inevitably, “[i]t is the domestic legal systems of the States Parties to the given convention which are the vehicles of implementation...It is also a characteristic of such treaties that the means of implementation of the treaty provisions are a matter of domestic jurisdiction.”⁵¹ Generally speaking, domestic concerns motivate the States parties to formulate reservations, e.g. to avoid conflicts between their constitutions and treaty obligations. Moreover, the discrepancy in domestic concerns between the States parties results in reservations to different types of treaty provisions. For example, many Islamic States reserve the provisions concerning men and women in matters relating to marriage and family relations. I will discuss these concerns in the next section.

3. The Motives to Formulate Reservations to Human Rights Treaties

As mentioned above, when States sign, ratify or accede to multilateral human rights treaties, they frequently formulate reservations because of domestic concerns. These fall into four general categories. First, States may intend to avoid the conflicts between their domestic law

⁵⁰ Bruno Simma, “From Bilateralism to Community Interest” (1994-VI) 250 *Recueil des Cours* 217, at 243 [footnote omitted]. For details on the existing reservations to human rights treaties, see *Multilateral Treaties*, *supra* note 9, at 125-355.

⁵¹ Ian Brownlie, *supra* Note 25, at 536.

Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of article 8 of the International Covenant on Economic, Social and Cultural Rights, except in relation to the sectors in which the right referred to in the said provisions is accorded in accordance with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan.⁵⁴

Japan confirmed this reservation upon its ratification on 21 June 1979. However, this reservation lacks clear indication of those domestic laws which the Japanese government would rely on. In contrast, the reservation lodged by the People's Republic of China (PRC) to Article 6 of the *Convention on the Rights of the Child* (CRC)⁵⁵ is more straightforward. It reads as follows:

Reservation: [T]he People's Republic of China shall fulfil [sic] its obligations provided by article 6 of the Convention under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution of the People's Republic of China and in conformity with the provisions of article 2 of the Law of Minor Children of the People's Republic of China.⁵⁶

Similarly, concerning the application of the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW),⁵⁷ Australia entered a reservation, as follows: “*Reservation:* The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defense Force policy which excludes women from combat duties.”⁵⁸

⁵⁴ *Ibid.*, at 162.

⁵⁵ *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force on 2 September 1990) [CRC]. China signed it on 29 August 1990 and ratified it on 2 March 1992.

⁵⁶ Multilateral Treaties, *supra* note 9, at 309 [emphasis in original].

⁵⁷ *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 513 (entered into force on 3 September 1981) [CEDAW].

⁵⁸ Multilateral Treaties, *supra* note 9, at 240 [emphasis in original]. Australia signed CEDAW on 17 July 1980 and ratified it on 28 July 1983.

Moreover, when participating in the human rights treaty-making under the UN, some States may also take into account their obligations under the regional human rights protection to which they are also States parties. For example, upon its ratification of the ICCPR, Austria appended a reservation, as follows: “Articles 19, 21 and 22 in connection with article 2 (1) of the Covenant will be applied provided that they are not in conflict with legal restrictions as provided in article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.”⁵⁹ A similar reservation was also formulated by Germany upon its ratification of the same treaty.⁶⁰ Also, upon its accession to the ICESCR on 4 November 1980, France declared “that it will implement the provisions of article 8 in respect of the right to strike in conformity with article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter.”⁶¹

Finally, reservations may also be formulated in order to exclude the application of the treaty provisions to some dependent territories, especially those autonomous or semi-autonomous territorial entities of a State party. For example, upon its ratification of the ICCPR, the United Kingdom of Great Britain and Northern Ireland (UK) reserved the rights not to apply some specific articles in some dependencies by appending the reservations, as follow:

Where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is deemed to be mutually beneficial, the Government of the United Kingdom reserve [sic] the right not to apply article 10 (2) (b) and 10 (3), so far as those provisions require juveniles who are detained to be accommodated separately from adults, and not to apply article 10 (2) (a) in Gibraltar, Montserrat and the Turks

⁵⁹ *Ibid.*, at 175. Austria signed the ICCPR on 10 December 1973 and ratified it on 10 September 1978. For the European Convention for the Protection of Human Rights and Fundamental Freedoms, see *supra* Note 17.

⁶⁰ *Ibid.*, at 177. Germany signed the ICCPR on 9 October 1968 and ratified it on 17 December 1973.

⁶¹ *Ibid.*, at 161. *European Social Charter*, 18 October 1961, 529 U.N.T.S.89, Eur. T.S. No. 35 (entered into force on 26 February 1965).

and Caicos Islands in so far as it requires segregation of accused and convicted persons.

The Government of the United Kingdom reserve [sic] the right not to apply article 11 in Jersey...

The Government of the United Kingdom reserve [sic] the right not to apply or not to apply in full the guarantee of free legal assistance in sub-paragraph (d) of paragraph 3 of article 14 in so far as the shortage of legal practitioners renders the application of this guarantee impossible in the British Virgin Islands, the Cayman Islands, the Falkland Islands, the Gilbert Islands, the Pitcairn Islands Group, St. Helena and Dependencies and Tuvalu.⁶²

In such circumstances, the decisive motive to append a reservation is the discrepancy in the political, economic and social developments between those constituent territories and the responsible State party. This factor is considered quite often by the Commonwealth States.⁶³

B. Difficulty in Satisfying Human Rights Standards in Near Future

In some cases, it is the legislative procedure which renders the implementation of treaty provisions difficult. For example, upon its accession to the CEDAW on 23 July 1985, Cyprus made a reservation, as follows:

The Government of the Republic of Cyprus wishes to enter a reservation concerning the granting to women of equal rights with men with respect to the nationality of their children, mentioned in article 9, paragraph 2 of the Convention. This reservation is to be withdrawn upon amendment of relevant law.⁶⁴

⁶² *Ibid.*, at 184.

⁶³ For in depth analysis of sub-state actors in the treaty-making process and its influence, please see Duncan B. Hollis, *supra* note 29.

⁶⁴ Multilateral Treaties, *supra* note 9, at 270.

As a result of the amendment of domestic law, on 28 June 2000, Cyprus withdrew this reservation. In contrast, for some States, especially developing and least developed countries, it is not procedurally difficult but economically difficult to satisfy the treaty standards in a foreseeable future. Thus, they take reservations on those provisions they cannot afford. For example, upon its accession to the ICESCR on 10 April 1984, Zambia appended a reservation, as follows:

Reservation: The Government of the Republic of Zambia states that it reserves the right to postpone the application of article 13 (2) (a) of the Covenant, in so far as it relates to primary education; since, while the Government of the Republic of Zambia fully accepts the principles embodied in the same article and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage.⁶⁵

A similar reservation was earlier formulated by Madagascar.⁶⁶ Obviously, these reserving States were expressing their temporary incapability to fully implement the standard on primary education provided in the ICESCR. More than twenty years have passed since Zambia's reservation was formulated, but it is still kept.⁶⁷ It is thus apparent that, in improving the human rights situation, developing and least developed countries still have a long way to go.

⁶⁵ *Ibid.*, at 165 [emphasis in original].

⁶⁶ *Ibid.*, at 162. Madagascar signed the ICESCR on 14 April 1970 and ratified it on 22 September 1971.

Madagascar signed the ICESCR on 14 April 1970 and ratified it on 22 September 1971.

⁶⁷ *Ibid.*

C. Maintain Religious or Cultural Tradition

Although multilateral human rights have a universal character,⁶⁸ the specific human rights standards provided therein are not welcome by all States with various religions and culture. For example, upon its accession to the CEDAW on 6 November 1984, Bangladesh made a reservation which reads “[t]he Government of the People’s Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, 13 (a) and 16 (1) (c) and (f) as they conflict with *Sharia* law based on Holy Quran and Sunna.”⁶⁹ In 1997, it withdrew the reservation relating to Articles 13 (a) and 16 (1) (c) and (f) but still keeps the reservation to Article 2.⁷⁰

In fact, when signing, ratifying or acceding to the CEDAW, many Islamic States have reserved the right not to abide by those provisions which are deemed to conflict with the Islamic *Sharia* Law.⁷¹ In this sense, the reservation appended by Egypt upon signature⁷² is typical. It reads as follows:

⁶⁸ See Section 2 *The Characteristics of Human Rights Treaties* of Chapter II *The Significance of and Reservations to Human Rights Treaties* of this thesis.

⁶⁹ Multilateral Treaties, *supra* note 9, at 270 [emphasis in original].

⁷⁰ *Ibid.* Article 2 of the CEDAW reads, “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women.” CEDAW, *supra* note 57, Art.2.

⁷¹ See Jason Mogan-Foster, *supra* note 30.

In respect of article 16 Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia*'s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern martial relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.⁷³

This reservation was confirmed upon ratification.⁷⁴ By formulating this reservation, Egypt articulated the discrepancy in family values between the *Sharia* and the treaty. It is no doubt that the *Sharia* is a dominant force in Egypt and other Islamic States. It has been firmly held over a long period of time and is unlikely to change. As a result, these States can hardly accept and fulfill the treaty obligations which will in fact challenge the religious and cultural traditions. This point can be demonstrated by the reservation made by Malawi upon its accession to the CEDAW. It reads as follows:

Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.⁷⁵

⁷² Egypt signed the CEDAW on 16 July 1980.

⁷³ Multilateral Treaties, *supra* note 9, at 241 [emphasis in original].

⁷⁴ Egypt ratified the CEDAW on 18 September 1981.

⁷⁵ Multilateral Treaties, *supra* note 9, at 272. Malawi acceded to the CEDAW on 12 March 1987, and on 24 October 1991, it notified the Secretary-General of its withdrawal of this reservation. *Ibid.*

Moreover, as a general practice, some states always reject the jurisdiction of the ICJ, e.g. the PRC. Upon its signature on the CEDAW on 17 July 1980, the PRC declared that it “does not consider itself bound by paragraph 1 of article 29 of the Convention.”⁸¹ A similar reservation was made by Ethiopia to the same treaty.⁸²

Reservations may also be formulated to deny the judicial competence of a treaty monitoring body. For example, upon its accession to the *Optional Protocol to the International Covenant on Civil and Political Rights* (First Optional Protocol),⁸³ France appended a reservation which reads as follows:

Reservation: France makes a reservation to article 5, paragraph 2 (a), specifying that the Human Rights Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement.⁸⁴

Similar reservations were formulated to the same treaty by 16 other States parties.⁸⁵ It is thus clear that the attitudes and practices of States with respect to the international tribunals and treaty bodies may also be a major cause of reservations.

⁸¹ *Ibid.*, at 241. Although this statement is in the name of declaration, it is beyond a doubt to exclude the art. 29 (1) of the CEDAW in the application to the PRC. Therefore, it is a reservation. This reservation was confirmed by the PRC upon ratification on 4 November 1980. Article 29 (1) of the CEDAW reads, “[a]ny dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.” CEDAW, *supra* note 57, Art. 29 (1).

⁸² Multilateral treaties, *Ibid.* Ethiopia signed the CEDAW on 8 July 1980 and ratified it on 10 September 1981.

⁸³ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302 (entered into force March 23, 1976) [First Optional Protocol].

⁸⁴ Multilateral treaties, *supra* note 9, at 225 [emphasis in original].

⁸⁵ *Ibid.*, at 225-227.

4. Conclusion

Multilateral human rights treaties have been the fundamental source of contemporary international human rights law. They share general characteristics of treaties, but are special in that they are non-reciprocal. Theoretically, all States should have universal participation therein. However, because of various domestic concerns, including their potential conflict with domestic law, economic difficulty to implement them, religious and cultural traditions and general practices relating to international tribunals, States parties have formulated a number of reservations to multilateral human rights treaties. As a result, the integrity of the treaties is destroyed.

Chapter III The Permissibility of Making Reservations

In this chapter, I will discuss the problems of reservations to human rights treaties by referring to the case of the Genocide Convention. I will ask whether it should be permissible to make reservations. To answer this question, I will study the ICJ Advisory Opinion and the ILC preparatory work for the Vienna Convention. I will demonstrate that, according to the judges and the jurists, the acts of making reservations should be permitted.

1. The Legal Problems of Reservations to Human Rights Treaties

The legal problems which reservations might bring to the treaty-making process can be exemplified by the case of the Genocide Convention. On 19 December 1948, the UN General Assembly passed Resolution 260A (III)⁸⁶ to authorize and invite States to sign and ratify or accede to the Genocide Convention. It was the first human rights treaty adopted under the UN framework and its Article XIII prescribed that “[t]he present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.”⁸⁷ Until 12 October 1950, the Secretary-General as the depositary had received a total of nineteen instruments of ratification and accession, from among which there were a total of eighteen reservations formulated by eight States. These

⁸⁶ *Adoption of the Convention on the Prevention and Punishment of the Crime of the Genocide, and text of the Convention*, GA Res. 260A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 174 [GA Res. 260A (III)].

⁸⁷ Genocide Convention, *supra* note 1, Art. XIII.

reservations were in respect to: Article IV *Responsible Individuals*,⁸⁸ Article VI *Tribunals*,⁸⁹ Article VII *Extradition*,⁹⁰ Article IX *Submission of Disputes to the International Court of Justice*,⁹¹ and Article XII *Non-Self Governing Territories*.⁹² All the reserving States formulated reservations to Article IX.⁹³

No provision of the Genocide Convention provided for reservations. Among other contracting States to the Genocide Convention, some objected to these reservations but others did not. As a result, the Secretary-General had difficulty in exercising his depositary functions. If he received the twentieth instrument, probably from the Federal Germany Republic, could he consider those instruments with reservations as valid and declare the entry into force of the Genocide Convention in ninety days time? It is thus clear that reservations might render the validity of those instruments to which they are appended questionable, and put the depositary in a difficult position to decide the entry into force of the treaty.

⁸⁸ Article IV reads, “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” *Ibid.*, Art. IV.

⁸⁹ Article VI reads, “[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” *Ibid.*, Art. VI.

⁹⁰ Article VII reads, “[g]enocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.” *Ibid.*, Art. VII.

⁹¹ See *supra* note 78 and accompanying text.

⁹² Article XII reads, “[a]ny Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.” ⁹² Genocide Convention, *supra* note 1, Art. XII.

⁹³ These reservations to Article IX included those formulated (upon the signatures on 16 December 1949) by Byelorussian Soviet Socialist Republic, Russian Federation and Ukrainian Soviet Socialist Republic constituting the Union of Soviet Socialist Republics (the Soviet Union), see 190 U.N.T.S. 381, 196 U.N.T.S. 345 and 201 U.N.T.S. 368. They were withdrawn in 1989. See Multilateral Treaties, *supra* note 9, at 133.

Moreover, reservations are deemed detrimental to the universal character of multilateral human rights treaties. For example, the Genocide Convention was adopted after World War II, when “genocide [had] inflicted great losses on humanity”⁹⁴ in Europe and East Asia. Its intention was to reach “international co-operation...to liberate mankind from such an odious scourge.”⁹⁵ Therefore, among other clauses, Article IV of the Genocide Convention provided that even the heads of States and chiefs of governments might be responsible for committing genocide or any of the related acts and be tried by an “international penal tribunal as may have jurisdiction.”⁹⁶ Under Article IX, “The International Court of Justice may order a State to pay damages for genocide committed against the citizens of a complaining country.”⁹⁷ However, as Lippman said, “[t]he provision for International Court of Justice jurisdiction under Article IX [of the Genocide Convention] is subject to numerous reservations, effectively eviscerating this crucial component of the Convention.”⁹⁸

Looking back to the era of the adoption of the Genocide Convention, it was inevitable that States would be reluctant to accept potential limitations on their sovereignty or the immunity of heads of State. These seemed inviolable in traditional notions of international law. States may have the incentive to promote international human rights standards by multilateral treaty-making, but they also want “to minimize the treaty’s infringement on aspects of domestic sovereignty that the state does not want to relinquish.”⁹⁹ As Professor Shaw says,

⁹⁴ Genocide Convention, *supra* note 1, Preamble.

⁹⁵ *Ibid.*

⁹⁶ See *supra* note 89.

⁹⁷ Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later” 15 *Ariz. J. Int’l & Comp. Law* 415, at 467.

⁹⁸ *Ibid.*

⁹⁹ Ryan Goodman, “Human Rights Treaties, Invalid Reservations, and State Consent” (July 2002) 96 *A.J.I.L.* 531, at 536.

The capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it. On the other hand, of course, to permit a treaty to become honeycombed with reservations by a series of countries could well jeopardise the whole exercise. It could seriously dislocate the whole purpose of the agreement and lead to some complicated inter-relationships amongst states.¹⁰⁰

Obviously, by virtue of reservations, the uniformity of multilateral human rights treaties might be prejudiced. Therefore, since the end of the 19th Century when accession to multilateral treaties became widespread, a rule concerning reservations had been developed. As stated in the report of the Committee of Experts for the Progressive Codification of International Law to the Council of the League of Nations,

In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.¹⁰¹

Under this rule, the validity of reservations was subject to its acceptance by all of the other contracting States. In other words, as long as one State considered a reservation as unacceptable, the reservation and the reserving State's signature or ratification as well would be invalidated. As a result, the reserving State would be excluded from the treaty.

Under such a strict rule, in the case of the Genocide Convention, all those reserving States would have been excluded because of the objections to their reservations. Since those reserving States could hardly accept the provisions which were deemed against their

¹⁰⁰ Malcolm N. Shaw, *International law*, 4th ed. (Cambridge: Grotius Publications, 1997), at 642.

¹⁰¹ *Admissibility of Reservations to General Conventions*, L.N. Doc. C.357. M.130. 1927. V.16., cited in Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), at 176.

certain division of powers. The ICJ is a principal organ of the UN, whereas the ILC is one of the subsidiary organs of the General Assembly. According to its Statute, the ILC can only play an advisory role in contributing to progressive development of international law. Even without pointing out their different functions and efficiencies,¹⁰⁴ the Resolution prioritized the future ICJ decision. This decision was supposed to lay out some legal principles on the issue of reservations, and to guide the ILC's study and codification. As the Special Rapporteur of the ILC, Brierly pointed out, because there had been no judicial opinion, academic views or uniform practices giving "a clear guide to any rule of international law"¹⁰⁵ on this issue,

[A]ny study of the subject by the commission, whether from the standpoint of codification¹⁰⁶ or the progressive development of international law, can hardly be definitive ...In view, however, of the questions now pending before the International Court of Justice it is considered that it would be inappropriate to make recommendations on this point until the Court has rendered its opinion.¹⁰⁷

Therefore, it is necessary to reiterate the three correlative questions on which the UN General Assembly requested the ICJ to give an advisory opinion. They read as follows:

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

¹⁰⁴ For these functions and efficiencies, see the ICJ Statute, *supra* note 18 and the ILC Statute, *supra* note 31.

¹⁰⁵ "Report on Reservations to Multilateral Conventions" (UN Doc. A/CN.4/41 incorporating Doc. A/CN.4/41/Corr.1) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) at 2-3 (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)) [Brierly's Report]. For various opinions, see Brierly's Report, Annex A *Summary of Debates in the Sixth Committee of the General Assembly*, Annex B *Opinions of Writers*, Annex C *Examples of Clauses in Conventions Regarding Reservations*, Annex D *Practice with Regard to Reservations*. *Ibid.*, at 4-16.

¹⁰⁶ Brierly's Report, *ibid.*, at 1.

¹⁰⁷ *Ibid.*, at 4.

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
 - (a) The parties which object to the reservation?
 - (b) Those which accept it?
- III. What would be the legal effect as regards the answer to question 1 if an objection to a reservation is made:
 - (a) By a signatory which has not yet ratified?
 - (b) By a State entitled to sign or accede but which has not yet done so?¹⁰⁸

In accordance with the logical sequence of these questions, Question I was vital. *Prima facie*, this question concerned the validity of a reservation. In depth, however, it related to the permissibility of making reservations. In other words, since the Genocide Convention neither explicitly permitted nor explicitly forbade States to formulate reservations, should one assume that the act of formulating reservations is permissible? This was the first question of merit encountered by the Court. The majority of the Court observed that,

[T]his question refers, not to the possibility of making reservations to the Genocide Convention, but solely to the question whether a contracting State which had made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation...¹⁰⁹

To justify this observation, the Court took into account the characteristics of the Genocide Convention. First of all, it was a human rights treaty (as demonstrated in the previous chapter, human rights treaties have the universal character). Thus, among other things, “the very wide degree of participation [of States] envisaged by Article XI of the Convention”¹¹⁰

¹⁰⁸ Resolution 478(V), *supra* note 102, at 74.

¹⁰⁹ 1951 ICJ Advisory Opinion, *supra* note 1, at 21.

¹¹⁰ *Ibid.*, at 21. Article XI of the Genocide Convention reads, “[t]he present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any nonmember State to

was especially noted by the Court. It noticed that “[e]xtensive participation in conventions of this type has already given rise to ... [m]ore general resort to reservations...”¹¹¹

In addition, it was also a multilateral treaty (also in the previous chapter, it is demonstrated that even human rights treaties are concluded on the basis of state consent. A State should not be bound by a provision without its consent thereto). Thus, the Court pointed out that “the Genocide Convention was...the result of a series of majority votes. The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations.”¹¹²

However, the Court did not sufficiently elaborate these two points in legal theory. Rather, it mainly referred to the *travaux préparatoires* of the Genocide Convention to demonstrate that “the faculty to make reservations to the Convention appears to be implicitly admitted by the very terms of Question I.”¹¹³ As a conclusion,

The Court recognizes that an understanding was reached within the General Assembly on the faculty to make reservations to the Genocide Convention and that it is permitted to conclude therefrom that States becoming parties to the Convention gave their assent thereto. It must now determine what kind of reservations may be made and what kind of objections may be taken to them.¹¹⁴

which an invitation to sign has been addressed by the General Assembly. The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations. After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid. Instruments of accession shall be deposited with the Secretary-General of the United Nations.” Genocide Convention, *supra* note 1, Art. XI.

¹¹¹ 1951 ICJ Advisory Opinion, *ibid*.

¹¹² *Ibid*, at 22.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*, at 22-23.

This recognition was the equivalent of presuming that making reservations was a permissible act in multilateral human rights treaty-making, although such an act could not ensure the legal validity of reservations. Under such a presumption, the majority of the Court was inclined to ensure the universality of multilateral human rights treaties rather than the uniformity. To this presumption, even the minority of the Court did not file any dissenting opinion.¹¹⁵ Moreover, it was also kept in the ILC study.

3. The ILC Study

Earlier, I mentioned the Report of Brierly, which was confined to tentative status before the ICJ rendered its opinion.¹¹⁶ This Special Rapporteur refrained from expressing his personal views on the permissibility of making reservations.¹¹⁷ In contrast, the ICJ recognized this permissibility from the angles of “majority votes” and “extensive participation”¹¹⁸ but the discussion was purely abstract. More demonstrations are to be found in the ILC study.

A. Majority Votes

¹¹⁵ See “Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo”, *ibid.*, at 31-48 [Joint Dissenting Opinion]; “Dissenting Opinion of M. Alvarez”, *ibid.*, at 49-55 [Alvarez’s Opinion].

¹¹⁶ See *supra* notes 105-107 and accompanying texts.

¹¹⁷ *Ibid.* Actually, after the ICJ Advisory Opinion was issued, Brierly submitted a second proposal to the ILC, but made no substantive difference from the first one. See “Draft of Report to the General Assembly by J.L. Brierly, Special Rapporteur ” (UN Doc. A/CN.4/L.18) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) at 26-27 (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)).

¹¹⁸ See *supra* notes 110-112 and accompanying texts.

By virtue of majority votes, multilateral treaties including human rights treaties are usually negotiated and adopted with diverging views of contracting States. In such circumstances, if reservations are completely prohibited, certain States in the minority will lose the right to voice their disagreements after the adoption of the text. As discussed in the Report of the Special Rapporteur, Lauterpacht,¹¹⁹ “the practice of appending reservations...in a sense, provides a safeguard for the rights of the minority of States which have agreed to become parties to a treaty drafted by the majority in disregard of the views and attitude, however well founded, of the dissenting minority.”¹²⁰

Furthermore, the same right should be enjoyed by those States which did not participate in the negotiation but later accede to the treaty. As Lauterpacht said, “[i]n cases of accession that minority may have had no opportunity at all to voice its objections. In such cases it may be difficult, at times, to dissent from the view that the rights of the minority must be admitted by the effective recognition of their faculty to make reservations.”¹²¹ Therefore, the necessity of making reservations can be proven on the basis of equal rights of contracting States in majority votes. In this context, Lauterpacht was firmly convinced of the permissibility of making reservations, as follows:

[T]he right of a State to become a party to a treaty subject to reservations is not at issue...Although the argument concerning the justification of reservations in general is inconclusive, there has been a growing tendency to acknowledge that there is

¹¹⁹ “Report by Mr. H. Lauterpacht, Special Rapporteur” (UN Doc. A/CN.4/63) in *Yearbook of the International Law Commission 1953*, Vol. II (New York: UN, 1959) at 90 (UNDOC.A/CN.4/SER.A/1953/Add.1 (59.V.4)) [Lauterpacht’s Report].

¹²⁰ *Ibid.*, at 126.

¹²¹ *Ibid.*

Of course, formulating reservations is a unilateral act and it will cause imbalance between treaty obligations of reserving States and of non-reserving States. No doubt, the former undertakes fewer obligations than the latter does. Reserving States thus seemed to be in a privileged position of participation in multilateral treaty-making. That was why, in the practice of the League of Nations, any reservation formulated after the adoption of the treaty text should require the other contracting States' unanimous consent, as if reverting to the negotiation phase.¹²⁷ However, this kind of imbalance between treaty obligations should not be attributable to the formulation of reservations. As Waldock said,

For normally the State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not made in any respect more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation.¹²⁸

According to the preceding paragraph, the formulation of reservations would not lay any burden on those non-reserving States. In other words, a reserving States' reservations would not make a non-reserving State's adherence to the treaty more difficult. Clearly, making reservations is a unilateral act. Similarly, the acts of signing, ratifying or acceding to multilateral treaties are also unilateral. Every State has the full autonomy in signing and ratifying any treaty and no State should be compelled to do so. Likewise, in the case of human rights treaties, individual States have the freedom of action to participate therein and observe the provisions thereof.

¹²⁷ See Arnold Duncan McNair, *supra* note 101 and accompanying text.

¹²⁸ Waldock's Report, *supra* note 124, at 64.

If the view is adopted that human rights treaties are non-reciprocal, it is each State party's own responsibility to comply with those provisions by which it consents to be bound. As Professor Simma elaborates,

In the case of the substance of human rights conventions, however, there is simply no contractual *quid pro quo* to withhold. Reciprocal non-application of a reserved provision by another State party would not only be useless but also legally inadmissible. Human rights treaties cannot be suspended or modified "in relation" with other parties; such action would of necessity lead to a breach of the treaty vis-à-vis all the other States parties. ...

If I am permitted to vary the meaning of a well-known concept for a moment, the obligations arising from such treaties can be considered obligations *erga omnes* --- the *omnes*, however, limited in our present context to the circle of the other contracting States. As I have mentioned earlier, performance of obligations arising from such treaties cannot be split up into pairs of bilateral interactions.¹²⁹

In this context, a reservation appended by the reserving State will not obstruct the performance of the treaty obligations by the non-reserving States. As aforementioned, human rights treaties are extensively reserved by their States parties. In particular, some reservations were formulated due to the reserving States' economic incapability of

¹²⁹ Simma, *supra* note 50, at 343, 370 [emphasis in original] [footnotes omitted]. It should be mentioned that according to Simma, "human rights treaties are 'built' like all other multilateral treaties... [creating] rights and obligations between their parties." *Ibid.*, at 370. In other words, Simma refrains from simply saying that human rights treaties are non-reciprocal. However, he also clarifies that "[b]y asserting that human rights treaties, too, create a network of rights and obligations between the States parties to them, I do not in any way want to deny that, in principle, human rights law can establish something like an 'objective order', that is, a framework of criteria and conditions to be applied. A legal-institutional framework along these lines is certainly developing... on the universal level. This régime may be called objective in so far as its legal architecture goes beyond the creation of correlative inter-State rights and duties along the contractual model." *Ibid.*, at 371-372. Clearly, the non-reciprocal character of human rights treaties is not self-evident but provable. See also *supra* note 46 and accompanying text.

performing relevant obligations prescribed by treaties, e.g. the obligation of making primary education free and compulsory.¹³⁰

On the one hand, whether or not the reserving States can rapidly ameliorate their economic conditions, they will not get extra benefit through these reservations; on the other hand, the non-reserving States will not encounter more difficulties in performing such obligations even if the reserving States become parties to the treaty. Therefore, despite these reservations, it is not unjust at all for those non-reserving States to fulfill the treaty obligations within their respective jurisdictions.

Since there is no connection between the formulation of reservations by some States and the treaty obligations undertaken by the non-reserving States parties, it is not conceivable to assert that such reservations would unduly bring dominance to a reserving State in its treaty relation with those non-reserving States. Probably, some reserving States might take advantage of making reservations to materially modify the application of treaty text. In other words, a reservation might be deemed destructive to the essential spirit of a treaty. Such being the case, it is still discretionary for non-reserving States to decide whether the treaty enters into force between themselves and the reserving State. As Waldock pointed out,

[Even if] there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all vis-à-vis the reserving State on the limited basis which the latter proposes, the non-reserving State can prevent the treaty

¹³⁰ See Subsection B *Difficulty in Satisfying Human Rights Standards in the Future* of Section 3 *The Motives to Formulate Reservations to Human Rights Treaties* of Chapter II *The Significance of and Reservations to Human Rights Treaties*, p. 22.

coming into force between itself and the reserving State by the simple expedient of objecting to the reservation.¹³¹

Therefore, reserving States, being exempt from certain provisions of a treaty, would not be in a privileged position of becoming a party to the treaty vis-à-vis non-reserving States. Therefore, the act of making reservations should not be presumed impermissible.

B. Extensive Participation

The cardinal principle of majority votes is that the minority is subordinate to the majority. This principle is helpful to finalize the uncompromising treaty negotiations among States. Generally speaking, the negotiation and adoption of multilateral human rights treaties cannot give consideration to all concrete domestic situations of negotiating and non-negotiating States.¹³² For the purpose of carrying forward a multilateral treaty-making process, the majority voting mechanism is necessary.

However, it is clear that those minority States in the negotiation disagree with certain provisions in the adopted treaty text. Moreover, certain States do not take part in the initial negotiation. It is not realistic to assume that all these States will agree to the whole treaty text. In this sense, the permissibility of formulating reservations is helpful to promote the extensive participation of States in treaties.

¹³¹ Waldock's Report, *supra* note 124, at 64.

¹³² See Bharathi Anandhi Venkatraman, "Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination against Women: Are the Shari'a and the Convention Compatible?" (Summer 1995) 44 Am.U.L.Rev. 1949.

If making reservations is not allowed at all, some States might rather refrain from signing or acceding to the treaty than accept those provisions to which they object. In fact, there has never been any rule of public international law which says that making reservations is inherently forbidden. However, excessive restriction used to be imposed on formulating reservations, e.g. the practice of the League of Nations.¹³³ In the case of the Genocide Convention, the representative of the UK, Sir Shawcross, advocated keeping this practice to restrict the formulation of reservations. He said that,

[Concerning] a definite arrangement having been arrived at and drawn up by all the interested parties, the party making the reservation is in effect rejecting that arrangement and attempting to substitute for it an arrangement which is different. The variation may be slight or it may be considerable; but it results in a *different* arrangement, and large or small, it is an attempt to alter something already finalized, and therefore it requires the consent of all the other interested parties.¹³⁴

In this statement, Shawcross overemphasized the formal integrity of a treaty. According to his view, a treaty text is a final arrangement adopted by all interested parties and such an arrangement seems to have become the norm of the international community. However, as referred to above, none of the multilateral treaties is negotiated by all States. Furthermore, if a treaty text is adopted by majority votes, there must be some negotiating States in the minority which do not agree with it. As a result, a treaty text is not a kind of arrangement arrived at by all interested parties. At most, it is drawn up by a certain number of States but not all in the world.

¹³³ See *supra* note 101 and accompanying text.

¹³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, "Statement by Sir Hartley Shawcross" (13 April 1951), [1951] I.C.J. Pleadings 358, [1951 ICJ Pleadings] at 374 [Shawcross' Statement] [emphasis in original].

able to participate in a given convention rather than that an unrestricted right to make reservations should be admitted which might imperil the convention altogether.¹³⁷

Clearly, he assumed that the preexisting States parties would hold identical views on the character of a reservation. However, if those parties have controversy thereon, e.g. in the case of the Genocide Convention, the situation will be different. As long as a single State party considers a reservation as destructive of the treaty value and objects to it, even though all the other parties have different opinions, the reserving State will still be excluded from the treaty.

In order to guard against “an unrestricted right to make reservations,”¹³⁸ the principle of consent gives the preexisting States parties an unrestricted right to object to reservations. Such an objection precludes the reserving States’ participation in a treaty. It is tantamount to prohibiting the formulation of reservations. Therefore, it might lead to participation by very few States and be destructive of the treaty value as well.

Certainly, the right to formulate reservations should be restricted in a proper way. This will be discussed in the next chapter. First of all, to facilitate extensive participation, this right should be admitted. In view of the international community consisting of more than one hundred States with different legal systems, political regimes, diverse cultures, religions and economic conditions, Waldock considered that,

What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of

¹³⁷ *Ibid.*, at 375-376 [emphasis in original].

¹³⁸ *Ibid.*

its provisions... [I]t seems legitimate to assume that the power to make reservations without the *risk* of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties... [T]he failure...to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the “integrity” of such treaties may be unduly weakened...¹³⁹

Obviously, the practice of the League of Nations brings the “risk” said by Waldock. Thus, Sir G. G. Fitzmaurice indicated in his Report to the ILC, “even as a matter of *lex data*, the strict traditional rule [pursued by the League of Nations] about reservations could be regarded as mitigated in practice by the... considerations which, taken together, allow an appreciable amount of latitude to States in this matter and should meet all reasonable needs...”¹⁴⁰ Therefore, for the purpose of extensive participation, any reservations mechanism should never be deemed reasonable so long as it imposes excessive restriction on the formulation of reservations or subjects the validity of reservations to the strict unanimous consent of other contracting States.

C. Current Study by the ILC

In 1993, the ILC decided to include in its agenda again the topic “The Law and Practice Relating to Reservations to Treaties,”¹⁴¹ and it was approved by the General Assembly in

¹³⁹ Waldock’s Report, *supra* note 124, at 64-65 [emphasis added].

¹⁴⁰ “Report by Sir G. G. Fitzmaurice, Special Rapporteur” (UN Doc. A/CN.4/101) in *Yearbook of the International Law Commission 1956*, Vol. II (New York: UN, 1957) at 126 (UNDOC.A/CN.4/SER.A/1956/Add.1 (56.V.3)) [emphasis in original] [Fitzmaurice’s Report].

¹⁴¹ “Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session” (UN Doc. A/48/10) in *Yearbook of the International Law Commission 1993*, Vol. II, Part 2 (New York: UN, 1995) at 96 (UNDOC. A/CN.4/SER.A/1993/Add.1 (Part 2) (E.95.V.4)).

1994.¹⁴² In his study on this topic, the Special Rapporteur Mr. Alain Pellet also fully endorsed the permissibility of making reservations.¹⁴³ He named it “the principle of freedom to formulate reservations.”¹⁴⁴

As to the principle of unanimous consent, Pellet pointed out that “the traditional presumption resulting from the system of unanimity [under the League of Nations framework] significantly restricted the freedom to make reservations.”¹⁴⁵ As mentioned above, Waldock considered that the effectiveness of a treaty ensured by extensive participation of States should be more important than the formal integrity of it.¹⁴⁶ This approach was also followed by Pellet. According to his view, Article 19 of the 1969 Vienna Convention resulted directly from Waldock’s proposals¹⁴⁷ and “does not guarantee the absolute integrity of treaties.”¹⁴⁸ He clearly said that,

[T]he very concept of reservations is incompatible with this notion of integrity... [However,] where a treaty is silent, the rules set out in the Vienna Conventions, by not fully addressing the concerns of those who would defend the absolute integrity of normative treaties, guarantee, to all intents and purposes, that the essence of the treaty is preserved.¹⁴⁹

¹⁴² *Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session*, GA Res. 48/31, UN GAOR, 48th Sess., Supp. No. 49, UN Doc. A/48/49 (Vol. I) (1994) 328-329.

¹⁴³ “Tenth Report to Reservations to Treaties by Alain Pellet, Special Rapporteur” (UN Doc. A/CN.4/558) [unpublished, forthcoming in *Yearbook of the International Law Commission 2005*, online: <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/370/19/PDF/N0537019.pdf?OpenElement>>] [Pellet’s Tenth Report].

¹⁴⁴ *Ibid.*, at para. 16.

¹⁴⁵ *Ibid.*, at para. 10 and its Note 20.

¹⁴⁶ See Waldock’s Report, *supra* note 124.

¹⁴⁷ Pellet’s Tenth Report, *supra* note 143, at para. 11.

¹⁴⁸ “Second Report to Reservations to Treaties by Alain Pellet, Special Rapporteur” (UN Doc. A/CN.4/477) [unpublished, forthcoming in *Yearbook of the International Law Commission 1996*, Vol. II, Part I, online: <<http://daccessdds.un.org/doc/UNDOC/GEN/N96/127/07/PDF/N9612707.pdf?OpenElement>>], at para. 137 [Pellet’s Second Report].

¹⁴⁹ *Ibid.*, at para. 137-138.

Specifically as regards human rights treaties, Pellet enumerated plenty of viewpoints on the right to reservations.¹⁵⁰ He noticed that in order to prohibit reservations, the negotiating States “need only to insert a clause,”¹⁵¹ but “such provisions [excluding reservations] should be so rare in normative human rights treaties.”¹⁵² In such circumstances, the rules in the Vienna Convention, including the permissibility of making reservations, should be applied as “ordinary-law.”¹⁵³ Therefore, in the absence of provisions providing for reservations in human rights treaties, the formulation of reservations should be permitted.

As a general appraisal of the permissibility of making reservations, Pellet said that,

This is an essential element of the “flexible system” stemming from the advisory opinion of the International Court of Justice of 1951, and it is no exaggeration to say that, in this respect, it reserves the traditional presumption resulting from the system of unanimity, the stated aim being to facilitate the widest possible participation in and, ultimately, the universality of treaties.¹⁵⁴

Hence, it is conceivable to say that, after decades of thorough study by the ILC, the permissibility of formulating reservations has become a reliable conclusion and a proper presumption in the study and reform of the reservations mechanism. Furthermore, Pellet attempted to prove the “presumption of validity of reservations.”¹⁵⁵ This point will be touched upon in the next chapter of this thesis.

¹⁵⁰ *Ibid.*, at para. 118-122.

¹⁵¹ *Ibid.*, at para. 123.

¹⁵² *Ibid.*, at para. 124.

¹⁵³ *Ibid.*, at para. 125.

¹⁵⁴ Pellet’s Tenth Report, *supra* note 143, at para. 10.

¹⁵⁵ *Ibid.*, at para. 10-21.

4. Conclusion

Reservations may bring many legal problems to multilateral human rights treaty-making. In order to solve these problems, the validity of reservations should be reasonably decided. Thus, the permissibility of making reservations should be clarified and ensured first. To summarize, the permissibility of making reservations was implied in the ICJ Advisory Opinion and sufficiently demonstrated in the ILC study. On the one hand, making reservations should be permissible to ensure the equality of multilateral treaty making; on the other hand, it should be permissible to facilitate the extensive participation in and promote the universality of multilateral treaties, including human rights treaties. This permissibility shall be a fundamental standard to evaluate any reservations mechanism. In case of no provisions providing for reservations, if a mechanism imposes excessive restriction on the formulation of reservations or subjects the validity of reservations to unpredictable response of other contracting States, such a mechanism is problematic. I will discuss the current mechanism in the next chapter.

A. Unanimity Rule

Before proceeding to the compatibility principle, it is necessary to consider all the views expressed to the Court concerning the validity of reservations. There were mainly three kinds of points of view. The first was to support the practice of the League of Nations, the so-called unanimity rule. In the oral statements, the British and French representatives considered that such a rule was linked to the notion of uniformity of treaties and had become a customary rule since the 19th Century.¹⁵⁶ As mentioned above, this notion involved the proposition that no reservation was valid unless all other contracting States accepted it, explicitly or implicitly.

This rule was also supported by a minority of the ICJ. In the joint dissenting opinion,¹⁵⁷ the minority of the Court tried to demonstrate that the unanimity rule was a clear “principle of law governing reservations... [but] the negotiating governments [had] the greatest flexibility in making express provisions [providing for reservations] in treaties.”¹⁵⁸ As to the Genocide Convention, the minority judges relied on its *travaux préparatoires* to assert that the unanimity rule was applicable to the Genocide convention. They found that there had been plenty of opportunities for “the delegates of the negotiating States either to define any permissible reservations in the Convention itself or to obtain for them the express permission of the General Assembly, that is to say that, in accordance with a not infrequent practice, the

¹⁵⁶ For the statements of the UK, see “Statement by Sir Hartley Shawcross” (13 April 1951), 1951 ICJ Pleadings, *supra* note 134, 358; “Statement by Mr. Fitzmaurice” (14 April 1951), *ibid.*, 402. For the statement of France, see «Exposé de M. Charles Rousseau » (14 April 1951), *ibid.*, 417.

¹⁵⁷ See Joint Dissenting Opinion, *supra* note 115.

¹⁵⁸ Joint Dissenting Opinion, *ibid.*, at 37.

permitted reservations should be agreed in advance.”¹⁵⁹ Since no provision providing for reservations was finally inserted into the text¹⁶⁰ as “the States negotiating the Genocide Convention did not do so,”¹⁶¹ the minority of the Court drew a conclusion that the unanimity rule should be applied to this Convention.¹⁶²

However, as recorded in the *travaux préparatoires*,¹⁶³ it is clear that the draft of the Genocide Convention had never been referred to any State or organization outside the UN before it was adopted. Although the minority judges sidestepped the limited number of the UN member States at the time, they should have noticed that, in Resolution 260A (III), the UN General Assembly proposed the Genocide Convention for participation, not only of the member States but also of the non-member States.¹⁶⁴ Generally speaking, those negotiating States should not be entitled to restrict the right of any other State to formulate reservations.

Therefore, as the Court pointed out, “it could certainly not be inferred from the absence of an article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations.”¹⁶⁵ Indeed, in the Genocide Convention, there was no provision providing for the unanimity rule either. At most, the *travaux préparatoires* could illustrate the negotiating States’ waiver of any express provision providing for reservations. The Court additionally considered that,

¹⁵⁹ *Ibid.*, at 40.

¹⁶⁰ See Annex Text of the Convention in GA Res. 260A (III), *supra* note 86.

¹⁶¹ Joint Dissenting Opinion, *supra* note 115, at 42.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, at 40-41. For history of the Genocide Convention, also see “Written Statement of the Secretary-General of the United Nations” (January 1951), 1951 ICJ Pleadings, *supra* note 134, 77, at 285.

¹⁶⁴ GA Res. 260A (III), *supra* note 86. Also see Article XI of the Genocide Convention, *supra* note 110.

¹⁶⁵ 1951 ICJ Advisory Opinion, *supra* note 1, at 22.

[T]here existed among the American States members both of the United Nations and of the Organization of American States, a different practice which goes so far as to permit a reserving State to become a party irrespective of the nature of the reservations or of the objections raised by other contracting States. The preparatory work of the Convention contains nothing to justify the statement that the contracting States implicitly had any definite practice in mind.¹⁶⁶

It was thus inconceivable to infer from such a waiver that those negotiating States had made an agreement on behalf of those non-negotiating States and non-member States to apply the unanimity rule in the future.

According to the majority of the Court, the unanimity rule was “of undisputed value as a principle... [But] as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle.”¹⁶⁷ These circumstances referred to by the Court are summarized by Professor Shaw as follows:

[1] the universal character of the UN under whose auspices the Convention had been concluded; [2] the extensive participation envisaged under the Convention; [3] the fact that the Convention had been the product of a series of majority votes; [4] the fact that the principles underlying the Convention were general principles already binding upon states; [5] that the Convention was clearly intended by the UN and the parties to be definitely universal in scope and [6] that it had been adopted for a purely humanitarian purpose so that state parties did not have interests of their own but a common interest.¹⁶⁸

Although these circumstances were limited to the Genocide Convention by the Court, they are applicable to all human rights treaties. Clearly, circumstances [1], [2] and [5] reflect the need for universality of human rights treaties. Circumstance [3] reveals the mode of adoption.

¹⁶⁶ *Ibid.*, at 25. The practice of the American States will be discussed later in this section.

¹⁶⁷ *Ibid.*, at 21.

¹⁶⁸ Shaw, *supra* note 100, at 645 [number added].

Moreover, circumstances [4] and [6] relate to the non-reciprocal character of the Convention, as discussed in the previous chapter of this thesis.

As previously discussed, the unanimity rule put undue stress on the unanimous consent of other contracting States to the validity of reservations. As the Court considered, “[t]his theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted.”¹⁶⁹ It was too strict and thus made the participation of States in treaties difficult. Furthermore, if a treaty did not consist of an interchange of mutual obligations and benefits between the contracting States, the contractual conception should have no place therein. Clearly, the unanimity rule was not suitable to be applied to a treaty concluded in the six circumstances summarized by Professor Shaw. The majority of the Court asserted that, “having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to *derogate* from that rule by admitting the faculty to make reservations thereto.”¹⁷⁰ Therefore, the unanimity rule was deemed inappropriate as a matter of principle by the Court. This was consistent with the Court’s presumption of the permissibility of making reservations.

In other words, even if the practice of the League of Nations constituted a principle of law, it was out of keeping with the international intercourse after World War II. As Shaw said, “[t]he Court’s approach... was in keeping with the move to increase the acceptability and

¹⁶⁹ 1951 ICJ Advisory Opinion, *supra* note 1, at 24.

¹⁷⁰ *Ibid.*, [emphasis added].

scope of treaties and with the trend in international organisations away from the unanimity rule in decision-making and towards majority voting.”¹⁷¹

B. Sovereignty Rule

Another view expressed to the Court was the so-called sovereignty rule, which was supported by the Soviet Union and some Eastern European States in their written statements.

For example, the Polish Government noted the following point:

At its present stage of historical development, international law permits any signatory to accede to a multilateral convention with such reservations it may consider consistent with its interests. This right results from the principle of the sovereign equality of States...

Thus there were no grounds in substance to submit the whole question to the International Court of Justice.¹⁷²

Accordingly, its view was that the capacity of a State to make reservations to a treaty was a reflection of its sovereignty. In other words, a State might disagree with any treaty provision without considering the view of any other contracting State. This point of view was also stated by the Ambassador of Czechoslovakia at The Hague, as follows:

Le droit de formuler des réserves lors de la conclusion d'un traité est généralement reconnu dans la théorie et dans la pratique internationale... Aucun État ne peut se constituer juge d'un autre État souverain... Si un État, qui a formulé une réserve à certaines dispositions d'un traité, devait être privé de la participation à ce traité

¹⁷¹ Malcolm N. Shaw, *supra* note 100, at 645.

¹⁷² “Written Statement of the Government of Poland” (13 January 1951), 1951 ICJ Pleadings, *supra* note 134, 283, at 285.

uniquement parce que l'une des parties contractantes a fait objection à une telle réserve, ce procédé serait en contradiction avec les dispositions de l'article I, paragraphe 3, de la Charte.¹⁷³

Clearly, this statement claimed the permissibility of formulating reservations. It also referred to the unanimity rule. The exclusion of a reserving State by an objection to its reservation was regarded as detrimental to international co-operation and thus unacceptable. Equally important, this statement linked the objections of other contracting States to reservations with the sovereignty of the reserving States. Since formulating reservations was a sovereign act, objecting to reservations was deemed as passing judgment on the sovereignty of reserving States. Since States are equal, no State can judge the acts of another sovereign State. Thus, the views of other contracting States to the reservations should not have any legal effect on the reserving States. In this respect, the statement of Romania was strongly worded, as follows:

Le Gouvernement roumain constate toutefois que les Gouvernements des U.S.A., de l'Angleterre et ceux qui les suivent, allant à l'encontre du désir de l'humanité progressiste tout entière, recourent, pour enlever toute efficacité à la Convention sur le génocide, à différentes manœuvres comme celle de contester le droit de États de faire des réserves à cette convention.

Le droit inconditionné des États de formuler des réserves à convention à l'occasion de la signature, de l'adhésion ou de la ratification d'une convention multilatérale découle du principe de la souveraineté et de l'indépendance des États et est consacré par une longue pratique dans les relations internationales.¹⁷⁴

¹⁷³ «Exposé Écrit du Gouvernement de Tchécoslovaquie» (20 January 1951), 1951 ICJ Pleadings, *supra* note 134, 286, at 286-287. Article I (3) of the UN Charter reads, "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, Art. I (3) [UN Charter].

¹⁷⁴ «Exposé Écrit du Gouvernement de la République Populaire de Roumanie» (20 January 1951), *ibid.*, 290, at 290-291.

Such a statement set up nearly an antithesis between the right of formulating reservations and any mechanism for adjudicating the validity of reservations. In other words, in virtue of the sovereignty and independence of States, an absolute license should be given to States to make reservations. The validity of reservations should be unchallengeable. In this sense, this statement was extending the permissibility of making reservations to the presumption of validity of reservations. In short, the right of formulating reservations should be unrestricted.

One should doubt that the concept of sovereignty was abused under such a rule. The Court simply said that “it is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.”¹⁷⁵ As to the arbitrary nature of the sovereignty rule, Sir Shawcross had the following comments:

States, in the exercise of their sovereignty, have discretion whether to enter into diplomatic relations with other States or not. They cannot be compelled to do so, but if they do so, they must do it under the conditions prescribed by the accepted rules of international law in regard to diplomatic representatives. They cannot receive someone in a diplomatic capacity and not accord the prescribed immunities. In exactly the same way, States are not obliged to become parties to treaties, but if they do, they must become parties subject to the terms of the treaty as it has been drawn up.¹⁷⁶

In contrast with the unanimity rule, the sovereignty rule goes to the other extreme. The sovereignty of States is no doubt inviolable, but it is sovereignty which entrusts to States the ability of concluding international treaties and undertaking international obligations. However, under the sovereignty rule, any objection to reservations could be criticized for

¹⁷⁵ 1951 ICJ Advisory Opinion, *supra* note 1, at 24.

¹⁷⁶ Shawcross' Statement, *supra* note 134, at 371.

violating a reserving State's power to make its own decision.¹⁷⁷ According to such logic, a diplomat claiming normal immunity could be accused of violating the sovereignty of the State he was sent to. Under this rule, no matter what reservations were formulated, all of them should be deemed valid. In other words, there were no limits on the validity of reservations.

As for the harm of this rule to the treaty-making process, I have quoted Professor Shaw's exposition previously. He said that,

[T]o permit a treaty to become honeycombed with reservations by a series of countries could well jeopardise the whole exercise [of treaty-making]. It could seriously dislocate the whole purpose of the agreement and lead to some complicated inter-relationships amongst states [instead of the universality of the treaty in scope].¹⁷⁸

In this sense, this rule would also do violence to the sovereignty of pre-existing States parties to the treaty by forcing them into treaty relations with those reserving States as modified by the reservations. Moreover, with regard to human rights treaties, Shawcross considered that "the making of a reservation which detracts from the norm, absolves the reserving State from an obligation or liability while not entailing the renunciation of any corresponding *benefit* at all."¹⁷⁹ His so-called "benefit" was not contractual interchange of interests, but an "intangible"¹⁸⁰ one, namely, "the mere status of *being* a party to a [human rights treaty] involves for the participating States a considerable degree of credit and prestige, and

¹⁷⁷ See *supra* note 173.

¹⁷⁸ See Malcolm N. Shaw, *supra* note 100 and accompanying text.

¹⁷⁹ Shawcross' Statement, *supra* note 134, at 372 [emphasis added].

¹⁸⁰ *Ibid.*

influence in the world.”¹⁸¹ Clearly, if a reservation was formulated to be destructive of the central premise of the treaty, the reserving State does not deserve such “benefit.”

To sum up, the sovereignty rule was not appropriate as a matter of principle either.

C. Pan-American Rule

The other view expressed to the Court was the Pan-American rule, which was supported by the Organization of American States (OAS).¹⁸² At the very beginning of its statement, it made known its position of seeking to “draw a line between the two extremes.”¹⁸³ The rule adopted and proposed by the OAS was developed by the American States, independently of the League of Nations. As described in following statement,

At the Sixth International Conference of American States, held at Havana in 1928, a Convention of Treaties was adopted, Article 6, paragraph 3, of which provided that: “In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation.”¹⁸⁴

In general, the purpose of this provision was to limit the effect of a reservation to the relation between the reserving State and other contracting States. It implied an intention not to simply preclude the reserving State from becoming a party to the treaty despite objections of

¹⁸¹ *Ibid.*, [emphasis in original].

¹⁸² “Written Statement of the Organization of American States” (14 December 1950), 1951 ICJ Pleadings, *supra* note 134, 15.

¹⁸³ *Ibid.*, at 15.

¹⁸⁴ *Ibid.* [quotation in original].

other contracting States to its reservations. This intention was codified “by the Governing Board of the Pan-American Union in its Resolution of May 4, 1932,”¹⁸⁵ as follows:

2. [The treaty] shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.
3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.¹⁸⁶

These rules were finally approved on 23 December 1938.¹⁸⁷ Accordingly, a reserving State might become a party to a treaty as long as another contracting State accepted its reservations. The reservations would only affect the application of the reserved provisions between these two States. It was not necessary for the reserving State to take into account all other contracting States’ views on its reservations. The Pan-American rule was thus more flexible than the other two, as discussed earlier. That was why the US named it “Liberal Practice.”¹⁸⁸ In so far as multilateral human rights treaties were concerned, this rule had obvious advantage in recruiting as many States parties as possible. Since human rights treaties lacked inter-State exchange of interests, the participation of States therein with reservations should depend even less on the consent of other contracting States. Therefore, concerning the Genocide Convention, the US made the following statement to the Court:

¹⁸⁵ *Ibid.*, at 18.

¹⁸⁶ *Ibid.*, at 17.

¹⁸⁷ Approval by the Eighth International Conference of American States. “Report of the International Law Commission to the General Assembly Covering the Work of its Third Session” (UN Doc. A/1858) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) at 127 (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)) [1951 ILC Report].

¹⁸⁸ “Written Statement of the Government of the United States of America” (January 1950), 1951 ICJ Pleadings, *supra* note 134, 23, at 34.

The Genocide Convention is not a complex multipartite agglomeration of economic concessions and guarantees closely bargained and precariously achieved. It is not a nicely balanced resolution of divergent and conflicting political and territorial aspirations and claims... General acceptance of the Convention and its firm establishment as a universal rule of law is an objective outweighing by far any nice considerations regarding the desirable discouragement of un desirable, but nevertheless not fatal, reservations.¹⁸⁹

However, this rule got negative appraisal from the ILC, as follows:

The members of the Organization of American States have adopted a procedure which...is designed to ensure the greatest number of ratifications. Yet...the history of the conventions adopted by the Conferences of American States...has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States.¹⁹⁰

Nevertheless, the ILC did not explain how “the history of conventions”¹⁹¹ failed to demonstrate that the Pan-American rule could promote a greater measure of universality of multilateral treaties. Even if such an argument was proven, it could not deny the flexibility and helpfulness of this rule. In fact, this rule was never deemed as able to guarantee an actual extensive participation in any treaty. After all, the recognition and consent of States to the object and purpose of a treaty was decisive in promoting their participation therein. Similarly, the statements of the UK and France and the joint dissenting opinion of the four judges did not rely on the history of treaties concluded under the League of Nations framework to prove the usefulness of the unanimity rule in safeguarding the uniformity of treaties.¹⁹² Instead, they only cited historical examples to uphold the unanimity rule as a principle of law.¹⁹³ By

¹⁸⁹ *Ibid.*, at 42-43.

¹⁹⁰ 1951 ILC Report, *supra* note 187, at 127-128.

¹⁹¹ *Ibid.*

¹⁹² See *supra* note 115, 141.

¹⁹³ *Ibid.*

comparison with the other two rules, the Pan-American rule was simply proposed as a more feasible way to recruit the States which intended to accept a treaty in general but not some of its provisions. In fact, this rule constituted the basis on which the ICJ developed the compatibility principle.

2. The Compatibility Principle

A. The Logical Relation between the Two Standards

As mentioned in the previous chapter, in the 1951 ICJ Advisory Opinion, the majority of the Court affirmed the permissibility of making reservations. This permissibility constituted a basic presumption of the Court in answering the questions submitted by the UN General Assembly. Under such a presumption, the majority of the Court was inclined to ensure the universality of multilateral human rights treaties. Finally, they developed the compatibility principle. In the name of the Genocide Convention, the Court said that,

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate...It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.¹⁹⁴

¹⁹⁴ 1951 ICJ Advisory Opinion, *supra* note 1, at 24.

In this sense, the compatibility principle can also be called the “object and purpose” test. Specifically, this test consists of two standards. In answering Question I submitted by the General Assembly, the Court developed the objective standard, as follows:

[A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.¹⁹⁵

In answering Questions II and III, the Court provided the subjective standard:

(a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention; ...

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

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.¹⁹⁶

Thus, the objective standard set a limit on the right of States to formulate reservations. It meant that, despite the permissibility of making reservations, any reservation should not lead to a disregard of the object and purpose of the treaty. It was the bottom line of preserving the uniformity of multilateral treaties. As a result, the unanimity rule would be relaxed and

¹⁹⁵ *Ibid.*, at 29.

¹⁹⁶ *Ibid.*, at 29-30.

applied in a flexible way. On the other hand, the subjective standard was substantially similar to the Pan-American rule.¹⁹⁷ As Piper comments thereon,

The unanimity rule and the Pan-American rule are the foundations of the present law of reservations. Balancing the objectives of integrity and universality embodied in these two rules has led to the development of reservation rules that fall on a spectrum between the unanimity rule and the Pan-American rule...

While the Pan-American Rule [*sic*] evidenced a shift from the unanimity rule, [the] advisory opinion... in 1951 served as the major catalyst of change in reservation law.¹⁹⁸

First of all, it is necessary to clarify the logical relation between the two standards comprising the compatibility principle.¹⁹⁹ As previously mentioned, answers by the Court to Questions II and III were required only if the answer to Question I was “in the affirmative.”²⁰⁰ Therefore, purely according to the objective standard, if a reservation was formulated to be incompatible with the object and purpose of the treaty, “[the reserving] State cannot be regarded as being a party”²⁰¹ to the treaty. In such a circumstance, i.e., when the answer to Question I was in the

¹⁹⁷ See *supra* note 187 and accompanying text.

¹⁹⁸ Catherine Logan Piper, “Reservations to Multilateral Treaties: the Goal of Universality” (October 1985) 71 Iowa L. Rev. 295, at 309 [footnotes omitted]. Even though in the Advisory Opinion, the majority of the Court tried to limit the application of the compatibility principle only to the Genocide Convention, it was inevitable for this newly emerging principle to exert a substantial influence on the reservations mechanism of treaty law. As the representative of the Secretary-General, Mr. Kerno addressed to the Court on 11 April 1951, «Par conséquent, j’espère et j’ai pleine confiance que l’avis de la Cour sera de la plus grande utilité pour résoudre les difficultés d’application d’une convention dont le bon fonctionnement présente un si grand intérêt pour les Nations Unies. En outre, je suis sûr que l’avis de la Cour aidera dans une très large mesure à résoudre le problème général des réserves à des conventions multilatérales. Il constituera ainsi une contribution importante à la jurisprudence consultative de la Cour qui a eu déjà une si grande part dans la clarification du droit international». «Exposé de M. Kerno (Nations Unies)» (from 10 to 11 April 1951), 1951 ICJ Pleadings, *supra* note 134, 306, at 325.

¹⁹⁹ In describing such a relation, Professor Rosenne used the phrase “went on” to connect the Court’s answering to Question I and its answering to the rest. See Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), at 427-428. I don’t think such description was exact.

²⁰⁰ See *supra* note 108 and accompanying text.

²⁰¹ 1951 ICJ Advisory Opinion, *supra* note 1, at 29.

negative, there should be no answer to the Questions II and III. Thus, the subjective standard would not be applied at all.

Conversely, if a reservation was compatible with the object and purpose of the treaty, the subjective standard should be applied by individual contracting States to decide their respective attitude on the reservation and the treaty relationship between themselves and the reserving State. Such a scenario and that of the Pan-American rule were very much alike. The main distinction between them was that the application of the Pan-American rule was not conditional on whether the reservation was formulated to be compatible with the object and purpose of the treaty.

Therefore, in substance, the compatibility principle or the “object and purpose” test added a prerequisite to the Pan-American rule. That was the compatibility of reservations. To conclude, under the compatibility principle, the application of the subjective standard should be predicated on the outcome of the application of the objective standard. This is the logical relation between the two standards.

B. The Problems of the Compatibility Principle

Naturally, the rationality and feasibility of this principle caused many objections, mainly from the minority of the Court and within the ILC. It is helpful to go through these opinions to fully understand this principle.

The first can be found in the joint dissenting opinion of the Court. The four judges showed their strong suspicion concerning the concept of compatibility, as follows:

This attempt to classify reservations into “compatible” and “incompatible” would involve a corresponding classification of the provisions of the Convention into two categories---of minor and major importance... [Maybe] a particular provision formed part of “the object and purpose of the Convention”... [Maybe] a particular provision did not form part of “the object and purpose”...

We can discover no trace of any authority...in support of existence of such a distinction between the provisions of a treaty...or of a power being conferred upon a State to make such a distinction...²⁰²

This suspicion is not persuasive. It partly misinterpreted the compatibility principle. It was not supposed to involve a division of the provisions of a treaty into two (absolute) categories. To the accomplishment of the object and purpose of the treaty, every provision was pertinent and important. In other words, every provision formed part of the object and purpose of the treaty and none of them should be separated therefrom. It was unreasonable to assert that the compatibility principle had any contrary intention on this point.

As previously stated, a reservation made to a provision signifies the intent of the reserving State to modify or exclude the application of that provision to itself. Hence, no formulation of a reservation aims at advancing or would advance the object and purpose of the treaty. Accordingly, the so-called compatibility of this reservation should mean that its modification or exclusion of the application of that provision would not essentially influence the accomplishment of the object and purpose of the treaty and thus could be tolerated. Likewise,

²⁰² Joint Dissenting Opinion, *supra* note 115, at 42-43.

the incompatibility of this reservation should mean that it would essentially influence and probably make the accomplishment impossible. The reservation would therefore be invalid.

Also, such a distinction between compatibility and incompatibility has been applied in and proven by the subsequent practice of multilateral human rights treaties. For example, on the ICCPR, the HRC commented as follows:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant...provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations... reservations to particular clauses of article 14 may be acceptable...²⁰³

²⁰³ General Comment 24, *supra* note 43, at para. 8 [emphasis in original]. Article 14 of the ICCPR reads, “1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt. 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him. 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” ICCPR, *supra* note 9, Art. 14. However, “a general reservation to the right to a fair trial would not be [acceptable].” General Comment 24, *supra* note 43, at para. 8.

[T]here is no automatic correlation between reservations to non-derogable provisions and reservations which offend against the object and purpose of the Covenant...²⁰⁴

Thus, concerning a multilateral human rights treaty, it is entirely possible to distinguish between the provisions to which the reservations will be compatible with the object and purpose of the treaty and those to which the reservations will not. In short, the distinction between compatibility and incompatibility of reservations exists *de facto*.

The second objection was aimed at the feasibility of the compatibility principle. As mentioned above, the compatibility principle was developed by the ICJ on the basis of the Pan-American rule. It was likely that the newly developed principle kept the problems of the old rule. In its Report to the General Assembly, the ILC considered that,

The Pan-American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former. The Commission, therefore, does not recommend that this practice should be applied to multilateral conventions in general...²⁰⁵

The main point of such a comment was to draw attention to the most fundamental shortcoming of the Pan-American rule. Under such a rule, a reservation formulated by the reserving State might receive completely different reactions from other contracting States. Some might consider it as acceptable but some might not. In a multilateral treaty regime, that causes confusion. Moreover, according to the Pan-American rule, these different considerations on the validity of the same reservation would result in different treaty

²⁰⁴ General Comment 24, *ibid.*, at para. 10.

²⁰⁵ 1951 ILC Report, *supra* note 187, at 128.

relationships between the reserving State and other contracting States. In a multilateral treaty regime, that is self-contradictory. In short, this rule lacked a common standard for the contracting States to judge on the validity of a reservation.

In this connection, as mentioned above, the ICJ added the criterion of compatibility as the objective standard to the Pan-American rule. According to the logical relation between the two standards of the compatibility principle, the compatibility of a reservation should be decided prior to the application of the subjective standard by individual contracting States in a temporal sense. The subjective standard would not be applied by contracting States until the reservation was found compatible with the object and purpose of the treaty. If it was found incompatible, the reserving State would definitely be excluded from the treaty. There should be no need for other contracting States to consider the status of this reserving State to the treaty.

However, this criterion was not deemed effective in solving the shortcoming of the Pan-American rule, for the Court also said that, “each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint.”²⁰⁶ That was why, in stating the subjective standard, the Court used the wordings such as “a party objects to a reservation which it considers to be incompatible...”²⁰⁷ or “a party accepts the reservation as being compatible...”²⁰⁸ The criterion of compatibility was thus repeated in the subjective standard.

²⁰⁶ 1951 ICJ Advisory Opinion, *supra* note 1, at 26.

²⁰⁷ See *supra* note 196 and the accompanying text.

²⁰⁸ *Ibid.*

Concerning the divergent views of contracting States on the compatibility of reservations, the Court suggested that they “adopt a position on the jurisdictional plane [such as the ICJ itself] in respect of this divergence and to settle the dispute.”²⁰⁹ Obviously, contracting States were expected to reach an identical view on the compatibility of a reservation before they decided their respective attitudes to the status of the reserving State to the treaty. Even so, such a rule was criticized by the joint dissenting opinion of the four judges, as follows:

[W]e have difficulty in seeing how the new rule can work [on the basis of the criterion of compatibility]... Under such a system, it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is referred to judicial decision; but this procedure, for various reasons, may never be resorted to by the parties... Such a state of things can only cause the utmost confusion among the interested States.²¹⁰

Therefore, in practice, there was no objective test on the compatibility of reservations. In its Advisory Opinion, the Court only indicated such a way to overcome the divergence, but the feasibility of such a way was doubted. If States did not resort to judicial dispute settlement, the divergent views would coexist and the situation of the Pan-American rule²¹¹ would reappear. As a result, that would probably render the objective standard purely symbolic. The same worry was also expressed by the ILC, as follows:

So long as the application of the criterion of compatibility remains a matter of subjective discretion, some of the parties being willing to accept a reservation and other not, the status of a reserving State in relation to the convention must remain uncertain. And where a convention confers jurisdiction on the International Court of Justice over disputes concerning the interpretation or application of its provisions, and

²⁰⁹ 1951 ICJ Advisory Opinion, *supra* note 1, at 27.

²¹⁰ Joint Dissenting Opinion, *supra* note 115, at 44.

²¹¹ See *supra* note 205 and accompanying text.

such jurisdiction is invoked by a party, difficulty might arise in determining which are the parties to the convention entitled to intervene under Article 63 of the Court's Statute.²¹²

Therefore, in his Report on the codification of treaty law, Lauterpacht proposed the submission of the compatibility of reservations to a committee appointed by States parties²¹³ or a chamber of the ILC.²¹⁴ Furthermore, Sir G.G. Fitzmaurice proposed a prohibition on reserving the provisions which provided for the jurisdiction of international tribunals.²¹⁵ Although Waldock sought to "suggest a different solution to this problem from any previously proposed,"²¹⁶ it was not fully adopted by the ILC in the provisional draft of treaty law in 1962.²¹⁷ In contrast, the ILC simply incorporated the criterion of compatibility into the draft²¹⁸ with the following explanation:

²¹² Article 63 of the ICJ Statute reads, "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it." The ICJ Statute, *supra* note 18, Art. 63.

²¹³ He proposed that, "[t]he parties or the organ of an international organization responsible for establishing the text of the treaty shall designate a committee, appointed in a manner to be agreed by them, competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty... If a reservation is objected to by a State qualified to object, then it shall be competent for the committee, at the request of the State making the reservation, to decide whether the reservation is admissible." Lauterpacht's Report, *supra* note 119, at 133.

²¹⁴ He also proposed, "[t]he parties or the organ of an international organization responsible for establishing the text of the treaty shall request the International Court of Justice to designate under its Rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty." *Ibid.*, at 134.

²¹⁵ He proposed, "[i]n no case can a reservation be made or admitted to any article of a treaty providing for the settlement of differences or disputes concerning the interpretation or application of that treaty, by means of a reference to the International Court of Justice or other international tribunal, or arbitration, conciliation, or by other specified means." Fitzmaurice's Report, *supra* note 140, at 115. The Special Rapporteur said, "[i]t is considered inadmissible that there should be parties to a treaty who are not bound by an obligation for the settlement of disputes arising under it, if this is binding on other parties... Such a provision is too fundamental to the scheme and order of any treaty containing it to permit of any reservation... A State which becomes a party to a treaty containing a provision for arbitration or judicial settlement thereby *ipso facto* consents to settle by those means any dispute in which it becomes involved under the treaty." *Ibid.*, at 127 [emphasis in original].

²¹⁶ Waldock's Report, *supra* note 124, at 63. For his proposals, see *ibid.*, 60-62.

²¹⁷ See "Report of the International Law Commission to the General Assembly Covering the Work of its Fourth Session" (A/5209) in *Yearbook of the International Law Commission 1962*, Vol. II (New York: UN, 1964) at 175-182 (UNDOC.A/CN.4/SER.A/1962/Add.1 (62.V.5)) [1962 ILC Report].

²¹⁸ Article 18 *Formulation of Reservations* of the 1962 text reads, "1. A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:...(d) In the case where the treaty is

[T]he Commission was agreed that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty.²¹⁹

Clearly, the attitude of the ILC on the compatibility principle changed. Undoubtedly, such a change reflected the permissibility of formulating reservations, which was admitted and kept in the ILC study.²²⁰ However, although the issue on the objective determination of the compatibility of reservations had been touched upon by those Special Rapporteurs several times, and also noticed by the ILC in the preceding paragraph, it resulted in nothing definite. In the reexamination by the ILC of the provisional draft in 1965²²¹ and the adoption of a single draft convention in 1966,²²² there was no substantial change to the provision providing for the criterion of compatibility. The ILC draft of 1966 constituted the basis of the 1969 Vienna Convention adopted at the *United Nations Conference on the Law of Treaties*. Thus,

silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty." *Ibid.*, at 175-176. Article 20 *The Effect of Reservations* of the same text reads, "... (a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force; (b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State." *Ibid.*, at 176.

²¹⁹ *Ibid.*, at 178 [quotation in original].

²²⁰ It was undeniable that the agreement on the appropriateness of the compatibility principle (by the ILC as indicated in the 1962 ILC Report) was led to by the Special Rapporteur Waldock's Report, especially his discussion on the permissibility of formulating reservations. See 1962 ILC Report, *ibid.*, at 178-180. For Waldock's discussion, see *supra* notes 124-132 and accompanying texts.

²²¹ Article 18 *Formulation of Reservations* of the 1965 text reads, "[a] State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless: ... (c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty." "Report of the International Law Commission to the General Assembly on the Work of the First Part of its Seventeenth Session" (UN Doc. A/6009) in *Yearbook of the International Law Commission 1965*, Vol. II (New York: UN, 1967) at 161-162 (UNDOC.A/CN.4/SER.A/1957/Add.1 (66.V.2)) [1965 ILC Report].

²²² Article 16 (c) reads exactly the same as Art. 18 (c) of the 1965 text. "Report of the International Law Commission to the General Assembly on the Second Part of its Seventeenth Session" (UN Doc. A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, Vol. II (New York: UN, 1967) at 202 (UNDOC.A/CN.4/SER.A/1966/Add.1 (67.V.2)) [1966 ILC Report]. Also see *ibid.*

the lack of a competent tribunal or organ to objectively determine the compatibility of reservations was allowed to continue in the current reservations mechanism.

3. The Current Reservations Mechanism

In the previous section of this chapter, I have gone through the origin and development of the compatibility principle on reservations and summarized the process of the codification of such a principle. The final outcome of this process was the *Reservations* Section of the 1969 Vienna Convention, which provides for the current reservations mechanism. However, under such a reservations mechanism, the logical relation between the two standards comprising the compatibility principle has been lost.

A. Analysis of Article 19

Article 19 of the Vienna Convention provides that,

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.²²³

²²³ 1969 Vienna Convention, *supra* note 3, Art. 19, also see Article 18 in the 1962 text and the 1965 text and Article 16 in the 1966 text. See also *supra* note 8 and accompanying text.

contracting States on the compatibility shall be in a divergent and disorganized state until a concrete dispute to which the issue of compatibility is relevant arises and may well be submitted to a dispute resolution medium, which will decide, *inter alia*, on the compatibility of the reservation in determining the applicable law.

B. Analysis of Article 20

Paragraph 4 of Article 20 *Acceptance of and Objection to Reservations* of the 1969 Vienna Convention provides for the subjective standard of the compatibility principle, as follows:

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 had accepted the reservations.²²⁶

In the first place, contrasted with the subjective standard stated by the ICJ,²²⁷ this paragraph does not include the consideration of compatibility by contracting States in the acceptance of or objection to reservations. After all, as mentioned above, Article 19 (c) in theory prevents any State from formulating reservations which are incompatible with the object and purpose

²²⁶ 1969 Vienna Convention, *supra* note 3, Art. 20 (4), also see Articles 19 and 20 in the 1962 text, Article 19 in the 1965 text and Article 17 in the 1966 text.

²²⁷ See *supra* note 196 and accompanying text.

of the treaty. Therefore, there is no incompatible reservation which would be accepted or objected to. In theory, this paragraph only aims at those reservations which are deemed compatible. Correspondingly, the reasons for which contracting States accept or object to reservations must be something other than their incompatibility. This was confirmed by Waldock, as follows:

[W]here a reservation had not been expressly authorized, and at the same time was not one prohibited under article 16, paragraph (c) [i.e., Article 19 (c) of the 1969 Vienna Convention], could a contracting State lodge an objection other than that of incompatibility with the object and purpose of the treaty? The answer was surely Yes [sic]. Each contracting State remained completely free to decide for itself, in accordance with its own interests, whether or not it would accept the reservation.²²⁸

Moreover, by comparison, the most significant difference between Article 20 (4) of the Vienna Convention and Article 17 (4) of the draft articles²²⁹ adopted by the ILC in 1966 is the legal effect of objections to reservations. According to the 1966 text, an objection to a reservation presumably “precludes the entry into force of the treaty”²³⁰ between the objecting State and the reserving State. However, under the 1969 Vienna Convention, it is left to each objecting State to decide on the legal consequences of its objection. Concerning such a modification, Waldock had the following explanation:

²²⁸ Official Records of the United Nations Conference on the Law of Treaties, *supra* note 224.

²²⁹ Article 17 (4) of the 1966 text reads, “[i]n cases not falling under the preceding paragraphs of this article: (a) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force; (b) An objection by another contracting State to a reservation *precludes* the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State; (c) An act expressing the State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.” *Draft Articles on the Law of Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session*, Official Records of the United Nations Conference on the Law of Treaties, 1968-1969, Documents of the Conference, UN Doc. A/CONF. 39/11/Add.2 (1966) 7, at 22 [emphasis added].

²³⁰ *Ibid.*

The International Law Commission had taken the view that, if the rule of [Article 17 (4) (b)] had been expressed conversely, so as to put the onus on the objecting State to say that the treaty was to come into force, that might be some encouragement to the free making of reservations; and also that perhaps the logical intention to attribute to a State was an intention not to have treaty relations with the reserving State...

However, as some representatives had pointed out... [t]he essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear.²³¹

Obviously, Waldock did not defend the view taken by the ILC. Again, in theory, those reservations which can be objectionable under Article 20 (4) of the 1969 Vienna Convention should be first compatible with the object and purpose of the treaty. Accordingly, if the objecting State does not definitely oppose the entry into force of the treaty between itself and the reserving State, Article 21 (3)²³² will apply and the objecting State will have treaty relations with the reserving State except for the provisions to which reservations are made. That is not unreasonable.

C. The Loss of the Logical Relation between the Two Standards

Based upon the preceding analysis, it is clear that the *Reservations* Section of the 1969 Vienna Convention has incorporated the compatibility principle in form. Fundamentally, Article 19 (c) codifies the objective standard and Article 20 (4) the subjective standard. However, as mentioned above, under the Vienna Convention, in the absence of objective

²³¹ Official Records of the United Nations Conference on the Law of Treaties, 2nd Sess., 11th plenary Mtg., UN Doc. A/CONF. 39/11/Add.1 (1969), at 34.

²³² Article 21 (3) of the 1969 Vienna Convention reads, "[w]hen a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservations relates do not apply as between the two States to the extent of the reservation." 1969 Vienna Convention, *supra* note 3, Art. 21 (3).

determination of the compatibility of reservations, the application of the criterion of compatibility is in fact left to individual contracting States. As Hylton says,

Article 19 allows two readings of the object and purpose test: (1) a one-tier test based on compatibility with the treaty, interpreting permissibility and acceptability under Articles 19 and 20 as the same thing, or (2) a two-tier test analyzing first permissibility under Article 19 and then acceptability under Article 20. The text of Article 19 (c) does not favor either interpretation over the other. The one-tier test requires confronted states to question only the compatibility of the reservation with the treaty based on the provisions of the treaty and the intent of the drafters... The two-tier approach allows a confronted state to object to a reservation on grounds of either impermissibility or unacceptability.²³³

Obviously, the so-called “one-tier test” was denied by Waldock.²³⁴ However, the so-called “two-tier test” adopts a realistic way to examine the current reservations mechanism. Under this mechanism, States may differ in their determinations of the compatibility of reservations with the object and purpose of the treaty. Thus, apart from those compatible reservations mentioned above, incompatible reservations may also be objectionable in practice. There are several situations in which contracting States object to incompatible reservations.

First, some contracting States may consider one or more reservations as incompatible and, in fact, they are incompatible. It is plain that Article 20 (4) (b) of the Vienna Convention is applicable in objecting to such incompatible reservations. Likewise, it will be discretionary for the objecting States, respectively, to decide on the legal consequences of their objections. As Redgwell points out,

²³³ Daniel N. Hylton, “Default Breakdown: The Vienna Convention on the Law of Treaties’ Inadequate Framework on Reservations” (May 1994) 27 Vand. J. Transnat’l L. 419, at 431-432.

²³⁴ See *supra* note 228 and accompanying text.

Occasionally States will explicitly state that the legal consequences of an objection made to a reservation on the basis of its incompatibility with the object and purpose of the Convention. There are but a handful of examples of the first possibility, namely, that the Convention does not enter into force as between the objecting and reserving State. More frequently, but still in a minority of cases, States will object to a reservation as incompatible with the object and purpose of the Convention but will not view such objection as precluding the entry into force of the Convention between them.²³⁵

Such being the case, the incompatibility has become no more than one of the reasons for which contracting States object to reservations. For example, Denmark raised an objection on 1 October 1993 to the US reservations to Articles 6 and 7 of the ICCPR,²³⁶ as follows:

In the opinion of Denmark, reservation (2) of the United States with respect to capital punishment for crimes committed by persons below eighteen years of age as well as reservation (3) with respect to article 7 constitute general derogations from articles 6 and 7, while according to article 4, para 2 of the Covenant such derogations are not permitted.

Therefore, and taking into account that articles 6 and 7 are protecting two of the most basic rights contained in the Covenant, the Government of Denmark regards the said reservations incompatible with the object and purpose of the Covenant, and consequently Denmark objects to the reservations.

These objections do not constitute an obstacle to the entry into force of the Covenant between Denmark and the United States.²³⁷

Such objections make little sense. The first paragraph explains that the US reservations are invalid. Then, the second paragraph declares that they are incompatible. Nevertheless, such incompatibility does not lead to an exclusion of the reserving State from the treaty. At most, only the provisions to which the US reservations relate do not apply as between these two

²³⁵ Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties" (1993) 64 *British Yearbook of International Law* 245, at 275-276 [footnotes omitted].

²³⁶ See *supra* note 9.

²³⁷ *Multilateral Treaties*, *supra* note 9, at 186.

States. On the contrary, the reserving State whose reservation is objected to by virtue of its incompatibility may also be accepted as a party to the treaty by the same objecting State.

If the view is adopted that an incompatible reservation will essentially influence the accomplishment of the object and purpose of the treaty and probably make it impossible, an objection to an incompatible reservation and the acceptance of the reserving State as a party are definitely irreconcilable. Thus, those objections such as the one raised by Denmark are evidently self-contradictory. In such a case, the reserving State may virtually attain its goal of becoming a party to the treaty while defeating its entire purpose.

Second, some contracting States may consider one or more reservations as incompatible and, in fact, they are incompatible. However, especially concerning multilateral human rights treaties, “States have often not seen any legal interest in or need to object to reservations.”²³⁸ In fact, an objection might not reduce the objecting State’s obligations under the reserved provision. For example, because of the above objection of Denmark to the US reservations, those reserved provisions will not apply between them in accordance with Article 21 (3) of the Vienna Convention. Nevertheless, it is inconceivable that Denmark can thus impose capital punishment on its domestic juvenile criminals.

Thus, in judging the compatibility of any reservation, each contracting State may completely proceed from the considerations of its own interests.²³⁹ The silence of a contracting State on

²³⁸ General Comment 24, *supra* note 43, at para. 17.

²³⁹ As Schabas observed, “objections are not without important political value...political considerations rather than principle would often appear to explain the failure to register objections. Canada, for example, has objected to reservations by Yemen but not to those by the United States [to the *International Convention on the*

reservations sometimes cannot in fact indicate its view of the compatibility of reservations. In such a circumstance, Article 20 (5)²⁴⁰ will apply and a reservation which is in fact incompatible with the object and purpose of the treaty may be tacitly accepted as valid in accordance with Article 20 (4) (c)²⁴¹ of the Vienna Convention. Meanwhile, the reserving State becomes a party to the treaty.

Third, some contracting States may assert one or more reservations to be incompatible but in fact, they are compatible. After all, under the Vienna Convention, contracting States are not required to justify either their judgments on the compatibility of reservations or their objections to reservations. Once a reservation is formulated, each contracting State is completely free to assert its compatibility without giving any reason or consulting the reserving State. On the other hand, once a reservation is objected to on the basis of its “incompatibility” or any other reason, the status of the reserving State is uncertain in any respect and left to the objecting State’s discretion. Thus, a reserving State which makes a reservation of minor importance and clear compatibility may still be subjected to such an

Elimination of All Forms of Racial Discrimination], although it is difficult to identify any objective criteria that would explain the difference in approach.” William A. Schabas, “Reservations to Human Rights Treaties: Time for Innovation and Reform” (1994) 32 Canadian Yearbook of International Law 39, at 50, 67-68 [William A. Schabas, “Innovation and Reform”]. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969) [Racial Discrimination Convention]. However, this example was not appropriate. The objection raised by Canada (on 10 August 1989) aimed at the reservations made by Yemen (upon accession on 6 April 1989) concerning Articles 5 (c) and 5 (d) (iv), (vi) and (vii). Multilateral Treaties, *supra* note 9, at XXXI, 144 and 155. However, upon its signature on 29 September 1966 and ratification on 21 October 1994, the US did not formulate any reservation to those provisions. *Ibid.*, 143. Thus, concerning these provisions, the reactions of Canada to these two States might not be comparable.

²⁴⁰ Article 20 (5) of the 1969 Vienna Convention reads, “[f]or 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.” 1969 Vienna Convention, *supra* note 3, Art. 20 (5).

²⁴¹ See *supra* note 226 and accompanying text.

uncertain status. That is unfair for the reserving State in the multilateral treaty-making and in opposition to the permissibility of formulating reservations, referred to above.

Fourth, even if some contracting States admit the compatibility of one or more reservations, they can still raise objections and thus explicitly preclude the entry into force of the whole treaty between themselves and the reserving State. This happens quite rarely.

Based on the above discussion, it is clear that, in the absence of objective determination of the compatibility of reservations, the manner and effect of objections to reservations are arbitrary and unpredictable. Neither the uniformity nor the universality of treaties can be protected or promoted under the current reservations mechanism. The logical relation between the two standards of the compatibility principle has been lost.

4. Conclusion

In this chapter, I have gone through the origin and development of the compatibility principle, especially its relations with the Pan-American rule and the permissibility of formulating reservations. I have clarified the logical relation between the two standards of this principle and found that the basic problem of this principle was the lack of a competent tribunal or organ to apply the criterion of compatibility. Although this problem was noticed by the ICJ and the ILC, the drafters of the Vienna Convention did not address it. Thus, despite the formal codification of this principle as the *Reservations* Section of the 1969 Vienna Convention, the current reservations mechanism is problematic. In the absence of

objective determination of the compatibility of reservations, the manner and effect of objections to reservations are arbitrary and unpredictable. Neither the uniformity nor the universality of treaties, including multilateral human rights treaties, can be protected or promoted under this reservations mechanism. Therefore, the current reservations mechanism needs reform by reestablishing the logical relation between the two standards.

Chapter V Objective Application of the Criterion of Compatibility

The current reservations mechanism needs reform to reestablishing the logical relation between the two standards comprising the compatibility principle. The key is to introduce a tribunal or organ as a neutral third party to apply the criterion of compatibility. Such a competent body should conduct the objective determination of the compatibility of reservations. Its decision will be furnished to all contracting States to consult and follow. In other words, contracting States in multilateral human rights treaty-making may relinquish their authority of adjudicating the compatibility of reservations to this competent body.

1. Orientation of the Competent Body

According to the 1951 Advisory Opinion, the compatibility of a single reservation might cause disputes between the reserving State and other contracting States and between other contracting States themselves. Each reserving State might have to convince the other contracting States that its reservations are compatible. Meanwhile, contracting States might also resort to an international tribunal in respect of their divergent views on the compatibility of reservations. Thus, an outside body was suggested for dispute settlement.²⁴² In practice, resort to dispute settlement has been disappointing. As Pellet pointed out,

²⁴² See *supra* note 209.

[A]lthough there are, admittedly, mechanisms for the peaceful settlement of disputes, to date they have been scarcely or not at all utilized in order to resolve differences of opinions among States with regard to reservations, particularly concerning their compatibility with the object and purpose of a treaty. Moreover, when such mechanisms exist, as is frequently the case with regard to human rights treaties, it is particularly important to determine the extent and limits of their powers with respect to reservations.²⁴³

Undoubtedly, the burden of bringing a claim constitutes an obstacle for States to resort to dispute settlement. More importantly, under the current reservations mechanism, a contracting State has absolute discretion to assess the legality of reservations made by others and decide on the relevant legal effect. Therefore, it has no need to turn to a third party to determine the compatibility of reservations with another State.

Even if States did resort to an outside body to solve their divergence, the situation would still be problematic. Any competent body would probably be overwhelmed if it were supposed to settle these disputes one-by-one. In the case of the Genocide Convention, Judge Alvarez expressed his concerns upon this point, as follows:

So far as the [criterion of compatibility] is concerned, States making reservations could argue that their reservations were not in conflict with the aim of the Convention, while States objecting to the reservations might allege the opposite. And, when one realizes that in this event it would be the duty of the International Court of Justice to settle the dispute, this tribunal will find itself so overburdened with controversies of this nature that its functions would be utterly distorted.²⁴⁴

To put forth an outside body for dispute settlement on reservations implies that their compatibility is an outcome of controversies. Suppose that a reserving State A made compelling arguments in the ICJ for the compatibility of its reservation to a provision and all

²⁴³ Pellet's Second Report, *supra* note 148, at para. 49.

²⁴⁴ Alvarez's Opinion, *supra* note 115, at 54.

the other contracting States thus accepted it; what then happens if five years later another State B tries to accede to the same treaty with a reservation to the same provision? At this time, perhaps the number of States parties to this treaty has doubled. Certain States parties did not participate in the dispute settlement concerning State A's reservation five years ago. Now, disputes may arise again among the States parties due to the compatibility of State B's reservation, although it is made to the same provision.

So, is the case of State A's reservation a precedent binding upon the Court and those States parties which accepted A's reservation five years ago? If not, does State B have to justify its reservation? On what grounds? If it fails to do so in the Court, should the States parties reach the consensus of opinion that B's reservation is incompatible? Again, this reservation might be exactly the same as the one made by A. Theoretically, a competent body in charge of the determination of compatibility, along with an increase in the number of States parties to the same treaty, would be overwhelmed by unnecessary repetitions.

Thus, the suggested outside body should not be oriented towards dispute settlement. To determine the compatibility of reservations, the emphasis ought to be placed on reservations *per se*. As previously pointed out, any reservation does not aim at advancing the object and purpose of a treaty. Its compatibility depends on the degree to which it will influence the accomplishment of the object and purpose of the treaty. Above all, those reservations of a general character are generally considered unacceptable. As the HRC noted,

Reservations must be specific and transparent, so that the Committee, those living in the territory of the reserving State and other States parties may be clear as to what

obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.²⁴⁵

As to general reservations, Schabas says, “[i]t is hardly necessary even to consider whether the reservation is compatible... Accordingly, although this is only implicit in the Committee’s General Comment, such reservations are incompatible.”²⁴⁶ Thus, reservations are supposed to indicate “certain provisions,”²⁴⁷ of which they tend to modify or exclude the application and effect. The influence of reservations on the accomplishment of the object and purpose of the treaty is decided by the provisions which provide for reservations and those which may be modified or excluded by reservations.

Which State makes reservations or why it makes such reservations do not influence the compatibility of these reservations. For example, the incompatibility of the US reservation to Article 6 of the ICCPR²⁴⁸ can be concluded from the fact that imposing the death penalty on juvenile criminals is destructive of the central premise of the treaty.²⁴⁹ In contrast, the fact that the reserving State is the US has nothing to do with the incompatibility. Likewise, the fact that the certain US domestic laws conflicted with the treaty provisions and led to the reservations, has nothing to do with the incompatibility either.

Generally speaking, the compatibility of reservations should be regarded as having an objective existence. An example can be found in the judgment of the European Court of

²⁴⁵ General Comment 24, *supra* note 43, at para. 19.

²⁴⁶ William A. Schabas, “Innovation and Reform”, *supra* note 239, at 58-59.

²⁴⁷ 1969 Vienna Convention, *supra* note 5, Art. 2 (d).

²⁴⁸ See William A. Schabas, “Invalid Reservations”, *supra* note 11.

²⁴⁹ See *Concluding Observations of the Human Rights Committee: United States of America*, *supra* note 10.

Human Rights (ECHR) in the case of *Belilos v. Switzerland*.²⁵⁰ Concerning the interpretive declaration appended by Switzerland to its ratification of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁵¹ in the light of its *travaux préparatoires*, the ECHR found that the nature of the Swiss declaration was the equivalent of a reservation.²⁵² However, in deciding its validity, the ECHR clearly distinguished between the domestic concerns which could be attributed to the reserving State and the compatibility of a reservation which should be objectively determined in line with the treaty. The ECHR considered that,

While the preparatory work and the [Swiss] Government's explanations clearly show what the respondent State's concern was at the time of ratification, they cannot obscure the objective reality of the actual wording of the declaration...The words... can therefore be interpreted in different ways, whereas Article 64 § 1 (art. 64-1) requires precision and clarity. In short, they fall foul of the rule that reservations must not be of a general character.²⁵³

²⁵⁰ *Belilos v. Switzerland* (1988), 74 Eur. Ct. H. R. (Ser A.) 132, 10 E.H.R.R. 466 [1988 *Belilos* Case].

²⁵¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 17. Switzerland ratified this Convention on 28 November 1974 with an interpretative interpretation as follows, "The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 (art. 6-1) of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge." Cited in 1988 *Belilos* Case, *ibid.*, at para. 29. Article 6 (1) reads, "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 17, Art. 6 (1).

²⁵² 1988 *Belilos* Case, *supra* note 250, at para. 40-49.

²⁵³ 1988 *Belilos* Case, *ibid.*, at para. 55. Article 64 (1) reads, "[a]ny State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article." *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 17, Art. 64 (1).

Thus, the ECHR found that the wording of the Swiss reservation *per se* was inconsistent with the requirement of the treaty, in spite of the reserving State's explanation. It is clear that, in deciding the validity of the reservation, the ECHR laid special emphasis on the spirit of the treaty. According to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, a reservation cannot be formally eligible unless it states clearly to what extent the reserving State will modify the application of certain provisions.²⁵⁴ In concurring with the view of the European Commission of Human Rights, the ECHR set forth its position on the determination of the compatibility of that reservation:

[T]he undeniable practical difficulties put forward by the [Swiss] Government could not justify the failure to comply with paragraph 2 of Article 64 (art. 64-2). The latter applied to all the States Parties without any distinction, whether they were unitary or federal and whether or not they had a unified body of procedural law... The purpose of Article 64 § 2 (art. 64-2) is to provide a guarantee... that a reservation does not go beyond the provisions expressly excluded by the State concerned. This is not a purely formal requirement but a condition of substance. The omission in the instant case therefore cannot be justified even by important practical difficulties.²⁵⁵

It is undeniable that the domestic concerns of the reserving States, especially their respective *travaux préparatoires* of participation in multilateral treaty-making, are very important in deciding the nature of their interpretative declarations²⁵⁶ and the effect of their invalid reservations.²⁵⁷ However, they played a limited role in the objective determination of the compatibility of reservations. In contrast, those provisions which provide for reservations,

²⁵⁴ See Art. 64 (1), *ibid.*

²⁵⁵ 1988 Belilos Case, *supra* note 250, at para. 58-59. Article 64 (2) reads, "[a]ny reservation made under this article shall contain a brief statement of the law concerned." *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 17, Art. 64 (2).

²⁵⁶ See D. M. McRae, *supra* note 7. See also Richard W. Edwards, Jr., "Reservations to Treaties: the Belilos Case and the Work of the International Law Commission" (Winter 2000) 31 U. Toledo L. Rev. 195.

²⁵⁷ See Ryan Goodman, *supra* note 99. See also Roberto Baratta, "Should Invalid Reservations to Human Rights Treaties be Disregarded?" (June 2000) 11 European Journal of International Law 413.

and those provisions of which reservations are made to modify or exclude the application, are vital.

The role played by the outside body needs to change. As long as a treaty text is adopted, a competent body can determine the compatibility of potential reservations made to any specific provision of the treaty. In other words, the objective determination of compatibility is to decide whether reservations made to a certain provision can be permitted or whether this provision can be reserved by States. As a result, each provision of a treaty text can be annotated by indicating the compatibility of potential reservations made thereto. Such an annotated text will become an objective and uniform standard for all contracting States to consult and follow. Accordingly, any State which formulates one or more incompatible reservations should be excluded from the treaty. With regard to those compatible reservations, each contracting State can either accept or object to them. Concerning the compatibility of reservations, there ought not to be disputes which may render the entry into force of the treaty and the status of the reserving State uncertain. Therefore, given that an outside body is suggested for the objective determination of compatibility, this body should be oriented towards legal consultation in advance instead of dispute settlement *ex post*.

2. Responsibility of the Competent Body

According to the preceding section, the compatibility of a reservation will be clear, if those provisions providing for reservations and those provisions which this reservation intends to modify or exclude are ascertained. If an outside body is conferred the competence of

objectively determining the compatibility of reservations, its major responsibilities will be 1) to interpret the object and purpose of a treaty; 2) to seek and confirm the provisions providing for reservations, if any; and 3) to determine the compatibility of potential reservations made to each provision of the treaty.

A. Interpreting the Object and Purpose

As to the first responsibility, there is no doubt that the competent body should rely upon the *travaux préparatoires* and the text of a treaty but not subsequent practice of States to draw a conclusion.²⁵⁸ In the case of the Genocide Convention, the ICJ did not make a systematic exposition of the object and purpose of the Convention. Nor did the Court develop any criterion to decide it. Rather, the Court elaborated upon the implications of the object and purpose of the Convention on universality and uniformity.²⁵⁹ As far as the Vienna Convention is concerned, the criterion of interpreting the object and purpose provided by its Article 31 (1) is deemed a “tautology.”²⁶⁰ Schabas considers that,

²⁵⁸ For example, Article 31 (2) of the Vienna Convention reads, “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”; Article 31 (3) (c) reads, “[t]here shall be taken into account, together with the context: ...any relevant rules of international law applicable in the relations between the parties”; and Article 31 (4) reads, “A special meaning shall be given to a term if it is established that the parties so intended.” 1969 Vienna Convention, *supra* note 3, Art. 31 (2), 31 (3) (c) and 31 (4). Since in this context I suggest that the object and purpose of a treaty be interpreted after the adoption of the text and before the opening for signature, the Articles 31 (3) (a) and 31 (3) (b) won’t be applicable here. They read, “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” *Ibid.*, Art. 31 (3) (a) and 31 (3) (b).

²⁵⁹ For example, see *supra* note 194 and accompanying text.

²⁶⁰ William A. Schabas, “Innovation and Reform”, *supra* note 239, at 48. Article 31(1) of the Vienna Convention reads, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be

The object and purpose may be considerably easier to assess in single-issue human rights conventions, such as the Genocide Convention, the Torture Convention, and the Racial Discrimination Convention. Scrutiny of reservations to these instruments will accordingly be quite strict. On the other hand, where human rights conventions contemplate a wide range of rights and obligations, not only is it more understandable that a state wishes to reserve to one or two specific norms, but also it is more difficult to identify the real “object and purpose” of the instrument. Two examples of more general conventions would be the International Covenants and the Convention on the Rights of the Child.²⁶¹

As to the former category, apart from the given examples, the First Optional Protocol is typical. The HRC stated its object and purpose in unequivocal terms:

Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant.... [T]he object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee...²⁶²

On the other hand, undoubtedly, a lot of broad concepts and moral claims can be attributed to a general human rights treaty. Its object and purpose may not be absolutely defined. For example, the ICCPR can be categorized as a general human rights treaty. Concerning its object and purpose, the HRC rendered a succinct summary, as follows:

[The ICCPR] articulates very many civil and political rights...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

given to the terms of the treaty in their context and in the light of its object and purpose.” 1969 Vienna Convention, *supra* note 3, Art. 31 (1).

²⁶¹ William A. Schabas, “Innovation and Reform”, *supra* note 239, at 48-49. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S 85 (entered into force 26 June 1987) [Torture Convention]. Racial Discrimination Convention, see *supra* note 239.

²⁶² General Comment 24, *supra* note 43, at para. 13.

are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.²⁶³

In this summary, the HRC did not elaborate on the meaning of the term “civil and political rights.” It could be criticized for evading the crucial question. However, similar to the definition of “human rights treaties,”²⁶⁴ the definitions of some general terms, such as “civil and political rights,” “economic, social and cultural rights,” are also changing and developing. Trying to state the intension of these concepts in human rights treaties will add much complexity to the interpretation of their objects and purposes. Maybe this way of doing interpretation will make the statement of the object and purpose logically comprehensible.

This discussion has touched upon a question of how human rights treaties should be interpreted. However, dealing with this question in depth goes beyond the subject of this thesis. In a sense, whether the object and purpose of a treaty can be interpreted in an unequivocal way or not, the process of objective determination will not be substantially affected. Since reservations must be made to certain provisions of the treaty, the basis of the objective determination of compatibility by the competent body will not exceed the treaty itself. For example, even though the HRC could not explain what “civil and political rights” are, those rights provided by the treaty are definitely in accord with this term. It can still be judged whether the accomplishment of the object and purpose will be essentially influenced if a provision is reserved. Thus, the object and purpose of a human rights treaty can also be explained in generalities.

²⁶³ *Ibid.*, para. 7.

²⁶⁴ See *supra* note 15 and accompanying text.

B. Seeking and Confirming the Provisions Providing for Reservations

After the object and purpose is interpreted, it is necessary for the competent body to seek and confirm the provisions providing for reservations. These provisions are diversified in form. Some are very clear and definite in providing for the admissibility of reservations and they cover all potential reservations to the treaty. For example, Article 9 of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*²⁶⁵ provides that “[n]o reservations may be made to this Convention.”²⁶⁶ The same provision can also be found in the *Convention against Discrimination in Education*.²⁶⁷ In such a circumstance, making any reservation is not allowed.

Likewise, Article 42 (1) of the *Convention Relating to the Status of Refugees*²⁶⁸ provides that “[a]t the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.”²⁶⁹ Such a provision is the equivalent of indicating the compatibility of potential reservations to each provision. A similar provision can be found in the *Convention on the Reduction of Statelessness*.²⁷⁰ It would be unreasonable to claim the incompatibility of a reservation which is explicitly permitted by the treaty.

²⁶⁵ *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 266 U.N.T.S. 3 (entered into force 30 April 1957).

²⁶⁶ *Ibid.*, Art. 9.

²⁶⁷ *Convention against Discrimination in Education*, 14 December 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962). Art. 9 reads, “[r]eservations to this Convention shall not be permitted.” *Ibid.*, Art. 9.

²⁶⁸ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954).

²⁶⁹ *Ibid.*, Art. 42 (1).

²⁷⁰ *Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975). Article 17 reads, “[a]t the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15.” *Ibid.*, Art. 17.

In contrast, some provisions providing for reservations only relate to reservations to some specific provisions but not the others. For example, Article 29 (2) of the CEDAW only provides for potential reservations to Article 29 (1), as follows:

Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.²⁷¹

Therefore, reservations to Article 29 (1) should be deemed compatible. However, concerning potential reservations to the other provisions, Article 28 (2) of the treaty simply integrates the criterion of compatibility without any further explanation.²⁷² Another example can be found in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Torture Convention).²⁷³ It only provides for reservations to Article 20²⁷⁴ and Article 30 (1)²⁷⁵ but keeps silent on reservations to the other provisions. Such being the case, it is the competent body which has the power and responsibility to judge on the compatibility of those reservations.

²⁷¹ CEDAW, *supra* note 57, Art. 29 (2). Article 29 (1), see *supra* note 81.

²⁷² Article 28 (2) reads, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted." CEDAW, *ibid.*, Art. 28 (2).

²⁷³ Torture Convention, *supra* note 261.

²⁷⁴ Article 28 (1) of the Torture Convention reads, "Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20." Torture Convention, *ibid.*, Art. 28 (1).

²⁷⁵ Article 30 (2) of the Torture Convention reads, "Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation." Torture Convention, *ibid.*, Art. 30 (2).

Furthermore, some provisions providing for reservations only prescribe some basic principles, but do not refer to reservations to specific provisions. For example, Article VII of the *Convention on the Political Rights of Women*²⁷⁶ provides that,

In the event that any State submits a reservation to any of the articles of this Convention at the time of signature, ratification or accession, the Secretary-General shall communicate the text of the reservation to all States which are or may become Parties to this Convention. Any State which objects to the reservation may, within a period of ninety days from the date of the said communication (or upon the date of its becoming a Party to the Convention), notify the Secretary-General that it does not accept it. In such case, the Convention shall not enter into force as between such State and the State making the reservation.²⁷⁷

Under this provision, the criterion of compatibility is not mentioned at all. Accordingly, formulating any reservation is permitted. However, any objection notified on time may exclude the entry into force of the treaty between the objecting State and the reserving State. Another example is Article 64 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which does not require the compatibility of reservations either, but a clear statement by every reserving State of reasons for making reservations.²⁷⁸ However, such provisions providing for reservations should not in any respect be understood as accepting incompatible reservations.

As previously pointed out, to the accomplishment of the object and purpose of a treaty, every provision is pertinent and important.²⁷⁹ It is thus inconceivable to assert that a certain provision in a treaty permits States to undermine the object and purpose of the treaty by

²⁷⁶ *Convention on the Political Rights of Women*, 31 March 1953, 193 U.N.T.S. 135 (entered into force 7 July 1954).

²⁷⁷ *Ibid.*, Art. VII.

²⁷⁸ See *supra* notes 253-255 and accompanying texts.

²⁷⁹ See *supra* note 202 and my opposition thereto.

formulating reservations. Therefore, if the provisions providing for reservations are expressed in general terms, the criterion of compatibility should be essentially applied in the objective determination. Such provisions providing for reservations may become additional rules to this criterion.

Finally, some provisions providing for reservations may be “retaining a ‘collegiate’ system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.”²⁸⁰ Such a mechanism can be found in the *International Convention on the Elimination of All Forms of Racial Discrimination* (Racial Discrimination Convention).²⁸¹ Its Article 20 (2) reads as follows:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.²⁸²

Even though this provision is more straightforward than those purely prescribing basic principles, the criterion of compatibility is still lost. For instance, a reservation by State A was accepted by more than one-third of the States parties at the time and deemed compatible. Nonetheless, along with the increase in the number of the States parties, more and more States might object to such a reservation. At this moment, the same reservation made by

²⁸⁰ 1962 ILC Report, *supra* note 217, at 180 [emphasis in original]. Also see Lauterpahct’s Report, *supra* note 119, “Alternative Draft A”, at 124, and “Alternative Draft B”, at 132-133; Fitzmaurice’s Report, *supra* note 140, at 115 and 127.

²⁸¹ Racial Discrimination Convention, *supra* note 239.

²⁸² Racial Discrimination Convention, *ibid.*, Art. 20 (2).

State B may be objected to by more than two-thirds of the States parties and thus deemed incompatible.

Under such a provision, the compatibility of reservations is still subject to individual States' assessment. Moreover, a certain number of objections made by States parties are regarded as the prerequisite for determining the incompatibility of reservations. However, only reservations which are compatible with the object and purpose of the treaty are objectionable, referred to above.²⁸³ In other words, the objective determination of compatibility should be done prior to the making of objections by States parties. Clearly, under the "collegiate" mechanism, no objective determination will be done and objections can be made without any grounds. Therefore, this mechanism has kept all the defects of the current mechanism provided by the Vienna Convention.

Such being the case, the manner and effect of objections to reservations are still arbitrary and unpredictable. In a sense, those provisions prescribing this "collegiate" mechanism are inconsistent with the objective determination of compatibility. Similarly, if a treaty explicitly provides for the unanimity rule with regard to reservations, the criterion of compatibility will have no place therein. In these circumstances, there will be no point in objectively determining the compatibility of potential reservations. Therefore, the competent body should, very exceptionally, stop dealing with the treaty text.

²⁸³ See the discussion on the logical relation between the two standards comprising the compatibility principle and the manner and effect of objections to reservations under the Vienna Convention, above.

C. Objectively Determining the Compatibility of Reservations

After fulfilling the previous two responsibilities, the competent body should undertake the third one. To determine the compatibility of potential reservations to each provision of the treaty is the major responsibility of the competent body. As to the legal doctrines for the determination of the compatibility of reservations, sufficient discussion can be found in the preceding text.²⁸⁴ Here, I want to talk about the objectiveness of the determination from the angle of the depositary. Although the process of objective determination should be conducted neutrally and independently, any State should be entitled to express its views to this body orally or in writing. So should the depositary of multilateral human rights treaties. Furthermore, there is force in the suggestion that the depositary should be competent in determining the compatibility of reservations.²⁸⁵

In this context, the role played by the depositary should be clarified. As mentioned above, for the past century, most of the multilateral human rights treaties have been sponsored by the League of Nations and the UN. The Secretary-General acts as the depositary. As Kohona points out, “the practice of the Secretary-General as depositary of multilateral treaties has given rise to important developments in the law and practice relating to reservations and declarations.”²⁸⁶ Nevertheless, traditionally, the Secretary-General did not have the jurisdiction to appraise reservations. His function was no more than receiving and circulating instruments deposited by States and counting the necessary number of instruments for the

²⁸⁴ See the discussion on the distinction between compatibility and incompatibility, above.

²⁸⁵ See Daniel N. Hylton, *supra* note 233.

²⁸⁶ Palitha T.B. Kohona, “Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties” (Winter 2005) 33 Ga. J. Int’l & Comp. L. 415, at 449-450.

entry into force of the treaty.²⁸⁷ To a certain degree, he is a representative of the UN and a coordinator of multilateral treaty-making. In the case of the Genocide Convention, it was those instruments subject to reservations which rendered his exercise of depositary functions difficult.

In fact, the current development in the Secretary-General practice does not exceed his traditional functions. One of the significant developments is that he becomes capable of distinguishing virtual reservations from other statements made by States.²⁸⁸ As Kohona says,

The Secretary-General takes the view that the function of determining whether a statement made by a government upon signature, ratification, acceptance, approval, or accession meets the technical criteria for acceptance in deposit as a reservation falls within his depositary responsibilities, particularly where the treaty concerned contains specific and applicable provisions....[However, he] does not undertake the additional responsibility of determining whether a proposed reservation is compatible with its object and purpose.²⁸⁹

²⁸⁷ See *Report of the Secretary-General to the General Assembly*, UN GAOR, 5th Sess., Annex, Agenda Item 56, UN Doc. A/1372 (1950). Also see Article 17 *Functions of Depositaries* of the Vienna Convention, which reads, "1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular: (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary; (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty; (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it; (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question; (e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty; (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited; (g) registering the treaty with the Secretariat of the United Nations; (h) performing the functions specified in other provisions of the present Convention. 2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned." 1969 Vienna Convention, *supra* note 3, Art. 77.

²⁸⁸ Traditionally, there was no uniform practice of depositaries concerning determination of virtual reservations. See D. M. McRae, *supra* note 7, at 159-160.

²⁸⁹ Palitha T.B. Kohona, *supra* note 286, at 440.

As mentioned above, the Secretary-General is charged with counting the necessary number of instruments for the entry into force of the treaty. According to Article 100 of the UN Charter,²⁹⁰ the Secretary-General should refrain from seeking the opinions of States and States should not attempt to influence the Secretary-General. If the Secretary-General is entitled to determine the compatibility of potential reservations before the treaty is open for signature, he will definitely encounter inconvenience or difficulty in consulting States or other authorities external to the UN. As a result, States cannot express their views to the competent body during the objective determination of the compatibility of reservations.

If the Secretary-General's jurisdiction extends to judging on the compatibility of reservations appended by States to their instruments, he will in fact have control over when the treaty enters into force and whether a reserving State can become a party to the treaty. Moreover, if a State is appointed to act as depositary, such control will be also conferred on it. There will be serious consequences. In this connection, "given the overriding need for the secretary-general [as depositary] to be impartial and noncontroversial, the quiet and nonobtrusive role he has played in contributing to the development of the law and practice in this area has been important."²⁹¹

²⁹⁰ Article 100 of the UN Charter reads, "1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. 2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities." The UN Charter, *supra* note 173, Art. 100.

²⁹¹ Palitha T.B. Kohona, "Current Development: Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations" (April 2005) 99 A.J.I.L. 433, at 450.

Thus, the depositary is not suitable to take the major responsibility of the competent body. It should be independent of the competent body. However, as mentioned above, it should be entitled to participate in the objective determination of the compatibility of reservations. Especially, the depositary can play a role in requesting that the competent body start the process of objective determination. Furthermore, it can also help the competent body with the interpretation of the object and purpose and the interpretation of the provisions providing for reservations, provided that its advice given to the competent body is disclosed to all States concerned, including all negotiating States.

The decision of the competent body can also facilitate the work of the depositary. For example, as mentioned above, the Secretary-General is capable of identifying virtual reservations.²⁹² If the Secretary-General exercises his depositary function according to the treaty text which has been annotated by indicating the compatibility of potential reservations, he can identify those incompatible reservations and inform the reserving State to withdraw them before re-accessing to the treaty. As for the compatible reservations, he can circulate them among the contracting States and collect their reactions. Those States which accept the reservations will have treaty relations with the reserving States except for the reserved provisions. So will those States which object to the reservations, provided that they do not explicitly oppose the entry into force of the treaty between themselves and the reserving States.²⁹³ As a result, the impartiality of the depositary is maintained while the compatibility is objectively determined for the treaty-making process. Thus, it is necessary to find appropriate outside bodies to undertake these responsibilities.

²⁹² See *supra* note 289 and accompanying text.

²⁹³ Also see *supra* note 231.

3. Suggestions on Competent Bodies

A. Treaty Monitoring Bodies

As defined by the Office of the United Nations High Commissioner for Human Rights, “[t]here are seven core international human rights treaties. Each of these treaties has established a committee of experts to monitor implementation of the treaty provisions by its States parties.”²⁹⁴ Monitoring bodies of human rights treaties could be suitable for the objective determination of the compatibility of reservations.

For example, the HRC is the monitoring body of the ICCPR, the First Optional Protocol and the *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty* (Second Optional Protocol).²⁹⁵ In its General Comment 24,²⁹⁶ the HRC clearly claims its authority to determine the compatibility of reservations, as follows:

It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.... Because of the special character of a human rights treaty, the compatibility of a reservation with the object

²⁹⁴ Online: International Law <<http://www.ohchr.org/english/law/index.htm>>. The seven core human rights treaties are: Racial Discrimination Convention, *supra* note 239; ICCPR, *supra* note 9; ICESCR, *supra* note 36; CEDAW, *supra* note 57; Torture Convention, *supra* note 261; CRC, *supra* note 55; and *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families*, 18 December 1990, GA Res. 45/158, UN GAOR, 45th Sess., Supp. No. 49, UN Doc. A/45/49 (1990) 261-273 (entered into force 1 July 2003).

²⁹⁵ *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, 1642 U.N.T.S. 414 (entered into force 11 July 1991) [Second Optional Protocol].

²⁹⁶ General Comment 24, *supra* note 43.

and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.²⁹⁷

Undoubtedly, such a claim was issued nearly twenty years after the ICCPR entered into force²⁹⁸ and the HRC considered itself entitled to assess the compatibility of reservations appended by individual States. “It may do this in the form of conclusions during the presentation of periodic reports, or in its views issued pursuant to individual or interstate petitions,”²⁹⁹ such as its comment on the US reservations to the ICCPR.³⁰⁰ Therefore, the HRC generally claimed its authority of *ex post* determination.

Notably, the authority of a treaty body in determining the compatibility of reservations has been frequently doubted. As early as 1978, the Committee on the Elimination of Racial Discrimination, the treaty body of the Racial Discrimination Convention, noted that, “[t]he Committee must take the reservations made by States parties at the time of ratification or accession into account; it has no authority to do otherwise. A decision --- even a unanimous decision --- by the Committee that a reservation is unacceptable could not have any legal effect.”³⁰¹ Schabas thus considers that this Committee “has explicitly refused to assume the role of judging the legality of reservations.”³⁰² Similar suspicion of the authority can be found in the summary record of the Committee on the Rights of the Child, the treaty body of the CRC.³⁰³ For example, Mr. Kolosov, a Committee member, noted that,

²⁹⁷ General Comment 24, *ibid.*, at para. 18.

²⁹⁸ See *supra* note 9.

²⁹⁹ William A. Schabas, “Innovation and Reform”, at 70.

³⁰⁰ See *supra* note 10 and accompanying text.

³⁰¹ *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 33rd Sess., Supp. No. 18, UN Doc. A/33/18 (1978) para. 374.

³⁰² William A. Schabas, “Innovation and Reform”, at 68-69 [footnote omitted].

³⁰³ Committee on the Rights of the Child, 2nd Sess., 41st Mtg., UN Doc. CRC/C/SR.41 (1992).

Any interpretation by the Committee of reservations and objections as undermining the goals of the Convention would be a doctrinal, and not an official, interpretation. While doctrinal interpretation by scholars was often significant, it had to be approached with caution. If an entire committee of experts made an interpretation that was unacceptable to a Government, it might be entering on a collision course with that Government.³⁰⁴

Different opinions can also be found. For example, at the forty-ninth session of the ILC, Pellet, the Special Rapporteur, and several members concluded that, “monitoring bodies should be competent to assess the permissibility of reservations in the context of their function of monitoring the implementation of the treaty. Hence they should have the requisite powers to fulfill that role, powers that could be implicit or explicit.”³⁰⁵ This idea was affirmed by the ILC.³⁰⁶

Basically, none of the constituent instruments of the treaty bodies has explicitly prescribed such competence. The HRC justified its claim of such competence by reason of carrying out the functions assigned to it.³⁰⁷ On a similar ground, scholars try to demonstrate the necessity of determining the compatibility of reservations by other treaty bodies.³⁰⁸ Furthermore, the

³⁰⁴ *Ibid.*, at para. 25.

³⁰⁵ “Report of the International Law Commission to the General Assembly on the Work of its Forty-Ninth Session” (UN Doc. A/52/10) in *Yearbook of the International Law Commission* 1997, Vol. II, Part 2 (New York and Geneva: UN, 2000) at 55 (UNDOC. A/CN.4/SER.A/1997/Add.1 (Part. 2) (E.99.V.8 (Part 2))) [1997 ILC Report].

³⁰⁶ 1997 ILC Report, *ibid.*, at 57.

³⁰⁷ General Comment 24, *supra* note 43, at para. 18.

³⁰⁸ For example, concerning the Committee on the Elimination of Discrimination against Women, Jennifer Riddle noted that, “The Committee can best evaluate and adjudicate disputes over state reservations because: 1) the Committee has jurisdiction to hear disputes under it; 2) the Committee likely knows more with regard to the relationships between CEDAW’s member states; and 3) the Committee can provide constant oversight over the implementation of the treaty. The Committee could simply ask the states to amend incompatible reservations, which would be an action similar to the reporting system. This goes one step further than the existing reporting system, however, because allowing the Committee to request that member states amend incompatible reservations gives the Committee the authority to judge the reservation. The Committee can then use its powers of “dialogue, persuasion, and international embarrassment” to encourage the state to withdraw its reservation.” Jennifer Riddle, “Making CEDAW Universal: A Critique of CEDAW’s Reservation Regime under Article 28 and the Effectiveness of the Reporting Process” (2002) 34 Geo. Wash. Int’l L. Rev. 605, at 631.

legal basis of the treaty bodies' authority to determine the compatibility may be sought from the 1969 Vienna Convention, the UN Charter etc.³⁰⁹

Therefore, the authority of treaty bodies to determine the compatibility of reservations is controversial to date. Of course, the binding force of the determination by the treaty bodies is doubted too. After all, according to public international law, any international tribunal, organ or treaty body can hardly have the authority to judge States, make binding decisions for States, or enforce such decisions. As Professor Simma considered,

[T]he legal effects of the findings made by the supervisory organs in this regard cannot exceed the authority with which they are generally invested for the exercise of their functions. Put more simply: since United Nations human rights treaty bodies do not have the power to decide in a legally binding way whether a State party has complied with its obligations under the treaty concerned, a decision by that body to the effect that a certain reservation is incompatible with the object and purpose of the treaty concerned cannot be legally binding either.³¹⁰

Clearly, the determination of compatibility by the treaty bodies cannot be binding. Unless the treaty bodies are invested with the power of making binding decisions, the legal status of such determination in relation to the treaty is mere an academic interpretation or an expert proposal. Despite this fact, Professor Simma expresses an optimistic view, as follows:

States parties must consider them [the determination by the treaty bodies] in good faith in the course of their own examination of the permissibility of a reservation. If this examination leads to the result that the reservation is indeed illicit, it remains for the reserving State to remedy this situation by withdrawing the reservation or

³⁰⁹ For example, see Elena A. Baylis, "General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties" (1999) 17 Berkeley J. Int'l L. 277.

³¹⁰ Simma, *supra* note 50, at 348-349.

modifying it, respectively for the other contracting parties to object to the reservation and eventually take further steps.³¹¹

Such a view is too optimistic to stand. What if the reserving State does not consider the treaty body decision of the incompatibility of its reservation in good faith? Furthermore, what if the other contracting States do not consider it in good faith? Some other parties can keep silent on such an incompatible reservation. The reserving State will be tacitly accepted as a party to the treaty. It is not necessary for this State to withdraw or modify its incompatible reservation. The problem of inconsistency will always arise if the decision is not binding.

Moreover, the controversies of the treaty bodies' authority are premised on a presumption that the treaty bodies will adjudicate the actual reservations appended by States. As advised above, the objective determination of the compatibility of reservations can be conducted after the adoption of a treaty text and before its opening for signature. However, treaty bodies will have difficulty in doing so. Since the authority of a treaty body is invested by the human rights treaty itself or an optional protocol, such a body cannot start working until the treaty or the protocol enters into force. For example, the competence of the HRC is provided for by the First Optional Protocol, which entered into force on 23 March 1976, 10 years after the ICCPR was opened for signature. In fact, when the HRC started working, the ICCPR had already entered into force. When the HRC issued the General Comment 24 in 1994, a number of reservations had been made to the ICCPR. In light of this General Comment, many pre-existing reservations made by the States parties should have been found incompatible.

³¹¹ *Ibid.*, at 349.

Apart from the problems mentioned above, one should also notice that not every human rights treaty establishes a monitoring body. An example is the Genocide Convention, which does not have a treaty body. Furthermore, each treaty body is only entitled to monitor one or several correlative treaties. It is incapable of assessing the compatibility of reservations for all the treaties. Therefore, treaty bodies are not quite suitable for the objective determination of the compatibility of reservations.

Even so, the past practice of the treaty bodies provides my suggestion of the annotated text with valuable examples. As I suggested above, after finishing the process of objective determination, the competent body should annotate each provision of the treaty text by indicating the compatibility of potential reservations thereto. This annotated text should be a uniform standard for the contracting States to consult and follow. Although the treaty bodies do not have the power to make a binding decision, some of their work can illustrate how a treaty should be annotated. For example, in the General Comment 24, the HRC indeed determined the compatibility of reservations, according to the treaty provisions rather than the explanations or justifications by individual States. Concerning Articles 1 and 2 of the ICCPR, the HRC noted that,

[R]eservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights recognized in the Covenant, and to do so on a non-discriminatory basis (art. 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (art. 2 (2)).³¹²

³¹² General Comment 24, *supra* note 43, at para. 9.

Clearly, this comment elaborated on the compatibility of reservations to some specific articles of the ICCPR. Since they were deemed destructive of the central premise of the treaty, the HRC considered them incompatible. That was universally applicable and independent of domestic concerns of individual States. Even though States were required by this General Comment to indicate their domestic laws when making reservations, it referred only to those compatible reservations.³¹³

Hence, if this General Comment were issued as a binding decision after the adoption of the ICCPR and before its opening for signature,³¹⁴ as I previously suggested, it could be utilized and referred to by contracting States with regard to making and objecting to reservations. In other words, the annotated text can raise awareness of the compatibility of potential reservations in advance. That will be helpful to regulate the multilateral treaty-making and enhance efficiency.

Thus, to achieve the idea of the annotated text, the legal status of the competent body's decision in relation to the treaty is pivotal. Put more simply, the annotated text has to be binding on States. Concerning this question, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) decided that,

³¹³ General Comment 24, *ibid.*, at 20.

³¹⁴ Actually, the HRC was established by Resolution 2200A (XXI), which adopted the treaty text and opened it for signature. Thus, it was procedurally possible for the HRC to objectively determine the compatibility of reservations and annotate the treaty text in advance. *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966) 49.

[I]t should support steps taken in common with other human rights treaty bodies to seek an advisory opinion from the International Court of Justice that would clarify the issues of reservations to the human rights treaties and thereby assist States parties in their ratification and implementation of those international instruments. Such an opinion would also help the Committee in its task of considering the progress made in the implementation of the Convention [CEDAW].³¹⁵

Clearly, the CEDAW Committee suggested that the ICJ be the competent body as regards the issue of reservations. In the discussion of the Committee, the members considered that “the matter of the reservations would have to be taken to the Court through the General Assembly.”³¹⁶ Similarly Baylis argues that concerning the decision-making on the “fate of incompatible reservations to human rights treaties.”³¹⁷ All these may give a clue to future development: as a universal tribunal, the ICJ is suggested to undertake the responsibility of objective determination.

B. International Court of Justice

Finally, I suggest that the ICJ be the competent body. As mentioned above, the ICJ did consider itself suitable for the objective determination of compatibility.³¹⁸ However, the ILC found that procedural difficulty might arise under Article 63 of the ICJ Statute, because it was hard to decide whether a reserving State was a party to the treaty in question.³¹⁹ Again, this kind of suspicion was derived from the presumption that the ICJ should adjudicate the disputes between States concerning reservations.

³¹⁵ *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 48th Sess., Supp. No. 38, UN Doc. A/48/38 (1993) 5.

³¹⁶ *Ibid.*, 100.

³¹⁷ Elena A. Baylis, *supra* note 309, at 317.

³¹⁸ See *supra* note 209 and accompanying text.

³¹⁹ See *supra* note 212 and accompanying text.

If the objective determination of compatibility is conducted before a treaty is open for signature, there is no need to identify whether a State is a party thereto. Such being the case, every human rights treaty can be submitted to the Court for the determination of the compatibility of reservations. Procedurally, after the adoption of a treaty, the depositary can request the ICJ to objectively determine the compatibility of potential reservations by issuing an advisory opinion. Under the UN system, the Secretary-General as the depositary is always entitled to request the advisory opinion with the authorization of the General Assembly.³²⁰

However, as some scholars point out,

Suggestions are occasionally heard that this should be changed. In fact, there have been several instances where the Secretary-General took the initiative in the General Assembly to request an advisory opinion [including the case of the Genocide Convention]...The question has received renewed attention and has been squarely placed on the current political agenda by the far-reaching proposals of the former Secretary-General, Dr. Boutros-Ghali, for the reorganization of the United Nations and the development of preventive diplomacy and related matters.³²¹

This trend was also mentioned by the former President of the ICJ, Judge Shi, in his statement before the Sixth Committee.³²² It is not certain yet whether the Secretary-General will be empowered to request advisory opinions from the ICJ on its initiative. It is clear that in practice, the Secretary-General has seldom encountered substantive difficulty in getting the authorization of the General Assembly to make the request. For example, concerning the problem of reservations to the Genocide Convention, it took the General Assembly no more

³²⁰ UN Charter, *supra* note 173, Art. 96.

³²¹ Shabtai Rosenne with the assistance of Yaël Ronen, *The Law and Practice of the International Court, 1920-2005*, Vol. I The Court and the United Nations (Leiden/Boston: Martinus Nijhoff Publishers, 2006) at 327 [footnotes omitted].

³²² UN GAOR 59th Sess., 21st Mtg., UN Doc. A/C.6/59/SR.21 (2004) [Shi's Statement].

than 1 month to pass the resolution requesting an advisory opinion since the item was placed by the Secretary-General on the agenda. So far, all the proposals for advisory opinions made by the Secretary-General have been adopted by the General Assembly resolutions.³²³

Thus, I suggest that the Secretary-General as the depositary be charged with starting the process of objective determination by requesting advisory opinions.³²⁴ If making reservations is explicitly prohibited by a treaty text, it is not necessary for the depositary to make such a request. This necessity must stem from some difficulty the Secretary-General may encounter or anticipate encountering in exercising the depositary functions. As Article 65 of the ICJ Statute reads,

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.³²⁵

Clearly, when there is no provision providing for reservations after the adoption of a treaty text, the compatibility of reservations constitutes an important legal question. Similarly, when there is a provision providing for reservations in general terms, the interpretation of

³²³ Shabtai Rosenne with the assistance of Yaël Ronen, *supra* note 321, Vol. I The Court and the United Nations, at 297-299. In fact, there has been no original proposal made by the Secretary-General. What is called "the Secretary-General took the initiative in the General Assembly" (See *supra* note 321) means that the Secretary-General placed an item (relating to an original proposal by one or more States) on the agenda of the General Assembly.

³²⁴ See also International Court of Justice Rules of Court, 14 April 1978 (entered into force 1 July 1978, amendment entered into force 14 April 2005), Article 104 [ICJ Rules], which reads, "All requests for advisory opinions shall be transmitted to the Court by the Secretary-General of the United Nations or, as the case may be, the chief administrative officer of the body authorized to make the request."

³²⁵ The ICJ Statute, *supra* note 18, Art. 65.

this provision plays an important part in the determination of compatibility. If a treaty text explicitly permits or prohibits reservations to certain provisions, it will be vital to decide whether these permitted or prohibited reservations are exclusive, i.e. these permitted or prohibited reservations are the only permitted or prohibited ones. If there are provisions providing for reservations in both general and precise terms, the situation will be more complicated.

Therefore, when the Secretary-General requests an advisory opinion with regard to a treaty text, he should append the complete *travaux préparatoires* of the treaty to his submission to the Court. Apart from the submission of request and transmission of documents, the Secretary-General should also be allowed to submit his views to the Court on the interpretation of the object and purpose of the treaty and the interpretation of the provisions providing for reservations, if any.³²⁶ This is how the depositary should work with the ICJ in the objective determination of the compatibility of reservations.

Notably, similar to the issue of the authority of the treaty bodies, questions were also put forward to the jurisdiction *ratione materiae*³²⁷ of the ICJ. No state can be made a party to any dispute before the ICJ unless it has agreed in advance. In order to solve this question, Sir Fitzmaurice proposed to apply “the optional clause procedure under article 36, paragraph

³²⁶ For the feasibility of the participation by the Secretary-General in the advisory proceedings, see Shabtai Rosenne with the assistance of Yaël Ronen, *supra* note 321, Vol. III Procedure, at 1691-1694.

³²⁷ As elaborated on the official website of the ICJ, “no sovereign State can be made a party in proceedings before the Court unless it has in some manner or other consented thereto. It must have agreed that the dispute or the class of disputes in question should be dealt with by the Court. It is this agreement that determines the jurisdiction of the Court so far as the particular dispute is concerned — the Court's jurisdiction *ratione materiae*.” Online: Framepage of the Blue Book <<http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>>

2”³²⁸ of the ICJ Statute, for “[a] State which becomes a party to a treaty containing a provision for arbitration or judicial settlement thereby *ipso facto* consents to settle by those means any dispute in which it becomes involved under the treaty.”³²⁹ However, if the provision for the jurisdiction of a tribunal is reserved³³⁰ or permitted to reserve,³³¹ Article 36 (2) is not applicable. In a word, Fitzmaurice’s proposal was also made on the basis of *ex post* dispute settlement by the ICJ concerning reservations.

In contrast, under the advisory jurisdiction of the ICJ, the jurisdiction *ratione materiae* is not concerned. According to Article 66 of the ICJ Statute, all States “entitled to appear before the Court”³³² may express their views in oral or written statements to the Court. So may the international organizations “considered by the Court.”³³³ Thus, every State under the jurisdiction *ratione personae*³³⁴ of the ICJ has the opportunity to voice its opinion on the

³²⁸ Fitzmaurice’s Report, *supra* note 140, at 127. Article 36 (2) reads, “[t]he states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.” The ICJ Statute, *supra* note 18, Art. 36 (2).

³²⁹ Fitzmaurice’s Report, *ibid.* Also see *supra* note 215 and accompanying text.

³³⁰ See the case of Genocide Convention, above.

³³¹ See *supra* notes 271-275 and accompanying texts.

³³² Article 66 reads, “1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court. 2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. 3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide. 4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.” The ICJ Statute, *supra* note 18, Art. 66.

³³³ *Ibid.*

³³⁴ See online: Framepage of the Blue Book <<http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm>>

compatibility of potential reservations to the treaty in question.³³⁵ All these can help the Court form a broad and comprehensive view on the issue.

Predictably, along with the increase in the number of human rights treaties concluded under the UN framework, requests for advisory opinions will become increasingly numerous. In fact, all these requests will ask the Court to do the same thing: to understand the object and purpose of a human rights treaty, interpret the provisions providing for reservations, and objectively determine the compatibility of potential reservations to each provision. Therefore, these requests will form a “particular category of cases.”³³⁶ A chamber of judges should be established to deal with these cases.

Since the objective determination of compatibility is suggested to be conducted before the opening for signature of a treaty, the legal question that the Court will answer is undoubtedly not “pending between two or more States.”³³⁷ Therefore, no judge *ad hoc* needs to be included in the chamber.³³⁸

Moreover, concerning the common object and purpose of human rights treaties to protect and advance the interests of individual persons all over the world, the efficiency of the objective determination of compatibility should also be emphasized. Thus, similar to the forming of a chamber of summary procedure pursuant to Article 29 of the Statute,³³⁹ the ICJ may establish a standing chamber composed of 5 judges, including the President or Vice-

³³⁵ Also see the ICJ Statute, Art. 67.

³³⁶ The ICJ Statute, *ibid.*, Art. 26 (1).

³³⁷ The ICJ Rules, *supra* note..., Art. 102 (2).

³³⁸ The ICJ Statute, *supra* note 18, Art. 31.

³³⁹ *Ibid.*, Art. 29 (1).

President, to determine the cases of the compatibility of reservations in advisory proceedings. It may be called the Chamber for Reservations to Human Rights Treaties.

The number of the written and oral statements received by the Court is an important factor that influences the length of time of the case. Suppose that the Chamber receives a total of 30 statements from the Secretary-General, States and some international organizations, with regard to a human rights treaty. According to the statistics,³⁴⁰ in none of the previous 21 cases in advisory proceedings did the Court receive more than 60 statements, either oral or written, from States within the fixed time limit. Only in 3 cases were more than 50 statements received. Among the other 18 cases, there was only one where more than 30 statements were received. In each of the other 17 cases, less than 20 or even less than 10 statements were submitted.³⁴¹ Moreover, 19 of these 21 cases lasted less than 1 year. According to the Vienna Convention, one State party's tacit acceptance of a reservation needs a period of 1 year.³⁴² Therefore, it is efficient to solve the question of the compatibility of reservations to a human rights treaty if it can be submitted to the ICJ before the treaty is open for signature.

Clearly, the deliberation of Chamber is the most important phase for the objective determination of compatibility. As mentioned above, the interpretation of the object and

³⁴⁰ Shabtai Rosenne with the assistance of Yaël Ronen, *supra* note 321, Vol. III Procedure, *Appendix to Chapter 30 Participation of States in Advisory Proceedings* (Excluding review of Judgments of the United Nations Administrative Tribunal), at 1703.

³⁴¹ One State may submit more than one written document, including copies of domestic laws, or send more than one representative in charge of the oral statement, to the Court. These factors are not supposed to be considered by the statistics. All parts of one State's response in either the written phase or the oral phase should be counted as one statement. If a State participated in both phases, its responses should be counted as two statements.

³⁴² Vienna Convention, *supra* note 3, Art. 20 (5).

purpose can be done in an unequivocal way for a single-issue treaty or in general terms for a general treaty.

Then the Chamber will turn to the provisions providing for reservations. The interpretation of these provisions should be decided by majority votes of the judges. If it is found that the treaty text in fact prescribes a kind of reservations mechanism which is inconsistent with the compatibility principle, e.g. the unanimity rule or the “collegiate” mechanism, the deliberation should be finalized; an advisory opinion should be rendered by indicating what mechanism is applicable to the treaty.

If the Chamber finds that the treaty permits or prohibits reservations to certain provisions exclusively, no more deliberation is needed. The Chamber should annotate each provision by indicating whether a reservation made to it is permitted.

The Chamber may also find that the treaty permits or prohibits reservations to certain provisions but keeps silent on the rest. In this circumstance, the Chamber should, on the one hand, annotate the former provisions by indicating whether reservations made thereto are permitted. On the other hand, the Chamber should have more deliberation on whether a potential reservation made to each of the latter provisions is compatible with the object and purpose of the treaty.

It may also be found that the treaty only provides for reservations in generalities, e.g. all reservations are required to be formulated to precise provisions. Under the ordinary-law

doctrine, the compatibility principle should apply. The Chamber should have more deliberation on whether a potential reservation made to each provision is compatible with the object and purpose of the treaty.

If there is no provision providing for reservations, the compatibility principle should apply. Generally speaking, the Chamber should annotate the treaty text in the advisory opinion issued. This annotated text, like any other advisory opinion, should be issued to the Secretary-General of the UN, who will “ensure that an appropriate item is included in the agenda of that [requesting] organ.”³⁴³ Although an advisory opinion is not binding, all the opinions issued were accepted by General Assembly Resolutions in the past practice of the General Assembly on receipt of advisory opinions.³⁴⁴ As Judge Shi observed,

Advisory Opinions were non-binding: even the requesting body was not obliged to accept the Court’s conclusions, although in fact both the Council of the League of Nations and the various agencies of the United Nations had always done so. ... Some treaties even stipulated that, in the event of a dispute, an advisory opinion of the Court would be considered decisive or binding.³⁴⁵

Accordingly, if the advisory opinions by the Chamber can be accepted by General Assembly Resolutions, they have “invariably been given authoritative status by the organs and States concerned.”³⁴⁶ Thus, the Secretary-General will be able to exercise his depositary functions in accordance with these opinions. In this respect, after the treaty is open for signature, the Secretary-General can identify those incompatible reservations according to the annotated

³⁴³ Shabtai Rosenne with the assistance of Yaël Ronen, *supra* note 321, Vol. I The Court and the United Nations, at 304.

³⁴⁴ See *ibid.*, at 304-316.

³⁴⁵ Shi’s Statement, *supra* note 322, at para. 71.

³⁴⁶ *Ibid.*, at para. 66.

text. He should suspend those instruments with incompatible reservations and inform the reserving State to withdraw those reservations before re-accessing to the treaty.³⁴⁷ Meanwhile, only those instruments without reservations or with compatible reservations will be circulated among the contracting States. Concerning reservations and objections, those contracting States will also have the uniform annotated text to consult and follow. If so, the purpose of the objective determination has been achieved.

Hence, for the conclusion of a multilateral human rights treaty, if there is an annotated treaty text as a guide for contracting States, its objectivity will be of great value in preventing States from arbitrarily formulating reservations, implicitly accepting incompatible reservations or unreasonably excluding a State party by objecting to compatible reservations. It is thus feasible for the ICJ to undertake the responsibility of the objective determination of compatibility.

³⁴⁷ See Subsection C *Objectively Determine the Compatibility* of the previous Section of this Chapter.

Chapter VI Conclusion

To summarize my discussion of this thesis, I am of the following opinions.

First of all, multilateral human rights treaties have been the fundamental source of contemporary international human rights law. These treaties not only have the general characteristics under the framework of treaty law, but also the special characteristic of non-reciprocity. Theoretically, all States should have universal participation therein. However, because of various domestic concerns, including the potential conflicts between domestic laws and treaties, economic situations, religious and cultural traditions and general practices relating to international tribunals, the States parties have formulated a number of reservations to multilateral human rights treaties. As a result, the integrity of the treaties is destroyed. In other words, reservations may bring many legal problems to multilateral human rights treaty-making.

In order to solve these problems, the validity of reservations should be reasonably decided. Thus, the permissibility of making reservations should be clarified and ensured first. I would like to say that the permissibility of making reservations was implied in the ICJ Advisory Opinion and sufficiently demonstrated in the ILC study. On the one hand, making reservations should be permissible to ensure the equality of multilateral treaty making; on the other hand, it should be permissible to facilitate the extensive participation in and promote the universality of multilateral treaties, including human rights treaties. This permissibility shall be a fundamental standard to evaluate any reservations mechanism. If a

mechanism imposes excessive restriction on the formulation of reservations or subjects the validity of reservations to unpredictable response of other contracting States, it is problematic. This is important understanding.

With this understanding, I have gone through the origin and development of the compatibility principle, especially its relations with the Pan-American rule and the permissibility of formulating reservations. I have clarified the logical relation between the two standards of this principle and found that the basic problem of this principle was the lack of a competent tribunal or organ to apply the criterion of compatibility. Although this problem was noticed by the ICJ and the ILC, it resulted in nothing definite. Thus, despite the formal codification of this principle as the *Reservations* Section of the 1969 Vienna Convention, the current reservations mechanism is problematic. In the absence of objective determination of the compatibility of reservations, the manner and effect of objections to reservations are arbitrary and unpredictable. Neither the uniformity nor the universality of treaties, including multilateral human rights treaties, can be protected or promoted under this reservations mechanism. Therefore, the current reservations mechanism needs reform by reestablishing the logical relation between the two standards.

The key to reestablish the logical relation above is to confer the competence of objectively determine the compatibility of reservations on an outside body. The objective determination should be according to each provision of the treaty and conducted after the adoption of the treaty text and before its opening for signature. The decision should be an annotated text for

contracting States to consult and follow. Finally, I suggest the International Court of Justice to act as such a competent body.

Appendices

I. The Summary of the 1951 ICJ Advisory Opinion

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, [1951] I.C.J. Rep. 15, Online: Summary: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide <<http://www.icj-cij.org/icjwww/idecisions/summaries/ippcgsummary510528.htm>>

RESERVATIONS TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

Advisory Opinion of 28 May 1951

The question concerning reservations to the Convention on the Prevention and Punishment of the Crime of Genocide had been referred for an advisory opinion to the Court by the General Assembly of the United Nations (G.A. resolution of November 16, 1950) in the following terms:

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

"I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

"II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

- (a) The parties which object to the reservation?
- (b) Those which accept it?

"III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

(a) By a signatory which has not yet ratified?

(b) By a State entitled to sign or accede but which has not yet done so?"

Written statements on the matter were submitted to the Court by the following States and Organizations:

The Organization of American States, the Union of Soviet Socialist Republics, the Hashemite Kingdom of Jordan, the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Secretary-General of the United Nations, Israel, the International Labour Organisation, Poland, Czechoslovakia, the Netherlands, the People's Republic of Romania, the Ukrainian Soviet Socialist Republic, the People's Republic of Bulgaria, the Byelorussian Soviet Socialist Republic, the Republic of the Philippines.

In addition, the Court heard oral statements submitted on behalf of the Secretary-General of the United Nations and of the Governments of Israel, the United Kingdom and France.

By 7 votes to 5 the Court gave the following answers to the questions referred to:

On Question I:

a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

On Question II:

(a) if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

(b) if, on the other hand, a party accept the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III:

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

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

Two dissenting opinions were appended to the Opinion: one by Vice-President Guerrero and Judges Sir Arnold McNair, Read and Hsu Mo, the other by Judge Alvarez.

*

* *

In its Opinion, the Court begins by refuting the arguments put forward by certain Governments against its competence to exercise its advisory functions in the present case. The Court then dealt with the questions referred to it, after having noted that they were expressly limited to the Convention on Genocide and were purely abstract in character.

The first question refers to whether a State which has made a reservation can, while maintaining it, be regarded as a party to the Convention on Genocide, when some of the parties object to the reservation. In its treaty relations, a State cannot be bound without its consent. A reservation can be effected only with its agreement. On the other hand, it is a recognised principle that a multilateral Convention is the result of an agreement freely concluded. To this principle was linked the notion of integrity of the Convention as adopted, a notion which, in its traditional concept, involved the proposition that no reservation was valid unless it was accepted by all contracting parties. This concept retains undisputed value as a principle, but as regards the Genocide Convention, its application is made more flexible by a variety of circumstances among which may be noted the universal character of the United Nations under whose auspices the Convention was concluded and the very wide degree of participation which the Convention itself has envisaged. This participation in conventions of this type has already given rise to greater flexibility in practice. More general resorts to reservations, very great allowance made to tacit assent to reservations, the admission of the State which has made the reservation as a party to the Convention in relation to the States which have accepted it, all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions. Moreover, the Convention on Genocide, although adopted unanimously, is nevertheless the result of a series of majority votes - which may make it necessary for certain States to make reservations.

In the absence of an article in the Convention providing for reservations, one cannot infer that they are prohibited. In the absence of any express provisions on the subject, to determine the possibility of making reservations as well as their effects, one must consider their character, their purpose, their provisions, their mode of preparation and adoption. The preparation of the Convention on Genocide shows that an undertaking was reached within the General Assembly on the faculty to make reservations and that it is permitted to conclude therefrom that States, becoming parties to the Convention, gave their assent thereto.

What is the character of the reservations which may be made and the objections which may be raised thereto? The solution must be found in the special characteristics of the Convention on Genocide. The principles underlying the Convention are recognised by civilised nations

as binding on States even without any conventional obligation. It was intended that the Convention would be universal in scope. Its purpose is purely humanitarian and civilising. The contracting States do not have any individual advantages or disadvantages nor interests of their own, but merely a common interest. This leads to the conclusion that the object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it, that as many States as possible should participate. This purpose would be defeated if an objection to a minor reservation should produce complete exclusion from the Convention. On the other hand, the contracting parties could not have intended to sacrifice the very object of the Convention in favour of a vague desire to secure as many participants as possible. It follows that the compatibility of the reservation and the object and the purpose of the Convention is the criterion to determine the attitude of the State which makes the reservation and of the State which objects. Consequently, question I, on account of its abstract character, cannot be given an absolute answer. The appraisal of a reservation and the effect of objections depend upon the circumstances of each individual case.

The Court then examined question II by which it was requested to say what was the effect of a reservation as between the reserving State and the parties which object to it and those which accept it. The same considerations apply. No State can be bound by a reservation to which it has not consented, and therefore each State, on the basis of its individual appraisals of the reservations, within the limits of the criterion of the object and purpose stated above, will or will not consider the reserving State to be a party to the Convention. In the ordinary course of events, assent will only affect the relationship between the two States. It might aim, however, at the complete exclusion from the Convention in a case where it was expressed by the adoption of a position on the jurisdictional plane: certain parties might consider the assent as incompatible with the purpose of the Convention, and might wish to settle the dispute either by special agreement or by the procedure laid down in the Convention itself.

The disadvantages which result from this possible divergence of views are real. They could have been remedied by an article on reservations. They are mitigated by the common duty of the contracting States to be guided in their judgment by the compatibility or incompatibility of the reservation with the object and purpose of the Convention. It must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention.

The Court finally turned to question III concerning the effect of an objection made by a State entitled to sign and ratify but which had not yet done so, or by a State which has signed but has not yet ratified. In the former case, it would be inconceivable that a State possessing no rights under the Convention could exclude another State. The case of the signatory States is more favourable. They have taken certain steps necessary for the exercise of the right of being a party. This provisional status confers upon them a right to formulate as a precautionary measure objections which have themselves a provisional character. If signature is followed by ratification, the objection becomes final. Otherwise, it disappears. Therefore, the objection does not have an immediate legal effect but expresses and proclaims the attitude of each signatory State on becoming a party.

II. “Reservations” Section of the 1969 Vienna Convention

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679
(entered into force 27 January 1980), Part II *Conclusion and Entry into Force of the Treaties*,
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.

Bibliography

I. Books & Collections

1. Paul Reuter, *Introduction to the Law of Treaties*, trans. by José Mico and Peter Haggenmacher (London & New York: Printer Publishers, 1989).
2. UN, *Multilateral Treaties Deposited with the Secretary-General*, Status as at 31 December 2004, Vol. I, Part I, Chapter I to XI (New York: UN, 2005).
3. James Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press; New York: Oxford University Press).
4. Javaid Rehman, *International Human Rights Law: A Practical Approach* (New York: Longman, Pearson Education Ltd., 2003).
5. Ian Brownlie, *Principles of Public International Law*, 6th ed. (New York: Oxford University Press, 2003).
6. Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (New York: Oxford University Press, 2000).
7. Malcolm N. Shaw, *International law*, 4th ed. (Cambridge: Grotius Publications, 1997).
8. Arnold Duncan McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961).
9. Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989).
10. Shabtai Rosenne with the assistance of Yaël Ronen, *The Law and Practice of the International Court, 1920-2005* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

II. Reports & Documents

1. *Report of the Secretary-General to the General Assembly*, UN GAOR, 5th Sess., Annex, Agenda Item 56, UN Doc. A/1372 (1950).
2. "Report on Reservations to Multilateral Conventions" (UN Doc. A/CN.4/41 incorporating Doc. A/CN.4/41/Corr.1) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)).
3. "Draft of Report to the General Assembly by J.L. Brierly, Special Rapporteur" (UN Doc. A/CN.4/L.18) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)).
4. "Report by Mr. H. Lauterpacht, Special Rapporteur" (UN Doc. A/CN.4/63) in *Yearbook of the International Law Commission 1953*, Vol. II (New York: UN, 1959) (UNDOC.A/CN.4/SER.A/1953/Add.1 (59.V.4)).
5. "Report by Sir G. G. Fitzmaurice, Special Rapporteur" (UN Doc. A/CN.4/101) in *Yearbook of the International Law Commission 1956*, Vol. II (New York: UN, 1957) (UNDOC.A/CN.4/SER.A/1956/Add.1 (56.V.3)).
6. "First Report on the Law of Treaties" (UN Doc. A/CN.4/144) in *Yearbook of the International Law Commission 1962*, Vol. II (New York: UN, 1964) (UNDOC.A/CN.4/SER.A/1962/Add.1 (62.V.5)).
7. "Report of the International Law Commission to the General Assembly Covering the Work of its Fourth Session" (A/5209) in *Yearbook of the International Law Commission 1962*, Vol. II (New York: UN, 1964) (UNDOC.A/CN.4/SER.A/1962/Add.1 (62.V.5)).
8. "Report of the International Law Commission to the General Assembly Covering the Work of its Third Session" (UN Doc. A/1858) in *Yearbook of the International Law Commission 1951*, Vol. II (New York: UN, 1957) (UNDOC.A/CN.4/SER.A/1957/Add.1 (57.V.6)).
9. "Report of the International Law Commission to the General Assembly on the Work of the First Part of its Seventeenth Session" (UN Doc. A/6009) in *Yearbook of the International Law Commission 1965*, Vol. II (New York: UN, 1967) (UNDOC.A/CN.4/SER.A/1957/Add.1 (66.V.2)).
10. "Report of the International Law Commission to the General Assembly on the Second Part of its Seventeenth Session" (UN Doc. A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, Vol. II (New York: UN, 1967) (UNDOC.A/CN.4/SER.A/1966/Add.1 (67.V.2)).

11. "Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session" (UN Doc. A/48/10) in *Yearbook of the International Law Commission 1993*, Vol. II, Part 2 (New York: UN, 1995) (UNDOC. A/CN.4/SER.A/1993/Add.1 (Part 2) (E.95.V.4)).
12. "Second Report to Reservations to Treaties by Alain Pellet, Special Rapporteur" (UN Doc. A/CN.4/477) [unpublished, forthcoming in *Yearbook of the International Law Commission 1996*, Vol. II, Part I, online: <<http://daccessdds.un.org/doc/UNDOC/GEN/N96/127/07/PDF/N9612707.pdf?OpenElement>>].
13. "Tenth Report to Reservations to Treaties by Alain Pellet, Special Rapporteur" (UN Doc. A/CN.4/558) [unpublished, forthcoming in *Yearbook of the International Law Commission 2005*, online: <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/370/19/PDF/N0537019.pdf?OpenElement>>]
14. "Report of the International Law Commission to the General Assembly on the Work of its Forty-Ninth Session" (UN Doc. A/52/10) in *Yearbook of the International Law Commission 1997*, Vol. II, Part 2 (New York and Geneva: UN, 2000) (UNDOC. A/CN.4/SER.A/1997/Add.1 (Part 2) (E.99.V.8 (Part 2))).
15. Human Rights Committee, *General Comment No. 24 (52) and General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, CCPR/C/21/Rev.1/Add.65, in *Report of the Human Rights Committee (Volume 1)*, UN GAOR, 50th Sess., Supp. No. 40, UN Doc. A/50/40 (vol. 1) (1994).
16. *Concluding Observations of the Human Rights Committee: United States of America*, Human Rights Committee, 53d Sess., 1413th Mtg., UN Doc. CCPR/C/79/Add.50 (1995).
17. *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 33rd Sess., Supp. No. 18, UN Doc. A/33/18 (1978).
18. Official Records of the United Nations Conference on the Law of Treaties, 1st Sess., 25th Mtg. of the Committee of the Whole, UN Doc. A/CONF. 39/11 (1968).
19. Official Records of the United Nations Conference on the Law of Treaties, 2nd Sess., 11th plenary Mtg., UN Doc. A/CONF. 39/11/Add.1 (1969).
20. Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference, UN Doc. A/CONF. 39/11/Add.2 (1968-1969).
21. Committee on the Rights of the Child, 2nd Sess., 41st Mtg., UN Doc. CRC/C/SR.41 (1992).

22. *Report of the Committee on the Elimination of Discrimination against Women*, UN GAOR, 48th Sess., Supp. No. 38, UN Doc. A/48/38 (1993).

III. Cases & Decisions

1. *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15.
2. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [1951] I.C.J. Pleadings.
3. *Reservations to Multilateral Conventions*, GA Res. 478(V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 (1950).
4. *Adoption of the Convention on the Prevention and Punishment of the Crime of the Genocide, and text of the Convention*, GA Res. 260A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).
5. *Report of the International Law Commission to the General Assembly on the Work of its Forty-Fifth Session*, GA Res. 48/31, UN GAOR, 48th Sess., Supp. No. 49, UN Doc. A/48/49 (Vol. I) (1994).
6. *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, GA Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, UN Doc. A/6316 (1966).
7. *Belilos v. Switzerland* (1988), 74 Eur. Ct. H. R. (Ser A.) 132, 10 E.H.R.R. 466.
8. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, [1996] I.C.J. Rep. 595.

IV. Legislations & Conventions

1. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980).

2. *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 21 March 1986, UN Doc. A/CONF.129/15, 25 I.L.M. 543 (Not yet in force).
3. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force on 23 March 1976).
4. *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).
5. *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 143, O.A.S.T.S. No. 36 (entered into force 18 July 1978).
6. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force 3 September 1953).
7. *African Charter on Human and People's Rights*, 27 June 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).
8. *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force on 24 October 1945).
9. *Statute of the International Law Commission*, G.A. Res. 174 (II), U.N. GAOR, 3d Sess., 123rd Mtg., UN Doc. A/519 (21 November 1947).
10. *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 January 1976).
11. *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3 (entered into force on 2 September 1990).
12. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).
13. *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 513 (entered into force on 3 September 1981).
14. *European Social Charter*, 18 October 1961, 529 U.N.T.S.89, Eur. T.S. No. 35 (entered into force on 26 February 1965).
15. *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302 (entered into force March 23, 1976).
16. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

17. *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969).
18. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987).
19. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 266 U.N.T.S. 3 (entered into force 30 April 1957).
20. *Convention against Discrimination in Education*, 14 December 1960, 429 U.N.T.S. 93 (entered into force 22 May 1962).
21. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954).
22. *Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175 (entered into force 13 December 1975).
23. *Convention on the Political Rights of Women*, 31 March 1953, 193 U.N.T.S. 135 (entered into force 7 July 1954).
24. *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, 1642 U.N.T.S. 414 (entered into force 11 July 1991).
25. *International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families*, 18 December 1990, GA Res. 45/158, UN GAOR, 45th Sess., Supp. No. 49, UN Doc. A/45/49 (1990) 261-273 (entered into force 1 July 2003).

V. Articles & Thematic Comments

1. D. M. McRae, "The Legal Effect of Interpretive Declarations" (1978) 49 *British Yearbook of International Law* 155.
2. Ved P. Nanda, "The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights" (1993) 42 *DePaul L. Rev.* 1311.
3. Edward F. Sherman, Jr., "The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation" (Winter 1994) 29 *Tex. Int'l L.J.* 69.

4. William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?" (1995) 21 Brooklyn J. Int'l L. 277.
5. Markus G. Schmidt, "Universality of Human Rights and the Death Penalty: the Approach of the Human Rights Committee" (Winter 1997) 3 ILSA J Int'l & Comp L 477.
6. Elizabeth A. Reimels, "Playing for Keeps: The United States Interpretation of International Prohibitions against the Juvenile Death Penalty – The U.S. Wants to Play the International Human Rights Game, but only if it Makes the Rules" (Spring 2001) 15 Emory Int'l L. Rev. 303.
7. Annika K. Carlsten, "Young Enough to Die? Executing Juvenile Offenders in Violation of International Law" (Summer/Fall 2001) 29 Denv. J. Int'l L. & Pol'y 181; Curtis A. Bradley, "The Juvenile Death Penalty and International Law" (December 2002) 52 Duke L.J. 485.
8. Francisco Forrest Martin, "Human Rights and the Hierarchy of International Law Sources and Norms: Delineating a Hierarchical Outline of International Law Sources and Norms" (2002) 65 Sask. L. Rev. 333.
9. Duncan B. Hollis, "Why State Consent Still Matters-Non-State Actors, Treaties, and Changing Sources of International Law" (2005) 23 Berkeley J. Int'l L. 137.
10. Jason Mogan-Foster, "Third Generation Rights: What Islamic Law can Teach the International Human Rights Movement" (2005) 8 Yale H.R. & Dev. L. J. 67.
11. Theodor Meron, "The Geneva Conventions as Customary Law" (April 1987) 81 A.J.I.L. 348.
12. Matthew Craven, "Legal Differentiation and the Concept of Human Rights Treaty in International Law" (September 2000) 11 E.J.I.L.489.
13. Matthew Lippman, "The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later" 15 Ariz. J. Int'l & Comp. Law 415, at 467.
14. Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent" (July 2002) 96 A.J.I.L. 531.
15. Bharathi Anandhi Venkatraman, "Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination against Women: Are the Shari'a and the Convention Compatible?" (Summer 1995) 44 Am.U.L.Rev. 1949.
16. Catherine Logan Piper, "Reservations to Multilateral Treaties: the Goal of Universality" (October 1985) 71 Iowa L. Rev. 295.

17. Daniel N. Hylton, "Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations" (May 1994) 27 Vand. J. Transnat'l L. 419.
18. Catherine Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties" (1993) 64 British Yearbook of International Law 245.
19. William A. Schabas, "Reservations to Human Rights Treaties: Time for Innovation and Reform" (1994) 32 Canadian Yearbook of International Law 39.
20. Richard W. Edwards, Jr., "Reservations to Treaties: the Belilos Case and the Work of the International Law Commission" (Winter 2000) 31 U. Toledo L. Rev. 195.
21. Roberto Baratta, "Should Invalid Reservations to Human Rights Treaties be Disregarded?" (June 2000) 11 European Journal of International Law 413.
22. Palitha T.B. Kohona, "Reservations: Discussion of Recent Developments in the Practice of the Secretary-General of the United Nations as Depositary of Multilateral Treaties" (Winter 2005) 33 Ga. J. Int'l & Comp. L. 415.
23. Palitha T.B. Kohona, "Current Development: Some Notable Developments in the Practice of the UN Secretary-General as Depositary of Multilateral Treaties: Reservations and Declarations" (April 2005) 99 A.J.I.L. 433.
24. Jennifer Riddle, "Making CEDAW Universal: A Critique of CEDAW's Reservation Regime under Article 28 and the Effectiveness of the Reporting Process" (2002) 34 Geo. Wash. Int'l L. Rev. 605.
25. Elena A. Baylis, "General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties" (1999) 17 Berkeley J. Int'l L. 277.
26. Bruno Simma, "From Bilateralism to Community Interest" (1994-VI) 250 Recueil des Cours 217.