

1995  
125

**EUROPEAN UNIVERSITY INSTITUTE**

Department of Law

**THE ADMISSIBILITY OF RESERVATIONS TO  
HUMAN RIGHTS TREATIES IN A UNIVERSAL  
CONTEXT:  
WHO SHOULD DETERMINE THE VALIDITY OF  
RESERVATIONS ?**

**Géraldine VEYA**

Thesis submitted for assessment with a view to obtaining the Diploma in Comparative, European  
and International Legal Studies (Ll. M.)

**Supervisor : Professor Philip ALSTON**

Academic Year 1999-2000

Word count: 34'054

**LIBRARY USE ONLY**

European University Institute



3 0001 0034 5377 8







## TABLE OF CONTENTS

<b>1. INTRODUCTION</b>	<b>1</b>
<b>2. THE LAW APPLICABLE TO RESERVATIONS</b>	<b>3</b>
2.1 THE DEFINITION OF A RESERVATION	3
2.2 THE LEGAL REGIME APPLICABLE TO RESERVATIONS TO HUMAN RIGHTS TREATIES: THE PROVISIONS OF THE VIENNA CONVENTION ON RESERVATIONS	4
<b>3. INADEQUACY OF THE VIENNA CONVENTION RESERVATIONS REGIME AS REGARDS HUMAN RIGHTS TREATIES</b>	<b>7</b>
3.1 THE COMPATIBILITY CRITERION AS STATED BY THE INTERNATIONAL COURT OF JUSTICE IN THE GENOCIDE CONVENTION OPINION	7
3.2 EXTENSION OF THE COMPATIBILITY TEST TO ALL MULTILATERAL TREATIES	8
3.3 UNCERTAINTY OF THE COMPATIBILITY CRITERION	9
A. The definition of the object and purpose of a treaty	9
B. The difficulty of application of the compatibility criterion	12
C. Subjectivity of the compatibility test: individual appraisal	13
D. How to determine the compatibility of a reservation with the object and purpose of a treaty?	16
a) <i>Reservations to peremptory norms</i>	16
b) <i>Reservations to customary norms</i>	17
c) <i>Balance of Interests</i>	18
d) <i>The insertion of a reservations clause</i>	19
e) <i>Third party determination of the compatibility of the reservation</i>	20
<b>4. THE TRADITIONAL MECHANISM FOR DETERMINING THE VALIDITY OF A RESERVATION AND THE INADEQUACIES OF THIS MECHANISM</b>	<b>21</b>
4.1 THE OBJECTION REGIME	21
OBJECTING TO INADMISSIBLE RESERVATIONS: AN OVERVIEW OF STATE PRACTICE	22
4.3 THE COSTS OF OBJECTING	26
<b>5. MODERN TRENDS: THE ROLE OF THE HUMAN RIGHTS TREATY MONITORING BODIES IN THE DETERMINATION OF THE VALIDITY OF RESERVATIONS</b>	<b>27</b>
5.1 THE COMPETENCE OF ASCERTAINING THE LEGALITY OF RESERVATIONS AND THE UNITED NATIONS BODIES	29
5.2 THE HUMAN RIGHTS COMMITTEE'S GENERAL COMMENT NO. 24(52)	31

5.3	THE CASE RAWLE KENNEDY V. TRINIDAD AND TOBAGO	32
5.4	COMPETENCE OF THE MONITORING BODIES OF THE UNITED NATIONS: AN ANALYSIS	33
5.4	THE DECLARATION OF THE COMMITTEE OF THE CONVENTION AGAINST TORTURE	36
<b>6.</b>	<b>THE CONSERVATIVE APPROACH OF THE INTERNATIONAL LAW COMMISSION</b>	<b>36</b>
6.1	OUTCOME OF THE FIRST AND SECOND REPORTS ON RESERVATIONS TO TREATIES	37
	THE INTERNATIONAL LAW COMMISSION 'S "PRELIMINARY CONCLUSIONS" OF 1997 AND THE CONSEQUENCES UPON THE AUTHORITY OF MONITORING BODIES	37.
6.3	CONSIDERATION OF THE THIRD, FOURTH AND FIFTH REPORTS ON RESERVATIONS TO TREATIES	40
<b>7.</b>	<b>IDEAL MODELS: PROPOSALS DE LEGE FERENDA TOWARDS AN INSTITUTIONALISED APPRAISAL OF THE COMPATIBILITY OF A RESERVATION WITH A HUMAN RIGHTS TREATY</b>	<b>41</b>
7.1	PRIOR PROPOSALS	41
7.2	OBJECTIVE TESTS OF 'RESERVATIONS VALIDITY: SURVEY AND EVALUATION OF OBJECTIVE SYSTEMS OF DETERMINATION OF THE VALIDITY OF RESERVATIONS IN LIGHT OF THE COMPATIBILITY PRINCIPLE	45
	A. the CERD model: towards a collective system?	46
	a) <i>The example of the International Convention on the Elimination of All Forms of Discrimination</i>	47
	b) <i>The collegiate mechanism as an alternative to the Vienna Reservation regime?</i>	47
	c) <i>The CERD model: between Unanimity and Flexibility</i>	48
	d) <i>The determination of an incompatible reservation under the CERD Model</i>	48
	e) <i>Does the compatibility test become an objective test with a determination by two-thirds of the parties?</i>	50
	f) <i>The efficiency of CERD model : does it constitute an efficient alternative to the Vienna reservations regime ?</i>	51
	g) <i>The current practice of the States parties to the CERD : a survey of reservations and objections</i>	53
	B. The competence of the International Court of Justice to ascertain the validity of reservations	55
	a) <i>The reluctance of States to accept the compulsory jurisdiction of the International Court of Justice</i>	55
	b) <i>Efficiency of the ICJ model in the determination of the validity of reservations</i>	56
	c) <i>The solution of the Advisory opinion</i>	58
	d) <i>The designation of a special chamber</i>	59
	C. Decisions on admissibility conferred on a Committee of experts	60
	a) <i>The experience of the Council of Europe</i>	60
	b) <i>What form could be envisaged for a Committee of experts?</i>	61

**8. CONCLUDING OBSERVATIONS ON THE PROPOSAL TO ESTABLISH AN  
OBJECTIVE MEANS OF DETERMINING THE VALIDITY OF RESERVATIONS TO  
HUMAN RIGHTS TREATIES** **63**

**BIBLIOGRAPHY** **67**

1. The first part of the document is a list of the names of the persons who were present at the meeting.

2. The second part of the document is a list of the names of the persons who were absent from the meeting.

3. The third part of the document is a list of the names of the persons who were present at the meeting.

4. The fourth part of the document is a list of the names of the persons who were absent from the meeting.



## 1. *Introduction*

The proliferation of human rights conventions since the end of World War II and the growing number of reservations used in such conventions have given birth to the main debate of the second part of the century concerning treaty law: is the legal regime under the Vienna Convention on the Law of Treaties regarding reservations also appropriate for human rights conventions, or are human rights of a special nature, thereby implying a special regime for reservations?<sup>1</sup> More specifically, one of the major and more recent questions raised by the use of reservations to human rights treaties concerns the problem of determining who should judge the legality of reservations made to such treaties.

*Two main replies could be made in this regard.* First, it could be argued, and this is precisely the conservative position adopted by the International Law Commission, that the Vienna Convention on Law of Treaties establishes a regime governing reservations to all multilateral treaties, thus including human rights treaties, and that it necessarily follows that decisions on the validity of reservations should be the prerogative of States parties to the treaty. It is up to the States parties to determine whether a particular reservation is consistent with the purposes and objectives of the treaty through the mechanism of acceptance and objections to reservations. Allowing another entity to judge the validity of reservations would automatically impinge on the prerogatives of States.

The second reply that could be given is that the existing law on reservations to treaties does not function adequately where human rights treaties are concerned: the inability of the system to cope with protective normative instruments leads to the need for a more "workable" regime. In the field of human rights treaties, a State should absolutely not be permitted to accede to a treaty, and at the same time nullify the central provisions of the treaty through reservations. In order to avoid impermissible reservations, it should be admitted that the Vienna Convention is not well suited to human rights treaties and that a fragmented approach might therefore be desirable. Recent developments in international human rights law have demonstrated especially through the practice of the monitoring bodies, the necessity of achieving an objective determination of the validity of

---

<sup>1</sup> For a general literature on the subject of reservations to human rights treaties see the bibliography prepared by the special rapporteur of the International Law Commission on the Law of Treaties on the work of reservations to treaties, Alain Pellet, A/CN.4/477/Add.1, at 89.

reservations. For this reason, the establishment of a competent body that could objectively decide if a reservation is permissible under the provision of a treaty must be envisaged.

Focusing on these two potential replies, the key issue in this paper will be to demonstrate the inappropriateness of the general regime under the Vienna Convention, as regards human rights treaties, to prevent States from formulating impermissible reservations and, consequently the necessity of adopting a more neutral regime for the determination of the validity of reservations. Having shown that the conventional mechanism governing the acceptance of and objections to reservations by States should not be applied to human rights treaties, the paper will aim at identifying and examining some of the major alternatives that could be adopted to objectively ascertain the validity of reservations. The recent trend of the United Nations treaty monitoring bodies will be analysed for a better understanding of the whole problem, and reviewed in order to judge whether the monitoring bodies have or should have the authority to decide on the validity of reservations. The related work of the International Law Commission on reservations to treaties will also be examined to show the contrast that exists in this new trend: the Commission's view is that the legal regime governing reservations should be kept uniformed and that the monitoring bodies have only the competence to comment on and make recommendations with regard to the admissibility of reservations by States. However, they have no competence to make legal determinations on the validity of particular reservations. In order to preserve the basic rule of the consent of States, that role should not go beyond an opinion or a recommendation.

The other major alternatives that will be proposed are firstly, the adoption of a collegiate mechanism for the making of decisions with regard to the validity of reservations, and, second, the proposal to confer power on the International Court of Justice to judge the validity of reservations, even if this solution seems to be, at first sight, time consuming and would therefore be unlikely to resolve problems that States are currently face on the subject of reservations.

Before going on to examine these issues, two further comments may be necessary. First, it should be brought to the reader's attention that throughout the study, the word "reservation" will be used in a broad sense, including interpretative declarations, and understandings. Second, the reader should keep in mind that all the proposals made to determine who should judge the validity of reservations will only be made relevant if the

treaty remains silent on the subject of reservations, namely when, as it will be seen further below, Article 19(c) is being applied.

## 2. *The law applicable to reservations*

### 2.1 *The definition of a reservation*

It is essential to explain from the outset, what is meant by a reservation. The Vienna Convention on the Law of Treaties<sup>2</sup> defines the notion of reservations in Article 2. (1). (d)<sup>3</sup> as follows:

“ ‘reservations’ means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”<sup>4</sup>

The most important thing to emerge from the formulation used in the Vienna Convention is that the essential criteria used to define a reservation is its capacity *to modify the legal effect of the treaty*, no matter how the statement is named.<sup>5</sup>

---

<sup>2</sup> The Vienna Convention on the Law of Treaties, 23 May 1969, entry into force 27 January 1980 (henceforth: “The Vienna Convention”).

<sup>3</sup> Other definitions may be found: see especially the third report of the Special Rapporteur Alain PELLET on reservations to treaties. The second part of this report deals with the definition of reservations. For an analysis of the terms of the definition see LIJNZAAD L., Reservations to UN-Human Rights Treaties, Ratify and Ruin?, in : 38 International Studies in Human Rights, Martinus Nijhoff Publishers, Dordrecht, 1995, at 32-36. LEBLANC L. J., Reservations to the Convention on the Rights of Child: A macroscopic view of state practice, in: 4 International Journal of Children's Rights, 1996, at 357-380. GAMBLE J.K. JR., Reservations to multilateral treaties: a macroscopic view of State Practice, in: 74 American Journal of International Law, 1980, at 372-394.

<sup>4</sup> The definition contained in the Vienna Convention is not universally accepted. Some writers refuse to consider the reservation to be an unilateral statement. For example, BRIERLY J., rapporteur of the International Law Commission regards the reservation as a multilateral statement: “That word is used as meaning a special stipulation which has been agreed upon, between the parties to a treaty, limiting or varying the effect to the treaty as it applies between a particular party and all or some of the remaining parties. It is not used to connote the mere proposal, by the State or the International organisation interested, of such a stipulation..

<sup>5</sup> GAMBLE J. K. JR., Op. cit., writes: “It is unimportant what label is attached to a statement so long as it fulfils the requirements of the definition. Thus, a reservation might be called a declaration, an understanding, a statement, or a reservation.”. On this subject see also Human Rights Committee, General Comment No 24 (52), General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Add. 6 (1994), § 3: “It is not always easy to distinguish a reservation from a declaration as to a States’ s understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of State rather than the form of the instrument”.

## 2.2 *The legal regime applicable to reservations to human rights treaties: the provisions of the Vienna Convention on reservations*

The Vienna Convention on the Law of Treaties contains some general rules on reservations in Articles 19 to 23. According to the drafters' expressed goals, the provisions on reservations were an attempt to find a balance between the universal acceptance of treaties and the preservation of their integrity<sup>6</sup>. As a result, the Vienna Convention reservations regime is conceived as a liberal regime often characterised as a "flexible"<sup>7</sup> mechanism, under which reservations are presumed to be permissible and acceptance is easily achieved. As a matter of fact, the first sentence of Article 19<sup>8</sup> postulates a general freedom to formulate reservations, but then limits it in a number of cases, as mentioned in paragraphs (a) to (c).

According to Article 19(c) of the Vienna Convention, which deals with the formulation of reservations, the consequence of the silence of treaties in respect to reservations, is that the

---

<sup>6</sup> See, in this regard, Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session and Eighteenth Session, UN GAOR 21<sup>st</sup> Session, Supp. No 9, §35, UN Doc. A/6309/Rev.1 (1966). On the notion of universality and integrity of multilateral conventions see HALAJCZUK B. T., Les conventions multilatérales entre l'universalité et l'intégrité, in *Revue de droit international, de sciences diplomatiques et politiques*, 1960, at 38-50, COOK R. J., Reservations to the Convention on the Elimination of All Forms of Racial Discrimination Against Women, in: 30 *Virginia Journal of International Law*, 1990, at 683-684, REDGWELL C., Universality or integrity? Some reflections on reservations to general multilateral treaties, in: 64 *British Yearbook of International Law*, 1993, at 279. As BASTID explains "two opposing interests are at stake. The first interest is the extension of the Convention. It is desirable for this convention to be ratified by the largest possible number of State; consequently, adjustments which make it possible to obtain the consent of a State will be accepted. The other concern relates to the integrity of the Convention. The same rules must apply to all parties; there is no point in having a treaty regime that has loopholes or exceptions, in which the rules vary according to the States concerned.", BASTID Suzanne, *Les traités dans la vie internationale-conclusions et effets*, Paris, Economica, 1985, at 71-72. See also the Report on reservations made by member states to Council of Europe conventions, Parliamentary Assembly of the Council of Europe, 3 June 1993, Doc. 6856. See also DUPUY R. J., L'universalité des droits de l'homme, in: *Studi in Onore di Giuseppe Sperduti*, 1984, at 541-556.

<sup>7</sup> As declared Alain Pellet in his third report on reservations to treaties, " 'Flexibility'-this is the key word of the new legal regime of reservations which is gradually replacing the old regime and becoming enshrined in the Vienna Convention". As noted REDGWELL C., *Op. cit.*, at 5 "Article 19 of the VCLT adopts a flexible approach and permits States individually to decide on admissibility of a reservation". See also the Preliminary Conclusions of the International Law Commission On Reservations to Normative Multilateral Treaties Including Human Rights Treaties, in Report of the International Law Commission on the work of its forty-ninth session, General Assembly Official Records Fifty-second Session, Sup. No 10, UN Doc. A/52/10, at 95ff, esp. at 106, § 2: "The Commission considers that, because of its flexibility, this regime [the Vienna Convention reservations regime] is suited to the requirements of all treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Convention govern reservations to such instrument"

<sup>8</sup> Article 19 of the Vienna Convention provides that: "A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

compatibility with the object and purpose test for establishing the validity of reservations applies as a matter of general international law. In other words, where a treaty is silent regarding reservations, the admissibility of a reservation is contingent upon its compatibility with the object and purpose of the convention to which it applies<sup>9</sup>. On the other hand, as soon as a convention has provisions referring to reservations, such rules take precedence over the Vienna Convention reservations regime.

Article 20<sup>10</sup> of the Vienna Convention addresses the acceptance of and objections to reservations and acknowledges the freedom of the other contracting parties to agree to or to reject the reservation. In other words, for a reservation to be deemed valid, other States parties must accept it. Article 20(4) deals with the consequences of reservations as well as the consequences of objections. As a result, the treaty will be divided into a network of bilateral agreements between two contracting parties which are bound by the treaty as modified by the reservation made by one State and accepted by the other.

What should be more closely examined is the link between Article 19(c) and Article 20(4), which remains unclear.<sup>11</sup> The problem is to know whether a reservation that is considered

---

<sup>9</sup> Most of Human Rights Treaties are silent concerning the problem of reservations or directly refer to the compatibility test set out in Article 19(c). The most famous example is the International Covenant On Civil and Political Rights which does not contain any explicit rules on reservations. During the drafting of the Covenant, this matter was intensely debated without any compromise being reached. Contrary to the Soviet Union, which maintained that reservations are an essential right of sovereign States, Chile and Uruguay argued in favour of the prohibition of every kind of reservation to protect the integrity of the Covenant (cf. E/CN.4/L.354.). On the different kinds of reservation clauses to treaties concluded within the Council of Europe, see AKERMARK S. S., Reservations Clauses in Treaties Concluded within the Council of Europe, in: 48 International and Comparative Law Quarterly, Part 3, July 1999, at 479-514.

<sup>10</sup> Article 20 of the Vienna Convention provides that: "1. A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides. 2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties. 3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation. 4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides: (a) acceptance of another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States; (b) an objection of another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State; (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation. 5. For the purpose of paragraphs 2 and 4 unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

<sup>11</sup> See The International Law Commission Commentary on the Draft Articles, which points out that Article 19 has to be read "in close conjunction with" Article 20, in United Nations Conference on the Law of Treaties, First Session, Official Records, Documents of the Conference, A/CONF.39/11/Add.2, at 27.

to be invalid under Article 19(c) can be examined under Article 20(4)<sup>12</sup>. In other words does the Vienna Convention allow a contracting Party to accept or to object to a reservation that is not valid under Article 19(c)? In order to reconcile Article 19(c) and Article 20(4) Catherine J. Redgwell describes the Vienna Convention reservations regime as a "two-stage test": while the first stage is the issue of *permissibility*, which is governed by Article 19, the second test is the *opposability* of permissible reservations. As a result, a State should not be considered as a party when formulating a reservation incompatible with the object or the purpose of a treaty (fails at stage 1) or if States object to its permissible reservation "with the expressly stipulated effect that no treaty relations shall result between the objecting and reserving States" (fails at stage 2)<sup>13</sup>.

Article 21 of the Vienna Convention deals with the legal effect of the reservations and of objections to reservations. While underlining the concept of reciprocity<sup>14</sup>, Article 21 formulates the responsibility of objecting States to indicate the effect of the reservation: whether it precludes the entry into force of a part or the whole of a Convention, or whether it precludes operation of the treaty between the concerned States.

<sup>12</sup> As put by REDGWELL, Op. cit., "[w]as a reservation which was incompatible with the object and purpose of a convention according to Article 19 VCLT nonetheless open to acceptance by States in accordance with Article 20 VCLT? Opinion was divided as to whether it could or should be.[...]. In reading Article 20 "in close conjunction with" Article 19, does this mean that a reservation which has fallen at the hurdle of Article 19(c) because of incompatibility with the object and purpose of the Convention is nonetheless open to acceptance or rejection by States under Article 20(4)?"

<sup>13</sup> According to GAJA G., Unruly Treaty Reservations, in *Le Droit International à l'heure de sa codification, Etudes en l'honneur de Roberto AGO*, Vol. 1, Milano, 1987, at 305-330, "The definition of a reservation as inadmissible should logically imply that the formulation of the reservation prevents the reserving State from becoming a party to the treaty, unless an amending agreement is concluded for this purpose or the reservation is withdrawn. However while this reading of the provisions in the Vienna Convention is generally upheld for the case of reservations which are either explicitly or implicitly prohibited by the treaty, only a minority view holds the same opinion with regard to the third category of reservations. According to the prevalent view, reservations which are incompatible with the object and purpose of the treaty are subject to the same regime of acceptance of, or objections to, reservations that applies to admissible reservations."

<sup>14</sup> On the subject of reciprocity see PINTO R., L'application du principe de réciprocité et des réserves dans les Conventions inter-étatiques concernant les droits de l'homme, in: *Mélanges en l'honneur de Georges Levasseur*, 1992. See also CAMPIGLIO C., Il principio di Reciprocità nel Diritto dei Trattati, in: *Pubblicazioni della Università di Pavia*, Vol. 77, 1995, at 141ff. See also PROVOST R., Reciprocity in Human Rights and Humanitarian Law, in: *65 British Yearbook of International Law*, 1994, at 383-454. In the report of the Council of Europe on reservations made by member states to the Council of Europe, GUNDERSEN explains that even if it is quite understandable to limit in certain cases the automatic effects of reciprocity as regards to human rights treaties, the normal rule to be applied is the Vienna Convention on the Law of Treaties, which is explicit in this connection, Doc. 6855, Forty-fourth Ordinary Session, Sixth part, 29 June-2 July 1993, Working paper, Volume X.

### 3. *Inadequacy of the Vienna Convention reservations regime as regards human rights treaties*

#### 3.1 *The Compatibility criterion as stated by the International Court of Justice in the Genocide Convention Opinion*

The criterion of compatibility owes its origin to the Advisory opinion of the International Court of Justice of 28 May 1951 on Reservations to the Genocide Convention<sup>15</sup>. As Koh rightly pointed out, "the International Court thereby introduced purposive words<sup>16</sup> into the vocabulary of reservations, which have previously been dominated by the term consent", marking the end of the unanimity rule. Defending its views on the Genocide Convention as requiring a wide degree of participation, the Court effectively argued that the classical theory of unanimous consent could no longer be applied<sup>17</sup> and consequently proposed the adoption of a new rule: "it is the compatibility of a reservation with the object and the purpose of the Convention that must furnish the criterion of admissibility"<sup>18</sup>. Thus, States would have in the future individually to ascertain the validity of a reservation. However, even if the objective of that new approach, namely to bring some flexibility among the rules governing the treaty formation, was totally satisfied, that new rule should nonetheless not have been taken as a reliable mean to solve the problem: as it will be seen further below, the application of a compatibility rule to the matter of reservations to human rights treaties

---

<sup>15</sup> The International Court of Justice was requested by a United Nations General Assembly resolution to answer three questions concerning the validity, as well as the legal effects of reservations to the Convention on the Preservation and Punishment of the Crime of the Genocide (henceforth: Genocide Convention), G.A., Res. 478, 5 U.N. GAOR Supp (No 20) at 74, U.N. Doc. A/C.6/L. 125, 1950. See Reservations to the Convention of Genocide, Advisory opinion, I.C.J. Reports, 1951. See also International Court of Justice. Pleadings, Oral Arguments, Documents, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. On this subject see PLANZER A., *Le crime de Génocide*, Thesis, Freiburg University, St Gallen, 1956. BISHOP W. W. studied in detail the forthcoming Genocide Convention, the Advisory opinion, as well as the reply of the I.C.J., Reservations to treaties, in: 103 Hague Collected Courses, 1961, at 247ff, esp. at 285ff. See also ZEMANEK K., *Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties*, in Essays in Honour of Judge Manfred Lachs, Reservations to the Vienna Convention, at 323ff. See also SCHABAS W. A., *Reservations to Human Rights Treaties; Time for innovation and reform*, *Annuaire canadien de droit international*, 1994, at 39ff. See also COCCIA M., *Reservations to Multilateral Treaties on Human Rights*, in: 15 *California Western International Law Journal*, 1985, at 6-7. See KAPPELER D., *Les réserves dans les traités*, Verlag für Recht und Gesellschaft SA, Bâle, 1958, at 37-39.

<sup>16</sup> KOH characterises the compatibility test as being a "purely purposive determination" of the validity of a reservation, namely having as its sole criterion the compatibility of the substance of the reservation with the object and purpose of the treaty, as opposed to the "purely subjective determination", having as its sole criterion the consent of all the parties to the treaty, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, in: 23 *Harvard International Law Journal*, 1982, at 73-74.

<sup>17</sup> It is "inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce the complete exclusion from the Convention of one or more States", *International Court of Justice*, I.C.J. Rep., 1951, at 24.

<sup>18</sup> I.C.J., Rep., 1951, at 24.

involves major inconsistencies. In brief, the first inconsistency that could be outlined is the difficulty, or even the impossibility of defining the notions of object and purpose of a treaty<sup>19</sup>. The second inconsistency that appears when applying the compatibility test is the question of who shall determine the object and purpose of the treaty, and moreover of who shall determine if the reservation is compatible with that object and purpose. Conferring this function on States will inevitably lead to confusion, as each State might reach a different conclusion as regards the validity of a particular reservation<sup>20</sup>.

### 3.2 *Extension of the compatibility test to all multilateral treaties*

It should be noted that the Advisory opinion should have been limited to the case in question, without being applied in the abstract to others conventions<sup>21</sup>: the issue of reservations more generally being a question to be resolved by another international body, as for example, the International Law Commission<sup>22</sup>. Consequently, the theory propounded by the International Court of Justice has been elaborated, without taking into account the possibility of its wider application<sup>23</sup>, as it has with hindsight been the case. As a matter of fact, it seems obvious that the rule mentioned in the Advisory opinion, having, at the time, as its sole purpose the interpretation of the Genocide Convention, only fits this particular convention. As the International Law Commission emphasised in its report, written just after the advisory opinion, "the criterion of compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide is not suitable for application to multilateral conventions in

<sup>19</sup> On this subject see FITZMAURICE G., who explains that "the criterion of the acceptability of any reservation propounded by the Court-namely its compatibility or otherwise "object and purpose" of the relevant convention was an entirely subjective one which might lead to great practical difficulties", in: *Judicial Innovation-Its Uses and its Perils, Essays in Honour of Lord Mc Nair*, 1965, at 24-47.

<sup>20</sup> According to the International Court of Justice "As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State". *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J.*, 1951, at 26.

<sup>21</sup> *International Court of Justice, I.C.J. Rep.*, 1951, at 20: "The questions thus having a clearly defined object, the replies which the Courts called upon gives to them are necessarily and strictly limited to that of the Convention".

<sup>22</sup> The resolution of the General Assembly which provides for an Advisory opinion of the International Court of Justice on the matter of reservations to the Genocide Convention also contains an invitation to the International Law Commission to begin "to study the question of reservations to multilateral conventions both from the point of view of codification and from that of the progressive development of international law", U.N Doc A/C.6/L. 125 (1950), G.A. Res. 478, 5 U. N. GAOR Supp. (No 20).

<sup>23</sup> See the joint dissenting Opinion of Judges Guerrero, Mc Nair, Read and Hsu Mo, which at the time stressed the necessity of being as careful as possible when replying to questions of the General Assembly



general"<sup>24</sup>. As Lijnzaad suggested, "as a result of the Genocide case, the rule developed has the disadvantages of being extremely simplistic"<sup>25</sup>. Accordingly, the subsequent application of such a rule to other treaties has given rise to significant problems related to the determination of the object and purpose of a treaty, as will be seen further below<sup>26</sup>.

### 3.3 *Uncertainty of the compatibility criterion*<sup>27</sup>

#### A. *The definition of the object and purpose of a treaty*<sup>28</sup>

To understand the Vienna reservations regime and, more precisely, the compatibility test, it would be of paramount importance to determine the exact meaning of the notions of object and purpose of a treaty<sup>29</sup>, especially with respect to human rights treaties. As a matter of fact, it would be more than necessary to delimit, as far as possible, the meaning, as well as the content of these notions, in order to know how to give effect to the object and purpose of a treaty, which is central in the making of a correct appraisal of the compatibility of a reservation.

---

because the Advisory opinion was likely to have a general effect on the law of reservations, I.C.J., Rep. 1951 at 31: "The Court cannot overlook the possibility of a wider effect".

<sup>24</sup> International Law Commission, Report of its Third Session, May 16-July 27, 1951, UN Doc. A/1858, §24.

<sup>25</sup> LIJNZAAD L., Op. cit. footnote no 3 at 81.

<sup>26</sup> In this connection, Manuel Rama-Montaldo explains that "the initial ambiguity of the application of the notion of object and purpose to treaty reservations has been carried over and perpetuated, through the work of the International Law Commission, to the provisions regulating reservations in the 1969 Convention on the Law of Treaties", RAMA MONTALDO M., Reservations to Human Rights Conventions, in Hector Gros Espiell *Amicorum Liber*, Vol. 2, 1997, at 1261, esp. at 1265.

<sup>27</sup> The International Law Commission agreed that "the Court's principle of compatibility with the object and purpose of the treaty is one suitable for adoption as a general criterion of the legitimacy of reservations to unilateral treaties and objection to them" but "[t]he difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty", in UN. Doc. A/CN.4/148, at 59. On this subject see especially ANDERSON D. R., Reservations to multilateral Conventions: a re-examination, in: 13 *International and Comparative Law Quarterly*, April 1964, at 450ff. See also TEBoul G., Remarque sur les réserves aux conventions de codification, in: 86 *Revue Générale de Droit International Public*, 1992, at 679, esp. at 695.

<sup>28</sup> For the object and purpose of a human rights treaty, see LIJNZAAD L., Op. cit., footnote no 3, at 81ff. On the object and purpose test see EDWARDS R. W. JR., Reservations to treaties, in: 10 *Michigan Journal of International Law*, at 362ff, esp. at 388.

<sup>29</sup> For instance, about the Convention on Racial Discrimination see LIJNZAAD L., Op. cit., footnote no 3, at 136: "The notion of object and purpose of the Convention seems self-evident, but it raises the question what the precise object and purpose of the Convention are". On this particular subject see also the joint Dissenting Opinion: the dissenting judges maintained that the rule elaborated by the International Court of Justice was not tenable because of the difficulty in applying the "object and purpose test" in practice. More precisely they wondered how to determine the exact content of "object and purpose" of the Genocide Convention, I.C.J., Rep., 1951 at 44: "What is the object and purpose of the Convention? To repress Genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement Articles of the Convention? That is the heart of the matter". On this subject see BUFFARD I. and ZEMANEK K., The object and purpose of a treaty: An Enigma?, in: 3 *Austrian Review of International and European Law*, 1998, at 311.

Looking at the paucity of legal literature written on this subject, it remains hard to find a thorough definition of these notions. At first sight, the difficulties in defining the meaning of the object and purpose of a treaty have prevented authors from trying to express their views about this concern<sup>30</sup>. For his part, Schabas points out the “tautology” that can be deduced from the Vienna Convention: the determination of the object and purpose of a treaty being a problem of interpretation, the object and purpose of a treaty are to be determined, according to 31 VCLT, in light of its object and purpose!”<sup>31</sup>. According to Sir Gerald Fitzmaurice, the uncertainty of the compatibility criterion, is due to a lack of fixity, the notion of object and purpose being not a “fixed and static one”, but conversely a notion “liable to change, or rather developed as experience is gained in the operation and working of the convention”<sup>32</sup>. Anyway, in some rare cases, as for example concerning the International Covenant on Civil and Political Rights, it is possible to find a definition of the object and a purpose of a specific treaty, but phrased in very broad terms: “the object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratified; and to provide an efficacious supervisory machinery for the obligations undertaken”<sup>33</sup>. For her part, Rebecca Cook emphasises the necessity of interpreting the object and purpose rule of treaties “in order that their object and purpose be given fullest weight and effect in a manner that is consistent with other parts of the text” rather than trying to determine “‘the’ object and purpose or multiple objects and purposes of a treaty which is ‘difficult and controversial’”<sup>34</sup>. She adds that, “the general object and purpose of a human rights treaties are to protect individual rights”<sup>35</sup>. This statement, in a certain way seems to meet the proposal<sup>36</sup>, according to which

<sup>30</sup> “Few attempts have been made to develop a theory on the content of the object and purpose rule in respect of human rights treaties. The absence of doctrine in this field is understandable when one considers the problems that arise in seeking the concrete content of the rule.”, LIJNZAAD L., *Op. cit.*, footnote no 3, at 81. On this subject, see also CHINKIN C. and OTHERS, *Human Rights as General Norms and a State’s right to opt out, Reservations to Human Rights Conventions*, The British Institute of International and Comparative Law, Human Rights Series, Ed. J. P. Gardner, at 20-34, at 164ff.

<sup>31</sup> SCHABAS W. A., *Op. cit.* footnote no 15, at 48.

<sup>32</sup> Sir FITZMAURICE G., *The Law and procedure of the International Court of Justice: Treaty Interpretation and other treaty points*, in: 33 *British Yearbook of International Law*, 1957, at. 208. See also LALIVE J.F., *La jurisprudence de la C.I.J.*, in *Annuaire suisse*, 1952, at 235. JULLY L., *Les réserves aux conventions multilatérales*, in: 51 *Friedenswarte*, 1952, at 255, esp. at 269.

<sup>33</sup> *General Comment No 24*, at 3.

<sup>34</sup> COOK R. J., *Op. cit.* footnote no 6, at 661.

<sup>35</sup> *Id.* at 661

<sup>36</sup> Examining the Convention on Racial Discrimination COOK R., *Op. cit.* footnote no 6, at 136, wonders whether the fact that the elimination of racial discrimination is clearly the purpose of the Convention implies that reservations to any of the substantive provisions are prohibited?



only reservations to substantive provisions should be prohibited, while reservations to procedural provisions would be admitted.

Considering the Advisory opinion, in which the compatibility test was enounced for the first time, it is still difficult to bring out some criterions, which may help in the understanding of both notions. However, the simplicity of the Genocide Convention, as opposed to further human rights treaties elaborated in a more detailed way<sup>37</sup>, explains why, in this particular case, a precise definition was useless. As a matter of fact, unlike other human rights treaties, which are more complicated, as well as more diversified<sup>38</sup>, the aim of the Genocide Convention seems quite easy to determine. Simply stated, the purpose of such convention is the banning of the genocide. Taking another human rights convention, for example the Convention on the Rights of the Child, it becomes really difficult, or even impossible, due to the multiplicity of rights established and their specificity, to ascertain what is the object and purpose of the Convention. (i) Assuming that the interpretation of the object and purpose of such convention should be envisaged in a extensive way, namely that the goal of the treaty is the whole protection of the rights of the child, how it is possible to consider that a reservation to any of its provisions might be considered as acceptable? An extensive interpretation could only lead to the prohibition of the use of reservations, with the consequence of rendering the compatibility test of Article 19(c) of the Vienna Convention pointless. (ii) On the contrary, the acceptance of a more restrictive interpretation of the notion of object and purpose of the convention would lead to a risk of abuses. By the way, very little reflection is necessary in order to understand that there are so many interpretations of the object and purpose of a convention as there are contracting parties to the convention<sup>39</sup>. An argument that could be also upheld in this regard is that the object and purpose of a human rights convention should be interpreted, due to their specificity, in a more rigorous manner than for other multilateral treaties.

<sup>37</sup> According to SCHABAS W. A., "the object and purpose test may be considerably easier to assess in single-issue human rights conventions, such as the Genocide Convention, the Torture Convention and the Racial Discrimination Convention. [...]. On the other hand, where human rights conventions contemplate a wider range of rights and obligations, not only is it more understandable that a State wishes to reserve to one or two specific norms, but also it is more difficult to identify the real object and purpose of the instrument", *Op. cit.*, footnote no 15, at 48.

<sup>38</sup> Taking for example the International Covenant on Civil and Political Rights, it is hard to identify the object and the purpose of such a treaty, especially because of the host of rights which are set out and protected. See also MIGLIORINI L., in: 77 *Rivista di Diritto Internazionale*, 1994, at 635-654, esp. at 640.

<sup>39</sup> According to SIMMA B., *Reservations to Human Rights Treaties, Some recent developments*, in *Liber Amicorum Professor Ignaz-Seidl-Hohenveldern*, Kluwer International Law, 1998, Chapter 34, at 669: "The objecting States' decision on the compatibility of a reservation with the object and the purpose of the treaty remains based on subjective auto-determination, with the possibility of different States arriving at different result."

By way of conclusion, what should at any rate be kept in mind is that the imprecision of the notions of the object and purpose of a treaty would have repercussions of paramount importance regarding the regime applicable to the admissibility of reservations to human rights treaties: to judge the validity of reservations according to a criterion so difficult to apply will automatically lead to uncertainty and confusion.

*B. The difficulty of application of the compatibility criterion*<sup>40</sup>

In this connection, it is advisable to highlight that the criticisms made of the Advisory opinion do not essentially concern the impossibility of defining the object and purpose of a treaty; they rather concern the difficulty of applying such a concept, which is considered to be "unworkable" by numerous text-books, because of the absence of an objective method for determining whether the criterion is satisfied. The dissenting judges have beside perfectly demonstrated the difficulty, which arises when the compatibility test turns to be applied: "*we have difficulty in seeing how the new rule can work. When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results. We do not think that the rule under examination satisfies either of these requirements*"(emphasis added)<sup>41</sup>. In short terms, the key issue seems to be the procedure adopted in the evaluation of the compatibility of a reservation: the solution of the Advisory opinion would have appeared to be available, if and only if the decision of compatibility could *objectively* be determined<sup>42</sup>, by reference to judicial or at least a neutral decision<sup>43</sup>. As Anna Jenefsky rightly points out, "the compatibility rule appears to be a reasonable compromise for determining the permissibility of reservations to a convention. However, in the absence of an authoritative mechanism for assessing the compatibility of a specific reservation with the object and purpose of an agreement, the rules provides little guidance"<sup>44</sup>.

---

<sup>40</sup> See BOWETT D. W., Reservations to Non-Restricted Multilateral Treaties, in: 48 British Yearbook of International Law, at 67-92, esp. at 74, 81.

<sup>41</sup> The joint Dissenting Opinion, Op. cit., at 44.

<sup>42</sup> See especially Sir FITZMAURICE G., Judicial Innovation-its uses and its perils, Op. cit. footnote no 19, at 33-35.

<sup>43</sup> According to the dissenting judges "It will only be objectively determined when the question of compatibility of the reservation is referred to judicial decision; but this procedure for various reasons may never be resorted to by the parties", Op. cit. at 44.

<sup>44</sup> JENEFSKY A., The permissibility of Egypt's reservations to the Convention on the Elimination of All Forms of Discrimination Against Women, in: 15 MD. Journal of International Law & Trade, 1991, at 199, esp. at 210. According to de LUNA GARCIA A. "the compatibility test is reasonable in principle but impracticable in the absence of any authority to decide the question of compatibility", in: Yearbook of the International Law Commission, 1962 I, at 160.

C. *Subjectivity of the compatibility test: individual appraisal*<sup>45</sup>

As pointed out by Clark, "although the standard is intended to be an objective one, it is subjectively applied, i.e., compatibility is assessed by the sole judgement of every other party"<sup>46</sup>. One of the most striking feature of the Vienna Convention reservation regime is its flexibility in permitting parties to decide freely which reservation should be considered as being compatible or incompatible with the object and purpose of the treaty, by the means of the procedure of objection to and acceptance of the reservations. As a matter of fact, States might have two options, according to the Vienna Convention, in order to react to a reservation. Firstly, they have the possibility to accept the reservation, either explicitly (Article 20.4a VCLT), or tacitly<sup>47</sup> (Article 20.5 VCLT). Whereas the express acceptance is almost never used, tacit acceptance seems to be the most frequent response to a reservation since as will be examined further below, States are almost always reluctant to use the second option, namely their ability to object to a reservation. In other words, the validity of a reservation only depends on the acceptance of the reservation by another contracting State. Thus, the judgement of validity of a particular reservation is purely, and only, based on individual appreciation, which is strongly contested in connection with human rights treaties.

This being the mechanism provided by the Vienna Convention for the judging of the compatibility of a reservation, it is obvious that each State will subjectively reach its own conclusion, depending only on its *own* views and *own* interests, this choice being most of the time rather political than judicial<sup>48</sup>. Furthermore, States do not have to justify their decision by explaining their reasons for making an objection. As a result, each State party could object and take the view that a reservation is not compatible with the object and purpose of the treaty on *personal* grounds.

<sup>45</sup> According to SCHABAS W. A., "the parties become the judge of the acceptability of reservations in much the same way as jurors vote to admit a new member to a jury". Op. cit., at 64.

<sup>46</sup> CLARK B., The Vienna Convention Reservation Regime and The Convention On Discrimination Against Women, in: 85 American Journal of International Law, 1991, at 301.

<sup>47</sup> Tacit acceptance takes place either at the moment a State expresses its consent to be bound by the treaty or after a period of twelve months during which no objections have been made.

<sup>48</sup> According to de ROVER C., "The problem [here] is that action against (excessive) reservations made by States parties must primarily be taken by other States parties. In that connection States will often consider much more than the mere object and purpose of a treaty at hand. Politics do play an important role in the field of human rights, including in the area of reservations to human rights treaties. First of all, States easily allege interference in domestic affairs where international human rights norms (threaten to) assert influence at the national level. Secondly, an individual objection to a reserving State's intentions might well trigger a reciprocal response in the future as to a reservation the now objecting State might wish to make for itself", in To serve and to protect, Human Rights and Humanitarian Law for Police and Security Forces, International Committee of the Red Cross, Geneva, 1998, at 77.

Incidentally, both the inconsistency and subjectivity of the compatibility test may be demonstrated when, taking a particular convention, and the subsequent objections made to reservations formulated counter to this particular convention, it is observed that there are almost as many different reservations concerned by the objections as there are objecting States. If, on the contrary, the compatibility test were objectively and consistently applied, it would have been possible to find out that objecting States had objected to similar reservations, due to their *objective* incompatibility with the object and purpose of the particular treaty. For his part, Zemanek emphasised that objections by other States parties seem to be happening *at random*: “[O]bjections by other parties to these types of reservations show no consistent pattern [...]. No State seems to have objected to all identical reservations to the same convention, nor have States objected consistently to reservations of the same type made to different conventions”<sup>49</sup>.

Taking as an example, the Convention on the Rights of the Child, thirteen States<sup>50</sup> have lodged at least one objection to approximately twenty-five different reservations. The number of States whose reservations have been objected to is of twenty-three<sup>51</sup>. Apart from a few number of reservations that could be easily identified as being objected to by several objecting States (notably reservations made by Brunei, Qatar, Pakistan, Singapore, Indonesia and principally to Articles 7, 14, 21, 37 of the Child Convention), it is almost impossible to clearly bring out some sets of reservations that have been considered invalid by most objecting States. This examination shows that subjectivity is the rule when a reservation is objected to, and furthermore, also when reservation is not objected to. Taking for granted that the principal reservations that have been objected, as seen above, were incompatible with the object and purpose of a treaty, why were they not objected by other States parties?

Again, assuming that, for the purpose of the examination, all the United Nations conventions on human rights are considered and taking a particular State, party to many of these conventions, the objectivity of the compatibility test would be admitted, if, that State had objected with consistency to reservations of the same type made to different

<sup>49</sup> ZEMANEK K., *Op. cit.* footnote no 15, at 176.

<sup>50</sup> The objecting States are Austria- Belgium- Denmark- Germany -Finland- Italy- Ireland- Netherlands- Norway-Portugal- Slovakia-Czech Republic. The sources are taken from *Multilateral Treaties*, *Op. cit.*

<sup>51</sup> The States whose reservations have been objected are : Andorra – Bangladesh – Botswana- Brunei Darussalam – Djibouti – Indonesia – Iran– Jordan– Kiribati– Kuwait– Liechtenstein– Malaysia–Myanmar – Oman –Pakistan – Qatar- Saudi Arabia- Singapore- Syria- Thailand- Tunisia– Turkey- UAE. The sources are taken from *Multilateral Treaties*, *Op. cit.*

conventions. On the contrary, what appears to be the result of this examination is that States act most of the time, if not always, in a rather inconsistent way; as an example, the behaviour of Denmark, when objecting to reservations which it considered to be incompatible, is particularly relevant: whereas Denmark has contested the legality of the broad reservation formulated by the Saudi Arabian Government in connection with the Convention on the Rights of the Child<sup>52</sup>, it has, on the contrary, formulated no objection to the same sort of reservations made by Saudi Arabia, in connection with the Convention on Racial Discrimination. Furthermore, assuming that the sort of reservation made by Saudi Arabia was clearly incompatible with the object and purpose of the treaty, how is it possible to explain, without agreeing with the principle of subjective determination, that Denmark lodged an objection only to the reservation formulated by the Saudi Arabia Government, and did not object to the same set of reservations formulated by Afghanistan, Brunei Darussalam, Iran, Kuwait, and Qatar?

It is, therefore, hardly possible to achieve an objective determination of the validity of a reservation, without relying on a neutral authority, as for example an expert committee, as well as an international court, or potentially a collegiate system.<sup>53</sup> In short, what is needed is an *organic*<sup>54</sup> appraisal of the validity of a reservation. As long as States remain empowered to individually ascertain the compatibility of a reservation, uncertainty will remain the rule.

---

<sup>52</sup> The reservation stated that Saudi Arabia reserves the right not to apply any provisions or Articles of the Convention that are incompatible with Islamic Laws (Sharia) and the internal legislation in effect, *Op. cit.*, at 239. Broad reservations to the Convention on the Rights of the Child were notably formulated by Afghanistan, Saudi Arabia, Brunei Darussalam, Djibouti, Iran, Malaysia, Kuwait, Qatar, Tunisia, Turkey. See *Multilateral Treaties*, *Op. cit.*, at 228 ff. (French version).

<sup>53</sup> According to the four dissenting judges "under such a system it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is referred to judicial decision.", I.C.J., 1951 at 44. Even if the International Law Commission shares the same point of view in regard to the subjectivity of the compatibility test, it remains doubtful concerning the judicial solution: "[...] there is no objective test by which the difference [between provisions which do and those which do not form part of the object and purpose of a convention] may be resolved; even there it is possible to refer the difference of views to judicial decisions; this might not be resorted to, and, in any case, would involve delay.", in *International Law Commission Report of its third session, May 16-July, 1951*, U. N. Document A/1858, at 24.

<sup>54</sup> This wording is used by MONTALDO M. R., *Op. cit.*, footnote no 26, at 1267.

D. *How to determine the compatibility of a reservation with the object and purpose of a treaty?*<sup>55</sup>

a) *Reservations to peremptory norms*

A first step in determining the compatibility of a reservation with the object and purpose of a treaty could be to assume that any reservation to substantive provisions is unacceptable<sup>56</sup>. It would effectively be considered to be inconceivable that a State, while accepting to ratify a human right treaty, nevertheless formulates reservations to provisions directly related to specific rights<sup>57</sup>. For example, what is to be thought of a State party to the Convention on the Elimination of All Forms of Discriminations Against Women that makes reservations to women's basic rights?<sup>58</sup> In connection with this theory, it has been argued in a rather extreme way that, human rights provisions, being part of the *jus cogens* norms, are non-derogable norms. Consequently no reservations to human-rights norms would be admitted<sup>59</sup>. Rosalyn Higgins points out, however, that even if a consensus exists that certain rights – such as to the right to life, the right to freedom from slavery and torture – are so fundamental that no derogation may be made, “neither the wording of the various human rights instruments nor the practice thereunder leads to the view that all human rights are *jus cogens*”<sup>60</sup>. In this regard, Schabas examined the issue of reservations made to peremptory norms and non-derogable provisions and concluded that even if a reservation to a *jus cogens* norm<sup>61</sup> is clearly illegal, it remains difficult to identify which human rights

<sup>55</sup> See SHERMAN E. F. JR., *The U.S Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the limitations of the Flexible System Governing Treaty Formation*, in: 29 *Texas International Law Journal*, 1994, at 69ff. He quoted Professor Bernard Oxman who declared that “to interpret and to apply the object and purpose criterion in the case of any given Article of this vast and complex Convention [the United Nations Convention on the Law of the Sea] would be exceedingly difficult, if not impossible”, OXMAN B., *The Third United Nations Conference on the Law of the Sea: the Eighth Session*, 1979, in: 74 *American Journal of International Law*, 1980, at 35.

<sup>56</sup> This is the approach expressed by Judge de MEYER of the European Court of Justice in his individual concurring opinion in the case *Belilos* against Switzerland, *Belilos Case*, 132 *Eur. Ct. H.R.*, Ser. A, 1988.

<sup>57</sup> The US ratification of the International Covenant on Civil and Political Rights, with a high rate of reservations, especially reservations to the provisions aimed at safeguarding the prohibition of the death penalty, resuscitated the problems linked with this statement.

<sup>58</sup> SCHABAS William agrees but emphasised the difficulty of evidence, given an example related to the Convention on the Rights of the Child: “A large number of reservations have been made to the provisions concerning adoption. It would be difficult to conclude that this issue is so fundamental to the Convention as to render such reservations contrary to its object and purpose.”. SCHABAS, *Reservations to the Convention on the Rights of the Child*, in: 18 *Human Rights Quarterly*, 1996, at 472-491, esp. at 480.

<sup>59</sup> See de MEYER, *Op. cit.* footnote no 56.

<sup>60</sup> HIGGINS R., *Derogations under human rights treaties*, in: 48 *British Yearbook of International Law*, 1976-1977, at 282.

<sup>61</sup> This issue also raises the question of the effect of the persistent objector rule on the principles governing the formulation of reservations: the case of the United States and their reservation to the death penalty provision perfectly illustrates the problem: assuming the death penalty provision as being part of the *jus cogens* norms, the reservation of the United States to that provision should be considered incompatible with



norms fall into that classification<sup>62</sup>. For his part, Sherman, appraising the United States' death penalty reservation related to the International Covenant on Civil and Political Rights, argues that the non-derogable nature of the provision "makes it inherently incompatible with the object and purpose of the Convention"<sup>63</sup>.

b) *Reservations to customary norms*<sup>64</sup>

In its General Comment No 24, the Human Rights Committee proposed another approach for a determination of whether certain reservations are compatible or incompatible with the object and purpose of a particular treaty. The hypothesis formulated is that provisions in the Covenant that are also norms of customary international law may not be the subject of reservations<sup>65</sup>. The adoption of such a hypothesis, and moreover its further extension to all human rights instruments, would permit the avoidance a great number of impermissible reservations. Again, let's take as an example the International Covenant on Civil and Political Rights and the reservation made by the United States to the ban on the death penalty for juvenile offenders, which was considered as highly controversial (Article 6, paragraph 5)<sup>66</sup>. Unless the United States is considered as being a persistent objector<sup>67</sup>, this

---

the object and purpose of the convention. However, one might question the effect of the behaviour of the State that has persistently objected to that provision: does it allow the State to opt out of emerging rules of customary international law?

<sup>62</sup> SCHABAS W. A., Op. cit., no 15 at 50f. On this subject see the Advisory opinion of the Inter-American Court of Human Rights, Restrictions to the Death Penalty, OC-3/83, Ser. A No 3,4 in Human Rights Law Journal 352.

<sup>63</sup> SHERMAN, Op. cit., footnote no 55, at 79.

<sup>64</sup> On this particular subject see SCHABAS W.A., Op. cit., footnote no 15, at 53-56.

<sup>65</sup> According to the Human Rights Committee "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial, or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to a fair trial would not be". See General Comment No 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6, at §3.

<sup>66</sup> On this particular subject see especially SCHABAS W. A., Les réserves des Etats-Unis d'Amérique au Pacte International sur les droits civils et politiques en ce qui a trait à la peine de mort, In Revue Universelle des droits de l'homme, Vol. 6, No 4-6, 1994, at 137-150. See also LILLICH R., (ed), US ratifications of the Human Rights Treaties: With or Without Reservations?, Charlottesville, University of Virginia Press, 1981. See SCHMIDT M. G., Reservations to the United Nations Human Rights Treaties- the case of the two Covenants, in: Human Rights as General Norms and a State's right to opt out, Reservations to Human Rights Conventions, The British Institute of International and Comparative Law, Human Rights Series, Ed. J. P. Gardner, at 20-34.

<sup>67</sup> On the subject of the persistent objector in relationship with the reservations to human rights treaties, see SHERMAN E. F. JR, Op. cit. footnote no 55, at 90-91. He notices that "[as] a persistent objector, the United States is not bound by the customary norms. If the death penalty reservation is incompatible with the object and purpose of the ICCPR, however, the United States' reservation ought to be void, even though this result would subject the United States to a treaty-based rule to which it has persistently objected."

hypothesis would entail the reservation being declared invalid, as being contrary to customary norms of international law.

A problem that may arise in connection with this approach is the determination of what norms should be included in the list of norms of customary international law?<sup>68</sup> It hardly appears to be an easy task to establish a complete<sup>69</sup> and exhaustive list of norms of customary international law, which leaves the door open to major difficulties, notably as regards the recognition by States of what norms should or should not be considered as being part of customary international Law.

c) *Balance of Interests*

Another solution to ascertaining the compatibility of a reservation is proposed by Kuper: "one way of judging the compatibility of a particular reservation with the [1989] Convention is to consider whether it is so sweeping that it almost make a nonsense of State ratification"<sup>70</sup>. Such a proposal would imply to the making of a balance between (i) the interest in having a State participating in the Convention with a specific reservation, and (ii) the interest not having the State participating in the Convention. Even if this weighing of interests would show whether the stress is put rather on the integrity of the Convention or on its universality, this test seems to be a rather implicit process which could not exist independently as such.

In this connection, it may be useful to add a further comment on a rather old as well as unusual proposition made by the International Court of Justice. The Court suggested that a determining factor regarding the admissibility of a reservation could be envisaged as being "*the degree to which the allowability of reservations was contemplated during the negotiations stages of the Convention in question*"<sup>71</sup> (emphasis added). Such a solution, however, implicitly presupposes that reservations had been foreseen during the negotiations. With respect to detailed human rights conventions that have been adopted, it is hardly conceivable that all reservations could have been foreseeable. Furthermore, such

<sup>68</sup> On this subject see HIGGINS R., *Problems and Process, International Law and How We Use it*, Oxford Clarendon Press, 1994, at 103.

<sup>69</sup> See for example SCHABAS who emphasised that the Committee does not mention the right of self determination, however this is cited by scholars as being part of customary norms of international law, *Op. cit.*, at 55.

<sup>70</sup> KUPER J., *Reservations, Declarations and Objections to the 1989 Convention on The Rights of the Child*, in LIJNZAAD L., *Op. cit.*, at 104-116, esp. at 108.

<sup>71</sup> I.C.J., 1951, at 22. See also HAZOU Linda L., *Determining the Extent of Admissibility of Reservations: Some Considerations with regard to the Third United Nations Conference on the Law of the Sea*, in: 9 *Journal of International Law and Policy*, 1989, at 69ff, esp. at 80.

a procedure would imply that the use of the majority rule has been adopted as the voting procedure: the use of consensus as the method of taking decisions would imply that almost no reservations would have been envisaged as being foreseeable.

d) *The insertion of a reservations clause*<sup>72</sup>

As declared by Bishop a few decades ago, "it has frequently been suggested that the best way to prevent problems concerning reservations is to spell out by clauses in the treaty itself what reservations are permissible"<sup>73</sup>. One of the most effective methods for ascertaining the validity of reservations might be to encourage the drafting of reservations clauses, namely either (i) to enumerate the provisions to which reservations will be deemed to be compatible with the object and purpose of the treaty or (ii) to mention those Articles without which the object and purpose of the treaty would no longer be respected<sup>74</sup>. It is true that the adoption of a reservations clause system could permit the avoidance of the application of Article 19(c) of the Vienna Convention, that is to say the application of the subjective test of the compatibility of the reservation with the object and purpose of a given treaty. Nevertheless, the inclusion of a reservations clause, whichever form ((i) or (ii)) is adopted, would not necessarily offer a guarantee of objectivity. As a matter of fact, the setting forth of a reservations clause according to alternative (i) would inevitably involve a pre-determination of the validity of certain reservations by the States participating to the drafting of the treaty. Then, as soon as a reservation has been formulated to one of the provisions contained in the clause, it would automatically be considered to be valid without requiring its acceptance by any other State party to the treaty. In the same way, the inclusion of a reservations clause in terms of alternative (ii) would equally necessitate a pre-determination of which reservations would be considered incompatible, and consequently not permissible. Moreover, it must be added that reservations formulated counter to the provisions not included in the reservations clause would not be automatically accepted but would have to satisfy the requirements of the rules of the Vienna Convention on the Law of Treaties.

<sup>72</sup> On this subject see IMBERT P.-H., *Les réserves aux Traités multilatéraux*, Paris, Pedone, 1979, at 163-173.

<sup>73</sup> BISHOP W. W., *Op. cit.* footnote no 15, at 323.

<sup>74</sup> See CHINKIN C. who describes three possibilities for States to organise their reservations regime: Isolation, General Prohibition, and Collective or Third Party Determination. She explains that the rules of the Vienna Convention being residual, States are free to stipulate in a convention the reservations regime which will apply to it: in Human Rights as General Norms, *Op. cit.* footnote no 30, at b12.

It is evident, therefore, that even if, in theory, this might appear safer, in terms of respect for human rights treaties, by defining in the treaty itself which provisions could be affected by reservations (or which provisions have absolutely to be respected), the subjective element in an appraisal of the validity of a reservation would remain absolutely unchanged.

*e) Third party determination of the compatibility of the reservation*

Another alternative in the reaching of an objective determination of the compatibility of the reservation would be to specify that an impartial body should always undertake the test set out in Article 19 (c)<sup>75</sup>. Although this kind of mechanism is already present in the framework of the Vienna Convention reservations regime, Article 20, paragraph 3 of which requires, that every reservation formulated counter to constituent instruments be submitted for acceptance to the competent organ of the body being established<sup>76</sup>, it has not yet been adopted for all other treaties. In this respect, two questions arise. Firstly, the question whether, as asked by Edwards, "the compatibility of a reservation with the object and purpose of the treaty is an appropriate subject for judicial determination"<sup>77</sup>. Second, in the case of an affirmative answer to the first question, the question of which organ would be competent to declare the reservation invalid. The reply to the first question having already been discussed, with the conclusion that in order to avoid a subjective determination of the compatibility of reservations, States should not be competent to undertake this function, the reply to the second question will be discussed further below.

As a matter of fact, such a subjective determination being unthinkable in respect to human rights treaties<sup>78</sup>, it would be necessary to determine the alternative approaches in the

<sup>75</sup> According to EDWARDS R. W. JR, "To have an objective character and be more than a doctrinal assertion [reference is made to the statement by Judge RUDA J. M., that the compatibility test is a "mere doctrinal assertion", Reservations to treaties, in Collected Courses of the Hague Academy, Vol. 146, 1975, at 95-218, esp. at 190], it is not necessary that Article 19(c) determination always be made by impartial tribunals or through a collegiate process. It is enough if there is the potential for impartial appraisal. In the case of some treaties, Article 19(c) may be applied by an organ of an international organisation", Reservations to treaties, in: 10 Michigan Journal of International Law, Op. cit. footnote no 28, Spring 1989, at 390-391.

<sup>76</sup> Article 20 paragraph 3 of the Vienna Convention on the Law of Treaties provides: "When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation". On this subject see RUDA J. M., Op. cit., footnote no 75

<sup>77</sup> EDWARDS R. W. JR, Op. cit., footnote no28, at 393-394. According to him, replying to the first question, "[S]ome would argue that the parties are the masters of their treaties. But, should dispute settlement clauses in treaties be read to exclude examination of the validity of reservations? Probably not. The European Court of Human Rights set an important precedent in the Belilos Case by ruling upon the validity of the Swiss reservation".

<sup>78</sup> According to BABEL M.-L., the designation of the object and purpose of the treaty depends not only on the States but also on the international and national communities, as well as individuals. Such a

appraisal of the validity of reservations, in order to secure an objective determination of its legality. Many plausible solutions for avoiding the confusions of the Vienna Convention could be envisaged, from adjudication by the treaty bodies, to the creation of a special committee responsible only for the validity of reservations, to the adoption of a collective mechanism, to the jurisdiction of an international tribunal<sup>79</sup>.

#### 4. *The traditional mechanism for determining the validity of a reservation and the inadequacies of this mechanism*

##### 4.1 *The objection regime*<sup>80</sup>

The Vienna Convention reservation regime permits States freely to accept or reject reservations through the mechanism of acceptance and objections to reservations. Thus, each State party has the power to decide, "*individually and from its own standpoint*"<sup>81</sup>, whether the reservation of another State is compatible with the object and purpose of the Convention. Even if the right of States parties to a treaty to object to the reservations made by others has always been recognised, this fails to prevent the acceptance of a reservation contrary to the object and the purpose of the Convention. Moreover, there is no assumption that States parties would necessarily object to all incompatible reservations. The small number of objections made by other contracting States to incompatible reservations reveals the loopholes of the Vienna Convention reservations regime<sup>82</sup>, especially when this regime is applied to human rights treaties. In this connection, Lawrence Leblanc declared that "[i]deally the states parties to the convention would take seriously their obligation to

---

determination should not belong only to one subject of international law -the State- but rather to an objective authority, Les réserves à la Convention des Nations Unies relative aux droits de l'enfant et à la sauvegarde de l'objet et du but du traité international, in: 8 European Journal of International Law, 1997, at 664ff.

<sup>79</sup> On this point see SCHABAS W. A, Op. cit., at 122.

<sup>80</sup> On this particular subject see CALAMIA A., La disciplina delle obiezioni alle riserve e la Convenzione di Vienna Sul Diritto dei Trattati, in: Studi in Onore di Giuseppe Sperduti, Milano, Dott. A Giuffrè Editore, 1984, at 7-27. See also MENDELSON, M. H., Reservations to the Constitutions of International organizations, in: British Yearbook of International Law, 1971, at 137-171, esp. at 149-151.

<sup>81</sup> International Court of Justice, Advisory opinion, Op. cit. footnote no 15, 1951, at 24.

<sup>82</sup> On that particular point, see the list of resulting problems established by PELLET A., Special Rapporteur of the I.L.C., First Report, A/CN.4/470, 30 may 1995, §§ 105-109. COCCIA M., Reservations to multilateral treaties on human rights, in: 15 Californian Journal of International Law, 1985, at 1-51, esp. at 34, writes: "[...] the primary issue concerning treaties on human rights is not whether reservations are incompatible with the object and purpose of the treaty, but whether States do, in fact, object to reservations made in regard to such treaties".

monitor carefully the reservations that others make and object to those that they consider incompatible with the object and purpose of the convention. Have they done so?"<sup>83</sup>

*Objecting to inadmissible reservations: An overview of state practice*

On the basis of the main issues summarised above, this examination will show the inadequate framework of the Vienna Convention, in connection with human rights treaties, from a practical point of view. Admittedly, taking the main human rights conventions, and the behaviour of States linked to these conventions, it is easy to demonstrate that the application of the Vienna Convention reservations regime to human rights treaties leads to major inadequacies. Whereas the discourse of reservations in respect of human rights treaties should be a firm one, without taking into account political preoccupations, the relatively high number of reservations made to major substantive provisions, affirms on the contrary, not only the little importance which it is given but also, and as Clark perfectly noticed, the "particular need of a workable reservations regime"<sup>84</sup>.

The Human Rights Convention that has, until now, attracted the greatest number of reservations is the Convention on the Elimination of All Discrimination against Women<sup>85</sup>. However, the more controversial reservation remains, above all, the reservation formulated to the provision related to prohibition of death penalty made by the United States<sup>86</sup>.

---

<sup>83</sup> LEBLANC L. J., Reservations to the Convention on the Rights of the Child, in: 4 International Journal of Children's Rights, 1996, at 357-381, at 373. Leblanc studies the practice of the states parties to the Convention on the rights of the Child regarding reservations, especially regarding their objections to reservations. See especially at 374-378.

<sup>84</sup> See CLARK B., Op. cit. footnote no 46, at 320.

<sup>85</sup> The problems created by this Convention are examined by CLARK, Op. cit., footnote no 46, ZEMANEK K., General Course on Public International Law, in: 266 Hague Collected Courses, 1997, esp. at 338, COOK R., Op. cit., footnote no 6, LIJNZAAD, Op. cit., footnote no 3, at 298-370.

<sup>86</sup> The case of the United States ratification to the International Covenant on the Civil and Political Rights in 1992 demonstrates the unwillingness of States to object to reservations in order not to interfere in state sovereignty as well as because of the political character of such decisions. The proposition of ratification made by the Senate to the Government of the United States was accompanied by five reservations, four interpretative declarations, five understandings and one proviso. The number of these statements provoked the indignation of the whole international community, as they were perceived as a rejection by the United States of all the general principles of the protection of human beings. On this particular subject see SHERMAN Edward F. JR., Op. cit. footnote no 55, arguing that the United States' death penalty reservation to the ICCPR violates international law. See also SCHABAS W. A., Invalid reservations to the International Covenant on Civil and Political Rights: is the United States still a party ?, Brooklyn Journal of International Law, Vol. 21, at 277, 1995. NANDA Ved. P., The U.S. Reservations to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights, in: 42 DePaul Law review, at 1311, 1993. SCHABAS W. A., Les réserves des Etats-Unis d'Amérique aux Articles 6 et 7 du Pacte International sur les droits Civils et Politiques, in: 6 Revue Universelle des Droits de l'homme, at 137, 1994.

*The case of the Convention on the Rights of the Child*<sup>87</sup>

An analysis of the Convention on the Rights of the Child reveals effectively that a host of reservations have been formulated, which defeats the essential goals of the convention, notwithstanding Article 51 (2) that provides that reservations incompatible with the object and purpose of the Convention are not permitted. A detailed study of the Convention shows that seventy-one parties<sup>88</sup> to the Convention on the Rights of the Child have at least formulated a reservation<sup>89</sup>, the number of reservations being approximately one hundred and seventy-one, including declarations and interpretative declarations.

The percentage of normative reservations to this treaty is particularly high: only four percent of the reservations are formulated with respect to procedural provisions, whereas the other ninety-six percent are concerned with the essence of the convention<sup>90</sup>. What may be especially noticed and what is especially relevant for this paper is that States do not object even to such reservations: excessive though these reservations may be, States are consistently reluctant to take a stand.

Taking, as an example, those provisions of the Children's Convention that have most frequently been affected by a reservation<sup>91</sup>, it is impossible to argue that these reservations are compatible with the object and the purpose of the Convention, all of the provisions of which undoubtedly serve to protect the basic rights of the Child. Despite the numerous interventions of human rights organisations<sup>92</sup>, the reservations are usually sustained<sup>93</sup>. The

<sup>87</sup> The Convention on the Rights of the Child, adopted by the General Assembly on 20 November 1989. The Convention entered into force on 2 September 1990. The legal literature on this subject often speaks of the four 'P's: the participation of children in decisions affecting their own destiny-the protection of the children against discrimination of all forms of neglect and exploitation-the prevention of harm to children-the provision of assistance for their basic needs. On the general subject of the Rights of the Child see Van BUEREN G., *The International Law on The Rights of the Child*, Martinus Nijhoff Publishers, 1995. On the specific subject of reservations to the Convention on the Rights of the Child see LUCKER-BABEL M., *Op. cit.* footnote 78. See also LEBLANC, *Op. cit.* footnote no 83 and KUPER, *Op. cit.* footnote no 70. Particularly on the text of reservations see SCHABAS, *Reservations to the Children's Convention*, in: 18 *Human Rights Quarterly*, 1996, at 474-491. The source of the statistics are taken from the document CRC/C/2/Rev.6 (1997). See also the discussion of the Committee on the Rights of the Child with respect to reservations, Annual report, 1994, UN Doc. A/49/41 at §§525-534.

<sup>88</sup> According to the Office of the High Commissioner, as of 15 May 2000, one hundred and ninety-one States parties to the Convention on the Rights of the Child and one signatory State.

<sup>89</sup> It is essential to bear in mind that the term "reservation" is to be understood in the broadest sense, including the notions of understandings and interpretative declarations. The texts of the reservations are to be found in *Multilateral Treaties*, UN. DOC ST/LEG/SER. E/17, at 228-238 (French version), dated 19 April 1999.

<sup>90</sup> See E/CN.4/Sub.2/1999/28.

<sup>91</sup> *Convention on the Rights of the Child*, in: 28 *International Legal Material*, 1989, II, at 1454ff.

<sup>92</sup> The Vienna World Conference in 1993 "urges States to withdraw reservations to the Convention on the Rights of the Child contrary to the object and purpose of the Convention or otherwise contrary to international treaty law", UN Doc. A/ Conf. 157/24, Part 1, October 13 1993, §46. The United Nations

provisions concerned are notably the Right to Adoption (Article 21 CRC)<sup>94</sup>, the protection of Freedom of Thought, Conscience and Religion (Article 14 CRC)<sup>95</sup>, the Right to Name, Nationality, Care of Parents (Article 7 CRC)<sup>96</sup>, the Prohibition of Torture and Inhuman Punishment (Article 37 CRC)<sup>97</sup>. Reservations to such provisions should not have been admitted: they risk ruining the Convention due to their incompatibility with the purpose of the Convention.

Looking more closely at the reservations that have been formulated, it can be seen that many of them are clearly incompatible with the object and purpose of the treaty, being most of the time too vague as well. While some of the reservations are relatively narrow in scope, others are wide-ranging and have the potential to threaten the pursuit of the goals of the treaty. Moreover, a reservation that is either too comprehensive or too general provokes the same effect as if there were no ratification at all. Furthermore, broad reservations are inherently unclear, especially due to the multiplicity of interpretations that one can give to such reservations.

For example, it is hardly necessary to even consider whether the reservation made by Iran to the Children's Convention is valid or not. According to Iran's reservation, the reserving State has the right to apply any provisions or Articles of the Convention that are *incompatible with Islamic laws* and the international legislation in effect. In fact, Iran goes far beyond what should be included in a permissible reservation: the reservation in favour of Islamic laws does not only deal with a specific provision but with the entire Convention. Using such a clause, Iran might be able to wholly escape from the obligations which derive

---

Commission in Human Rights also recommended that States parties to the Convention on the Rights of the Child "review the compatibility of their reservations with Article 51 of the Convention and other relevant rules of the Convention", in: Implementation of the Convention on the Rights of the Child, Res. 1992/75, Mars 5 1992, §6.

<sup>93</sup> However, some States have withdrawn their reservations. For example, Myanmar has withdrawn its reservation formulated counter to Article 37 on 19 October 1993. See UN Doc. Supplement to ST/LEG/SER.E/11.

<sup>94</sup> Fifteen States have formulated a reservation (including declarations and understandings), i.e., Argentina, Bangladesh, Brunei, Canada, Egypt, Jordan, Kuwait, Maldives, Oman, of Korea, Spain, Syria, UAE, Venezuela. On reservations formulated counter to the right of adoption see SCHABAS, Op. cit., footnote no 87, at 480.

<sup>95</sup> Eighteen States have formulated a reservation, i.e., Algeria, Bangladesh, Belgium, Brunei, Holy See, Indonesia, Iraq, Jordan, Kiribati, Malaysia, Maldives, Morocco, Holland, Oman, Syria, UAE, Poland, and Singapore.

<sup>96</sup> Twelve States have formulated a reservation, i.e., Andorra, Kuwait, Liechtenstein, Luxembourg, Malaysia, Monaco, Oman, Poland, Switzerland, Thailand, Tunisia, and UAE.

<sup>97</sup> Eleven States have formulated a reservation, i.e., Australia, Canada, Cook Islands, Iceland, Japan, Malaysia, Holland, New Zealand, Singapore, Switzerland, and the UK.



from the Child Convention, insofar Islamic laws do not provide for the same obligations, which would be more than astonishing<sup>98</sup>.

Consequently, Germany, Ireland, Netherlands, Portugal and Sweden have objected to that reservation, stating that: "a reservation by which a State party limits its responsibilities under the Convention, by invoking general principles of national law, may cast doubts on the commitments of the reserving State".

In this connection, certain States parties making reservations have also referred to national law and values, though by contrast these concern specific provisions: as an example, the reservation formulated by Myanmar -now withdrawn- concerning Article 37 could have been considered to be clearly not permissible, especially because of its general and comprehensive character. The reservation effectively stated that nothing in Article 37 should prevent the Myanmar government from exercising the powers required to protect "the supreme national interest", which include "arrest, detention, imprisonment, exclusion, interrogation, inquiry and investigation".<sup>99</sup> Such a reservation without any doubt undermines the scope of the Convention: how is it possible to consider that a reservation which attempts to limit a fundamental right, such as the prohibition of torture, does not runs contrary to spirit of the 1989 Convention and moreover to the general principles of international law? As may be gathered from the above, taking for granted that the prohibition of torture is a *ius cogens* norm<sup>100</sup>, one could argue that no derogation to such a right would be accepted.

Again, it is possible to identify some States, especially Islamic States, which have formulated reservations to religious and traditional values, which seem to run counter to the aim of the Children's Convention. The vagueness of such reservations and thus the faculty to interpret them in multiple ways are factors that may involve their incompatibility: for example, what is one to think about Djibouti's reservation<sup>101</sup> which states that the provisions of the Children's Convention "shall be interpreted in the light of the principles of Islamic Laws and Values".

---

<sup>98</sup> According to SCHABAS W. A., examining the Pakistan's reservation which is formulated in the same terms as the Iran's one, "This reservation could conceivably affect the application of every provision of the Convention", Op. cit. footnote no 87.

<sup>99</sup> ST/LEG/SER.E/17, at 246.

<sup>100</sup> See *Barcelona Traction, Light and Power Company (Belgium v. Spain)*, I.C.J. Rep. 1970, esp. at §§33-34.

<sup>101</sup> See UN Doc. ST/LEG/SER.E/17, Op. cit., at 231. See also the reservations formulated by Brunei Darussalam, Iran, Kuwait, and Qatar.

In the light of what has been seen here in relation to the various reservations that have been made to the Convention on the Rights of the Child, and in order to briefly sum up, it appears that the vague terms of the reservations, as well as their general character might be considered, most of the time, as the grounds of incompatibility<sup>102</sup>. As Kuper rightly points out, "[R]eservations must be sufficiently precise for compliance to be properly monitored"<sup>103</sup>.

Besides, assuming that those reservations have been considered to be invalid, how is it possible to explain that hardly any State has formulated an objection? Out of the host of reservations that have been made, only twelve States have objected to reservations<sup>104</sup>. Focusing on the reservations that have been examined above, it can be noticed that not more than five States parties<sup>105</sup> have objected to Pakistan's reservation, while only three States parties<sup>106</sup> to Myanmar's reservation and four States parties<sup>107</sup> have objected to the Djibouti's reservation. Moreover, among the few States that have put forward an objection, not even one has considered its objection as constituting an obstacle to the entry into force of the Convention.

#### 4.3 *The costs of objecting*

This small number of objections leads unfortunately to the conclusion that the Vienna Convention mechanism of objections does not permit the avoidance of incompatible reservations. The evidence is undeniable: for a large number of political, practical, logistic reasons, States are often unwilling to object to unacceptable reservations.<sup>108</sup> As Bruno

<sup>102</sup> On this subject see the Article 64 § 2 of the European Convention on Human Rights, which provides that reservations should not be of a "general character".

<sup>103</sup> KUPER J., *Op. cit.*, footnote no87, at 113.

<sup>104</sup> See UN Doc. ST/LEG/SER. E/ 17, *Op. cit.* at 238-242 (French version). The States that formulated objections to reservations are Germany, Austria, Belgium, Denmark, Finland, Ireland, Italy, Norway, Netherlands, Portugal, Slovakia, and Sweden.

<sup>105</sup> Finland, Ireland, Norway, Portugal, and Sweden. See UN Doc. ST/LEG/SER.E/17 at 238ff.

<sup>106</sup> Germany, Ireland, and Portugal. See UN Doc. ST/LEG/SER.E/17 at 238ff.

<sup>107</sup> Ireland, Netherlands, Norway, and Portugal. See UN Doc. ST/LEG/SER.E/17 at 238ff.

<sup>108</sup> See LEBLANC L. J., *Op. cit.* footnote no 83, at 374, explains the reasons that States do not object to reservations which are not compatible with the object and the purpose of the treaty: "Most States are apparently both unable and unwilling to invest the amount of time and energy that would be required to do an effective job in monitoring the reservations that other parties to the convention make. They may be unable to object because of the weakness of their bureaucratic infrastructure, an especially serious problem for many third World countries. They may be unwilling to object for various political reasons. In the first place, an objection might be interpreted by another State as a hostile act, and many states may want to avoid giving such an impression. Secondly, an objection might give rise to a charge of "cultural imperialism", especially if a Western state objects to the reservation of a third World state, and many states may simply want to avoid being accused of harbouring such motives. Thirdly, many states may be unwilling to object to reservations of their close allies, geographical neighbours, or states that they are otherwise dependent on for trade or natural resources. Fourthly, states might see no practical benefits to be derived from objecting to the reservations of

Simma emphasises, there are "political costs of objecting", particularly when "traditional friendly-or-foe patterns"<sup>109</sup> exist. Whereas the choice of States to accept or to object to must be dictated by objective criteria, such as the examination of the reservation with the "compatibility test", they judge a reservation according to subjective<sup>110</sup> considerations, most of the time with view of their own concerns. As far as human rights treaties are concerned, such subjective determination of the compatibility of reservation should no longer be tolerated.

##### 5. *Modern trends: the role of the human rights treaty monitoring bodies in the determination of the validity of reservations*

The lack of objective criteria for determining the compatibility of reservations, as well as the willingness to reach a far more effective implementation of human rights has in recent years led the monitoring bodies or judicial bodies<sup>111</sup> normally charged with the

---

other states. Put another way, they may feel that they have nothing to gain in objecting to reservations to human rights treaties as they might in the case of reciprocal rights treaty. Nor do states have any reasons for believing that their objections will lead other states to withdraw their reservations." See also SIMMA B., Op. cit. footnote no 39, at 668, who declared that "while the great majority of States parties to human rights treaties prefer to acquiesce in reservations declared by other parties, however troubling these may be, a(n apparently growing) minority of States has resolved to counter such attacks on the integrity of international human rights by objecting to inadmissible reservations and linking such non-acceptance with various legal consequences,...". See also CLARK B., Op. cit. footnote no 46, at 314. Clark notably takes the interesting example of Mexico, which did not object to a reservation formulated by Brazil counter to the CEDAW Convention, although it objected to all seven of the similar reservations made by non-Latin American States. See also AKERMARK S. S., Reservations: breaking new grounds in the Council of Europe, in: 24 European Law Review, October, 1999, at 510. He notices that the reluctance of member states to object to reservations within the Council of Europe. According to Akermark, it is possible to explain this by various factors: "[L]egally, the uncertainty regarding the effect of objections, especially as regards treaties of legislative character, is one possible reason. In this respect, the on-going work of the International Law Commission has the potential to shed some light in this direction. Politically, objecting to another state's reservations is often regarded as an unfriendly act which risks to harm diplomatic relations between the reserving and the objecting state. Finally, as rightly pointed out by the Council of Europe Secretariat, group loyalty is another inhibiting factor, especially as far as members of the same political and geographical groupings are concerned".

<sup>109</sup> SIMMA B., Op. cit., at 664.

<sup>110</sup> SIMMA B., Op. cit., at 669: "The objecting States' decision on the compatibility of a reservation with the object and the purpose of the treaty remains based on subjective auto-determination, with the possibility of different States arriving at different results".

<sup>111</sup> This has been the case with the European Commission on Human Rights (Temeltasch case) Temeltash v. Switzerland, Decisions and reports (DR) 31, pp. 120 ff., fifth of May 1982, the European Convention on Human Rights (Belilos case, judgement of 29 April 1988, Publications of the ECHR, Ser. A, Judgements and Decisions, Vol. 132. See also the Inter American Court of Human Rights, Advisory opinion on Restrictions to the death penalty, September 8, 1993, Series A Judgements and Opinions No 3. See the General Comment No 24 of the Human Rights Committee, UN. Doc. CCPR/C/21/Rev.1/Add.6 of 11 November 1994. The European Commission of Human Rights and the European Court of Human Rights are the first organs to have recognised their own competence to judge the legality of a reservation. As a matter of fact, the Belilos Case [v. Switzerland] (1988) is certainly of the utmost importance for the European Court of Human Rights: here for the first time the European Court asserted that it has jurisdiction to examine the validity of a declaration, considered a reservation, which is determined to be invalid: Adopted unanimously, this

implementation of various human rights conventions, increasingly to declare themselves competent to appraise the validity of the reservations<sup>112</sup>. This new trend towards an institutionalised determination of the validity of a reservation has given rise to a revival of an old basic controversy, between a flexible approach of the use of reservations and a more restrictive application. Looking at the texts of the existing human rights treaties, it appears at first sight that they do not provide any explicit basis for allowing the supervisory organs to exercise such a competence, nor do they provide any collective mechanism for the assessment of the admissibility of reservations<sup>113</sup>. As a matter of fact, the monitoring bodies were, until now only responsible for the interpretation and application of the conventions, while the power of determining the validity of reservations remained in the hands of States. Notwithstanding their specific competence, the monitoring bodies have insisted on the necessity of taking into account the particular character and nature of human rights treaties, in order to put an end to the confusion that has reigned since the advisory opinion on reservations to treaties.

Varying this approach slightly, the Human Rights Committee (*at a universal level*), as well as the European Court of Justice<sup>114</sup> (*at a regional level*), has examined the issue of

---

judgement ended a long doctrinal controversy on the power of the European organs to control the legality of reservations, which started with the way opened by the Commission in the earlier Temeltash case (1982).

<sup>112</sup> As SCHABAS W. A. pointed out "it should seem obvious that the courts, commissions, and tribunals charged with monitoring human rights treaties and with adjudicating individual petitions also assume the task of ruling the legality of reservations. How can they fulfil this task without establishing which obligations bind the party concerned? This issue has been widely debated, principally because of the objections mechanism of the Vienna Convention.", Reservations to Human Rights Treaties, in: 32 *Annuaire Canadien de Droit International*, 1994, at 39 ff., esp. at 68.

<sup>113</sup> The only collective mechanism found in a human rights treaties is the one provided by the Convention on the Elimination of all Forms of Racial Discrimination, 1966. As provided by Article 20(1): "The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within the period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it". Article 20(2) provides that: "A reservation incompatible with the object and the purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it". This collective mechanism provides a presumption in favour of the validity of the reservation. In case a State decides to object to a reservation, a two-thirds majority must be reached for a reservation to be considered as not valid. Does this mechanism offers a better approach in terms of avoiding the formulation of incompatible reservation than that of the Vienna Convention? On this subject see CASSESE A., A new reservations clause (Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination), in: *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève, 1968, at 266-304, at 297.

<sup>114</sup> On this subject see MARKS S., Three Regional Human Rights Treaties and Their Experience of Reservations, in *Human Rights as General Norms*, Op. cit., at 35 ff. See also MACDONALD R. St. J., Reservations Under The European Convention on Human Rights, in: 21 *Revue belge de droit international*, 1988, at 429 ff. FROWEIN J. A., Reservations to the European Convention on Human Rights, in Matscher and Petzold (eds), *Protecting European Rights: The European Dimension: Studies in Honour of Gerard J. Wiarda*, 1988, at 199. AKERMARK S. S., Reservations Clauses in Treaties Concluded within the Council of

reservation and concluded for the first time that, it is from now on the role of the supervisory organs to control the acceptability of reservations in order to ensure that unacceptable reservations no longer exist in human rights treaties.

### *5.1 The competence of ascertaining the legality of reservations and the United Nations bodies*

At a universal level, the Human Rights Committee was the first monitoring body to declare that the classic rules on reservations (especially those concerning objections) were not appropriate to human rights treaties and therefore that another mechanism should be provided by the monitoring bodies. This new conception marked a serious change in the cautious behaviour United Nations bodies had always demonstrated in relation to the issue of reservations. As a matter of fact, United Nations bodies, while always expressing great concern about reservations to human rights treaties, were still reluctant to assume competence to express this view. Taking another UN supervisory body as an example, the Committee for the Elimination of Racial Discrimination has explicitly refused to assume the role of judging the legality of reservations<sup>115</sup>. The Committee on the Rights of the Child<sup>116</sup> seems also to have adopted a relatively cautious attitude towards the issue of the validity of reservations. In 1992, the Egyptian Government formulated a reservation counter to the right to adoption arguing that adoption is recognised by the Islamic

---

Europe, in: 48 *International and Comparative Law Quarterly*, Part 3, July 1999, at 479 ff. IMBERT P.-H., *Les réserves à la Convention européenne sur les droits de l'homme devant la Commission européenne (Affaire Temeltasch)*, in: 87 *Revue Générale de Droit International Public*, 1983, Tome 2, at 580ff. See GOLSONG E. G., *Les réserves aux instruments internationaux pour la protection des droits de l'homme*, in *Les Clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme: Fourth Colloquy of the Human Rights Department of the Catholic University of Louvain*, 7 décembre 1978. CAMERON I. and HORN F., *Reservations to the European Convention on Human Rights: The Belilos Case*, in: 33 *German Yearbook of International Law*, 1990, at 69 ff. MARKS S., *Reservations unhinged: the Belilos Case before the European Court of Human Rights*, in: 39 *International and Comparative Law Quarterly*, April 1990, at 300 ff. COHEN-JONATHAN G., *Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)*, in: 93 *Revue Générale de Droit International Public*, 1989, at 273ff.

<sup>115</sup> This reaction can be justified by the fact that the Treaty itself provides a specific mechanism for determining the legality of reservations. UN Doc. A/33/18, § 374. The Office of Legal Affairs responded to three questions in respect of reservations as regards the CERD committee, especially as to whether the Committee is competent to determine the validity of a reservation. The Office of Legal Affairs explained that "when a reservation has been accepted at the conclusion of the procedure expressly provided for by the Convention (Article 20) -even a unanimous decision- by the Committee that such a reservation is unacceptable could not have any legal effect", ST/LEG/SER. C/14, at 221, § 8. There are members of the Committee who considered that the Committee is empowered to make such a determination: see for example CERD/C/SR.156 (Tonga); CERD/C/SR.629 (Fidji); CERD/C/SR. 249 (United Kingdom).

<sup>116</sup> As to the question of the Committee on the rights of the Child to challenge illegal reservations, see SCHABAS, *Reservations to the Children's Convention*, Op. cit., footnote no 58, at 486-488.

Shariah<sup>117</sup>. Though that reservation clearly appears to be illegal in terms of its compatibility with the object and purpose of the Child Convention, and despite the allegation of one of its members, who expressly condemned the Egyptian reservation<sup>118</sup>, the Child Committee has made absolutely no comment on this point in its preliminary observations<sup>119</sup>. This absence of reaction obviously indicates that the Child Committee does not consider itself to be competent to challenge the legality of reservations. As far as the Committee of the Convention on the Elimination of All Forms of Discrimination against Women is concerned, this Committee also seems to also have adopted the view that the monitoring bodies are not competent to judge the legality of reservations and that is up to States parties to make their determination: "[A]lthough the Convention does not prohibit the entering of reservations, those which challenges the central principles of the Convention are contrary to the provisions of the Convention and to general international law. As such *they may be challenged by other States parties*" (emphasis added). However, in its survey of the reservations formulated counter to the Convention, the Committee recalled that it remains convinced that "reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn". The Committee also stressed that "[T]he special rapporteur considers that control of the permissibility of reservations is the primary responsibility of the States parties. However, the Committee again wishes to draw to the attention of States parties its grave concerns at the number and extent of impermissible reservations"<sup>120</sup>.

Until recently, even the Human Rights Committee had avoided dealing with the issue of reservations. In a case *MK v. France*<sup>121</sup>, the Committee refused to examine an individual communication directed against France in the light of Article 27 of the International Covenant on Civil and Political Rights because the declaration of the French Government was equivalent to a reservation. More directly, in 1987, a member of the Human Rights

<sup>117</sup> See Multilateral Treaties, ST/LEG/SER.E/17 at 231 (French version). See also the initial report of Egypt, U. N. Doc. CRC/C/3/Add. 6, at 174.

<sup>118</sup> According to SCHABAS, member Yuri Kolosov "appears to have been condemning the Egyptian Reservation for vagueness and suggesting that the consequences of its vagueness be the full application of the Children's Convention". See U. N. Doc. CRC/C/1, 1992.

<sup>119</sup> See the Preliminary observations of the Committee on the Rights of the Child: Egypt, U. N. Doc. CRC/C/15/Add. 5, 1992.

<sup>120</sup> See the Contribution to the Commemoration of the fiftieth anniversary of the Universal Declaration on Human Rights, Annex 10 of the Annual Report of the Convention on the Elimination of All Forms of Discrimination Against Women, A/53/318, 26 August 1998, §7, §16, §23. See the report of the working group II, CEDAW/C/1998/II/W.G.II/W.P.1/Rev.2

<sup>121</sup> NO 220/1987 (A/45/40) at §127, 8 November, 1989. See also LIJNZAAD L., Op. cit., at 286.

Committee, Birame Ndiaye, stated in an individual opinion that the Committee "had no power to object to reservations of States parties".<sup>122</sup>

The Human Rights Committee's General Comment on the issue of reservations<sup>123</sup>, provoked by the United States ratification of the International Covenant on Civil and Political Rights, essentially provoked the culmination of a reversal of this traditional respect towards reservations.

## 5.2 *The Human Rights Committee's General Comment No. 24(52)*

On November 1994 the Human Rights Committee adopted General Comment Number 24 (52)<sup>124</sup> relating to reservations made on ratification or accession to the International Covenant on Civil and Political Rights. One of the main concerns of the Committee in its General Comment was that the objection mechanism of the Vienna Convention on Law of Treaties was not appropriate to human rights conventions because of the specific character of human rights treaty obligations<sup>125</sup>:

"[T]he Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties [....]. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations."

As a result, the Committee argued that it "*necessarily falls to the Committee*" (emphasis added) to make determination as to whether specific reservations are compatible with the object and purpose of the Covenant for two main reasons. First, because, as indicated above, it is an inappropriate task for States parties in relation to human rights conventions and second because it is a task that the committee cannot avoid in the performance of its functions.

<sup>122</sup> NDIAYE B., Individual Opinion, C.L.D. v France, Case 228/1987, UN Doc. A/43/40 at 257.

<sup>123</sup> On the role of Committee see LIJNZAAD L., Op. cit., at 294.

<sup>124</sup> General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declarations under Article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6, adopted by the Committee at its 1382<sup>nd</sup> meeting on 2 November 1994.

<sup>125</sup> According to IMBERT "si effectivement les objections aux réserves faites aux conventions relatives aux droits de l'homme n'ont pas du tout la même portée que dans le cadre d'autres conventions, elles ne sont pas pour autant absolument inutiles. Elles peuvent permettre en particulier de s'opposer à l'interprétation d'une disposition qui pourrait résulter des réserves et d'une manière générale, de préserver la force d'un principe" in: Les réserves aux traités multilatéraux, Op. cit. footnote no 72, at 116.

### 5.3 *The case Rawle Kennedy v. Trinidad and Tobago*<sup>126</sup>

The Human Rights Committee applied the theory developed in its General Comment No 24 in a specific case, in a decision dated 31 December 1999 involving Trinidad and Tobago. The crucial point of the issue was the assessment of the admissibility of a communication from a person condemned to death. According to the Government of Trinidad and Tobago the Human Rights Committee was not competent to consider the communication, due to the reservation formulated following the "re-accession" to the Optional Protocol to the International Covenant on Civil and Political Rights. The reservation effectively rejects the competence of the Committee "to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith"<sup>127</sup>. The government of Trinidad and Tobago argued that "in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party considers the actions of the Committee in respect of this communication to be void and of no binding effect"<sup>128</sup>. In response to the views expressed by the government of Trinidad and Tobago the Human Rights Committee first examined its competence, referring to its General Comment No 24: "[A]s opined in the Committee's General Comment No 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must,

<sup>126</sup> *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, 31 December 1999, CCPR/C/67/D/845/1999. See also International Law Commission, The Fifth Report on reservations to treaties, By Alain Pellet, A/CN.4/508., 29 March 2000, at 5.

<sup>127</sup> For the text of the reservations, see Multilateral Treaties deposited with the Secretary-General, Status as of 30 April 1999, at 172.

<sup>128</sup> See *Rawle Kennedy v. Trinidad and Tobago*, Op. cit. footnote no 126, at 4.2.



### 5.3 *The case Rawle Kennedy v. Trinidad and Tobago*<sup>126</sup>

The Human Rights Committee applied the theory developed in its General Comment No 24 in a specific case, in a decision dated 31 December 1999 involving Trinidad and Tobago. The crucial point of the issue was the assessment of the admissibility of a communication from a person condemned to death. According to the Government of Trinidad and Tobago the Human Rights Committee was not competent to consider the communication, due to the reservation formulated following the "re-accession" to the Optional Protocol to the International Covenant on Civil and Political Rights. The reservation effectively rejects the competence of the Committee "to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith"<sup>127</sup>. The government of Trinidad and Tobago argued that "in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party considers the actions of the Committee in respect of this communication to be void and of no binding effect"<sup>128</sup>. In response to the views expressed by the government of Trinidad and Tobago the Human Rights Committee first examined its competence, referring to its General Comment No 24: "[A]s opined in the Committee's General Comment No 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must,

<sup>126</sup> *Rawle Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, 31 December 1999, CCPR/C/67/D/845/1999. See also International Law Commission, *The Fifth Report on reservations to treaties*, By Alain Pellet, A/CN.4/508., 29 March 2000, at 5.

<sup>127</sup> For the text of the reservations, see *Multilateral Treaties deposited with the Secretary-General*, Status as of 30 April 1999, at 172.

<sup>128</sup> See *Rawle Kennedy v. Trinidad and Tobago*, Op. cit. footnote no 126, at 4.2.

however, determine whether or not such a reservation can validly be made"<sup>129</sup>. Then, recalling the application of the Vienna Convention on the Law of Treaties, it observed that "the issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol"<sup>130</sup>. Finally it concluded that "because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to object and purpose of the First Optional Protocol, even if not of the Covenant"<sup>131</sup>. The Human Rights Committee therefore declared the complaint receivable on the basis of General Comment No 24.

#### 5.4 *Competence of the monitoring bodies of the United Nations: an analysis*

Consideration of the General Comment causes controversies; besides the hostile reaction of States to perceived unjustified interferences into their domestic sphere, the legitimacy of intervention, and the basis on which the Human Rights Committee maintains its competence are questionable for being vague and unclear. Should the authority of monitoring bodies being considered as implicitly included in the function of interpretation? Or should the function of interpretation be distinguished from the function of the determination of the validity of reservations?

The discussion on whether the function of monitoring the implementation of a human rights treaty includes the function of determining the validity of reservations has been often debated but never finally resolved<sup>132</sup>. For its part, the Commission on Human Rights has pointed out that the authority to determine the validity of a reservation necessarily comes within the competence of monitoring bodies: "[t]hat must, logically, includes the authority to determine the validity of a reservation which would affect the scope of their competence or jurisdiction. It appears to be an inherent feature of the type of authority which they are given."<sup>133</sup> Given its character as a "guardian of the Covenant", the Committee may

<sup>129</sup> Rawle Kennedy v. Trinidad and Tobago, Op. cit., at 6.4.

<sup>130</sup> Id. at 6.5.

<sup>131</sup> Id. at 6.6

<sup>132</sup> IMBERT P. H., Op. cit., L'affaire Temeltasch, in: 87 Revue Générale de Droit International Public, 1983, at 610, explains that the question of interpretation of reservations is far away from the question of their validity. See ROSENNE, in: 12 Comunicazioni e studi, 1966, at 21, esp. at 62. Rosenne says "In practice it is believed that either the organ which has competence in the matter of admission of new members, or the organ which has competence to interpret the constituent instrument, is normally competent in the matter of reservations".

<sup>133</sup> E/CN.4/Sub.2/1999/28, page 7, § 20.

effectively be considered, as fully able to control the legality of reservations. Moreover, in order to consider an eventual withdrawal of reservations, the Committee must be able to reconsider the reservations.

Nevertheless, does this statement necessarily imply that the Committee has the authority to declare reservations invalid? According to Gros Espiell, speaking about the competence of the Inter-American Court on Human Rights in the area of monitoring reservations, an affirmative answer should be given on the ground of the specific character of human rights treaties and the need to ensure an efficient exercise of the Court's competence so that it may perform, in an appropriate manner, its monitoring function in the area of human rights<sup>134</sup>.

On the contrary, one could argue that, in the absence of established rules on competence, decisions of supervisory organs to examine the validity of reservations run, contrary to general international law<sup>135</sup>. As a matter of fact, the assertion of the Human Rights Committee, while safeguarding the particular characteristics of human rights treaties by ascertaining an objective determination of the validity of reservations, clearly contravenes to the general rules laid down in the Vienna Convention. In order that the Vienna Convention reservations regime is respected, States should have the capacity to judge freely the compatibility of a specific reservation without any authoritative third-party procedure.

In this respect, the General Comment appears to go much too far in ascertaining its competence to determine the compatibility of specific reservations. Even if it were true that it is an inappropriate task for States parties to judge the legality of a reservation in relation to human rights treaties, it would not necessarily imply that it is the role of the Committee to perform this task<sup>136</sup>. In the first place, to be exercisable, such a competence should be established by the treaty in question or created by an amendment<sup>137</sup>. As a matter of fact, for supervisory committee to be vested with judicial powers, States parties should have

<sup>134</sup> GROS ESPIELL Hector, *La Convention américaine et la Convention européenne des droits de l'homme*, in: 208 Hague Academy Collected Courses, 1989, Volume VI, at 382 (translation from Manuel Ramamontaldo, *Op. cit.*, at 1268.).

<sup>135</sup> As declared LIJNZAAD L., "Under general international law, it is for the States Parties to accept reservations, or if necessary object to the reservations. The Committee has no role to play in this respect. Yet, when it comes to the application of the Covenant, and the impact that reservations may have in this respect the Committee is fully entitled, if not obliged, to interpret the reservation.", *Op. cit.*, at 294.

<sup>136</sup> See the observations made by the United Kingdom on General Comment Number 24, concluding that: "Even if it were the case that the law on reservations is inappropriate to address the problem of reservations to human rights treaties, this would not in itself give rise to a competence or power in the Committee".

necessarily given their consent. However, it may be doubted whether such a system will ever be attained, due to the reluctance of States to confer power on the monitoring bodies<sup>137</sup>. From another point of view, it could be argued that this practice has been accepted by the States, without any intervention of a persistent objector, as being part of customary law.

In the second place, taking into account the urgent need for a neutral institution competent to decide upon the admissibility of reservations, the impartiality and objectivity of the Committee should be questioned. Although it has originally been foreseen that members of the supervisory Committees should be totally independent, one must not forget that such Committees are nonetheless created by governments, and that members are nominated and elected by the States parties.

By way of preliminary conclusion, it could be suggested that the modern trend developed by the organs of the European Convention on Human Rights could only be applied to systems in which the monitoring bodies are empowered to exercise quasi-judicial powers. That is by no means the case in United Nations Conventions on human rights, whose monitoring bodies are composed of public officials, usually subject to instruction by their respective governments. So that, in the future, monitoring bodies of United Nations human rights conventions could be competent to decide upon admissibility of reservations, their competence must be expanded.

This conclusion is supported by two major rationales: first of all, by the fact that, in the General Comment n°24, the Human Rights Committee implicitly referred to Article 40 of the International Covenant on Civil and Political Rights to warrant the competence of the Human Rights Committee, which provides for a basically non-judicial competence. In the second place, the European Court of Justice, in the *Loizidou* case, rejected any similarity between the practice of the European organs and the ICJ practice under Article 36 of the Statute of the ICJ: "In the first place, the context within which the International Court of Justice operates is quite distinct from that of Convention Institutions. The international Court is called in *inter alia* to examine any legal dispute between States that might occur in

<sup>137</sup> As indicated above, in case of silence of a particular treaty, the Vienna Convention should be applied as general subsidiary law.

<sup>138</sup> See I. BOEREFIJN, *Towards a Strong System of Supervision: The Human Rights Committee's Role in reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights*, in: 17 *Human Rights Quarterly*, 1995, at 766-793, "The system unquestionably has its built-in limitations: the initial steps rests with the States, who must ratify or accede to a legally binding instrument; the system continually

any part of the globe with reference to principles of international law. The subject matter of a dispute may relate to any area of international law. In the second place, unlike the Convention Institutions, the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention"<sup>139</sup>.

#### 5.4 *The Declaration of the Committee of the Convention against Torture*

Recently, following the new trend developed by the Human Rights Committee in its General Comment No 24, the Committee of the Convention against Torture has also expressed its views on the competence of monitoring bodies to challenge the legality of reservations and took the conclusion that, in fact, the monitoring bodies should be considered as fully competent to exercise that power: "In addition, the Committee against Torture believes that the approach taken by monitoring bodies to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted and safeguarded is consistent with the Vienna Conventions on the Law of Treaties"<sup>140</sup>.

#### 6. *The conservative approach of the International Law Commission*

Aware of the difficulties and the ambiguities resulting from the application of the Vienna Convention on the Law of Treaties to human rights treaties, and more broadly from the use of reservations to human rights treaties, the International Law Commission decided to begin a thorough study on the law and practice relating to reservations to treaties and therefore, in 1994, appointed its French member Alain Pellet as a Special Rapporteur<sup>141</sup>. Formally speaking, already five reports on reservations to treaties have been submitted to the International Law Commission, but only an incomplete version of the fourth report was submitted to the International Law Commission, in 1999.

---

requires at least some level of voluntary co-operation by States; and there are no effective sanctions for non-compliance with the obligations States parties have accepted".

<sup>139</sup> *Loizidou v. Turkey*, Publications of the ECHR, Ser. A No 310, §84, 23 March 1995.

<sup>140</sup> Declaration of the Chairperson of the Committee against Torture to the Secretary of the International Law Commission about its preliminary conclusions, 1997.

<sup>141</sup> On the previous work of the Law Commission see BISHOP, *Op. cit.*, footnote no 15, at 326ff. See also the work of Lauterpacht who proposed in 1953 four alternative drafts "as possible statements for the future". *Law of Treaties, Draft of Articles, Art. 9*. UN Doc. A/CN.4/63; *International Law Commission Yearbook*, 1953, Vol. II, at 91.

## 6.1 *Outcome of the first and second reports on reservations to treaties*

While the first report<sup>142</sup> gives a framework of its future work and explains that it will include a guide to practice in respect to reservations in the form of draft Articles, the second report<sup>143</sup>, submitted in 1996, addresses in its chapter two the issue of "Unity or diversity of the legal regime for reservations to treaties", especially human rights treaties. The aim of this chapter is to determine which are the rules applicable to human rights treaties; in other words whether the rules of the Vienna Convention are applicable to all multilateral treaties. The conclusion reached in this respect is that the Vienna reservations regime must be preserved, being applicable to all treaties, including human rights treaties. In addition, the special Rapporteur prepared two detailed questionnaires on reservations to treaties<sup>144</sup> in order to better appraise the practice of reservations to treaties.

The International Law Commission discussed the second report in 1997 at its forty-ninth session and finally adopted "Preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties"<sup>145</sup>.

### *The International Law Commission's "Preliminary Conclusions" of 1997 and the consequences upon the authority of monitoring bodies*

The preliminary conclusions reaffirm the Vienna Convention reservations regime as being conceived for a general application<sup>146</sup>, dealing essentially with the role of the monitoring

<sup>142</sup> First Report on reservations to treaties, A/CN.4/470, 1995.

<sup>143</sup> UN Doc. A/CN.4/477/Add. 1

<sup>144</sup> See the Resolution 50/45 of 11 December 1995 and 51/160 of 11 December 1996 of the General Assembly. According to Alain Pellet, A/CN.4/508 (fifth report on reservations to treaties) at 3, the number of replies is unsatisfactory: "replies have been received from only 33 of the 188 States members of the United Nations to which the questionnaire was sent and 24 of the international organisations that received questionnaires, or 18 per cent and 40 per cent, respectively. Moreover, the replies are not evenly distributed geographically: they are mainly from European States (or other States in that group) (20 replies) and Latin American States (8 replies); and although five Asian countries have also replied, the Special Rapporteur has so far received no replies from any African countries. Furthermore, one of the most active treaty-making international organisations, the European Communities, has yet not replied to the questionnaire sent to it".

<sup>145</sup> See report of the International Law Commission on the work of its forty-ninth session, General Assembly Official Records Fifty-second Session, Sup. No 10, UN Doc. A/52/10, at 95 ff. See The preliminary conclusions at 106 f. In the preamble, the International Law Commission declares "The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions". See also SIMMA B., Op. cit. at 676 ff. "The Commission's Preliminary Conclusions must certainly comes as a disappointment to human rights lawyers. Even though its mandate comprises not only codification proper but also the progressive development of international law, the ILC has taken a conservative, pronouncedly "statist" stand on the issue of reservations to human rights treaties."

<sup>146</sup> As declared by the International Law Commission, "1. The Commission reiterates its view that Article 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and 1986 govern the regime of reservations to

bodies in connection with appreciation of the validity of reservations made by States. The Commission considers that the monitoring bodies "are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations" (paragraph 5) but recalls however that this authority "does not exclude or otherwise affects the traditional modalities of control by the contracting parties" (paragraph 6). Therefore, with the intention of avoiding the prior uncertainty due to the silence of conventions, the Commission proposes the insertion of "specific clauses" in case of States are seeking "to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation" (paragraph 7). On the other hand, the lack of such express authorisation only permits the monitoring bodies to exercise "their power to deal with reservations" within the limits of "that resulting from the powers given to them for the performance of their general monitoring role"(paragraph 8). By way of conclusion the Committee declares that "the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts"(paragraph 12).

The last statement of the International Law Commission (paragraph 12) is of the utmost importance as regards the General Comment on reservations. As a matter of fact, the exclusion of the practice of the regional bodies from the preliminary conclusions seems to be a way of condemning the progressive views defended by the Human Rights Committee in its General Comment, insisting on the fact that the "Strasbourg approach" cannot simply be applied to universal instruments: the levels of integration are so different that it is unthinkable that the same construction be adopted on a universal or regional level.

By way of response to these Preliminary conclusions, human rights bodies as well as a few numbers of States<sup>147</sup> commented on the views expressed by the International Law Commission. In brief, what clearly emerges from these replies is the necessity of not disregarding the practice developed by universal human rights bodies as regards the responsibility of the monitoring bodies to judge the permissibility of reservations<sup>148</sup>. In this

---

treaties [...]. 3. The Commission considers that these objectives [of preservation of the integrity of the text of the treaty and universality of participation in the treaty] apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Convention govern reservations to such instruments."

<sup>147</sup> Five States have replied to the Preliminary conclusions: China, Monaco, Philippines, Liechtenstein, and Switzerland.

<sup>148</sup> Liechtenstein proposed a consideration of the following points: (i) Reconsideration of the correlation between paragraphs 5 and 7 of the preliminary conclusions; (ii) The possibility of drafting optional protocols should be further elaborated upon. In doing so, the Commission should consider issues such as feasibility, usefulness from a practical point of view, including timeframe; (iii) Practical and concrete suggestions for the imminent future to remedy the current state of affairs involving uncertainties concerning the application of

direction, the Chairperson of the Human Rights Committee<sup>149</sup> emphasised the important role that universal monitoring bodies, such as the Human Rights Committee play in the development of rules and practices. As a consequence she declared that "it must be recognised that the proposition enunciated by the Commission in paragraph 10 of the preliminary conclusions<sup>150</sup> is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance"<sup>151</sup>.

In addition, in the ninth meeting of the chairmen held in Geneva from 25 to 27 February 1999, the chairpersons of the human rights bodies recalled that human rights treaties "cannot be placed on precisely the same footing as other treaties with different characteristics". Then they expressed their firm support "for the approach reflected in General Comment No. 24 of the Human Rights Committee" and they urged that "the conclusions proposed by the International Law Commission should be adjusted accordingly to reflect that approach"<sup>152</sup>.

Though discussions on the preliminary conclusions reveal a growing concern with the competence of the universal monitoring bodies to ascertain the validity of reservations, the debate seems rather to have evolved towards the idea that the role of the human rights treaty monitoring bodies with regard to reservations should be reviewed, namely towards the recognition of the fact that the human rights treaty-monitoring bodies *should be* given the competence to consider the legality of reservations, being for the moment without such a jurisdiction; As a consequence, as long as the role of the monitoring bodies is not enhanced, the traditional modalities of control by the contracting parties will continue to be applied<sup>153</sup>. In conclusion and as pointed out Bruno Simma "the attempt by the Human

---

multilateral treaties, especially in the field of human rights; (iv) Comments on the legal effect of objections by States parties made to reservations lodged by other States parties; (v) Study of the potential of an enhanced role played by depositaries of multilateral treaties.

<sup>149</sup> See letter dated 9 April 1998 and letter dated 5 November 1998.

<sup>150</sup> The text of the paragraph 10 provides: "The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving States that have the responsibility for taking action. This action may consist for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or foregoing becoming a party to the treaty".

<sup>151</sup> This paragraph is reproduced in the third report on reservations to treaties, A/CN.4/491 at §16.

<sup>152</sup> See the letter dated 29 July 1998 by which the presiding officer of the eighth and ninth meetings of the chairmen of bodies established pursuant to human rights instruments informed the Chairman of the Commission of the discussions on the matter. See also fifth report on reservations to treaties, Op. cit., at 7-8.

<sup>153</sup> See for example the conclusions of the Committee of Legal Advisers on Public International Law, first meeting held in Paris on 26 and 27 February 1998, about the Preliminary conclusions that read as follows: "The Group shared the view of the ILC that:- the regime of the Vienna Convention is applicable to all treaties, including normative and human rights treaties;- the regime should not be changed. However, it was felt that the issue of the role of the monitoring bodies still required further consideration; some delegations were not in full agreement with conclusions 5 and following [of the ILC preliminary conclusions], in



Rights Committee to strengthen the UN system of treaty-based concern with human rights by extending to it the *acquis* reached on the regional European plane has failed, at least for now”<sup>154</sup>.

### 6.3 *Consideration of the third, fourth and fifth reports on reservations to treaties*

While the third report on reservations to treaties consists of two chapters dealing respectively with the definition of reservation<sup>155</sup> and with the formulation and withdrawal of reservations, acceptances and objections<sup>156</sup>, the fourth report contains a single chapter recapitulating the new elements introduced since the consideration of the second report. That being so, neither the third report, nor the fourth report raise any further considerations on the issue of the legality of reservations. The same goes for the fifth report on reservations to treaties, which deals with the alternative to reservations (Chapter II), the formulation and withdrawal of reservations and interpretative declarations (Chapter III), the formulation of acceptance of reservations (Chapter IV) and the effects of reservations, acceptance and objections (Chapter V). It is consequently unnecessary to consider them in this study<sup>157</sup>.

---

particular the articulation between *lex lata* and *lex ferenda* provisions”, Document CADHI (98/8) of 3 March 1998.

<sup>154</sup> SIMMA B., *Op. cit.*, at 680.

<sup>155</sup> Chapter II of the general outline of the study, adopted in the second report, A/CN.4/477, §37-50.

<sup>156</sup> Chapter III of the general outline of the study, *Id.*

<sup>157</sup> About the third and fourth report on reservations to treaties, see the fifth report on reservations to treaties, A/CN.4/508, especially at 11-15.

7. *Ideal models: proposals de lege ferenda*<sup>158</sup> *towards an institutionalised appraisal of the compatibility of a reservation with a human rights treaty*

The regime governing the reservations should be more exacting in order to reduce the great number of reservations formulated in human rights treaties. As has been previously noted, a large number of factors point to the need for some changes regarding the formulation and the acceptance of reservations by States parties. As long as human rights treaties remain governed by the performances of the States parties, rather than by a more dynamic approach such as the supervision of a judicial body or a neutral committee, States and governments will continue to formulate impermissible reservations. In brief, what has to be examined is an intermediary solution between the liberal regime defended by the International Law Commission and the modern trend sustained by the Human Rights Committee.

7.1 *Prior proposals*

Before going on to discuss these legal issues, it should be however noted that this concern is not that new: the very first to fight against the application of the established regime of reservations was Sir Hersch Lauterpacht, rapporteur of the International Law Commission, who proposed four alternative draft Articles, *de lege ferenda*<sup>159</sup>, in order to avoid abuses

---

<sup>158</sup> On this particular subject see HYLTON D. N., 'Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations, in: 27 Vanderbilt Journal of International Law, 1994, at 419-451, especially at 444. According to the author, three modifications would improve the current framework governing reservations to treaties: "First, reversing the presumption of acceptability of reservations to favour the confronted States would bar default acceptance of reservations for non-compliance with technical rules and force the confronted States to either accept or object to every reservation. Second, adopting different frameworks for different types of international agreements would better address the policy concerns for reservations to each type of agreement. In the alternative to the second suggestion, establishing an authoritative decision maker would depoliticize the process and better preserve the integrity of the agreement". For a development of these suggestions, see at 445ff. See also BOWETT D. W., Op. cit. footnote no 40, at 81. He declares that "The question of permissibility, since it is governed by the treaty itself, is eminently a legal question and entirely suitable for judicial determination and, so far as the treaty itself or some general treaty requiring legal settlement disputes requires the Parties to submit this type of legal question to adjudication, this would be the appropriate means of resolving the question".

<sup>159</sup> I.L.C. Yearbook, 1953, Vol. II, at 123-136. He proposed in his first report to the International Law Commission, an Article 9, *de lege lata*, which still provided for the application of the unanimity rule, and consequently, taking those considerations as unsatisfactory, presented four alternative drafts, *de lege ferenda*. See also Doc N.U. A/CN.4/63, Article 9, Draft A and B. On this subject see RUDA J.M., Op. cit. footnote no 75, at 156: he explains in great details the work of the International Law Commission after 1951, notably the drafts proposed by Lauterpacht. See also ANDERSON D. R., Reservations to Multilateral Conventions, A re-examination, in: 13 International and Comparative Law Quarterly, April 1964, at 451, esp. at 466, according to whom, "the great virtue of Lauterpacht's proposals is that they would establish certainty where previously there was uncertainty". See also NAWAZ M. K., The International Law Commission's views on the subject of reservations to multilateral conventions, in: 1960 Indian Journal of International Law, at 100-114.

that could be made when formulating reservations according to the compatibility test. In short, the basic idea of these four proposals, essentially based on the majority rule, was to propose a compromise between the flexibility of the Pan-American system and the unanimity rule.

According to *Alternative A*<sup>160</sup>, a State that formulates a reservation should wait three years to know whether it is considered to be a party to the convention or not. As a matter of fact, the novelty is a creation of a provisional category where reserving States are located within three years after their making reservations: to be deemed as a party they need a the approval of two-third of the parties. If, after three years, less than two-thirds of the party agree to the reservation, the reserving State would cease to be a party. What should also be noticed is that tacit acceptance might be inferred from silence.

The main criticism that could be made of the first alternative proposed by Lauterpacht is the uncertainty within a period of three years: States and their governments have to accept the likelihood of no longer being a party any longer, in the event that their reservations are rejected by at least one third of the contracting parties. Moreover, there is the emergence of a supplementary complication in the regime of reservations to treaties and consequently the aggravation of the lack of transparency that already reigns with the *de lege lata* rules.<sup>161</sup> The second alternative, *Alternative B*<sup>162</sup>, however contains the advantages of the majority rule without the disadvantages raised by the provisional participation.

The *alternative draft C*<sup>163</sup> proposes the establishment of a special committee empowered to judge the validity of the reservations made by the contracting parties. The States or the

---

<sup>160</sup> *Draft A*: 1. The appending of a reservation is ignored for the purpose of ascertaining the number of States becoming parties; 2. If less than two-thirds of the parties agree to the reservation within three years, the reserving State is excluded and if, as a result of this, the requisite number of States for the coming into operation of the treaty falls below the stipulated number, the treaty is dissolved; 3. If two-thirds or more of the parties agree expressly or tacitly to the proposed reservation, the reserving State is deemed to be a party but parties can consider themselves not bound by the reserved clause in relation to the reserving State; 4. Tacit agreement is assumed if a State does not make a formal rejection within three months.

<sup>161</sup> According to ANDERSON D. R., Op. cit. footnote no 159, it would be perhaps more adequate to suppress this provisional category and instead to consider those members as "intending members", i.e. suspended members. The difference is that reserving States would not be counted as members initially but only after three years. The fundamental idea underlying such a system would have the merit of being clearer than the one proposed by Lauterpacht.

<sup>162</sup> *Draft B*: 1. Three months after notification of a proposed reservation a party is deemed to have accepted it if it does not notify its disagreement; 2. The reserving State is excluded if two-thirds of the States have not accepted the proposed reservation within a specified time; 3. If two-thirds or more accept the reservation, the reserving State becomes a party subject to the right not to apply to the reserving State the reserved clause.

<sup>163</sup> *Draft C*: 1. Designation of a Committee by the parties or the organs of an international organisation responsible for establishing the text of the treaty; 2. The Committee would be competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty; 3. The text of the reservations received shall be communicated by the depositary authority to all the

international organs, which have been created by the text of the specified treaty, would appoint such a committee. As soon as a State contests the legality of a reservation, and assuming that it would notify it within the three months period, the Committee would be competent to determine whether the reservation is permissible or not. If it is not admissible, the reserving state could not become a party unless the reserving State agrees to withdraw the reservation. This approach has both good and bad aspects: on one hand such a solution involves an appraisal by an organ of the validity of reservations instead of an individual decision by States, however, on the other hand, the impartiality of the Committee would remain doubtful, especially due to independence of the Committee vis-à-vis States parties<sup>164</sup>. However, such a disadvantage could easily be overcome by adopting the proposal of Draft D, which has the merit of being a thoroughly impartial arrangement. As a matter of fact, according to *Alternative D*<sup>165</sup>, the competence of judging the validity of a reservation should also be conferred to an organ, but to a specific one, namely the Chamber of Summary Procedure, designated by the International Court of Justice.

Though the alternative draft D appears to be the more neutral way of appraising the validity of reservations, one can see how unlikely it is that States parties would accept it. Furthermore, to leave the decision to the International Court of Justice would involve longer delay and is not so "practicable"<sup>166</sup> a solution. On the contrary, it has been also been argued that in matters relating to reservations "elements of dispute" are permanently present. Consequently, the issue of reservations to human rights treaties is eminently suited

---

interested States; 4. Period of three months following the receipt of the communication to notify the depositary authority that a State disagree with reservation. If the State does not notify on the expiry of the period of three months, it shall be deemed to have accepted it; 5. If a reservation is objected, the Committee shall examine the validity of the reservation; 6. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

<sup>164</sup>On this particular point see ANDERSON D. R., *Op. cit.* footnote no 159, at 468: "Polemical argument among the parties would tend to break out in the committee and perhaps even the perpetuation of factions would result".

<sup>165</sup>*Draft D*: "1. The parties or the organs of an international organization responsible for establishing the text of the treaty shall request the I.C.J to designate under its rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty. 2. The text of the reservations received shall be communicated by the depositary authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested state does not notify the depositary authority that it disagrees with the reservation, it shall be deemed to have accepted it. 3. If a reservation is objected to by a state qualified to object, then it shall be competent for the Chamber of Summary Procedure, at the request of the state making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation."

<sup>166</sup> See the opinion of the Honourable Justice SINHA, *Reservations to Multilateral Conventions*, in: 1960 *Indian Journal of International Law, Discussion*, at 111.

to being solved by a body of permanent composition and of acknowledged independence<sup>167</sup>.

This solution of conferring the decision upon the validity of a specific reservation to the International Court of Justice will be examined in greater detail further below.

*Propositions made by Sir Gerald Fitzmaurice and Sir Humphrey Waldock*

By contrast, the two subsequent rapporteurs, respectively Sir Gerald Fitzmaurice and Sir Humphrey Waldock totally departed from the Lauterpacht proposals and whereas the former took the view that the unanimity rule would remain the only plausible system in order to deal with reservations, the latter favoured the adoption of a flexible system, thus rejecting the four alternatives proposed by Lauterpacht.

Firstly, in 1953, Sir Gerald Fitzmaurice, while highlighting the numerous difficulties linked to reservations to multilateral conventions, proposed an "ideal system" for the future<sup>168</sup>. As a matter of fact, he suggested two ways of achieving it: the first solution by reference to a tribunal or a commission and the second solution, by the insertion of a reservation clause, which contains a mechanism, close to the one adopted in the Convention on Elimination of all Forms of Racial Discrimination<sup>169</sup>.

However, just a few years later, in 1956, abandoning its idea of an "ideal system", Fitzmaurice went back to the unanimity rule and submitted a report<sup>170</sup> to the International

<sup>167</sup> See U. N. Doc. A/CN.4/63, at 137.

<sup>168</sup> "If, however, future United Nations Conventions are silent on the subject of reservations, and unilateral reservations are in fact made, the difficulties and confusions will arise", FITZMAURICE G., *Reservations to Multilateral Conventions*, in: 2 *International and Comparative Law Quarterly*, January 1953, at 22-23. See the declaration of Fitzmaurice at the time of the sixth session of the General Assembly, Doc. N.U. A/C.6/SR.267, § 24, in which he proposed the adoption of the collegiate system.

<sup>169</sup> The mechanism provided by FITZMAURICE G. states that: "(i) The texts of any reservations would be communicated by the Secretary-General to all interested States, which would be informed that any objections to the reservation concerned must be received within a limited period (or say one or two months) from the date of the notification, otherwise it would be assumed that none was entertained. (ii) If one the expiry of the period in question, the Secretary-General was in receipt of formal objection on the part of not less than one-third of the States entitled to offer objections, the reservation would be deemed unacceptable, and the reserving state would be so notified, and would be informed that unless it preferred to withdraw the reservation, and gave notice of withdrawal within a further time limit, its instrument of ratification, accession or acceptance would be regarded as inoperative, but that it would be open to it at any subsequent time to deposit a fresh instrument, unaccompanied by the reservation. (iii) If, on the other hand, less than two-thirds of the States concerned offered objection, the reservation would be regarded as admitted, and the reserving State as being a party-subject (for what significance that might have in the case of United Nations Conventions) to the right of any State which objected to the reservation not to apply the provision in respect of which the reservation had been made, in its relation with the reserving State, and not to accord to that State any benefits under that provision (insofar as the provision involved any specific relations, or the extension of any benefits.", FITZMAURICE, *Op. cit.*, at 23-24.

<sup>170</sup> *Yearbook of the International Law Commission*, 1956, II at 115ff.

Law Commission which only reaffirms, with minor changes, the position of the Commission in 1951. For his part, Sir Humphrey Waldock<sup>171</sup>, envisaged radical changes to the question of the admissibility of reservations: the principle was that a reservation that was not authorised by a treaty should be admitted only with the consent of all the parties to the treaty. He considered in fact that a reservation has to be thought in terms of new contractual offer, so that every State parties to the treaty had to implicitly or expressly accept the counter-offer, namely the reservation, in order to be contractually linked with the reserving State<sup>172</sup>. Regarding the adoption of a collegiate system of objections, he explains that the proposal, however attractive it seems, would tilt the balance towards inflexibility and might make general agreement on reservations more difficult.<sup>173</sup>

Again, in 1958, this issue was examined within the context of the Vienna Conference, which highlighted the imperfections of a system based on the individual judgement of the validity of a reservation. Many alternatives were proposed among which was the adoption of a system based on a collective determination<sup>174</sup>. Whereas several States favoured the idea of a collective judgement of the validity of a reservation, the majority of the Conference voted against the proposal of a collegiate system.

## 7.2 *Objective tests of reservations validity: survey and evaluation of objective systems of determination of the validity of reservations in light of the compatibility principle*

Assuming that there should be some impartial body which could indicate impartially whether a reservation is permissible or impermissible, many solutions could be envisaged, from a collective determination of the validity, as has been adopted in the CERD

<sup>171</sup> Sir Humphrey Waldock took the place of Sir Gerald Fitzmaurice when he resigned from the International Law Commission due to his election as a Member of the International Court of Justice. The first report of Sir Humphrey Waldock was submitted in 1962 to the International Court of Justice. See the Report to the International Law Commission on the Conclusion, Entry into Force and Registration of Treaties, Yearbook of the International Law Commission, 1962, at 60-68. On the work of the Special Rapporteur see also KOH, Op. cit. footnote no 16, at 88-95.

<sup>172</sup> See Article 18, paragraph 4 (b) (ii) of the Report that provides "The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorised by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State".

<sup>173</sup> Twenty-fourth meeting the International Law Commission, Yearbook of the International Law Commission, 1966, Vol. 2, at 189-190.

<sup>174</sup> According to Sir Ian Sinclair "[T]here was an obvious need for some kind of machinery to ensure that the test [the compatibility test] was applied objectively, either by some outside body or 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", Twenty-first meeting of the Committee of the Whole, 10 April 1968, United Nations Conference on the Law of Treaties, Official records, First Session, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, at 114.

Convention, to the assessment of the reservation by the International Court of Justice - or its subsidiary bodies - or even another body. Although there is no denying that there is weight and cogency to all of these possibilities, which might appear, at first sight, to satisfy the requirements of a more objective test in the determination of a reservation's validity, it remains doubtful whether they are all practicable and serve to guarantee a totally impartial decision. Furthermore, one must not forget that States hardly consider any alternative methods for judging reservations, other than their sovereign right to make objections. Keeping in mind Lauterpacht's draft resolution, it is now necessary to examine each of these possibilities in greater details, in order to make a correct appraisal of what could be a reliable alternative to the Vienna Convention reservation regime.

A. *the CERD model: towards a collective system*<sup>175</sup>?

One approach for promoting objectivity would involve the use of the majority rule to ascertain compatibility. As a matter of fact, the compatibility of the reservations with the object and purpose test might lie in the hands of a collective determination. An examination of the Genocide case, as well as of the travaux préparatoires to the Vienna Convention reveals that the International Court of Justice and some States already suggested such a mechanism for determining the validity of a reservation. Drafts A and B proposed by Lauterpacht were also, as seen above, an application of a collective procedure. This would involve a reservation only being accepted if a majority of States parties failed to lodge an objection to it on the basis of incompatibility<sup>176</sup> within a time limit. In other

<sup>175</sup> On this subject see especially CASSESE A., A new reservation clause: Article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, in: Recueil d'Etudes de droit international en Hommage à Paul Guggenheim, Institut Universitaire de Hautes Etudes Internationales, Genève. See also SCHWELB E., The International Convention on the Elimination of All Forms of Racial Discrimination, in: 15 International and Comparative Law Quarterly, 1966, at 996ff, especially at 1055: "The reservation clause in Particular (Article 20): (...) "Now Article 20 transposes the "object and purpose" criterion into a Convention which deliberately sets out to regulate the question of reservations and expressly embodies in it what would also be the law if the Convention had remained silent on it. At the same time it extends the "object and purpose" criterion by adding that a reservation, the effect of which would inhibit the operation of any of the bodies established by the Convention shall also not be allowed."(...)". See REISMAN W. M., Responses to Crimes of Discrimination and Genocide: An appraisal of the Convention on the Elimination of Racial Discrimination, in Denver Journal of International Law and Politics, Vol.1. 1971, at 29-64, esp. at 43-44. See also LIJNZAAD L., Op. cit., at 131ff.

<sup>176</sup> During the drafting process of the International Covenant on Civil and Political Rights, the United Kingdom proposed a reservations clause containing a system of collective determination of the validity of reservations. According to the International Law Commission, the existing principles of international law make useless the insertion of such a reservation clause: "Plusieurs représentants ont fait observer que le droit de tout Etat contractant à formuler des réserves à un traité multilatéral était désormais un principe de droit international accepté, à condition que ces réserves ne soient pas incompatibles avec l'objet et le but du traité. Il était également bien établi que toute objection élevée contre une réserve par un autre Etat contractant empêchait l'entrée en vigueur du traité entre l'Etat qui faisait la réserve et l'Etat qui formulait l'objection, à moins que celui-ci n'ait exprimé une intention contraire. De l'avis de plusieurs membres, l'existence de ces

words, whether a reservation is to be regarded as compatible or incompatible with a particular treaty's object and purpose would depend on a required number of States' approval, either an absolute number or a percentage of States parties.

a) *The example of the International Convention on the Elimination of All Forms of Discrimination*

The only example of collective determination may be found in the Convention on the Elimination of All Forms of Racial Discrimination<sup>177</sup>, which provides in Article 20 for the application of a collegiate system, namely that "[a] reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it"<sup>178</sup>. Apart from the Racial Discrimination Convention, no other United Nations Conventions on human rights provide for a similar procedure in order to decide whether the reservation is valid or invalid.

b) *The collegiate mechanism as an alternative to the Vienna Reservation regime?*

The collegiate mechanism could be envisaged in the field of the human rights treaties as an alternative to the Vienna Convention reservations regime in reducing the power of States to formulate impermissible reservations, by setting forth a more adequate mechanism of controlling the validity of reservations. As opposed to the rules established by the Vienna Convention, if a sufficient number of States objected to a specific reservation, the reserving State with its unacceptable reservation would be excluded. As a matter of fact, a required number of States would have to agree to the State's reservation before it could do so.

---

principes rendait inutile l'insertion d'un Article tel que celui présenté par le Royaume-Uni.", in U.N. Doc., A/C.3/SR 1412, twenty-first session, 1966, Annexes et rapport de la troisième commission, A/6546, §142-143. See also IMBERT, *Op. cit.*, footnote no 72, at 411-413.

<sup>177</sup> The Convention was adopted by the United Nations General Assembly on December 21<sup>st</sup> 1965.

<sup>178</sup> LIJNZAAD L. describes the content of the convention and then, more precisely the content of Article 20, *Op. cit.*, at 131-139. The Article 20 of the Convention on the Elimination of All Forms of Racial Discrimination provides as follows "1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by the States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it. 2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it. 3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification take effect on the date on which it is received."



c) *The CERD model: between Unanimity and Flexibility*

The first point which needs to be made is that the collegiate mechanism would appear to be an interesting compromise between the undermining effect of reservations on the integrity of the treaty, especially in a human rights treaty, and the need to maintain a flexible regime in order to obtain the greatest possible participation<sup>179</sup>. In this respect, this mechanism could be described as being halfway between the old unanimity rule and the modern Vienna Convention regime. As a matter of fact, Clark considers the collegiate mechanism as offering the flexibility of the Vienna Convention and the tyranny of the unanimity system<sup>180</sup>. In this manner, States, on one hand, preserve their power to formulate reservations, and, on the other hand, acquire the capacity to exclude a State, as soon as a required number of States are convinced of the incompatibility of the reservation.

Secondly, it is necessary to glance more precisely at the main differences existing between the Vienna Convention reservations regime and the CERD model, especially as regards to the compatibility test. At this point it should be recalled that there is a need to set up a more objective way of ascertaining the compatibility of a specific reservation, in order to safeguard as much as possible the protection of human rights, namely to prevent States from formulating abusive reservations, as well as to avoid the lack of willingness of States to object to incompatible reservations. In short, what should be examined is the efficiency of the collegiate mechanism in conferring a more adequate determination of compatibility, since, as indicated above, the Vienna reservation regime fails to provide such an objective mechanism.

d) *The determination of an incompatible reservation under the CERD Model*

The mechanism established by the Convention on Racial Discrimination to judge the validity of a reservation does not provide for an individual determination such as that which is applied under the Vienna Convention reservations regime, nor for an institutional decision, as could be the case with, for example, an advisory opinion of the International Court of Justice to solve a dispute upon the admissibility on a particular reservation. However, to say that it is not an individual decision is perhaps not so evident: in order to

<sup>179</sup> According to CASSESE A., Op. cit. footnote no 175, "Article 20 [of the United Nations Convention on the Elimination of All Forms of Racial Discrimination] is clearly a compromise between two contrasting requirements: the need for "universality of participation", to allow the largest number of States possible to become parties to a treaty and other desire for "integrity of agreement", to safeguard the text of the treaty in the form it was originally drawn up.", in A new reservation clause, at 267.

<sup>180</sup> See CLARK B., Op. cit., footnote no 46, at 298.

consider that a specific reservation is incompatible, two-thirds of the States parties must lodge an objection counter to it. In other words, each of the two-third parties must make its own determination of the validity of the reservation (first phase). In fact, the mechanism of the CERD Convention is a cumulation of individual decisions of compatibility<sup>181</sup>, which could give it, perhaps, its qualification of being an objective mechanism.

*How is incompatibility determined in the framework of Article 20 ?*

Although this mechanism appears to be, at first glance, clearer and more transparent than the one provided by the Vienna Convention, it does cast doubts on what should be the exact content of the objections made by the States parties. Do States parties retain the faculty of objecting to a certain reservation on personal grounds or do they have to accept every reservation, except those they consider as being incompatible with the object and purpose of the treaty ? Related to this first point, one might also wonder if States parties, when notifying their objections to the Secretary-General, have to justify their grounds for objecting to reservations?

From a first point of view, looking closely at the wording of Article 20, is that no matter what the grounds of a State party might be, as soon as it has lodged its objection, it is assumed that the reservation is incompatible with the object and purpose of the treaty. In short, the formulation of an objection does not necessarily imply that the reservation is incompatible but rather that a particular State "*does not accept it*"<sup>182</sup>. From a second viewpoint, shared by Antonio Cassese<sup>183</sup>, it clearly results from the interpretation of Article 20 and especially from the close connection between paragraph 1 and 2, that States parties should *only* object to reservations when the reservation is incompatible with the object and purpose of the treaty or would inhibit the operation of any of the bodies established by this Convention. Again, this statement raises the problem of the subjective determination of the compatibility of the reservation, each State party having a different interpretation, of what could be considered compatible or incompatible.

<sup>181</sup> According to LIJNZAAD L., Op. cit., at 175 the final determination is "arithmetic".

<sup>182</sup> Article 20 CERD, Op. cit., footnote no 178.

<sup>183</sup> CASSESE A., Op. cit. footnote no 175, at 274-275.

- e) *Does the compatibility test become an objective test with a determination by two-thirds of the parties?*

In order to achieve a complete evaluation of the CERD mechanism, it is necessary to examine whether the fact that two-thirds parties are entitled to consider reservations formulated by other States, as either falling or not falling into one of the two above-mentioned categories (permissible and impermissible reservations) is sufficient to characterise the CERD mechanism, as being an objective system of determination.

In first place, comparing with the Vienna reservations regime, it is obvious that this system permits the avoidance of a purely individual judgement on the validity of reservations, since a reservation, to be deemed valid or invalid, has to be evaluated by at least two-thirds of the members participating in a convention. Based on the principle of democracy, it must therefore be acknowledged that, although the CERD model does not provide for an organic decision of compatibility, it tends objectively to apply - by two thirds determination - what remains a profoundly subjective test - the compatibility of the reservation with the object and purpose of the treaty.

However, in light of the current practice of States parties, several doubts are still raised by the so-called objective character of such mechanism, notably by the fact that States have first to individually assert the validity of a reservation. During this first phase, States may still wrongly apply the mechanism in question, following their own interests. As a matter of fact, there is apparently<sup>184</sup> no way to prevent States parties from, either not rejecting a reservation, which would be contrary to the object and purpose of a treaty or inhibit the operation of one of the bodies set up by the Convention(i) or, on the contrary, rejecting a reservation which, at first sight, appears to be valid, the objection being consequently totally unmotivated (ii). Whereas the case (ii) is unlikely to happen, especially because, as mentioned above, the few objections that are usually lodged by States parties, and because it is not safe to assume that they will object more in the CERD framework, case (i) seems in fact more likely to succeed. Even though it only constitutes the first phase of the determination of the validity of a reservation - the collective determination being the second phase- objectivity should remain a cardinal principle, in order not to render the mechanism useless. It is, however, hardly conceivable, despite the presupposed good faith

<sup>184</sup> Except by having recourse to the procedure of Article 22 of the CERD Convention, which permits the resolution of disputes on the admissibility of reservations: a difference of opinion could be taken to the International Court of Justice. However, it must be recalled that up to now, not less than twenty-nine States

of States parties, that these will act in an objective manner. Therefore, even in the framework of the CERD mechanism, it must be admitted that objectivity is not fully achieved, the rule rather creating a “pseudo-objectivity”<sup>185</sup>.

f) *The efficiency of CERD model : does it constitute an efficient alternative to the Vienna reservations regime ?*

Despite its description as being “an ideal way out”<sup>186</sup>, especially in the human rights field, the collegiate mechanism system fails to prevent States parties from formulating undesirable and incompatible reservations, at least for three main reasons: first of all, it must be emphasised that such a mechanism does not provides for an express acceptance of a specific reservation made by a State. On the contrary, the current framework of the CERD presumes *the tacit acceptance of States parties*<sup>187</sup>. There is a presumption that the reservation is accepted unless two thirds of the States parties have objected to it<sup>188</sup>. As a result, a State’s failure either to object to or to accept a reservation would automatically lead to the acceptance of the reservation, favouring, as Daniel Hylton rightly points out, the reserving State and its reservation<sup>189</sup>. Thanks to the rule of tacit acceptance, what becomes more important is less the provocation of the formulation of a too large number of

---

have reserved Article 22 CERD. See further below an overview of States practice. On this particular point see also CASSESE A., Op. cit., at 276-277 and CERD/C/SR.253.

<sup>185</sup> LIJNZAAD L., Op. cit., at 175.

<sup>186</sup> See IMBERT P.-H., Les réserves et les dérogations, La question des réserves et les conventions en matière de droits de l’homme, in Actes du cinquième colloque international sur la Convention européenne des droits de l’homme, Francfort, 9-12 avril 1980, at 98ff, esp. at 126: “Le système majoritaire a toujours été présenté comme une solution miracle, un système idéal.” Imbert declared also that the success of this mechanism could be easily explained: “[P]our les anciens partisans du système classique, la règle majoritaire est celle qui s’en approche le plus. Elle permet d’exercer un contrôle sérieux sur les réserves, et n’engendre aucune situation ambiguë: elle s’applique automatiquement et le statut de l’Etat réservataire comme celui du traité (du point de vue de son entrée en vigueur) sont toujours bien établis. En outre, les traités étant à l’heure actuelle adoptés au scrutin majoritaire, il semble normal qu’un principe comparable s’applique à l’acceptation d’une réserve. Enfin, cette règle apparaît comme la meilleure solution de compromis, en raison de l’assouplissement qu’elle représente et qui supprime le risque de décision arbitraire, principal défaut du consentement unanime. Elle peut ainsi rallier de nombreux Etats qui, tout en étant opposés au système classique, redoutent les dangers d’une procédure trop libérale qui donne à chaque Etat intéressé la possibilité de formuler individuellement un jugement sur la validité de la réserve”, Op. cit., footnote no 125, at 142-143.

<sup>187</sup> According to HYLTON D. N., Op. cit. footnote no 158, at 445, prior to the Vienna Convention, reservations to treaties were presumed impermissible and unacceptable, whether under the unanimity rule, the Pan-American System, the principle of the Genocide Convention, or the collegiate system.

<sup>188</sup> CASSESE A., Op. cit., at 267 see the presumption as set up in the CERD Convention as an advantage: “in this way no single contracting State could prevent a reserving State from participating in the Convention”. See also SHERMAN E F. JR, Op. cit. footnote no 55, at 92, who proposes that the rule of tacit acceptance should be replaced with a procedure that would require every state party to a treaty to respond in a set fashion to each of a ratifying party’s reservation. He suggests that the rule should provides that “A reservation is incompatible with the object and purpose of a treaty if two-thirds of the state parties object to the reservation as such. It is required that when a State enters a proposed reservation, every party to the treaty must respond to the reservation within twelve months of the entry of the reservation.”

<sup>189</sup> HYLTON D. N., Op. cit., footnote no 158, at 445.

objections rather than the obtaining of a certain majority in favour<sup>190</sup>. However, in order to improve the regime governing reservations to human rights instruments, it might perhaps be advisable either to reverse the presumption, or to compel States to reach a decision on every reservation, and moreover within a brief time limit. By doing so, it will be possible to remedy the fact that "it is the passage of time that establishes compatibility rather than an explicit determination"<sup>191</sup>. As a matter of fact, it might have been thought possible to envisage the reversal of the presumption of tacit acceptance, proposing a new reservations clause; such a new reservations clause may provide that a reservation which has not been accepted by two third of the States parties<sup>192</sup> is considered as being incompatible with the object and purpose of the Convention. However, it must be stressed that, even in this case, the acceptance of a reservation would not necessarily mean that a reservation is compatible with the object and the purpose of the treaty but rather that an assumption of compatibility is established<sup>193</sup>.

As a consequence of such a rule, what ultimately matters is the number of objections made by the States parties, which always remains very low: taking the Convention on the Elimination of All Forms of Racial Discrimination as an example, it must be stressed that the number of objections has never reached the required majority<sup>194</sup>. Therefore, it seems evident that such a system is not particularly adequate as far as human rights treaties are concerned: reservations are considered invalid only if a certain number of States have objected and unfortunately they never do so<sup>195</sup>.

Moreover, and this is the second point, in case where objections do not achieve the required majority, the reserving State becomes a party to the Convention, with the benefit

<sup>190</sup> On this subject see IMBERT P.H., *Op. cit.*, footnote no 186, at 146. See also Doc. A/CONF. 39/C.1/SR. 24, §9: Sir WALDOCK H. explained why such a mechanism could remain theoretical since States do not readily lodge objections to reservations.

<sup>191</sup> LIJNZAAD L., *Op. cit.*, at 175.

<sup>192</sup> In this manner States parties will have to expressly accept the reservations, which is more in conformity with the spirit of the human rights conventions.

<sup>193</sup> On this subject see GRAEFRATH B., *Menschenrechte und internationale Kooperation*, Berlin, 1988, at 70.

<sup>194</sup> According to LIJNZAAD L., *Op. cit.*, "It should be noted that all reservations have been accepted, as the number of objections never amounted to two-thirds of the States Parties." Lijnzaad affirms that the number of objections depends not only of the intention of States but also of the problem of the relatively short period available for objections. Yet the objections should be communicated in a ninety-day period provided for in Article 20.1 CERD.

<sup>195</sup> For instance, see the Convention on the Elimination of All Forms of Racial Discrimination: States parties to the Convention have formulated a host of reservations, whereas only two have been objected. The first one concerns the reservation to Article 5 (that contains a catalogue of rights) made by the Yemen Arab Republic and to which 14 States have objected, and the second one to be mentioned is the Pakistani objection to the Indian reservation to Article 22 which deals with the dispute-settlement provision. See ST/LEG/SER.E/11.

of its reservation, which is therefore considered as to be compatible with the purpose and the object of the treaty. As a consequence, it would imply that the State which had raised an objection to the reservation, will be considered to be bound by the treaty except by the provision to which a reservation has been lodged. It clearly appears from this that every time a reservation does not lead to the objections of two-thirds of the States parties, and this has until now always been the case, the collegiate system also provides for a liberal regime of reservations close to the one adopted by the Vienna Convention. Again, considering a reservation which is manifestly incompatible with the object and purpose of a treaty, and assuming that fewer than two-thirds of the States parties have objected to it, the reservation will nevertheless be considered valid.

The third reason why the collective mechanism should not be adopted as an alternative to the Vienna Convention reservations regime as regards human rights treaties is the increased number of States required to object to a reservation: accordingly to the two-third rule, the more States ratify the Convention, the more States have to object to a reservation in order to exclude a State from the Convention. As Lijnzaad rightly pointed out in connection with the CERD procedure, "the protective value of the two-thirds rule diminishes as more States become parties to the CERD"<sup>196</sup>. This statement is verified by the fact that, as already explained, not even one single reservation has provoked the formulation of objections by two-thirds of all the States parties to the Convention. As will be seen, when examining the current practice of the States parties to the CERD convention, even the more controversial reservations - reservations formulated counter to Article 5 of the CERD convention - have been objected to only by a small number of States parties.

g) *The current practice of the States parties to the CERD : a survey of reservations and objections*<sup>197</sup>

In the following, effective reservations and objections made to this particular convention will be discussed to find out whether the innovations of the CERD model have positive effects on the quality and the number of reservations and objections made to human rights treaties.

<sup>196</sup> LIJNZAAD L., Op. cit., at 136, explains that "though the rule remains unchanged, the number of states necessary to establish incompatibility according to 20(2), two-thirds of the ratifying states, necessarily increases. Thus, the rule has an intrinsic flexibility that implies a loss of control, proportional to the growing number of States parties". On this subject see also CLARK B., Op. cit., at 298.

<sup>197</sup> On this subject see LIJNZAAD L., Op. cit., at 140ff.

Among the one hundred and fifty-three States parties to the Racial Discrimination Convention<sup>198</sup>, forty-four States parties have, up to now, formulated at least one reservation to an Article or a provision of that Convention. Briefly, the Article to which the most reservations have been lodged by States parties is, not surprisingly, Article 22 of the CERD Convention<sup>199</sup>, a procedural Article that provides for the compulsory jurisdiction of the International Court of Justice. Another provision which has also met with a high number of reservations is Article 4 of the CERD Convention<sup>200</sup>. Amazingly, not even one objection has been lodged towards those reservations. The only reservations that have been objected to are the broad reservations formulated by the Governments of Yemen and Saudi Arabia to Article 5 of the Convention, which provides for a genuine catalogue of human rights<sup>201</sup>. Despite the fact that these reservations were clearly incompatible with the object

<sup>198</sup> See Multilateral Treaty Series, Op. cit., at 103 (French Version).

<sup>199</sup> Twenty-two States parties have formulated a reservation counter to Article 22 of the CERD Convention. See the table, Op. cit., at 42-43.

<sup>200</sup> Eighteen States parties have formulated a reservation counter to Article 4 of the CERD Convention. See the table, Op. cit., at 42-43. Article 4 of the CERD Convention provides that: "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia: (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law; (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

<sup>201</sup> Two States parties have formulated a reservation counter to Article 5 of the CERD Convention. See the table, Op. cit., at 42-43. Article 5 of the CERD Convention provides that "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State; (ii) The right to leave any country, including one's own, and to return to one's country; (iii) The right to nationality; (iv) The right to marriage and choice of spouse; (v) The right to own property alone as well as in association with others; (vi) The right to inherit; (vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression; (ix) The right to freedom of peaceful assembly and association; (e) Economic, social and cultural rights, in particular: (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration; (ii) The right to form and join trade unions; (iii) The right to housing; (iv) The right to public health, medical care, social security and social services; (v) The right to education and training; (vi) The right to equal participation in cultural activities; (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks."

and purpose of the treaty, and also in spite of the significant number of States that have declared that they consider them to be incompatible, the strict application of the two-thirds rule has not lead them to be judged as being incompatible. As a matter of fact, fifteen States<sup>202</sup> have lodged an objection, namely less than ten per cent of States parties. Consequently, one must admit that the collegiate mechanism adopted by the CERD convention also does not provide for a suitable remedy for the avoidance of impermissible reservations.

*B. The competence of the International Court of Justice to ascertain the validity of reservations*

A second proposal for remedying the vacuums in the Vienna Convention reservations regime would be for the International Court of Justice to be given the jurisdiction to take a decision on the admissibility of the reservations formulated counter to human rights treaties. This proposal will be examined further below, in connection with the usual reluctance of States to accept the compulsory jurisdiction of the International Court of Justice, as well as in connection with the difficulties of application that may be involved by the adoption of such mechanism: the competence of the Court, the legitimacy of intervention and the relatively long delays necessary to obtain a decision.

*a) The reluctance of States to accept the compulsory jurisdiction of the International Court of Justice*

Admittedly, States have always shown a marked unwillingness<sup>203</sup> to accept the compulsory jurisdiction of international tribunals, even more so than usual in the field of human rights: the lack of commercial interests has always prevented States from considering the human rights objectives as being *erga omnes* obligations. As far as the International Court of Justice is concerned, it is true that quite a large number of States have until now not accepted the optional clause. Furthermore, even where the International Court of Justice has jurisdiction over disputes related to a specific Convention (under a provision in the relevant convention); States parties could formulate reservations against the compulsory jurisdiction of the I.C.J. Two examples could be examined in this connection. The first one concerns the Genocide Convention, the great majority of reservations to which refer to

<sup>202</sup> The objecting States are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Mexico, Netherlands, New Zealand, Norway, Spain, Sweden, and the UK.



Article IX, which deals with the compulsory jurisdiction of the International Court of Justice<sup>204</sup>. The example of the CERD Convention, as a second example, also illustrates the reluctance of States parties to empower an international tribunal without express consent to be given in each particular case. As seen above, the dispute settlement clause, under which there is a possibility of individually referring a dispute either to arbitration or to the International Court of Justice has been rejected by several States parties. It is true that States parties strongly prefer to make a determination *ex post* of the competence of the International Court of Justice in light of any disputes that may arise: many of the twenty-nine States which have formulated a reservation counter to Article 22 of the Convention on Racial Discrimination have also declared that the express consent of all the parties to the dispute will be necessary<sup>205</sup>.

b) *Efficiency of the ICJ model in the determination of the validity of reservations*

The whole problem in knowing whether the International Court of Justice is a suitable organ for deciding on the admissibility of a reservation is therefore totally dependent on the faculty of convincing States to accept the optional clause or the specific treaty provision giving jurisdiction to the Court. As long as States continue almost systematically to reject the compulsory jurisdiction of the International Court of Justice, the proposal seems hardly to be feasible: of what relevance will a system be under which the Court cannot decide an issue unless the parties to a dispute have accepted the compulsory jurisdiction of the Court? This would mean that whereas in some rare cases the Court will be considered to be competent to judge the legality of a reservation - especially where all the parties to the disputes have expressly given their consent - its competence will most of the time be denied, with the consequence of raising major uncertainties and especially to show no consistent pattern.

Moreover, referring to the possibility of inserting a specific provision providing for the competence of the Court to judge the legality of the reservations, what will be the consequences if a State formulates a reservation counter to that provision? Will the Court

<sup>203</sup> According to Anderson "it must be admitted that in practice the history of States' willingness (or their lack of it) to refer issues to the International Court is far from encouraging and in view of this it seems unlikely that many States would favour this draft [Draft D]", *Op. cit.*, at 468.

<sup>204</sup> To find the texts of the reservations and objections to reservations to the Genocide Convention, see Status of Multilateral Treaties deposited with the Secretary General, in United Nations, Office of legal Affairs, Treaties Section, at <http://www.un.org/Depts/Treaty/bible.htm>.

<sup>205</sup> See reservations formulated by Saudi Arabia, Bahrain, Egypt, India, Iraq, Libya, Kuwait, Madagascar, Morocco, Mozambique, Nepal, Syria, and Yemen.

be competent to judge the legality of a reservation that precisely contests that competence? According to Article 36 paragraph 6 of the Statute of the International Court of Justice, the Court is competent also "in the event of a dispute as to whether the Court has jurisdiction". However, in order to avoid the intricacies of such a proposal, it would perhaps be more appropriate to simultaneously insert a reservation clause prohibiting the formulation of reservations counter to that specific provision. In this way States will have to accept the compulsory jurisdiction of the International Court of Justice if they want to become parties to the treaty. There are however some significant risks that States may refuse to ratify human rights treaties that contain such clauses.

Conferring the judgement of the validity of reservations made to human rights conventions on the International Court of Justice would first give *authority* as well as *legitimacy* to the decisions of validity or invalidity of reservations: as Anderson rightly points out, the advantages of a decision taken by an international tribunal which is already constituted and whose high standards are already accepted must be obvious to any lawyer<sup>206</sup>. Moreover, referring disputes related to reservations to the International Court of Justice would involve, on one hand, an objective as well as impartial decision of compatibility, undoubtedly more in line with the goals of human rights treaties, but it would on the other hand risk complicating to a significant degree the mechanism of determination<sup>207</sup>, especially due to the rather long delays in the intervention of the International Court of Justice. As a matter of fact, it is hardly conceivable that States can be made to wait for the decision of the International Court of Justice, with the consequence that States parties to a specific convention on human rights would not know until that decision their precise obligations under that convention, especially in their relationship with other States parties.

In order to remedy the "impracticability" of this solution of asking the International Court of Justice to render a decision upon the validity of a reservation, two other alternatives, however still within the framework of the International Court of Justice, could at this point be examined: the first possibility is to ask the International Court of Justice for an *advisory opinion* on the compatibility of certain reservations with UN human rights instruments, while the second possibility is to establish a *special chamber* of the International Court, only responsible for judging the compatibility of the reservations. Both possibilities take advantage of the impartiality as well as the objectivity of the framework of the

---

<sup>206</sup> ANDERSON D. R., Op. cit., footnote no 27, at 468.

International Court of Justice, while also seeming more practical in the sense that they will notably avoid the interminable delays of intervention of the Court.

c) *The solution of the Advisory opinion*

The solution of the Advisory opinion has already been proposed, in 1993, by the Committee on the Elimination of Discrimination against Women<sup>208</sup>, which supported the idea of asking the International Court of Justice for an advisory opinion on the compatibility of certain reservations with UN human rights instruments. Even if the solution of the advisory opinion could present the advantage of indirectly affecting States which have not necessarily consented to the Court's compulsory jurisdiction<sup>209</sup>, this problem is mitigated by the following specific points: (i) The first reason why the mechanism of the advisory opinion should be considered not to be suitable to address the issue of the validity of reservations is that States cannot request an advisory opinion: only the General Assembly of the United Nations, the Security Council and such other organs of the United Nations and of the specialised agencies authorised by the General Assembly can request an advisory opinion. (ii) The second reason that leads to a refutation of the mechanism of the advisory opinion as an alternative to the Vienna Convention reservations regime is the discretionary power of the International Court of Justice to accept or to decline requests for advisory opinions. According to the Article 65 of the Statute of the International Court of Justice, "the Court *may* give an advisory opinion on any legal request"<sup>210</sup>. Therefore, even if a request for an advisory opinion should not, in principle, be refused<sup>211</sup>, this eventuality should be taken into account. (iii) The third reason for rejecting the mechanism of the advisory opinion as a means to determine the validity of reservations is linked to the effect of the advisory opinions. Despite the fact that they obviously possess a great persuasive influence and authority, advisory opinions are technically not binding on the parties. (iv) The general character of the advisory jurisdiction *may* be the fourth reason for not considering advisory opinions as offering a reliable means for the judging of the

<sup>207</sup> According to Honourable Justice SINHA "it would clearly be not practicable to leave the decision to the ICJ", in: Indian Journal of International Law, Op. cit., footnote no 166 at 111.

<sup>208</sup> See the CEDAW report on the work of its twelfth session, UN. Doc. A/48/38, 28 May 1993, at §3, 5.

<sup>209</sup> The consent of individual States who may be affected by a request of an Advisory opinion, or who may be involved in a dispute to which that request refers is not necessary in order to enable the Court to give the Opinion, FITZMAURICE, The Law and Procedure of the International Court of Justice, Grotius Publications Limited, Vol. I, 1986, at 114.

<sup>210</sup> See also Article 96, paragraph 1 of the Charter.

<sup>211</sup> According to the International Court of Justice, Advisory opinion on Reservations to Treaties, Op. cit. footnote no 15, 1951, at 19, "the Court has the power to decide whether the circumstances of a particular case such as to lead the Court to decline to reply to the request for an Opinion".

validity of reservations. It has frequently been maintained that all requests for advisory opinions should be formulated in abstract terms, even if they are motivated by a concrete situation in order to avoid quasi-contentious jurisdiction<sup>212</sup>. If it were the case, although the Court seems to negate this view<sup>213</sup>, the technique of the advisory opinion would be useless when applied to the determination of the validity of a particular reservation.

d) *The designation of a special chamber*<sup>214</sup>

A reasonable alternative to that proposal would be, and that was precisely the suggestion already proposed by Lauterpacht in his Draft D, to request the International Court of Justice to set up a special chamber<sup>215</sup>, designated under its own rules, able to decide on the admissibility of reservations and act in a rather more summary way. The advantage of specially establishing the Chamber of Summary Procedure is that this Chamber acts in accordance with simplified procedures<sup>216</sup>, thereby offering to the States a specialised and more rapid way of determining the validity of a reservation<sup>217</sup>. Moreover, by adopting such a mechanism for controlling the validity of reservations, impartiality and objectivity seem to remain guaranteed, the rules of designation being the same as those of the International Court of Justice. However, as pointed out Rosenne, in the past, only one case has ever been brought before this Chamber and this unique experience failed to demonstrate the value of these particular Chambers as well as the preference of States to prefer for Chambers as opposed to the full Court<sup>218</sup>.

---

<sup>212</sup> See Judge Azevedo, First Admissions case, 1948, at 73-75.

<sup>213</sup> See the First Admission Case, 1948, at 61.

<sup>214</sup> According to ROSENNE S., *The International Court of Justice, An essay in Political and Legal Theory*, Ledyen A. W. Sijthoff's Uitgeversmaatschappij N. V., 1957, at 154, "[T]he Statute also envisages the possibility of cases being decided by smaller collectivities of judges than the full Court, collectivities known under the appellation 'Chamber'. The Statute provides for two types of Chambers, those with a jurisdiction limited to a particular type of case or even a particular case, and a Chamber of Summary Procedure with general jurisdiction".

<sup>215</sup> See the Statute of the International Court of Justice, Article 29 which provides: "With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit".

<sup>216</sup> See Section 2 of the Rules of the Court, Adopted on May 6<sup>th</sup>, 1946, Article 72.

<sup>217</sup> According to ROSENNE S., *Op. cit.*, at 155, "it is difficult to see what is the particular advantage of these specialised Chambers, or the Chamber for Summary Procedure, over the more orthodox type of arbitration, which is always useful when what is required is expert and perhaps technical knowledge in a limited sphere rather than broad general competence in international law and practice as a whole, which is the special attribute of the Court".

<sup>218</sup> ROSENNE S., *Op. cit.*, at 155.

C. *Decisions on admissibility conferred on a Committee of experts*

The suitable organ to decide on the admissibility of reservations could also be a Committee to which the parties would refer disputes on a particular reservation. Such a committee could be envisaged in various forms: a centralised monitoring mechanism composed of independent experts empowered to judge the legality of all the reservations made to the United Nations Conventions on human rights, as well as a Committee designated by the States parties - or an organ of an international organisation responsible for establishing the text of the treaty - to a specific Convention, or even to the Legal Committee of the General Assembly. However, the competence of the treaty-based organs, such as the Human Rights Committee, will not be examined here, having already been discussed above.

a) *The experience of the Council of Europe*

Up to a certain extent, the creation of a committee composed of experts has already been achieved within the framework of the reservations concluded within the Council of Europe. As a matter of fact, the most recent effort of the Council of Europe in combatting inadmissible reservations finds expression in the creation of an "observatory of reservations", in the framework of the existing Committee of Legal Advisers on Public International Law <sup>219</sup>(CADHI). This Committee, though composed of representatives of the States parties, is also assisted by a Group of Experts on Reservations to International Treaties<sup>220</sup> which was established in 1997, and whose members are specialists, but also countries and international organisations with the statute of observers<sup>221</sup>. According to the mandate conferred by the Committee of Ministers, the major task of the group of experts is to "assist the CADHI in its role as an European observatory of reservations, i.e. in examining reservations and reactions to reservations to multilateral treaties of significant importance to the international community<sup>222</sup>". The Group should examine and bring

<sup>219</sup> The Committee of Legal Advisers on Public International Law (hereinafter CADHI) is "a pan-European forum where high level representatives of the Ministries of Foreign Affairs of all member states of the Council of Europe exchange information, discuss and now also co-ordinate issues of common-interest in the field of public international law", AKERMARK S. S., Op. cit., footnote no 9, at 511.

<sup>220</sup> The abbreviation is DI-E-RIT.

<sup>221</sup> For an example of international organisations that are invited to the meetings, there are the Hague Conference on Private International Law as well as the Commission of the European Community. The countries that are present to the meetings are essentially: Armenia, Australia, Azerbaijan, Canada, Japan, Mexico, United States of America.

<sup>222</sup> The Group will have to "(a) examine and propose ways and means and, possibly, guidelines to assist member States in developing their practice regarding their response to reservations and interpretative declarations usually or potentially inadmissible under international law and (b) consider the possible role of the CADHI as an "observatory" of reservations to multilateral treaties of significant importance to the international community raising issues as to their admissibility under international law, and as an observatory

attention of the CADHI reservations and declarations which raise issues as to their admissibility from the point of view of international law and in particular from a human rights perspective"<sup>223</sup>. The activities of co-operation with other international entities<sup>224</sup>, dissemination of information and exchange of views, as well as the establishment of reports are also part of the work of the Group of experts.

Even though the creation of that Group of Experts undoubtedly leads to some favourable changes in the monitoring of potentially or actually not valid reservations, it should be noted that, on the contrary, it does not bring any innovations as to the existing regime of determination of the validity of reservations: the Group of experts facing with an impermissible reservation could only formulate recommendation in order to obtain the withdrawal or modification of the reservation. In fact, the creation of the Group of experts does not prevent the mechanism of individual determination by the means of objections from being still applied in the judging of the validity of reservations.

*b) What form could be envisaged for a Committee of experts?*

In order to satisfy the requirements of objectivity and impartiality, the formation of a Committee of experts must at least observe the following principles: first, it should be composed of specialists and not of representatives of the States parties to assure on one hand their knowledge of the matter of reservations to human rights treaties and on the other hand, their total independence. Such independence is absolutely necessary in order to obtain a complete depoliticization of the matter of the determination of the legality of reservations to human rights treaties, avoiding thus the political influences that may arise in a political forum. This is also one of the reasons why the proposal that the General Assembly could entrust the Legal Committee<sup>225</sup> with the competence to determine the validity of reservations is not suitable: the Legal Committee on which all the members of the United Nations are represented is not able to decide impartially whether reservations are compatible or not with a given treaty. Second, the election of the Committee should be organised in a democratic way, with the participation of the members of the United

---

of reactions by Council of Europe member States Parties to these instruments", see the introductory documents, first meeting, DI-S-RIT (98)1, Strasbourg, 2 February 1998.

<sup>223</sup> AKERMARK S. S., Op. cit. footnote no 9, at 511.

<sup>224</sup> The Group met the special Rapporteur Alain Pellet of the International Law Commission during its first working year, in 1998.

<sup>225</sup> See the proposal of the Honourable Justice Sinha, Op. cit. footnote no 166, at 111. See also the proposal of Fenwick, C. G. FENWICK, Reservations to Multilateral Conventions: the Report of the International Law

Nations. This inevitably raises the question of how it may be possible to ensure that the members of the United Nations will act in a totally independent way in electing the required number of independent experts, especially taking into account that experts would come from the States parties to the United Nations. Linked to that question is the difficulty of finding a means by which so high a number of members could democratically elect a relatively low numbers of experts.

*Examination of the WTO dispute settlement mechanism: a model to be adopted in human rights treaties?*

One mechanism that may be examined in the course of determining how to set up a totally independent group of experts is that provided by the World Trade Organisation<sup>226</sup> when, a dispute occurring between States, it becomes necessary to designate experts to be members of a particular panel. The WTO dispute settlement system offers a relatively simple and rapid procedure, generally well accepted by States since that mechanism seems to have been used more frequently than any other international institution for the settlement of disputes among states<sup>227</sup>.

What is strongly relevant for the purpose of this study is the manner by which panels are established in order to ensure the independence and the impartiality of panel members. In brief, the parties to a dispute have the right, sixty days after the first stage of negotiation, to seek the setting up of a panel by the WTO. Usually panels have three members, none of which comes from the countries concerned, designated by the WTO Secretariat on the basis of a list of the potential panel members. If one of the parties to the dispute rejects a panel member, the Director-General should arrange a new panel within sixty days<sup>228</sup>. The authority of the panels' decision is firstly due to the fact that States have absolutely no role in the designation of the members, as it was the case before. Secondly, this is ensured by the fact that with a view to perfectly ensuring the independence of panelists, it is expressly specified that "panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organisation"<sup>229</sup>. Thirdly, this is also

Commission, Editorial Comment, in: 46 American Journal of International Law, 1952, at 119-123, esp. at 122.

<sup>226</sup> Hereinafter: WTO

<sup>227</sup> For a statistical evaluation of the panel's deliberations see HUDEC, 1993.

<sup>228</sup> Articles 8(\$6) and 8(\$7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>229</sup> See Article 8(\$9) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

guaranteed by the requirements on the qualification and knowledge of the panelists who shall possess "a sufficiently diverse background and a wide spectrum of experience".

Such a dispute settlement mechanism being the result of a well established integration process, it could not, as such, be automatically transposed to the issue of reservations to human rights treaties. However, the procedure adopted, especially as regards the establishment as well as the composition of panels, should be considered a precious guideline when elaborating a proposal to elect a committee responsible for judging the validity of reservations formulated counter to all United Nations conventions on human rights.

As a matter of fact, the General Assembly might be requested to elect a permanent committee of experts on the basis of a pre-determined list of potential members possessing the qualifications required, proposed by States and international organisations. Then, the members of this committee will be granted the independence necessary for the performance of their task without any interference from their respective governments. It should also be provided that members whose governments are concerned with that dispute shall not participate in the debate in order to ensure complete objectivity. The possibility of creating panels should also be envisaged. Last, but not least, the committee should have the competence to give an opinion on whatever reservations formulated counter to a human rights convention as soon as a State or an international organisation casts doubts on the validity of a particular reservation.

Convenient as this may be, it is not realistic, and the same conclusion has already been drawn in relation with to potential competence of the International Court of Justice, to imagine that States would accept the endowing of a committee with the responsibility of determining the validity of reservations made to human rights treaties. As a matter of fact, States would more easily accept being deprived of some of their competence when they have particular interests in doing so, as for example in the matter of international trade.

8. *Concluding observations on the proposal to establish an objective means of determining the validity of reservations to human rights treaties*

This paper has argued that the Vienna Convention reservations regime does not have the effect of avoiding impermissible reservations and therefore that this regime should not be applied to human rights treaties. As such, in order to protect the human rights treaties from



abusive reservations, the establishment of an objective mechanism for controlling the validity of reservations has been proposed. However, even if the necessity of rethinking the flexible system that governs the validity of reservations to human rights treaties has been widely demonstrated, there are significant risks that States will refuse to adhere to a system that will deprive them of their sovereign right to make reservations.

The cardinal principle of international law being that a sovereign independent State is only bound to the extent to which it has consented, and referring to the proposals that have been studied in this paper, it is barely conceivable that States will either grant jurisdiction to the Court International of Justice to decide on the validity of reservations, or agree to the establishment of a special committee empowered to judge the validity of reservations. Moreover, the competence of the treaty monitoring bodies to control the validity of reservations cannot be derived from their actual powers. In order to have authority to decide on validity of reservations, the treaty monitoring bodies should be given an explicit delegation by the States themselves. This possible extension of the competence of the monitoring bodies should be a matter for further discussion within the context of the work of the International Law Commission on the subject of reservations to treaties. In this connection, a system of collaboration between States and monitoring bodies might be also envisaged. The treaty monitoring bodies should be at least given the power to comment upon and express recommendations with regard to the validity of reservations, while the responsibility and the competence to take action on impermissible reservations should remain in the hands of States. Thus, the monitoring bodies would have the power to consult the reserving State and the other States parties about the validity of a reservation, but would leave to the States parties the right to make their determination on the reservation on the basis of the Vienna Convention on the Law of Treaties. This seems to be the only reasonable way to make a step towards a more objective means of ascertaining the validity of reservations.

As for the proposal of the adoption of a collegiate mechanism, it has been seen that even if it seems to be a good suggestion based on the principle of democracy, its application does not permit the avoidance of impermissible reservations.

In conclusion, as no complete solution for the establishment of an objective means of judging the validity of reservations seems to be feasible, it might be necessary to make the following recommendations: first of all, one of the most effective approaches in combatting impermissible reservations would be to *encourage* States parties to react to the

reservations that have been formulated. This would probably have the effect of reducing the number of impermissible reservations to which no objections are made. A further step would be to *force* States parties to react to reservations: the rule of tacit consent could be replaced with an obligation for every State party to respond to reservations. Admittedly, replacing the rule of tacit consent, for example within the framework of the collegiate mechanism, would undoubtedly lead to a more effective system of judging the validity of reservations. If States were compelled to react to reservations, the application of the two-thirds rule certainly would provoke the rejection of certain incompatible reservations. Second, it would be highly desirable that all future conventions on human rights expressly provide for either the inclusion of a reservation clause or the adoption of a dispute settlement mechanism relating to reservations. This does not mean that previous conventions on human rights could not adopt protocols in order to achieve the same results. Thirdly, it could also be recommended that the validity of reservations to human rights treaties be limited to a maximum period of a certain number of years, as for example five or ten years. Finally, and linked to the previous point, States should be encouraged to withdraw their reservations as soon as possible.



## BIBLIOGRAPHY

### I. BOOKS

S. BASTID, *Les traités dans la vie internationale-conclusions et effets*, Paris, Economica, 1985.

C. CAMPIGLIO, *Il principio di reciprocità nel diritto dei trattati*, Padova, 1995.

C. CHINKIN AND OTHERS, *Human rights as general norms and a State's right to opt out, Reservations to human rights conventions*, The British Institute of International and Comparative Law, Human Rights Series, Ed. J.ATGardner.

G. COHEN-JONATHAN, *La Convention européenne des droits de l'homme*, Presses universitaires d'Aix-Marseille, Collection de droit public positif, Economica, 1989.

P. DAILLET, A. PELLET, Nguyen Quoc Dinh, *Droit International public*, Séd., Paris, L.G.D.J., 1994.

E. DECAUX, *La réciprocité en droit international*, Paris, Librairie générale de droit et de jurisprudence, 1980.

J. DHOMMEAUX, *Les états parties à la Convention européenne des droits de l'homme de l'ONU: de la cohabitation du système universel de la protection des droits de l'homme avec le système européen*, in: Liber Amicorum Marc-André Eissen, Bruxelles, 1995.

G. FITZMAURICE, *The Law and Procedure of the International Court of Justice*, Grotius Publications Limited, 1986.

J. A. FROWEIN, *Reservations to the european Convention on human rights*, in: Mélanges Wiarda, 1988.

B. GRAEFRATH, *Menschenrechten und internationale Kooperation*, Berlin, 1988.

K. HOLLOWAY, *Modern Trends in Treaty Law*, London, 1967.

K. HOLLOWAY, *Les réserves dans les traités internationaux*, Paris, 1958.

F. HORN, *Reservations and Interpretative declarations to multilateral treaties*, Upsala, Swedish Institute of International Law, 1988.

P.-H. IMBERT, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979.

W. KALIN, G. MALINVERNI, M. NOWAK, *La Suisse et les Pactes des Nations Unies relatifs aux droits de l'homme*, 2éd., Bruxelles, Bruylant, 1997.

D. KAPPELER, *Les réserves dans les traités internationaux*, Bâle, Verlag für Recht und Gesellschaft S.A., 1958.

M. KHADJENOURI, *Réserves dans les traités internationaux*, thèse, Ambilly, 1953.

L. LIJNZAAD, *Reservations to UN-Human Rights Treaties, Ratify and Ruin?*, International Studies in Human Rights, Volume 38, Martinus Nijhoff Publishers.

R. LILLICH, *Us ratifications of the human rights treaties: with or without Reservations?*, ed., Charlottesville, University of Virginia Press, 1981.

L. MIGLIORINI, *Le obiezioni alle riserve nei trattati internazionali*, Giuffrè Editore, 1997.

P. REUTER, *La Convention de Vienne du 29 mai 1969 sur le droit des traités*, A. Colin, Paris, 1970.

P. REUTER, *Introduction au droit des traités*, Genève, Publications de l'Institut universitaire de hautes études internationales, 1996.

S. ROSENNE, *The International Court of Justice, An essay in Political and Legal Theory*, Ledyen A. W. Sigthoff's Uitgeversmaatschappij N. NV., 1957.

I. SINCLAIR, *The Vienna Conference on the Law of Treaties*, 2<sup>nd</sup> ed., Manchester, 1984.

G. VAN BUREN, *The International Law on the Rights of the Child*, Martinus Nijhoff Publishers, 1995, Dordrecht.

J. VELU, R. ERGEC, *La Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 1990.

E. VITTA, *Le riserve nei Trattati*, Torino, 1957.

## II. ARTICLES

S. S. AKERMARK, *Reservation Clauses in Treaties concluded within the Council of Europe*, in 48 International Comparative Law Quarterly, Part. 3, 1999, at 479.

S. S. AKERMARK, *Reservations: breaking new ground in the Council of Europe*, in: European Law Review,

R. P. ANAND, *Reservations to Multilateral Conventions*, in: Indian Journal of International Law, 1960, at 84-91.

D. R. ANDERSON, *Reservations to Multilateral Conventions: A Re-Examination*, in: 13 International and Comparative Law Quarterly, 1964, at 450-479.

W. W. BISHOP, *Reservations to the Convention on Genocide*, in: 45 American Journal of International Law, n°3, 1951, at 579.

I. BOEREFIJN, *Towards a strong system of supervision: the Human Rights Committee's role in reforming the reporting procedure under article 40 of the Covenant on Civil and Political Rights*, in: 17 Human Rights Quarterly, 1995, at 766-793.

H. J. BOURGUIGNON, *The Belilos Case : New Light on Reservations to Multilateral Treaties*, in: 29 Virginia Journal of International Law, 1989, at 347-386.

D. W. BOWETT, *Reservations to non-restricted multilateral treaties*, in : 48 British Yearbook of International Law, 1976-1977, at 67-92.

I. BUFFARD, K. ZEMANEK, *The object and purpose of a treaty: An Enigma?*, in: 3 Austrian Review of International and European Law, 1998, at 311.

A. BYRNES, *The "Other Human Rights Treaty Body": The Work of the Committee on the Elimination of Discrimination against Women*, in: 14 Yale Journal of International Law, 1989, at 1-67.

A. M. CALAMIA, *La disciplina delle obiezioni alle riserve e la convenzione di Vienna sul diritto dei trattati*, in: Studi in Onore di Giuseppe Sperduti, Milano, 1984, at 3-27.

I. CAMERON, F. HORN, *Reservations to the European Convention on human rights : the Belilos case*, in: German Yearbook of International Law, Volume 33, at 69-129.

A. CASSESE, *A new reservation clause (Article 20 of the United Nations Convention on the elimination of All Forms of Racial Discrimination)*, in: Recueil d Etudes de Droit International en hommage à Paul Guggenheim, Genève, 1968, at 266-304.

C. CERNA, *Les effets des réserves sur l'entrée en vigueur de la Convention américaine*, in: Annuaire français de Droit International, 1983, at 306.

B. CLARK, *The Vienna Convention regime and the convention on discrimination against women*, in: 85 American Journal of International Law, at 281-321.

M. COCCIA, *Reservations to multilateral Treaties on Human Rights*, in: 15 California Western International Law Journal, 1985, at 1-51.

R. J. COOK, *Reservations to the Convention on the Elimination of Discrimination against Women*, in: 30 Virginia Journal of International Law, 1990, at 643-716.

R. J. COOK, *International human rights concerning women: cases notes and comments*, in: 23 Vanderbilt Journal of International Law, 1990, at 779-818.

G. COHEN-JONATHAN, *Les rapports entre la Convention européenne des droits de l'homme et le Pacte des Nations Unies*, in: Colloque S.F.D.I., Bordeaux, Pedone, 1977, at 321.

G. COHEN-JONATHAN, *Les réserves à la Convention européenne des droits de l'homme- A propos de l'arrêt Belilos du 29 avril 1988*, in: 93 Revue Générale de Droit International Public, 1989, Tome 1, at 273.

G. COHEN-JONATHAN, *Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux*, in: Revue Générale de Droit International Public, 1996-4, at 915.

R. COOK, *Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, in: 30 Virginia Journal of International Law, at 643.

R. J. DUPUY, *L'universalité des droits de l'homme*, in: Studi in onore di Giuseppe Sperduti, Milano, 1984, at 541-556.

R. W. EDWARDS, *Reservations to treaties*, in: 10 Michigan Journal of International Law, 1989, at 362-405.

C. G. FENWICK, *Reservations to Multilateral Treaties*, in: 45 American Journal of International Law, 1951, at 145-148.

C. G. FENWICK, *Reservations to Multilateral Conventions: the Report of the International Law Commission*, in: 46 American Journal of International Law, Vol. 1, 1952, at 119-123.

G. FITZMAURICE, *The law and procedure of the International Court of Justice 1951-1954*, in: 33 British Yearbook of International Law, 1957, at 203-293.

G. FITZMAURICE, *Judicial Innovation. Its Uses and Its Perils*, in: Mélanges Mc Nair, 1965, at 33-35.

G. FITZMAURICE, *Reservations to Multilateral Conventions*, in: 2 International and Comparative Law Quarterly, 1953, at 1-26.

J. F. FLAUSS, *Le contentieux de la validité des réserves à la CEDH devant le tribunal fédéral suisse : requiem pour la déclaration interprétative relative à l'article 6§1*, in: 5 Revue universelle des Droits de l'Homme., n° 9-10, 1993, at 297.

J. A. FROWEIN, *Reservations to the European Convention on Human Rights*, in: Protecting Human Rights: the European Dimension; F. Matscher, H. Petzold (eds.), Köln, 1988, at 193-200.

J. K. GAMBLE Jr., *Reservations to multilateral treaties : a macroscopic view of state practice*, in: 74 American Journal of International Law, 1980, at 372.

G. GAJA, *Unruly Treaty Reservations*, in: Le Droit à l'heure de sa codification (Etudes en l'honneur de Roberto Ago), Vol. 1, Milano, 1987, at 305-330.

H. GOLSONG, *Les réserves aux Instruments Internationaux pour la protection des droits de l'homme*, in: Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme, 4ème colloque du département des droits de l'homme, Bruxelles, Bruylant, 1982.

B. T. HALAJCZUK, *Les Conventions multilatérales entre l'universalité et l'intégrité*, in: 38 Revue de Droit International., 1960, at 38.

L. HAZOU, *Determining the extent of the Admissibility of reservations: some considerations with regard to the Third United Nations Conference on the Law of the Sea*, in: 9 Denver Journal of International Law and Policy, 1980, at 69-83.

R. HIGGINS, *Derogations under Human Rights treaties*, in: 48 British Yearbook of International Law, Volume 1976-1977, at 281-282.

R. HIGGINS, *Human Rights: Some Questions of Integrity*, in: 53 *Moderne Law Review*, 1993, at 12.

D. N. HYLTON, *Default Breakdown: the Vienna Convention on the law of treaties Inadequate Framework on Reservations*, in: 27 *Vanderbilt Journal of Transnational Law*, 1994, at 419-451.

P.- H. IMBERT, *Les réserves et les dérogations- La question des réserves et les Conventions en matière de droits de l'homme*, in: *Actes du cinquième Colloque International sur la Convention européenne des droits de l'homme*, Frankfurt, Pedone, 1980.

P.- H. IMBERT, *Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)*, in: 87 *Revue Générale de Droit International Public*, 1983, Tome 2, at 580.

A. JENEFSKI, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, in: 15 *Maryland Journal of International Law&Trade*, 1991, at 199-233.

L. JULLY, *Les réserves aux Conventions multilatérales*, in: 51 *Friedenswarte*, 1952, at 254-275.

J. F. KOH, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, in: 23 *Harvard International Law Journal*, 1982/83, at 71-116.

J. KUPER, *The Convention on the Rights of the Child*, in: *Human Rights as a General Norms and a State's right to opt out: Reservations and Objections to Human Rights Convention*, The British Institute of International and Comparative Law, Human Rights Series, Ed. J.ATGardner, at 104-113.

J.-F. LALIVE, *La jurisprudence de la Cour Internationale de Justice*, in: *Annuaire Suisse*, 1952, at 235.

L. J. LEBLANC, *Reservations to the Convention on the Rights of Child: a macroscopic view of States practice*, in: 4 *International Journal of Children's Rights*, 1996, at 357-381.

M.-F. LUCKER-BABEL, *Les réserves à la Convention des Nations Unies relative aux droits de l'enfant et la sauvegarde de l'objet et du but du traité international*, in: 8 *European journal of International Law*, 1997, at 664-683.

R. St. J. MACDONALD, *Reservations under the European Convention on human rights*, in: 21 *Revue belge de droit international*, 1988, at 429-450.

S. MARCUS-HELMONS, *L'article 64 de la Convention de Rome ou les réserves à la Convention européenne des droits de l'homme*, in: *Revue de Droit International et de Droit Comparé*, 1968, at 14.

S. MARKS, *Reservations unhinged : the Belilos Case before the European Court of human rights*, in: 39 *International and Comparative Law Quarterly*, 1990, at 300-327.



M. M. MEEK, *International Law: Reservations to Multilateral Agreements*, in: 5 DEPaul Law Review, 1955, at 40-74.

M. H. MENDELSON, *Reservations to the Constitutions of International Organizations*, in: 34 British Yearbook of International Law, 1971, at 137-171.

Th. MERON, *On a hierarchy of International Human Rights*, in: 80 American Journal of International Law, 1986, at 1-23.

L. MIGLIORINO, *La revoca di riserve e di obiezioni a riserve incompatibili con l'oggetto e lo scopo del trattato*, in: 77 Rivista di Diritto Internazionale, 1994, at 635-654.

P. MOCK, *Quelques réflexions sur les réserves déposées par la Suisse lors de la ratification du Pacte International sur les droits civils et politiques*, in: Aktuelle juristische Praxis, 1994, at 984.

V. P. NANDA, *The US Reservations to the Ban of the Death Penalty for Juvenile Offenders: An Appraisal under the International Covenant on Civil and Political Rights*, in: 42 DEPAUL Law Review, 1993, at 1311.

M. K. NAWAZ, *The International Law Commission's views on the Subject of Reservations to Multilateral Conventions*, in: Indian Journal of International Law, 1960, at 100-114.

B. OXMAN, *The third United Nations Conference on the Law of the Sea, eighth session*, in: 74 American Journal of International Law, 1979, at 35.

R. PINTO, *L'application du principe de réciprocité et des réserves dans les Conventions inter-étatiques concernant les droits de l'homme*, in: Mélanges offert en l'honneur à G. LEVASSEUR, 1992, at 82.

R. PROVOST, *Reciprocity in Human Rights and Humanitarian Law*, in: 65 British Yearbook of International Law, 1994, at 383-454.

M. RAMA-MONTALDO, *Human Rights Conventions and reservations to treaties*, in: Hector Gros Espiell Amicorum Liber, 1997, Vol. II, at 1261-1277.

K. N. RAO, *Reservations to Multilateral Conventions*, in: Indian Journal of International Law, 1960, at 84-91.

C. REDGWELL, *Reservations to treaties and human rights, Committee General Comment n° 24 (52)*, in: 46 International and Comparative Law Quarterly, 1997, at 390-412.

C. REDGWELL, *Universality or Integrity? Some reflections on reservations to General Multilateral Treaties*, in: 64 British Yearbook of International Law, 1993, at 245-282.

W. M. REISMAN, *Responses to Crimes of Discrimination and Genocide: An appraisal of the Convention on the Elimination of Racial Discrimination*, in: 1 Denver Journal of International Law and Politics, 1971, at 23-64.

I. RUIZ MORENO, *Reservations to treaties relating to human rights*, in: 54<sup>th</sup> meeting of the International Law Association, 1970, at 642-645.

R. SAPIENZA, *Sull'admissibilità dei riserve della competenza della commissione europea dei diritti dell'uomo*, in: *Rivista di Diritto Internazionale*, 1987, at 641-653.

W. A. SCHABAS, *Reservations to the Convention on the rights of Child*, in: 18 *Human Rights Quarterly*, 1996, at 472-491.

W. A. SCHABAS, *Les réserves des Etats-Unis d'Amérique au Pacte International relatif aux Droits civils et politiques en ce qui a trait à la peine de mort*, in: 6 *Revue Universelle des Droits de l'Homme*, n° 4-6, at 137.

W. A. SCHABAS, *Reservations to human rights treaties: Time for innovation and reform*, in: 32 *Canadian Yearbook of International Law*, 1994, at 39-81.

W. A. SCHABAS, *Invalid Reservations to the International Covenant on Civil and Political Rights: is the United States still a party?*, in: 21 *Brooklyn Journal of International Law*, 1995, at 277.

E. SCHWELB, *The International Convention on the Elimination of All Forms of Discrimination Against Women*, in: 15 *International and Comparative Law Quarterly*, 1966, at 996-1068.

M. M. SYCHOLD, *Ratification of the Genocide Convention, the legal effects in light of reservations and objections*, in: *Schweizerische Zeitschrift für Internationales und europäisches Recht*, 1998, at 533-552.

B. SIMMA, *Reservations to Human Rights Treaties, Some recent developments*, in: *Liber Amicorum Professor Ignaz Seidl-Hohenveldern in honour of his 80-birthday*, The Hague, Kluwer, 1998, at 659-682.

R. SZAFARZ, *Reservations to Multilateral Treaties*, in: 3 *Polish Yearbook of International Law*, 1970, at 293-316.

D. SHELTON, *Reservations to human rights treaties*, in: 205 *Canadian human rights Yearbook*, 1983, at 213-214.

E. F. SHERMAN JR, *The US Death Penalty Reservations to the International Covenant on Civil and Political Rights*, in: 29 *Texas International Law Journal*, 1994, at 69-92.

E. SUY, *Développements récents en droit international des droits de l'homme*, in: 32 *Revue de la Commission internationale des droits de l'homme*, Volume 82-85, Juin 1984, at 47.

G. TEBOUL, *Remarque sur les réserves aux Conventions de codification*, in: 86 *Revue Générale de Droit International Public*, 1982, at 679-717.

C. TOMUSCHAT, *Admissibility and Legal Effects of Reservations to Multilateral Treaties*, in: 27 *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, 1967, at 463-482.

E. V. VIERDAG, *Some remarks about special features of human rights treaties*, in: *Netherlands Yearbook of international law*, University of Amsterdam, 1994, at 119-142.

S. WRIGHT, *Human Rights and Women's rights: an analysis of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, in: *Human Rights in the twenty-first century: A Global Challenge*, K. E. Mahoney and P. Mahoney (eds.), Dordrecht, 1993, at 75-88.

K. ZEMANEK, *Some unresolved questions concerning reservations in the Vienna Convention on the Law of Treaties*, in: *Essays in International Law in Honour of Judge Manfred Lachs*, 1984, Martinus Nijhoff Publishers, at 323-336.

### III. DOCUMENTS

- U.N. *General Comment on Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocol thereto, or in relation to declaration under article 41 of the Covenant*, Doc. CCPR/C/21/Rev.1/Add.6, 2 novembre 1994.
- U.N. *Report of the International Law Commission on the work of its fortieth Session*, 2 May- 21 July 1995, General Assembly, Official Records, Fiftieth Session, Supplement No 10, A/50/10.
- U.N. *Report of the International Law Commission on the work of its forty-ninth Session*, 18 May-18 July 1997, General Assembly, Official Records, Fifty-second Session, Supplement No 10, A/52/10.
- U.N. *First report on reservations to treaties*, International Law Commission, Forty-seventh Session, Doc. A/CN.4/470.
- U.N. *Second report on reservations to treaties*, International Law Commission, Forty-eight session, Doc. A/CN.4/477/Add.1.
- U.N. *Third report on reservations to treaties*, International Law Commission, Fiftieth Session, Doc. A/CN.4/491.
- U.N. *Fourth report on reservations to treaties*, International Law Commission, Fifty-first Session, Doc. A/CN.4/491.
- U.N. *Fifth report on reservations to treaties*, International Law Commission, Fifty-second session, Doc. A/CN.4/508.
- U.N. *Official Records of the General Assembly*, Fifty-third session, Supplement No 38, Doc. A/53/38/ Rev. 1.
- U.N. *Report of the Secretary-General on Reservations to Multilateral Conventions*, Doc A./1372, 21 September 1950.
- U.N. *Reservations to Multilateral Conventions*, G. AMADO, Doc. A./C.N.4/L.9, 31 May 1951.
- U.N. *Report on Treaties*, J. H. BRIERLY, Doc. A./C.N.4/23, 14 April 1950.

- U.N. *Report of the Human Rights Committee*, Volume 1, General Assembly, Official Records, Fiftieth Session, Supplement No 40, A/50/40.
- U.N. *United Nations Conference on the Law of Treaties*, First Session, Official Records, Documents of the Conference, Doc. A/CONF.39/11/Add.2
- U.N. *Les Nations Unies et les droits de l'homme 1945-1995*, Série livres bleus des Nations Unies, Volume VII, Nations Unies, 1995.
- U.N. *Report of the Committee on the Rights of the Child*, Eleventh session, C.R.C./C./50.
- U.N. *Report of the Committee on the Rights of the Child*, Twelfth session, C.R.C./C./54.
- U.N. *Report of the Committee on the Rights of the Child*, Thirteenth session, C.R.C./C./57.
- U.N. *Report of the Committee on the Rights of the Child*, Fourteenth session, C.R.C./C./62.
- U.N. *Report of the Committee on the Elimination of All Forms of Discrimination Against Women on the validity of an Egyptian reservation*, Doc. N.U. A/39/45, Vol. II, 1984, at 28.
- U.N. *Report of Working Group II of the Committee on the Elimination of All Forms of Discrimination Against Women*, CEDAW/C/1998/II/W.G.II/W P.1/Rev.2
- U.N. *Rawle Kennedy v. Trinidad and Tobago*, Communication No 845/1999, CCPR/C/67/D/845/1999.
- U.N. *Multilateral treaties deposited with the Secretary-General*, Status as of 30 April 1999, United Nations, New York, 1999.
- I.C.J. *Reports of Judgements, Advisory Opinions and Orders, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, May 28<sup>th</sup>, 1951.
- I.C.J. *Pleadings, Oral arguments, Documents, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, May 28<sup>th</sup>, 1951.
- E.C.H.R. *Publications of the European Court of Justice, Belilos Case*, Serie A, Judgments and Decisions, No 132, 1989.
- E.C.H.R. *Report of the European Commission on Human Rights, Temeltasch Case*, Application No 9116/80, in: *Decisions and Reports*, 31, 1983, at 120ss.
- E.C.H.R. *Publications of the European Court of Justice, Loizidou Case*, Serie A, No 310, 23 March 1995, at 30ss.

#### IV. THE HAGUE ACADEMY COLLECTED COURSES

J. BADESVANT, *La conclusion et la rédaction des traités*, T. 15, 1926, Volume V, at 596-642.

W. W. BISHOP JR., *Reservations to treaties*, T. 103, 1961, Volume II, at 249-341.

H. GROS-ESPIELL, *La Convention américaine et la Convention européenne des droits de l'homme*, T. 218, 1989, Volume VI, at 171-411.

N. MANDELSTAM, *La protection internationale des droits de l'homme*, T. 38, 1931, Volume IV, at 129-229.

J. M. RUDA, *Reservations to treaties*, T. 146, 1975, Volume III, at 95-218.

K. VASAK, *Le droit international des droits de l'homme*, T. 140, 1954, at 333-413.

M. VIRALLY, *Panorama du droit international contemporain, Cours général de droit international public*, T. 183, 1983, at 123-382.











