RESERVATIONS TO MULTILATERAL TREATIES ON HUMAN RIGHTS*

MASSIMO COCCIA**

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* This article is dedicated, with the deepest sorrow, to the memory of Professor Antonio Malintoppi, my teacher and mentor. His untimely passing was a great loss to all those who knew and admired him.

** Institute of International Law—University of Rome Law School. J.D., 1981, University of Rome Law School; LL.M., 1984, University of Michigan Law School.

Among the possible approaches to the problem of the international protection of human rights, the treaty approach has proven to be the most effective. Several considerations lead to the conclusion that multilateral treaties are perhaps the only legal means that may give a certain degree of international protection to human rights. These considerations include the inherent difficulty in ascertaining any rule of customary international law, the lack of consensus concerning the true nature of the "general principles of law recognized by civilized nations,"[1] the vagueness of the human rights provisions of the UN Charter,[2] and the uncertainty about the legal meaning and effect of the Universal Declaration of Human Rights[3] and other General Assembly resolutions. Obviously, the treaty approach has several weaknesses as well,[4] but it can be an effective tool for implementing "hard law"[5] in this field. For example, this effectiveness has been amply demonstrated by the implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms[6].

A distinctive feature of the treaty approach is the ability of any contracting State to make reservations at the moment of ratification of or accession to an international agreement.[7] The term "reserva-

1. Statute of the International Court of Justice art. 38(1)(c).

2. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

3. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948).

4. *See* Bilder, *Rethinking International Human Rights: Some Basic Questions*, WIS. L. REV. 171, 205 (1969). Bilder points out four weaknesses of the treaty approach. These include: (1) conventions are legally binding only on States which accept them; (2) the provisions of conventions often reflect agreement only at the lowest common level and the language itself is often very "soft"; (3) the sense of obligation to international commitments may be weak; and (4) even when governments ratify and enact domestic implementing legislation the practical enforcement may be slight. However, it appears that Bilder's critique blends two different approaches. One approach considers the weaknesses of the international legal system *as a whole*, and is reflected by items (3) and (4) above. Another approach is to analyze the weaknesses of one of the available instruments *within* the international legal system, which is done by items (1) and (2) above. For the purposes of this article, the second approach will be followed; that is, the issues involved here will be analyzed from the international legal perspective without considering the practical and political enforcement problems which are the well-known background of every international law issue.

5. On the notion of "hard" and "soft" law see Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549 (1980).

6. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. 5 [hereinafter cited as European Convention].

7. *See generally* D. ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 334-336 (4th ed. 1955); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 605-608 (3d ed. 1979); C. DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL 291-294 (4th ed. 1970); T. ELIAS, THE MODERN LAW OF TREATIES 27-36 (1974); M. GIULIANO, 1 DIRITTO INTERNA-

tion" is construed by the Vienna Convention on the Law of Treaties[8] as meaning a "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."[9] The ability to individually limit the scope of certain norms would appear to be an easy way for unwilling States to avoid compliance with the legal obligations embodied in multilateral treaties on human rights.[10] However, the possibility of formulating reservations may well be seen as a strength rather than a weakness of the treaty approach, insofar as it allows a more universal participation in human rights treaties.[11] Prior to any discussion of this point, however, it is appropriate to briefly outline the historical evolution of the law concerning reservations to multilateral treaties, which "has

ZIONALE 379-86 (1974); K. HOLLOWAY, MODERN TRENDS IN TREATY LAW 467-542, 592-631, 645-51 (1967); P.-H. IMBERT, LES RÉSERVES AUX TRAITÉS MULTILATÉRAUX (1979); A. MCNAIR, THE LAW OF TREATIES 158-177 (1961); G. MORELLI, NOZIONI DI DIRITTO INTERNAZIONALE 315-19 (7th ed. 1967); I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 40-50 (1973); H. THIERRY, J. COMBACAU, S. SUR & C. VALLÉE, DROIT INTERNATIONAL PUBLIC 60-65 (3d ed. 1981); E. VITTA, LE RISERVE NEI TRATTATI (1957); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 137-93 (1970); Anderson, *Reservations to Multilateral Conventions: A Re-Examination*, 13 INT'L & COMP. L.Q. 450-481 (1964); Bishop, *Reservations to Treaties*, 103 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 245-341 (1961); Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67-92 (1976-77); Fitzmaurice, *Reservations to Multilateral Conventions*, 2 INT'L & COMP. L.Q. 1-26 (1953); Fitzmaurice, *Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 272-93 (1957); Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372-94 (1980); Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 38-42 (1978); Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71-116 (1982); Nisot, *Les réserves aux traités et la Convention de Vienne du 23 Mai 1969*, 77 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [R.G.D.I.P.] 200-06 (1973); Parry, *The Law of Treaties*, in MANUAL OF PUBLIC INTERNATIONAL LAW 194-198 (M. Sorenson ed. 1968); Ruda, *Reservations to Treaties*, 146 R.C.A.D.I. 95-218 (1975); Szafarz, *Reservations to Multilateral Treaties*, 3 POL. Y.B. INT'L L. 293-316 (1970); Teboul, *Remarques sur les réserves aux conventions de codification*, 86 R.G.D.I.P. 679-717 (1982).

8. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969) (*entered into force* Jan. 27, 1980) [hereinafter cited as Vienna Convention].

9. *Id.* art. 2(1)(d). Many provisions of the Vienna Convention are regarded as a codification of customary international law. *See infra* text accompanying notes 27-79.

10. At the Vienna Conference Mr. Maresca (Italy) colorfully asserted that "reservations might be regarded as the disease of treaty-making." U.N. Doc. A/CONF.39/Add.1, at 37 (1969).

11. O. SCHACHTER, M. NAWAZ & J. FRIED, TOWARD WIDER ACCEPTANCE OF U.N. TREATIES 148 (1971). This UNITAR study shows statistically that "the treaties . . . which permit reservations, or do not prohibit reservations, have received proportionally larger acceptances than the treaties which either do not permit reservations to a part or whole of the treaty, or which contain only one substantial clause, making reservations unlikely."

manifestly undergone a great deal of change over the last thirty years."[12]

I. THE PROBLEM OF RESERVATIONS TO MULTILATERAL TREATIES: AN HISTORICAL SURVEY

A. Before the Second World War

Traditional doctrine required the unanimous consent of all contracting States in order for a State making a reservation to become a party to the treaty. This so-called unanimity rule was based on the principle of the integrity of the treaty, which was deemed to be unsusceptible of exceptions. The practice of the League of Nations showed a definite acceptance of this doctrine as law by its Member States. In 1927, the Council of the League of Nations adopted a Report of the Committee of Experts for the Progressive Codification of International Law.[13] The Report, which restated the doctrine of unanimous consent for the admission of reservations, read in pertinent part:

> In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.[14]

It should be noted that the Secretariat of the League, in its position as depositary of treaties, went even further than the Committee of Experts. The Secretariat of the League asked for unanimous acceptance of an accession which was subject to reservation not only by all "contracting parties" of a treaty, but also by all "signatories."[15]

Although the unanimity doctrine was very well established and had the support of all leading international law scholars, a new practice regarding the admission of reservations to multilateral treaties arose within the American States. In 1928, the Sixth International Conference of American States adopted the Havana Convention on Treaties.[16] Article 6 of the Havana Convention reads as follows:

> 1. Ratification must be unconditional and must embrace

12. Bowett, *supra* note 7, at 67.

13. Report of the Committee of Experts for the Progressive Codification of International Law, 8 LEAGUE OF NATIONS O.J. 69 (1927).

14. *Id.* at 800.

15. *See Harvard Research in International Law*, 29 AM. J. INT'L L. 843, 910 (Supp. 1935).

16. Havana Convention on Treaties, Feb. 20, 1928, *reprinted in Conventions on Public International Law Adopted by the Sixth International Conference*, 22 AM. J. INT'L L. 124, 138-142 (Supp. 1928).

the entire treaty. It must be made in writing pursuant to the legislation of the State.

2. In case the ratifying State makes reservations to the treaty, it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance.

3. In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation to the other contracting States with the State making the reservation.[17]

The radical changes brought about by this Article, although partially hidden by the conservative language of the first paragraph, are to be found in the second and third paragraphs. The second paragraph, which refers to bilateral treaties, introduced the concept of tacit or implied acceptance of a reservation. Meanwhile, the third paragraph, which refers to multilateral treaties, recognized the possibility of applying the rest of the treaty to the reserving States, and brought about the so-called rule of reciprocity of reservations.

Following the adoption of the Havana Convention, the American States consistently maintained this particular system of reservations. The new system was refined in subsequent treaties and in the practice of the Pan American Union and the Organization of American States.[18] The Pan American doctrine heavily influenced general international practice and launched a new trend in the law of treaties. This trend was recognized after the war by the International Court of Justice, and culminated in the Vienna Convention on the Law of Treaties. It should also be mentioned that the 1928 Havana Convention, which ultimately brought about a major change in international law, was based on a draft prepared by the International Commission of American Jurists. Ironically, it may be reasonably assumed that the members of the Commission actually overlooked the meaning of Article 6 since the record does not show any intention by the Commission to forsake the traditional unanimity rule.[19]

17. *Id.* art. 6.

18. For a detailed account of the birth and growth of the Pan American Doctrine, see IMBERT, *supra* note 7, at 33-38; Ruda, *supra* note 7, at 115-33.

19. *See* Ruda, *supra* note 7, at 116.

B. The 1951 Advisory Opinion of the International Court of Justice

In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[20] the International Court of Justice perceived that the international community had changed and that the attitude of States concerning international law had changed as well. With respect to multilateral treaties, the priority had shifted from the principle of the absolute integrity of the treaty to the principle of universal participation. The Court seemed to pay homage to the traditional unanimity rule, stating that "the notion of the integrity of the convention as adopted . . ., which is directly inspired by the notion of contract, is of undisputed value as a principle."[21] However, the Court made it clear that times had changed and that there was "a new need for flexibility in the operation of multilateral conventions."[22] The Court added that "it does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law."[23] Consequently, the Court substantially adopted the Pan American doctrine, holding that:

> [E]ach State . . . will or will not . . . consider the reserving State to be a party to the Convention [and] such a decision will only affect the relationship between the State making the reservation and the objecting State . . . . Finally, it may be that a State . . . will . . . object to [a reservation] but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.[24]

Furthermore, the Court introduced a new element which was not a part of the Pan American practice. In an attempt to limit and set guidelines for the future behavior of States, the Court established a criterion to evaluate the admissibility of reservations and objections. The Court stated:

> The object and purpose of the Convention thus limits both the freedom of making reservations and that of objecting to them. It follows that it is the *compatibility of a reservation with the object*

20. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 [hereinafter cited as 1951 Advisory Opinion on Genocide].

21. *Id.* at 21.

22. *Id.* at 22.

23. *Id.* at 24.

24. *Id.* at 26-27.

> *and purpose of the Convention* that must furnish the criterion for the attitude of a State in making the reservation on accession, as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.[25]

The majority opinion, however, was sharply criticized by two dissenting opinions.[26] The dissenting opinions emphasized the difficulty of determining the actual object and purpose of a treaty. In addition, the dissents critiqued the uncertainty provoked by the prerogative of each State to decide whether a reservation is admissible under the "compatibility rule." Nonetheless, the Court's decision soon gained widespread acceptance among States and scholars. The ultimate consequence of this favorable reception is clearly visible in the Vienna Convention on the Law of Treaties.

C. *The Vienna Convention on the Law of Treaties and the Present Status of Customary International Law*

The Vienna Convention on the Law of Treaties is the basic document for any modern study involving issues pertaining to the law of treaties.[27] The Convention has been a major work of "codification" and "progressive development"[28] of international law which has lasted many years,[29] and it has heavily influenced the legal pattern of international relations.

Besides Article 2(1)(d),[30] there are other provisions which deal with the question of reservations. Article 19 governs when reservations may be formulated.[31] Article 20 determines when they may be

25. *Id.* at 24 (emphasis added).

26. One dissenting opinion was written jointly by Judges Guerrero, McNair, Read and Hsu Mo. The other dissenting opinion was written individually by Judge Alverez. *Id.* at 31.

27. The Vienna Convention was adopted at the end of the Vienna Conference on the Law of Treaties by the large majority of 79 votes in favor, 1 against and 19 abstentions. U.N. Doc. A/CONF.39/11/Add.1, at 207 (1969). *Cf.* Ago, *Droit des traités à la lumière de la Convention de Vienne*, 134 R.C.A.D.I. 297-332 (1971); Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47-69 (1970).

28. *See* U.N. CHARTER art. 13; STATUTE OF THE INTERNATIONAL LAW COMMISSION art. 15. *See generally* Ago, *La codification du droit international et les problèmes de sa réalisation*, in RECUEIL D'ETUDES EN HOMMAGE 'A P. GUGGENHEIM [REC. GUGGENHEIM] 93-131 (1968).

29. The Draft of the Convention presented at the Vienna Conference was the culmination of seventeen years of work by the International Law Commission and in particular by the four eminent Special Rapporteurs succesively appointed: Brierly, Lauterpacht, Fitzmaurice and Waldock.

30. Vienna Convention, *supra* note 8, art. 2(1)(d).

31. *Id.* art. 19.

accepted or objected to[32] and Article 21 describes their legal effects.[33] In addition, Article 22 describes when reservations may be withdrawn[34] and Article 23 outlines the procedures regarding reservations, acceptances, objections and withdrawal.[35] These provisions seem to indicate that the traditional unanimity rule is obsolete, although it has not yet totally disappeared. In fact, the unanimous consent of all signatories is still required for reservations to multilateral treaties open to a restricted number of parties. Article 20(2) requires:

> When it appears from the limited number of the negotiating States and the object and the 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.[36]

Moreover, a remnant of the unanimity rule can also be found in Article 20(3): "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."[37]

Apart from these specific cases, the Vienna Convention, which codifies flexible rules intended to foster a larger participation in multilateral treaties, seems to uphold and develop the principles set forth in the 1951 Advisory Opinion on Genocide. The basic premise of the norms embodied in the Vienna Convention is that sovereign States are free to make whichever reservations they deem appropriate unless the treaty forbids some or all of them. Only reservations which are compatible with the object and purpose of the treaty are admissible.[38] The real extent of this "compatibility rule" is quite controversial and the issue will be dealt with below.[39]

Comparing this rule, as codified in the Vienna Convention, with the one envisaged in the 1951 Advisory Opinion on Genocide, one difference must be pointed out. Currently there is no limitation upon the ability of a State to accept or object to reservations. The International Court of Justice set forth the object and purpose rule as a test

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32. *Id.* art. 20.
33. *Id.* art. 21
34. *Id.* art. 22.
35. *Id.* art. 23.
36. *Id.* art. 20(2).
37. *Id.* art. 20(3). *See generally* Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BRIT. Y.B. INT'L L. 137-171 (1971).
38. Vienna Convention, *supra* note 8, art. 19.
39. *See infra* text accompanying notes 113-177.

to "limit both the freedom of making reservations and that of objecting to them."[40] The Vienna Convention, however, adopted the rule only with respect to the freedom of making reservations. The implications of this difference will be discussed below as well.

It is fair to say that the interplay between reservations and the acceptances of or objections to such reservations determines the obligations of parties to multilateral treaties in spite of the compatibility rule. In treaties where a "reservation clause" expressly authorizes a given reservation the situation is quite clear. No acceptance of such a reservation is needed[41] and an objection would be a breach of the treaty. The reason such an objection would constitute a breach is because "having made its permissibility the object of an express agreement, the parties have abandoned any right thereafter to object to such a reservation."[42] The role of acceptances and objections, however, becomes fully relevant when a treaty has no reservation clause. In this case, the situation is rather complex.

As an illustration, if State A accepts (or does not object to) the reservation of State B, the treaty will then be in force between them as modified by the reservation. If, on the other hand, State A objects to the reservation of State B, the treaty will be either not in force between them (if so expressly stated by A),[43] or it will be in force without the provision to which the reservation relates. The practical result of this system is that a modern multilateral treaty involves a patchwork of different rights and obligations among the various contracting States, depending upon reservations, objections and acceptances.

To a lesser extent, a certain role is also played by the so-called declarations and understandings, although they are not expressly

40. 1951 Advisory Opinion on Genocide, *supra* note 20, at 24.

41. Vienna Convention, *supra* note 8, art. 20(1).

42. Bowett, *supra* note 7, at 84-85.

43. There is, therefore a presumption in favor of the entry into force of the treaty among the two related parties. If the objecting State does not declare anything besides the objection, the treaty will be deemed to be in force between that State and the reserving State notwithstanding the objection. The draft of the International Law Commission, however, had the opposite presumption. *See* Report of the International Law Commission to the U.N. General Assembly, *Draft Articles on the Law of Treaties* [hereinafter cited as 1966 I.L.C. Report], [1966] 2 Y.B. INT'L L.COMM'N 173, 202-208, U.N. Doc. A/CN.4/SER.A./1966/Add.1. However, the strong position on this point taken by the Soviet Union during the Vienna Conference determined the final version of the article. *See USSR Explanatory Memorandum on the Question of Reservations to Multilateral Treaties* (with a proposed amendment concerning Article 17 (now 20)), U.N. Doc A/CONF.39/L.3 (1969). The USSR amendment was eventually approved by 49 votes to 21, with 30 abstentions. *See* U.N. Doc. A/CONF.39/11/Add.1, at 35 (1969).

mentioned in the Vienna Convention.[44] Often they look like true reservations but are labeled in a different way. In such cases, since it is the substance and not the label that determines the nature of a statement, they must be regarded simply as reservations. Article 2(1)(d) refers indirectly to declarations and understandings when it provides that the statements having certain characteristics "however phrased or named" will be treated as reservations.[45]

The term "declaration" is often used when a government wants to give notice of its views on certain issues without modifying or limiting any of its rights or obligations under the treaty. In fact, a declaration would be more properly considered as a political statement. The term "understanding" or "interpretative declaration" is generally used when a government intends to clarify or explain how certain provisions ought to be interpreted or applied, while retaining the substantive rights or duties stipulated in the treaty. Declarations and understandings short of reservations should not create legal rights or obligations for the other contracting parties.[46] However, in view of the fact that they are not directly regulated by the Vienna Convention, this point is debatable. According to some scholars, even interpretative declarations are opposable by and to the declaring State in certain instances.[47]

Discerning the real substance of the often complex statements made by States upon ratification of, or accession to a multilateral treaty is a matter of construction and must be solved through the ordinary rules of interpretation. In practice, there seem to be two primary criteria developed by international judicial bodies to distinguish between opposable and non-opposable statements, that is, between reservations and interpretative declarations. First, a statement is a true reservation if it purports to exclude or modify the *legal effect* of certain provisions, which is something more than just the exclu-

44. *See generally* ELIAS, *supra* note 7, at 35; HOLLOWAY, *supra* note 7, at 485-95; SINCLAIR, *supra* note 7, at 44; WHITEMAN, *supra* note 7, at 137-38; Bishop, *supra* note 7, at 303-22; Bowett, *supra* note 7, at 67-70.

45. Vienna Convention, *supra* note 8, art. 2(1)(d).

46. A simple declaration or understanding is "[un] acte purement unilatéral qui ne peut pas etre invoqué pour justifier—par voie de réciprocité—une non-application totale ou partielle du traité mais qui, à l'inverse, est inopposable aux autres Etates." Imbert, *La question des réserves dans la Décision Arbitrale du 30 Juin 1977 relative à la délimitation du plateau continental entre la République Française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*, 1978 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 29, 33.

47. *See* McRae, *The Legal Effect of Interpretative Declarations*, 49 BRIT. Y.B. INT'L L. 155 (1978). McRae draws a distinction between a "mere interpretative declaration" and a "qualified interpretative declaration." The former is treated as a non-opposable statement and the latter as a reservation.

sion or modification of the *actual terms* of certain provisions. Second, it is a true reservation if it purports to be a condition set forth by the State for its acceptance of the treaty.[48]

Concerning the relationship between the Vienna Convention and customary international law, it is not easy to ascertain: (1) which provisions of the Convention were, in 1969, the codification of a "general practice accepted as law,"[49] and thus binding *qua* customary international law on the whole international community; (2) which provisions were then the expression of "progressive development," and thus binding *qua* treaty rules only on States which were parties to the Convention; (3) which provisions did not codify any existing rule but have since become customary law; and (4) which provisions were, in 1969, the expression of a general practice acepted as law but have since lost this character.[50] Notwithstanding the difficulties of classifying any provision in the proper category, the practices of States and the decisions of international tribunals show a definite trend towards a greater acceptance of the Vienna Convention as the expression of the present status of the customary international law of treaties.[51]

With regard to judicial decisions, the International Court of Justice, in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*,[52] stated: "The rules laid down by the Vienna Convention on the Law of Treaties

48. *See* Anglo-French Continental Shelf Arbitration Case, 18 R. INT'L ARB. AWARDS 3, 38-40; Temeltesch Case, [1982] Y.B. EUR. CONV. ON HUMAN RIGHTS, paras. 68-82 (Eur. Comm'n on Human Rights) (Report of May 5, 1982). For comments on this aspect of the cases, see Bowett, *supra* note 7, at 90-92; Boyle, *The Law of Treaties and the Anglo-French Continental Shelf Arbitration*, 29 INT'L COMP. L.Q. 498 (1980); Imbert, *supra* note 46, at 29; Imbert, *Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (Affaire Temeltasch)*, 87 R.G.D.I.P. 580 (1983) [hereinafter cited as *Affaire Temeltasch*].

49. Statute of the International Court of Justice art. 38(1)(b).

50. As regards the issue of the interplay between customary and conventional international law, see G. TUNKIN, THEORY OF INTERNATIONAL LAW 142-147 (W.E. Butler trans. 1974); Baxter, *Treaties and Custom*, 129 R.C.A.D.I. 25-106 (1970); Jimenez de Arechaga, *supra* note 7, at 12-23.

51. *Cf.* BROWNLIE, *supra* note 7, at 601; ELIAS, *supra* note 7, at 5-8; VERDROSS, DIE QUELLEN DES UNIVERSELLEN VÖLKERRECHTS 39 (1973); Briggs, *United States Ratification of the Vienna Treaty Convention*, 73 AM. J. INT'L L. 470 (1979). *But cf.* Weil, *Vers une normativité relative en droit international?*, 86 R.G.D.I.P. 5, 42-44 (1982) (modified and slightly expanded in the English version *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 439-440 (1983)).

52. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16.

concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."[53] Again, in the *Fisheries Jurisdiction Case*,[54] the International Court of Justice asserted that:

> The principle of termination of a treaty by reason of change of circumstances, . . . and the conditions and exceptions to which it is subject have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law.[55]

In other cases it seems that the International Court of Justice found it unnecessary to expressly state that the Vienna Convention was cited as the codification of customary law.[56]

In addition to the International Court of Justice, other international tribunals have acknowledged the customary status of the Vienna Convention. For example, in the *Beagle Channel Arbitration Case*,[57] the Court of Arbitration, which was established by the British Government pursuant to the Argentina-Chile Treaty of Arbitration of 1902,[58] held that: "[T]he traditional canons of treaty interpretation [are] now enshrined in the Vienna Convention on the Law of Treaties, which . . . both the Parties have accepted as governing the matter . . . ."[59] Additionally, in the *Young Loan Arbitration Case*,[60] the Arbitral Tribunal for the Agreement on German

53. *Id.* at 47.

54. Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 12 (Judgment of Feb. 2).

55. *Id.* at 18. The one in the text is not the only instance in the Judgment of significant language. *E.g.*, "There can be little doubt, as is . . . recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void." *Id.* at 14.

56. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46, 67 (Judgment of Aug. 18) ("[A]ccording to the definition of a material breach of treaty contained in Article 60 of the 1969 Vienna Convention . . . ."); Agean Sea Continental Shelf Case (Greece v. Turk.), 1978 I.C.J. 1, 39 (Judgment of Dec. 19) ("[T]he Court . . . knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement (*cf.* Arts. 2, 3 and 11 of the Vienna Convention on the Law of Treaties)"); Interpretation of the Agreement of 25 March 1951 Between the W.H.O. and Egypt, Advisory Opinion, 1980 I.C.J. 73, 94-95 ("A further general indication as to what those obligations may entail is to be found in the second paragraph of Article 56 of the Vienna Convention on the Law of Treaties . . . .").

57. Beagle Channel Arbitration Case (Argen. v. Chile), *reprinted in* 52 INT'L L. REP. 93 (1979).

58. General Treaty of Arbitration, May 28, 1902, Argentina-Chile, 191 Parry's T.S. 215, *reprinted in* 95 BRITISH AND FOREIGN STATE PAPERS 759.

59. Beagle Channel Arbitration Case, *supra* note 57, at para. 15.

60. Young Loan Arbitration Case (Belg., Fr., Switz., U.K., & U.S. v. W. Germ.), *reprinted in* 59 INT'L L. REP. 494 (1980).

External Debts relied strongly on the Vienna Convention. The Court stated:

> The international law on treaties. . . has been codified in the Vienna Convention on the Law of Treaties of 23 May 1969. The provisions of the Convention do not apply in the present proceedings but nevertheless . . . the Convention properly reflects both the present and the past state of international treaty law, since as regards interpretation at least, it is restricted to the codification of customary law in force. This is a view subscribed to not only by all parties to these proceedings, but by the Tribunal itself in its previous decisions.[61]

With regard to the practice of States, the United States, for example, has often referred to several provisions of the Vienna Convention as binding international law, even though it is not a party to the Convention.[62]

Regarding the provisions relating to reservations, scholars and practitioners have considered them closer to the codification rather than the progressive development end of the spectrum of Vienna Convention norms.[63] At the Vienna Conference, although the formulation of Articles 19-23 was harshly debated, their final approval was almost unanimous.[64] Moreover, international jurisprudence has

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61. *Id.* at 529.

62. In the President's Message submitting the Convention to the Senate it is asserted that the Convention "is already generally recognized as the authoritative guide to current treaty law and practice." S. EXEC. DOC. NO. L, 92d Cong., 1st Sess., 1 (1971). In daily diplomatic correspondence the Vienna Convention is referred to over and over again by U.S. officials. Some instances include: (a) "The importance for the interpretation of a treaty of subsequent practice . . . had been expressed *inter alia* in Article 31 of the Vienna Convention on the Law of Treaties." 1973 DIG. U.S. PRAC. INT'L L. 360; (b) "If a party to the Chicago Convention commits a material breach of the obligation to ensure the safety of civil aviation, the other parties individually have the right to suspend the operation of the Convention in whole or in part with respect to the defaulting State in accordance with customary international law, as codified in Article 60 of the Vienna Convention on the Law of Treaties." 1973 DIG. U.S. PRAC. INT'L L. 307; (c) "Under customary international law, as reflected by Articles 35 and 36 of the Vienna Convention on the Law of Treaties . . . , neither rights nor obligations for third parties are created by a treaty unless the parties to the treaty so intend." 1978 DIG. U.S. PRAC. INT'L L., 701. *See also* 1977 DIG. U.S. PRAC. INT'L L., 107; 1978 DIG. U.S. PRAC. INT'L L. 767, 771, 775.

63. *See* IMBERT, *supra* note 7, at 78-81; Baxter, *supra* note 50, at 48 n.44. Baxter states that: "[I]ts provisions on reservations (Arts. 19-23) generally reflect the dominant modern view of the effect of reservations, as it has developed in the practice of States and of the United Nations."

64. The final vote on each article was as follows: art. 19: 92 in favor, 4 against and 7 abstentions; art. 20: 83, 0, 17; art. 21: 94, 0, 0; art. 22: 98,0,0; art. 23: 90,0,0. U.N. Doc. A/CONF.39/11/Add.1, at 30, 35, 36, 38, 36 respectively (1969).

also taken a position on the customary status of the Vienna provisions on reservations.

In the *Case Concerning the Delimitation of the Continental Shelf*,[65] the *ad hoc* Court of Arbitration, as well as the Parties in their pleadings, referred several times to the Vienna Convention. Both the Court and the Parties clearly assumed the current customary status of the rules on reservations. The Court stated:

> The Court shares the opinion of the Parties that the effect of the French reservations and the United Kingdom's refusal to accept them has to be appreciated in the light of the law in force at the time when those acts occurred. Like the Parties, it also recognizes that *the law governing reservations to multilateral treaties was then undergoing an evolution which crystallized only in 1969 in Article 19 to 23 of the Vienna Convention on the Law of Treaties.*[66]

The references to the Vienna Convention regime on reservations, made in this case by the Court and the Parties, are of particular significance. The treaty at stake was concluded *prior to* the Vienna Convention, which, by its own terms, "applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."[67] Since the Court and the Parties could not legally invoke any provisions of the Vienna Convention insofar as treaty rules, their frequent referrals to those provisions were made only in the context of their being norms of customary international law. This is especially significant because France has not signed the Convention, being the only State to vote against its adoption at the end of the Vienna Conference.

As a recent example of practice substantiating the overall customary status[68] of the provisions on reservations, mention may be made of the Report of the European Commission on Human Rights relating to the application by Mr. Temeltasch against Switzerland.[69] Both the Government of Switzerland, in its pleadings,[70] and the Commission, in its opinion,[71] invoked the Vienna Convention to determine whether Switzerland's interpretative declaration on Article

65. Case Concerning the Delimitation of the Continental Shelf (U.K. v. Fr.), 18 R. INT'L ARB. AWARDS 3 (1977).

66. *Id.* at 42-43, para. 38 (emphasis added). *See also id.* paras. 55, 58, 61. *Cf.* Boyle, *supra* note 48; Bowett, *supra* note 7, at 90-92; Imbert, *supra* note 46.

67. Vienna Convention, *supra* note 8, art. 4 (the so-called non-retroactivity provision).

68. The customary status is "overall" in the sense that it would seem incorrect to draw the conclusion that every aspect of those provisions has obtained that status.

69. Temeltesch Case, *supra* note 48.

70. *Id.*

71. *Id.*

6(3)(e) of the European Convention on Human Rights[72] could be regarded as an actual reservation.[73] Switzerland asserted that the Vienna Convention, which it had not signed, was "a source of guidance in the interpretation of the [European] Convention insofar as it stated generally accepted principles of international law."[74] Switzerland quoted the definition of "reservation" in Article 2(1)(d), and referred to the commentary on the Draft by the International Law Commission presented at the Vienna Conference.[75] While the Vienna Convention could not apply to the European Convention (because of the aforementioned Article 4 preventing retroactive application), the Commission upheld the relevance of the Vienna Convention to its decision, stating:

> As Article 64 [of the European Convention] contains no definition of the term "reservation", the Commission must analyze this notion, and the notion of "interpretative declaration," as they are understood in international law. In this regard, it will attach particular importance to the Vienna Convention on the Law of Treaties of 23 May 1969, which states above all the existing rules of customary law, and is essentially in the nature of a codification.[76]

The attitude of the American States, especially the United States, towards the Vienna Convention regime on reservations shows a very high regard for its customary status. In 1973 the General Assembly of the Organization of American States approved a set of Standards on Reservations to Inter-American Multilateral Treaties.[77] These Standards replaced the old Inter-American standards of 1932 and 1938 and made them compatible with the Vienna Convention. Prior to the vote, the United States Representative declared: "In supporting these standards, my delegation wishes to note its belief that the standards are not inconsistent with the relevant provisions of the Vienna Convention."[78]

Moreover, in a Department of State legal memorandum of 1976 there is clear support for the Vienna Convention despite a previous differing United States position on the matter:

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72. European Convention, *supra* note 6, art. 6(3)(e). This article concerns the right to have the free assistance of an interpreter.

73. *See supra* text accompanying notes 44-48.

74. Temeltesch Case, *supra* note 48, at para 32.

75. *Id.* at paras. 33-34.

76. *Id.* at para. 68. For a comment upon the case, see *Affaire Temeltasch*, *supra* note 48.

77. *See* O.A.S. Doc. OEA/SER. P, AG/Doc.375/73 Rev.1 (1973).

78. *See* 1973 DIG. U.S. PRAC. INT'L L. at 179.

> There is nothing in the Vienna Convention or in its legislative history which indicates that reservations may be communicated only by means of the instrument of ratification. A writing is required, but there is no specification as to the form that the writing must take. To the extent that the rule expressed . . . in the Vienna Convention appears to be inconsistent with the views set forth by Marjorie Whiteman in the *Digest of International Law*, it is the Legal Adviser's judgement that the . . . Vienna Convention formulations are correct.[79]

The foregoing instances suffice to demonstrate that, within the international community, there appears to be a wide acceptance of the norms on reservations embodied in the Vienna Convention as customary law. The legal pattern of this subject matter, although complex, seems to have achieved a certain degree of predictability. This is instrumental in the development of multilateral treaties as a tool for the implementation of human rights.

II. RESERVATIONS AND HUMAN RIGHTS TREATIES

A. In General.

The basic question concerning treaties on human rights is whether or not they are to be considered as a category separate from other multilateral treaties, and in particular, whether the rules on reservations just outlined apply to them with equal force.[80] State practice does not seem to differentiate, from the *legal* point of view, human rights treaties from other multilateral treaties. It is true, however, that the terms "reservation" and "human rights" appear to contradict one another.[81] Indeed, an argument may be made that all such reservations are void because every norm of a human rights treaty is *jus cogens*,[82] (that is, "a norm accepted and recognized by the 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").[83]

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79. *See* 1976 DIG. U.S. PRAC. INT'L L. at 216; *see also* 1975 DIG. U.S. PRAC. INT'L L. at 263-67.

80. *Cf.* HOLLOWAY, *supra* note 7, at 604-14.

81. Imbert, *Reservations and Human Rights Conventions*, 6 HUM. RTS. REV. 28 (1981).

82. *Cf.* HOLLOWAY, *supra* note 7, at 607.

83. Vienna Convention, *supra* note 8, art. 53. *See generally* BROWNLIE, *supra* note 7, at 512-15; Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 R.C.A.D.I. 221 (1981); Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 R.C.A.D.I. 271 (1981); Ronzitti, *La disciplina dello jus cogens nella Convenzione di Vienna sul diritto dei trattati*, 15 COMUNICAZIONI E STUDI 241 (1978).

In fact, some provisions of treaties on human rights seem to be among the best settled examples of *jus cogens*,[84] assuming that *jus cogens* exists.[85] However, not all of them appear to be of equal importance. The current trend of general international law seems to be towards "a distinction between different types of internationally wrongful acts on the basis of the subject-matter of the international obligation breached and, more particularly, of the importance which the international community attaches to obligations relating to certain matters."[86] In the *Barcelona Traction Case* (Second Phase),[87] the International Court of Justice supported this trend with an oft-quoted assertion:

> An essential distinction should be drawn between the *obligations of a State towards the international community as a whole* and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. . . . Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and as from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[88]

In Article 19 of its Draft Articles on State Responsibility the International Law Commission distinguishes between an "international crime" and an "international delict." The former is "the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."[89] The latter encompasses all other wrongs.

Three concepts flow out of this trend: *jus cogens*, obligations *erga omnes* and international crimes. Although these concepts are

84. The prohibition of slavery and genocide are among the examples quoted by the International Law Commission (I.L.C.). 1966 I.L.C. Report, *supra* note 43, at 248.

85. This is not something to taken for granted. *See* Weil, *supra* note 51, *passim*.

86. Report of the International Law Commission to the U.N. General Assembly, *Draft Articles on State Responsibility*, [1976] 2 Y.B. INT'L L. COMM'N 97; U.N. Doc. A/CN.4/SER.A./1976/Add.1 (part 2) [hereinafter cited as 1976 I.L.C. Report].

87. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3.

88. *Id.* at paras. 33-34 (emphasis added).

89. *See* 1976 I.L.C. Report, *supra* note 86, at 95. Among the examples of international crimes given in the draft Article itself is "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*." *Cf.* Jimenez de Arechaga, *supra* note 7, at 273-75.

related to one another it is difficult to reconcile them in the abstract because it is not clear to what extent they overlap or differ.[90] Assuming that these concepts actually have a place in international law,[91] it is fair to say that while the core of human rights obligations is surely affected by them, it is incorrect to treat all of the international human rights norms in the same way. The language of Article 19(3)(c) of the International Law Commission Draft on State Responsibility[92] is eloquent in this respect. The Draft states that "a serious breach on a widespread scale" cannot be put at the same level as a single violation of a minor provision.[93] For example, a generalized system of *apartheid* cannot be compared to the lack of free assistance by an interpreter. The fact that only a few, if any, provisions of treaties on human rights could be considered *jus cogens* or norms which create obligations *erga omnes*, or norms whose breach would be an international crime, means that a human rights treaty must be treated like any other multilateral treaty, even though its ethical meaning is indeed different. Accordingly, the effects of reservations must be the same.

B. Factors Inducing States to Make Reservations

Notwithstanding some scholarly attempts to promote the prohibition of reservations to human rights treaties,[94] State practice demonstrates that whenever a treaty has allowed reservations[95] States

90. The I.L.C. itself warned against easy assimilations of the three concepts. *See* 1976 I.L.C. Report, *supra* note 86, vol. I at 71, 74, 90, and vol. II at 119-20. It is a kind of "mystery triangle" which is puzzling several international law scholars. *See* Weil, *supra* note 51, at 442 (English version) and at 46 (French version). Weil sharply criticizes this trend for confusing *lex lata* and *lex ferenda* and significantly characterizes the mentioned concepts as "legal fashions adorned with the trappings of modernism."

91. If the position is taken that these concepts have not crystallized into norms of international law, then the argument that human rights treaties are wholly *jus cogens* vanishes and the regime of reservations must be the ordinary one of every multilateral treaty.

92. 1976 I.L.C. Report, *supra* note 86, at 95.

93. *Id.*

94. See the Report by Professor I.R. Moreno, *Reservations to Treaties Relating to Human Rights*, in International Law Association, Rep. 54th Conf., at 642-45 (1970), where the following resolution was proposed: "That the conventions consecrating international recognition of human rights *cannot be subject to reservations by the States* when these reservations restrict the rights they consecrate or annul their effect." *Id.* at 645 (emphasis added). However, the resolution eventually approved by the International Law Association ended up being strictly adherent to the reality of international practice: "A convention consecrating international recognition of Human Rights cannot be subject to reservations *incompatible with the object and purpose thereof.*" *Id.* at xiv (emphasis added). *See also Discussion at the Working Session on Human Rights, id.* at 596-625 (in particular at 603-04, 624).

95. Only two of the numerous treaties on human rights expressly provide that reservations are forbidden. These are: (1) Supplementary Convention on the Abolition of Slavery, the Slave

have made much use of this possibility.[96] States are often motivated to resort to reservations as a result of many factors other than a mere unwillingness to respect human rights. In a sphere so sensitive to State sovereignty there are several legal, political and practical factors which may induce a State to make one or more reservations while ratifying, or acceding to, a multilateral treaty on human rights.

One common factor is the presence, in the domestic law of the State concerned, of a constitutional or statutory provision which is somewhat inconsistent with the treaty at stake. For example, in regard to the Convention on the Political Rights of Women,[97] numerous States have made reservations to the provision which confers upon women the right to hold public office, since there may be a conflict with domestic laws on military recruitment.[98]

Another frequent concern of States in ratifying human rights conventions is the difficulty of maintaining the constitutional balance between the jurisdictions of central and local authorities. This is an especially important concern in States which have a federal system of government.[99] A related factor is the existence in some States of territories with special legal status where reservations of a "geographical" nature are required.[100] Additionally, some treaties are inconsistent with each other in some aspects while overlapping in others. This is the case, for example, with the European Convention on Human Rights and the two UN International Covenants,[101]

Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 40 (1957) (art. 9: "No reservation may be made to this Convention"), and (2) Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 (art. 9: "Reservations to this Convention shall not be permitted").

96. *See* U.N., Multilateral Treaties Deposited with the Secretary-General, Dec. 31, 1982, ST/LEG.SER.E/2, at 91-145 [hereinafter cited as 1982 U.N. Treaties].

97. Convention on the Political Rights of Women, July 7, 1954, 193 U.N.T.S. 135.

98. *E.g.*, the reservations made by Australia, Austria, Denmark, Fiji, Federal Republic of Germany, India, Italy, Mauritius, New Zealand, Sierra Leone and the United Kingdom. U.N., Multilateral Treaties Deposited with the Secretary-General, Dec. 31, 1981, ST/LEG. SER.E/2, at 492-96 [hereinafter cited as 1981 U.N. Treaties].

99. *Cf.* SCHACHTER, NAWAZ & FRIED, *supra* note 11, at 107-14; VITTA, *supra* note 7, at 91; Liang, *Notes on Legal Questions Concerning the United Nations: Colonial Clauses and Federal Clauses in United Nations Multilateral Instruments*, 45 AM. J. INT'L L. 108-128 (1951).

100. *E.g.*, the reservations to the International Covenant on Economic, Social and Cultural Rights made by the United Kingdom concerning Hong Kong and by the Netherlands concerning the Antilles. 1982 U.N. Treaties, *supra* note 96, at 114, 116. *Cf.* VITTA, *supra* note 7, at 88-92; Liang, *supra* note 99.

101. International Covenant on Economic, Social & Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter cited as Economic, Social and Cultural Covenant]; International Covenant on Civil & Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Civil and Politial Covenant]. *See* Capotorti, *Possibilities of Conflict in National Legal Systems*

where several reservations were made by some European States for this very reason.[102] Sometimes the relevant factor is the unwillingness of national parliaments to go through the laborious and time-consuming process of enacting new legislation to comply with all of the treaty provisions. This can occur due to the existence of more urgent domestic interests, time pressures and other such factors. In a situation such as this a State may nevertheless ratify the treaty in order to show its general concern for human rights.[103] A similar consideration is the objective impossibility of many less developed countries to readily comply with certain provisions concerning "second generation" human rights. This usually brings about one or more reservations postponing such provisions, or making their application more gradual.[104]

Another factor which has possibly played at least a diminishing a role in the use of reservations upon ratification of human rights treaties is the lack of expertise in the governments of less developed countries, especially those which have recently gained their independence.[105] The shortage of personnel capable of grasping the actual scope of a complex multilateral treaty and its interaction with existing or prospective legislation, coupled with their inability to perform adequate support functions results in a more cautious approach to the treaty under consideration.[106] Other problems are created by

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Between the European Convention and Other International Agreements, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW 72-93 (A.H. Robertson ed. 1968).

102. *E.g.*, the sixth French reservation to the International Covenant on Civil and Political Rights which states: "The Government of the Republic declares that articles 19, 21 and 22 of the Covenant will be implemented in accordance with articles 10, 11 and 16 of the European Convention. . . ." 1982 U.N. Treaties, *supra* note 96, at 123.

103. *Cf.* SCHACHTER, NAWAZ & FRIED, *supra* note 11, at 93-107.

104. *See, e.g.*, the reservation by Madagascar to Article 13 of the International Covenant on Economic, Social and Cultural Rights: "The Government of Madagascar states that it reserves the right to postpone the application of article 13, paragraph 2, of the Covenant, more particularly in so far as relates to primary education, since, while the Malagasy Government fully accepts the principles embodied in the said paragraph and undertakes to take the necessary steps to apply them in their entirety at the earliest possible date, the problems of implementation, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage." 1982 U.N. Treaties, *supra* note 96, at 114.

105. *See* SCHACHTER, NAWAZ & FRIED, *supra* note 11, at 88-90; Nawaz, *The Ratification of or Accession to Human Rights Conventions*, 13 INDIAN J. INT'L L. 576, 579 (1973); UNITAR, *Acceptance of Human Rights Treaties*, U.N. Doc. A/CONF.32/15, at 7 (1968) [hereinafter cited as UNITAR Paper].

106. A different issue concerning the new States is the problem of making anew, confirming, or withdrawing reservations and objections (at the moment of their succession) to multilateral treaties stipulated before the independence by the former Colonial Powers. *See* Gaja, *Reservations to Treaties and the Newly Independent States*, 1 ITAL. Y.B. INT'L L. 52-68 (1975).

dispute settlement clauses. These clauses confer jurisdiction upon the International Court of Justice or other judicial bodies, and as a matter of principle are not accepted by many States for any type of treaty whatsoever.[107] Another factor common to several States is their unwillingness to deal in any way with certain other States for political or ideological reasons. In this type of case a reservation is one way to prevent the entry into force of a treaty with regard to a particular State. By adopting the reservation the State avoids political problems such as those which might be caused by the "recognition" of other States.[108]

Finally, a very important factor in this area is that States often fear the unforeseeable consequences of a general ratification. This is due to the element of uncertainty present in every treaty. This uncertainty is sometimes aggravated by the vagueness of certain provisions and the "dynamic force" inherent in human rights treaties.[109] The simplest manner of avoiding unknown consequences which may affect a State's interest is by the adoption of a reservation. However, the paradoxical outcome is that many reservations are ultimately found to be unnecessary.[110]

In conclusion, several factors might play a role in inducing a State to make reservations to or refraining from ratifying altogether to a human rights treaty.[111] This is true even though the State might

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As Professor Gaja points out, the fact that in most cases new States have taken no action with regard to reservations or objections while notifying their succession to treaties, adds consistency to the argument outlined in the text.

107. *Cf.* Gamble, *supra* note 7, at 387. Gamble's statistical study shows that twelve percent of all the reservations made to multilateral treaties entered into force from 1947 to 1971 deal with provisions on compulsory settlement of disputes. As an illustration of a State's practice, see Szafarz, *Reservations and Objections in the Treaty Practice of Poland*, 6 POL. Y.B. INT'L L. 245 (1974) ("On analysis of Polish reservations, . . . the most numerous reservations are those that exclude the judicial and arbitration clauses from the scope of obligations accepted by Poland"). For a recent discussion of the political role of the World Court, see Falk, *The Role of the International Court of Justice*, 37 J. INT'L AFF. 253 (1984).

108. The obvious example is the standard reservation made by most of the Arabic States to dodge any treaty relationship with Israel. *E.g.*, the reservation made by Syria to both International Covenants: "The accession of the Syrian Arab Republic to these two Covenants shall in no way signify recognition of Israel or entry into a relationship with it regarding any matter regulated by the said two Covenants." *See* 1982 U.N. Treaties, *supra* note 96, at 115. *Cf.* SCHACHTER, NAWAZ & FRIED, *supra* note 11, at 155; Gamble, *supra* note 7, at 387-88. For other examples see VITTA, *supra* note 7, at 88-89.

109. *See* Imbert, *supra* note 81, at 30.

110. *Id.* at 30-31.

111. *See* Nawaz, *supra* note 105, at 583-84. Nawaz identifies some possible causes of non-ratification (or delay in ratification) of human rights treaties, and considers the use of reservations as a measure which possibly facilitates wider and readier acceptance of such treaties. *See also* UNITAR Paper, *supra* note 105, at 12-13.

be sympathetic to the rights which are being protected. The approach of governments to human rights treaties is frequently conditioned by manifold domestic or international inconveniences. Hence, the likely alternative to ratification *with* reservations is often non-ratification, rather than ratification *without* reservations. The United States, which has seldom ratified any major post-war treaty on human rights, provides a very significant example of this point.[112]

C. The Scope of the Compatibility Rule

Reservations, as demonstated above, are not evidence *per se* of a will not to comply with human rights principles. Moreover, ratification by a large number of States is an important goal, at least at this stage in the development of the international protection of human rights.[113] As the International Court of Justice observed regarding the Convention on Genocide, (although the remark is applicable to any treaty on human rights), "the complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis."[114]

Not all reservations, however, must be regarded as allowable. As in the case of any other multilateral treaty, a judgment upon the admissibility of reservations must be based upon their compatibility with the object and purpose of the treaty, unless the treaty itself has special rules. Treaties on human rights often have a variety of general provisions which concern the authorization to make reservations, the prohibition of reservations and the specification of the provisions which may or may not be subjected to reservations.[115] Apart from the obvious cases where reservations are either expressly forbidden or permitted, it is difficult to ascertain whether a reservation is compatible with the object and purpose of the treaty.

In addressing this issue it is important to analyze the real scope of the compatibility rule embodied in Article 19(c), and its relationship with the rules on the acceptance of and objection to reservations of Article 20(4). The two provisions are not easy to reconcile. Article 19(c) provides that a State may not formulate a reservation if it is

112. Among the ten treaties listed in the Appendix, only the Convention on the Political Rights of Women has been ratified by the United States. The U.S. ratified the treaty on April 8, 1976, twenty-two years after its entry into force.

113. *See* 1966 I.L.C. Report, *supra* note 43, at 205.

114. 1951 Advisory Opinion on Genocide, *supra* note 20, at 24.

115. *Cf.* IMBERT, *supra* note 7, at 193.

incompatible with the object and purpose of the treaty concerned.[116] However, no consequences for such an act are provided for. Article 20(4) provides that a reserving State becomes a party to the treaty vis-à-vis all the accepting, non-objecting, and "relatively objecting" States.[117] Article 20 does not consider the content of the reservation and its consistency with the object and purpose of the treaty. Thus, it appears that States are told on the one hand that they are forbidden from making certain reservations, and on the other that their participation in the treaty depends only upon the reaction of the other contracting parties, who are free to accept or reject any reservation regardless of its content.

Two constructions of this apparent contradiction have been proposed. Under one interpretation the only real test for the admissibility of a reservation is acceptance by the other States.[118] Since everything depends upon the reaction of the other parties, the compatibility rule is irrelevant. Under this interpretation Article 19(c) can be regarded "as a mere doctrinal assertion which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that."[119]

The compatibility rule is surely difficult to apply. For example, because it is unclear whether a reservation must be compatible with the "object and purpose of the treaty," considered as separate criteria, or whether they must be considered together.[120] This ambiguity, however, would not be important since under this construction the distinction is not crucial to the admissibility of reservations.[121]

Following this construction, in a dispute between two States a reservation would be opposable by and to the reserving State, provided it was not previously objected to by the other State, and even though it might not be compatible with the object and purpose of the treaty. The hypothetical judicial body would only ascertain whether

116. Vienna Convention, *supra* note 8, art. 19(c).

117. *Id.* art. 20(4). As a matter of terminology, "relative objection" is here taken to mean an objection which does not express a definite intention to preclude the entry into force of the treaty as between the reserving and objecting State. The *time* of the entry into force (under paragraphs (4) and (5) of Article 20) between the two concerned States is: (a) at the moment of the acceptance if the reservation is expressly accepted; (b) at the moment of the objection if the reservation is relatively objected; (c) if no position is taken, either twelve months after the silent State is notified of the reservation or at the moment it ratifies the treaty, whichever is later.

118. *See* IMBERT, *supra* note 7, at 137-40; Ruda, *supra* note 7, at 182-90.

119. Ruda, *supra* note 7, at 190.

120. That is, the object *and* the purpose or the object-purpose. *See* Teboul, *supra* note 7, at 695-701.

121. *See* IMBERT, *supra* note 7, at 138.

the reservation was accepted or rejected in the first place, while its content would be relevant only to the interpretation of the actual rights and obligations of the parties.

According to the second construction[122] Article 19 and Article 20 raise separate issues. Article 19 governs the issue of the "permissibility" of a reservation, while Article 20 concerns the issue of its "opposability." If a reservation is incompatible with the object and purpose of a treaty it is impermissible and therefore illegal.[123] Whether a reservation is in fact impermissible does not depend on the reaction of the other parties; rather it is a preliminary legal issue to be solved as a matter of treaty interpretation.[124] Other States "may not accept an impermissible reservation."[125] If they do their acceptance is illegal as well.[126] Since States can accept only permissible reservations, Article 20 must be considered only after it has been established that a reservation is permissible. In other words, "the issue of 'opposability' . . . arises only in relation to a permissible reservation and . . . involves inquiring into the reactions of the Parties to that reservation and the effects of such reaction."[127]

Utilizing this construction in a dispute between a reserving State and another party, the second party may always claim that the reservation is incompatible with the object and purpose of the treaty. This is true even though it did not object to the reservation when it had the opportunity to do so.[128] Therefore, the hypothetical judicial body would first look into the content of the reservation to determine whether it is compatible with the object and purpose of the treaty. If the answer to this question was affirmative, then it would ascertain the pattern of treaty obligations between the two States as modified or excluded by the reservation, along with the related acceptance or objection. On the other hand, if the answer was negative, the treaty would not be in force between the two States. In such a situation the fact that the reservation was accepted or objected to would be irrelevant.[129]

Both constructions have merit. However, it would seem that the

122. *See* Bowett, *supra* note 7, *passim*.

123. *Id.* at 77.

124. *Id.* at 88.

125. *Id.* at 89.

126. *Id.* at 83.

127. *Id.* at 80.

128. *Id.* at 81.

129. *Id.* at 88. Bowett states that "the impermissible reservation nullifies the State's acceptance of the treaty as a whole."

first reads too little into Articles 19 and 20 and the second reads too much. To state that the compatibility rule is "a mere doctrinal assertion,"[130] and "devoid of any substance,"[131] may be close to reality but does not provide a legal explanation. On the other hand, to say that "an impermissible reservation cannot be accepted,"[132] and that "a purported 'acceptance' of an impermissible reservation . . . should be regarded as a nullity"[133] may be desirable *de lege ferenda*. However, such a construction seems to detract too much from the legal weight of the sovereign will of States.[134] Perhaps another construction may be suggested.

The definite rule stated in Article 19(c) of the Vienna Convention that a State may not formulate a reservation which is incompatible with the object and purpose of a treaty cannot be ignored. Therefore, a State is clearly under a legal obligation, either conventional (if it is a party to the Vienna Convention), or customary (if this rule is deemed to be a codification of general international law),[135] to refrain from formulating such a reservation upon ratification of a treaty.[136] If a State does formulate such a reservation the act amounts to a breach of that obligation. Therefore, it is a wrongful act, entailing such State's international responsibility vis-à-vis each other party to the treaty.[137] It does not amount to a breach of the

130. Ruda, *supra* note 7, at 190.

131. IMBERT, *supra* note 7, at 136 ("vid[ède] de toute sa substance;" translation from the original).

132. Bowett, *supra* note 7, at 83.

133. *Id.* at 84.

134. *Cf.* Weil, *supra* note 51, at 43 (French version). Weil warns against any hard and fast conclusion concerning the law of treaties drawn in the wake of certain international legal trends.

135. For the purpose of the argument it will be assumed that the compatibility rule is actually part of customary law. The reasonableness of such an assumption has already been demonstrated. *See supra* text accompanying notes 49-79.

136. The term "ratification" is used here in the broad sense of *expression of consent to be bound by a treaty*. Therefore, it is taken to mean both "ratification" in the strict sense and "accession." For the difference between the two notions, see BROWNLIE, *supra* note 7, at 604-605. Concerning the *timing* of reservations, under the Vienna Convention, only statements formulated at the moment of ratification are considered true reservations. If formulated before, they must be confirmed upon ratification (Article 23); if formulated afterwards, they are by definition nothing more than policy statements devoid of any legal effect whatsoever with regard to the treaty (reading *a contrario* Article 19). An obvious consequence of these rules is that a reservation which is formulated rightfully upon ratification may be withdrawn later (Article 22), but it cannot be broadened. A State is quite free to formulate far-reaching reservations, but once they are accepted it cannot modify them at will.

137. *Cf.* Report of the International Law Commission to the U.N. General Assembly, *Draft Articles on State Responsibility*, [1980] 2 Y.B. INT'L L. COMM'N 30. Article 1 states: "Every international wrongful act of a State entails the international responsibility of that

treaty itself, but rather of the general norm embodied in the Vienna Convention forbidding "incompatible" reservations.

Whether a reservation is in fact incompatible with the object and purpose of a treaty, that is, whether it constitutes a violation of international law, is a matter of interpretation. Accordingly, it is correct to state that this "is eminently a legal question and entirely suitable for judicial determination."[138] However, not all other parties to the treaty would be entitled to claim that such a reservation is improper. This right depends on their reaction to the reservation itself. Those States which have objected to such a reservation may subsequently be able to claim the reserving State's responsibility for having breached the compatibility rule.[139] In contrast, those States which have expressly or tacitly accepted the reservation[140] do not have the right to subsequently assert the reserving State's responsibility in relation to themselves.

There are two rationales for denying a State the right to claim the incompatibility of a reservation once it has been accepted. Under either one the practical result would be analogous, although reached through different legal rationales. One rationale would rely upon the concept of the "waiver" of a subjective right, while the other would rely on the concept of "consent" as a circumstance precluding wrongfulness. The rationale which is utilized depends upon the position taken concerning the preliminary issue of when a reservation legally comes into effect.

One view is that a reservation should be considered as an entirely unilateral act which is effective and complete when formulated,

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State"; Article 3: "There is an international wrongful act of a State when: (a) conduct consisting of an action or omission is attributable to the State under international law; and (b) that conduct constitutes a breach of an international obligation of that State."

138. Bowett, *supra* note 7, at 81.

139. The fact that an objection is not motivated by legal reasons does not make any difference. The point is that since the objecting State has not expressed any form of consent to the reserving State's wrongful act.

140. Hereinafter "acceptance" means both express and tacit acceptance. As a matter of fact, the Vienna Convention has equalized under Article 20(5) acceptance and non-objection, codifying "the international practice concerning multilateral conventions [where] very great allowance [is] made for tacit assent to reservations." 1951 Advisory Opinion on Genocide, *supra* note 20, at 21. While the twelve month deadline of Article 20(5) is probably not customary, "[t]hat the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted." 1966 I.L.C. Report, *supra* note 43, at 208. A further distinction might be drawn between "tacit" and "implied" acceptance. The former occurs when the twelve-month deadline expires without any objection, while the latter occurs when a State accedes to a treaty without objecting to reservations previously formulated by States already parties to the treaty. *See* VITTA, *supra* note 7, at 53-54.

regardless of the reaction of the other parties to the treaty. This was formerly the position of the socialist States,[141] which contended that a State does not "formulate" (that is propose) a reservation, but "makes" it.[142] As a consequence of this doctrine, a reservation comes into existence for all the other parties at the moment of the reserving State's ratification. Assuming that this reservation was incompatible with the object and purpose of the treaty, the wrongful act is committed at the same moment. If another party to the treaty accepts such a reservation, its consent cannot preclude the wrongfulness of the act because the act took place at a previous stage. However, since this other party freely expressed its approval of the other State's wrongful conduct it is deemed to have *waived* its subjective right to claim the other State's responsibility as a consequence of the wrongful conduct. The International Law Commission, in its Report on State Responsibility,[143] claimed that "there is no doubt that if the consent is given only after the commission of the act (*ex post facto*), it will simply amount to a waiver of the right to assert responsibility and the claims arising therefrom. But, with such a waiver, the wrongfulness of the prior act remains."[144]

If the view is shared that reservations are fully unilateral acts, the first legal rationale to be followed relies on the notion of "waiver," which is the conscious unilateral relinquishment of a known subjective right.[145] However, the premise that a reservation is

141. See, for example, the Soviet Union statement of January 13, 1951, in 1951 Advisory Opinion on Genocide, 1951 I.C.J. Pleading 21, and the USSR *Explanatory Memorandum on the Question of Reservations to Multilateral Treaties*, *supra* note 43. *Cf.* IMBERT, *supra* note 7, at 98-101; Bishop, *supra* note 7, at 335-36; Cassese, *Su alcune "riserve" alla Convenzione sui diritti politici della donna*, 51 RIVISTA DI DIRITTO INTERNAZIONALE [R.D.I.] 294, 300-05 (1968).

142. The distinction between "formulating" (*i.e.* proposing) and "making" a reservation was clearly stated by Sir H. Waldock in his first Report to the I.L.C. *See* Report of the International Law Commission to the U.N. General Assembly, *Draft Articles on the Law of Treaties* [1962] 2 Y.B. INT'L L. COMM'N 62, 65. The distinction has eventually survived in the Vienna Convention. Under Article 19 a State may "make" a reservation only if the treaty itself authorizes it—thus "not requir[ing] any subsequent acceptance by the other contracting States"—and may only "formulate" it in every other case. *Cf.* IMBERT, *supra* note 7, at 83-86.

143. Report of the International Law Commission to the U.N. General Assembly, *Draft Articles on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N 113 [hereinafter cited as 1979 I.L.C. Report].

144. *Id.*

145. *See* E. SUY, LES ACTES JURIDIQUES UNILATERAUX EN DROIT INTERNATIONAL PUBLIC 153-187 (1962); Alaimo, *Natura del consenso Nell'illecito internazionale*, 65 R.D.I. 257, 262-64 (1982); Venturini, *La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats*, 112 R.C.A.D.I. 363, 394-96 (1964). *But see* Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM J. INT'L L. 1, 13-15 (1977).

a fully unilateral act does not appear to be substantiated by international practice. There appears to be more support for a "bilateral" concept of reservations. The International Court of Justice stated the point boldly: "[I]t is well established that in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto."[146]

The *travaux préparatoires* at the Vienna Conference show that most States view reservations as being ineffective against a State which has not accepted the reservation.[147] As a matter of fact, an amendment proposed by China purporting to replace the words "formulate a reservation" with the words "make reservations" was rejected.[148] The Vienna Convention itself, in Article 20(4)(c), seems to confirm that a ratification containing a reservation is effective towards other parties only as a result of their consent to that end.[149] In addition, scholars are practically unanimous in affirming that a reservation only becomes effective vis-à-vis another State when agreement to the reservation is expressed in one way or another.[150] Therefore a second view must be utilized. This view leads to the "consent" rationale as the basis for denying a State the right to assert that a reservation is impermissible.

This second viewpoint postulates that a reservation is completed only when accepted by other States. In this regard, the reservation is not a truly unilateral act because it is unilaterally "formulated," but not unilaterally "made." The formulation amounts only to "a proposal and not a completed and operative reservation."[151] As such, each act which expresses a State's consent to be bound by a treaty and which contains a reservation is effective vis-à-vis any other party at the moment of their acceptances of, or objections to the reserva-

146. 1951 Advisory Opinion on Genocide, *supra* note 20, at 21. *See also* Ambatielos Case (Greece v. U.K.), 1952 I.C.J. 76 (dissenting opinion of Judge Zoricic where a reservation is significantly defined as "a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning." *Id.* at 76.

147. *See* U.N. Doc. A/CONF.39/11, at 107-38 (1969); U.N. Doc A./CONF.39/11/Add.1, at 29-38 (1969).

148. *See* U.N. Doc. A/CONF.39/11, at 121 (1969).

149. Vienna Convention, *supra* note 8, art. 20(4)(c). Article 20(4)(c) provides: "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."

150. *See, e.g.*, IMBERT, *supra* note 7, at 97-108; MCNAIR, *supra* note 7, at 162; VITTA, *supra* note 7, at 49-57; Anderson, *supra* note 7, at 452-54; Bishop, *supra* note 7, at 255; Fitzmaurice, *supra* note 7, at 274-79; Ruda, *supra* note 7, at 179;

151. Fitzmaurice, *supra* note 7, at 275.

tion.[152] If the reservation is incompatible with the object and purpose of the treaty, it constitutes a wrongful act committed by the reserving State towards any other party to the treaty. Since an acceptance of the reservation amounts to an agreement on the proposed modification of the treaty between the two parties concerned, those parties accepting the reservation are deemed to agree with the otherwise wrongful act. This precludes future claims of responsibility in their respective relations with the reserving State. Since consent is given at the same time the reservation becomes effective, it constitutes a circumstance which precludes the wrongfulness of the particular State's act of making an impermissible reservation.[153]

There should be no doubt that the principle of *volenti non fit injuria* applies in international law as a circumstance which precludes wrongfulness. This was clearly demonstrated by the International Law Commission in its Draft Articles on State Responsibility. Article 29(1) reads:

> The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.[154]

The consent to an act, which, without such consent would constitute a breach of an obligation towards the consenting State, "really amounts to an agreement between the two subjects, [that is,] an agreement which has the effect of rendering the obligation inoperative in that particular case."[155] Logically, the consent given by one State cannot preclude the wrongfulness of an act in relation to other

152. The reservation comes into existence, vis-á-vis the objecting States, at the moment of their objections because with these acts they recognize its existence although they do not consent to the proposed modification of the treaty. Hence, if the reservation is, in fact, "incompatible," they retain the right to subsequently invoke the reserving State's responsibility. This would be true even if an objecting State has rejected the entry into force of the whole treaty with regard to the reserving State because the obligation breached does not come from the treaty itself but from the supposedly general norm—codified in the Vienna Convention—forbidding such reservation.

153. *See* Ago, *Eighth Report to the I.L.C. on State Responsibility*, [1979] 2 Y.B. INT'L L. COMM'N 37. Ago writes: "Consent of the injured State can constitute a circumstance precluding the wrongfulness of the conduct adopted by a State in a particular case, provided that such consent is given *prior to or at the time of the conduct in question*." If consent is given *after* the act is committed it constitutes a waiver, that is, the forbearance "to pursue the consequences arising out of the wrongful act (including a claim to reparation)." *Id.* at 37.

154. 1979 I.L.C. Report, *supra* note 143, at 109.

155. *Id. See also* Alaimo, *supra* note 145, at 269-74.

States which have not consented to it.[156] However, as regards the consenting State, there is freedom to accept whatever reservation is proposed.

If the compatibility rule of Article 19(c) limited this freedom, it would be impossible to legally express such consent and States could not accept an "incompatible" reservation. While the 1951 Advisory Opinion on Genocide set forth the compatibility rule as a limit both for reservations and for acceptances or objections,[157] the Vienna Convention keeps the rule only with respect to reservations.[158] Therefore, the limits to the acceptance of or objection to a reservation are the same limits proper to any international agreement, that is, its validity.[159]

There is one limit in particular which precludes the acceptance of particularly outrageous reservations. Consent cannot be given with respect to a reservation which purports to derogate from a norm of *jus cogens*. The International Law Commission has expressly taken into account this limit on consent as a circumstance precluding wrongfulness. This limit is codified in Article 29(2) of its Draft Articles on State Responsibility.[160] The explanation of the Commission is that:

> [I]f one accepts the existence in international law of rules of *jus cogens* . . . one must also accept the fact that conduct of a State which is not in conformity with an obligation imposed by one of these rules must remain an internationally wrongful act even if the injured State has given its consent to the conduct in question.[161]

Since *jus cogens* is "the only real exception to the general principle of consent as circumstance precluding wrongfulness,"[162] States may respectively formulate and accept reservations to any treaty rule which is not of peremptory character. Unless the compatibility rule itself is deemed to be a norm of *jus cogens*, which appears to be highly

156. *See* 1979 I.L.C. Report, *supra* note 143, at 114 ("it is obvious that such an agreement—like any other agreement—produces effects only as between the parties").

157. 1951 Advisory Opinion on Genocide, *supra* note 20, at 24.

158. Vienna Convention, *supra* note 8, art. 19.

159. 1979 I.L.C. Report, *supra* note 143, at 109 (art. 29(1)). Consent must be "validly given," that is to say in compliance with the customary rules—mostly codified in Part V, Section 2 of the Vienna Convention—on invalidity of international agreements.

160. *Id.* Article 29(2) provides that: "Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law." The second part of the paragraph reproduces exactly the same notion of *jus cogens* codified in article 53 of the Vienna Convention.

161. *Id.* at 114.

162. *Id.*

unlikely,[163] the rule cannot prevent States from agreeing to reservations which are incompatible with the object and purpose of a treaty. As a result, it appears incorrect to assert that a State "cannot, under the guise of a reservation . . . seek to find acceptance for a legal proposition which is at variance with, or even concerned with, rules of law based upon rules of customary international law."[164]

It is generally accepted that States can modify by agreement customary norms between themselves, unless they are norms of *jus cogens*.[165] Accordingly, it is possible for States, through an accepted reservation, to modify *inter se* a customary norm not of peremptory character. The customary norm may be either codified in the treaty itself or unrelated to it. The *dictum* of the International Court of Justice in the *North Sea Continental Shelf Cases*[166] (that reservations are not possible with regard to treaty provisions which codify customary law) is unpersuasive.[167] The fact that a certain norm is recognized as customary international law cannot prevent States from making an agreement providing for the modification or exclusion of that norm as between themselves. Otherwise, any difference between *jus dispositivum* and *jus cogens* would be nullified and all customary law would be deemed to be *jus cogens*. An agreement to modify a customary norm can be a separate treaty. It may also take the technical form of an accepted reservation to a multilateral treaty which purports to codify that norm. Not only is such a reservation possible, but if it draws many acceptances it can be advanced as relevant evidence against the purported customary status of the reserved provision.[168] As pointed out by Judge Sørenson's dissenting opinion in the *North Sea Continental Shelf Case*:

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163. It is already a difficult task, by itself, to prove that the compatibility rule is even an "ordinary" customary international law rule (*i.e.*, a norm of *jus dispositivum*).

164. Bowett, *supra* note 7, at 73.

165. *See* MORELLI, *supra* note 7, at 36; THIERRY, COMBACAU, SUR & VALLÉE, *supra* note 7, at 149-151; D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1, 28-31 (1962); Quadri, *Cours générale de droit international public*, 113 R.C.A.D.I. 237, 335-40 (1964).

166. North Sea Continental Shelf Case (Den. v. W. Germ.), 1969 I.C.J. 3 (Judgement of Feb. 20).

167. *Id.* at 39-40. The Court commented: "Customary law rules . . . cannot therefore be subject of any right of unilateral exclusion exerciseable at will." The ambiguity of this *dictum* arises from the Court's reference to a "right of unilateral exclusion," while reservations imply a right of *bilaterally agreed* exclusion. Some of the dissenting opinions and several authors have questioned the Court's assertion. *See* BROWNLIE, *supra* note 7, at 13; H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 120-21 (1972); Baxter, *supra* note 50, at 48-50; Teboul, *supra* note 7, at 690.

168. *See* Baxter, *supra* note 50, at 50.

> The acceptance, whether tacit or express of a reservation made by a contracting party does not have the effect of depriving the Convention as a whole, or the relevant article in particular, of its declaratory character. It only has the effect of establishing a special contractual relationship between the parties concerned within the general framework of the customary law embodied in the Convention. Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such.[169]

In summary, where no *jus cogens* is involved, under the Vienna Convention rules States are free to accept *any* reservation by another State regardless of its content. This is true even where the reservation is incompatible with the object and purpose of the treaty.[170] Once a State accepts such a reservation its illegality is precluded as far as the reserving and the accepting States are concerned. As a result, it will be impossible to raise it as an issue in a subsequent dispute between the two States.[171] It is still a basic principle of international law that States can modify *inter se* previous or more general conventional or customary obligations as long as the obligations are not of peremptory character.[172]

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169. North Sea Continental Shelf Case, *supra* note 166, at 249 (noting also the dissenting opinions of Judges Tanaka, at 183, and Morelli, at 199). As has been shown, the real limitation upon the possibility of making reservations is neither the compatibility rule nor customary international law. Since an accepted reservation is basically in the nature of a bilateral agreement, it is limited only by its consistency with *jus cogens*, if the existence of *jus cogens* is assumed. Indeed, an argument may be made that a reservation incompatible with the object and purpose of a treaty tends necessarily to be against *jus cogens* as well. This appears to be a sound argument from the factual point of view, because a reservation to a human rights treaty which is incompatible with that treaty's object and purpose can be also a violation of a norm of *jus cogens*. However, from the legal point of view the two concepts are distinct, and it is not correct to consider such an equivalence as a general rule.

170. Therefore, it is difficult to accept the following considerations by Professor Bowett, who states: "The contradiction in the conduct of a Party which accepts a treaty and then accepts a reservation which it acknowledges to be contrary to the object and purpose of that same treaty is self-evident. Thus, the conclusion ought to be that impermissible reservations cannot be accepted." Bowett, *supra* note 7, at 83. Such conduct would certainly be inconsistent, but it would be wholly legal. Professor Bowett himself seems to acknowledge this when he comments: "[O]f course, it is always possible for the parties, by agreement, to vary customary rules in their treaty regime (assuming the rules are not part of the *jus cogens*)." *Id.* at 74 n.1.

171. As mentioned, if the acceptance of the reservation is considered to be only a "waiver," it would not preclude the wrongfulness of the act but would nevertheless prevent any assertion of the reserving State's responsibility and any claim (*e.g.* reparation) arising therefrom.

172. Some authors, in the context of quasi-sociological studies, have made assertions that from the legal viewpoint seem less than sound. *See* Koh, *supra* note 7, at 74. Koh writes that "the compatibility of the substance of the reservation with the 'object and purpose' of the treaty . . . is the rational constraint placed on a State's power to consent or to oppose a reservation,"

The real scope of the compatibility rule of Article 19(c) is limited by the consent of States since it applies only when such consent is lacking. An hypothetical judicial body would first determine whether a reservation was accepted or objected to. Only in instances where a State objected to the reservation would it seek to discover whether the reserving State has violated international law vis-à-vis the objecting State by formulating a reservation incompatible with the object and purpose of the treaty vis-à-vis the objecting State. As a result, it appears to be incorrect to state that the incompatibility of a reservation with the object and purpose of the treaty "has no practical juridical importance."[173] In instances where a reservation is objected to the compatibility rule retains its full value.

Moreover, it is only partially correct to say that "each State may finally decide the matter for itself."[174] This is true only when a State accepts a reservation. When a State objects to a reservation, the question of the reservation's validity is still at issue. It is a fiction to assume that States, when objecting to a reservation, impliedly assert incompatibility with the object and purpose of the treaty. States usually accept and object to reservations on the basis of their own legal and political interests and policies. States have rarely asserted that they were objecting to a reservation because they deemed it to be incompatible with the treaty.[175] Thus, an objection to a reservation (in addition to the effects provided for in Article 21) simply leaves the door open for a possible subsequent claim against the reserving State concerning the "incompatibility", that is, the illegality of the reservation. If such a dispute arises, such illegality becomes a routine legal question to be answered through the procedures available in international law.

The scope of the compatibility rule, therefore, depends *de facto* on the number of objections made by States. Since States do not ap-

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and that "the unanimous consent of the parties is neither necessary nor sufficient to validate the reservation; indeed such consent may be simply irrelevant." This assertion overlooks the sovereign will of States as the primary source of international law. Agreement between sovereign States is still sufficient to derogate from any customary rule whatsoever, including the "object and purpose" rule. In theory, as mentioned above, the only limit to the will of States as expressed in international agreements is the doctrine of *jus cogens*; in practice it is doubtful whether such will undergoes any limit at all.

173. Ruda, *supra* note 7, at 190.

174. *Id.*

175. See, for example, the objection made by Czechoslovakia to the Spanish reservations with respect of Articles I, II and III of the Convention on the Political Rights of Women, "on the grounds that they are incompatible with the objectives of the Convention." 1981 U.N. Treaties, *supra* note 98, at 497.

pear to be very eager to oppose the reservations of other States,[176] the role played by the compatibility rule becomes rather narrow. On the other hand, of all the reservations made to multilateral treaties most are of fairly minor importance; only a small number (roughly six percent) can be classified as "major substantive" reservations.[177] Thus, there are not many opportunities for the application of the compatibility rule even within the outlined limits.

The legal picture appears to be the same regarding particular human rights treaties. An argument may be made that the object and purpose of a human rights treaty must be interpreted in a more rigorous manner, given the particular obligations involved. Yet, because the compatibility rule does not apply when States accept reservations, such rigorous interpretation must, in any event, yield to the acceptances of States. As a result, from a practical viewpoint the primary issue concerning treaties on human rights is not whether reservations are incompatible with the object and purpose of the treaty, but whether States do, in fact, object to reservations made in regard to such treaties.

D. The Relevance of Objections to Reservations

In accordance with the conclusion that the admissibility of reservations can be questioned only when there are objections (unless the treaty otherwise provides), it is relevant to establish the frequency with which objections to reservations are made. In addition, it is also important to determine whether they have a real impact on the conventional obligations of States.[178] Examination of the post-1951 treaties on human rights open to universal participation which have entered into force shows that only a small number of States have objected to the reservations of other States. Furthermore, as new conventions enter into force, the trend is clearly toward a smaller number of objections.[179]

While States still deem it useful to formulate reservations, objections are becoming less frequent and are often not motivated by legal

176. *See* IMBERT, *supra* note 7, at 376-83 (where the rarity of objections to reservations is shown in detail).

177. *See* Gamble, *supra* note 7, at 383-91. The figures in this study relate to all multilateral treaties entered into force between 1947 and 1971.

178. The 1951 Advisory Opinion on Genocide is the turning point of the general law of reservations. *See supra* notes 20-26 and accompanying text.

179. See Appendix for the table illustrating the attitude of States towards reservations and objections to reservations.

reasons.[180] For example, the sole objecting State to the Apartheid Convention[181] was merely declaring its disapproval of the political statements by other States against it.[182] This shows on the one hand that objections, like reservations, still have a place in the context of human rights treaties as political tools and as opportunities to make unilateral statements.[183] On the other hand, this may also show how objections, unlike reservations, are no longer regarded as effective legal tools, at least with respect to human rights treaties.

There is little question about the validity of the above arguments when viewed in the context of the scope of objections under the Vienna Convention. Article 21(3) provides that "when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States *to the extent of the reservation*."[184] In addition, Article 21(1) provides that a reservation modifies for a reserving State, in its reciprocal relations with all the accepting (or non-objecting) States, "the provisions of the treaty to which the reservation relates *to the extent of the reservation*."[185] Thus, it is difficult, *prima facie*, to see the difference, if any, between the legal effects of an objection to and an acceptance of a reservation. In both cases the reciprocal treaty relations between the two States concerned are modified "to the extent of the reservation."

When, as in most cases, the treaty remains in force between the reserving and the objecting States, it can be argued that "ultimately, the legal effects of an objection [to], and an acceptance of a reservation are identical."[186] However, an interpretation based upon certain views expressed at the Vienna Conference,[187] and on the maxim *ut*

180. *Id.*

181. International Convention on the Suppression and Punishment of the Crime of Apartheid, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973) [hereinafter cited as Apartheid Convention].

182. The objecting State was Israel, while the two States whose reservations were objected to were Kuwait and Egypt. Kuwait and Egypt had made the usual "non-recognition" reservation in relation to Israel. At a later stage Egypt withdrew its reservation; accordingly, the related Israeli objection must be regarded as dropped as well.

183. Such unilateral statements might have certain legal effects depending upon their content and on the value to be assigned to unilateral declarations in international law.

184. Vienna Convention, *supra* note 8, art. 21(3) (emphasis added).

185. *Id.* art. 21(1) (emphasis added).

186. Ruda, *supra* note 7, at 200; *See also* Cassese, *A New Reservations Clause*, in REC. GUGGENHEIM 266, 280-81 (1968); Chaumont, *Cours générale de droit international public*, 129 R.C.A.D.I. 333, 448 (1970).

187. *Cf.* U.N. Doc. A/CONF.39/11/ADD.1, at 181 (1969) (statements of Mr. Ago and Mr. Yasseen). *Cf. also* IMBERT, *supra* note 7, at 152-59, 260-68.

res magis valeat quam pereat, leads to a possible distinction between two cases.[188] If a reservation is only meant to *modify* the legal effect of a particular treaty provision, an objection would completely preclude the application of the whole provision as between the two parties. An acceptance would leave the provision in force between them, *as modified*. Conversely, if a reservation is meant to *exclude* the legal effect of a treaty provision, an objection or an acceptance would have the same effect; it would preclude application of the provision between the two parties. Whichever interpretation of Article 21 is utilized, the difference between acceptance of and objection to a reservation is currently rather obscure.

Before the Vienna Convention the difference was obvious. If a State had objected to a reservation without further specifications the whole treaty would not have entered into force as between that State and the reserving State. Under the Vienna Convention, however, States must definitely speak out if they want an objection to have that same effect.[189] In light of the dynamics of international relations this onus seems to make a great difference, at least with respect to human rights treaties.[190] The practice of States confirm this impression.[191] Recent practice shows a difference in the use of objections by States between treaties entered into force before the adoption of the Vienna Convention (May 23, 1969) and treaties entered into force thereafter. For example, *none* of the States which made reservations to the Genocide Convention[192] could avoid objections. Twenty-two States made one or more reservations, and all of the States had at least one reservation which was objected to by another State. As to the Con-

188. *See* Vienna Convention, *supra* note 8, art. 2(1)(d) (where a reservation is defined as a unilateral statement which purports to *exclude* or to *modify* the legal effects of a treaty provision).

189. This reversal of the presumption was sponsored at the Vienna Conference by the Soviet Union. This was consistent with the notion of reservations asserted by the States of the so-called communist bloc. According to this doctrine, and as a consequence of the fundamental principle of States' sovereignty, every State has the inalienable right to make any reservation whatsoever. Such reservations have their purported legal effects regardless of other States' attitudes. *Cf.* Bishop, *supra* note 7, at 335-36; Cassese, *supra* note 141, at 300-05. Today such an extreme position appears to be abandoned, and Soviet authors take into account the role played by consent in the law of reservations. *See* TUNKIN, *supra* note 50, at 98-99.

190. Sinclair, *supra* note 7, at 43. Sinclair foresaw the possible consequences of this reversed presumption when he wrote: "Finally, there is the psychological consideration that the onus is now on the innocent party (that is to say the objecting State) to declare publicly that it does not intend to have treaty relations with the reserving State; this is an onus which smaller States may find difficult to discharge when the reserving State is a powerful neighbor."

191. *See* Appendix

192. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 [hereinafter cited as Genocide Convention].

vention on the Political Rights of Women,[193] of the forty-two reserving States, fourteen drew one or more objections.[194] However, in later treaties the use of objections has diminished greatly, while the use of reservations has still enjoyed great favor among States. This shift in the attitude coincides with the adoption of the Vienna Convention, but began long before its actual entry into force (January 27, 1980). This strengthens the argument that the Vienna Convention, and in particular its regime on reservations, is in large part a codification of customary international law. As such, the norms either predated the Vienna Convention or, as in this case, crystallized shortly thereafter.

The impairment of the legal role of objections brought about by the Vienna Convention is a phenomenon which affects all multilateral treaties. However, its impact is magnified in regard to human rights treaties. In this area the obligations of States have a less contractual character because every State undertakes to abide by certain rules which for the most part concern the treatment of its own citizens.[195] The concept of reciprocity, which is common to most international law issues, does not work here in the usual way because the notion of contractual balance between the rights and duties of States is quite altered.[196]

This does not mean, however, that there is a difference between the legal structures of human rights treaties and other multilateral treaties. Technically they are the same. There is, however, a psychological difference which resides in the motivation of States. When their own interests are not at stake States usually do not have as much incentive to request other States to comply with the treaty. Because human rights treaties are less "contractual" than other treaties, some legal doctrines, such as *inadimplenti est inadimplendum*, are not always applicable. It should be noted that this is clearly not a

193. Convention on the Political Rights of Women, *supra* note 97.

194. There are still a fair amount of objections in the context of the Convention for the Suppression of Traffic in Persons, and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271. Only at first glance has this Convention registered less objections than the Convention on the Political Rights of Women. In fact, in proportion to the number of reserving States, the number of States whose reservations were objected to is rather close to that of the Convention on the Political Rights of Women (4 out of 14 (28%) as compared with 14 out of 42 (33%)).

195. *Cf.* Cassese, *supra* note 186, at 268.

196. *See.* IMBERT, *supra* note 7, at 153; Virally, *La réciprocité dans le droit international*, 122 R.C.A.D.I. 1, 26-27 (1967). *Cf.* Reservations to the Convention on the Prevention & Punishment of the Crime of Genocide, 1951 I.C.J. Pleadings 59-69 (written statement by G. Fitzmaurice of the U.K.).

question of the old-fashioned distinction between treaty-law and treaty-contract. Such a distinction is generally regarded today as neither useful nor acceptable.[197]

An objection to a reservation by a State, in the context of a treaty concerning the treatment of its own citizens, is not an effective countermeasure that can be used to place pressure on the reserving State. Furthermore, it leaves the objecting State with a sense of frustration because it still must comply with all the treaty provisions vis-à-vis the other parties. Such an objection, however, might have some symbolic value, either as a bargaining chip to obtain the withdrawal of the reservation or as a statement of policy on certain matters. As to the compatibility rule, the limited use made of objections confirms that its practical role in human rights treaties tends to be minor.

III. RESERVATIONS PROPOSED BY THE U.S. EXECUTIVE WITH RESPECT TO HUMAN RIGHTS TREATIES

Very few treaties on human rights have been ratified by the United States. The general legal and political problems involved in the ratification by the United States of such treaties have been discussed at length by several writers and need not be recalled here.[198] Ratification of human rights treaties, however, continue to be periodically debated. The issue was last discussed under the Carter Administration in connection with a foreign policy generally concerned about human rights.[199] Under that administration there was an attempt by President Carter to obtain from the Senate the required

197. *See* BROWNLIE, *supra* note 7, at 63; MORELLI, *supra* note 7, at 33-34; THIERRY, COMBACAU, SUR & VALLÉE, *supra* note 7, at 45-47. Therefore, the distinction put forth by some writers between "normative treaties" and "contractual treaties" can only be accepted as non-legal. *Cf.* Koh, *supra* note 7, at 75-76.

198. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, 154-56, 394 nn. 71, 76, 85 & 91-93 (1972); U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES (Lillich ed., 1981) [hereinafter cited as U.S. RATIFICATION]; Dearborn, *The Domestic Legal Effect of Declarations that Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233 (1979); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979) [hereinafter cited as *Rights: American and Human*]; Noble, *The Covenant on Civil and Political Rights as the Law of the Land*, 25 VILL. L. REV. 119 (1979-80); Schachter, *The Obligation of Parties to Give Effect to the Covenant on Civil and Political Rights*, 73 AM. J. INT'L L. 462 (1979); Skelton, *The United States Approach to Ratification of the International Covenants on Human Rights*, 1 HOUS. J. INT'L L. 103 (1979); Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

199. *See* R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 824-871 (1979).

advice and consent for the ratification[200] of four major treaties on human rights.

On February 23, 1978, President Carter transmitted to the Senate four human rights treaties. These treaties were: (1) the International Convention on the Elimination of All Forms of Racial Discrimination;[201] (2) the International Covenant on Economic, Social and Cultural Rights;[202] (3) the International Covenant on Civil and Political Rights;[203] and (4) the American Convention on Human Rights.[204] Annexed to the President's Message were two Department of State reports describing the treaties. There were also included a number of reservations, declarations and understandings.[205] Since the treaties have never received the support of the two-thirds majority of the Senate needed for ratification, the reservations, declarations and understandings have perhaps lost any practical meaning.[206] A short comment on the statements, however, is appropriate in light of the previous considerations.

In examining the three human rights treaties open to universal participation,[207] three of the recommended statements are common to each one: (1) a declaration indicating the non-self-executing character of the treaties, (2) a reservation preserving the freedom of expression and (3) a reservation concerning the jurisdiction of States and of the federal government. In addition, two of the proposed statements are common only to the two Covenants: (1) a declaration concerning private property rights and (2) an understanding on pro-

200. U.S. CONST. art. II § 2.

201. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969). This was adopted in resolution form by the U.N. General Assembly on Dec. 21, 1965 in G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965) [hereinafter cited as Convention on Racial Discrimination].

202. Economic, Social and Cultural Covenant, *supra* note 101.

203. Civil and Political Rights Covenant, *supra* note 101.

204. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. (No. 36) at 1, O.A.S. Off. Rec. OEA/Ser.K/XVI/1.1, Doc. 65, Rev.1 Corr.1, Jan. 7, 1970 [hereinafter cited as American Convention].

205. *See* Message from the President of the United States to the Senate Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. No. 95-C, D, E and F, 95th Cong., 2d Sess. (1978), *reprinted in* U.S. RATIFICATION, *supra* note 198, at 83-198 [hereinafter cited as Message].

206. A word of caution is necessary on the loss of the practical meaning of the recommended statements. Reportedly, should the current Administration resubmit these treaties to the Senate, approximately the same reservations, declarations and understandings would be proposed again.

207. The American Convention is the only one of the four treaties not open to universal participation.

gressive implementation. Lastly, four statements pertain to the Convention on Racial Discrimination: (1) a reservation concerning capital punishment, (2) a reservation concerning the right to compensation and revoked penalties, (3) an understanding on double jeopardy and (4) an understanding related to racial discrimination in private activities.

A. The Non-Self-Executing Character of the Treaties

The proposed declaration that the provisions of the treaties are not self-executing[208] is not relevant from an international legal perspective. The statement would not be a true reservation, since it would not modify or exclude the international legal effect of any provision of the treaties.[209] Whether a treaty is self-executing is an issue which pertains entirely to the municipal law of the single contracting parties.[210] International law is not concerned with the means by which States comply with their international obligations (that is, whether they require legislative or administrative acts in order to excute the treaty). From the standpoint of international law only the act of ratification is legally relevant. In order to constitute a true reservation the declaration must modify or exclude the *international* legal effect of treaty provisions, not their *domestic* legal effect.

In numerous States (for example, the Federal Republic of Germany, Italy and the United Kingdom), a legislative act of the parliament, legally unrelated to the ratification, is required to execute a treaty. In these countries treaties are never self-executing in the same sense as in United States law. Therefore, the declaration at issue has no tangible effect upon the United States. Since those States could not legally justify failure to comply with their treaty obligations, the failure of United States could not be justified either.[211] Thus, whether United States courts deem the declaration effective is only an issue of domestic law.[212] As a result, if a specific treaty obligation

208. Message, *supra* note 205, at 93, 97, 103. "The United States declares that the provisions of . . . this Convention are not self-executing.").

209. *See* Vienna Convention, *supra* note 8, art. 2(1)(d).

210. *Cf.* Schachter, *supra* note 198, at 464 n.11; Schachter, *Intervention at International Human Rights Treaties: Hearings before the Committee on Foreign Relations of the U.S. Senate*, 96th Cong., 1st Sess. 88-89 (1979) [hereinafter cited as *Hearings*].

211. It is a very well settled rule of customary international law—now codified in Article 27 of the Vienna Convention—that a State cannot set forth its domestic law as a justification for failing to perform a treaty obligation.

212. The declaration might be deemed to be an unconstitutional attempt to legislate by the Senate alone, without the required participation of the House. *Cf.* Dearborn, *supra* note 198, *passim*; Henkin, *The Covenant on Civil and Political Rights*, in U.S. RATIFICATION, *supra* note

is violated by such a construction the United States would be internationally responsible.

B. Freedom of Expression

The reservation on freedom of expression[213] is probably the only necessary reservation.[214] It has been criticized for being too "sweeping" because it refers not only to the Constitution, but also to the "laws and practices of the United States."[215] From an international legal perspective, however, it constitutes a true reservation and would probably not attract any objection by other States.

Article 4 of the Convention on Racial Discrimination,[216] Article 5 of the Economic, Social and Cultural Covenant,[217] and Article 20 of the Civil and Political Covenant[218] are the targets of this reservation. In particular, Article 4 of the Convention on Racial Discrimination and Article 20 of the Civil and Political Covenant might be regarded as inconsistent with the freedom of speech and press clauses of the First Amendment.[219] For example, Article 4 of the Convention on Racial Discrimination prohibits "all dissemination of ideas based on racial superiority or hatred,"[220] and Article 20 of the Civil and Political Covenant prohibits "any propaganda for war" and "any advocacy of national, racial or religious hatred."[221]

On the other hand, Article 5 of the Economic, Social and Cultural Covenant is perhaps only indirectly inconsistent with the First Amendment. Consequently, the reservation seems to be redundant. This view is confirmed by the fact that no State has made a reserva-

198, at 23-24; Rovine & Goldklang, *Defense of Declarations, Reservations, and Understandings*, U.S. RATIFICATION, *supra* note 198, at 59-61; Weissbrodt, *supra* note 198, at 66-72; Weston, *U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights*, in U.S. RATIFICATION, *supra* note 198, at 37-38.

213. Message, *supra* note 205, at 91, 95, 98 ("The Constitution of the United States . . . contain[s] provisions for the protection of individual rights, including the right of free speech, and nothing in this Convention shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution laws, and practice of the United States").

214. *See Rights: American and Human*, *supra* note 198, at 423-24; Henkin, *supra* note 212, at 22.

215. *See* Weissbrodt, *supra* note 198, at 62-63.

216. Convention on Racial Discrimination, *supra* note 201, art. 4.

217. Economic,Social and Cultural Covenant, *supra* note 101, art. 5.

218. Civil and Political Covenant, *supra* note 101, art. 20.

219. U.S. CONST. amend. I, § 1.

220. Convention on Racial Discrimination, *supra* note 201, art. 4.

221. Civil and Political Covenant, *supra* note 101, art. 20.

tion to the provision.[222]

C. *The Jurisdiction of the States and the Federal Government*[223]

The federal-state reservation is perhaps anachronistic given the current state of United States constitutional law.[224] Its purpose, however, is to facilitate the advice and consent of the Senate in the ratification process.[225] From the viewpoint of international law it is a typical reservation, with which the United States limits the impact of the treaties by pledging to take appropriate measures to obtain, from the local governments, the fulfillment of the treaties. Such a reservation would justify the failure of the United States to comply with the treaties to the extent that their subject matter conflicts with the exclusive jurisdiction of the states. The United States would be responsible for a breach of the treaties' provisions in only two instances: (1) where there is concurrent jurisdiction of federal and local governments, or (2) when there is exclusive jurisdiction of the federal government.

D. *Private Property Rights*[226]

Both Covenants have provisions referring to the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[227] They manifestly recall the notion of "permanent sovereignty over natural resources" embodied in Resolution 1803, which declares Permanent Sovereignty over Natural Resources,[228] Resolution 3201 which declares the Establishment of a New Interna-

222. 1982 U.N. Treaties, *supra* note 96, at 112-16.

223. Message, *supra* note 205, at 92, 96, 102. "The United States shall implement all the provisions of the Convention over whose subject matter the Federal Government exercises legislative and judicial administration; with respect to those provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant."

224. *Cf.* Henkin, *supra* note 198, at 143-48, 227-48; Henkin, *supra* note 212, at 24-25; Weissbrodt, *supra* note 198, at 63-66.

225. *Cf.* Rovine & Goldklang, *supra* note 212, at 59-62.

226. Message, *supra* note 205, at 94, 102. The declaration provides: "The United States declares that nothing in the Covenant derogates from the equal obligation of all States to fulfill their responsibilities under international law. The United States understands that under the Covenant everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property."

227. Economic, Social and Cultural Covenant, *supra* note 101, art. 25; Civil and Political Covenant, *supra* note 101, art. 47.

228. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5127 (1962).

tional Economic Order,[229] and Resolution 3281 which contains the Character of Economic Rights and Duties of States.[230]

The United States has opposed such principles because of their direct relation to the problem of seizure or nationalization of foreign property. Therefore, the proposed declaration on private property rights, although not a true reservation, is a policy statement which reaffirms the position of the United States on the subject matter. It is perhaps a superfluous statement to be made in connection with a human rights treaty. However, given the disputed dynamics of the formation of customary international law it is not unwise for a State to make such statements whenever its position is challenged.[231] In addition, it is probably essential to include such a declaration in order to overcome the reluctance of the Senate towards these treaties.[232]

E. Progressive Implementation

The understanding on progressive implementation is a true reservation. It purports to modify the legal effect of certain provisions of both Covenants by making their application gradual.[233] It is a very common reservation in human rights treaties and is usually made by less developed countries.[234]

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229. G.A. Res. 3201 (S-VI), 29 U.N. GAOR Supp. (No. 1.) at 3, U.N. Doc. A/ 9559 (1974).

230. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 30) at 50, U.N. Doc. A./ 9030 (1974). *See generally* BROWNLIE, *supra* note 7, at 540-45; D. CARREAU, P. JUILLARD & T. FLORY, DROIT INTERNATIONAL ECONOMIQUE 84-93, 538-95 (2d ed. 1980); NGUYKEN QUOC DINH, P. DAILLIER & A. PELLET, DROIT INTERNATIONAL PUBLIC 762-76 (2d ed. 1980); P. PICONE & G. SACERDOTI, DIRITTO INTERNAZIONALE DELL ECONOMIA 127-72, 245-64 (1982); THIERRY, COMBACAU, SUR & VALLÉE, *supra* note 7, at 614-16. All of these works have bibliographical references to the abundant literature on the subject matter.

231. The hint here is to the very controversial issue—strictly linked to the general issue of the nature of customary international law—of the "permanent (or persistent) objector." *See generally* BROWNLIE, *supra* note 7, at 10-11; THIERRY, COMBACAU, SUR & VALLÉE, *supra* note 7, at 111-12; TUNKIN, *supra* note 50, at 122-33.

232. *Cf. Hearings*, *supra* note 210, at 7-10, 13-16. No other State has formulated declarations with respect to the quoted provision, perhaps substantiating, on the one hand, the impression that such statements are redundant in the context of a human rights treaty, and on the other hand, the argument that few States, if any, share the same conservative position of the United States on this issue.

233. Message, *supra* note 205, at 98 ("The United States understands . . . that the provisions . . . of this Covenant describe goals to be achieved progressively rather than through immediate implementation.").

234. *See supra* note 104 and accompanying text.

F. Capital Punishment

The target of the reservation on capital punishment[235] is Article 6 of the Covenant on Civil and Political Rights.[236] Article 6 provides that:

> [S]entence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime . . . . Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence . . . . Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.[237]

In the words of Professor Weissbrodt, with the adoption of the recommended reservation, the United States would "assert its right to execute children and pregnant women [and to] refuse to guarantee the availability of pardon or prevent the imposition of capital punishment for non-serious crimes."[238] Such a reservation is quite useless because it would have almost no effect on the practices of the United States.[239] Moreover, the fact that no other State has made reservations to this provision negatively emphasizes the United States' position on the subject matter.[240]

G. Compensation and Revoked Penalties

The reservation on the right to compensation and revoked penalties is made in a single statement directed toward two provisions of the Civil and Political Covenant.[241] It can therefore be regarded as actually encompassing two reservations.[242] The first reservation would avoid the application of Article 9(5), which bestowes an enforceable right to compensation to anyone who has been the victim of unlawful arrest or detention.[243] Three other States have made reservations with reference to this provision without drawing any

235. Message, *supra* note 205, at 98 ("The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.").

236. Civil and Political Covenant, *supra* note 101, art. 6.

237. *Id.* art. 6, paras. 2, 4, 5.

238. Weissbrodt, *supra* note 198, at 73-74.

239. *Id.* at 72 n.210.

240. *See* 1982 U.N. Treaties, *supra* note 96, at 121-28.

241. Message, *supra* note 205, at 99. The reservation provides that: "The United States does not adhere to paragraph (5) of Article 9 or to the third clause of paragraph (1) of Article 15."

242. *Cf.* Weissbrodt, *supra* note 198, at 74-75.

243. Civil and Political Covenant, *supra* note 101, at art. 9(5).

objection.[244]

The second reservation would prevent the application of the third clause of Article 15(1). Article 15(1) provides that an offender must benefit from new legislation enacted after the commission of the offense if it imposes a lighter penalty.[245] So far, three reservations (by the Federal Republic of Germany, Italy, and Syria) have been made to Article 15(1). These reservations were not objected to.[246]

H. Free Legal Assistance and Double Jeopardy

The recommended statement on free legal assistance and double jeopardy would alter the application of several norms contained in Article 14 of the Civil and Political Covenant to make them consistent with the United States law.[247] First, it would modify the norms concerning the rights to free counsel in certain instances. Moreover, it would exclude the application of the double jeopardy clause of the Covenant when both federal and state courts have jurisdiction in cases involving actions which are both federal and state crimes.[248] In spite of being termed an understanding, the statement contains true reservations. These would probably not be objected to since quite a few nations have made reservations to Article 14.[249] Seven States have made reservations to the double jeopardy clause for varying reasons. Most have made their reservations because of domestic laws which permit resumption of criminal cases where the accused parties were acquitted. In adddition, sixteen States have made reservations to other norms of Article 14. These reservations range from the right to a double exercise of jurisdiction to the right of the free assistance of an interpreter. No State has objected to any reservation made with respect to Article 14.

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244. *See* 1982 U.N. Treaties, *supra* note 96, at 121-29, 132-33.

245. Civil and Political Covenant *supra* note 101, art. 15(1).

246. *See* 1982 U.N. Treaties, *supra* note 96, at 121-29, 132-33.

247. Message, *supra* note 205, at 100: This understanding provides that:

> The United States understands that subparagraph (3)(b) and (d) of Article 14 do not require the provision of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The United States further understands that paragraph (3)(e) does not forbid requiring an indigent defendant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provisions of United States law currently in force constitute compliance with paragraph (6). The United States understands that the prohibition on double jeopardy contained in paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause.

248. *Cf.* Weissbrodt, *supra* note 198, at 75-77.

249. *See* 1982 U.N. Treaties, *supra* note 96, at 121-29.

I. Private Racial Discrimination

The statement on private racial discrimination[250] is probably best considered as a true reservation since it would exclude the application of some provisions of the Convention on Racial Discrimination. Specifically, it would exclude application of the Convention to private activities which are not required by federal or state laws to be available on a non-discriminatory basis. This reservation is related to the one concerning freedom of speech. Thus, the considerations made with respect to that reservation may be deemed to be appropriate here as well.[251]

J. Summary of the Reservations Proposed by the Carter Administration

The reservations recommended by the Carter Administration to the Senate are not particularly troublesome from an international law perspective. Many are analogous to reservations already made by other States. Moreover, none of the reservations can be easily considered incompatible with the object and purpose of the treaties. In any event, the issue of compatibility would arise only if objections were made by the other parties to the treaties. As shown by the analysis of the Vienna Convention regime, the compatibility rule is only applied in relationships with objecting States. Thus, if the proposed United States reservations drew no objections within one year they would automatically be regarded as binding on all the contracting parties. If some objections were formulated—which today is quite unusual in human rights treaties[252]—the chance of actual legal disputes appears remote. A certain number of objections, however, might amount to a political failure. In any event, ratification with reservations would appear to be more desirable than nonratification for a number of legal and political reasons.[253]

Since 1978 the situation has not changed. The mentioned human rights treaties and the Convention on Genocide still wait to

250. Message, *supra* note 205, at 90. The statement provides:

> The United States understands its obligation to exact legislation and take other measures under paragraph (1) of Article 2, subparagraphs (1)(c) and (1)(d) of Article 2, Article 3, and Article 5 to extend only to governmental or government-assisted private activities and to private activities required to be available on a non-discriminatory basis as defined by the Constitution and laws of the United States.

251. *See supra* text accompanying notes 213-222.

252. *See* Appendix.

253. *See* Buergenthal, *The American Convention on Human Rights*, in U.S. RATIFICATION, *supra* note 198, at 47-53; Rovine & Goldklang, *supra* note 212; Skelton, *supra* note 198, *passim*. *But see* Henkin, *supra* note 212, at 25.

be ratified. The latter treaty has already waited thirty-five years. Thus far, the Reagan Administration has not attempted to obtain Senate advice and consent for ratification of these treaties. However, the Reagan Administration is reportedly now considering taking a position in favor of ratification.[254] If this occurs, the outlined reservations will probably remain unaltered, and will be recommended once again to the Senate, as will several new reservations concerning the Convention on Genocide.[255]

IV. SUMMARY AND CONCLUSION

It must be recognized that in the modern law of treaties reservations still play an important role in shaping international obligations. Reservations to treaties on human rights do not differ from reservations made with respect to other multilateral treaties;[256] the legal regime and roles are the same. The practices of States show that reservations to human rights treaties are often made to overcome domestic, legal or political problems. Such problems are frequently overrated and often do not actually require the use of a reservation since they have little to do with the actual compliance by the reserving States to basic human rights principles. Indeed, reservations are useful because they allow a more universal participation to such conventions. Thus, the issue of international enforcement of human rights has little to do with the issue of reservations to human rights treaties. The fact that States without satisfactory human rights records often ratify without reservations is quite significant in this regard.

In choosing whether to formulate reservations a State is bound first by the treaty itself and secondly by the Vienna Convention regime on reservations. The Vienna Convention is binding either as a treaty or, arguably, as customary international law. The Vienna Convention provisions, however, appear to leave wide latitude to States in terms of control over the contents of other States' reservations. Although the rule of compatibility with the object and purpose of the treaty—the so-called compatibility rule—is, as a matter of law, an objective test, its legal actionability depends upon the other States'

254. *See* AMERICAS WATCH, HELSINKI WATCH & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, FAILURE: THE REAGAN ADMINISTRATION'S HUMAN RIGHTS POLICY IN 1983, 13-14 (1984).

255. *Id.*

256. *Contra* Imbert, *supra* note 81, at 46: "[R]eservations to human rights conventions undoubtedly differ from those made in respect of other conventions . . . . "

reactions. This must *not* be taken to mean that States themselves judge the validity of reservations made by other States. Such an interpretation would amount to defining the compatibility rule as a subjective acceptability test. This definition cannot be accepted because it completely nullifies Article 19 of the Vienna Convention. In addition, it involves the pure fiction of pretending that a given State's only concern in reacting to a reservation is its compatibility with the object and purpose of the treaty.

The actionability of the compatibility rule, however, does depend to some extent upon the other States' reaction to the reservation. The necessary premise is that a State which formulates an incompatible reservation is undoubtedly breaching the compatibility rule and thereby commits a wrongful act which entails its international responsibility. If the other States accept such a reservation (even acknowledging that it is an illegal reservation) they express their consent and preclude the wrongfulness of such an act in relation to themselves. The only limit to the expression of such consent falls under the doctrine of *jus cogens*. If the reservation is inconsistent with a norm of *jus cogens*, consent cannot validly be given since both States would be violating international law. Where no *jus cogens* is violated, however, States can bilaterally agree on certain modifications or exclusions because reservations are in the nature of special agreements between the reserving and the accepting States.[257]

If States do object to a reservation which is incompatible with the object and purpose of the treaty they do not give their consent to the wrongful act. In such instances the objecting States are not claiming the incompatibility of the reservation; they are simply preventing its "legalization" in their respective bilateral relations with the reserving State. The practical effectiveness of the compatibility rule is related to the use made of objections by States. The rule cannot operate between States who have agreed, through a non-objected reservation, on a certain pattern of treaty obligations.

It has been shown that in the context of human rights treaties objections to reservations have gradually become disfavored.[258] This appears to be due to the impairment of the role of objections brought about by the Vienna Convention. The inversion of the presumption

257. As an evident corollary, once a reservation is made and accepted, a State cannot alter it adding further restrictions (*e.g.* modifying or excluding the application of the treaty to certain geographical areas which were not mentioned in the original reservation) without violating the basic norm *pacta sunt servanda* with regard to the agreement it has reached with the accepting States on the scope of its treaty rights and obligations in relation to them.

258. *See* Appendix.

concerning the entry into force of the treaty as between the reserving and the objecting State has had a major impact on human rights treaties. This has occurred because the concept of reciprocity, upon which the notion of objection is based, has a limited influence in these types of treaties. As a result, the compatibility rule is no longer effective in human rights treaties either. From a legal viewpoint, however, it still retains its full value. Thus, a State cannot thoughtlessly formulate incompatible (that is illegal) reservations as this would mean reliance on the absence of the other States' objections. Consequently, this would include the risk of involvement in a legal claim concerning the State's international responsibility. As such, the debate in the United States concerning the ratification of major human rights treaties, with or without reservations, must take the compatibility rule into some account.

APPENDIX

STATES' ATTITUDES TOWARD RESERVATIONS AND OBJECTIONS CONCERNING MAJOR POST-1951 HUMAN RIGHTS TREATIES*

Treaty	Open. for Sign.	Entry into Force	No. of States Parties	No. of States Making Reserv.	No. of States Object. to Reserv.	No. of States Whose Reserv. Are Object. to
Genocide[1]	Dec. 1948	Jan. 1951	89	22	11	22
Traffic in Persons[2]	Mar. 1950	July 1951	52	14	3	4
Women Pol.Rts.[3]	Mar. 1953	July 1954	90	42	12	14
Racial Discrim.[4]	Mar. 1966	Jan. 1969	117	44	2	8
Econ.Soc. Cul.Rts.[5]	Dec. 1966	Jan. 1976	75	30	3	1
Civ.Pol. Rts.[6]	Dec. 1966	Mar. 1976	75	35	3	3

* Some specifications: a. Data are drawn from U.N., Multilateral Treaties Deposited with the Secretary-General, Dec. 31, 1982, ST/LEG.SER.E/2, at 91-145; b. "Reservations" is to be understood in the broadest sense, comprehensive of declarations and understandings, given the extreme subjectivity inherent in ascertaining the real essence of a government's statements; c. Not included in the Table: i) treaties which forbid reservations, ii) regional treaties, iii) minor treaties, iv) treaties concerning side issues, *e.g.*, refugees or stateless persons, v) treaties amending pre-UN treaties, vi) treaties concluded under the auspices of specialized agencies.

1. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

2. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostituion of Others, July 25, 1951, 96 U.N.T.S. 271.

3. Convention on the Political Rights of Women, July 7, 1954, 193 U.N.T.S. 135.

4. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [this was adopted in Resolution form by the UN General Assembly on Dec. 21, 1965, in G.A. Res. 2106, 20 GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965)].

5. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

6. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

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Opt.Protocol Civ.Pol.[7]	Dec. 1966	Mar. 1976	28	6	0	0
War Crimes[8]	Nov. 1968	Nov. 1970	23	13	0	0
Apartheid[9]	Nov. 1973	July 1976	70	6	1	2
Women Discrim.[10]	Dec. 1979	Sept. 1981	45	27	0	0

7. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59. U.N. Doc A/6316 (1966).

8. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73.

9. International Convention on the Suppression and Punishment of the Crime of Apartheid, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

10. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979).