RESERVATIONS, HUMAN RIGHTS TREATIES IN THE 21ST CENTURY:
FROM UNIVERSALITY TO INTEGRITY

by

PIERRICK DEVIDAL

(Under the Direction of Professor Gabriel M. Wilner)

ABSTRACT

This thesis is a study of the question of the legality of reservations to international human rights treaties. The evolution of reservations law demonstrates that the system seek to promote universal adherence to multilateral treaties through flexible rules that reflects the superiority of national sovereignty in the international society. However, the flexibility of reservation law as codified in the Vienna Convention of the Law of Treaties has facilitated wide acceptance of multilateral treaties at the cost of their integrity. In the case of human rights treaties, this issue is of paramount importance considering the essentiality of a balance between integrity and universality for human rights norms. There is an urgent necessity to promote adequate reforms of the Vienna Convention system and rely on human rights treaty bodies’ competence and jurisdiction to review the validity of reservations and ensure that universality and integrity are equally respected.

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CHAPTER 1
INTRODUCTION

It is commonly agreed that the modern international society is subject to an accelerated process of globalization. The dynamic of globalization is complex, multi-sided, composed of positive and negative aspects. One important characteristic of this global phenomenon is what has been called the “globalization of freedom.”\(^1\) Although the spreading of democratic values and human freedoms throughout the globe did not really constitute “The End of History,”\(^2\) it is undeniable that the world as a “global village” has evolved along a continuous increase of human freedom.\(^3\)

This trend can be largely observed through the analysis of the evolution of international law in the last half-century. Since the end of World War II, states are no longer exclusive actors of the international legal order. Many other entities have emerged as subjects of international norms: international organizations, corporations, non-governmental organizations (NGO’s), but most importantly, individuals.\(^4\) Indeed, the greatest achievement of modern international law has been the development of general rules affirming the rights and freedoms of individuals versus states: international human rights law.

It is a branch of international public law that has been the subject of growing academic scrutiny over the past 50 years, mainly because of its novelty and

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\(^3\) See Hongju Koh, *supra* note 1, at 295.

ambiguous nature: although the individual is the recipient of the norm, the state remains the classical subject of the rule.\textsuperscript{5} Human rights have been the central focus of modern international law because of their unique nature, resulting from a fundamental opposition between the two forces driving its evolution. A continuous tension, a perpetual adjustment between the essential rights and freedoms of individuals, and the corresponding limitation of states’ sovereignty has characterized the evolution of modern international law. With the globalization of international affairs, and the ever-increasing interdependence among states, the struggle for human freedoms has also adopted a universal nature. After the atrocities of World War II, nations came together within the United Nations forum to acknowledge the need for universal human rights norms.\textsuperscript{6} However, considering the growing number of states, and the consecutive institutionalization of cultural relativism, the task of universalizing limitations on states’ sovereignty to allow the creation of concrete rights for individuals was gigantesque, and constituted the most important challenge to international law. How should one reconcile states’ sovereignty and human rights?

This essential question is reflected in the perpetual debate over reservations to multilateral treaties, which ‘has been one of the most controversial subjects in contemporary international law.’\textsuperscript{7} The importance of this issue is demonstrated by states’ practice, the enormous amount of legal doctrine regarding the subject and by the time and energy that publicists and scholars spent commenting the possible

\textsuperscript{6} See U.N. CHARTER, at pmbl.; Universal Declaration of Human Rights, at pmbl.
\textsuperscript{7} Jose M. Ruda, \textit{Reservations to Treaties}, 146 \textit{RECEUIL DES COURS} 95 (1975).
solutions to this critical question. The growing recourse to the use of reservations and others instruments of qualified consent have created disorder in treaty law understanding, because the various labels attached to the qualifying statements introduced ambiguity over the effects of those ratification devices. The effects of this terminological ambiguity has however been limited in practice by the adoption of a rule that does not attach any conclusive value to the label of the statement, which will only be qualified by reference to its substance and content.

The important use of those qualifying statements corresponds to the increasing reliance on multilateral treaties as instruments of international regulation. At the “age of globalization,” multilateral treaties have become the primary source of international law in general, but also the primary source of human rights law. Therefore, the use of reservations, which permits states to “exclude or modify the legal effect of certain provisions of the treaty” on the basis of domestic concerns, has been an essential instrument of compromise to the functioning of the international law.

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8 See infra BIBLIOGRAPHY.
9 For the purpose of this study, understandings, declarations, or interpretative statements will also be covered by the term “reservation.” On the differences between reservations, understandings, declarations and interpretative statements, see generally, David Mc Rae, The Legal Effects of Interpretative Declarations, 1978 BRIT. Y. B. INT'L L. 155 (1978). See also, Derek W. Bowett, Reservations to Non-Restricted Multilateral Treaties, 1976-1977 BRIT. Y. B. INT'L L. 67, 67-69 (1977).
10 See Bowett, supra note 9, at 68-69.
11 Reservations are “unilateral statements, however phrased or named, made by a state...” Vienna Convention on the Law of Treaties, May 23, 1969, reprinted in 8 I.L.M. 679, art. 2(1)(d) (emphasis added) [hereinafter cited as the Vienna Convention].
12 Hongju Koh, supra note 1, at 295.
15 See Vienna Convention, supra note 11, art. 2(1)(d).
16 The rationale behind reservations is “multi-dimensional”. However, reservations are usually justified by domestic law constrains, higher national standards, ideological dissent, political objectives, vital interests, harmonization of parallel obligations, precautionary measures, economic constrains or religious fundamentalism. See Tyagi, supra note 14, at 190-201.
legal system.\textsuperscript{17} In fact, the law of reservations is so fundamental to the modern practice of international law, that it represents one of the most accurate reflections of the world order.\textsuperscript{18}

Thus, the law of reservations have been “shaped” by universality and integrity,\textsuperscript{19} two opposite forces reflecting two visions of the international legal order: “a world composed of autonomous states versus an integrated world order.”\textsuperscript{20} The legalization of human rights through treaties have faced the same internal clash, and the law of reservations is meant to “bridge the gap”\textsuperscript{21} between the need for universal acceptance of the norms codifying human rights standards, and the necessity of a common understanding of the content of those norms.

As one could say, “reservations to human rights treaties are questionable [because] they instantly create a feeling of unease. It does not seem proper to exclude provisions from a treaty obviously meant to protect people, as human rights treaties are.”\textsuperscript{22} Consequently, the study of reservations to human rights treaties is particularly interesting. It is multi-sided and raises important political questions. Moreover, it is a technical area, which calls for the reconciliation of traditional treaty law and human rights law. The appropriate equilibrium between universality and integrity has always

\textsuperscript{19} See id.
\textsuperscript{20} Id.
\textsuperscript{22} LIESBETH LINZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES, RATIFY AND RUIN?, INTERNATIONAL STUDIES IN HUMAN RIGHTS 38, 3 (Martinus Nijhoff Publishers, 1995).
been very fragile, and in the light of modern human rights policies and practices, one could legitimately questions whether either of these objectives has been attained. Indeed, the first-sight impression is that ‘many states, when ratifying, at the same time ruin the treaty.’\textsuperscript{23} However, the majority of states consenting to human rights conventions with reservations are in a much better position than some others, which ratify treaties integrally, but never implement them.\textsuperscript{24}

The law of reservations is still a very relevant issue within human rights studies. The ongoing academic debate over the subject is a good indication of its significance. However, only very few things remained to be said about this topic. It has been lengthily studied by the greatest experts in the field and therefore, this article will hardly bring any revolutionary ideas into the literature. Nevertheless, the argumentation presented here aims to reveal the inconsistency of the present system of reservations within the context of human rights treaties, call for a development of a current trend initiated by human rights treaty bodies and demonstrate the appropriateness of the emerging law in the light of contemporary theories of international law. Yet, the scope of this study will be limited to the theoretical and systemic aspects of the question. The states’ practice regarding reservations will not be studied in details, nor will the particular context of the various human rights instruments.

From a human rights advocate perspective, and with an acknowledged accent of idealism, this paper will explain why, after a too long quest for universal

\textsuperscript{23} Id.
acceptance of human rights norms, the time has come to engage in the next step, and to promote rules that also protect the essential integrity of international standards for human rights. The arguments presented will also rely on the idea that international law could be an efficient instrument for change in human rights practice and could allow an ever greater respect for human rights in the 21st century.

Part one will summarize the historical evolution of the law of reservations along the transformation of the world order, and present the general rules and characteristics of the system of reservations established by the Vienna Convention on the Law of Treaties.

The second part of the article will analyze the inadequacy of the advantages offered by the current flexible system, the inefficiency of the corresponding mechanisms and the failure of the machinery to curtail the pressure of traditional sovereign states’ influence on the legalization process. It will also reveal the resulting unreachable integrity of human rights norms, the imperious need to use law as an instrument of change, and the necessity to give a new impetuous strength to the international legalization of human rights norms.

The third part of this paper will introduce the existing solutions and alternative systems that have been proposed to transform the current rules, and present the special mechanisms which should be used to end incoherent practice with regard to reservation to human rights treaties. It will also provide examples of supporting

24 See id.
precedents, evaluate conflicting views and appraise the future evolution of reservation practice. Finally, it will analyze the applicability of the suggested solution in the light of state practice, through the example of the United States human rights treaty policies.
CHAPTER 2
THE QUEST FOR UNIVERSALITY

The birth of the first international human rights instruments corresponds to the emergence of a new world order based on the left-over of second world conflict. The primary mission of the international community was to establish international standards affirming the dedication of states to prevent the repetition of the holocaust atrocities and nazi-regime-like abuses. This “standard-setting” phase\(^\text{25}\) was relatively easy considering the immediate post-war context, and the overall control of western states on the negotiations process of these instruments. However, in the wake of the independence movement, the increasing number of state actors and the influence of diverse political and cultural values on the codification process pushed for the adoption of flexible mechanisms of treaty making. Indeed the symbolic force of human rights instruments could only be maintained if supported by widespread acceptance. Thus, through the evolution of the world order and the transformation of the reservations rules, one can identify the search for a needed greater malleability of human rights standards corresponding to the institutionalization of cultural relativism.\(^\text{26}\) If the system has evolved through different stages, it is now codified in the Vienna Convention on the Law of Treaties, which creates a flexible system for reservations.

\(^{25}\) See Hongju Koh, supra note 1, at 295.

A. Reservations Law and the reflection of the world order.

The doctrine of reservations is highly complex because it includes subtle legal and political elements. The treaty-making process is used by states to advocate their vision of what the world order should be: a forum of sovereign states or an integrated community. Thus, the rules governing the validity of reservations to multilateral treaties reflect the evolution of states’ sovereignty and the different views on the value of international legislative norms.

1. The Unanimity Rule:

The traditional rule of customary international law governing the validity of reservations, in the absence of any provision in the treaty itself, established that a reservation to any multilateral treaty should only be allowed if accepted by all the parties to the treaty. The so-called “unanimity rule” reflected a purely subjective version of reservation law, consistent with the traditional concept of absolute states’

29 Logan Pipper, supra note 21, at 306.
sovereignty and the theory of contract.\textsuperscript{30} If the reservation was objected to, it had to be withdrawn, or would prevent the reserving state from becoming a party to the treaty. Thus, the reserving state had its rights and obligations modified to the extent of the reservation, towards every party to the treaty. The validity of reservations was dependant on a subjective standard of opposability, by which the uniformity of obligations was maintained and the integrity of the treaty protected.\textsuperscript{31} However, considering that no limit was imposed on the content or scope of the reservation, the mechanism did not afford protection to the core of the treaty, and the reserving state's statement could in fact amount to a real counter-offer.\textsuperscript{32}

The unanimity rule could be described as the ‘good old days’ of reservations law. At the time, the rule was clear, simple to apply and universally accepted. But it also mirrored the early to mid-twentieth century nature of the international legal order, where the absolute sovereignty of states was prevailing; and rules were defined by the western states, which concentrated the power of rule making at the international level.\textsuperscript{33} Thus, the unanimity rule was easy to apply, but especially because very few states were involved in the treaty making process.

\textsuperscript{30} See Kyongun Koh, \textit{supra} note 18, at 75.
\textsuperscript{31} See \textit{id.} at 79.
2. The Pan-American System:

In the 1930’s, the Pan-American Union broke the traditional obedience to the unanimity rule by creating its own system governing the effects of reservations. The rules created provided another subjective system solely based on the independent acceptance of the reservation by each party to the treaty, and a reserving state could become a party to the convention, even though other parties objected to their reservations, as long as one other contracting state had accepted them. Thus, the validity of a reservation was variable and could only be analyzed on a reciprocal basis. This purely subjective system rendered objections to reservations ineffective regarding non-objecting states, and therefore ‘under the piecemeal validity doctrine of the Pan-American system, only unanimous opposition could make a reservation completely invalid.’

Under this system, the multilateral treaty was only a sort of framework, an addition of several various and diverse autonomous bilateral relations, vaguely linked to the same object. This kind of subjective approach to reservations, however, was the first step towards the recognition of the changing nature of the international system, and the need for universal acceptance of non-restricted multilateral treaties. Indeed, if the Pan-American rule clearly protected state’s sovereignty in preventing any reservation to have effect on an objecting state, it also provided for a large flexibility

33 See Logan Pipper, supra note 21, at 307.
34 See id. at 308.
35 See Kyongun Koh, supra note 18, at 80.
36 See INTER-AMERICAN JUDICIAL COMMITTEE, REPORTS ON THE JUDICIAL EFFECTS OF RESERVATIONS TO MULTILATERAL TREATIES 3 (1955).
and created ‘possibilities of maximum participation.’”\(^{38}\) This first step towards the recognition of a change in the international community was important, but very limited in effect. Indeed, states’ sovereignty was the supreme value sheltered by the system,\(^{39}\) and wide participation was only possible because there was no real integrity in the treaty, which consisted of a sum of “sub-treaties”\(^{40}\) that every party could transform as it wished. Although the quest for wide participation could give the illusion of the birth of a world community, the complete absence of treaty integrity revealed the true nature of the created legal order,\(^{41}\) which preserved the states’ inherent right to make reservations to multilateral conventions, as an instrument of their sovereignty.\(^{42}\)

Thus, the combination of the traditional unanimity rule and the Pan-American system provided the basis of modern reservation law, which is an institutionalization of a balancing mechanism, created to attain the right equilibrium in the “spectrum” between universality and integrity.\(^{43}\) This process of balancing the two competing forces behind treaty making was clearly illustrated in the International Court of Justice’s (hereinafter ICJ or World Court) opinion on the reservations to the Convention on the Crime of Genocide.\(^{44}\)

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\(^{37}\) Kyongun Koh, supra note 18, at 81.

\(^{38}\) Ruda, supra note 7, at 121.

\(^{39}\) See Kyongun Koh, supra note 18, at 84.


\(^{41}\) See Kyongun Koh, supra note 18, at 84.

\(^{42}\) See Hylton, supra note 40, at 425.

\(^{43}\) See Logan Pipper, supra note 21, at 309.
3. The Genocide Case:

The problematic effects of the greater use of reservations became apparent in the 1950’s. The confrontation between the unanimity rule and the flexible Pan-American system strongly arose within the Sixth Committee of the United Nations General Assembly which, along with the International Law Commission, was charged with the determination of the legal consequences of the multiple reservations to the Genocide Convention and its entry into force. 45 Facing ‘profound divergence of views’ within the Committee, 46 the General Assembly finally adopted a resolution requesting an advisory opinion of the ICJ. 47 The opinion of the ICJ on the legal effects of reservations to the Genocide Convention constitute a milestone, an ‘historical moment’ in the evolution of the law of reservation. 48 By abandoning the unanimity rule, and introducing an ‘object and purpose’ 49 validity test on reservations, the world court ended the exclusive contractual theory of international treaty making 50 and introduced a dose of integration in a world of sovereign states.

In view of the humanitarian nature of the convention, 51 the court considered that the traditional subjective approach regarding the validity of reservations was not adapted anymore. 52 Indeed, the Genocide Convention, as other human rights treaties,

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45 See Redgwell, supra note 27, at 249.
48 See Kyongun Koh, supra note 18, at 85.
50 See Redgwell, supra note 27, at 250.
52 See id.
had a *raison d’être* of its own: ‘the accomplishment of those high purposes’ of the convention that constituted the ‘common interest’ of the contracting parties. Thus, the ICJ concluded that the convention was not characterized by ‘individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties’ and that the classic subjective test of acceptability was not sufficient to ensure the validity of reservations to the Genocide Convention. Therefore, it introduced the now famous ‘compatibility test,’ which permits a reserving state to become a party to a treaty, notwithstanding objections by other parties, as long as the reservation was ‘compatible with the object and purpose of the convention.’

The court based its opinion on the dual nature of ‘humanitarian’ and ‘civilizing’ conventions, created for universal participation in the formation of international minimum standards for individuals’ rights and freedoms. On one hand, the goal of universal participation, necessary to the norm-creating objective of the convention, rendered the unanimity rule totally ‘inconceivable,’ as it would lead to possible exclusion of certain reserving states for negligible reasons. On the other hand, the flexible system inspired by the Pan-American rule could easily guide to the ‘sacrifice of the very object of the Convention in favor of a vain desire to secure as many participants as possible,’ what was then considered as ‘even less’ possible.

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53 Id. at 23.
54 Id.
55 Id.
56 Id.
57 Id. at 22.
59 See Redgwell, supra note 27, at 251.
61 Id.
The new compatibility test combined enough flexibility to maintain the freedom of states to enter reservations to treaties, and a test based on the object and purpose of the treaty as a limit safeguarding the integrity of the convention. However, the vocabulary used by the Court seems to suggest that the preservation of the integrity of the treaty was the superior function assigned to the compatibility test. The failure to assert an appropriate mechanism to define the compatibility test would nevertheless render this superior goal unachievable.

In sum, while searching for the reconciliation between universal acceptance and treaty integrity, the ICJ created a presumption favoring ratification and wide participation to the treaty but also instituted an objective test of compatibility designed to protect the integrity of the treaty on the basis of its object and purpose. This experimentation in mixing subjective and objective elements to regulate the use of reservations lead to various imperfections and gave rise to many criticisms of what then resembled to a judicial revolution in the area of reservations law.

First, notwithstanding the special attention that the Court attached to the traditional rule of state consent; a state could now only invalidate the reservation of another party by reference to an external and objective standard. This newly established objective standard constituted a rather remarkable intrusion on the states’ sovereignty. This significant departure from the traditional practice was severely

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62 Id.
61 “Even less”, id.
65 See Kyongun Koh, supra note 18, at 88.
67 See Kyongun Koh, supra note 18, at 87.
criticized by the minority of the court as an assault on the sovereignty of states and on the sacrosanct rule of state consent.\textsuperscript{68}

Moreover, the “object and purpose” test was very fragile and ambiguous in practice. Indeed, objecting parties could use the same standard, while possibly referring to different or even conflicting views over the object and purpose of the treaty.\textsuperscript{69} This theoretical objective standard could in fact lead to the disintegration of the treaty’s integrity and transform it into a “fragmented commitment, interpreted in various inconsistent ways by frustrated parties.”\textsuperscript{70}

Additionally, the suggested recourse to special agreements for dispute settlements over the object and purpose definition was clearly unsatisfactory, considering the general reluctance of states regarding these mechanisms.\textsuperscript{71} The legal uncertainty resulting from the subjective application of an objective standard demonstrated the limit of the rule created by the ICJ, which was also attacked as lacking legal basis.\textsuperscript{72} Immediately, dissenters\textsuperscript{73} and scholars\textsuperscript{74} predicted the great practical difficulty to apply the compatibility rule in the absence of an objective arbitrary system.

Although the opinion of the world court reflected the necessity of a flexible adaptation of the treaty making process in the light of the expansion of the post-war international community, the increasing use of multilateral treaties, and the quest for widespread acceptance of emerging human rights standards; it also demonstrated the

\textsuperscript{68} See Genocide Convention case, 1951 I.C.J. 15 (May 28), at 46 (Joint Dissenting Opinion).
\textsuperscript{69} See Kyongun Koh, supra note 19, at 87.
\textsuperscript{70} Id. at 88.
\textsuperscript{71} See Genocide Convention case, 1951 I.C.J. 15 (May 28), at 45 (Joint Dissenting Opinion).
\textsuperscript{72} See id.
limit of the quest for universal constraint on states' sovereignty. The consequences of
the decision were also to be limited by the concomitant work on treaty law produced
by the International Law Commission (hereinafter the ILC). However, the Genocide
Opinion of the ICJ remains a ‘catalytic event initiating the subsequent development in
the law of reservations.’

4. The International Law Commission Project.

The importance of the ICJ opinion was also accentuated by the fact that it
preceded, and strongly influenced, the publication of the work of the ILC on the
codification of treaty law. Indeed, the majority of the Commission was supporting
the maintenance of the traditional unanimity rule, and arguing for its codification as
a general rule of international law on reservations. However, in its opinion, the ICJ
had rightfully demonstrated the need for a more reasonable approach of the issue, and
the ILC was therefore forced to consider the necessity to nuance its absolute
protection of the integrity of treaties. The ILC finally admitted the importance of
universality in the changing international community, and recognized that a pure
contractual theory was no more applicable to general multilateral treaties.

73 See id.
74 See Redgwell, supra note 27, at 252.
75 Id. at 313.
77 See Redgwell, supra note 27, at 253.
78 See Kyongun Koh, supra note 18, at 92.
Thus, the articles drafted by the Commission integrated the compatibility test created by the ICJ, but subjected it to the “fundamental principle” of state consent. Indeed, the purpose and object of the treaty was only taken into consideration when formulating a reservation. The compatibility test was the most favored, but not the only, ground for objecting to a reservation. The draft project also introduced the concept of tacit acceptance, which created a de facto presumption for acceptance for reservations. A limited period of time was available to states to register their objections against reservations. After this period, reservations were reputed to be implicitly accepted. This technique of standardization of intent was conditioning states’ ability to object and made the form, rather than the substance, the “key element” of the reservations procedure.

Objections to a reservation rendered the treaty inapplicable between the two parties. Therefore, a conditionally accepted treaty would only be in force between the reserving states and those accepting the reservations. This compromise was the result of a strong opposition between integrality and universality advocates within the ILC. While acknowledging the need for flexibility, some feared that the protection of states’ interests and sovereignty would curtail the benefit of the international community in the preservation of the integrity of the treaty. According to them,

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79 See ILC Report I, supra note 76, at 66.
80 See id. at 60.
82 See ILC Report I, supra note 76, at 61.
83 See id.
84 See Kyongun Koh, supra note 18, at 92.
85 See ILC Report I, supra note 76, at 62.
86 Id. at 61.
87 See Logan Pipper, supra note 21, at 315-316.
88 See K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 537 (1967).
safeguards were necessary to preserve the effectiveness of the treaty. 89 Their opponents argued that a certain margin of manoeuvre should be left to the states to allow them to protect their individual particularities by using reservations. 90 The flexibility would enhance the universal adherence to the treaty, which was better adapted to the modern nature of the international legal order. 91 However, the treaty would ‘remain the master agreement providing guidance for the international community.’ 92 Clearly, universality then became the prime objective of the law of reservations, which functioned on a largely subjective basis. 93 This was the result of the increasing diversity among states participating to the creation of international norms. Notwithstanding the introduction of certain constrains on states’ will, the system as a whole was largely prioritizing states’ sovereignty over the interest of the international community, and subsequently failed to create a functioning balance. 94

If the ‘flexible system’ 95 created by the ILC never came into force, the ILC Report had nevertheless confirmed the movement instituted by the ICJ in its Genocide case, and had certainly influenced the drafters of the Vienna Convention to a great extent. 96

89 See id.
90 See Logan Pipper, supra note 21, at 315.
91 See K. Holloway, supra note 88, at 357.
92 Logan Pipper, supra note 21, at 315.
93 See Kyongun Koh, supra note 18, at 91.
94 See id.
95 ILC Report I, supra note 76, at 60.
96 See Kyongun Koh, supra note 18, at 88.
B. The Vienna Convention System.

The Vienna Convention on the Law of Treaties is one of the most achieved successes of the international law making process. It was the result of ‘twenty years of research, deliberations and negotiations’ and provided the codification of existing rules of international customary law governing the creation, effects and interpretation of international agreements. It was signed on May 23, 1969 at the Vienna Conference on the Law of Treaties, and entered into force for 35 countries on January 27, 1980. As of 2000, 90 states are party to it, and its legal force goes beyond its nature, as most states of the world, even though there are not parties to it, are nowadays admitting the binding power of the Convention.

Part Two, Section Two of the Vienna Convention deals with the rules on reservations, and has become the most elaborate system of reservations in international law. It also constitutes the lex generalis on reservations. Article 19 deals with the formulation of reservations, article 20 with acceptance of and objections to reservations, article 21 with the legal effects of reservations and objections, article 22 provides the rules for the withdrawal of reservations and objections, and finally, article 23 states the procedural rules concerning

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97 Id. at 95.
98 See DAMROSCH & AL., supra note 4, at 452.
99 See id.
100 On the customary force of the Vienna Convention, see SINCLAIR, supra note 81, at 14.
102 See Kyongun Koh, supra note 18, at 95.
103 Tyagi, supra note 14, at 213.
reservations.\textsuperscript{104} The analysis presented here will focus on articles 19, 20 and 21, which represent the institutionalization of the revolutionary rule enunciated by the ICJ in the Genocide case. However, this rule is not considered as revolutionary anymore,\textsuperscript{105} and clearly represents the positive law, as applied by the most important courts\textsuperscript{106} at the international level and followed by all “prudent” states.\textsuperscript{107} Yet, we will see that the codification of accepted rules does not guarantee a perfect system.

1. The Rules: a flexible system.

\hspace{1cm} i. Article 19, the object and purpose test codified.

Article 19 deals with the admissibility, the permissibility of reservations. The object and purpose test as codified in article 19 of the Vienna Convention is only a safety valve, a last resort solution. It is a default rule, a “safety net,”\textsuperscript{108} which enters into effect when the treaty itself does not provide any information on its reservations regime.\textsuperscript{109} First, one should notice than the vocabulary used by the drafters suggests a

\textsuperscript{104} See Vienna Convention, supra note 11.
\textsuperscript{105} It is even considered by some as a “holy writ.” See Richard W. Edwards, Jr., Reservations to Treaties, 10 Mich. J. Int'l L. 362, 365 (1989).
\textsuperscript{107} See Edwards, supra note 105, at 366.
\textsuperscript{109} See Human Rights Committee General Comment No. 24 on Issues Relating to Reservations made to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.6, para.17 (1994) [hereinafter General Comment 24].
general positive presumption for reservations.\footnote{A State may [...] formulate a reservation unless...}, Vienna Convention, \textit{supra} note 11, art. 19 (emphasis added). \textit{See also} PIERRE-HENRI IMBERT, \textit{LES RESERVES AUX TRAITES MULTILATERAUX}, 86-90 (1979); Ruda, \textit{supra} note 7, at 180.\footnote{See Vienna Convention, \textit{supra} note 11, art. 19(a).} This presumption can be reversed by specific provisions of the treaty providing for the prohibition of the reservation submitted,\footnote{See \textit{id.} art. 19(b).} or by an implicit prohibition resulting from the absence of the reservation in question within a specific authorization clause, listing authorized reservations.\footnote{See \textit{Lijnzaad, supra} note 22, at 39-40.} Thus, the default rule of article 19(c) has a broad scope of application and covers every other treaty.\footnote{See Edwards, \textit{supra} note 105, at 384.} Indeed, international agreements are rarely providing dispositions for reservations,\footnote{See infra II.A.} which are always difficult to negotiate. Moreover, ambiguity usually satisfies all the parties.\footnote{See infra I.B.2.} However, the application of article 19(c) is limited to the formulation of reservations,\footnote{See M. Coccia, \textit{Reservations to Multilateral Treaties on Human Rights}, 15 CAL. W. INTL. L. J. 1, 9 (1985).} and the object and purpose test is not mentioned in the objections article. In this respect, the rule differs from the ICJ opinion,\footnote{"The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them." See Genocide Convention case, 1951 I.C.J. 15 (May 28), at 24 (emphasis added).} and has created a strong controversy regarding the articulation between the permissibility and the opposability of a reservation.\footnote{See infra I.B.2.}

A state can enter a reservation when it signs, ratifies, accepts, approves or accedes to a treaty if the latter does not prohibit such a reservation. It cannot do so if the Treaty does not allow it specifically while listing possible reservations, or in any other cases if the reservation is contrary to the object and purpose of the treaty.\footnote{See Vienna Convention, \textit{supra} note 11, art. 19.}
This objective standard of the ‘object and purpose’ of the treaty is a limit on the admissibility of a reservation. The compatibility with the core of the treaty\textsuperscript{120} reflect the importance attached by the Vienna Convention drafters, like the judges of the world court, to the integrity of the treaty. The “object” and the “purpose” of the treaty, although quite unclear in nature,\textsuperscript{121} constitute the legal identity of each treaty and have to be interpreted as such.\textsuperscript{122} Indeed, when signing a treaty, states are presumed to endorse its goal(s),\textsuperscript{123} and consideration is due to state’s consent. Thus, the ‘object and purpose’ test could appear as an objective and effective standard to protect the integrity of the treaty against attacks by extended reservations.

\textit{ii. Article 20, acceptance and objections.}

“Article 20.4\textsuperscript{124} comprises the basic rules concerning reservations: namely the consequences of reservations as well as the consequences of objections. It is basically this provision that lays down the pattern of future treaty relations.”\textsuperscript{125} When a state enters a reservation to a treaty while expressing its consent to be bound, it can only become a party to the treaty if another party to the treaty accepts its reservation.\textsuperscript{126} However, a unique acceptance suffices to give legal effect to the reservation.\textsuperscript{127} Thus, acceptance of reservations functions on a purely bilateral manner, and establishes

\begin{flushright}
\textsuperscript{120}The test creates a \textit{de facto} distinction between “core and non-core” provisions of the treaty. \textit{See} LIJNZAAD, \textit{supra} note 22, at 41.
\textsuperscript{122}See LIJNZAAD, \textit{supra} note 22, at 42.
\textsuperscript{123}See \textit{id.} at 40.
\textsuperscript{124}Articles 20.1(expressly authorized reservations), 20.2 (reservations to treaties with limited negotiating states) and 20.3 (reservations to constituent instrument of an organization) will not be dealt with, as their object is beyond the scope of this study.
\textsuperscript{125}LIJNZAAD, \textit{supra} note 22, at 42.
\textsuperscript{126}See Vienna Convention, \textit{supra} note 11, art. 20.4(a).
\textsuperscript{127}See \textit{id.} art. 20.4(c).
\end{flushright}
treaty relations on a reciprocal basis.128 The multilateral treaty will ‘break down’ and enter into force on a bilateral basis as modified by the acceptance or the rejection of reservations.129 This mechanism constitutes a flexible system that certainly encourages reservations.130 The orientation of the Vienna Convention’s rules towards greater flexibility is confirmed by the objections system.

Indeed, objections themselves do not preclude the entry into force of the treaty between the reserving and the objecting states.131 The objecting state bears the ‘burden’132 to reverse the new presumption133 favoring the maintenance of treaty relations, and shall “definitively express”134 that it opposes the entry into force of the treaty with the reserving state. Some have argued that this presumption favoring universal acceptance of treaties was a rule of customary law, preexisting to its codification in the Vienna Convention.135 In any case, the rule seems coherent with the general flexibility of the system, and fit within the search for greater participation to the treaty, as recommended by international practice.136 One should notice that objections are attached very little effect, unless the objecting state has clearly stated otherwise. Opinions differ as to whether the objecting state has an obligation to express its motives for objecting and precluding the entry into force of the treaty.

128 See LIINZAAD, supra note 22, at 42.
129 Id. See also, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §313 comment b.
130 See Ruda, supra note 7, at 189.
131 See Vienna Convention, supra note 11, art. 20.4(b).
132 Logan Pipper, supra note 21, at 320.
133 “...previously an objection implied no entry into force...”, L. LIINZAAD, supra note 22, at 45.
134 Vienna Convention, supra note 11, art. 20.4(b).
135 See Coccia, supra note 116, at 36; IMBERT, supra note 110, at 155; Ruda, supra note 7, at 193.
136 See LIINZAAD, supra note 22, at 44.
However, it is certain that the entry into force will only be precluded if the intention of the objecting state is ‘incontestable.’

The flexibility regarding the acceptance of reservations is also emphasized by article 20.5 which provide that ‘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, or by the date on which it expressed its consent to be bound by the treaty, whichever is later.’

This other presumption of consent reinforces the flexibility of the system, and clarifies the issue of entry into force of the treaty for the reserving state. Like in the ILC project, the form rather than the substance is central to the Vienna convention system.

iii. Article 21, the legal effects of reservations on treaty relations.

Reciprocity is the basic element characterizing article 21, and the effects of reservations. Indeed, reservations modify the treaty relationship between the reserving and accepting states in both ways. The provision of the treaty to which the reservation relates is modified for the reserving state ‘to the extent of the reservation,’ and ‘to the same extent for [the] other party.’ The effect is limited to a reciprocal degree, because it ‘does not modify the provisions of the treaty for the other parties to the treaty inter se.’

\[\text{\begin{flushright} 137 Id. \end{flushright}}\]
\[\text{\begin{flushright} 138 See IMBERT, supra note 110, at 142. \end{flushright}}\]
\[\text{\begin{flushright} 139 See Kyongun Koh, supra note 18, at 104. \end{flushright}}\]
\[\text{\begin{flushright} 140 See LIUNZAAD, supra note 22, at 47. \end{flushright}}\]
\[\text{\begin{flushright} 141 Vienna Convention, supra note 11, art. 21.1(a). \end{flushright}}\]
\[\text{\begin{flushright} 142 Id. art. 21.1.(b). \end{flushright}}\]
\[\text{\begin{flushright} 143 Id. art. 21.2. \end{flushright}}\]
give a limited effect to reservations, which, in principle, have to be interpreted restrictively.\textsuperscript{144}

Articles 21.3 has deprived objections not precluding the entry into force of the treaty of any legal effect and rendered “the difference between acceptance and objection […] rather obscure.”\textsuperscript{145} Indeed, “when a state objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving state, the provisions to which the reservation relates does not apply as between the two states to the extent of the reservation.”\textsuperscript{146} Thus, the objected reservation has the same effect than the accepted one: the non-application of the related provision, to the extent of the reservation, between the two parties. Some argue that the objection still has some effect as political statement,\textsuperscript{147} or as an \textit{a priori} objection to the possible creation of a customary rule.\textsuperscript{148} Nevertheless, the confusion remains.

The preceding remarks demonstrate that the rules for reservations created by the Vienna Convention are a mixture of different elements offering enough flexibility to protect the sovereign will of states, and maintaining several presumptions in favor of the treaty. However, the combination of paradoxical elements representing the two opposite driving forces of treaty law also created a certain amount of legal uncertainty regarding the interpretation and the meaning of the rules presented below.

\textsuperscript{144} LIJNZAAD, \textit{supra} note 22, at 49.
\textsuperscript{145} Coccia, \textit{supra} note 116, at 36.
\textsuperscript{146} Vienna Convention, \textit{supra} note 11, art. 21.3.
\textsuperscript{147} See IMBERT, \textit{supra} note 110, at 157.

We have already noticed that the “object and purpose” test was mentioned as operating for the formulation of reservations, but was not cited as a criterion for objection. Thus it is unclear what is the role of the test in relation with permissibility and opposability, and two categories of scholars are opposing their interpretations.

For some, the incompatibility with the object and purpose of the treaty vitiates the reservation, which is “immediately and incurably invalid.” The validity of a reservation is based on a “one-tier test” which defines the permissibility of a reservation on the basis of the object and purpose of the treaty. According to this view, the acceptance by other parties “is a matter of policy” and does not play any role in the validity of the reservation, because there would be a contradiction in signing a treaty and accepting a reservation that violates its object and purpose. This interpretation represents an objective system based on treaty interpretation and implies that article 19 defines the permissibility of a reservation, while article 20 defines its opposability. This view is justified by the fact that the acceptance of an

149 See supra, text accompanying note 136.
150 Know as the “permissibility school” and the “opposability school.” See Kyongun Koh, supra note 18, at 97; ILC Report II, supra note 108, at para. 55.
151 Kyongun Koh, supra note 18, at 97.
153 Bowett, supra note 9, at 88.
154 See, id. at 83. But see Redgwell, supra note 27, at 257, noting that “[a]cceptance of an inadmissible reservation is theoretically not possible” (emphasis added).
155 See Bowett, supra note 9, at 88.
156 See Cook, supra note 148, at 657.
impermissible reservation would render the compatibility test useless, what would be contrary to the principle of effectiveness in the interpretation of treaties. However, considering the lack of any independent adjudication mechanism in the Vienna Convention, the objective standard cannot be used “objectively.” Thus, states make the determination of the permissibility subjectively, and the practicability of a one-tier test is therefore questionable.

For others, “the validity of reservations depends solely on the acceptance of the reservation by another contracting state.” Consequently, the compatibility test would only play an inspirational role but would have no legal effect. This view is supported by the absence of the compatibility test in article 20, which set forth the conditions for objections. One could easily argue that the two-tier test is justified by the fact that the convention does not “expressly preclude the making of objections to reservations other than on the grounds of incompatibility.” Under this test, states can object to a reservation on the basis of impermissibility, but also on the basis of political considerations. Within the ‘opposability school’ views differ on whether it is possible to object to an impermissible reservation. Judge Ruda argues that states might have political interests in accepting an impermissible reservation, and that the text of the convention does not prevent them to do so. Under this view, permissibility is only a preliminary issue. Validity includes more: acceptability.

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157 See Clark, supra note 64, at 306.
158 See Redgwell, supra note 27, at 261.
159 Ruda, supra note 7, at 190.
160 See id.; Kyongun Koh, supra note 18, at 98.
161 See Ruda, supra note 7, at 190.
162 Clark, supra note 64, at 304.
163 See id.
164 See Ruda, supra note 7, at 190.
165 See Clark, supra note 64, at 303.
The text of the Vienna Convention is of little help to determine who is right. The compatibility test created by the convention is treated as a ‘unaffiliated metaphysical concept’\textsuperscript{166} and the objectivity sought by article 19(c) seems inapplicable, considering that no corresponding judicial mechanism is created, and that only states are able to review the permissibility of a reservation on the basis of a subjective definition of the object and purpose of the treaty.\textsuperscript{167} It is argued that this omission of the Vienna Convention drafters was deliberate\textsuperscript{168} and one should therefore conclude that, in practice, states retain the power to determine the validity of a reservation, by defining its compatibility in a subjective manner and consecutively establish its opposability. The flexible system is therefore very convenient for states and includes many advantages regarding international rule making in many areas. However, with respect to human rights agreements, the system is obsolete and inadequate. As Professor (and Special Rapporteur) Pellet put it, ‘although the Vienna regime generally worked satisfactorily, the ongoing and perhaps insoluble doctrinal ‘quarrel’ between the opposability school and the permissibility school showed that there were ambiguities and uncertainties with regard to reservations that the regime could not remove.’\textsuperscript{169}

\textsuperscript{166} Kyongun Koh, \textit{supra} note 18, at 98 \\
\textsuperscript{167} See Teboul, \textit{supra} note 121, at 694; Ruda, \textit{supra} note 7, at 182. \\
\textsuperscript{168} See Ruda, \textit{supra} note 7, at 182. \\
CHAPTER 3

THE OBSELENCE OF THE FLEXIBLE SYSTEM.

The Vienna Convention has created a very malleable treaty making system, favoring the establishment of treaty relations through a general presumption supporting states’ abilities to enter reservations;\(^\text{170}\) a bilateral system of reservations acceptance;\(^\text{171}\) and a rule of tacit consent.\(^\text{172}\) This very elaborate system is the result of previous experiences and reflects the recent need of the international society for greater flexibility.\(^\text{173}\) These norms of reservations law have obtained a certain success since their creation and allowed many multilateral treaties to gain a large acceptance rate, something inconceivable under the reign of the unanimity rule.

However, this part will demonstrate that the advantages of the Vienna Convention system are not benefiting the human rights regime anymore. Indeed, the perpetual quest for universal acceptance of human rights treaties through loose reservations mechanisms has hidden the overwhelming control of sovereign states over international standards setting, and the inaccessibility of coherence and integrity in many areas. Considering the unique nature of human rights conventions, it appears that the present system of reservations is inadequate for legislative treaty making, and that there is a strong need to change reservations mechanisms with respect to human rights law.

\(^\text{170}\) See Vienna Convention, supra note 11, art. 19.
\(^\text{171}\) See id. art. 20.
\(^\text{172}\) See id.
\(^\text{173}\)
A. Inadequate Flexibility.

1. “A problem of tools.”

   i. The contractual nature of treaty law.

   A treaty can be defined as an agreement whereby two or more states establish, or seek to establish, a relationship governed by international law between them. States have always used treaties to regulate their mutual relationships. The first treaties were designed on the model of private contracts, as kings exercising property rights over their kingdoms governed most nations. Treaties were establishing rights and obligations on a subjective basis, with reference to rules of private law and customs. The traditional rules of contract evolved and were adapted to the changing practice. States acquired independent legal entity and developed their commercial relations with other nations.

   With the growing of the international community, the appearance of new states, the development of travel and communication technologies, interdependence and multilateral relations have increased rapidly. The traditional contractual approach to treaty between states was therefore obsolete and needed to be adapted. The forms of treaty making were changed to reflect the structural evolution of the international community. However, the ‘horizontal expansion’ of the international community did not change the fundamental methods of setting rules at the

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173 See supra I.A.
174 LIINZAAD, supra note 22, at 107.
175 See Vienna Convention, supra note 11, art. 2.
international level. Indeed, although the scope and the number of treaties grew, the subjects and beneficiaries of the instruments remained the same: sovereign states. Consequently, states continued to use contractual techniques to negotiate among each other, because it was the best mean to protect their sovereignty. As states can only be bound by what they consent to, contractual methods were the best safeguards of sovereignty in the international ruling system. Thus, they adapted treaties rules to transform multilateral agreements into ‘a bundle of bilateral treaties.’"  

In this respect, the Vienna Convention on the Law of Treaties is a success. It institutes states’ consent as a supreme value, and reciprocity as an absolute instrument of international regulation. The rules on reservations are a perfect reflection of this characteristic. As we have seen, the system of acceptance of reservations practically breaks any multilateral agreement into a sum of bilateral relations. Changes to the treaty by mean of reservations will only have reciprocal effects. This logic is justified by the fact that reciprocity is a fundamental element of the law of treaties, which stabilizes relations and ensures equilibrium between the parties. Reciprocity seems absolutely essential to treaty law, since the international legal order still lacks a central authority and states remains the masters of the functioning system. Through the bargaining process of treaty making, they control the level of their commitments, in the light of the costs and benefits of the resulting agreement.

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177 See Logan Piper, supra note 21, at 303-304.
178 LIINZAAD, supra note 22, at 108.
179 See id. at 67-72.
180 See supra, I.B.1.
181 See LIINZAAD, supra note 22, at 67.
182 See id. at 68.
When dealing with a formulated reservation, states will proceed the same way: what are the benefits and the costs of accepting the reservation? Of rejecting it? This practice is logical when states’ interests, rights and obligations are the object of the reservation. However, when dealing with human rights treaties, this reciprocal approach is not adapted because then, ‘states do not have an interest of their own; they merely have, one 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.’

ii. The aspirational nature of human rights law.

The traditional contractual nature of international law has been influenced by the vertical transformation within the international community. The emergence of international institutions and organizations as new actors of international law has brought the law making process to a more cooperative trend. This move from reciprocity to cooperation gave birth to more law-making treaties, such as the Vienna Convention, and more legislative treaties, such as the Genocide Convention and other human rights instruments. These legislative treaties are distinguished from contractual agreements because they deal with general obligations of objective

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184 See Logan Piper, supra note 21, at 303.
186 Law making treaties are concerned with establishing general norms or overall legal regimes in accordance with which the parties to such a treaty agree to order their conduct and relations with each other”, David H. Ott, Public International Law in the Modern World, 23-24 (1987), in Weston & al. eds., supra note 13, at 80.
nature and the interests of the international community as a whole, not with the ‘reciprocal exchange of rights for the mutual benefit of the contracting states.’

Human rights law is mainly constituted by these legislative treaties, which provide rights for individuals against their own or other states. Theoretically, custom would have been the most adapted tool to develop human rights law, which consists in imposing universal constraints on states’ sovereignty. However, the length of the custom making process, its uncertainty and fuzziness, naturally pushed the human rights movement into the classical technique of “treatyfication.” However, treaties had always been used by states to protect their interests. They were instruments of states, not of individuals. In human rights treaties, states remain the subject of the agreements, but are not the beneficiaries anymore. Individuals are the recipients of duties imposed on states. States are commonly bound to achieve a common goal, but have no interest of their own. Treaty law was adapted to the creation of mutual and reciprocal obligations, but not to the formation of universal and objective obligations. Therefore, the rule governing the formation of treaties had to be transformed to provide enough flexibility to be applicable to different kind of treaties: contractual, constitutional, and legislative. This was a technical challenge

187 "The obligations undertaken by the High Contracting Parties [...] are essentially of an objective character...", European Commission on Human Rights, Austria v. Italy, Application 788/60, 4 E UR. Y.B. HUM. RTS. 1961, at 138.
190 LIINZAAD, supra note 22, at 108-109.
191 "In concluding [...] human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." The Effects of Reservations Case, Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 2, para.14 (1982), at para. 29.
192 "...while the content of treaties changed, the method of creating law through written agreements remained the same." Id.
for the Vienna Convention,\textsuperscript{193} which was to provide a uniform set of rules, but be sufficiently flexible to be applied universally and to various kinds of treaties, including human rights conventions. Indeed, a separate system of treaty rules for human rights convention was undesirable,\textsuperscript{194} as it would create confusion,\textsuperscript{195} possible conflicts, and isolate the human rights regime from international law.\textsuperscript{196}

The technical problems between treaty law and human rights law also resulted from a more profound divergence. On the one hand, treaty law is based on a fundamentally static approach, codifying solidly rooted traditional tools of consensual rule making. On the other hand, human rights law is subject to a dynamic process resulting from its aspirational nature.\textsuperscript{197} Therefore, “serious conceptual problems arise when one attempts to apply traditional rules to human rights treaties.”\textsuperscript{198} Indeed, human rights conventions are in constant evolution. They are “living instrument[s]”\textsuperscript{199} aimed at the promotion of individuals’ rights and freedoms. This primary difference with the static character of treaty law created a need for a technical conciliation, because if “the traditional law of treaties is not the best possible tool [for the development of human rights] unfortunately it is the only available one.”\textsuperscript{200} In its

\textsuperscript{193} It has been said that “no single framework uniformly applied could be wholly satisfactory to cover all cases,” ILC Report I, \textit{supra} note 76, at 327.
\textsuperscript{194} See ILC Report II, \textit{supra} note 108, at paras. 75-77.
\textsuperscript{195} “…What had to be avoided was precisely the proliferation of specific legal regimes on reservations that depended on the nature of the legal instruments in question, since that would lead to confusion and the fragmentation of the rules of law.” ILC Report II, \textit{supra} note 108, at para. 124; “…the creation of two systems for reservations presupposes that the categories to which each system would apply are readily identifiable. This may not be so…” Redgwell, \textit{supra} note 27, at 280.
\textsuperscript{196} See IMBERT, \textit{supra} note 110, at 30.
\textsuperscript{197} “Human rights law is based on a different morality, the morality of aspiration,” L. INZAAAD, \textit{supra} note 22, at 109.
\textsuperscript{198} Buergenthal, \textit{supra} note 189, at 21.
\textsuperscript{200} LINZAAAD, \textit{supra} note 22, at 109. See also, FREDERIC SUDRE, \textsc{Droit International et Européen des Droits de l’Homme}, 119 (2\textsuperscript{nd} ed. 1995) : “le plus souvent, c’est le système de droit commun qui
Genocide Opinion, the ICJ has fulfilled this technical task of reconciliation between treaty law and human rights law. In creating the object and purpose test to ensure the validity of reservations, the world court ensured that the aspirational nature of human rights treaties would limit the effects of reservations. However, to be efficient and ensure the harmonization of treaty and human rights law, the test would have to be enforced and not remain a toothless watchdog.

2. The sabotage of the object and purpose test.

i. Objective standard, subjective mechanism.

According to the ICJ, the flexibility needed to obtain universal adherence should be balanced with the essential need for integrity in legislative treaties. The object and purpose test was a technical device incorporating some objectivity in a system dominated by subjectivity and reciprocity. Many states contested the creation of the test as a revolutionary threat on their sovereignty, which was now subject to an objective limitation mechanism. It is unquestionable that the creation of such a constraint on states’ sovereignty could only result from the decision of an independent, supranational body. On their own, and within the traditional context of international negotiations, states would not have set up a norm that creates an obligation for all, and a benefit for none. That is why human rights treaties are traditionally negotiated under the auspices of international or regional organizations.

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202 See supra, I.A.3.
which are able to gather states and push them to go beyond their individual interest, to attain a superior and common objective.\textsuperscript{203}

Once the object and purpose test was created, states had to deal with it. In the light of the structural changes of the international community, its rejection was impossible: it was a “reasonable” test.\textsuperscript{204} The test was therefore included in the Vienna Convention.\textsuperscript{205} However, states retained their control over the negotiations of the Vienna Convention, and were able to shape the rules of treaty law according to their interests. Thus, they codified the objective mechanism in article 19, but voluntarily omitted\textsuperscript{206} an appropriate mechanism to ensure that the compatibility test would function. Indeed, article 20 implies that states are charged with the implementation of the objective standard. One could reasonably question the logic\textsuperscript{207} of having an objective standard implemented subjectively.\textsuperscript{208} This legal trick ensured states that the constraint on their sovereignty would be meaningless in practice, as they would be able to appreciate the objective element freely.\textsuperscript{209} The Vienna Convention giving no definition of the test, and failing to install an objective mechanism to define it, states were left with the freedom to construe the object and

\begin{footnotesize}
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\item \textsuperscript{203} See generally, Dhommeaux, \textit{supra} note 5.
\item \textsuperscript{204} See 1962 International Law Commission report to the United Nations General Assembly, 1 Y.B. INTL. L. COMMN 160.
\item \textsuperscript{205} See Vienna Convention, \textit{supra} note 11, art. 19.
\item \textsuperscript{206} “The Vienna Conference was well aware of the disadvantages of a system by which parties decided individually on the permissibility of a reservation,” Bowett, \textit{supra} note 9, at 81.
\item \textsuperscript{207} Professor Sudre speaks about “l’incohérence du système des réserves en la matière,” S UDRE, \textit{supra} note 200, at 118. Professor Redgwell considers that “clearly there may be considerable concern expressed regarding the efficacy of a system which leaves to the arbitrary appreciation of individual States the decision whether to accept or reject a reservation which is incompatible with the object and purpose of the treaty,” Catherine J. Redgwell, \textit{Reservations to Treaties and Human Rights Committee General Comment No. 24(52)}, 46 INTL. COMP. L. Q. 390, 404 (1997).
\item \textsuperscript{208} “Le principe de la réciprocité des engagements […] qui fonde le régime des réserves défini par la Convention de Vienne du 23 mai 1969, est incompatible, en théorie, avec le caractère « objectif » des traités relatifs aux droits de l’homme : les obligations d’une partie ne sauraient être modifiées par l’attitude d’une autre partie.” S UDRE, \textit{supra} note 200, at 118.
\item \textsuperscript{209} See Redgwell, \textit{supra} note 27, at 253.
\end{itemize}
\end{footnotesize}
purpose of the treaty according to their interest.\textsuperscript{210} Thus, the validity of reservation is entirely dependant on states’ will\textsuperscript{211} which decide whether or not another parties’ reservations are compatible with the object and purpose of the treaty.\textsuperscript{212} As predicted by the ILC, the test became really impracticable,\textsuperscript{213} and was transformed from an objective safeguard into a ‘mere doctrinal assertion.’\textsuperscript{214}

Moreover, since states are able to assess subjectively the compatibility test, there is nothing to ensure the absence of ‘political or extralegal motives’\textsuperscript{215} interfering with this legal matter. Additionally, the risk of perverting a legal mechanism into a diplomatic game is reinforced by the tacit consent rule of article 21 of the Vienna Convention. Indeed, considering that an objecting state carries the burden of an explicit objection to an incompatible reservation,\textsuperscript{216} its objective reasons to oppose an incompatible reservation could easily be vitiated by extralegal considerations. First of all, the twelve-month time limit is a rather short one.\textsuperscript{217} In practice, many objections have been disqualified as such, because communicated after the twelve-month limit.\textsuperscript{218} Objecting to a reservation within twelve months implies the administrative capacity and the technical resources to do so, and it is doubtful that all states possess them.\textsuperscript{219} Additionally, economic and geo-strategic considerations can

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\item \textsuperscript{210} States are ‘libres de réagir à leur guise’, Teboul, supra note 121, at 691.
\item \textsuperscript{211} See e.g., Clark, supra note 64, at 301; Sherman, supra note 152, at 84.
\item \textsuperscript{212} See Cook, supra note 148, at 681.
\item \textsuperscript{213} 1962 International Law Commission Report to the United Nations General Assembly, 1 Y.B. INTL L. COMM’N 160.
\item \textsuperscript{214} Ruda, supra note 7, at 190.
\item \textsuperscript{215} Clark, supra note 64, at 301-302. See also Sherman, supra note 152, at 84.
\item \textsuperscript{216} See SINCLAIR, supra note 81, at 62-63.
\item \textsuperscript{217} See Tyagi, supra note 14, at 215.
\item \textsuperscript{218} However, the United Nations Secretariat apply a certain tolerance towards the application of article 20(5) of the Vienna Convention. See Clark, supra note 64, at 313-314.
\item \textsuperscript{219} See id. at 312-313; LIJNZAAD, supra note 22, at 46; IMBERT, supra note 110, at 107.
\end{itemize}
influence states to refrain from objecting to a reservation formulated by others.\textsuperscript{220} Objection to a reservation is always considered as a somewhat unfriendly act\textsuperscript{221} and could easily provoke a "political backlash."\textsuperscript{222} Indeed, some states are protected against objections to their reservations by their economic power or political influence.\textsuperscript{223} Furthermore, considering that "the pressure an objection can exert to withdraw a reservation is now negligible, since the reserving state can still remain a party to the treaty and the treaty may even enter into force between the reserving and the objecting states,"\textsuperscript{224} there is indeed very little incentive for a state party to enforce the objective compatibility test. Consequently, it is not surprising that in practice, states adopt a "precautionary approach."\textsuperscript{225} Tacit acceptance of reservations has become a \textit{de facto} rule, and explicit acceptance is an exception.\textsuperscript{226}

In sum, the Vienna Convention and its extra-flexibility favoring treaty relations and universal participation has sabotaged the objectivity, and therefore the efficiency, of the compatibility test created by the Genocide case. In the context of human rights, this has led to problematic consequences and impaired the force of human rights law.

\textsuperscript{220} See Clark, \textit{supra} note 64, at 315.
\textsuperscript{221} See id. \textit{See also}, Tyagi, \textit{supra} note 14, at 215.
\textsuperscript{222} Sherman, \textit{supra} note 152, at 84.
\textsuperscript{223} The reservations of the United States are usually far reaching enough to be questionable under the compatibility test, however, they are rarely objected, and if so, not on compatibility grounds. For instance, only 11 States objected to the U.S. reservations on the International Covenant on Civil and Political Rights, but none invoked the compatibility test to prevent the entry into force of the Covenant for the United States. \textit{See} Gérard Cohen-Jonathan, \textit{Les Réserves dans les Traités Relatifs aux Droits de l'Homme}, 1996 \textit{REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC} 915, 920 (1996). \textit{See also}, Redgwell, \textit{supra} note 207, at 406.
\textsuperscript{224} Clark, \textit{supra} note 64, at 312-313.
\textsuperscript{225} Redgwell, \textit{supra} note 27, at 396.
\textsuperscript{226} See Clark, \textit{supra} note 64, at 315; Lijnzaad, \textit{supra} note 22, at 46.
ii. Unreachable standards.

The integrity of human rights treaties is essential to their existence. The ICJ has rightly explained that the goal of integrity should not be sacrificed for the sake of universality.\(^{227}\) Both objectives are part of the aspirational nature of human rights treaties, but as explained by the world court, integrity is somehow more essential to human rights treaties that universality.\(^{228}\) This natural preeminence of integrity over universality is due to the legislative/codifying purpose of human rights conventions. They are aspirational in the sense that they call for a change in the practice of states, and are aimed at the transformation of the *lex feranda* into *lex lata*.\(^{229}\) For this purpose, both universality and integrity are needed. The codification is only worthy if it has a certain degree of horizontal application; wide acceptance is therefore needed. But what is the relevance of a great participation to an empty code? The universality of a human rights convention is therefore dependant on its integrity.

Reservations to human rights treaties are highly valuable in their contribution to the goal of universality. This value is nevertheless conditioned to their limitation and to the respect for the object and purpose of the treaty. Indeed, a large and uncontrolled admissibility of reservations tend to ruin the legal uniformity that legislative treaties are seeking to establish.\(^{230}\) Then, human rights conventions would just become additional documents in a collection of treaties, without any positive

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\(^{227}\) See *supra* I.A.3.

\(^{228}\) See *supra* text accompanying note 77.

\(^{229}\) See *Teboul*, *supra* note 121, at 715.

\(^{230}\) See *id.* at 711-712.
legal value. As Ryan Goodman put it, ‘concerns to maintain the core of an agreement assume special significance in the case of human rights treaties. In such contexts, the very purpose of the multilateral regime is to codify and maintain a minimum level of global standards. Allowing states to join the treaty with incompatible reservations would repudiate or downgrade its normative, or standard-setting base. This result, of course, cannot be controlled by individual state objections, because State O’s objections apply only to the relationship between itself and State R. Accordingly, State O cannot prevent the incompatible reservations from affecting the constitutive elements of the treaty.’

It is also argued that reservations provide legal certainty over the definition and the scope of human rights treaties dispositions, regularly vaguely formulated. This additive legal security is very precious in the context of codification treaties. However, this certainty only emerges at a bilateral level. Through the reciprocal acceptance/objections game, states are allowed to ‘pick and choose’ their obligations, defining the scope of the human rights standards. If their proposal is accepted, or rather not objected to, then the standard is defined precisely, with respect to the non-objecting state. However, ‘the concept of reciprocity is inapplicable to

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231 J. GUSTAVE GUERRERO, LA CODIFICATION DU DROIT INTERNATIONAL, 29-30 (1930), in Teboul, supra note 121, at 711.
233 See LUNZAAD, supra note 22, at 71; Logan Piper, supra note 21, at 321.
legislative situations.”\textsuperscript{236} In fact, the treaty would become a list of bilateral commitments, a framework of standards à \textit{géomètrie variable} and would be deprived of any uniformity.\textsuperscript{237} It would remain an empty shell.

Some have claimed that the negative effect of reservations to human rights and legislative treaties is exaggerated.\textsuperscript{238} The integrity of such a treaty can only be affected by important and numerous reservations. Apparently, a “macroscopic view” demonstrates that this is not the case in practice.\textsuperscript{239} Therefore, it seems justified to put in perspective the obstructive effect of reservations on the creation of uniform international standards.\textsuperscript{240} Still, reservations seem to have a more rampant consequence on human rights law. By breaking down a uniform international codification into a sum of bilateral standards, the liberal use of reservations under the Vienna Convention has rendered codification ineffective and legislative treaties meaningless.\textsuperscript{241} The flowering and multiplication of human rights agreements in the recent decades is also a sign of their weakness. Human rights law is searching authority in the accumulation of norms, since the natural authority of a legislative instrument is absent from most human rights treaties, which are vitiated by

\textsuperscript{236} Clark, \textit{supra} note 64, at 318. The United Nations Human Rights Committee stated that ‘the principle of inter-state reciprocity has no place’ in human rights treaties. General Comment 24, \textit{supra} note 109, at para. 17. \textit{See also}, Tyagi, \textit{supra} note 14, at 186: “The difficulty is essentially, that the concept of human rights is not based on the idea of reciprocity.”

\textsuperscript{237} Speaking about the Covenant on Civil and Political Rights, and the Covenant on Economic and Social Rights Professor Jenks said that because of reservations and their indeterminate validity ‘there is a real danger that the Covenants may disintegrate into a series of bilateral agreements expressed in two common instruments but binding different degrees between different parties,” in Tyagi, \textit{supra} note 14, at 206.

\textsuperscript{238} \textit{See generally} Gamble \textit{supra} note 17. \textit{See also} IMBERT, \textit{supra} note 110, at 359.

\textsuperscript{239} \textit{See} Gamble, \textit{supra} note 17, at 392.

\textsuperscript{240} \textit{See} Teboul, \textit{supra} note 121, at 713-714.

\textsuperscript{241} \textit{See} Clark, \textit{supra} note 64, at 317: “The function of legislative treaties is to contribute to world order by providing regulation and consistency in specific area. If derogations from such treaties are numerous […] this function is impaired.”
incompatible reservations. The danger is that reservations would transform legislative treaties into “des monstres juridiques qui ne sont ni des traités, ni des lois,” and weakens the general authority of international law. It could also eventually confine human rights law into declarative instruments deprived of legal force.

It appears that the system of the Vienna Convention interchanged the primacy of integrity over universality that resulted from the ICJ genuine compatibility test. Nevertheless, the universality obtained by the over flexible system appears of rather limited benefit. The Vienna Convention reservation regime has perverted the relation between integrity and universality, and it may be the time to restore the process.

**B. Limited Universality.**

1. The myth of universal acceptance.

   i. The cost of flexibility.

   A flexible reservation regime is aimed to maximize states’ participation, and thus increase the authoritative and symbolic force of the treaty. A treaty signed by an extended majority of countries will be more likely to be obeyed, and joined by others eventually. Developing adherence to international standards increases their legitimacy and demonstrates their universal applicability. However, universal

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242 A. POMME DE MIRIMONDE, LES TRAITES IMPARFAITS - LES RESERVES DANS LES TRAITES INTERNATIONAUX, 153 (1920), in Teboul, supra note 121, at 717.
243 See Logan Piper, supra note 21, at 296.
participation to multilateral treaties is increasingly difficult to achieve, due to the
importance of political and cultural diversity among states, and to the ever-greater
scope of international agreements. The law of reservation had to evolve to its
current state to allow for a maximum level of flexibility, permitting states to
individually arrange their obligations under the treaty and prevent conflict with their
cultural, legal or political identity or interests. This need for flexibility and
universality is particularly strong with respect to human rights treaties, which are at
the junction of states’ sovereignty and the development of universal values.

Thus, reservations have provided ‘means for states to overcome minor
difficulties in joining a treaty and lead to a wider acceptance of the treaty’s rule.’
Reservations have been especially necessary to the development of international
human rights law, which has developed to a substantive set of norms with a certain
symbolic and consensual force. The rules of the Vienna Convention seems to provide
for a maximum flexible use of reservations by states which finally control their
validity through permissibility and opposability. This process reflects the
sacrosanct principle that states can only be bound by their consent. Hence, states
can control the level of their commitment and undertake obligations that are in
conformity with their interests or identity. In the same time, the States’ participation
to the treaty ensures a greater authority to the treaty and reinforces its binding
character at the global level. Moreover, although reserving States are not obliged to
comply with every obligations of the treaty, they remain within the scope of the

244 See FRIEDMAN, supra note 185, at 124-125.
245 Logan Piper, supra note 21, at 296.
246 Id.
247 See I.B.1.i supra.
248 See I.B.1.ii supra.
treaty, and this membership ‘will ensure supervision, and encourages the improvement of the domestic human rights situation.’ In sum, the idea that human rights are universal must be reflected by global adherence to human rights treaties, and due to the complex nature of the international society, the greatest adherence is ensured by a system allowing flexible use of reservations.

However, commentators have pointed out that this somehow logical conclusion ‘lacks statistical confirmation,’ and that the positive effect of a flexible reservation system has certainly been overestimated. For instance, the International Covenant on Political and Civil Rights has applied the flexible system of the Vienna Convention which resulted in only 100 ratifications of the treaty, including 44 reservations. Considering that the world counts nowadays almost 200 States, one should definitely put the influence of reservations to treaty participation in perspective. There is no doubt that reservations facilitate States’ participation to multilateral treaties, and especially human rights treaties, in which sovereign, cultural and political attributes are at stake. However, it is quixotic to pretend that absolute universal participation to international human rights agreements will be obtained on the basis of a maximum flexible use of reservations. Therefore, it seems reasonable to reconsider the necessity of an absolute flexibility when dealing with reservations to

\[\text{See Vienna Convention, supra note 11, art. 2.}\]
\[\text{Lijnzaad, supra note 22, at 105.}\]
\[\text{See Lijnzaad, supra note 22, at 106.}\]
\[\text{See Lijnzaad, supra note 22, at 106.}\]
human rights treaties. The goal of universality is legitimate and initiatives that promote it should be welcomed. Nonetheless, if “reservations are a necessary price for universal participation”\textsuperscript{256} to human rights treaties, one should keep in mind that universality of human rights is very relative, and that therefore, the reservation-price of universal participation should also be reconsidered.

ii. Which Universality?

The universality of human rights is a broad and difficult question.\textsuperscript{257} This issue is multi-sided, largely rooted in philosophical, religious and moral ideas.\textsuperscript{258} Therefore, one should immediately reckon than universality of human rights is unlikely to be achieved through the limited scope of legal instruments, and even less through the sole basis of treaty law.

It is unquestionable that universal participation to human rights treaties would contribute to the overall development of the universality of human rights. However, the confusion between “formal” and “substantial” universality is easy.\textsuperscript{259} Universal adherence to human rights treaties is neither synonymous of universal respect for human rights, neither of the universality of human rights. Indeed, “global adherence alone is a rather meager form of universality.”\textsuperscript{260} Therefore, the benefit of the quest for universality through the flexible use of reservations is relative. It should not be an absolute or perpetual quest, because it is very doubtful that an absolute universal acceptance of human rights treaty will ever be obtained anyway. As a matter of legal

\textsuperscript{256} Id.
\textsuperscript{257} See supra note 34.
\textsuperscript{258} See Lijnzaad, supra note 22, at 103.
\textsuperscript{259} See id.
\textsuperscript{260} Id.
doctrine, universality does not fit in international agreements: ‘the method suitable for the creation of universally valid and integrally binding law would be customary international law.’”

Thus, the absolute universality, which is sought through the flexible use of reservation, seems unreachable. If one admits that substantial universality is unreachable, that formal universality is idealistic and of limited interest, one should also question the justification of a treaty law system which has made universality its supreme and ultimate objective, at the cost of the integrity of the treaty.


i. The cost of universality.

In a famous statistical study, Gamble has tried to demonstrate that a liberal use of reservations was also justified by their relatively benign consequence in practice. In a very detailed and well supported manner, Gamble suggests that ‘reservations may not be too serious of a problem; [because] most are of fairly minor nature.” However, this conclusion might be totally different when one looks at it in the context of human rights conventions. In the context of human rights, the struggle of treaty law for an adequate balance between universality and integrity might not be the same than in the context of general multilateral treaties. Indeed, in the context of human rights, universality and integrity are not opposite forces, but

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261 Id. at 108.
262 See Gamble, supra note 17.
263 Id. at 391.
264 See LIJNZAAD, supra note 22, at 106.
‘twin ideals.’ 265 Universality and integrity complement each other within the common process of the development of human rights 266 because universality in the broadest sense means universal and integral adherence. 267 Like the ICJ’s Genocide case has demonstrated, reservations, combined with the object and purpose test, offers the best way to maximize those two elements and develop international human rights law. However, in the absence of the object and purpose test or, in the case of the Vienna Convention, in absence of any objective mechanism for its implementation, there is no safeguard to ensure that universality and integrity are harmonized and balanced. In other words, under the Vienna Convention reservation regime, universality is favored over integrity, which is afforded a theoretical protection, lacking any efficient enforcement system.

This over-estimated need for flexibility is the result of a short-term perspective, which sees universality as a primary objective for treaty law. Under this approach, universal adherence to human rights treaties provides stronger consensual force to international agreements, which permits subsequent substantial developments protecting the integrity of the norms. 268 Universality of human rights treaties should be stressed out because ‘an approach to the convention[s] that emphasizes universality may, in time, also serve the goal of integrity; universality can be viewed as complementary to integrity and not in opposition to it.’ 269 It is certainly defensible that this argument is relevant to the reservations debate. However, its validity is subordinated to a short-term vision. Indeed, the universal acceptance of human rights

265 Cook, supra note 148, at 686.
266 See Friedmann, supra note at 127-128; Kyongun Koh, supra note 18, at 303; Logan Piper, supra note 21, at 303.
267 See Lijnaad, supra note 22, at 109.
268 See Logan Piper, supra note 21, at 304-306.
treaties developed through the liberal use of reservations has certainly not provided integrity to the extent it was supposed to. When one looks at the rate of withdrawal of reservations,\textsuperscript{270} supposed to reflect the increasing integrity of human rights treaties, there are many reasons to doubt that universality at any rate will always serve integrity. Therefore, the “gradualistic” approach\textsuperscript{271} of searching universality for the sake of integrity works to a certain extent, and for a limited period of time. When this period is over, one has to go on with the gradual process. In sum, “the modern approach should be viewed as harmonizing-rather than choosing between-universality and integrity.”\textsuperscript{272}

ii. An ongoing process: from universality to integrity.

The liberal use of reservations was supposed to promote universality, and consecutively, integrity for human rights. We have demonstrated that this universality was only formal, and have observed that the level of acceptance had probably already achieved a maximum level, although not amounting to universal acceptance. A certain level of integrity has probably been created through universal adherence to international treaties, but generally, integrity has been pushed into the background of human rights development. Now that formal universality as an objective has been (substantially) attained, it is time to promote the evolution of the system towards the successive step. If universality and integrity can really be seen as complementary in a unique process, it seems that the time has come to get into the second phase of the

\textsuperscript{269}Cook, \textit{supra} note 148, at 686.
\textsuperscript{270}See LIINZAAD, \textit{supra} note 22, at 106.
\textsuperscript{271}Cook, \textit{supra} note 148, at 686.
\textsuperscript{272}Goodman, \textit{supra} note 232, at 535.
gradualistic approach to reservations law, and to promote integrity in itself, not only as a correlative of universality.

Under a long-term perspective, it is justified to see universality and integrity not as opposite but as complementary objectives. The Vienna Convention reservation regime appeared to be relatively successful in the promotion of the universality objective, but also relatively ineffective in safeguarding integrity as an interdependent goal. It has tried to “maximiz(e) universal application of multilateral treaties, at the cost of compromising its integrity.” As we have seen, this failure is due to the inadequate uniform nature of the flexible system, overly based on a traditional perspective of international law.

The Vienna Convention system is based on a vision of a Westphalian international society, and of States’ sovereignty rooted in a slightly nuanced version of the 19th century world order. The control that States still exercise on the development of human rights law through the use of reservations echoes the old argument that human rights and freedoms are primarily a matter of domestic concern. This argument seems somehow completely obsolete in a 21st century where the world is seen as a ‘global village,’ economies are totally integrated and our societies increasingly interdependent. Global problems, transnational issues need to be addressed not only through international cooperation and inter-governmental negotiations. New actors have to be integrated in the regulation system, and be able to contest and challenge the exceeding power of States at the international community

\[^{273}\text{Cook, supra note 148, at 644.}\]
level. The emergence of the ‘New Sovereignty’ concept demonstrates the centrality of individuals in modern international law.

Law can restrain, or advance the evolution of a society. The current law of reservation contains the development of human rights law through treaties into an obsolete system. This paper will now demonstrate that significant changes of reservations rules could allow the normal path of human rights development to go on, from universality to more integrity.
CHAPTER 4
SEARCHING OBJECTIVITY FOR AN OBJECTIVE STANDARD: EXISTING SOLUTIONS, ALTERNATIVE SYSTEMS.

The debate over reservations to human rights treaties and their fundamentally paradoxical nature is relatively old. When dealing with the subject, one has to be ‘aware of the perilous nature of the exercise, particularly in view of the complexity and technicality of the topic and the politically very sensitive nature of some of its aspects’. That is why the subject has been the ferment of so many academic controversies, and provoked serious oppositions between advocates of a statu quo, and supporters of change. We have demonstrated that the current system hampers the natural development of human rights law towards greater uniformity and strength. We have also recognized the essential role of reservations in this development process, and it seems fundamental to keep this in mind while attempting to formulate proposals for reforms. Among the reformist group itself, various solutions has been offered. They either promote internalization of reservation rules; radical procedural transformations within the Vienna Convention system of reservations; or a restoration of the object and purpose test by the creation of an objective mechanism. This section will focus on an analysis of the pro’s and con’s of existing solutions and alternatives systems of reservations and demonstrate the necessity and logic of an objective system with respect to human rights treaties.

A. Relying on States, repairing traditional reservations rules.

1. «Prendre le mal à la racine,» reforming the Vienna Convention reservation regime.

Although the Vienna Convention on the Law of Treaties was one of the greatest achievements in the codification of international law, it is far from being perfect. Indeed, one could wonder how a single framework convention could fit the rules for every kind of international agreements, which can be very dissimilar in nature. The inadequacy of the Vienna Convention reservation regime with respect to human rights treaties has lead several commentators to argue for a reform of the Vienna Convention. The proposals are mainly attempts to rationalize the system, and to reinforce the standard of the compatibility test by corresponding objective mechanisms.

i. Renormalizing consent.

A basic proposal has been the abandon of the tacit consent rule of article 20(5). The suggestion is based on the idea that States should play a more active role with the preservation of the integrity of the treaty. Thus, States would be required to actively respond to every reservations formulated by other parties. By forcing States to react on other parties’ reservations, one increases the attention over reservations, and decreases the risk of incompatible reservation significantly. Moreover, it is

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275 See supra text accompanying note 216.
276 See e.g. Sherman, supra note 152, at 92; Hylton, supra note 40, at 445.
logical to give a more important sense of responsibility to States. After all, through the integrity of the treaty, it is their consent that is protected. The tacit rule of 20(5) is a good excuse for States to neglect their general duty to act in good faith under the treaty. The obligation to act in good faith includes “a mechanism for determining the extent of the legal obligations assumed by states or other subjects of international law.” If the tacit consent rule is not, in theory, in contradiction with the obligation to act in good faith, the passivity resulting from this negative mode of expression seems somehow conflicting with the positive nature of the obligation to act in good faith. Adopting a rule pushing states to react to reservations appears a suitable method to ensure a better respect for the *pacta sunt servanda* principle.

However if the replacement of the tacit rule is desirable in theory, it might be difficult in practice. Indeed, as we have seen, the twelve months limit is inadapted to the administrative reality. Obliging every state to react to every reservation to every treaty they sign within twelve months presupposes that states will have the capacities and resources to do so. It might take several dozens of agents working full time to obtain a reaction on time. It is unlikely that small or developing countries will ever be able to “watch the clock” and respect the deadline. On the other hand, lengthening the twelve-month limit would affect the relevance of the states’ reactions to reservations and impair their validity. A more fundamental question emphasizes the

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277 “Every treaty in force is binding upon the parties to it and must be performed in good faith”; “the treaty must be interpreted in good faith [...] in light of its object and purpose,” Vienna Convention, *supra* note 11, art. 26 and 31.


279 See Clark, *supra* note 64, at 312. Professor Redgwell also speaks about “the general inertia of States” resulting from the tacit consent rule, see Redgewell, *supra* note 207, at 405-406.

280 “Good faith forms the foundation of *pacta sunt servanda*...”; Virally, *supra* note 278, at 132.
difficulty of such a reform: what happens if, notwithstanding the obligation, a State party fails to react to a reservation? In sum, “this suggestion seems wildly implausible, but its objective is laudable.”

ii. The preventive method.

The Vienna Convention could also develop a more preventive approach to reservations law, rather than the contemporary curative method. Indeed, under the present system, the validity of reservations is asserted ex post facto, what does not encourage clarity or legal certainty. On the basis of the ‘better to prevent than to cure’ maxim, the method could be reversed and provide for an a priori validity review.

The example of the Organization of the American States (O.A.S.) provides a relevant model. Indeed, the practice of reservation under the O.A.S. system requires states to circulate the reservations they intend to adopt before ratifying the treaty. This allows the other parties to know instantly what is the real intent of the reserving state while adopting the treaty. It also allocates them the chance to express their opinion in advance regarding the validity of the reservations formulated. Consecutively, the reserving state can review the formulation or content of its reservations to conform to the comments of the other parties and ensure its validity. The validity of the reservation is therefore determined before its entry into force, further disputes on the matter are avoided and the overall legal certainty of the treaty is reinforced.

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281 See Kyongun Koh, supra note 18, at 92.
282 Tyagi, supra note 14, at 243, note 236.
283 Written Statement of the O.A.S., 1951 I.C.J. Pleadings (Genocide case) 15 (December 14, 1951).
However, the circulation method is still dependent on ‘contract-based assumptions that are inappropriate to human rights treaties.’\textsuperscript{285} It leaves the determination of the objective compatibility test in the hands of states, which can, \textit{a priori} as much as \textit{a posteriori}, ensure a maximum respect for their mutual sovereignty and thus restrain the development of international accountability for human rights violations. Therefore, it seems that an independent watchdog would be more reliable for the protection of the interest of the treaty itself, and more equipped for an objective protection of an appropriate balance between flexibility and integrity.

Finally, the proposals on the reform of the Vienna Convention are unlikely to succeed for other simple, but fundamental, reasons. The Vienna Convention was the result of a very long process, incredible efforts and has acquired the status of a customary norm.\textsuperscript{286} A project to reform the Convention would consequently create substantive and tumultuous opposition. Moreover, the reforming process would take a long time and could lead to more confusion for a result that is not guaranteed. Therefore it seems reasonable to search for more convenient and practical methods to improve the system, notably through the increasing recourse to internalized treaty reservations systems.

\textsuperscript{284} See Baylis, \textit{supra} note 58, at 317.  
\textsuperscript{285} \textit{Id.}  
\textsuperscript{286} The ILC consider that ‘the regime of the Vienna Conventions should be preserved, since they established a satisfactory balance that worked well, containing as they did rules of reference which,

The dispositions of the Vienna Convention apply as default rules because it is clear that the most efficient system for reservations would be an independent set of rules regarding conditional consent in each treaty. If human rights treaties stated the rules applicable to reservations, the level of uncertainty and the ambiguity regarding the issue would be considerably reduced. Indeed, the rules could easily be formatted to the particular context and nature of the treaty. Through the negotiations, sensitive issues and areas of concern have been identified, and allowed treaty makers to decide the most adapted reservations mechanisms and rules in the light of the travaux préparatoires. The internalization of reservation law would permit an efficient management of the issue of conditional consent and reduce significantly successive disputes and technical discussions over the entry into force or the application of the treaty.

i. Prohibiting reservations?

Some treaties simply prohibit the formulation of reservations.²⁸⁷ It is claimed that the possibility of reservations opens the possibility to ruin the work accomplished during the negotiations. Multilateral treaties, and human rights treaties in particular, are complicated to negotiate, and difficult to build. The adoption of a text is the result of long process, incommensurate efforts and is dependant on fragile deals and trade-offs obtain by diplomats. Offering the possibility to neglect those achievements irrespective of their nature at the time of their adoption, could be regarded as having acquired a customary value.” ILC Report II, supra note 108, at para. 58.
through reservations is a threat to the moral authority of the text and open the door to the annihilation of the negotiators’ success. Furthermore, it endangers the norm making process to a serious extent: why would diplomat struggle to conciliate if the result of their efforts is likely to be demolished by reservations? states have the opportunity to make their voices and arguments heard during the negotiations. Once a text is adopted, states should not be allowed to simply turn back to what has been achieved. As Judge Alvarez poetically put it, once concluded, human rights conventions ‘are distinct from [their preparatory] work and have acquired a life of their own; they can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. [They] must be interpreted without regard to the past, and only with regard to the future.’

However, this view is relatively simplistic. First of all because reservations do not have the destroying potential that one could imagine. They are often devices to reinforce what has been negotiated, and provide certainty on the extent of the treaty dispositions. Moreover, it has been demonstrated that, in general, reservations do not deal with substantive rules of treaties and have a relatively modest effect on the treaty as a whole. Reservations are not automatically a menace to the indivisibility of human rights conventions. In addition, the absence of reservations possibilities in

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289 See generally, Gamble, supra note 17.
290 Judge Alvarez argues that human rights conventions ‘by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest,’ Genocide Convention case, 1951 I.C.J. 15 (May 28), at 53, (dissenting opinion of Judge Alvarez).
the context of human rights treaties seems somehow idealistic. Although the goal of these treaties, the general good, renders every restriction to it suspicious, reservations are crucial to the existence of human rights agreements. They allow a greater adherence and reinforce the moral authority of the conventions. More importantly, they allow the essential level of flexibility necessary to deal with core issues of states’ sovereignty. The ‘living’ and legislative nature of human rights treaties implies a certain degree of vagueness surrounding them and reservations constitute one of the safety valve which allow greater legal security with regards to human rights commitments. Considering the complexity of negotiations and the often fragile nature of the resulting texts, it seems reasonable to consider reservations as a vital tool for the human rights treaty regime.

**ii. Conditioning reservations?**

Nevertheless, including specific dispositions within the treaty would certainly rationalize the use of reservations and limit their potential negative impacts. Explicit list of permissible and non-permissible reservations would eliminate doubts surrounding the compatibility test. Explicit dispositions would ensure that reservations do not threaten the non-derogable nature of certain rights. Obviously,

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291 “The endless debate on whether or not reservations to treaties should be allowed was futile. Reservations to treaties were a fact of life.” ILC Report II, *supra* note 108, at para. 73(a).

292 See *supra* text accompanying note 27.


294 The United Nations Committee recognized the “useful function” of reservations with respect to human rights treaties, General Comment 24, *supra* note 109, at para. 4.

295 In human rights treaties, it is argued that the nonderogability of rights should be linked with the permissibility of reservations; see Buergenthal, *supra* note 189, at 23-25. This position is sustained by the Inter-American Court of Human Rights which argued that ‘a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it,” Inter-American Court of Human Rights, Restrictions to the Death Penalty, Advisory Opinion No. OC-3/83, 8 Sept. 1983, in (1984) 23 L.L.M. 320, 341. *See also*, the Effect of Reservations case, *supra* note
the inclusion of procedural requirements in the treaty would increase significantly the security of the text and reduce the possibilities of disputes regarding reservations. An essential rule would require any reservation to be sufficiently specific to avoid uncertainty on its scope. Indeed, “Imprecise reservations cheat the requirements of the Vienna Convention.”

Therefore, treaties should ensure that every reservation refer to a specific disposition of the treaty, or is labeled in such a manner that its scope of application is clearly identifiable. Example can be taken on the European Convention of Human Rights, which prohibits reservations of general character and requires mention of the domestic law justifying the reservation. Although this later requirement could appear relatively incommodious, it certainly allows greater certainty, and permit other states parties, or a third party, to be informed and to understand the rationale behind the reservations and avoid further misunderstandings.

106. However, States and other international treaty bodies’ practice is quite inconsistent with this logic; see SUDRE, supra note 200, at 117; Redgwell supra note 207, at 402-403. For instance, the Human Rights Committee consider that “while there is no automatic correlations between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.” General Comment 24, supra note 109, at para. 10.

Clark, supra note 64, at 310.

Reservations must be specific and transparent, […] reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope and relation thereto,” General Comment 24, supra note 109, at para. 19.

The European Convention is a model of precision in this respect: “1- Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provisions of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article. 2- Any reservations under this article shall contain a brief statement of the law concerned.”, European Convention for the Protection of Human Rights and Fundamental Freedoms, open for signature Nov. 4 1950, entered into force Sept. 3, 1953, art. 64 [hereinafter ECHR].

iii. Collegiality.

Another common idea is the creation of a voting or collective system to enforce the compatibility test by collegiality. In combination with an explicit consent rule, the “collegiate system” would rely on the collective determination of the validity of reservations by the parties. Such a mechanism had long been demanded but was rejected by the Vienna Conference as a general solution, under the pressure of the ILC, which argued that it would “tilt the balance towards inflexibility and might make general agreements on reservations more difficult.” The value of the collegiality system was nevertheless implicitly acknowledged in the Vienna Convention. Indeed, article 20(3) of the Vienna Convention states that reservations to treaties constitutive of international organizations require the acceptance of the competent body of the organization to be valid. Considering that many international organizations bodies express consent through a majority vote, the rule embodied in article 20(3) equals a collegiate system. If the collegiate system is indeed, especially appropriate in the case of constitutive treaties, it might very well be so with respect to other treaties, including human rights treaties.

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300 See Clark, supra note 64, at 298.
301 See Kyongun Koh, supra note 18, at 101. See also, Bowett, supra note 9, at 81-82, Redgwell, supra note 27, at 252.
302 "There was an obvious need for some kind of machinery to ensure that the test [the compatibility test] was applied objectively [...] through the establishment of a collegiate system for dealing with reservations which a large group of interested States considered to be incompatible with the object and purpose of the treaty.” Ian Sinclair, United Nations Conference on the Law of Treaties, Official Records, 1st Sess., Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, 25th Meeting of the Committee of the Whole, April 16, 1968, 114 [hereinafter Official Records]; in Bowett, supra note 9, at 81. Moreover, the idea was supported by several countries such as Sweden, Australia, Ghana, Japan, Italy, Ireland, Zambia, New Zealand, id. at 81, note 5.
303 Id. at 126.
304 “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.” Vienna Convention, supra note 11, art. 20(3).
Such a mechanism cumulate the advantage of avoiding controversies and possible conflicts resulting from different interpretations of the object and purpose of the treaty, while not depending on subjective reciprocal techniques. Furthermore, such a collective method seems totally appropriate to the nature of human rights treaties and other legislative agreements, which rely on a common and collective interest of states parties. The Convention on Elimination of the Elimination of all forms of Discrimination,\(^{306}\) which is considered as “the most effective international human rights instrument in existence,”\(^ {307}\) has adopted a collegiate system in its article 20. Thus, “a reservation [to this convention] shall be considered incompatible or inhibitive if at least two-thirds of the states Parties to this Convention object to it.”\(^ {308}\)

The two-third mechanism ensures a certain degree of objectivity in the determination of the compatibility of a reservation and is protective of the integrity of the treaty. The collective decision implies coherence with respect to the definition of the object and purpose test. However, the protective value of such a mechanism is not absolute. Indeed, the system “has an intrinsic flexibility that implies a loss of control, proportional to the growing number of states Parties.”\(^ {309}\) In fact, the two-third rule will be more and more difficult to apply as the number of parties to the treaty increase.\(^ {310}\) Additionally, such a collective system would deny any substantive value

\(^{305}\) See Kyongun Koh, \textit{supra} note 18, at 101.


\(^{308}\) CERD, art. 20(3).

\(^{309}\) LIJNZAAD, \textit{supra} note 22, at 136.

\(^{310}\) See id.
to objections, which do not amount to a two-third majority\textsuperscript{311} and would complicate the determination of the effects of reservations towards objecting states.\textsuperscript{312}

Moreover, if it is true that a collective reaction would allow to reduce the influence of political pressures significantly and prevent the disarticulation of the treaty,\textsuperscript{313} the collegial system does not completely eradicate the risk of corruption of the objectivity of the test by extra-legal factors. The collegiate system leaves the determination of the compatibility to states.\textsuperscript{314} States are rational actors, and many factors are susceptible to interfere with the ability of states, individually and collectively, to act as watchdogs of the integrity of the treaty. If states keep control on the reservation regime, they will naturally protect their sovereignty and it is likely that a maximum flexibility will be retained.

It is unquestionable that the internalization of specific reservations rules within treaties would highly simplify the system, especially with regard to human rights treaties. As some have predicted, ‘the inclusion of rules in the treaty text eliminates uncertainty and possible controversy in dealing with reservations. Internal reservations provisions optimally should become a widespread practice in the future. The increased awareness of the uncertainties in reservations law and of the wide variety of rules in existence counsels such a change.”\textsuperscript{315} Nevertheless, the change

\footnotesize{
\textsuperscript{311} See id.
\textsuperscript{312} On this issue, see Antonio Cassese, \textit{A New Reservation Clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)}, in \textsc{Recueil d’Études de Droit International en Hommage à Paul Guggenheim}, 266 (I.U.H.E.I., 1968).
\textsuperscript{313} See Hylton, \textit{supra} note 40, at 446-447; Riddle, \textit{supra} note 32, at 636.
\textsuperscript{314} ‘The two-third rule […] creates pseudo-objectivity, as all States parties to the Convention decide themselves about the compatibility of reservations and the final determination is mere arithmetic,” Tyagi, \textit{supra} note 14, at 222.
\textsuperscript{315} Logan Piper, \textit{supra} note 21, at 319.
}
attended never occurred, and most treaties still rely on the reservation regime of the Vienna Convention. Indeed, the reservations clauses are always terribly delicate to negotiate. Instituting a comprehensive treaty regime, which would also internally regulate the use of reservations would impair states’ sovereignty to a greater extent. Therefore, it is not surprising that the internalization of reservations rules is silently rejected by most states, which jealously try to maintain the lex generalis and an ambiguous flexible system that is clearly favorable to them. Thus, if the Vienna Convention system was not so favorable to states, they might have a greater incentive to be more active in the negotiation of reservations clauses within the context of each treaty. However, there is a possibility to influence the behavior of states through the intermediary of an independent actor, which would act as an objective arbiter, and ensure the revival of the object and purpose test.

B. The necessity of an independent adjudication.

1. Which independent arbiter?

The conclusion resulting from the preceding remarks emphasizes that the system cannot and should not rely on states to ensure an objective determination of the validity of reservations, and safeguard the integrity of human rights treaties. However, it is idealistic to think that states would just remain passive in the process of reviewing the validity of reservations, and gently obey to whatever decision a certain arbiter would have made. Reservations remain a fundamental instrument of

\footnote{The preceding citation was formulated in 1985.}
sovereignty, and it is unquestionable that states will use all possible means to ensure that they continue to be so. Changing the current system of reservations would require the consent of states, explicitly or implicitly. There is no doubt that the quest for more objectivity within the law of reservations will demand sensitivity to political questions, and a great amount of diplomatic sense when dealing with states’ privileges.

In sum, the perfect candidate to play the role of the independent decision maker should combine legal expertise to face the technicality of reservations law; the ability to take into account political factors and to control the political consequences of its decisions to a certain extent; and finally the capacity to act in total objectivity while maintaining a constructive dialogue with states. Various possibilities can be considered. Other elements should also be taken into account. Who should designate the independent authority? Under which procedure? Should the arbiter be an individual or an entity? Should it be of judicial or political nature?

Various solutions have been offered. However, it seems that only one could satisfy those requirements. Unfortunately the appropriate solution seems to amount to a revolution in the world of international law. But it will be argued that this revolution is natural, and would be consistent with the evolution of the international society in the 21st century.

317 See Tyagi, supra note 14, at 255.
i. The middle-man option.

It has been claimed that the improvement of reservation rules could also lie in the appointment of the depository as a general default decision-maker.\(^{318}\) It is argued that this solution would permit a rationalization of the reservations system by creating an objective mechanism, detached from the control of states’ parties, for the application of the compatibility test. Moreover, due to its central place within the treaty system, the depository would be the most convenient entity to perform the task of determining the compatibility of a reservation. Indeed, the relevance and efficiency of the compatibility test would be maximized considering that the depository has knowledge of all the reservations formulated, and has a neutral position: the depository plays the role of the middle-man in the current treaty regime. The depository already has the power to ask information and require explanations on the ratifying instruments it receives;\(^ {319}\) expanding these powers seems pragmatic and efficient.\(^ {320}\) Thus, by enlarging the role of the depository to the control of reservations’ validity, one guarantee the objectivity of the mechanism of reservations’ compatibility test.

Nevertheless, ‘like other reform proposals, [this idea] is too ambitious and has no chance of adoption.’\(^ {321}\) Indeed, the question of the compatibility of a reservation with the object and purpose of the treaty is eminently a legal question subject to judicial adjudication, which largely goes beyond the traditional functions of the treaty

\(^{318}\) See ILC Report II, supra note 108, at para. 105; Hylton, supra note 40, at 449; Imbert, supra note 299, at 621; Redgwell, supra note 207, at 410.


\(^{320}\) See Imbert, supra note 299, at 621.

\(^{321}\) Tyagi, supra note 14, at 243.
depository, which does not include judicial tasks.\textsuperscript{322} A reform of the rules of the Vienna Convention\textsuperscript{323} or of the specific dispositions of each treaty dealing with the functions of the depository could change the situation, but it seems inappropriate to afford such an important decision-making power to the depository. Moreover, there is a significant probability that this option would complicate the overall system and endanger the traditional role of the depository. Thus, the middle-man option appears to be half of a solution. If there is to be an independent decision-maker, this latter ought to be armed to define the compatibility of reservations in an efficient and suitable fashion.

\textbf{ii. National Courts.}

Professor Tyagi has recently suggested that the potential role of national courts in the reservations debate has been largely underestimated.\textsuperscript{324} He argues that the importance of international human rights treaties in national litigations is increasing and that consequently, the question of reservations is progressively more likely to arise in domestic courts. He notes that only very few national cases has been dealing with the issue of reservations to human rights treaties, because courts are generally reluctant to question the legality of their government consent to an

\textsuperscript{322} Referring to the U.N. Secretary General and the Convention on the Elimination of Discriminations against Women [hereinafter CEDAW], Professor Tyagi explains that the depository ‘has the resources to perform the task of examining the compatibility but has no legal mandate to declare a reservation incompatible.’ He notes that ‘by resolution 598 (VI) of 12 January 1952, which approved the ICJ advisory opinion in the \textit{Reservations to the Genocide Convention case}, the U.N. General Assembly directed the Secretary-General (a) to continue to act as depository of documents containing reservations or objections, without passing any judgment upon the legal effect of such documents, and (b) to communicate the text of such documents to all States concerned, leaving it to each State to draw legal consequences from such communications’; Tyagi, \textit{supra} note 14, at 230.

\textsuperscript{323} Vienna Convention, \textit{supra} note 11, art. 77.

\textsuperscript{324} \textit{See generally}, Tyagi, \textit{supra} note 14, at 236-239.
international agreement. He explains, however, that the possibility of such a review does exists and illustrate his argument with few concrete examples.\footnote{See id.}{325}

It is true that national courts constitute a very adequate forum to review the ‘hexus [of reservations] with domestic conditions.’\footnote{Id. at 239.}{326} However, the question of the compatibility with the object and purpose of the treaty might be impossible to assess in the context of national procedures. First, very few judicial organs have the benefit of a sufficient independence to officially question the appropriateness of the executive’s, or legislature’s, vision of what kind of national particularity justifies a reservation. Secondly, not only the understanding of the treaty might be too limited, but also, national courts’ interpretation of the treaty’ object might differ from a country to another, and the probability of a fragmented ‘object and purpose’ criteria remain.\footnote{See id.}{327}

Professor Tyagi finally concludes that the national courts might be a useful complement to the international system.\footnote{See id.}{328} However, considering the precedents remarks, significant doubts appears as to whether this additional mechanism would actually be of positive influence on the international mechanism.

\textbf{iii. The International Court of Justice.}

The International Court of Justice is the highest judicial authority within the United Nations system.\footnote{See id.}{329} The world Court consequently enjoys a certain prestige and a strong moral authority. It has been argued that it could be the most appropriate
entity to endorse the role of the independent decision maker with respect to the validity of reservations and their compatibility to human rights treaties.\(^{330}\)

First, it is unquestionable that the ICJ possesses the appropriate expertise to deal with the technicality of the legal questions related to the validity of reservations.\(^{331}\) Then, by definition, the Court enjoys total independence from states,\(^{332}\) and would certainly be able to decide objectively on the legality of reservations.

Not only the ICJ holds material competence to be such a decision maker, but it also has jurisdiction to be so. Universal human rights treaties are the fruits of the United Nations mandate. Under the United Nations Charter,\(^{333}\) the General Assembly, the Security Council, and under certain circumstances,\(^{334}\) other bodies or agencies, have the power to request an advisory opinion to the world court on any relevant legal matter. The question of the validity of reservations to human rights treaties is eminently a legal matter. Considering the broad scope of application of the question, ‘it would be a particularly appropriate subject for an ICJ advisory opinion of general applicability.’\(^{335}\) This is illustrated by the Genocide Opinion of 1951. The General Assembly automatically turned back to the ICJ when it faced uncertainty regarding

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331 The judges of the ICJ ‘possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.” I.C.J. Statute, 26 June 1945, U.S.T.S. 993, art. 2.
332 “The Court shall be composed of a body of independent judges, elected regardless of their nationality…”; id.
333 U.N. CHARTER, art. 96.
334 “Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinion of the Court on legal questions arising within the scope of their activities.” U.N. CHARTER, art. 96 para. 2.
the legal effects of the reservations to the Genocide Convention. After all, the most authoritative rule in the law of reservations remains the Reservations Opinion of the ICJ. Since the general competence of the world court is not questionable, neither on a legal basis, nor on functional grounds, it would seem reasonable to consider the ICJ as a noteworthy candidate for the position of the permanent independent adjudicator in charge with the enforcement of the compatibility test.

However, practically, this solution is quite problematic. If advisory opinions of the ICJ enjoy a remarkable moral value within the academic world, it is far from being the case with respect to states. On one hand, the requesting U.N. body would certainly obey to the opinion of the Court and consider the validity of the concerned reservations in conformity with the view of the Court. On the other hand, states have generally a relative respect for the decisions of the Court.\textsuperscript{336} As an example, article 29 of the Convention on the Elimination of All forms of Discriminations Against Women has establish a possibility of an ICJ decision in case of dispute over the legality of reservations to the Convention. In practice, an infinitesimal number of states has accepted this possibility.\textsuperscript{337} Additionally, states would not be parties to the advisory opinion, and therefore, would not be legally bound by it.\textsuperscript{338} Although they would have to face criticisms due to the moral authority of the Court’s opinions, they can still maintain their positions, and with the process of time, the authority of the opinion might decrease, while the invalid reservations would remain.

\textsuperscript{335} Baylis, \textit{supra} note 58, at 317.
\textsuperscript{336} See \textit{id}.
\textsuperscript{337} See Cohen-Jonathan, \textit{supra} note 299, at 280.
\textsuperscript{338} See \textit{id}.
Furthermore, the process of the advisory opinion is relatively long. It requires lengthy researches and preparatory investigations from the Court. Relying on the procedure of the advisory opinion to review the validity of questionable reservations to every human rights treaty could lead to perpetual extensive proceedings leading to uncertain results. Indeed, while the qualifications and abilities of the judges to produce the wisest opinions cannot be questioned, the Court still somehow detached from the context of the treaty to which the reservations relate. We have seen that the validity of reservations is a very sensitive and complex issue, which requires a profound understanding of the treaty concerned, its nature and context. This distance between the ICJ and the various specificities of particular human rights regimes lead to some doubts about the ICJ’s advisory opinion option.

Moreover, the ICJ is a pure judicial body. Due to the intrinsic nature of international law, it has, however, dealt with questions closely related to international relations theories and political issues. But the world court has always been somehow uncomfortable with politically rooted legal questions. Now we have seen that the legality of reservations is profoundly rooted in sensitive political considerations. Therefore, one can question the ability of the Court to demonstrate sufficient political sensitivity and diplomatic skills to review the legality of reservations to human rights treaties in a constructive manner. In a way, the ICJ suffers from its judicial nature to handle efficiently the task of evaluating the compatibility of reservations to the object and purpose of human rights treaties.

339 Reservations generally originate from ground realities, and a fair approach towards reservations
2. The perfect candidate: treaty bodies.

If the highest judicial authority in the world appears in some way unable to deal efficiently with the question of the reservations to human rights treaties, one could wonder who will be. In fact if the debate over reservations remain controversial after so many years, it is because it is disputed between the traditional actors of the international scene. However, we have seen that the human rights movement possesses a dynamic of its own, which differs from the forces driving general international law. The various monitoring bodies that human rights treaties have created have played one of the most influential roles in the development of human rights law. Therefore, it seems logical that these same organs have a significant role to play in the continuing challenge posed by reservations to human rights conventions. We will see that these organs have not only the appropriate competence to deal with the issue, but also a natural jurisdiction to do so.

The traditional problem characterizing human rights conventions and the rights that they create is the lack of enforcement mechanisms. However, many human rights treaties are not completely toothless. The creation of the European Court of Human Rights (hereinafter ECHR) was the first example of an efficient enforcement mechanism. However, the example was of limited influence. Indeed, the ECHR was an exceptional judicial body, the success of which can only be understood with regards to the particularities of the European regional legal order. The dynamism of the Council of Europe, under the auspices of which the Court was created, rely on a necessarily requires an in-depth understanding of those realities.” Tyagi, supra note 14, at 257.
strong solidarity between European nations, and their common dedication to prevent the atrocities of dictatorial regimes that they all faced during the second world conflict.

Nevertheless, the ECHR constituted the model for the creation of other organs charged with the review of states’ compliance with their human rights obligations. In other regional areas, the Inter-American Court of Human Rights and the African Commission on Human Rights were strongly inspired by their European predecessor. These bodies have been relatively successful in increasing states’ compliances with their obligations to respect human rights, but their success is largely due to the regional context.

At the universal level, the creation of a similar judicial organ entitled to enforce human rights conventions has been more difficult. Since March 2003 however, the International Criminal Court (hereinafter ICC) is activated and will be charged of the prosecution and punishment of individuals responsible for the worst human rights violations. However, the ICC has no jurisdiction over human rights complaints against states. This does not mean that states are free from international scrutiny.

i. A special competence.

Although the implementation of international human rights conventions relies primarily on national enforcement, the system is complemented by international measures, which are essential to the effective observance of human rights.340 These

implementation schemes vary in their intensity and functions. Not every human rights convention benefit of these enforcement mechanisms. However, all the main instruments are accompanied by some kind of implementation procedures at the international level.

The Convention on the Elimination of Racial Discrimination has established the Committee on the Elimination of Racial Discrimination and an Ad Hoc Conciliation Commission, the Covenant on Civil and Political Rights has created the Human Rights Committee, the Convention on the Elimination of All Forms of Discrimination Against Women has set up a Committee on the Elimination of Discrimination against Women, the Convention Against Torture instituted the Committee against Torture, the Convention on the Rights of the Child has also created its Committee, and so did the Covenant on Economic, Social and Cultural Rights.

Each of these treaty bodies has a specific mandate, adapted to their political context and subject matter. Although their competence and duties varies from a

342 See CERD, supra note 308, art. 8.
343 See ICCPR, supra note, art. 28.
345 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, opened for signature Dec.10, 1984, 1465 U.N.T.S. 85., art. 17 [hereinafter CAT].
treaty to another, some common features characterize them.\textsuperscript{349} Their general mission is to monitor states parties’ compliance with the treaty on the basis of a mandatory reporting procedure. However, states’ compliance with the procedural requirements of the reporting process is largely unsatisfactory,\textsuperscript{350} and the efficiency of the monitoring system has been dramatically impaired by incomplete, inaccurate or overdue reports. The enforcement scheme is sometimes reinforced by the existence of procedures for individual complaints of treaty violations.\textsuperscript{351} However, due to their optional nature and the small rate of states’ adherence to these individual petition procedures and the coexistence of efficient regional mechanisms, their complementary value has been relatively limited.\textsuperscript{352}

These treaty bodies have a very peculiar nature, quite unique in the area of international law. First, they are created by the states parties to their constitutive treaties and are not, therefore, organs of the United Nations strictly speaking.\textsuperscript{353} Thus, although materially and financially dependent on the United Nations,\textsuperscript{354} they have been able to develop a certain autonomy of action.\textsuperscript{355} This energy has been amplified by the particular status of the experts composing these treaty bodies.

What is striking at the first glance is that although these committees have to deal with the implementation of rules of international law, they are not strictly

\begin{footnotesize}
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\item \textsuperscript{349} See id.
\item \textsuperscript{350} See Bayefski, \textit{supra} note 341, at 232-246.
\item \textsuperscript{351} See Optional Protocol to the Covenant on Civil and Political Rights; CERD, \textit{supra} note 308, art. 14; CAT, \textit{supra} note 354, art. 22.
\item \textsuperscript{352} See Bayefski, \textit{supra} note 341, at 327.
\item \textsuperscript{353} See MCGOLDRICK, \textit{supra} note 340, at 52.
\item \textsuperscript{354} The functioning of the committees, the financial compensation of the experts and the administrative assistance is entirely supported by the United Nations. Additionally, the meetings of the committees take place in the United Nations Headquarters in New York or Geneva. See id., at 53.
\item \textsuperscript{355} For instance, they have adopted their own rules of procedures. See id.
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composed of lawyers. Indeed, the members of these bodies are ‘experts.’ These persons are all of very elevated professional quality and are all highly qualified. Although many of them will, in practice, have substantial legal experience, the requirements for the qualifications to the functions of expert are primarily high moral qualities and extended competence in the field of human rights. This diversity in the composition of treaty bodies has allowed to broaden the expertise of these organs in a useful manner. Political scientists, journalists, sociologists or economists can bring pertinent eclectic views to the treaty bodies and widen their perspectives. Thus, treaty bodies benefit of the expertise of specialists from other human sciences, which improve the understanding of human rights in practice. This ability of the treaty bodies to adopt a non-strictly legal approach would be especially valuable with respect to the analysis of the validity of reservations, which is a legal question closely related to political and other extra-legal elements.

The highly precious expertise of the members of these treaty bodies is strengthened by several other qualities that render them particularly competent to deal with reservations issues. As we have seen, most reservations are based on cultural, religious or domestic considerations. Therefore, the fact that special consideration is given to ‘equitable geographical distribution’ and the ‘representation of the different

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356 For instance, art. 28(2) of the CCPR emphasize that in the composition of the Committee, ‘consideration shall be given to the usefulness of participation of some persons having legal experience.’ In practice, ‘the reference to legal expertise in article 28 has perhaps been too literally applied. Members of the HRC to date have all been legal experts of some kind.” See id. at 45. See also CAT, supra note 345, art. 17(1).
357 See CERD, supra note 308, art. 8(1); CCPR, supra note 253, art. 28(2); CEDAW, supra note 344, art. 17(1); CAT, supra note 345, art. 17(1); CRC, supra note 346, art. 43(2).
forms of civilization and of the principal legal systems”\textsuperscript{358} in the election of the members of these organs is of paramount importance. However, this proportional representation of national and cultural identities is not synonymous of national obedience. The independence of the treaty bodies is protected by the assurance that the experts serve in their “personal capacity.” Although nominated and elected by the states parties, the experts are personally accountable and are acting in independence from their respective governments.

Nevertheless, this independence is somehow relative. It is an institutional or functional independence, but not an individual independence. When acting in their capacity of experts, the members of the treaty bodies enjoy total independence; they have no mandate from their government and do not represent them;\textsuperscript{359} they act as members of an independent organ. But, the experts’ mission within these treaty bodies is only part-time. And “although members [of these bodies] receive emoluments from the United Nations rather than their respective national governments, the level of emoluments has been very low. The effect in practice has been that membership […] has been limited to persons receiving a regular salary, in academic or governments posts.”\textsuperscript{360} Thus, the functional independence of the experts is attenuated by the lack of personal independence. “However, the continuous contact of members with high-level legal and political activity within their respective national systems brings critically

\textsuperscript{358} CERD, \textit{supra} note 308, art. 8(1); CCPR, \textit{supra} note 253, art. 28(2); CEDAW, \textit{supra} note 344, art. 17(1); CAT, \textit{supra} note 345, art. 17(1); CRC, \textit{supra} note 346, art. 43(2).

\textsuperscript{359} See THOMAS BUERGENTHAL, DINAH SHELTON & DAVID P. STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL, 49 (3rd ed., West Group, 2002).

\textsuperscript{360} MCGOLDRICK, \textit{supra} note 340, at 45.
important practical knowledge and expertise to the [Committee]'s considerations,“361 and is thus an important advantage.

The special status of treaty bodies members, their various national, cultural, religious and professional backgrounds combined with their singular independence are all advantages that give these special organs a very unique competence to deal with reservations issues. The problem remain that their authority to endorse this difficult mission lack legal basis.

ii. A natural jurisdiction.

The nature and functions of the human rights treaties bodies is rather vague.362 They can be described as organs of cooperation, conciliation, arbitration, litigation or supervision.363 They are not judicial in nature, but perform tasks that are similar to those of tribunals.364 There are also the “administrator”365 and the “executive organ”366 of the treaties that establish them. Their function consist fundamentally in the administration of the reporting system,367 the promotion, monitoring and supervision of states parties “with respect to improved human rights performances.”368 In sum, they can be described as the “parent organ” or the

361 Id.
362 “The best way to describe the functions and role of the Committee(s) has been a matter of controversy,” Torkel Opsahl, The Human Rights Committee, in THE UNITED NATIONS AND HUMAN RIGHTS, 369 (Philip Alston ed., 1992); “Clearly […], there are some differences within the HRC as to its nature and purposes,” MCGOLDRICK, supra note 340, at 54.
363 See Opsahl, supra note 362, at 369.
364 See MCGOLDRICK, supra note 340, at 54.
365 Baylis, supra note 58, at 277.
366 MCGOLDRICK, supra note 340, at 54.
367 See BUERGENTHAL, SHELTON & STEWART, supra note 359, at 49.
368 MCGOLDRICK, supra note 340, at 54.
“guardian(s)” of human rights conventions\(^{369}\) of which nature “includes elements of judicial, quasi-judicial, administrative, investigative, inquisitorial, supervisory and conciliatory functions.”\(^{370}\)

However, this description is quite optimistic. In practice, the power of the committees to promote the enforcement of human rights conventions is “sadly deficient.”\(^{371}\) The treaty bodies do not have the competence to perform binding adjudications or to declare a state in violation of the Conventions;\(^{372}\) they lack the legal authority to settle controversies. Therefore, the system of the treaty bodies cannot really be described as a direct enforcement mechanism.\(^{373}\)

Considering this lack of formal judicial power, there seem to be no legal basis to justify the power of these treaty bodies to review and decide on the legality of reservations to human rights treaties. Nowhere in the dispositions constituting these bodies and attributing them powers mention is made of any authority over the question of reservations. As we have seen, human rights treaties usually rely on the default system of the Vienna Convention to regulate the use of reservations.\(^{374}\) The absence of reservations rules does not imply that the treaty bodies were given the power to act on the question of reservations.\(^{375}\) Thus, the committees should not

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\(^{369}\) See id.

\(^{370}\) Id., at 55.


\(^{373}\) See Baylis, *supra* note 58, at 281.

\(^{374}\) See *supra* III.A.2.b.

\(^{375}\) See Baylis, *supra* note 58, at 296.
‘intervene in ‘situations’, however acute or frustrating,” unless the treaties expressly authorize them to do so.\textsuperscript{376}

Some have evocated the possibility that the power of the treaty bodies over the question of reservations would flow from article 20(3) of the Vienna Convention.\textsuperscript{377} This article provides international organizations the power to adjudicate the validity of reservations to their constitutive instruments. A very extensive reading of this provision could lead to consider the treaty bodies as international organizations, and the conventions establishing them as constitutive instruments. However, the treaty bodies are not international organizations, and the human rights conventions are not constitutive instruments.\textsuperscript{378} Although these organs enjoy some kind of independence from the United Nations,\textsuperscript{379} they have no separate legal identity. Human rights treaties do institute monitoring bodies, but their primary object is to create rights for individuals and obligations for states parties, not to be a constitutive charter of international organizations. They are not the equivalent of the United Nations Charter. Article 20(3) of the Vienna Convention has therefore no applicability whatsoever with respect to human rights treaty bodies to deal with the legality of reservations.

Nevertheless, other factors can justify the natural jurisdiction of these organs to adjudicate the validity of reservations. First, the vague and incomplete nature of the provisions establishing the treaty bodies has obliged them to demonstrate practical

\begin{footnotesize}
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\item\textsuperscript{376} See Opsahl, \textit{supra} note 362, at 369.
\item\textsuperscript{377} See Baylis, \textit{supra} note 58, at 296.
\item\textsuperscript{378} See id.
\item\textsuperscript{379} See \textit{supra} III.B.2.b.
\end{itemize}
\end{footnotesize}
sense and develop a certain creativity. The treaties concerned are important instruments constitutive of the International Bill of Rights and are very unlikely to be amended to ameliorate procedural aspects of the committees’ work. Therefore, facing practical needs, the treaty bodies, inspired by the leading role of the Human Rights Committee, had to espouse a dynamic interpretation of their powers to be able to perform their tasks in an efficient fashion. Thus, the committees have developed a comprehensive set of procedures that facilitates their work and reinforce their original powers. This active approach has not been limited to procedural matters. The committees did not limit their work to a passive review of states’ reports but have demonstrate a certain aggressiveness to enhance the limited potential of the reporting system. Considering the overall lack of enthusiasm of states for the reporting procedure, committees have used all kind of techniques to expand the inquisitorial nature of the system. States’ reports are deeply analyzed and explored, representatives are submitted to comprehensive interrogations, the accuracy and relevance of the information are strictly verified through a developed comparison process with other sources from intergovernmental organizations, United Nations agencies and NGO’s. This has allowed greater transparency and forced states to increase their attention to the quality and content of their reports. Although the committees do not have the power to condemn states for violations of the reporting process requirements, states are more and more likely to comply with the demands of the treaty bodies

380 See Opsahl, supra note 362, at 369.
381 See id.
382 For instance, they have asserted their rights to use non-governmental NGO’s information, decided to publicize its decisions, recommendations and comments and adopted strict guidelines for the format and content of states reports. See BUERGENTHAL, SHELTON & STEWART, supra note 359, at 51; Baylis, supra note 58, at 299.
simply to avoid the costs of a bad publicity and future harassment from the committees. Indeed, the publicity of the committees’ work is fundamental to the functioning of the process and the development of a real state accountability. Their conclusions and recommendations are published in official documents and press releases both at the national and international level and communicated to NGO’s and other human rights actors in the civil society; committee members participate to academic conferences and official meetings, write articles on the work of the committees and the problems they face.\footnote{See McGoldrick, \emph{supra} note 340, at 49.} This publicity around the work of the treaty bodies and states’ cooperation within the monitoring process push states to improve the quality of their participation to the procedure.

Treaty organs have also manifested their boldness with respect to reservations.\footnote{See infra, III.C.1.b.} The energetic review of states’ compliance has included a continuous control of reservations justifications and appropriateness.\footnote{See Baylis, \emph{supra} note 58, at 299.} ‘In the course of consideration of states’ reports, the committee(s) enquire about reservations and request states to review, reduce and withdraw their reservations.’\footnote{Tyagi, \emph{supra} note 14, at 221.} The process does not amount to an adjudicative mechanism, but rather constitutes an interactive process based on a constructive dialogue with states. It nevertheless provides treaty bodies a functional argument to evaluate reservations.\footnote{See Baylis, \emph{supra} note 58, at 299.} Indeed, if the role of the committees is the monitoring of states’ compliance with their obligations, they need to know to
what is the extent of the party’s obligations under the treaty.\textsuperscript{389} The scope of their obligations is shaped by reservations. Therefore, it seems natural and logical that treaty bodies implicitly possess the authority to review reservations.\textsuperscript{390} Indeed, ‘if an instrument creates a treaty body whose mission it is to study and comment upon ‘the measures the states parties have adopted which give effect to the rights recognized herein and on the progress made in the enjoyments of those rights,’ then the treaty body must inevitably examine just what norms actually bind the state party. To do this, it must pronounce itself on the validity of reservations.’\textsuperscript{391} The Vienna Convention itself seems to support this conclusion of ‘common-sense.’\textsuperscript{392} Indeed, the rules of treaty interpretation requires to take into account ‘any instrument which was made by one or more parties in connection with the conclusion of the treaty.’\textsuperscript{393} Consequently, in their interpretation of the treaties, the monitoring organs are legally bound to consider reservations.\textsuperscript{394}

States have implicitly accepted the development of these implied powers by the treaty bodies. Those who respect their obligation to report faithfully have complied with their increased procedural duties or failed to object; and those who do not perform their obligations have obviously little legitimacy to complain. The constructive and forward-looking nature of the evaluation of reservations has also naturally conducted states to participate to the dialogue with the committees. By tacitly acquiescing to the transformation of the treaty bodies’ role and submitting to

\textsuperscript{389} See id. at 314-315.
\textsuperscript{390} See General Comment 24, supra note 109, at 18.
\textsuperscript{391} Schabas, supra note 254, at 315.
\textsuperscript{392} Baylis, supra note 58, at 314.
\textsuperscript{393} Vienna Convention, supra note 11, art. 31.
the dynamic interpretation of their implied powers, states have legitimized the committees’ authority to deal with reservations. The submission of states to the treaty bodies’ practice of evaluating reservations has created a sort of custom that has acquired legal value.

Consequently, the jurisdiction of the treaty organs to deal with reservations issues is not only natural or functional, but also has a legal basis. Moreover, the nature of the monitoring procedures developed by treaty bodies seems to be particularly adapted to the question of the compatibility of reservations to human rights treaties. Because they operate on the basis of a transparent, public, continuous, evolutive, inter-active and forward-looking system, treaty bodies are particularly well armed to deal with the complexity of reservations issues. This conclusion is supported by various precedents.

C. The practice test.

1. The precedents.

The practice of the various human rights treaty organs demonstrates the delicate nature of the reservations issues. In general, treaty bodies have demonstrated

394 See Baylis, supra note 58, at 314.
395 See id., at 299.
396 See Vienna Convention, supra note 11, art. 31(3).
397 Analyzing the Human Rights Committee practice, Elena Baylis notices that “only the Committee knows the relationship of each state party to the covenant and understands how the Covenant is being
a relative prudence in dealing with the issue of reservations.\textsuperscript{398} However, the inefficiency of the Vienna Convention regime being increasingly apparent with the time, they have progressively adopted a more assertive position and developed a direct or indirect jurisprudence that demonstrate their ability to face the challenge of the validity of reservations. The different nature of the various legal systems at the international level have lead to diverse tactics in the development of competences over reservations. However, the general trend seems to confirm that treaty bodies are particularly adapted forums for the question of the legality of reservations to human rights conventions.

i. Regional Organs.

The first regional organ to have asserted its competence over the validity of reservations was the (former)\textsuperscript{399} European Commission of Human Rights (hereinafter the Commission). In the Temeltasch case,\textsuperscript{400} the Commission asserted for the first time its competence to determine the validity of a Swiss declaration to the European Convention on Human Rights.\textsuperscript{401} The case concerned a Dutch citizen of Turkish origins who has been arrested for drug possession and later released after acquittal by the Swiss court. Mr. Temeltasch was however requested to pay the cost of the remuneration of the interpreter who assisted him during the trial, and he argued that this was in contradiction with article 6 §3 of the European Convention of Human Rights implemented. Only the Committee could provide continuous and consistent oversight of reservations,” Baylis, *supra* note 58, at 314. 

\textsuperscript{398} See Cohen-Jonathan, *supra* note, at 286.


\textsuperscript{400} Request No. 9116/80, Alparslan Temeltasch v. Switzerland, Commission Report, May 5, 1982 [hereinafter Temeltasch case].

\textsuperscript{401} See generally, Imbert, *supra* note 299.
Rights. The Swiss government argued that it had joined an interpretative declaration of article 6 to its ratification of the convention, and that it was exonerated from the obligation to provide free interpreters to criminal defendants.

The Commission firstly stated that the attacked declaration constituted a reservation in the meaning of the Convention, and went on in asserting its “absolute” jurisdiction to interpret and review the validity of reservations to the Convention, denying any legal value to the acceptation/objection game. The Commission based its reasoning on the particular nature of the European Convention, in which the objective obligations created could not be controlled by reciprocity. The Commission derived its competence from the necessity of a collective mechanism to ensure the protection of the objective obligations created by the Convention.

The decision of the Commission was very criticized for confusing its ability to construe reservations with the power to control their legality. It was also attacked for disrespecting the intention of the drafters to rely on the states system, and endangering the system of the Convention by exercising an unjustifiable *a posteriori* review of reservations. However weak and fragile the legal reasoning of the Commission was, it nevertheless created a strong precedent and demonstrated that treaty organs were able to emancipate from their original status. The strength of this precedent was illustrated 6 years later, when the European Court of Human Rights itself embraced the controversial issue of reservations and followed the path opened

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402 See Temeltasch case, *supra* note 400, at para. 73.
403 Imbert, *supra* note 299, at 609.
405 See id. at paras. 63-65.
by the Commission. The Belilos Case\textsuperscript{408} has been described as one of the most important decision of the Court\textsuperscript{409} because the unanimous judgment constituted the first invalidation of a reservation by an international court.\textsuperscript{410}

Mrs. Belilos had been charged with participation to an illegal demonstration and condemned to pay a fine by an administrative tribunal. She argued that her right to be judged by a judicial tribunal, according to article 6 of the European Convention, had been violated. The Swiss government objected to her complaint arguing that it entered a valid reservation to article 6, releasing it from the obligation to provide more than an administrative adjudication to certain criminal accusations. In its decision, the Court affirmed its competence to review the legality of the Swiss reservation, and declared it invalid.\textsuperscript{411} The Court considered its authority to control the validity of reservations as obvious and undisputable, and did not explain it extensively.\textsuperscript{412} It simply rejected the application of the general reservations system of the Vienna Convention,\textsuperscript{413} and relied on the same justification that the Commission had used in the Temeltasch case. Charged with the enforcement of the Convention,\textsuperscript{414} ultimate guardian of this instrument of “European public order,”\textsuperscript{415} the Court has the

\textsuperscript{407} See id., at 613-617.
\textsuperscript{409} See Cohen Jonathan, supra note 223, at 274.
\textsuperscript{410} See id. \textit{See also}, Bourguignon, supra note 408, at 347.
\textsuperscript{411} Belilos case, supra note 498, at 24.
\textsuperscript{412} See Bourguignon, supra note 408, at 367. In fact, the Swiss government itself did not dispute the authority of the Court, it simply invited it to consider the abstention to object of the other parties on its reservation, see Cohen-Jonathan, supra note 223, at 293.
\textsuperscript{413} Belilos case, at para. 47.
\textsuperscript{414} ECHR, supra note 298, art. 19.
Kompetenz-Kompetenz power to construe its own jurisdiction\textsuperscript{416} and to interpret and apply all the dispositions of the Convention to ensure an integral and efficient application of the Convention.\textsuperscript{417} As illustrated in the Loizidou case,\textsuperscript{418} the jurisprudence of the Court on the question of reservations is now completely stable. Once again, the Court used its competence over reservations, and invalidated Turkey’s reservation on the territorial application of the Commission’s jurisdiction. According to what has then became “consistent practice,” Turkey should have been aware that the Court would invalidate reservations incompatible with the object and purpose of the Convention.\textsuperscript{419}

Although the competence of the European organs to review the validity of reservations seems totally unquestionable, it seems necessary to view this conclusion in perspective. The European system of the protection of human rights is based on a very strong regional historical solidarity,\textsuperscript{420} and operates as a constitutional regime designed to maintain a collective protection of an ordre public européen. Therefore, the European Convention system is original enough to operate on an exceptional and unique regime.\textsuperscript{421} Moreover, the judicial nature and the prestige of the oldest organ\textsuperscript{422} for the protection of human rights at the supranational level largely explained the

\textsuperscript{416} ECHR, supra note 298, art. 49.
\textsuperscript{417} ECHR, supra note 298, art. 45.
\textsuperscript{419} Loizidou case, at para.65.
\textsuperscript{420} The Preamble of the European Convention states that its aim is to achieve “greater unity” between its members, “which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law.”
\textsuperscript{421} Le système de Strasbourg est assez original pour souffrir des solutions particulières,” Cohen-Jonathan, supra note 223, at 295. “The European Convention, beyond any doubt, is unique among multilateral treaties, […] it has become more than a treaty and has developed into a quasi-constitutional relationship,” Bourguignon, supra note 498, at 386.
\textsuperscript{422} What Susan Marks called the “age factor,” Marks, supra note 408, at 318.
particular power of the Court, and can also justify an exceptional power to review the legality of reservations.

However, the same kind of reasoning and powers has been claimed in another regional system by the Inter-American Court of Human Rights. In its Advisory Opinion on the Effect of Reservations, the Inter-American Court also rejected the applicability of the acceptance/objection game on human rights treaties reservations regime, stating that reciprocity was inadapted to the objective nature of states’ obligations. Thus, although the Inter-American Convention explicitly refers to the Vienna Convention reservation regime, the opinion of the Inter-American Court implied that the enforcement mechanism could also apply to the legality of reservations.

Consequently, various precedents at the regional level supports the idea that treaty bodies are particularly well suited to deal with the legality of reservations and possess an inherent authority to do so. If the particularity of the European system limits its comparability and extension at the international level, the existence of a similar approach at the Inter-American level, which do not have the same integrative nature, supports the possibility to see the European system as a model for a developing international *ordre public*. This latter would be based on the International Bill of Rights and guarded by human rights treaty bodies, which would have the

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423 See the Effect of Reservations Opinion. See also, generally, Buergenthal, *supra* note 189.
424 See the Effect of Reservations Opinion, at paras. 29-33.
425 See Inter-American Convention, art. 75.
power to decide on the validity of reservations.\textsuperscript{427} No matter how idealistic this position might seems at the moment, it has been endorsed by the United Nations treaty organs which struggle for the development of integral human rights and the disappearance of illegal reservations.

\textit{ii. United Nations treaty bodies.}\textsuperscript{428}

The procedural differences characterizing the work of the various United Nations human rights committees have had substantial consequences on their respective practice regarding reservations issues. However, their natural dynamism and the passage of time have brought them to adopt a common attitude and a similar audacity.

The first committee to face the question of reservation was the CERD Committee.\textsuperscript{429} Facing no restrictive precedents, the CERD Committee started a very aggressive reservation jurisprudence by pronouncing a reservation incompatible with the CERD. However, the potential consequences of this first decision was rapidly blown away by a Memorandum of the United Nations Secretariat denying any legal effect to the decision,\textsuperscript{430} which considerably “restrained the CERD Committee’s role

\textsuperscript{427} Analyzing the Belilos case, Professor Bourguignon concludes that “the Court’s judgment in Belilos […] strongly bolsters the more contemporary position of those who believes that States, in submitting to multilateral treaties, are joining in a multinational quest for the goal or purpose embodied in the treaty, who believe that a world community can be created based on the shared norms spelled out in multilateral treaties, and who look primarily to the object and purpose of a treaty to determine the validity of a State’s reservation.” Bourguignon, \textit{supra} note 408, at 386.

\textsuperscript{428} See generally, LINZAAD, \textit{supra} note 22.

\textsuperscript{429} See Tyagi, \textit{supra} note 14, at 220. See also, generally, Antonio Cassese, \textit{supra} note 312.

in reservations matters." 431 Indeed, the CERD specifically provides that the compatibility of reservations is to be determined by the two-third majority of the parties to the treaty. 432 Although the CERD Committee’s enthusiasm over reservations issues was somehow curbed by this intervention, it remained the first U.N. treaty body to assert its authority and to declare a reservation incompatible with the object and purpose of a treaty. 433

The reservations to CEDAW are certainly the most controversial, that is why the CEDAW Committee has been so “uncomfortable” with them. 434 Additionally, CEDAW contains a dispute settlement mechanism 435 that, according to the United Nations Legal Adviser, 436 clearly deprived the Committee of any power over disputed reservations. However, the CEDAW Committee has demonstrated a progressive emancipation and confidence that conducted it to the adoption of a General Comment on Reservations 437 which significantly contributed to ‘the further development of law relating to reservations.’ 438 Since then, the CEDAW Committee followed the practice of other treaty bodies by continuously inviting states to review and progressively withdraw their invalid reservations while showing greater intransigence over reservations matters in general. 439

431 Tyagi, supra note 14, at 223.
432 See CERD, supra note 308, art. 20(3).
433 See Tyagi, supra note 14, at 223.
434 See id.
435 See CEDAW, supra note 344, art. 29.
438 Tyagi, supra note 14, at 231.
439 See LJINZAAD, supra note 22, at 366-369.
The Committee on the Rights of the Child has also developed a constructive monitoring scheme of reservations and considers that it bears “a decisive role to play in the assessment of the validity and impact of reservations made by states parties and will continue to systematically raise this issue with state parties.”

The Committee Against Torture has had a relatively limited role in the development of reservations law. However, this can be explained by the fact that ‘reservations have only been a marginal problem” to the Convention Against Torture ‘which is an instrument codifying a rule of *ius cogens,*’ to which reservations are impossible. States have objected to the most controversial reservations, which have consecutively been withdrawn, leaving very little work to the Committee on reservations matters. However, ‘there is a slow but steady improvement in the Committee’s procedures, which may eventually reflect the body’s competence to deal with reservations matters.”

The Committee on Economic, Social and Cultural Rights had not real opportunity to deal with reservations, which are part of the CESCR progressive system of implementation. Nevertheless, the CESCR Committee recommended that reservations should be gradually withdrawn and congratulated states that did not attach reservations to the CESCR.

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441 LIINZAAD, *supra* note 22, at 391.
444 Tyagi, *supra* note 14, at 234.
445 See *id.*, at 235.
The most relevant practice which illustrate that treaty bodies have the appropriate competence and a functional jurisdiction to deal with reservations issues is that of the Human Rights Committee (hereinafter HRC) established by the ICCPR. The HRC has been the leader of the U.N. human rights treaty bodies’ family in many different respects, but especially with respect to reservations issues. The dynamism and boldness of the HRC certainly result from its nature “quasi-contentieuse” and from the fact that it is usually compared as ‘the universalist counterpart to regional organs.’

Considering that its original role consisted more in a fact-finding or monitoring mission that in a judiciary function, the Committee was first reluctant to address the issue of reservations. It had to develop a gradual and progressive strategy to expand its explicit authority and obtain the implied powers it needed. The Committee has used the periodic reports procedure to increasingly inquire about reservations, and built a constructive dialogue with states, to press them to review and withdraw their reservations. The HRC has usually been less intrusive towards transitional reservations than towards permanent ones but had, in general, limited its action to a positive exchange with states.

The creativity of the HRC also transformed the practice of general comments. Originally, general comments were quite indefinite in nature: they were to be issued as the Committee “may consider appropriate.” The HRC adopted guidelines stating that they should promote cooperation between states parties, suggest improvement in

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446 Cohen-Jonathan, supra note 223, at 285.
447 Id. at 223.
448 See id., at 285.
449 See Baylis, supra note 58, at 311.
450 See id.
reporting procedures and implementation mechanisms and invite states to ameliorate their engagement for the protection of human rights.\textsuperscript{453} Over the time however, general comments became more than a simple exchange of views with states. The HRC increasingly used them to define the scope of the Covenant, and extend its mandate.\textsuperscript{454} The combination of a more and more inquisitive reporting process dealing with reservations and the transformation of general comments into policy tools drove the HRC to a revolutionary decision, which has deeply transformed the debate over reservations to human rights treaties. Although the production of a general comment on reservations from the HRC was anticipated,\textsuperscript{455} its effects remained quite sensational.

In its General Comment 24, the Human Rights Committee “faced with a devastating array of reservations and declarations,” expressed its frustration with the current law of reservations,\textsuperscript{456} controversially affirmed its sole competence to determine the legality of reservations to the ICCPR and attempted to create a new reservation regime for human rights treaties. According to the general comment, the validity of reservations is to be decided by the Committee\textsuperscript{457} on the basis of their compatibility with the object and purpose of the treaty.\textsuperscript{458} Incompatible reservations will be considered void and severed from the reserving party’s act of adherence to the

\begin{footnotesize}
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\item See Tyagi, \textit{supra} note 14, at 224.
\item ICCPR, \textit{supra} note 253, art. 40(3).
\item See McGoldrick, \textit{supra} note 340, at 92.
\item See Baylis, \textit{supra} note 58, at 384-385.
\item See Lijnzaad, \textit{supra} note 22, at 297; Cohen-Jonathan, \textit{supra} note 223, at 286.
\item See General comment 24, \textit{supra} note 109, at para. 17.
\item See \textit{id.}, at paras. 16-18.
\item See \textit{id.}, at para. 6.
\end{enumerate}
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The HRC based its decision on the inadequacy and the patent failure of the Vienna Convention regime to ensure the compatibility of reservations with the object and purpose of the Covenant, and on the irresponsibility and passivity of states in the implementation of the Covenant and administration of reservations. It also argued that the control of the compatibility of reservations was not an adequate task for states, and that it necessarily felt into its competence to ensure the enforcement of the Covenant and review states parties’ compliance.

“This was nothing less than a revolution. It took a clear view on the power of a treaty body in reservation matters. It set a precedent for other treaty bodies.” The HRC did not stop there however. Conscious of the controversial position that it had taken; it went on upholding its new reservations policy. Although it rarely pronounced a reservation incompatible with the object and purpose of the Covenant, the HRC continuously harassed states about the justification or appropriateness of their reservations, express regrets, concerns and dissatisfaction about their reservations. ‘Undoubtedly, the reservations to the ICCPR are governed by the most progressive body of law, much to the discomfort of states.’

Thus, the practice of the various human rights treaties organs, both at the regional and international level seems to confirm that the general reservation regime of the Vienna Convention is not satisfying with respect to human rights treaties. However contrasted, their practice with respect to reservations undeniably

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459 See id., at para. 18.
460 See id., at para. 17.
461 See id., at para. 18.
462 Tyagi, supra note 14, at 224.
464 Tyagi, supra note 14, at 225-226.
demonstrate that they play a considerable influence over the ongoing debate. Their dynamism and qualification has allowed for more integral respect for human rights through the aggressive restrictions that they have progressively imposed on states. U.N. treaty bodies have allowed the emergence of new principles shaping the future law of reservations, and continue to reflect their commitment to the cause of human rights through a common struggle.\textsuperscript{465} However, the war on incompatible reservations is not over. The achievement of the Human Rights Committee in its General Comment 24 was certainly welcomed by human rights activists and admired by its U.N. sisters bodies as a demonstration of the necessity for changes in reservations law.\textsuperscript{466} Nevertheless, although they have somehow acquiesced to their increasing authority, states are generally reluctant to the development of treaty bodies’ prerogatives and will certainly continue to struggle to maintain their privileges under the general Vienna Convention regime.\textsuperscript{467} Additionally, the logic of the HRC’s General Comment 24 is attenuated by its weak legal basis, and by the potential radical consequences that its decision would have on international law.

\textsuperscript{465} “The treaty bodies have an institutionalized form of interaction with the help of periodic meetings of their chairpersons (…). These meetings were initiated primarily to exchange thoughts on the functioning of the treaty bodies, especially their reporting procedures. However, the scope of these meetings has gradually expanded. Now these meetings have assumed the form of a common policy forum of the treaty bodies, covering a wide range of issues, including reservations to human rights treaties and strategies to obtain sufficient resources and services to enable the treaty bodies to carry out their respective mandates efficiently.” \textit{Id.}, at 223, note 158.

\textsuperscript{466} \textit{See id.}, at 243.

\textsuperscript{467}States will, of course, struggle to retain sovereign authority to make fundamental policy choices consistent with national values and needs. Nevertheless, all States must accept constraints on their freedom of action in order to obtain the considerable benefits of collective, supranational regulation and to promote more humane systems of governance”, Derek P. Jinks, \textit{The Legalization of World Politics and The Future of U.S. Human Rights Policy}, 46 \textit{ST. LOUIS U. L. J.} 357, 376 (2002).
2. The Conflict.

i. A traditional reluctance from States.

As we have seen, in the delicate area of human rights, states are generally disinclined to submit themselves to the adjudicative powers of an international judicial mechanism. They traditionally fear the possibility of abusive complaints and infringement on their national sovereignty. Thus, when the creation of monitoring bodies was proposed to ensure the enforcement of the International Bill of Rights, states attached importance to delimitate the prerogatives of these organs precisely. With respect to reservations, they could not agree on the role that these bodies should play, and therefore provided them with no specific powers. However, this omission does not imply that the states parties would rely on the treaty bodies to decide on the legality of reservations. On the basis of the principle *pacta sunt servanda*, “the bodies monitoring universal human rights conventions did not have such competence unless it was expressly attributed to them by the state parties. They should therefore function strictly in conformity with their mandate.” The dynamism of the treaty bodies might indeed have severe consequences on states’ practice. States will certainly be more and more reluctant to submit themselves to any kind of international monitoring system if they know that the limits they placed on the system will be progressively removed under the influence of the supervisory organs. Therefore, the improved legal certainty that treaty bodies bring to human rights law by controlling reservations is somehow removed from treaty law. Yet, states have a fundamental

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469 See Baylis, *supra* note 58, at 296.
interest in protecting the certainty and stability of treaty law. To limit this kind of development, states might simply abstain from entering human rights regimes with ‘harsher reservations policy.’”

States’ reactions to General Comment 24 demonstrate the difficulties to implement a new reservation law on the basis of U.N. treaty bodies practice. Several Asian and African countries have protested to the HRC position on reservations. But the most virulent contestations came from France, the United Kingdom and the United States, which were certainly the countries implicitly targeted by General Comment 24. Their strong opposition is also understandable considering that they would probably be the first victims of a new reservations system.

The example of the United States’ reaction is particularly explicit. It considers that the Comment violates both the ICCPR and general international law, and that the HCR has no competence to decide on the legality of reservations. But the American reaction was not limited to an official protestation. The United States Senate attempted to sanction the HRC by conditioning federal funds for the implementation of the ICCPR to the revocation of General Comment 24. The Senate wanted to ensure that the validity of the various reservations, declarations and understandings

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471 Baylis, supra note 58, at 314. See also, ILC Report II, supra note, at para. 135.
472 See Tyagi, supra note 14, at 246.
476 See id.
that the United States had attached to its ratification of the Covenant would not be
severed. However, President Clinton finally vetoed the attempt of the Senate.478 Other
punitive solutions were considered, but so far, no concrete action has been taken.479
Of course the reaction of the United States is a bit extreme and must be analyzed in
the context of the agitated history of the U.S. ratification of the ICCPR.480 However, it
represents the general opposition of states to the emergence of a new reservation
regime.

The principles adopted by the HRC in its General Comment on reservations
were not new. They had been extensively discussed by the doctrine and were not
ignored by states’ administrations. The revolutionary nature of the Comment was
therefore very relative. What truly constituted a radical change was the
institutionalization of these principles in an official act of a U.N. treaty body. States
realized the potential consequences of this change and strongly reacted to prevent the
propagation of the HRC audacity to its sister bodies. This reaction can be explained
by the fact that states have a strong incentive to maintain the current system of
reservations, which highly favors their interests.481 Changes in international public
law do not occur instantly. They are the result of a long process and require the

478 See Baylis, supra note 58, at 318.
479 See id.
480 See, e.g., Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator
Bricker, 89 AM. J. INTL. L. 341 (1995); Schabas, supra note 254; Bradley & Goldsmith, supra note
234; Cherif Bassiouni, Reflections on the ratification of the International Covenant on Civil and
Political Rights by the United States, 42 DePaul L. Rev. 1169 (1993); Ved P. Nanda, The United
Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the
International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1311 (1993); Jordan J. Paust,
Avoiding Fraudulent Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and
Political Rights, 42 DePaul L. Rev. 1257 (1993), John Quigley, The International Covenant on Civil
and Political Rights and the Supremacy Clause, 42 DePaul L. Rev. 1287 (1993), David Weissbrodt,
481 See supra II.
consent of the traditional actors of the international legal system. States are one of them. The United Nations International Law Commission is another one.

**ii. The ILC Report.**

The International Law Commission is a permanent institution created for the codification and development of international law and is the expert body of the United Nations on international law.\(^{482}\) It is responsible for the codification, among other things, of the law of treaty in the Vienna Convention. As we have seen, the ILC has dealt with the law of reservations since the very beginning of the debate.\(^{483}\) It was therefore logical that it would respond to the mini-revolution caused by the HRC's General Comment 24. In 1997, at its 49\(^{th}\) session, the ILC heard the report of Professor Alain Pellet, the Special Rapporteur on reservations to multilateral treaties, who especially addressed the problem of the application of the Vienna Convention reservations regime to human rights treaties.\(^{484}\)

If the ILC is charged with the development of international law, it is nevertheless known for its traditionalist vision. This is partly explainable if one considers that ILC members are elected by the United Nations General Assembly on the basis of a list of candidates submitted by the member states. Even though the ILC members are supposedly independent, they often are closely related to their governments, which, most of the time, were their former employer.\(^{485}\) In any case, the


\(^{483}\) See supra I.A.4.


\(^{485}\) See Morton, *supra* note 482, at 11-12.
ILC usually looks at the issues submitted to it on a broad and general perspective, what sharply contrast with the practice of human rights treaty bodies. If the decisions of the HRC have an applicability limited to the scope of the ICCPR, the decisions of the ILC have a much broader scope of application, and can have serious repercussions on other areas of international law. The contrast between the dynamic nature of the treaty bodies and the traditionalism of the ILC explain their conflicting views over the reservations issue to a certain extent, but other factors also have to be taken into account.

Of course, ‘the topic of reservations was not terra incognita for the Commission.’ Indeed, the ILC is partly responsible for the failure of the Vienna Convention reservation regime. It was first reluctant to the creation of a compatibility test, but faced with the necessity of a flexible approach, it pushed for a compromised which would not endanger the sovereignty of states to a too large extent. The result was a pseudo-objective system totally inadapted to human rights conventions. After General Comment 24, the ILC realized that the fruit of its work, the Vienna Convention regime, was ‘under fire’ and that it had to react.

It responded by reaffirming the authority of the Vienna Convention which ‘generally worked satisfactorily’ notwithstanding certain “ambiguities and uncertainties,” and should therefore be “preserved.” The report also stated that the applicability of the Vienna Convention reservation regime to human rights

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487 See supra I.A.4.
488 Tyagi, supra note 14, at 249.
490 See id. at para. 58.
conventions should not be contested;\textsuperscript{491} and that states remains charged with the enforcement of the object and purpose test, even though international human rights bodies could address the question of the permissibility of reservations ‘when necessary for the exercise of their functions.’\textsuperscript{492} However, due to their non-jurisdictional nature, and unlike their regional counterparts, they had no binding authority to decide on the legality of a reservation.\textsuperscript{493} The report concluded that ‘the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role, […] in the event of inadmissibility of a reservation, it is the reserving state that has the responsibility for taking action.’\textsuperscript{494}

Naturally, the report is subject to changes and the views of the ILC are not definitive.\textsuperscript{495} However, considering its state-centered approach,\textsuperscript{496} it is unlikely that the ILC will go further and recognize the authority of human rights treaty bodies to adjudicate the legality of reservations to human rights conventions. Indeed, although it acknowledged the inherent capacity of these organs to ‘comment upon and express recommendations with regard, \textit{inter alia}, to the admissibility of reservations by states, in order to carry out the functions assigned to them,’\textsuperscript{497} the ILC, like states, still

\begin{itemize}
  \item \textsuperscript{491} See \textit{id.}, at para. 75.
  \item \textsuperscript{492} \textit{Id.}, at para. 82.
  \item \textsuperscript{493} See \textit{id.}, at paras. 83-85.
  \item \textsuperscript{494} Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties including Human Rights Treaties, paras. 8-9, ILC Report II, \textit{supra} note 108.
  \item \textsuperscript{495} See Tyagi, \textit{supra} note 14, at 249.
  \item \textsuperscript{496} See \textit{id.} at 250-251.
  \item \textsuperscript{497} Preliminary Conclusions, paras.5, ILC Report II, \textit{supra} note 108.
\end{itemize}
strongly opposes the HRC’s position on the highly controversial question of the severability of incompatible reservations.

**D. Evaluation.**

The idea of treaty bodies responsible for the determination of the validity of reservations to human rights convention is not new. It results from the failure of the Vienna Convention reservation regime, or the failure of states, to ensure that the quest for universality through a flexible use of reservations would not endanger the integrity of human rights treaties. Practice has shown that these organs were the most qualified to handle this controversial challenge and that they had a natural functional authority justifying their actions. However, states and other institutional actors oppose further developments and resist the emergence of a new reservations law. The fear of a new system of reservations, which would maintain an effective balance ensuring more integrity for human rights, is based on the presumption that any change in favor of human rights integrity would threaten states’ sovereignty. We will see that although the severability doctrine partly justify the apprehension of states, the emergence of new principles of reservations law are consistent with the evolution of the international society.

1. **The unsettled severability controversy.**

Once the competence of treaty bodies to review the legality of reservations is accepted, the debate over reservations is not over. Indeed, the most sensible issue
remains: what to do with an incompatible reservation? International law, through the doctrinal debate, has provided three different solutions.

The first solution consist to consider the incompatible reservation as void, and to regard the reserving state as bound by the treaty, with the exception of the disposition to which the invalid reservation was related to.

Secondly, the invalidity of the reservation affects the ratification of the treaty as a whole, and therefore, the reserving state is not a party to the treaty anymore.

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

The first solution appears implausible. Indeed, the declaration of the illegality of the reservation would have no legal effect because the provisions of the treaty it objected to, would still not bind the reserving state, whether or not its reservation was valid. Thus, the state would remain in the same position, and the reservation would be given full effect, notwithstanding its illegality. This solution cannot be defended, because it affects the interest of all other parties. The object and purpose test is aimed at the protection of the integrity of the treaty, which consists in the elements that have been bargained and agreed upon by the parties. Consequently, an illegal reservation, that is contrary to the object and purpose of the treaty, affect the interest and consent of every other party to the treaty (or at least of those which did not explicitly accept the incompatible reservation). As a result, this solution ´is not viable under contemporary treaty practice.´

Goodman, supra note 232, at 533.
In its General Comment 24, the Human Rights Committee adopted the severability option. For the HRC, “the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”499 This solution is based on a presumption that the state’s intent to be bound by the treaty as a whole was superior to its intent to be bound by the treaty as modified by the invalid reservation. The decision of the HRC seems to have been inspired by the precedents created by the European organs, which first used “the presumption in favor of successful ratification”500 to sever invalid reservations.501 What is striking is that, notwithstanding the important consequences of the severability solution, neither the European Court, nor the HRC, made the effort to explain and justify their decision. For the European Court, it was “beyond doubt that Switzerland [was], and regard[ed] itself as, bound by the Convention irrespective of the validity of the declaration.”502 For the HRC, the severability of the invalid reservation was a “normal consequence.”503

However, the solution of severability is far from being undisputed. Declaring the invalidity of a reservation is an “acte grave,”504 because it substantially affects and partially denies one of the most important principles of international law: state consent. Under the general maxim pacta sunt servanda, a state is presumed to be

499 General Comment 24, supra note 109, at para. 18.
500 Baylis, supra note 58, at 300.
501 See supra III.C.1.a.
502 Belilos case, supra note 408, at para. 60.
503 General Comment 24, supra note 58, at para. 18.
bound only by what it has agreed to. Considering that a reservation allows him to exclude dispositions of a treaty that it does not want to be bound by,\(^{505}\) it is a specific ‘indication of non-consent.’\(^{506}\) Thus, applying severability is in contradiction with the principle of state consent because a state ends up being bound by a disposition of a treaty that it has especially rejected.\(^{507}\) Under the Vienna Convention, the will of state is the superior element of treaty law which has a consensual nature,\(^{508}\) therefore, it should not suffer contradictory presumptions such as the one used by the European Court and the HRC. If the decision of the European court can be justified and accepted in the particular context of the Council of Europe, it is very doubtful that it can be transposed at the international level.\(^{509}\) In the European context, the Convention is considered as a constitutional instrument, and the states concerned by the illegal reservation expressly admitted that they intended to be bound by it regardless of the fate of their reservations.\(^{510}\) It is argued that in the context of the ICCPR, the United States’ reservations declared incompatible with the object and purpose of the treaty (but not severed yet) by the HRC were explicitly considered as ‘integral parts’ of the United States’ consent to be bound by the Covenant.\(^{511}\) The severability of its reservations would therefore be in contradiction with principles of international law.\(^{512}\)

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\(^{504}\) Cohen-Jonathan, supra note 223, at 298.
\(^{505}\) See Vienna Convention, supra note 11, art. 2.
\(^{506}\) Baylis, supra note 58, at 304.
\(^{507}\) See Bradley & Goldsmith, supra note 234, at 429-439.
\(^{508}\) See Vienna Convention, supra note 11, art. 11.
\(^{509}\) See ILC Report II, supra note 108, at paras. 84-85.
\(^{510}\) See Belilos case, supra note 408, at 28; Schabas, supra note 254, at 319; Baylis, supra note 58, at 302, Bradley & Goldsmith, supra note 234, at 438.
\(^{511}\) See U.S. observations on General Comment 24, supra note 475, at 269.
\(^{512}\) See ILC Report II, supra note 108, at para. 85; Bradley & Goldsmith, supra note 234, at 439.
Nevertheless, the fact that certain reservations are considered as “integral parts” of a consent to be bound by a treaty leave the possibility that some reservations might no be essential to the consent to be bound. When first faced with the question of the severability of reservations, Judge Lauterpacht considered if reservations were conditions *sine qua non* of the acceptance of a treaty. This ‘essentiality test’ seems to reflect the reality of reservations. Considering that the efficiency of the acceptance/objection game of the Vienna Convention is very relative - because it depends on the ability or willingness of states- a state is usually not afraid of submitting “a package of reservations” that ‘reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound.” Therefore voiding unessential reservations would not affect state consent to a great extent.

However, this implies that one can differentiate between essential and inessential reservations, which might reveal to be a very difficult exercise. First, because the *a posteriori* analysis might take place at a moment were the rationale behind reservations do not exist anymore, or do not have the same intensity; secondly because it involve delicate political considerations. Only the state itself might be able to evaluate the importance of the reservation at the time of its consent, because the use of the *travaux préparatoires* for this purpose can be very delicate. The use of presumptions to determine the issue seems appropriate because it allows a certain

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514 See *supra* I.B.1.


517 Id., at para.83.

518 See the example of the Belilos case, *supra* note 408, at paras. 45-49.
amount of certainty but does not prevent the emergence of contradictory evidence. But which presumption?

A traditional perspective based on the principle of state consent, adopted by states, the ILC and even some members of the HRC, would favor the presumption that a reservation means what it means, and that the state did not intend to be bound by the dispositions of the treaty it rejected through the use of reservations. Thus, the severability of the invalid reservation is impossible, and the result of the illegality of the reservation is that the state is not a party to the treaty anymore. The main question that was asked by those who opposed the severability option was why should the presumption based in the traditional rule of state consent be inversed?  

A very convincing answer has been elaborated by Ryan Goodman. He explains that ‘reservations to human rights treaties should be presumed to be severable unless for a specific treaty there is evidence of a ratifying state’s intent to the contrary.’ According to him, the ‘anti-severability’ position does not reflect the complex structure of state consent, whereas a reservations regime that would permit severability would maximize the protection of state consent. The severability option actually leaves the state with the possibility to decide what is the most appropriate solution, and ‘to weigh the interest served by the particular reservation against the cost of voiding the act of ratification.’ Without severability, the state

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519 See Goodman, supra note 232, notes 4, 5, 6 and 7, at 532.
520 See Baylis, supra note 58, at 304-305.
521 Id. at 531.
522 See id. at 532.
523 Id. at 546.
would be forced to drop out the treaty, for the sake of an invalid reservation, which most of the time actually reflect technical or minimum disagreement.\textsuperscript{524} States’ consent to ratify a human rights treaty is often the result of a long and difficult process, and is justified by many objectives. These objectives might very well be of superior interest than the one expressed within a reservation. Therefore, the traditional argument that views every reservation as fundamental to states’ consent seems radical. State consent might actually be better protected by leaving the choice to the state to maintain a reservation and lose the benefit of the treaty membership, or withdraw its reservation and preserve a membership that it had won with difficulties at the domestic level. The price of a re-ratification might be superior to the price of a severed reservation. Assorted with certain safeguards,\textsuperscript{525} the severability regime would be flexible enough to maintain the integrity of human rights treaties through the elimination of reservations incompatible with their object and purpose, and permit states to ensure the self-protection of their consent.

However, the debate over the severability doctrine remains a pure intellectual exercise. Outside the regional forum, severability is a chimerical concept. So far, the HRC has abstained from severing any reservation, even the reservations that he has found incompatible with the object and purpose of the ICCPR.\textsuperscript{526} The explanation is simple: the decisions of the HRC and other human rights treaty bodies have no binding authority. That is why only few states have officially reacted, and no more than with an official declaration of disagreement. Unless they give an express

\textsuperscript{524} See generally, Gamble, supra note 17.
\textsuperscript{525} See Goodman, supra note 232, at 555-559.
adjudicative authority to the treaty bodies, states can simply ignore their decisions. Under positive international law, states remain the masters of reservations law. When faced with the declaration of incompatibility of their reservations, states have several options: ‘(a) the state could, after having examined the finding in good faith, maintain its reservation; (b) the state could withdraw its reservation; (c) the state could regularize its situation by replacing its impermissible reservation with a permissible reservation; (d) the state could renounce being a party to the treaty.’

If states have generally ignored the boldness of the treaty bodies, treaty bodies have also demonstrated very little concern about the reaction of states. Actually, the severability debate highly resemble to a ‘deaf dialogue’. The best treaty bodies can do is to continue to assess and exercise their valuable competence in the evaluation of reservations within a constructive dialogue with states. Until the severability option is accepted as the best mean to ensure a balance between the integrity of human rights and the protection of state consent, human rights treaty bodies will have to continue their struggle against the application of the Vienna Convention reservation regime to human rights treaties with their traditional weapons: dialogue, harassment, public opinion and the mobilization of shame.

On the other hand, their chance to win the battle over an obsolete regime might increase with the emergence of modern concepts of state sovereignty that reflect the necessary evolution of international law in the 21st

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528 "In the human rights area, treaty regimes are notoriously weak, and national governments, for reasons of economics or realpolitik, are often hesitant to declare openly that another government engages in abuses. In such area, where enforcement mechanisms are weak, but core customary norms are clearly defined and often peremptory (jus cogens) the best compliance strategies may not be ‘horizontal’ regime management strategies, but rather, vertical strategies of interaction, interpretation, and internalization." Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L. J. 2599, 2655-2656 (1997).
century. As Professor Tyagi explains, ‘how can states continue to live with their sovereignty-centric mindset in the field of human rights? Logically, if globalization can flourish without altering national boundaries, human rights too can flourish without eliminating national identities. Conversely, if national boundaries can survive the process of globalization, reservations too can survive universal standards of human rights. [...] [T]he momentum of a new world order will not allow reservations to remain unchallenged. While states will continue to rely on reservations for accommodating their conflicting interests, the global community will increasingly exercise its right to question the discretion of states. As a result, reservations will come under greater scrutiny.”

2. ‘New Sovereignty,” reputational costs.

One of the most severe criticisms of the HRC and the European Court severability doctrine has been their misguided strategy. The treaty bodies certainly wanted to enhance and strengthen the human rights regime by creating a stronger enforcement mechanism. However, many commentators have seen this constructive tactic has erroneous. According to them, the severability doctrine could only weaken the system. Indeed, they see the severability solution has a great threat on states’ national sovereignty that will discourage them from entering human rights treaties, or push them to drop out of the international human rights regime. This fear is certainly justified on the basis of a traditional perception of states’ sovereignty. However, it seems necessary to reconsider the argument in the light of the evolution

529 Tyagi, supra note 14, at 255.
of the concept of sovereignty. Does traditional national sovereignty have the same meaning in today’s globalized and interdependent world than at the time of the Vienna Convention?

States’ sovereignty unquestionably remains the most important element of positive international public law. In practice, it also remained the most invoked argument by states to oppose international action or cooperation. However, it is also undeniable that the notion of states having the sole and exclusive authority to control every activity within their territory is obsolete. The development of the transnational society have imposed duties and imperatives of international cooperation to states, that now have to deal with international organizations which increasingly regulate part of the national life. This evolution has led some thinkers to notice the emergence of a “New Sovereignty.” The argument is worth quoting at length: “Traditionally, sovereignty has signified the complete autonomy of the state to act as it chooses, without legal limitation by any superior entity. The state realized and expressed its sovereignty through independent action to achieve its goals. If sovereignty in such terms ever existed outside books on international law and international relations, however, it no longer has any real world meaning. The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes -security, economic well being,

531 Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State”, U.N. CHARTER, art. 2 para. 7.
532 See Sloane, supra note 26, at 532.
and a decent level of amenity for their citizens- without the help and cooperation of
many other participants in the system, including entities that are not states at all. […]
That the contemporary international system is interdependent and increasingly so is
not news. [The] argument goes further. It is that, for all but few self-isolated nations,
sovereignty no longer consists in the freedom of states to act independently, in their
perceived self-interest, but in a membership in reasonably good standing in the
regimes that make up the substance of international life. To be a player, the state must
submit to the pressures that international regulations impose.”535

According to this thesis and considering the increasing role that human rights
law have played in contemporary international law, states’ participation in the
international human rights regime would be an essential element of their sovereignty.
This conclusion is very paradoxical and reflects the complexity of the modern
international system: participation to human rights conventions constitutes one of the
greatest threat on traditional states sovereignty, but also one of the main element of
their ‘New Sovereignty.’”

Consequently, nothing really prevents the severability doctrine to become part
of international law. The fate of the doctrine will depend on the reaction of states.536
Yet, some leading states (within the new sovereignty approach) have already
officially expressed their support for the severability doctrine and demonstrated a very
positive reception of the dynamic practice of human rights treaties bodies with respect

534 See generally, ABRAM CHAYES AND ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY
(Harvard, 1995).
535 Id. at 26-27 (footnotes omitted).
536 See Baylis, supra note 58, at 329.
to reservations.\textsuperscript{537} Their futuristic, or modern, vision might very well gained support in the coming years.

The other argument that states might simply withdraw from human rights regimes with harsher reservations policies is also relatively incoherent. The possibility of a United States’ withdrawal from the ICCPR is often cited.\textsuperscript{538} It is indeed, an example of particular relevance, which demonstrates the improbability of the experience.

Firstly, the withdrawal is legally impossible. The ICCPR does not provide for such a possibility, and according to the requirement of the Vienna Convention,\textsuperscript{539} general international law does not permit withdrawal in this particular context. Indeed, the nature of the Covenant, which is part of the International Bill of Rights, does not imply a possibility for withdrawals, which would affect the legislative value of the treaty. Moreover, it is very doubtful that such a possibility can be proved to result from the intent of the drafters of the ICCPR.

Secondly, ‘to generate predictions about state behavior, one must have a theory about the magnitude of the reputational loss resulting from violations of law.’\textsuperscript{540} In the present case, the United States government is certainly aware of the catastrophic consequences that such an act would have. The reputational costs\textsuperscript{541} of a

\begin{footnotesize}
\textsuperscript{537} See Goodman, supra note 232, at 546-547, referring to Belgium, The Netherlands and the Nordic countries.
\textsuperscript{538} See Baylis, supra note 58, at 319.
\textsuperscript{539} See Vienna Convention, supra note 11, art. 42 and 56.
\textsuperscript{540} Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CAL. L. REV. 1823, 1861 (2002)
\textsuperscript{541} On the importance of reputational costs and the compliance theory of international law, see, e.g., CHAYES & CHAYES, supra note 534; Raustiala, supra note 533; Guzman, supra note 540; George W. Downs and Michael A. Jones, Reputation, compliance, and International Law, 31 J. LEGAL STUD. 95
\end{footnotesize}
withdrawal from one of the most important instrument for the protection of human rights are simply too high. They are even higher than the cost of non-adherence, which the United States could already not face.\(^{542}\) Domestically, problems might not even arise: American citizens certainly enjoy the benefits of the highest human rights standards in the world.\(^{543}\) At the international level however, the consequences might be slightly different. Because the United States is using its status of human rights leader in the world as one of the main instrument of foreign policy,\(^{544}\) it certainly could not afford the price of a mobilization of shame campaign concerning its human rights policy.\(^{545}\) As a matter of consistency, the United States will not be able to remain a ‘flying buttress rather than a pillar in the cathedral of human rights, choosing to stand outside the international structure supporting the international human rights system, but without being willing to subjects its own conduct to the scrutiny of that system.’\(^{546}\) Therefore, in the case of the development of the severability doctrine in international law, the United States would face an important

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\(^{542}\) See Schabas, supra note 254, at 235.

\(^{543}\) With the notorious exception of the death penalty.

\(^{544}\) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.” 22 U.S.C. §2304(a)(1) (1988) (emphasis added). See also, Warren Christopher, DEMOCRACY AND HUMAN RIGHTS: WHERE AMERICA STANDS, 4 Dispatch 441 (U.S. Department of State Bureau of Public Affairs June 1993), available at http://dosfan.lib.uic.edu/ERC/briefing/dispatch/1993/html/Dispatch4no25.html.

\(^{545}\) See generally, HUMAN RIGHTS AND U.S. FOREIGN POLICY (Barry M. Rubin and Elizabeth P. Spiro eds., 1979).

\(^{546}\) Harold Hongju Koh, supra note 1, at 308, citing Professor Louis Henkin.
dilemma.\textsuperscript{547} It is very likely that the solutions to this challenge will be found within the domestic realm,\textsuperscript{548} where the roots of the reservations problem remain.

\textsuperscript{547} Countries engaged in ongoing interactions and facing a high cost for violations of international law have a great deal to gain from a system in which they are able to select from a menu of commitment levels. By adjusting their level of commitment, states are able to signal their willingness to honor their promises and can control the amount of reputational capital they stake as collateral. This flexibility allows states that enjoy a high level of mutual trust to enter into agreements that come with only low levels of commitment. Without the ability to modulate the level of reputational capital pledged, states would sometimes choose to make no deal at all rather than accept an obligation that they may not keep.” Guzman, \textit{supra} note 540, at 1870-1871 (footnotes omitted).

\textsuperscript{548} See \textit{id.} at 1834.
CHAPTER 5

CONCLUSION

The issue of reservations to human rights treaties will survive to this modest study of the problem. Reservations are a necessary evil to human rights law: treaties, the primary source of modern human rights law, could not survive without reservations. But can human rights law survive to reservations?

The law of reservations will continue to reflect the transformation of the international legal order, just like it did during the last fifty years. Is the globalization process going to proceed until the complete integration of the world into a single community? If so, what kind of community will it be? Are the resisting forces going to contain the transformations and succeed to ensure that world integration will maintain a humane face? All these considerations are likely to influence the evolution of international law. They will also certainly influence the debate on reservations, shape the emergence of new rules, or permit the survival of old principles. Current international events seems to suggests that states still have the ability to suddenly inverse the tendency of increasing international cooperation. A recent re-apparition of ancient concepts, combining nationalism, moral and spiritual values demonstrate that states, or at least one of them, have the power to constrain the progressive evolution of international law. In this context, it is doubtful that the concept of New Sovereignty, fundamental to the emerging law of reservations, will survive to the revival of past ideologies.
The emergence of new principles applicable to reservations to human rights treaties is the result of a long process; the solidification of this rising law might even take longer. What is certain is that international law has so far succeeded to evolve and adjust to the transformation of the world. When faced with the enlargement and diversification of the international community, states have accepted to abandon some privileges because the unanimity rule could not reasonably function in a post-colonial world. The birth of the human rights movement transformed the contractual nature of international law, and the International Court of Justice, a symbol of the world community, demonstrated the need for a balance between universal and integral acceptance for humanitarian conventions. The mechanism created then certainly contained weaknesses and flaws, but the “object and purpose” test nevertheless became an internationally accepted standard. It reflected the necessity and difficulty to reconcile the conflicting nature of treaty law and human rights law. The test could have been improved and rendered practicable if an adapted enforcement mechanism had been simultaneously implemented, but this has not been the case. The Vienna Convention, by relying on a purely subjective and reciprocal system, perverted the test into an abstract guideline and confiscated the only safeguard that permitted the integrity of human rights treaties to survive to a perpetual and blind quest for universality. The consequences were, if not catastrophic, very concerning. Indeed, integrity and universality are so equally fundamental to human rights law that the preeminence of an objective over another threatens the entire human rights regime, to the detriment of individuals’ freedoms. Academics have reacted to this important challenge by offering various solutions to reform the Vienna Convention reservation regime as a whole, to rationalize it, or to promote the internalization of
reservations rules. But the truth is that the international community cannot rely on states to ensure the integrity of human rights, simply because they do not have the capacity to enforce objectively an objective standard. Therefore, the solution consists in the appointment of an independent and objective arbiter that would be charged to ensure the compatibility of reservations to the object and purpose of human rights conventions. There seems to be no better solution than to rely on the existing treaty bodies.

Indeed, the very peculiar nature and composition of these bodies provide them with a unique competence to deal with the complicated politico-legal aspects of the validity of reservations to human rights treaties. The diverse and complementary expertise of their members, associated with an incomparable understanding of the treaty systems and their political implications provide them with the most appropriate qualifications to deal with the sensible question of the compatibility of reservations. Moreover, this competence is totally justified on a functional perspective. The evolution of these treaty bodies’ powers and functions has revealed their capacity to challenge the failures of the international legal system and confront states to provide for an ever better respect for human rights. The dynamism of these organs, added to the democratic, transparent and constructive nature of their procedures has pushed states to admit their authority and competence regarding reservations issues. Consequently, states have supported greater international scrutiny and conformed to increasing international control of their human rights practice. Additionally, the transformation of practice has provided a restricted, but solid, legal basis for the emergence of a new reservation law administered by human rights treaty bodies. Precedents at the regional and international level have demonstrated the suitability of
the evolution of reservation rules towards greater integrity, through a flexible but controlled use of reservations, and states have implicitly accepted it.

The remaining obstacle to the crystallization of the new principles of reservation law is the opposition of states and other institutional actors to the doctrine of severability. However, this conflict is not surprising. Treaty bodies simply try to develop their authorities and powers to attain their objective of more integrity for human rights through a better enforcement system, while states attempt to protect their privileges and sovereignty. Realistically however, states remain in control of international law and can therefore restrain the development of the severability doctrine into law. Only when states will accept that their traditional prerogatives are eroded and that it does not serve their interest in today's integrated international society to remain attached to obsolete and radical concepts of sovereignty, the positive law will change. Until then, treaty bodies will certainly continue their struggle to protect human rights treaties from abusive reservations. Hopefully the 21st century will bring the definitive equilibrium in reservation law, and allow universality and integrity to contribute equally to the development of human rights.
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