

Some Problems Related with Reservations to International Treaties: Focus on Human Rights Treaties

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Briefly, the writer basically explores whether the rules of reservations available in the Vienna Convention on the Law of Treaties and other customary international law are compatible with the nature, objects and purposes as well as protection of human rights treaties. Specifically, the writer argues that such rules are either inadequate or are not suitable to govern reservations that may be made to human rights treaties. The problems related with lack of appropriate institutions or authorities to interpret rules of reservations and follow up the consequences of reservations made to human rights treaties will be assessed in terms of their impact on the protection of human rights.

Introduction

Since the end of World War II, human rights treaties have been flourishing mainly in the form of multilateral conventions. From the human rights activists' perspective, universal application of human rights has been highly intended, which may in turn be achieved by allowing as many states as possible to ratify such treaties. It has also been desired that states should become a party to the full contents of human rights treaties as a result of which their unity and integrity would be maintained. In practice, however, these two broad objectives have not been achieved at the same time. Due to various factors, inter alia, sovereignty, national interest, incapacity to implement human rights treaties, states may understand some provisions of human rights treaties as burdensome and onerous. Thus, compelling them to be a party to all provisions of a given human rights treaty may have an exclusionary effect in a sense that states may automatically opt to disregard being a party to the whole treaty, and hence its universality will be compromised.

Thus, the concept of reservation has been introduced in international law with the view of balancing the two crucial goals: universality and unity of international treaties in general and human rights treaties in particular. Reservations are not only seen as manifestation of states consent and sovereignty but also as mechanisms which may increase the participation of states to human rights treaties by allowing them to reserve to one or more

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provisions, while being a party to the substantial contents of such treaties. It is not, however, easy to strike a balance between such goals when we come to human rights treaties.

In this paper the writer basically aims to deal with the following issues: Whether there are adequate international rules that govern reservations; whether there are special rules applicable to reservations to human rights treaties; if not, whether it is fair to employ the general rules of reservations to them. The adequacy/inadequacy of such rules will also be evaluated from the perspective of their roles to maintain the balance between universality and integrity of human rights treaties. As to which international organ has the legitimate power to construct and determine rules of reservations to human rights treaties and related problems will also be the point of focus in the discussion.

In order to tackle such basic research problems, the paper is logically organized into four parts. In the first part definition, features, elements and scope of international treaties will be dealt. International rules of reservations and their nature and applicability will make the discussion in the second part. The writer will substantially embark on examining major problems associated with rules of reservations that may be made to human rights treaties in part three. Part four will wrap up the discussion by way of conclusion and recommendations

1. Some Remarks on International Treaties

1.1. What do International Treaties Constitute?

It is widely accepted that international treaties (herein after treaties) are the major sources of international law. Article 38 of the Statute of the International Court of Justice (ICJ) provides that international conventions, whether general or particular, are accepted as a source of international rules together with international custom, general principles of law, and judicial decisions. Treaties are not only a principal source of international legal rules but also are themselves the subject of considerable body of international law called the law of treaties. Nowadays, the most favoured and frequented means of creating international rules is the conclusion of treaties.¹ The significance of treaties is also found immense as they are constantly used by the international community to codify existing international customary rules. They are not only a means to create international norms among nations but

¹ Antonio Cassese, *International Law*, Oxford University Press, 2nd ed, 2005, P. 170

also becoming an increasing source of national laws thereby rights and obligations of individuals can be established. This is especially true in human rights and humanitarian law treaties. The ever increasing interdependence of states, the ongoing process of regionalization and internationalization and the system of globalization as a challenge of the new world order, the effect of technology and the concern of human rights protection are the major push for the importance of treaties. This fact can be easily seen from the case that between 1946 and 2003 the United Nations has received registration for over 50,000 treaties.²

Thus, treaties are the major regime to create international legal norms not only in old fashion international fields such as foreign relations and diplomacy, navigation and use of high seas, use of force and international security, commerce but also in human rights and environmental protection, control of modern weapons, investment, halting terrorism etc. The wide consumption of treaties as major alternative norms is partly attributed by the fact that treaties are systematically codified and arranged, more specific and explicit, written and duly registered, modern, consensual and deliberate acts of states. These are also important factors that lead treaties to be more respected and enforced at international and national levels.

Currently the most authoritative definition of treaties is the one provided under the 1969 Vienna Convention on the Law of Treaties (herein after the Vienna Convention). Article 2(1) (a) of the convention provides:

Treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation.

From the explicit and implicit messages of the given definition, we can establish some basic elements or features of treaties.

a) *Treaties are international:* unlike domestic laws whose application is limited within the territory of respective states, treaties have international character governing broader relations between international subjects. In fact the term international is relative. There are particular treaties involving two or

² D.B.Hollis et al (Editors), *National Treaty Law and Practice*, Martinus Nijhoff Publisher,2005, P.1

several states or general treaties which establish rules, or norms to be applied at regional or universal levels. The latter types of treaties are known as law making treaties to which human rights treaties belong. The term international seems to be a repetition of ``between states`` and hence superfluous.

b) *Treaties are consensual:* Consent is the central element of treaties. Treaties are deliberate and conscious actions of sovereign states. Rights and obligations embodied in a treaty are freely and expressly determined or consented by the subjects of international law. In this regard treaties are different from other sources of international law such as customary norms which impose obligations on states even without their express consents. They are also different from national public laws whose application may not depend on the consent of their subjects. Rather, treaties are like national and international private contracts, trusts and other juridical acts the obligations of which emanate from consent of contracting parties. Even though treaties are, as a matter of principle, consensual and cannot impose obligation on or create rights for the non-party states, there are exceptional situations in which states may be bound by treaties or benefit from them without their consent. When treaties have codified customary norms, all states including the non-party ones are duty bound to respect them. Moreover, treaties which contain obligation *erga omnes* have the power to impose their obligations on all states regardless of their consent. Of course the backbone of such treaty obligations and rights affecting third states is basically international custom.

c) *Treaties shall involve two or more states:* According to the given definition only sovereign states are entitled to make treaties. This is a very narrow definition. On the one hand, unilateral acts of states are excluded from being a treaty as there shall be at least two states to involve in treaty making-process. On the other hand, agreements between international legal persons such as international organizations or between organizations and states are not deemed to be treaties. Despite this continuing controversy, these types of agreements are now being considered as treaties. Accordingly, the 1986 Vienna Convention sought to resolve such controversy by defining treaties to include international agreements between states and international organizations as well as between international organizations themselves.

d) *Form:* the definition provided by the Vienna Convention is also narrower from another perspective as it excludes oral agreements. Hence, treaties must

be in written form though no particular formality is set as to the number of instruments in which treaties are expressed and their designation. The requirement of a written form is the modern quality of treaties and is found essential for clarity and simplicity though it may exclude a good number of oral agreements out of the scope of treaties. But the room for applying and giving valid force for oral agreements is not totally closed. If oral agreements are the restatement of established international customs, they can be validly respected whatever their form may be.³

Another interesting issue here is that the Vienna Convention doesn't stipulate registration of treaties as part of the definitional elements of treaties. This may lead us to conclude that registration is not a decisive requirement so that unregistered treaties may not be excluded from being a treaty. Of course article 80(1) of the Convention provides that treaties, after their entry into force, be transmitted to the secretariat of the United Nations for Registration. But this doesn't tell us about any consequence of unregistered treaties. Registration is also required by article 102 of the United Nations Charter. The Charter also comes with a certain consequence of unregistered treaties in that they may not be enforced before any one of the UN Organs. In practice, however, ICJ has considered unregistered agreements as treaties so long as other requirements have been fulfilled though registration and publication can have still strong probative value to show the binding character of treaties.⁴

The Vienna Convention is also indifferent as to the particular designation a treaty can assume. The implication is that treaty shall be taken as a general term which represents a variety of different names such as charter (e.g. UN Charter, African Human Rights and peoples' Charter), covenants (e.g. International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights), international agreements, pacts, general acts, statutes, declarations, conventions etc.⁵ Though giving infinite and informal names to treaties is more confusing, it is essential to focus on substance and on the determination of basic features and requirements of treaties so that content will be more decisive than form, name and structure.

e) Governed by international law: The making of treaties, their effect, scope, extent of application, reservation, invalidation, amendment and termination and their operational framework in general are governed by international

³ Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, P.7

⁴ Ibid at P.39

⁵ Ibid at P. 19-23

rules. Such governing norms have been for long provided by international customs. Yet, today the 1969 Vienna Convention on the Law of Treaties provides comprehensive norms for treaty regulation. The logical implication of this feature of treaties is that international agreements between states, or states and organizations which are often to be governed by municipal law such as large number of commercial concessions or transnational contracts are not treaties. It has been also suggested that the phrase `governed by international law` includes the element of an intention of states involved in a treaty to create legally binding norms in the form of rights and obligations under international law.⁶ As we will see in the following section, the existence of intention of states is also a basic feature of treaties that excludes non-binding international agreements from the ambit of the term treaty.

f) Purpose of Treaties: In the definition given under the Vienna Convention the purpose of treaties is not explicitly mentioned. From its implied reading we can understand that treaties aim to regulate the relationship between states-to create binding norms between themselves or to establish enforceable rights and obligations just for them. Though this may be out of the scope of the Vienna Convention, there are treaties whose purpose is to govern the relationship between states and international organizations or between organizations. Though treaties basically aim to regulate the relationship between sovereign states, and sometimes with or between organizations as international subjects, most recently they are intended to extend rights and obligations directly to individuals. There are sizeable self- executing human rights treaties that can be directly enforced by national courts and claimed by individuals.⁷

1.2. International Treaties as Legally Binding Instruments

Taking into account the above discussed features and elements of treaties, readers may understand what treaties really are and why every international agreements or norms are not a treaty. But they may still get puzzled as to why treaties are binding, applicable and given proper place in international and national regimes. There are people who naively conceive treaties as fictitious and optional agreements than as binding norms. Here we will briefly fight such obstacle with a view to facilitate the ground for our main discussion.

⁶ Ibid at P.17

⁷ Antonio Cassese, Supra Note at No.1, P.146-147

The principle of Pacta Sunt Servanda: This is a long established principle dictated by scholars as a major reason why treaties are binding and respected by their makers. It is a deep-rooted customary norm since it has been used by classic states. It was firmly believed that treaties as a solemn covenant or contracts of sovereign states were legally and morally binding as the law of nature as strongest pledge sworn oath because God and the law of nature obliged promisors to keep their promises and makers of treaties to honor their commitments.⁸ The main reasons for respecting treaties were associated with natural law, morality and fear of God. Yet, this principle is not only a traditional one but also a modern concept taken as one of the basic reasons for obligatory nature of treaties though for different justifications.

Accordingly, the Vienna Convention under its article 26, *pacta sunt servanda*, states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This is just the re-affirmation of the oldest principle as governing norm. The very assumption behind this principle is that in the absence of certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.⁹ Unlike the traditional thought, the basis of such assumption is not related with natural law or the law of God. More usually, it turns to the authority of sovereign states to account for the mandatory character of treaties. The idea is that treaties are legally binding because they are concluded by sovereign states consenting to be bound. As states are freely involved in negotiating, concluding and accepting treaties, they are also legally bound to perform treaties in good faith.

Intention: Another basic requirement for the binding nature of treaties is the existence of intention not only to make treaties but also to be bound thereby. The existence of a treaty as a binding instrument lies on the fact that the parties to the treaty must intend to create legal relations as between themselves by means of their agreement. The intention of parties involved is a vital precondition not only for the formation and existence of the treaty but also important for its enforcement at international and national levels. The problem is that there is no consensus as to whether this requirement is stated in the definition of treaties given under the Vienna Convention.

⁸ Mark W. Janis, *An Introduction to International Law*, Aspen Publishers, 4th ed, 2003, P.166

⁹ M.N.Shaw, *International Law*, Grotius Publications Limited, 5th ed., 2006, P.812

1.3 The Extent (Scope) of International Treaties

At this stage, we will try to delimit the subject matter- treaties where the act of reservation is carried out. We have seen that non- consensual acts, oral agreements, unilateral acts, declarations or statements are excluded from the ambit of treaties though they may be a source of obligations and rights from other perspectives. It has been also pointed out that agreements involving international private law undertakings, commercial relations and contracts regulated by national law have nothing to do with treaties even if they are legally binding acts. Moreover, the fact that treaties are legally binding instruments excludes non-binding or gentlemen's agreements and various soft laws such as communiqués issued at the end of summit meetings, declarations of common policy by members of regional organizations, general diplomatic correspondence, bilateral acts of daily administration of foreign affairs that depend on the request or willingness of respective states and UN general assembly resolutions all of which are political commitment than binding treaties.¹⁰ However, it has to be admitted from the outset that there is still confusion on the scope of treaties and what they exactly do constitute. States usually make a great many arrangements *inter se* and sometimes there will be a question about where to draw the line between international agreements that are legally binding and so called gentlemen's agreements and some varieties of soft law that are not binding though they may have some moral or political force.

From international law perspective ICJ has granted treaties a broader scope. In its 1994 *Qatar V Bahrain* decision, it held that the signed minutes of a meeting among the foreign ministers of the Bahrain, Qatar, and Saudi Arabia, recording an agreement to submit a maritime and territorial delimitation dispute to the court if diplomatic negotiations were to fail, constituted a legally binding agreement regardless of the protest of the foreign minister of Bahrain that the minutes were simply a statement recording a political understanding.¹¹

The court stated that as a matter of principle all international agreements are treaties; So long as there is a commitment, legal rights and obligations are created; any requirement seeking the intention of either party and the assessment of the legal effect of agreements shall not be left to the

¹⁰ Martin Dixon , *Text Book on International Law*, Black Stone Press Limited, 4th ed, 2000, P.52

¹¹ www.un.org/law/icjsum/indexw.htm

parties involved in a dispute. The court added that any instrument will be a treaty so long as it is intended to be legally binding in the sense of creating rights and duties enforceable under international law and this is to be judged objectively (not subjectively by referring the disputant parties' intention) according to the nature and content of the agreement and the circumstances in which it was concluded. So, this view gives treaties an extensive scope in such a way that it includes the most informal international agreements such as those emanating from the deliberation of an international conference, direct bilateral negotiations, informal government discussions, exchanges of notes and letters.¹² The fact that all agreements must be regarded as treaties and there shall not be a distinction between treaties and the so-called gentlemen's agreements is also supported by some scholars such as Klabbers.¹³ According to him the room is either none or narrow for the existence of the concept called gentlemen's agreements.

But there are other scholars who make a distinction between treaties and other agreements which are not legally binding.¹⁴ According to A. Aust intention of states is the basic requirement of treaties and if there is no such intention to create rights and obligations under international law the instrument will not be a treaty.¹⁵ Thus, agreements which have no any legal force and binding nature can be taken as memorandum of understanding, soft law, or gentlemen's agreements than treaties. In line with this view, many national constitutions do establish a distinction between treaties and the rest of international agreements. To begin with many countries have adopted a system of national law giving democratic control or legitimacy to the process of treaty-making. In principle international agreements qualify as treaty when they pass through the participation or approvals of national legislatures. Treaties are the end product of formal international processes and national legislative procedures. Moreover, treaties are legally binding instruments that produce rights and obligations on member states and capable to be enforced before national or international tribunals. At the same time many countries have introduced a different category of international agreements that need not require the participation or approval of legislatures. These types of agreements are usually called gentlemen's agreements or soft laws. They may be

¹² Martin Dixon, *Supra* Note at No.10, P.52

¹³ Jan Klabbers, *The concept of treaty in international law*, 1996 as Quoted by Anthony Aust, *Supra* Note at No.3, P.41-43

¹⁴ *Ibid*

¹⁵ *Ibid* at P.17

international policy agreements, administrative agreements, presidential or executive agreements, informal agreements etc depending on their scope and preference of national constitutions. National constitutions do not qualify such agreements as a treaty.¹⁶

It is contended that unlike treaties they need not pass through formal national procedures like approval; they lack intention of their makers to create legally binding norms and don't create enforceable rights and obligations before courts.¹⁷ Even if there is an intention of the parties to those agreements; it is not to be legally bound but only politically. Hence, they are soft or gentlemen's agreements which are more of political commitments than legally binding acts. The idea is that the government has to be free to enjoy discretionary powers in its dealing with foreign and diplomatic relations, minor or technical affairs, things of urgent nature and the like. But on the other side of the argument there are others who contend that such agreements should have at least some legal character, otherwise their enforcement remains fictitious. In any ways their legal status is not yet settled. This paper, however, deals only with treaties that have a legally binding force.

2. International Rules of Reservations in Brief

2.1. What Does the Concept of Reservations Represent?

The concept of reservations is one of the most controversial issues in the law of treaties. There are always unsettled questions in relation to the definition, scope, nature and status of reservations. A reservation is defined in article 2 (1) (d) of the Vienna Convention as:

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

On the basis of this definition and other considerations in international law the following crucial features and scopes of reservations can be pointed out:

¹⁶ Phillip R. Trimble, *International Law : United States Foreign Relations Law*, New York Foundation Press, 2002, P.132-134

¹⁷ D.B.Hollis, *Supra Note at No.2, P.16*

Unilateral Statement: A reservation is a unilateral statement or an act made by the concerned state without being agreed by the negotiating states. But this does not exclude the possibility that two or more states can agree to make the same reservation. As we can see below, however, all unilateral statements can not be considered as a reservation. Thus, all other elements or features of the definition of reservation must be cumulatively considered so that it can be distinguished from other types of unilateral statements or declarations.

Time when Reservations may be made: As stated in the above definition, reservation is not a separate treaty process. It is part and parcel of the manifestation of an expression of consent of a sovereign state towards a treaty; hence, it may be made by a state at a time when it expresses its consent to be bound by means of signature, ratification, acceptance, approval, or acceding to a treaty. The real message of a state transmitted to the negotiating states during signing, ratifying, accepting, approving, or acceding to a treaty is, in short, the expression of consent to be bound by all or most of the provisions of the treaty, or the expression of reservation to exclude the application of some of the treaty provisions. Before the coming of the Vienna Convention, reservation was possible only when it has been accepted unanimously by all negotiating states, tacitly or expressly, and usually before signature.¹⁸ But now this practice is no more existent.

There are strong logical, historical and legal bases that a state that expressed its consent to be bound by a treaty may withdraw its consent before the entry into force of the treaty as it is not a legally binding instrument in that period. There is nothing wrong to extend the same argument to the case of reservations. If it is possible for a state to withdraw its consent from the entire treaty, for stronger reason, it can make new valid reservations (if it had not made any when giving consent or it wishes to add new reservations) so long as the treaty has not yet entered into force and so long as the reservation is made in accordance with the applicable rules. For example, in 1958 Spain withdrew an instrument of accession two months after it had been deposited, but before the treaty had entered into force and at the same time it deposited a new instrument containing a reservation, that in both cases no objection was made.¹⁹ In general, no reservation is allowed after the treaty has entered into force unless a non-signatory state consents to a treaty by accession where

¹⁸ Shaw, Supra Note at No.9, P.825

¹⁹ Anthony Aust, Supra Note at No.3, P.96

reservation is part of it. In fact, withdrawal of reservations can not be controversial as such and shall be welcomed any time.

Reservation purports to exclude or modify the legal effect of some treaty provisions: from the outset it is possible to forward a general formula that the very purpose of reservation is to exclude or modify the legal effect of certain treaty provisions in their application to its maker and all other statements which do not have such effect though they are unilateral and made by the state when consenting to a treaty are far from being reservations. Thus, reservation must be distinguished from other statements or declarations made with regard to a treaty that are not intended to have the legal effect of reservation, such as understandings, arrangements, political statements or interpretative declarations. In political declarations, what is involved is a political manifestation for primarily internal effect that is not binding upon the other parties.²⁰ When signing, ratifying, accepting, approving or acceding to a treaty, a state may make a kind of political declaration which is not to have any legal effect. A declaration may be as to the general policy of the state towards the subject matter of the treaty, or a disclaimer that ratification does not signify recognition of a particular party as a state.²¹

It is also clear that as the very purpose of reservation is to exclude or modify the legal effect of certain treaty provisions, interpretative declarations are removed from its ambit. The International Law Commission (ILC) has found that an interpretative declaration means;²²

A unilateral statement, however phrased or named, made by a state or by an international organization whereby that state or that organization purports to specify or clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions.

In principle, interpretative declarations are not reservations though they are as widely applied as reservations. If the statement makes an interpretation of treaty provisions just for the purpose of clarification, specification, definition and explanation of their meaning and scope, without

²⁰ M. N. Shaw, Supra Note at No.9, P. 820

²¹ Anthony Aust, Supra Note at No.3, P.103

²² UN Doc.A/Cn.4/491/Add.4,para. 961

excluding, altering and modifying the original content or substance of the provisions, it is not a reservation but an interpretative declaration. It is a formal unilateral statement expressing the interpretation favoured by a particular state and becomes part of the negotiating history or declared at the time of signature or ratification.²³ The purpose of an interpretative declaration is very often to establish an interpretation of the treaty which is consistent with the domestic law of the state concerned and it has been an element of interpretation governed by rules of construction unless it amounts to a disguised reservation.²⁴ As we can see more below, however, it is not always easy to distinguish reservations from declarations.

However phrased or named: One of the most challenging problems in relation to reservation is that there is always confusion between it and other related concepts. In practice, interpretative statements and other declarations may possibly transgress the boundary of reservation thereby excluding or modifying the legal effect of some treaty provisions. They may open the door for systematic exclusion of the content and substance of provisions of a treaty and in effect they may be a disguised reservation. Thus, appearance, naming, phrasing, structure and titling of a particular attachment made to the treaty shall not be decisive criteria. However, phrased or named, whatever language we employ, the decisive thing is to look into content and substance of the statement even if the term reservation is not there. If the statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the state, it constitutes a reservation. Conversely, if a so-called reservation merely offers a state's understanding of a provision but does not exclude or modify that provision in its application to that state, it is, in reality, not a reservation. It is not uncommon for what is in fact a reservation to be described as an understanding, explanation or observation which at the same time systematically exclude or modify the legal consequence of a given treaty. The reasons for making such disguised reservations may be that the treaty prohibits reservations or it may be more acceptable politically for a state not to appear to be attaching conditions by way of reservations to its participation in a treaty.²⁵ But, as the definition of reservation makes clear, it does not matter how the declaration is phrased or what name is given to it so that those disguised reservations may be,

²³ S.K. Verma, *An Introduction to Public International Law*, Hall Of India PLC, 1998, P.270.

²⁴ Anthony Aust, *Supra Note at No.3*, pp.101-102

²⁵ *Ibid at P.104*

depending on the circumstances and the intention of the state, considered as true reservations.

By the same token, states may employ the term interpretative statement in stead of reservation though, in reality, it is a systematic exclusion or modification of the content of treaty obligations. Hence, a distinction has been drawn between mere or simple interpretative declarations and qualified or conditional interpretative declarations that need to be accepted by others.²⁶ Simple or mere interpretative declarations are usually taken as genuine interpretive statements; hence they are excluded from the scope of reservation. However, conditional or qualified interpretative declarations may in certain circumstances contain systematic or disguised reservations by stipulating strong conditions which in effect exclude or modify treaty provisions. Again we shall not be deceived by the term interpretative statement and in such cases they shall be considered as reservation depending on given circumstances.

In the *Belilos* case in 1988, the European Court of Human Rights considered the effect of one particular interpretive declaration made by Switzerland upon ratification.²⁷ The court held that one had to look behind the title given to the declaration in question and to seek to determine its substantive content.²⁸ It was necessary to ascertain the original intention of those drafting the declaration and, thus recourse to the *travaux préparatoires* was required.²⁹ In light of these, the court felt that Switzerland had intended to avoid the consequences and found the declaration was actually a reservation which was invalid. It is generally accepted that reservation in its capacity to exclude, modify or alter treaty obligations can best be distinguished from interpenetrative declarations and other statements if one relies on intention of the concerned state towards the subject matter, content and substance of the statements, their ordinary meanings interpreted in good faith, the circumstances in which the treaty is made and the nature of the provisions, than the name given to statements.

Finally, there are some border areas from which reservation has to be identified. Reservations are different from derogations as the former are intended to exclude or modify the legal application of some provisions of a treaty to the concerned state for indefinite period. On the contrary, derogations are statements authorized by a treaty by which a party is able to exclude

²⁶ M.N. Shaw, *Supra* Note at No.9, P.823

²⁷ www.uio.no/studier/emner/jus/.../h06/.../Belilos_v_Switzerland.doc

²⁸ *Ibid*

²⁹ *Ibid*

certain provisions in their application to it during a particular period, such as a public emergency.³⁰ Reservation is also different from a case where a state wishes to become bound by a specific part of a treaty only. In that case, the state can do so if it is permitted under the treaty or it has been otherwise agreed by the contracting states. Third states may consent to some treaty obligations or rights and be bound while they are free from the rest of treaty provisions. This situation is completely different from the concept of reservations. Further, it is important to note that the nature of bilateral treaties is totally incompatible to the concept of reservation. Reservations can not be conceived in such treaties. This is because in case of bilateral treaties all of the terms must be accepted by the other party absolutely and unconditionally. If one party refuses to accept some of the provisions by way of reservation, an agreement between the two parties can not exist as negotiation would re-open for the modification or exclusion. Thus, we will deal with reservation as the most natural and basic feature of multilateral treaties.

2.2. Justifications for Reservations

Why do reservations exist as a concept? There are various justifications behind reservations. First, the privilege to make a reservation is regarded as an incident of sovereignty and perfect equality of states.³¹ Treaties are deliberate and consensual acts of states-without their consent a treaty can not create rights and obligations. By the same spirit, the capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty and national independence of states, whereby a state may refuse its consent to particular provisions so that they do not become binding upon it. But the justification that considers a reservation as an absolute and unconditional manifestation of national sovereignty may be incompatible with the nature of human rights treaties which may not be fully characterized by the relations between states. This controversy will be dealt more in section three.

Second, the theoretical justification of reservations that bases itself on the consent and sovereignty of states can be supported by some practical reasons. If the state is unable to fulfill its obligations under the treaty in its totality because of certain constraints and instead of excluding it altogether from participating in the treaty, the state should be allowed to do so, even if in a limited way, provided that the reservation does not materially affect the

³⁰ Anthony Aust, *Supra Note at No.3, P.105.*

³¹ S.K. Verma, *Supra Note at No.23, P.270.*

basic provisions of the treaty.³² In some situations, the obligations of certain treaty provisions may be too onerous or burdensome for a state which can be cornered and frustrated unless it is permitted to adjust those obligations by way of reservations with domestic laws which might be difficult, if not impossible, or undesirable to change them for various social, religious, cultural and political factors.³³

Third, Reservations are, nowadays, being taken as a best instrument for the furtherance of multilateral treaties. Since the culmination of WWII, there have been many multilateral treaties that involved a good number of states such as the UN Charter and the Convention on the Rights of the Child each of which has been joined by more than 180 states. Without reservations, reaching an agreement to such types of treaties, which have far-reaching effect, general and universal applications, could be unthinkable. The ever increasing number of states involved in negotiating, adopting, concluding and consenting to treaties is only one reason that necessitates reservation. It is also hard to imagine any agreement with those states which have a different background—from capitalism, mixed economy to socialism, from conservative to radical views, from western Christianity to Islamic radicalism unless there is a way out for reservations. This situation is further complicated by the fact that most of the multilateral treaties are adopted by consensus which needs a compromise on major aspects of a treaty.³⁴ Given all these problems, states would have been forced to reject treaties in their totality had they not been given a privilege to exclude or modify the applications of some burdensome provisions by way of reservations.

Thanks to reservations, where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may agree to be bound to a treaty which otherwise it might reject entirely while at the same time excluding such provisions by the device of reservation.³⁵ This will have beneficial results in the negotiation, adoption, conclusion and expression of consents to multilateral treaties, by inducing as many states as possible to adhere to the proposed treaty and becomes a means of compromise and harmony amongst states of widely differing social, economic and political systems.³⁶ Thus, reservation has a capacity to promote general application of

³² Ibid

³³ Antonio Cassese, *Supra Note at No.1, P.129.*

³⁴ Anthony Aust, *Supra Note at No.3, P. 107.*

³⁵ Shaw, *Supra Note at No.9, P.821.*

³⁶ Ibid

treaties and considered as a necessary price paid for the attainment of universality of treaties.

On the contrary, the need for universal and general application of treaties by allowing reservations for states has been seriously facing a tension exerted from the other side of concern for unity and integrity of treaties which can be achieved by not permitting any deviation or reservation. It has been argued that to permit a treaty to become honeycombed with reservations by considerable number of countries could well jeopardize the whole exercise of treaty obligations.³⁷ It could seriously dislocate the whole purpose of the treaty and lead to some complicated inter-relationships which are cornered by reserving states and objecting states. It is unfortunate that many states have made reservations to human rights treaties than other types of treaties.³⁸ This has inevitably affected the applications of international human rights in some states.

2.3. International Rules Governing Reservations

There are various rules that provide manners and conditions whereby reservations may be made. Rules that govern reservation are found in the law of treaties and in general international law (customary rules), yet the application of such rules different from time to time. The following three approaches will give us a clear picture about rules of reservations.

A) Traditional Approach

The basis of this traditional view is a positivist approach which promoted consent as the basis of all international obligations and considered treaties as purely contractual concept. According to this approach reservations could only be made when they are accepted by all the other states involved in the process, otherwise both reservations and the signatures or ratifications to which they were attached were considered as null and void.³⁹ This rule of unanimity was generally followed by major states, the League of Nations (until 1945) and the UN (until 1950). The idea was that as the adoption of a treaty used always to require the agreement of all the negotiating states, so was a reservation only effective if it had been accepted by all.⁴⁰ This move was intended to preserve as much the unity and integrity of (full contents) of treaties as possible to ensure the success of treaties and to minimize deviations

³⁷ Ibid at P.822.

³⁸ Anthony Aust, Supra Note at No.3, P.107.

³⁹ Malcolm D. Evans, Supra Note at No.18, P.191.

⁴⁰ Anthony Aust, Supra Note at No. 3, P.113.

from them.⁴¹ However, this approach is very rigid or restrictive where reservations are virtually impossible. Each state has a veto in that if a single state objects the particular reservation, the reserving state could either become a party to the original treaty by withdrawing its reservation or reject a treaty as whole. This rule may be good to maintain the unity of a treaty but it narrows the scope of the treaty as only few states could join it in such situation so that its general or universal application is questionable.

B) The Pan American Union Approach

This approach is more lenient and flexible one when compared with the above rule of reservations. Under the Pan American Union Approach, adopted in 1932, reservations are permissible but the judicial status of treaties ratified with reservations will be affected in the following manner:⁴²

- 1) The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations.
- 2) It shall be in force between the governments which ratify it with reservations and the signatory states which accept the reservations in the form in which the treaty may be modified by the said reservations.
- 3) It shall not be in force between a government which may have ratified with reservations and another which may have already ratified and which does not accept such reservations.

The above approach has rejected the rule of unanimity and vetoes of contracting states in allowing reservations. Rather, it introduced various flexible rules that could give a way out for different conflicting interests of states.

C) The Modern Approach

1) **The ICJ Approach:** With regard to rules of reservations the modern chapter was opened in 1951 when ICJ was requested by the General Assembly to give its advisory opinion on the *Reservations to the Genocide Convention Case*.⁴³ Reservations made by some countries to the 1948 Genocide Convention which contained no clause permitting such a reservation, put the whole issue of making reservations to a multilateral treaty in a new perspective which

⁴¹ M.N. Shaw, *Supra* Note at No.9,P.825.

⁴² S.K.Verma, *Supra* Note at No.23, P.271.

⁴³ www.scribd.com/.../The-Reservations-to-the-Genocide-Convention-Case

triggered a change to the old unanimity approach. In its opinion the ICJ came up with the following conclusions:⁴⁴

- a) If a reservation has been objected to by one or more parties, but not by others, the reserving state will be a party, provided the reservation is compatible with the object and purpose of the treaty.*
- b) If a party objects to a reservation because it considers it incompatible with the object and purpose, that party may consider the reserving state as not a party.*
- c) If a party accepts a reservation as being compatible with the object and purpose, it may consider the reserving state as a party.*

In many cases the Pan American and the ICJ have adopted similar approach which is more flexible and lenient than the traditional approach. One basic difference is, however, that the latter circumscribed the area of reservation by laying down the criterion of ``compatibility with the object and purpose of the treaty`` for making the reservation and that of objecting to it. In doing so, the compatibility test was skillfully invented by ICJ as flexible and liberal approach so as to strike a balance between the two contrasting concerns towards treaties, namely, universality and integrity of treaties. The traditional unanimity approach which favoured only the integrity of a treaty was not accepted by ICJ as it failed to achieve the two objectives at a time. On the one hand, the ICJ tried to promote the universality and general application of the treaty in that the object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of states which adopted it that there should be widest possible participation by states. The complete exclusion from the Convention of one or more states would not only restrict the scope of its participation, but would detract from the authority of the moral and humanitarian principles which are its basis.⁴⁵

Thus, reservations are tolerable so long as they are compatible with the object and purpose of the Convention and this is found important to increase the acceptability and scope of treaties and with the trend in adopting

⁴⁴ Id.

⁴⁵ Malcolm D.Evans, Supra Note at No. 18, P.192.

multilateral treaties which are away from unanimity rule and towards majority voting. On the other hand, the court did emphasis on the principle of integrity of the Convention as reservations which could affect the object and purpose of the Convention shall not be accepted. However, as we have seen it from the opinion of the court, the compatibility test is left for each state whose decision may be highly influenced by subjectivity. Hence, this test is found most problematic and unworkable. Moreover, in practice, the above rules formulated by the court would lead to fragmentation of multilateral treaties.⁴⁶

2) Rules of the Vienna Convention: The very liberal and flexible doctrine of universality of treaties developed by the ICJ has been held by the Vienna Convention under articles 19 to 23. Article 19 provides: a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

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

The way articles 19 to 23 are drafted in general and the word ``unless``, in article 19 in particular show that, in principle, states are allowed to make reservations. It seems that they are prohibited from making reservations only exceptionally when their cases fall under either of the above three conditions. That means most of the rules drawn from the conclusions of the ICJ and the justifications behind them must have been well considered by ILC which drafted the Vienna Convention (in fact, the rules of the ICJ were intended to be applied to the Genocide Convention where as the rules of the Vienna Convention have a comprehensive applications for all treaties between sovereign states). In its provisions under articles 19 to 23, the Convention attempts to strike a balance between ensuring the integrity of a treaty whilst encouraging universal participation by adopting liberal rules of reservations. The ILC was forced to reject the old rigid requirement which claimed the consent of all contracting states for making reservations as it was found

⁴⁶ Antonio Cassese, *Supra* Note at No.1, P.130.

extremely difficult to secure the whole votes of the ever increasing membership in international community having diverse attitude. This requirement could potentially exclude many states from joining treaties since the only option available for them is either to accept the treaty as whole or not to be a party at all.⁴⁷ But, as we shall see below, some of the provisions of the Convention have a devastating effect on the protection of human rights treaties because of their inclination to universalism than integrity.

Thus, states can append reservations unless such reservations are expressly prohibited by the treaty (either because the treaty totally prohibits any reservation or only allows reservations to provisions other than the one that is the object of a reservation) or found incompatible with the object and purpose of the treaty. Many treaties particularly the ones on human rights such as the International Labour Organization (ILO) Conventions stipulate express provisions that totally prohibit the making of reservations.⁴⁸ Reservations shall not also be made when the treaty prohibits reservations to most of the provisions to which the object of the reservations belongs (while at same time it is provided in the treaty that only some reservations may be made). Here it can be reminded that the rules stipulated under article 19 (a and b) may show that the Convention has not given an ultimate demise or blow to the traditional approach which required the consent of all other states in order a given state to make a reservation. That old rule has somewhat been maintained as other states may give consent to the reservation by expressly providing a total prohibition or partial prohibitions to reservations. Of course, now a day, a consensus or qualified majority vote of negotiating states is sufficient for adopting multilateral treaties concluded in international conferences or international organizations. Thus, we may extend the argument that the prohibition in (a) and (b) of article 19 may be made by consensus or qualified majority vote.

When states fail to provide an express prohibition to reservations in their treaty either in the form stated under (a) or under (b), it does not mean that states are totally free to attach reservations. They may do so if and only if their reservations are not incompatible with the object and purpose of the treaty as provided under article 19 (c). This rule is exactly the replica of the one forwarded by the ICJ in the Genocide Convention case. The compatibility test of the Convention may be taken as the most systematic, liberal and flexible instrument to advance the universality of treaties and their general

⁴⁷ S.K. Verma, *Supra* Note at No. 23, P.273.

⁴⁸ Anthony Aust, *Supra* Note at No.3, P.109.

application by inviting many states to multilateral treaties at least for most of the provisions while at the same time maintaining crucial substance, basic object and purpose of the treaties. In practice, however, it is very difficult to maintain the balance and achieve the goal intended. In particular, the compatibility test has encountered chronic problems with regard to reservations to human rights treaties. Still the Convention has left the compatibility test to be decided by contracting states based on subjectivity which may complicate the process of reservation and reduce the effectiveness of human rights treaties. This liberal rule of compatibility may impair the integrity of human rights treaties since they may end up being split into series of bilateral agreements.⁴⁹ Moreover, the terms `object` and `purpose` of treaties and compatibility itself are too general and subjective and without concrete criteria for determining them. We will see those problems and their particular impact on human rights treaties somewhere below.

2.4. The Legal Consequences of Reservations under the Rules of Vienna Convention

Assuming that a reservation is not prohibited under article 19 (a), (b) or (c), is there a situation where reservation is not permitted? The answer is definitely yes. In instances where reservation is possible, once again, the traditional rule of unanimity requiring acceptance by all parties is maintained to be applicable under article 20(2) of the Convention. It provides: 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. With similar spirit, article 20(3) also provides another possibility for prohibition of reservations. According to this article when a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization. Thus, in those two cases, reservations which lack consent of all contracting states or approval of the competent organ, respectively, shall not be made even if not prohibited under article 19. The reason for maintaining such old rule relates to the special nature of such treaties which require integrity as a vital factor for their applications.

It may be thought that objections to reservations are possible only on the basis of the prohibition under article 19 (a) and (b) or on the basis of

⁴⁹ Antonio Cassese, *Supra* Note at No.1, P.130

compatibility under (c). But objections to reservations may be possible even when reservations are not prohibited under article (a), (b), or (c) of article 19 unless a reservation is expressly authorized by a treaty pursuant to article 20(1) in which any subsequent acceptance or objection is not required. Acceptance of and objection to reservations (except those reservations expressly authorized by a treaty or require the consent of all parties or competent organs) that base on the prohibitions under article 19 or any procedural or substantive grounds may have some legal consequences stated under article 20(4), 20(5) and article 21. Article 20(4) provides:

(a) acceptance by another contracting state of a reservation constitutes the reserving state a party to the treaty in relation to that other state if or when the treaty is in force for those states;

(b) an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and the 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.

From the above provisions, it is clear that normally the objection does not have major legal consequences different from the acceptance; acceptance of a reservation by another state makes the reserving state a party in relation to the accepting state and at the same time objection to reservation does not preclude the entry into force of the treaty as between the reserving state and the objecting states unless a clear intention to this effect (such as opposing the entry into force of the treaty between itself and the reserving state) has been expressed by the objecting state.⁵⁰ This is at variance with the ICJ's approach, which precluded the entry into force of the treaty between the reserving and the objecting states. Lack of major differences in the legal consequences of acceptance of and objection to reservations can also be drawn from the cumulative reading of articles 20(4) and 21. By virtue of reservation, the treaty stands modified to the extent of reservation in relation to other states

⁵⁰ S.K. Verma , Supra Note at No.23, P. 273.

accepting the reservation or objecting, but not precluding the entry into force of the treaty between themselves and the reserving state.⁵¹ Therefore, when the reservation is aimed at excluding the applicability of a particular provision, there is no difference between acceptance of a reservation and objection to it: in both cases the treaty applies, except for the excluded provision, as between the reserving and the objecting states or all non-objecting states.⁵²

Given the cumulative messages of articles 20(4), 20(5) and 21, the promise to strike a balance between universality of treaties and integrity of treaties by way of rules stated under article 19 particularly by compatibility test seems to have been eroded. In other words, the fact that both acceptance of and objection to reservation do not preclude the entry into force of the treaty (article 20 (4) (a) and (b); respectively), the treaty to which reservation is made is effective as soon as at least one other contracting state has accepted the reservation (20 (4)(c)); 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 12 months, and the modified provision has more or less the same legal consequences to both the accepting and objecting states towards their relation to reserving states, have tilted the balance towards widening participation by states to multilateral treaties than keeping the unity or integrity of treaties. Here the rules of the Convention are even more liberal than the approach followed by the ICJ in Genocide Convention case. It may be useful to bring sufficient number of states to become parties to multilateral treaties. It may be even helpful for the application of many non-human rights treaties. But these more liberal rules may pose some problems to human rights treaties as we will discuss the issue subsequently. The rules of the Convention are also unclear about the effect of impermissible reservations. We will look at these and other controversial issues in the following section

3. Problems of Reservations to Human Rights Treaties

In the first section we have examined the salient features, elements, conditions and scope of treaties. Reservation is inherently associated with and inseparable from the concept of treaties. In section two, we explored what reservations are, what basic features and qualities they have and what rules and conditions are applicable to them. Along the way, we have witnessed several unsettled issues, and controversial problems that arise from rules of

⁵¹ Ibid

⁵² Antonio Cassese, *Supra* Note at No.1, P.130.

reservations: What does the compatibility test constitute? How and by what standards can this test be determined? Who has the legitimate authority to determine the test? What effect do inadmissible reservations bring about? The impact of these and other related problems on human rights treaties will be assessed in this particular section.

3.1. Some Special Features of Human Rights Treaties: a Call for Caution in Reservations?

In my previous discussion I have pointed out most of the essential features of treaties as a common denominator for all international conventions including human rights treaties. Readers may get puzzled why reservations create special problem to human rights treaties. Thus, in this section we have to brief some special features of human rights treaties, which in turn may influence the discussion on the problem of reservations to them. Such special features may also be taken by themselves as justification for the special treatment of human rights treaties.

Human rights treaties are international legal instruments that play a role for promotion, protection and enforcement of human rights which are considered as natural, inalienable, universal, irreducible and equally applicable for all mankind. After World War II, human rights are not only seen as natural value and dignity of all mankind but also their protection has been taken as vital instrument for international peace. Second, more than any other treaties the protection of international human rights treaties has given a certain blow to state sovereignty. Today, the special attention given to human rights protection can be explained by the extent that large-scale and flagrant human rights violation may be a ground for a legitimate intervention by the UN against state sovereignty.⁵³ Third, in the modern world, unlike other treaties which govern the relations between sovereign states, many human rights treaties include a good number of self-executing provisions that can directly be applicable to individuals. Meaning, such treaties may provide rights and obligations for individuals who increasingly have become international legal subjects and such rights and obligations establish relations between the state and individuals. But it has been suggested that the Vienna Convention on reservation presume relations between states or inter-exchange of mutual obligations which may not necessarily explain the nature of all

⁵³ Antonio Cassese, *supra* note at No.1, P.360.

human rights treaties that assume state-individuals relations.⁵⁴ Moreover, human rights treaties are one of the most evolving and dynamic international norms whereas the law of treaties is relatively static so that some kind of incompatibility may be inevitable between them.⁵⁵

Fourth, in recent years a good number of human rights treaties are either codified norms of existing customary norms or instruments from which certain important customary norms have gradually evolved. Consistent practice and *opinio juris* show that the banning of slavery, genocide, racial discrimination, torture and denial of the right of peoples to self-determination belong to the corpus of customary law.⁵⁶ Those customary norms (codified in the form of treaties or evolved from treaties) bind all states, whether they have ratified treaties or not. Violation of those norms will entail international crimes for the offenders. This situation also results in international responsibility where each state is legally entitled to request states to discontinue any gross violation or take necessary measures.⁵⁷ Some of those customary norms are elevated to the status of *jus cogens*, *erga omnes* obligations and rights and non-derogable regimes. We can imagine the possible impact of those norms on reservations made by states in general and the applicability of compatibility test in particular as we see it later.

Article 53 of the Vienna Convention defines *jus cogens* (peremptory norm of general international law) as a norm accepted and recognized by international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The same article provides that a treaty will be void if at a time of its conclusion, it conflicts with peremptory norm of general international law. Even though there is no agreement on the criteria for identifying which norms of general international law have peremptory character or *jus cogens*, due considerations must be made in case a state attaches a reservation to human rights treaties and the determination of compatibility of reservations with human rights treaties must be conducted at utmost caution.

⁵⁴ Human Rights Committee, General Comment 24(52), General Comment on issues relating to Reservations Made up on Ratification or Accession to the Covenant or Optional Protocol thereto, U.N.Doc. CCPR/C/21/Rev.1/Add.6 (1994).

⁵⁵ Liesbeth Lijnzaad, *Reservations to UN- Human Rights Treaties: Ratify and Ruin?*, Martinus Nijhoff Publishers, 1994, P.80.

⁵⁶ Antonio Cassese, *Supra* Note at No.1, P.370.

⁵⁷ *Ibid.*

Fifth, because of the above special features and being inspired by the conviction that human rights should be available for all, the universality of human rights treaties is intended as a goal that can be achieved if all or most states become parties to them. But there is another contrasting strong zeal that each and every norm of human rights treaties is an inherent value of human dignity so that the entire content of each human rights treaty shall be respected by states. That means not only the whole text of the treaty shall be accepted by all or most states (the need for universality) but also all or most of human rights treaty provisions must be universally accepted by states (the need for integrity). Because of these contrasting situations, reservations to human rights treaties become complicated and highly controversial. Finally, the fact that human rights treaties have created mechanisms of supervisions of the implementations of obligations laid down in those treaties such as by way of UN monitoring organs or treaty bodies has complicated the issue of reservations to human rights treaties. The scope of powers, jurisdictions and competence of such organs in relations to monitoring reservations vis-a vis states and international courts has added some controversy on how to make reservations to human rights treaties. This is a unique feature of such treaties that need special treatment when compared with non-human rights treaties. We will elaborate the above special features in light of rules of reservations in the following sections.

3.2. The Compatibility of Rules of Reservations with Human Rights Treaties

A) The Problem of “Compatibility Test” to Human Rights Treaties

It has been intended that the rules of Vienna Convention on the Law of Treaties in general and rules of reservation in particular are comprehensively applicable to all treaties including human rights treaties. This stand of the Convention was reaffirmed by ILC (the drafter of the Convention), in its 1997 report, that the rules of reservation stated under articles 19-23 apply equally to normative (i.e., law making) treaties, including human rights treaties.⁵⁸ Despite their special features and concern, human rights treaties are put together with other treaties to be regulated in the straight-jacket rules. The situation is worsened by various ambiguities and controversies that emanated from the rules of reservations in the Convention. As a matter of general rule, it may be argued that the making of reservations to human rights treaties, except the fact that it is expressly prohibited under Article 19 (a and b) may not pose

⁵⁸ Anthony Aust, *Supra* Note at No.3, P.123

serious problems. However, the fact that reservations can not be made to human rights treaties (even when there is no an express prohibition to make reservations) if they are incompatible with the object and purpose of the treaty (art.19(c)), creates one of the most serious problems in protection of human rights.

Though the compatibility test was invented to be a useful instrument to maintain the balance between the universality and integrity of treaties, in cases of human rights treaties it is highly difficult to maintain that balance given their special nature. First, the criterion `` incompatible with the object and purpose of human rights treaties`` is too general, vague and highly subjective. The Convention itself does not define what constitute object and purpose of human rights treaties and it has no objective standards, guidelines and rules to determine such criterion. It is said rather unsubstantiated and how and when the compatibility test can be applied remains confused. Lack of established standards in the Convention to determine the criterion is not the only problem. Only few theories and doctrines have been made to develop the concept; the practices of states are patchy and uncertain so that there are inadequate attempts to formulate concrete criteria for the test; there are insignificant number of international courts and monitoring bodies who have defined procedures in the field.⁵⁹ All these factors have led to divergence and extreme subjectivity that make impossible to have objective standards to determine the criterion.

Accordingly, different views have been forwarded to apply the compatibility test. Unfortunately, the two major views established with regard to the criterion of compatibility are contradictory though the aspiration is to achieve universal, equal and irreducible application of human rights for all man kinds. The first view considers the whole human rights treaty as object and purpose without any distinctive content.⁶⁰ Meaning, human rights norms are a set of rules protecting the fundamental freedoms and dignity of people, in which all component norms have the same importance; hence, making a hierarchy or rank between them or among their provisions defeats the object and purpose of human rights protection.⁶¹ If a treaty prohibits discrimination, each and every provision contributes to such goal of the treaty, and is thought to be part of its object and purpose. This view is somewhat an extreme case that it seems to be absurd as merging the distinction between core obligations

⁵⁹ Liesbeth Lijnzaad, *Supra Note at No. 55, P.69.*

⁶⁰ *Ibid.*, at P.82.

⁶¹ *Ibid.*

and other obligations, that implies a complete prohibition on the making of reservations and makes article 19(c) of the convention non-effective in its totality.

Another version of this view accepts some kind of hierarchy or rank among various human rights norms, yet it believes that the whole content of human rights treaty must be taken as object and purpose. It has been argued that reservations contrary to the whole content of higher human rights norms such as *jus cogens*, *erga omnes* obligations, rules of international crimes, human rights treaty codifying customary norms and provisions of the UN Charter shall be taken as incompatible ones.⁶² Even in these cases, it is very difficult to assume the total prohibition of reservations and it may be unwise to think in terms of the whole text of such treaties. We have seen that the ICJ has introduced the idea of compatibility test as it has suggested that so long as reservations are compatible to the purpose and object of the Genocide Convention, they can be made to some of the provisions of the Convention. In its comments on reservation made by Guatemala to non-derogable rights, the American Convention on Human rights stated that:⁶³

... A reservation which was designed to enable a state to suspend any of the non-derogable fundamental rights must be deemed incompatible with the object and purpose of the convention, not permitted by it. The situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as whole of its basic purpose.

It may be contended that acting contrary to *jus cogens* is already prohibited per se, so that it does not require any additional prohibition under the guise of object and purpose. At the same time it may be said that article 53 of the Convention makes treaties contrary to such norms null and void. Likewise, human rights treaties codifying customary norms may be governed by customary rules independent of the Convention.

Contrary to the above view, firmly believing that giving reasonable effect to the rule of compatibility stated under article 19(c) of the Convention, the second view presupposes the possibility of difference between the full text of a treaty and its core goals. Unless we accept the distinction between all

⁶² Ibid.

⁶³ Malcolm D. Evans, *Supra* Note at No.18, P.193.

obligations in the treaty and the core obligations, the compatibility test will be out of vision and the whole purpose of reservations will be defeated. Thus, it is quite possible that reservations are made if they do not touch upon object and purpose, but remain on fringe and to assume core values of the treaty whose object and purpose shall remain intact; otherwise the reservations would be incompatible.⁶⁴ Given the whole justifications of reservations and the spirit of the Convention embodied in the compatibility test, this view is logical. The problem is that there are no rules or standards that provide criteria to distinguish those core values of human rights treaties and those which are not. Neither the Convention nor the practice provides necessary tools to identify those human rights treaty norms whose object and purpose are potentially incompatible with reservations and from those non-core norms.

But it is possible to suggest that reservations of general character are considered to be incompatible with the object and purpose of human rights treaties. In the *Belilos* case, for example, the European Court of Human Rights decided that a declaration made by Switzerland when ratifying the ECHR was in fact a reservation of a general character and therefore impermissible.⁶⁵ In most cases reservations that offend peremptory norms or *jus cogens* are incompatible with the object and purpose of human rights treaties.⁶⁶ Although treaties which codify customary international law are mere exchange of obligations between states and may allow them to make reservations, it is otherwise in human rights treaties which are for the benefit of persons living within their respective jurisdictions. Accordingly, provisions that represent customary international law (and *a fortiori* when they have the character of peremptory norms such as protection from slavery, torture, genocide) may not be the subject of reservation. Sometimes a case by case approach is essential to resolve the compatibility of reservations by duly considering factors such as the importance of each human rights, the implication to protection and promotion of human rights, particular natures of the treaty etc.⁶⁷ In short, the absence of definite standards and criteria in the convention or in practice to determine the compatibility test makes the goal intended to maintain the balance between universality and integrity of human rights treaties unattainable.

⁶⁴ Liesbeth Lijnzaad, *Supra* Note at No.55, P83.

⁶⁵ *Belilos* Case, *Supra* Note at No.27.

⁶⁶ Human Rights Committee, *Supra* Note at No.54

⁶⁷ Liesbeth Lijnzaad, *Supra* Note at No.55, P.84.

The second serious problem to the determination of compatibility test comes from the question `` who shall authoritatively decide upon it? `` The very general nature of ``object and purpose`` of human rights treaties and lack of objective rules to determine the compatibility of reservations with the object and purpose of the treaty have been worsened by another subjective situation. At a glance three competing entities, namely, contracting states, international and regional courts, and monitoring organs may be suggested to hold authoritative interpretation on the question at hand. Normally, even if they are very few, international courts such as ICJ, European Courts of Human Rights and American Court of Human Rights , as specific treaty provisions have provided judicial power for them to do so, have played important role in assessing the compatibility of reservations with the object of human rights treaties. The competence of the monitoring organs towards the subject matter is still controversial. Articles 19 and 20 of the Vienna Convention seem to have given the ultimate power of determining the compatibility test to each contracting state. As we shall see later, the Human Right Committee has claimed the sole authority to determine what the content of compatibility with object and purpose means whereas states are extremely jealous of having it such power.⁶⁸ From the out set, we can conclude that there is an inevitable confusion or lacunae (even some sort of tension) as to the role, and extent of participation and as to who has power of final say on determining the test.

The issue of who may decide on the compatibility test and in what manner becomes complicated by the ambiguity emanating from joint application of articles 19 and 20 of the Convention. From the interpretation of those provisions, two schools of thought have been developed.⁶⁹ The first is the permissibility school which is based on two stages assessment: first, the reservation must be objectively assessed for compatibility with the object and purpose of the human rights treaty and if it is not compatible, acceptance by other states can not validate it.⁷⁰ If, however, the reservation is compatible with the object and purpose of the treaty, the parties may decide whether to accept or object to the reservation on whatever other grounds. Broadly, this school argues that reservations expressly prohibited by article 19 (a and b), either totally or specifically, and those found incompatible with the object and purpose of human rights treaties are void *ab intio*. In other words,

⁶⁸ Anthony Aust, Supra Note at No.3, P.131.

⁶⁹ Malcolm D.Evans, Supra Note at No.18, P.193.

⁷⁰ Ibid.

impermissible reservations in those three situations are automatically void without any need of acceptance or objection by other parties as required by article 20. The requirements of acceptance and objection stated under article 20 are only for permissible reservations not for impermissible reservations under article 19. For this effect the two provisions must be applied independently.

Of course, it may be argued that the requirement of acceptance or objection made by states under article 20 to reservations which are already prohibited expressly by article 19(a and b) in accordance with the agreement of all parties is unnecessary. If reservations are already prohibited by the treaty, why should states be expected to accept or object again, given the consequence of acceptance and objection? Even here states should be given a chance to object as there may be a conflict over whether the matter of reservations falls on the prohibition or not. But making the incompatible reservations automatically void totally excludes the role of contracting states from participating in determining the compatibility test either in the form of acceptance or objection. This approach could be acceptable and provide a better protection to human rights treaties had we had well developed standards and objective criteria, sufficient number of international and regional courts (there are only few today) and monitoring organs with uncontroversial competence on the matter, to determine the test objectively and declare incompatible reservation null and void. But none of them is fulfilled and hence the total exclusion of states from determining the test may be a danger. Moreover, neither the Convention nor the practice sheds any green light to support this school of thought. The ILC report of 1997 is also totally against the position of Permissibility School.⁷¹ So the school is a normative suggestion or mere recommendation of amendment for the Convention.

On the contrary, the opposability school bases the validity of reservations entirely upon whether it has been accepted by other parties and sees the compatibility test stated under article 19(c) of the Convention as merely a guiding principle for the parties to contemplate when considering whether to accept or object to reservation.⁷² This approach wants to give full effect to the requirement of acceptance and objection made by contracting states and it needs the compatibility test to pass through article 20. It argues that the Vienna Convention, instead, vests the other, non-reserving states with the final authority on compatibility and if states accept reservation, or fails to

⁷¹ untreaty.un.org/ilc/sessions/49/49docs.htm.

⁷² Malcolm D.Evans, *Supra* Note at No.18, P.193.

object within the allotted time, this may reflect their considered judgment that the reservation is not contrary to the object and purpose of the treaty, but it is in any event decisive.⁷³

From the Vienna Convention's point of view as well as from the prevailing practice, it is true that the question of whether a reservation is contrary to the object and purpose of human right treaty or not is to be decided by each contracting state. But the assessment and determination of compatibility test is left in extreme subjectivity in which decisions of contracting states may highly be diluted by national interest in that human rights treaties are subjected to greatest potential threat of infinite reservations as the compatibility test is not seriously taken. We can safely say that both schools do not provide a healthy solution to the problem. It is also difficult if not impossible to suggest a middle ground. It may better to suggest that there must be some kind of amendments to the Convention with regard to rules of reservations applicable to human rights treaties and the move must be towards objectivity(there must be objective standards for determination of purposes of reservations and an international organization which is appropriate to apply such standards objectively must be established). As we have seen, rules of reservations are designed in a very general manner in such a way that they may applicable to kinds of treaties and are full of subjectivity- The first school seems to be without legal bases and in short of institutions with legal authority to achieve the objective determination of the compatibility test. The second school ultimately rests on the shoulder of contracting states to determine the test, which is unsuitable to human rights protection.

Even if we accept the opposability approach, there is still a more challenging problem. Which shall have the final and decisive authoritative interpretation on compatibility, the reserving state(s) or the non-reserving ones? In my view, the ILC, in its 1997 report has complicated the issue rather than solving it. Though the ILC has accepted that compatibility with the object and purpose is the most important criterion for determining the admissibility of reservations favoured the opposability approach which lets individual states judge for themselves which reservations are compatible with the object and purpose of the treaty, seems to neglect the interests of non-reserving states.⁷⁴ As we will elaborate the point below, some rules in the Convention as well as developed in practice, and opposability school of thought entrusts the reserving states with substantial responsibility for

⁷³ Ibid.

⁷⁴ Anthony Aust , Supra Note at No.3, P124.

determining compatibility. The ultimate consequence of all this is that the applicability and enforcement of human rights treaties to which reservations are made remain to be determined by the reserving states than the international community.

B) The Legal Consequences of Impermissible Reservations to Human Rights Treaties

Another lasting debate in human rights law concerns the result of invalid reservations made to multilateral human rights treaties. What legal remedies should follow the determination of invalidity of reservations? Neither the Vienna Convention nor other international instruments provide clear and sufficient rules on admissibility and legal consequences of prohibited reservations. Relying on the rules of the Convention, state practice, scholars' views, and jurisprudence, the following three major consequences of invalid or prohibited reservations will be discussed as available options.

1) *The state remains bound to the treaty except for the provision(s) to which the reservation related:* This legal remedy is provided by the rules of the Convention under articles 20(4) and 21 which laid down a foundation to opposability approach that dictates the compatibility of reservation (with the object and purpose of human rights treaties) has to be decided solely by contracting states. Once impermissibility has been demonstrated by such states, the prohibited reservation based on incompatibility may not be declared as null and void. Rather, it is maintained as though it were valid and accepted reservation. In other words, the objection of states to incompatible reservation is virtually without legal consequence and it is nearly equivalent to acceptance: the treaty to which reservation is made enters into force between objecting states and reserving states in the same way as between accepting states and reserving states (article 20(4) (a and b)); likewise, the only fate, status and effect of incompatible reservations are to be disapplied between objecting states and reserving states in the same way as between reserving states and accepting sates (article 21 (1,2 and 3)).

Obviously, these rules have adverse consequence on human rights treaties. First, though they are more favourable for reserving states to be retained as a party, it is against consent and participation of non-reserving states in their effort to object incompatible reservations.⁷⁵ They are left with

⁷⁵ Ryan Goodman, "Human Rights Treaties, Invalid Reservations, and State Consent", *the American Journal of International Law*, Vol.96: 531, P.534.

little incentives since the reserving state will benefit from the reservation regardless of whether a non-reserving state objects as there is no practical difference between accepting the reservation and disapplying the provision entirely. This yields the same result that as if the reservations were enforced. It is true that any objection is without fruit and only for the record unless the objecting state expressly excludes the reserving state from the treaty (21(3)). This is a problem over the problem. The fact that the Convention has authorized contracting states to have a final say on compatibility of reservations to human rights treaties leads to subjectivity. That means states may not even exploit some of the available rules in the Convention due to their carelessness, disinterested relations and giving priority to national interests. These problems of determining the compatibility of reservations are paradoxically worsened by the lack of proper legal remedies for those objections of impermissible reservations. Allowing the same result for both acceptance and objection would negate the purpose of having determination of incompatibility. Why decide if whether the reservation is incompatible? What is the need to object if the remedy for incompatibility is to maintain the same result?⁷⁶

Secondly, the above remedy of the Convention that the state to be bound by the treaty except for the incompatible reservation would infringe the interests of other states in maintaining the object, purpose and the bargained-for elements of human rights norms that may be defeated when the reserving state becomes a party to the treaty with its benefit of incompatible reservation. Growing concerns to maintain the core of an agreement assume special significance in the case of human rights treaties whose very purpose is to codify and maintain minimum level of global standards.⁷⁷ Allowing states to join the treaty with incompatible reservations would repudiate or downgrade its normative, or standard setting base and this result can not be achieved by individual state's objections, because state A's objections apply only between itself and the reserving state.⁷⁸ Accordingly, the objecting state can not prevent the incompatible reservations from affecting the constitutive elements of the treaty. This may also make the protection of the most core values of human rights such as *jus cogens* and *erga omnes* difficult.

Third, the rules of the Convention under articles 20 and 21 from which our first remedy for impermissible reservation is derived totally presuppose

⁷⁶ Ibid, at P.535.

⁷⁷ Ibid 534.

⁷⁸ Ibid.

the relations of sovereign states. Specially, rules enshrined under article 21 (1(b) and (3) provide reservations in terms of mutual relations and reciprocity between states. The whole message of such rules is that reservations, whether compatible ones (accepted) or incompatible ones (objected) since they have virtually the same effect, not only modify treaty obligations for the reserving state but also modify those provisions to the same extent for the other parties (both accepting and objecting states) in their relations with the reserving state, not with each other. This reciprocity may serve something good in non-human rights treaties that might intend to promote political, economical, social, environmental relations between states. Reciprocity may also deter reservations if a reserving state's interest in its reservation is outweighed by the harm (to it) of extending the benefit of reservation to the others. But looking human rights treaties in the mirror of reciprocity and mutual relations between states will jeopardize human rights protection. This is totally against their nature and conception. Human rights are to address individuals as subjects of the new international law. They are to govern the relations between states and individuals not between states. If incompatible reservations benefit not only reserving states but also other states in their relations to the former, it means that other states in a way are allowed to make sub-optional reservations to human rights treaties under the guise of reserving state. States may take this as a pretext to erode their obligations of human rights norms even including *jus cogens*, *erga omnes* and other highest norms.

Finally, even though the modern trend including the attempt of the Convention under article 19 dictates the balance between the universality and integrity of human rights treaties, the rules of the Convention under article 20 and 21 in general and the legal remedies provided by them in particular can not achieve such two basic objectives.⁷⁹ Of course both universality and integrity are crucial to human rights treaties because of their special nature and the balance must be maintained. As we have said earlier, the assumption of the universality of human rights is inspired by the Conviction that these rights should be available for all and must be binding at a global level. Liberal rules of reservations would promote protection of human rights by enabling as many states as possible to join the treaty at the expense of non-core human rights norms that may not possibly contravene the object and purpose of the treaty as reservations are the necessary price for universal participation.⁸⁰ In addition to facilitating ratifications, being a party by way of reservations may

⁷⁹ Antonio Cassese, *Supra Note at No.1, P.130.*

⁸⁰ Liesbeth Lijnzaad, *Supra Note at No. 55, P.106.*

ensure supervisions by monitoring bodies for that particular state. The commitment of reserving states to the majority of the provisions of a treaty may encourage the improvement of the domestic human rights situation. Moreover, being a state party to a particular human rights treaty will prompt the withdrawal of reservations in the future. For example, until 1992 there have been 110 ratifications to Convention on the Elimination of Discrimination Against Women (CEDAW), and 51 reservations to it of which 12 have been withdrawn.⁸¹

But the above three weaknesses related to the first remedy of impermissible reservations as provided under article 20 and 21 of the Convention can be a good reason to conclude that rules of reservations are too liberal that are inclined to universality than integrity. If all objections to incompatible reservations have more or less same result with the acceptance, it is highly favouring reserving states than non-reserving states and international community as a whole in their interest to protect the core object and purpose of human rights treaties. For that matter, in addition to the three points that we have raised above, pursuant to article 21 (c) of the Convention an act containing reservation is effective as soon as at least one other contracting state has accepted the reservation. What is worse, all contracting states are considered to have accepted the reservations if no objections to the reservations have been raised by the end of 12 months after notification (article 20 (5)). These two rules show how the Convention is extremely liberal and favouring maximum reservations. How could the acceptance of one state bring reservations of whatever kind to human rights treaties into valid and effective act? Fixing such strict deadline for objection made to incompatible reservations to human rights treaties is also absurd. It may promote quick responses to reservations. But, delay is unavoidable because of miscalculation, carelessness, confusion on whether such deadline is also applicable to incompatible reservation and the like.⁸² In any standard such strict and procedural deadline should not be applicable to incompatible reservations that contravene the very substance, object and purpose of human rights treaties. In short, those highly liberal rules of reservations would achieve only simple adherence to human rights treaties, formal universality without marinating the substantive universality (integrity of human rights

⁸¹ Ibid

⁸² Edward T. Swaine, "Reserving," *Yale Journal of International Law*, Vol.31: 307, 2006, P.319.

treaties) in which the substance, object and core human rights have been eroded by infinite incompatible reservations.

2) *The invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the human rights treaty:* This second option as legal consequence of prohibited reservation has no clear indication in the Convention. One single instance is that the objecting state may exclude the reserving state from the treaty if it clearly expresses its intention to this amount (Article 20(4)). It is also logical to say that contracting states may stipulate provisions that exclude states making incompatible reservations from the treaty. The problem comes when the treaty is silent or the contrary intention of objecting states is not expressed. In this case the practice of states is not consistent to support this option. In 1980 Burundi made a reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons 1973, in which it purported to exclude from its scope alleged offenders who were members of national liberation movements.⁸³ Four parties objected that the reservation was incompatible with the object and purpose of the treaty, three of them saying that until it was withdrawn they would not consider it as a party.⁸⁴ Finally, the reservation was withdrawn. To the contrary, USA was never told the same message while she made reservation to ICCPR in 1992 even though eleven European States objected that the reservation was incompatible with the object and purpose of the Covenant.⁸⁵ The total exclusion of a reserving state may exert pressure on it so that it might be forced to join the treaty by disregarding its reservation. But this will be only realized when the benefit that the reserving state obtains from the treaty outweighs the obligations that can be relieved if reservation was successful. In general, however, this second option is highly burdensome for states and may open the door for boycotting human rights treaties.

3) *An invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provisions to which the reservation related:* The idea is that prohibited reservations specially those parts that prove to be incompatible to the object and purpose of human rights treaties must be regarded as null and void, invalid and severed, as if they were not formulated and the original treaty (including the reserved

⁸³ Anthony Aust, *Supra* Note at No.3, P.111.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

provisions) shall be fully applicable to the reserving state without any benefit from the reservations. The Vienna Convention does not have any basis for such outstanding remedy; rather it tries to find its legal bases from customary law, normative nature of human rights and promotion of utmost protection of human rights.⁸⁶ Monitoring bodies such as UN Human Rights Committee are staunch supporter of this position.⁸⁷ In a decision of 1999 on Rawle Kennedy case, this Committee have pronounced that if a state enters a reservation to human rights treaty that is inadmissible either because it is not allowed by the treaty itself or because it is contrary to its object and purpose, it shall be regarded as null and void so that the reserved provisions must fully operate with regard to reserving state.⁸⁸

Fortunately, the recent trends of regional human rights courts are in the move towards the position of monitoring bodies in adopting severability as a best remedy for invalid reservations.⁸⁹ In *Belilos* case, the European Court of human Rights laid a particular emphasis upon Switzerland's commitment to the European convention on Human Rights (ECHR), so that the effect of defining the Swiss declaration which was then held to be invalid was that Switzerland was bound by the provision of article 6 in full without benefiting the reservation.⁹⁰ The same Court reaffirmed this position in the *Loizidou* case in which it analyzed the validity of the territorial restriction, i.e. reservations made by Turkey to the provisions recognizing the competence of the Commission and the Court and held that the reservation is impermissible under the terms of ECHR because of its incompatibility.⁹¹ The Court then concluded that the effect of this in light of the special nature of the ECHR as a human rights treaty was that the reservations were severable so that Turkey's acceptance of the jurisdiction of the Commission and the Court remained in place, unrestricted by the terms of the invalid reservations.⁹² On the contrary, the practice of states towards severability is not uniform; it is uncertain and inadequate.⁹³

⁸⁶ M.N.Shaw, *Supra* Note at No.9, P.830.

⁸⁷ *Ibid*

⁸⁸ www1.umn.edu/humanrts/undocs/845-1998.html

⁸⁹ Antonio Cassese, *Supra* Note at No.1, P.194.

⁹⁰ *Belilos* Case, *Supra* note at No.27.

⁹¹ en.wikipedia.org/wiki/search?search=Loizidou+Turkey

⁹² *Ibid*.

⁹³ Anthony Aust, *Supra* Note at No.3, P.120.

However, the severability approach has encountered a serious opposition from various states, scholars and ILC. The contentions pounded against this approach have something to do with lack of competence and legal authority on the side of monitoring organs (I shall discuss this point in the next section), consent and sovereignty of states. It has been argued that severability has no legal basis in international law as international law currently provides for only two remedial responses for invalid reservations (these remedies are: the reserving state remains party to the treaty but is still not bound by those provisions that the reservation excluded or modified or the state is no longer a party to the treaty at all).⁹⁴ Do they mean that international law is merely the Vienna Convention? Is it not possible to trace some rules of reservations from customary law that represent object, purpose and protection of human rights? Is it not unfair to govern human rights of higher values such as having the nature of *erga omnes*, non-derogatory or *jus cogens* by those simplistic rules of Vienna Conventions? The difficulty of establishing such rules can not be a reason to deny their existence. It is also necessary to notice those problems we mentioned in the discussion of the first remedy and we should not repeat them here.

Those countries such as USA, France and UK contend that severability is totally against the principle of consent and state sovereignty.⁹⁵ For them state consent and sovereignty are higher values than anything else and dictate that as states are totally free to express their consent to the whole treaty or part of the text, they should also be free not to be bound by those provisions they want to exclude their effect. They argued that reservations, valid or invalid, are part and parcel of an expression of consent of states and therefore states shall not be bound by treaty provisions they specifically declined to accept.⁹⁶ But severability is criticized being against this concept as it has a tendency to oblige states to be bound by invalid reservations. In line with this, the ILC has emphasized that if a reservation is inadmissible it is the reserving state that has the responsibility to take action (e.g., by withdrawing or modifying the reservation, or foregoing becoming a party).⁹⁷

On the whole, despite lack of support from the Vienna Convention, ILC and some major states, the third remedy is by far an important option for human rights protection and should be considered in the future. As we have

⁹⁴ Ryan Goodman, *Supra Note* at No.75, P.532.

⁹⁵ Malcolm D.Evans, *Supra Note* at No.18, P.195.

⁹⁶ Ryan Goodman, *Supra Note* at No.75, P.531.

⁹⁷ Anthony Aust, *Supra Note* at No.3, P.124.

said, human rights are not contractual in nature and do not create rights and obligations between states on the traditional basis of reciprocity and mutual obligations. So the question of consent and state sovereignty should not be an obstacle for the protection of universal human rights. At least incompatible reservations to core human rights values, central to the object and purpose of the treaty must be severed and applied fully to the state. In such case human rights treaties must prevail over the concern of sovereign states. If there is a conflict between the international community's need for contracting parties to remain bound as far as possible by international standards on human rights, and the intent of one of these parties to diminish the legal impact of such standard, the former must prevail.⁹⁸ Severability should also be taken as useful option for third party institutions which are independent, competent and objective (such as domestic courts, national and regional human rights commissions, regional human rights courts and ICJ, UN and treaty supervising bodies) to invoke and determine the validity of incompatible reservations.⁹⁹

Finally, those opponents of severability have one major drawback. They argued that considering the state with invalid reservation as non-party to the human rights treaty is in line with international law and consent of states than severability. But this has a huge negative impact both to the consent of state and human rights protection.¹⁰⁰ If a state consented to most of the provisions of the treaty is considered as excluded from the treaty because of one or few invalid reservations, it is the total exclusion that is more prejudicial to state consent than severability. This is also more harmful to human rights as it exempts more and more states from the treaty obligations for good. In many cases, the harm to state consent in voiding its membership in human rights treaty outweigh the harm in voiding only the invalid reservation and keeping the state bound.¹⁰¹

3.3. The Role of Monitoring Bodies in Determining the Validity of Reservations to Human Rights Treaties: A Problem of Competence and Authority

In this section I am not interested in dealing with the organization and working procedures of international monitoring bodies and their general

⁹⁸ Malcolm D. Evans, *Supra Note* at No.18, P.131.

⁹⁹ Ryan Goodman, *Supra Note* at No.75,P.532.

¹⁰⁰ *Ibid* , at P.536.

¹⁰¹ *Ibid*.

powers, functions and roles in human rights protection. Rather, I want to examine some controversies with regard to the authority, competence and specific role of such bodies with regard to reservations to human rights treaties.

The problem of determining the validity of reservations to human rights treaties, in particular assessing the compatibility of reservations with the object and purpose of human rights treaties as well as invoking the legal consequences of impermissible reservations is complicated by the absence of international institutions which have judicial power and competence to pass authoritative decisions on such matters. Currently, there are only few standing tribunals that dispense disputes involving human rights issues both at international and regional levels. Neither is this gap bridged by international human rights monitoring bodies as they are devoid of judicial competence to pass binding decisions.¹⁰² The most common monitoring entities are the UN system monitoring bodies that are established by the UN resolutions (such as Commission on Human Rights, the UN High Commissioner for Human Rights etc) and treaty-bodies established by each human rights treaty (such as UN Human Rights Committee that oversees the implementation of International Covenant on Civil and Political Rights (ICCPR), the Committee on the Rights of the Child and Committee Against Torture). Most modern universal human rights treaties have established supervising bodies.¹⁰³ But, neither the UN itself nor treaty system monitoring bodies have authority to come up with a legally binding decision on reservations. Rather, their competence is limited to submitting recommendations to each state.

Quite contrary to this background, the UN Human Rights Committee has introduced the most controversial and revolutionary move with regard to the determination of reservations to human rights treaties. The Committee in its controversial General Comment 24(52) of 1994 regarded itself as the only competent body to determine whether a specific reservation to human rights treaties was or was not compatible with the object and purpose of the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁴ It has established the following reasons for this conclusion:¹⁰⁵

1) Human rights have special nature in the sense that such treaties and ICCPR specifically, are not a web of inter- state exchanges of mutual obligations,

¹⁰² Antonio Cassese, *Supra Note at No1, P.363.*

¹⁰³ Anthony Aust, *Supra Note at No.3, P.122.*

¹⁰⁴ Human Rights Committee, *Supra Note at No.54.*

¹⁰⁵ *Ibid.*

rather they concern the endowment of individuals with rights. Thus, the principle of inter-state reciprocity has no place.

2) Those rights (such as enshrined in ICCPR) which represented higher norms of customary international law could not be the subjects of reservations. Yet, in the case of reservations to non-derogable provisions not falling in this category; states had a heavy onus to justify such reservations out of subjectivity.

3) Unacceptable reservations that contravene the object and purpose of human rights treaties shall be severed and then fully applied to the reserving states.

4) Given the above reasons, the Committee stressed that the provisions of the Vienna Convention on the role of state objections in relation to reservations are inappropriate to address the problems of reservations to human rights treaties: states have often not seen any legal interest in or they need to object reservations despite many invalid reservations have been made to human rights treaties; yet, the absence of protest by states can not imply that reservations are either compatible or incompatible with the object and purpose of the treaty .

5) In addition, the Committee claimed that passing an authoritative interpretation on reservation is a task that it can not avoid in the performance of its functions given under article 40 of ICCPR and First Optional Protocol. In order to know the scope of its duty to examine the state's compliance or communication, the Committee has necessarily to assume an authoritative interpretation on the compatibility test. It has been also claimed that the nature of human rights dictates an objective determination of incompatible reservation and the Committee is exactly competent for that mission.

Definitely, the Committee has not invoked any legal authority or bases either from human rights treaties or other international law to support its bold and ambitious assertion of its competence. Article 40 of ICCPR and its First Optional Protocol has clearly stipulated the power and competence of the Committee: its role includes considering, scrutinizing and commenting on periodic reports by the parties on their implementation of the Covenant; to consider and examine individual complaints or communications (petitions) and to pass recommendations or General Comments. Nowhere is the Committee empowered judicial functions to render a legally binding decision.¹⁰⁶ The prevailing intentions of states do also suggest the absence of the judicial competence of the Committee. Because of the adverse attitude of

¹⁰⁶ Anthony Aust, *Supra* Note at No.3, P.123.

many states towards judicial settlements of human rights at international level, both UN and human rights treaty bodies were established as non-judicial monitoring institutions with less moderate course of actions so as to strike a compromise between state sovereignty and the requirement that states comply with international standards on human rights.¹⁰⁷ In line with this trend, the ILC in its 1997 report, after stating that compatibility test is the most important criterion for determining the admissibility of reservations, it has pointed out that where a human rights treaty establishes a monitoring body, unless the treaty provides otherwise the body is competent only to comment on and make recommendations as to the admissibility of reservations.¹⁰⁸

Thus, the Committee's assumption that it is the only competent body to have a final say on incompatible reservations seems to be out of legal reality. Such extraordinary position of the Committee may backfire on the credibility of the Committee at least for the moment. In the case of *Kennedy v Trinidad and Tobago*, when the latter acceded to the first Optional Protocol of ICCPR with reservation to article 1 thereof to the effect that the Committee shall not be competent to receive and consider communications to any prisoner who is under sentence of death, the Committee, in its views on 2 November 1999, determined that the reservation was impermissible and therefore could not produce any legal effect.¹⁰⁹ Trinidad and Tobago did not accept the decision. It not only refused to cooperate any further in the case of Kennedy, but it then availed itself of the opportunity to denounce the Optional Protocol of ICCPR definitively on 27 March 2000.¹¹⁰ It is clear that the overzealous attitude of the Committee has done more harm than good on maintaining both the universal application and unity and (integrity) of human rights treaties. It may be well argued that the Committee will have some kind of judicial competence, but there must be first some international instruments in the future for its authority, otherwise its mere claiming of authority without legal basis is a cart before the horse.

But, it does not mean that the above reasons invoked by the Committee are irrelevant. It is also not to mean that the rules of the Vienna Convention with regard to reservations to human rights treaties are appropriate. There should be a shift of some judicial power to human rights

¹⁰⁷ Antonio Cassese, *Supra Note at No.1, P.363.*

¹⁰⁸ Anthony Aust, *Supra Note at No.3, P.124*

¹⁰⁹ Press Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University, 2003, P.162.

¹¹⁰ *Ibid.*

supervising bodies in order to achieve genuine human rights protection. An absolute reliance on states on the final determination of compatibility of reservations to human rights treaties and sticking to the dogma of state sovereignty as argued by USA and UK does not take us anywhere, which in turn contrary to the spirit of core values of human rights. So there should be some workable reforms in this regard.

4. Conclusion and Recommendations

Based on the findings of my research the following concluding remarks and recommendations can be suggested:

1) As a general principle reservations to human rights treaties have been treated under the rules of Vienna Convention on the Law of Treaties and other international law in the same way other types of treaties have been handled. As a general principle, reservations are not prohibited unless they are exceptionally prohibited by the treaty or found incompatible to the object and purpose of the treaty. This principle is also applicable to human rights treaties pursuant to such rules of reservations. But looking at human rights treaties with the same mirror of other ordinary treaties is a cause of some controversies and there should be a development of special rules of reservations that can suit the nature of human rights. Further, allowing reservations as a matter of principle is contrary to other principle which runs that in principle states must accept the full range of human rights obligations that makes reservations exceptional for human rights.

2) Despite the ambition of the Vienna Convention to achieve the balance between universality and integrity of human rights treaties through compatibility test, it has not come up with some sort of guidelines and objective standards to determine such criteria. Nor have such standards been developed in customary law or by monitoring bodies and international and regional courts. This situation leaves a lot of controversies and ambiguities that cast major obstacle to the determination of incompatible reservations and human rights protection in general. Thus, developing objective standards in the matter is more than necessary.

3) Under the rules of the Convention and prevailing practices contracting states seem to have an upper hand and final say on deciding the validity of reservations and their compatibility with the object and purpose of human rights treaties in particular. This may be welcomed in other treaties. But these