RESERVATION TO TREATIES AND SOME PRACTICAL ISSUES

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The modern law on reservations to treaties is now embodied in the 1969 Vienna Convention on the Law of Treaties (VCLT), which provides the basic guidance for state practice. Generally speaking the flexible approach adopted by the VCLT has operated quite satisfactorily.¹ However, this does not mean that the system is free from problems or deficiencies in its application. The present paper is designed to analyse the operation of the VCLT rules and the problems associated therewith in the light of relevant state practice, with a view to clarifying some of the issues involved.

1. INTRODUCTION

Reservation to treaties is one of the complex and difficult issues in the law of treaties and in the state practice with respect to treaties. The concept is deeply rooted in the basis of international law itself, namely the consent of states. The essence of a reservation is to attach certain conditions to the consent expressed by a state to be bound by a treaty. There are two aspects that need clarification. One is that a reservation, in order to be admissible and effective *vis-à-vis* other parties to the treaty, has to be accepted by them. The other is that no international obligation can be imposed upon a state without its acceptance, either explicitly or implicitly. It follows that a state can withhold the application of certain provisions in a treaty by way of a reservation, like the persistent objector state in the formation of customary rules of international law. The development of the rules on reservations to treaties witnesses a changing emphasis from the former to the latter aspect in responding to the reality of international relations and the corresponding political and legal requirements.

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¹ Professor BROWNIE concludes that “[i]n practice, for extraneous reasons, the flexible system is working fairly well”. I. BROWNIE, *Principles of public international law*, 4th ed. (1990) 611.

Theoretically, reservations may be made to any treaty, bilateral and multilateral. Reservations to bilateral treaties, however, seem to have little practical meaning because in that case they would amount to lack of agreement on the issue at point.² It is also contended that reservations to bilateral treaties do not present any problems³. As the International Law Commission (ILC) stated, “[a] reservation to a bilateral treaty presents no problems, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement – either adopting or rejecting the reservation – the treaty will be concluded; if not, it will fall to the ground”.⁴ The present paper will be confined to examining issues relating to reservations to multilateral treaties.

The traditional rules on reservations to multilateral treaties were developed upon the perception that a treaty resembles a contract in the municipal legal order where, once the terms have been agreed upon, the contract can only be modified with the consent of the parties. So a reservation made by a state can be assimilated to an offer which must be accepted by all the contracting parties to the treaty, in order for it to produce legal effect. Any objection to a reservation would have as its consequence that either the reserving State withdraws its reservation and becomes a party without the reservation, or insists on its position and does not become a party. The actual veto power of one objecting party would preclude a reserving State from becoming a party to the treaty, no matter how minor the reservation is or even if it might seem acceptable to most other parties. This is where the question whether half a loaf would not, after all, be better than no bread⁵ comes in.

The need to ensure the widest possible participation in multilateral treaties, especially those of a normative and humanitarian nature, coupled with the prevailing reality of international relations including the new procedures for the adoption of the text of a treaty prompted the International Court of Justice (ICJ)

² R.JENNINGS and A.WATTS, *Oppenheim's International Law*, Volume 1, 9th edn.(1992) 1242; P.REUTER, *Introduction to the law of treaties*, 2nd English edition (1995) 78. Occasionally, but rarely, one of the parties to a bilateral treaty makes a reservation when expressing its consent to be bound by the treaty. The legal consequences arising therefrom may be resolved either by interpreting it to the effect that no agreement has in fact been reached on the subject matter, or by applying the unanimity rule of acceptance. If not accepted, no treaty relations between the parties are deemed established. It is not quite clear whether the VCLT rules apply to reservations to bilateral treaties. It remains even more questionable whether tacit acceptance can be assumed when the other party that has been previously notified of the reservation proceeds to the exchange of instruments of ratification without raising any explicit objection to the said reservation. The question might partly be answered by reference to Art.20(2) of the VCLT if the term “limited number of negotiating states” can be interpreted as to cover also the case of bilateral treaties. For further discussion, see F.HORN, *Reservations and interpretative declarations to multilateral treaties* (1988) at 4 and 7.

³ D.P.O'CONNELL, *International law*, 2nd ed.(1970) 232; HORN, *supra* n.2 at 4.

⁴ YILC 1966-II at 203.

⁵ G.FITZMAURICE, *Law and procedure of the International Court of Justice*, Vol.1 (1986) 411.

to reject the traditional unanimity rule on reservations in its advisory opinion on Reservations to the Genocide Convention.⁶ The Court stated:⁷

“[I]t has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto. It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law.”

In the same opinion, the Court adopted a more flexible approach based on the consensual conception of international law. It said that

“[i]t follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as 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.”⁸

As to the effect of a reservation and an objection thereto, the Court decided

“that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.”⁹

Despite criticism from many quarters and especially the reluctance on the part of the ILC to follow such an approach in its earlier reports on the law of treaties, the flexible approach as pronounced by the ICJ has been followed by the UN Secretary-General in his depositary practice and was later incorporated in the ILC Draft Articles on the Law of Treaties and finally adopted in the VCLT.

⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Rep.1951:15.

⁷ *Ibid.* at 24.

⁸ *Ibid.* at 24.

⁹ *Ibid.* at 15.

2. THE MODERN LAW AND ASSOCIATED PROBLEMS

The modern law of reservations is now contained in Article 2(1)(d) and Articles 19-23 of the VCLT, the result of both codification and progressive development of international law. The bulk of the rules is based on the flexible approach, but remnants of the unanimity system are easily discernible, e.g. in the provisions of Article 20(2) and (3) of the VCLT. In the *Anglo-French Continental Shelf Arbitration* case, the Tribunal made reference to Article 2(1)(d) in determining the status of French declarations and in effect applied Article 21(3) in deciding on the legal effect of an objection to a reservation in circumstances where the objecting State had not opposed the entry into force of the treaty between itself and the reserving State.¹⁰ In the *Temeltasch* and *Belilos* cases, the European Commission and the European Court of Human Rights applied Article 2(1)(d) of the VCLT¹¹. Although it might be too bold to assert that the Convention regime represents in its entirety codification rather than progressive development¹² of international law, the subsequent state practice certainly raises the impression that the VCLT rules are evolving as customary rules of international law.¹³

2.1. Definition of a reservation

Although the practice of reservations to treaties can be traced back as far as the end of the 18th century¹⁴, it was not until 1969 that an authoritative definition of a reservation crystallised in the VCLT. In Article 2(1)(d) of the Convention, a reservation is defined as

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

¹⁰ *Anglo-French Continental Shelf Arbitration*, 54 ILR 50-52; I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, 2nd ed. (1984) at 26.

¹¹ European Commission in *Temeltasch v. Switzerland* (1982), 88 ILR 627; European Commission and Court in *Belilos v. Switzerland* (1988), 88 ILR 640 and 663.

¹² SINCLAIR noted that Articles 19-23, at least to some measure, represent progressive development rather than codification. He is very cautious in judging whether they have evolved into customary law. See SINCLAIR, op.cit. n.10 at 12-13.

¹³ L. LIJZAAD, *Reservations to human rights treaties: ratify and ruin?* (1995) at 76. Professor PELLET concludes that “even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by article 2, paragraph 1 (d), and articles 19 to 23 have now acquired customary force.” See A. PELLET, *First Report on the Law and Practice relating to Reservations to Treaties* (1995), UN Doc. A/CN.4/470, p.71. But Professor GREIG expresses doubts on this point. See D.W. GREIG, “Reservations: equity as a balancing factor?”, 16 *Austral. YIL* (1995) 21.

¹⁴ HORN, *supra* n.2 at 7.

Three elements are essential in this definition: form, time and distinctive character. In terms of form, a reservation is a 'unilateral statement'. Clearly it is external to the treaty provisions and is made by a state on its own. It is unilateral in the sense that it is made *vis-à-vis* other parties to the treaty. This would also cover the case of a statement jointly formulated by more than one party. The fact that it is presented jointly by a group of like-minded States does not change the *unilateral* character of the statement as long as it is intended not to have effect on their relations *inter se*,¹⁵ but on their relations with parties other than themselves. It is the one-sided initiative of the reserving State(s) that is essential here.¹⁶ The unilateral statement is only the first step in the reservation process. It only produces legal effect when it is accepted, one way or another, by another party to the treaty in question.¹⁷

The next element is the temporal requirement of a reservation. Although a unilateral statement could be made at any time during the negotiations of a treaty or after its conclusion, it will only have the character of a reservation when it is made by the state at the time of expressing its consent to be bound by the treaty, i.e. when "signing, ratifying, accepting, approving or acceding to a treaty". Where signing is subject to ratification or approval, the statement has to be confirmed by the state when it definitely expresses its consent to be bound. This temporal requirement may be considered as a default rule. It is open to the parties to a treaty to devise different temporal limitations in a specific treaty. International law basically being of a consensual nature, rules and procedures may also be created by explicit or tacit consent or acquiescence. There are examples of reservations made far exceeding the specific temporal restrictions of the treaty.¹⁸ They have exceptionally been tolerated by the parties to the treaties in question as a matter of expediency and out of pragmatic considerations, from which no *opinio juris* may be deduced. Such a pragmatic approach is mainly intended to simplify the normal procedure of withdrawing from a treaty and then rejoining the treaty with a reservation made at the time of becoming a party. However, it is doubtful whether such exception could be made in case of a treaty which is silent on the possibility of denunciation and

¹⁵ If the statement is solely directed toward altering treaty relations *inter se*, it would not constitute a reservation but might produce an effect as meant by Art.32 item (b) as a tool for interpretation, or Art.41(1) as a device for modification. See GREIG, *supra* n.13 at 26-27.

¹⁶ LIJNZAAD, *supra* n.13 at 32.

¹⁷ SINCLAIR, *supra* n.10 at 51; J.M.RUDA, "Reservations to Treaties", 146 Hague Recueil (1975-III) 105.

¹⁸ France made a reservation to the Convention Providing for a Uniform Law for Cheques of 1931 more than 40 years after it acceded to the treaty. The UN Secretary-General as depositary communicated the reservation to the states concerned. In the absence of objections within 90 days, the reservation took effect. The argument was that the parties to a treaty may, by unanimous decision, amend the provisions of the treaty or take appropriate measures with respect to its application and implementation. See *United Nations Juridical Yearbook 1978* at 199-200; HORN, *supra* n.2 at 42-43; GREIG, *supra* n.13 at 28 fn.35. If the French approach had met with just one objection, the matter would be much more complicated. The most likely solution would be for France first to withdraw from the treaty and then rejoin it with the intended reservation.

where neither the intention of the parties nor the nature of the treaty would allow the withdrawal from it.¹⁹

Finally, the essence of a reservation lies not in its wording or nomenclature, but in the effect it intends to produce. The phrase “however phrased or named” indicates that the form or name of the statement is irrelevant and that its content and substance are decisive. In the structure of the definition, the phrase serves as a qualifier to ‘statement’ and provides a logical link with the ‘purport ...’ phrase. It should be noted that the phrase is important in defining the concept of reservation, but when applying the definition to a specific situation the words should not be given an ‘overriding effect’²⁰ without due consideration of other relevant specific factors and the reasonableness of the end result.²¹

The key element in establishing a statement as a reservation is contained in the clause “whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. The words ‘purport’ and ‘exclude or modify the legal effect’ provide two clues for the application of the test. For ‘purport’, the subjective aspect of the statement has to be looked into, implying an investigation into the intentions of the author of the statement. As to whether the statement would, if applied, have the result ‘to exclude or to modify the legal effect’ of provisions of the treaty, an objective assessment is required, consisting of comparing the effect of application of the statement with that of the application of the treaty provisions as such.

The fact that states often append statements of various kinds and sometimes of a mixed or ambiguous nature to their signatures or to instruments of ratification makes it extremely difficult to determine categorically what amounts to a reservation *stricto sensu*. In its commentary of 1966, the ILC pointed out that states not infrequently make declarations as to their understanding of some matter or their interpretation of a particular provision and that “[s]uch a declaration may be a mere clarification of the State’s position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted”.²² It is not easy to draw a clear line between the two, especially where a statement says how a State would understand or propose to interpret or apply a particular provision of a treaty. (see *infra*, section 3.1)

To clarify the matter, it should be emphasized that a reservation to and the interpretation of treaties are two different legal issues regulated by different articles of the VCLT. The definition of a reservation as contained in Article 2(1)(d), if looked at in isolation from other parts of the treaty text, appears to include statements on interpretation, particularly by the words “however

¹⁹ VCLT Arts. 54 and 56.

²⁰ GREIG, loc.cit.n.13 at 27.

²¹ The issue is to be further dealt with when discussing the distinction between interpretative statements and reservations in Section 3.1 below.

²² YILC 1966-II 190.

phrased or named” and “whereby it purports to exclude or to modify the legal effect”. Some writers suggest that “an interpretative statement is a reservation if the interpretation specified in the statement is imposed as a condition of the acceptance of the treaty by the State issuing the statement”²³ or if “a State makes its ratification or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty”²⁴. Such a proposition confuses the distinct legal rules clearly set forth in different parts of the VCLT. It is doubtful that under the VCLT unilateral interpretation could be imposed on other parties. Article 31 of the Convention states that a treaty shall be interpreted in good faith. The function of interpretation is to ascertain the legal effect of the provisions of a treaty as it is intended by the parties according to the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose and, where necessary and appropriate, with recourse to subsidiary means of interpretation. In good faith, a unilateral interpretation cannot purport to ‘exclude or modify’ the legal effect of a treaty provision. This may provide a perspective from which a reservation and an interpretative declaration could be distinguished from one another.

2.2. Formulation of reservations: admissibility

Article 19 of the Convention follows a permissive approach to the right to formulate reservations. It provides that “[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation ...”. This first half of the Article sets out in clear terms the right to formulate a reservation as a matter of general principle. But as indicated in another part of the Article, the right is circumscribed by three exceptions:

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

The scope of Article 19(a) and (b) is obvious. The prohibition referred to in Article 19(a) can be a general prohibition of any reservation (sometimes with the exception of those which are expressly permitted) or a specific prohibition of certain kinds of reservations or reservations to certain articles. As to Article 19(b), its scope was very much narrowed after the introduction of a Polish amendment inserting the word ‘only’ before ‘specified reservations’. If a treaty contains a provision merely permitting certain specific reservations, this does not by itself preclude a state from formulating other reservations. The original

²³ GREIG, loc.cit.n.13 at 30.

²⁴ D.M.McRAE, “The legal effect of interpretative declarations”, 49 BYIL (1978) 160.

presumption of the ILC that a provision permitting certain reservations would prohibit all others was changed into a formula prohibiting all other reservations except those exclusively permitted (in fact, an implicit prohibition). In this sense, Article 19(a) and (b) can be seen as one single exception to the right to formulate a reservation, i.e. if the reservation is prohibited by the treaty either explicitly or implicitly.

The limitations on the right to formulate reservations as set forth in the Article are objective criteria, but they are not 'self-executing' by the mere fact that they are included in the Convention. They have to be applied, primarily and first and foremost, by the state contemplating and proposing a reservation.

Article 19(a) and (b) are stated in rather clear terms and do not need much subjective assessment. When a reservation is formulated, the confronted states will apply the criteria in assessing whether the reservation so formulated is consistent with Article 19(a) and (b). Up to this stage, the rules are applied internally by both the reserving and confronted states. In a next stage, if the confronted state considers the reservation to be not admissible, it may respond accordingly and thereby rely on a reservation clause in the treaty concerned under which the reservation is prohibited explicitly or implicitly. It may then take the view that the reservation is a breach of the treaty and devoid of legal effects as a consequence of *ex injuria jus non oritur*. If, on the other hand, it finds the reservation not in contravention with the criteria of Article 19(a) and (b), it can respond in accordance with Article 20.

The VCLT adopted the flexible system for reservations as pronounced by the ICJ in the *Reservations* case. Compatibility with object and purpose of the treaty applies to both reservations and objections raised against them. In earlier drafts of the ILC there was a reference to the compatibility criterion with respect to objections. The reference was dropped in the final draft which was presented to the Diplomatic Conference because it was thought that very often objections to reservations were made not on the ground that the reservation was incompatible with the object and purpose of the treaty, but on other grounds²⁵. This does not, however, in any way diminish the fact that the compatibility in question is subject to the assessment by the confronted states, and that it is not a mandatory ground for objection to the reservation, although the objecting state is not obliged to state the reasons or grounds of its objection.

Article 19(c), though it can be seen as an objective criterion, contains subjective elements as the object and purpose of a treaty is an abstract concept, the identification of which requires much subjective interpretation. on the part of the confronted state. The compatibility of a reservation with object and purpose of the treaty is thus to be established in light of the responses (including silence) of the confronted states. In the absence of any objective mechanism or competent judicial organ to assess the compatibility in question, the test must be made by each state individually from its own perspective. When the reservation fails the object and purpose test, the state concerned will draw the legal conse-

²⁵ YILC 1966-II: 207.

quences as it sees fit. It could consider the reservation as invalid because it does not meet the requirement of Article 19(c). Consequently, it may explicitly exclude its entry into treaty relations with the reserving state. However, if it judges such treaty relations to be in its best interests, it can enter such relations according to its own free will. Anyhow, its conclusion as to the incompatibility of the reservation cannot override a different conclusion of other parties and invalidate the reservation with *erga omnes* effect. Only if all other parties consider the reservation incompatible with the object and purpose of the treaty would the reservation be of absolute invalidity *ab initio*.

The operations of Articles 19(c) and 20 are intermingled. The application of the criteria in Article 19(c) can only take place through the responses of other parties in accordance with Article 20. As the ILC stated:²⁶

“The admissibility or otherwise of a reservation under paragraph (c), on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph has, therefore, to be read in close conjunction with the provisions of article 17 [VCLT Art.20] regarding the acceptance of and objection to reservations.”

Article 19(c) is a criterion guiding the formulation of a reservation. It essentially contains a limitation of the right to formulate the reservation. Such a limitation primarily to be ‘self-applied’ by the formulating state: the latter shall make sure that the reservation to be proposed is not incompatible with the object and purpose of the treaty. In the 1962 ILC draft, the (then) Article 17(2)(a) clearly indicated that “[w]hen formulating a reservation ..., a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty”.²⁷ Support for such a perception of Article 19(c) can be drawn from the ICJ advisory opinion in the *Reservations* case, where it was stated:²⁸

“The object and purpose of the Convention ... limit 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 and purpose of the Convention that must *furnish the criterion for the attitude of a State in making the reservation* ... as well as for the appraisal by a State in objecting to the reservation.” [emphasis added]

The formulation of a reservation is a unilateral act. There is a presumption that a state exercises its right to formulate reservations in good faith and that it does not make any reservation that will *prima facie* be contrary to the limitations of Article 19. As it was pointed out by Mr. DE SARAM, “it also seemed reasonable to assume that Governments ... would not wish to disengage themselves from the central core obligations within a treaty... referred to in an advi-

²⁶ Ibid.

²⁷ YILC 1962-II: 60.

²⁸ ICJ Rep.1951: 24.

sory opinion of ICJ as the object and purpose of a treaty” and “there was no statistical or other basis for assuming that reserving States acted in bad faith”.²⁹

The ‘objective’ criterion of the ‘object and purpose’ test referred to in Article 19(c) is thus very dependent on the ‘subjective’ application by individual parties and their conclusions. The ICJ emphasized that the appraisal of the validity of reservations and the response to them are rights exercised individually by states from their individual point of view. It stated that “each State objecting to [the reservation] will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose ...”.³⁰ An objective determination is only possible in exceptional cases where there is a judicial body empowered to that effect. The ICJ in its opinion referred to such possibility, but this was not relevant in the case at hand as it was precisely the reservation to such judicial function that had led to the application for the advisory opinion. Under some regional human rights conventions, however, the parties have indeed vested monitoring bodies with the power to rule on issues relating to the interpretation and implementation of the conventions including the validity of the reservations made thereto.

Different perceptions of the limitations to the right to formulate reservations have led to the development of two different doctrinal views on the nature and function of these limitations, resulting in quite different modes of application of the rules. According to the ‘permissibility school’, the issue of ‘permissibility’ is the preliminary issue that must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether “... other parties find the reservation acceptable or not”³¹. In contrast, for the “opposability school”, “the validity of a reservation depends solely on the acceptance of the reservation by another contracting State”, and “not on the fulfilment of the condition for its admission on the basis of its compatibility with the object and purpose of the treaty”.³² The criterion in Article 19(c) is considered to be “a mere doctrinal assertion, which may serve as a basis for guidance to States regarding acceptance of reservations, but no more than that”.³³ The arguments of both schools of thought have their merits. Both schools recognize that all three items (a), (b) and (c) of Article 19 constitute conditions for the formulation of reservations. But they adopt different approaches as to how such conditions function. One school lays much emphasis on the theoretical aspect of the conditions, while the other stresses their practical application. Pushed to their extremes, they further complicate rather than help clear the inherent ambiguities. A line of thinking should be explored to bridge the doctrinal differences between the two schools while maintaining the

²⁹ J.DE SARAM, in YILC 1995-I:167.

³⁰ ICJ Rep.1951:26.

³¹ D.W.BOWETT, “Reservations to Non-Restricted Multilateral Treaties”, 48 BYIL (1976-7) 88.

³² RUDA, loc.cit.n.17 at 190.

³³ RUDA, *ibid*.

large measure of commonality in their practical application. There seem to be no major differences regarding Article 19(a) and (b). As to the problem that arises under Article 19(c), the permissibility school is right from a theoretical point of view, but such a theory can hardly be practicable due to the lack of objective determination at the jurisdictional plane. It is the pragmatic and practical scenario offered by the opposability school that seems to be prevailing, and the state practice is more or less in line with it.

2.3. Acceptance of and objections to reservations: opposability

The VCLT rules dealing with reservation are based on two balanced considerations: the freedom of states to formulate reservations (subject to the three exceptions of Article 19) and the freedom of parties to a treaty to accept or object to reservations. The principle underlying the whole system is that no obligation can be binding upon a State without its consent. It has been firmly stated by the ICJ in the Reservations case that “[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”.³⁴ In order to be opposable, a reservation has to be accepted by the other parties to the treaty. Acceptance can be explicit or implicit (or tacit). The system of the VCLT with respect to the acceptance of reservations consists of a combination of the traditional unanimity rule and the flexible approach. Article 20 encompasses three acceptance rules: unanimity, collective decision and individual response. It is generally recognized that individual response is the basic rule while the other two are to be seen as *lex specialis*.³⁵ In temporal terms, there are two ways envisaged in Article 20: a reservation can be accepted, either in advance, as in the case of reservations ‘expressly authorized’ by the treaty, or subsequently (Art.20(1) VCLT). In terms of the actors whose response is required, the acceptance by the competent organ of an international organization is required if the treaty in question is the constituent instrument of that organization (Art.20(3)), whereas in all other cases acceptance is to be obtained from the other parties to the treaty.

2.3.1. *Opposability by acceptance in advance*

In Article 19 reference is made to the formulation of a reservation (‘to formulate a reservation’) and its making (‘may be made’). These point to different implications for the application of Article 20. A reservation formulated in contravention of Article 19(a) or (c) will not have any legal effect before the other parties to the treaty have responded to it, whereas a specific reservation

³⁴ ICJ Rep.1951:21.

³⁵ Ruda, loc.cit n.17 at 188.

authorized by a treaty as covered by Article 19(b) can be validly made without the need of any subsequent acceptance by parties to the treaty. This may be seen as an acceptance in advance and follows from Article 20(1) which refers to “a reservation expressly authorized by a treaty” which “does not require any subsequent acceptance by the other contracting States unless the treaty so provides”. The requirement of “expressly authorized by a treaty” is quite stringent, and cases of reservations made under such authorization are in fact rather rare in practice.³⁶ The criteria used in Article 19(b), according to which “only specified reservations ... may be made” seems to meet the requirement. If, however, a treaty in a general way allows reservations or reservations to certain articles of the treaty, it only means that reservations may be made but does not include an obligation to accept on the part of the other parties. Reservations made under such entitlement would still be subject to subsequent response by the other parties who are free to accept or object. For example, the 1958 Geneva Convention on the Continental Shelf states in its Article 12 that “any State may make reservations to Articles of the Convention other than to Articles 1 to 3 inclusive”. In the *Anglo-French Continental Shelf* case, the Court concluded with regard to the French reservation and the UK objection thereto that:³⁷

“the Court considers that the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 and 3 to be clearly correct. Such an interpretation of Article 12 would amount almost to a license to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specific reservations could parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms.”

Here the Court drew a clear distinction between cases where reservations were specified and cases where the reservation clause merely indicated the range of articles to which reservations may be made. In contrast to this ruling, the Inter-American Court of Human Rights applied the rule of Article 20(1) quite liberally in its advisory opinion on the *Effects of Reservations on the Entry into Force of the American Convention* (ACHR). The Court interpreted the reference in Article 75 to reservations “in conformity with the provisions” of the VCLT in such a way that it only related to Article 19(c) thereof, and that the compatibility with the object and purpose of the treaty would suffice to meet the requirements for the acceptance in advance of any reservations made in accordance with Article 75. This interpretation was based on the belief that a more flexible rule was envisaged in drafting the ACHR. The underlying presumption was that reservations made under Article 75 were permissible. But

³⁶ GREIG, loc.cit.n.13 at 119. For examples, see HORN, op.cit.n.2 at 113.

³⁷ 54 ILR 43.

such an interpretation of Article 20(1) of the VCLT is far from plausible. The impact of the opinion on state practice is yet to be awaited.

2.3.2 *Opposability by unanimous acceptance*

The traditional unanimity rule still plays a role in the VCLT in respect of the so-called restrictive multilateral treaties. Article 20(2) states that

“[w]hen it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.”

There are two factors that dictate the application of the requirement of unanimous acceptance of reservations. The first one is the limited number of negotiating States. The second one is the intention of the states concerned that the integrity of the treaty is essential for their individual consent to be bound by that treaty. Such intention can be deduced from the object and purpose of the treaty. These two factors taken together constitute the conditions under which the unanimity rule operates. One writer has pointed out that in such a special situation the acceptance by ‘all parties’ should be understood as the acceptance by all ‘States entitled to become parties’³⁸. This assertion can be seen as a pragmatic stand rather than a plain interpretation of the rule. In fact, the traditional unanimity rule requires that a reservation should be accepted by all the contracting parties.³⁹ Although ‘contracting parties’ here does not necessarily mean parties that have definitely expressed their consent to be bound by the treaty, it seems not possible to extend its scope beyond the ‘negotiating States’ and signatories.

2.3.3 *Opposability by collective acceptance*

Since the VCLT applies to treaties concluded between states, the response to reservations is to come from the states parties to the treaty. But the VCLT makes an exception to this general rule by stipulating in Article 20(3) that in the case of a treaty being the constituent instrument of an international organization, “unless [the treaty] otherwise provides, a reservation requires the acceptance of the competent organ of that organization”. The Convention does not elaborate further on the way in which this provision operates. It has been left to the organization in question to decide which is its competent organ and what is the applicable procedure for granting the said acceptance in accordance with the provisions of its constitution and its rules of procedure. In most cases, the competent organ is a decision-making body representing the member states.

³⁸ RUDA, loc.cit.n.17 at 186.

³⁹ SINCLAIR, op.cit.n.10 at 53-54; HORN, op.cit.n.2 at 15-16.

The acceptance usually is the result of a collective decision. Assuming that the decision is taken by a majority vote of the member states, what is the scope and the effect of this decision of acceptance? Is the decision binding upon a member state who voted against it? No clear answer can be found in the VCLT. As a general rule, a state cannot be subjected to any obligation without its consent, nor can it impose its will on other States without their consent. The acceptance by the competent organ would, consequently, not deprive a state of its right to individually object to the reservation, and such an objection would prevent the opposability of the reservation against that state. An alternative interpretation would be that the acceptance referred to in Article 20(3) is meant to be an additional requirement for the validity of a reservation to the constituent instrument, which is applied simultaneously with the normal response requirements. However, a textual reading of the chapeau of Article 20(4)⁴⁰ appears to exclude such an interpretation.

2.3.4. *Opposability by individual acceptance*

The opposability of a reservation being established by individual acceptance is the general rule governing the acceptance of reservations. According to VCLT Article 20 paragraph 4, it applies to cases not falling under what have been discussed in the foregoing, and is of a residual nature as it applies “unless the treaty otherwise provides”. Opposability by individual acceptance is the essence of the ‘flexible regime’. The flexibility lies in the fact that the acceptance by all parties is not required for the validity of a reservation. As a result of this flexibility, coupled with the effect of an opposable reservation, a multilateral treaty could be ‘bilateralized’, breaking down as it were into several bilateral treaties. Article 20(4) provides in (a) that “acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States” and in (c) that “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”. The opposability of a reservation is established if it is (expressly or tacitly) accepted by another party. Such opposability has two important functions. One is to establish treaty relations between the reserving and the accepting states (Art.20(4)(a)). The other function is to establish the status of the reserving State as a party to the treaty. The combined effect of Article 20(4)(a) and (c) makes the status as party to the treaty an objective one. While Article 20(4)(a) confines that status to a bilateral context, Article 20(4)(c) confirms the act expressing consent to be bound as a fact with legal effect not only in bilateral context but *erga omnes*. As such the act counts for the determination of the numbers necessary to bring the treaty into force.

⁴⁰ “In cases not falling under the preceding paragraphs and unless the treaty otherwise provides: ...”

2.3.5. *Objection to a reservation*

The objection to a reservation is designed to counter-balance the right to formulate a reservation, with which it shares the legal presumption that a State cannot be subjected to any obligation without its consent. Both are based on the consensual conception of international law. Under the traditional reservation system, objection would have an absolute effect tantamount to 'a virtual veto' of a single state to keep out another state despite the fact that the latter's participation could be valuable even on a reduced basis.⁴¹ Even a writer who was very critical of the flexible approach adopted by the ICJ pointed out the need to mitigate the unanimous consent rule somewhat so as to permit states to participate with a reservation, provided this reservation is accepted, or not objected to, by the great majority of the other states parties.⁴² Under the VCLT the general rule is that an objection will not have the effect of precluding treaty relations unless the objecting state so indicates. The ILC draft articles gave more weight to an objection by granting it a default effect and precluding the effectuation of treaty relations between the objecting and the reserving states. This was reversed at the Vienna Conference so that the Convention now puts the onus on the objecting state by leaving to it the competence to decide whether its objection has the effect of precluding the treaty to enter into force between the reserving and objecting state.⁴³ In that connection, Sir HUMPHREY WALDOCK commented at the Conference:⁴⁴

"[T]he problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in favour of stating the rule in one way rather than the other, provided it was perfectly clear."

As a result the objection has become a lesser sanction against a reservation. The combined effect of the reversed rule on objection and tacit acceptance has made it easier for a reserving state to become a party to the treaty. Noticeably, with the onus on the objecting state to publicly declare that it does not intend to have treaty relations with the reserving State, it would be difficult for a small State to do so when the reserving State is a powerful one.⁴⁵

It is very doubtful that an objection in the context of the VCLT system could be considered to contribute, in a passive manner, to the opposability of a reservation. An objection would normally, unless otherwise declared by the objecting state, not preclude the establishment of treaty relations between the

⁴¹ FITZMAURICE, *op.cit.*n.5 at 441.

⁴² *Ibid.*

⁴³ SINCLAIR, *op.cit.*n.10 at 62.

⁴⁴ United Nations Conference on the Law of Treaties, Second Session, *Official Records*, Plenary Meetings, pp.30-35, cited in SINCLAIR, *op.cit.*n.10 at 62-63.

⁴⁵ SINCLAIR, *op.cit.*n.10 at 63.

reserving and objecting states. However, this is rather different from stating that such an objection alone would cause the reserving State become a party to the treaty, in a similar way as does an acceptance of a reservation under Article 20(4)(a). It is admittedly a question of theoretical hypothesis rather than one of practical significance. Even if a 'non-precluding' objection has been raised before the time of presumed tacit acceptance under Article 20(5) (*see infra*), such objection can hardly be considered as having the effect of expressing consent of the objecting state to be bound by the treaty together with the reserving state.

As a compensation for the limited effect of an objection, no substantial limitation is imposed upon the right to object to a reservation. An objection can be employed for the rejection of an impermissible reservation under Article 19(c). It can also be used for the rejection of a permissible reservation, unless the latter has been accepted in advance as referred to in Article 20(1). The objecting state is indeed not obliged to publicize the grounds of its attitude.

2.3.6. *Tacit acceptance of a reservation*

Failure to object to a reservation is presumed to be a tacit acceptance. It is the most significant feature of the international practice regarding reservations.⁴⁶ Article 20(5) provides that

"[f]or the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later."

Tacit acceptance is common to both the traditional unanimity rule and the present flexible system. By the terms of its introductory phrase, the rule on tacit acceptance as set forth in Article 20(5) applies to Article 20(2) and (4) which, respectively, represent the traditional system and the flexible system. This excludes its application to reservations to the constituent instrument of an international organization as referred to in Article 20(3) and to cases where a treaty requires express acceptance.

Article 20(5) deals with two cases of tacit acceptance. In the case of an existing party to the treaty, non-reaction to a reservation within a certain period of time is to be construed, *sub silentio*, as tacit acceptance. This has been referred to by some writers as 'tacit acceptance proper'.⁴⁷ On the other hand, there is the case of silence on a pre-existing reservation on the part of a state at the time of expressing its consent to be bound by the treaty, which implies the acceptance of the reservation, and which is referred to by the term 'implied acceptance'.⁴⁸

⁴⁶ RUDA, loc.cit.n.17 at 184; see also SINCLAIR, op.cit.n.10 at 63.

⁴⁷ HORN, op.cit.n.2 at 126.

⁴⁸ RUDA, loc.cit.n.17 at 185.

A matter of significance is the temporal factor in the process of tacit consent, viz. the period of time after which acceptance can be inferred from non-reaction. In the traditional unanimity system where consent or non-objection to a reservation by all contracting states is required, this time factor plays a most important role as it is essential for determining whether or not acceptance of a reservation can be deemed to exist. It can be said that there is a rule of customary international law requiring states to make their objections known within a reasonable time of being notified of a reservation.⁴⁹ But the length of this 'reasonable time' is not settled as a matter of customary law. Its determination would largely depend on the circumstances of the case. Article 20(5) refers to 'twelve months' after which silence is 'considered' to be acceptance. The less emphatic and more presumptive language employed in the sub-paragraph would indicate that the 12-month period is not reflecting an existing norm at the time of the conclusion of the Convention. Nor can subsequent state practice be assessed as being consistent and containing a strong conviction of the existence of a legal rule (*opinio juris*) to that effect. One writer⁵⁰ has suggested an operating framework for the concept of tacit acceptance in which two situations are distinguished: one in which consent to a reservation is essential to the reserving state's participation in a treaty and where the objecting and reserving states have relatively close contacts, and another where there are few or no contacts between the parties concerned. In the former case, the presumption that non-objection constitutes tacit acceptance is the strongest, while in the latter a failure to object within a relatively short period would not necessarily be considered to amount to acceptance when an objection is raised much later. Since there is no certainty about the existence of a customary rule prescribing specific time limits, the foregoing suggestion may be a reasonable assessment of the situation. But as a matter of treaty law the VCLT's 12-month rule is to apply strictly. Non-reaction within this period is deemed to be an acceptance. Objections beyond the period are null and void as they are in breach of the treaty which "is binding upon the parties to it and must be performed by them in good faith".⁵¹

2.3.7. Relationship between permissibility and opposability

Permissibility governs the formulation of reservations. 'Formulation' is a quite neutral word, and the formulation of a reservation should in no way pre-judge that a reservation has in fact been made or proposed. Sir GERALD FITZMAURICE emphasizes the distinction between a completed reservation and a proposal for a reservation.⁵² Under the VCLT, Article 19 should be broadly understood to govern the issue of formulation of a reservation.

⁴⁹ GREIG, loc.cit.n.13 at 123.

⁵⁰ Ibid. at 132-133.

⁵¹ VCLT Art.27.

⁵² FITZMAURICE, op.cit.n.5 at 409-411.

As a matter of fact, the application of the permissibility criteria mostly take place *ex post facto*⁵³: the permissibility or otherwise of a reservation can only be assessed after it has been put forward. Before that, the criteria are employed internally by a state in considering the desirability of making a reservation. As Article 19(a) and (b) are objective in nature and self-evident, they appear to be less subject to (subjective) interpretation by the individual parties. Article 19(c), however, concerning the compatibility with the object and purpose of a treaty, is not at all that clear and self-evident, and is liable to different interpretations and a subjective appreciation of the parties, in the absence of an objective determination process.

It is obvious that a reservation can be accepted in advance. But can it also be objected to in advance? To a certain extent, the permissibility criteria of Article 19(a) and (b) could be seen as instances of objection to a reservation in advance. From that perspective the proposition could be made that reservations always require a response either in advance or subsequently. The consequences of the responses, however, are not provided in Article 19 but are addressed in Article 20(4) and (5). This provides a logical link between the two articles and makes the permissibility criteria and the opposability effects operating in one single process. Whilst permissibility and opposability may represent two different stages in the process, their application are not mutually exclusive, but rather complementary.

The responses under Article 20 would have a dual function. On the one hand, it is to make a reservation opposable to the reacting party. On the other hand, it is to spell out an assessment of the permissibility of a reservation. The compatibility with the object and purpose of a treaty as referred to in Article 19(c) cannot by itself establish the permissibility or otherwise of a reservation. Permissibility will be established in a combined process of operation of Articles 19(c) and 20(4) and (5). The reaction concerning incompatibility together with an expressed preclusion of the entry into treaty relations would finally complete the operating process of the permissibility test. In the absence of judicial determination, unless all other parties reach the same conclusion as to the incompatibility of a reservation through the above process, the impermissibility outcome of one state party in itself would not have any effect on the treaty relations that become established between the reserving State and other parties to the treaty.

⁵³ SINCLAIR, *op.cit.* n.10 at 81 fn.78.

2.4. Legal effect of a reservation

2.4.1. *Effect of a reservation on other parties inter se*

A valid reservation produces legal effects upon the treaty relations between the parties to the treaty. Under the unanimous acceptance rule a reservation, when accepted, would only have effect on the relationship between the reserving and each accepting party bilaterally. The reservation would have no effect on the relationship between such other parties *inter se*. This general rule is incorporated in VCLT Article 21(2). As the VCLT has adopted a flexible approach to reservations whereby the opposability of a reservation is, with exception of those under Article 20(2) and (3), established by individual (express or tacit) acceptance, the reservation so accepted is first and foremost operative in the relationship between the reserving State and those accepting the reservation. A reservation falling under Article 20(2) and (3), once established, would have the same effect.

2.4.2. *Relationship between a reserving and an accepting party*

The effect of a valid reservation, as it is established with regard to another party in accordance with Articles 19, 20 and 23, operates reciprocally, viz. modifies, for the reserving state in its relations with the other party, the provisions of the treaty to which the reservation relates to the extent of the reservation and modifies those provisions to the same extent for that other party in its relations with the reserving state. The operating rule is that of reciprocity of reservations. The reserving state can invoke its reservation in its own favour *vis-à-vis* the accepting state and vice versa. Theoretically, general application of this reciprocity rule can be presumed, but in practical terms its application has to take account of other operating factors in the interpretation and application of treaties. The reciprocity rule can be easily applied to treaties or provisions of treaties that are of a reciprocal character as most cases might be. But in the case of a treaty or a treaty provision which is not of a reciprocal character or the reciprocal application of which would lead to a breach of other provisions of the treaty or to an absurd result, the effect of the reservation thereto upon the relationship between the reserving and accepting states need to be reassessed in the light of the specific circumstances. As it has been observed by one writer,⁵⁴ “whether it can be applied in a particular situation is a matter of interpretation, of seeking to ascertain the intentions of the parties in drafting the treaty, and of the reserving State in so far as that can be gathered by the other parties from the wording of the reservation in light of the circumstances in which it was made”. The reciprocity rule of reservations does not limit the right of an accepting party to invoke the reservation *vis-à-vis* the reserving party. But the exercise of such a right may be circumscribed by other obligations undertaken

⁵⁴ GREIG, loc.cit.n.13 at 141.

otherwise by the accepting party, such as good faith in its performance and application of the binding treaty. It might be appropriate to distinguish between the entitlement to reciprocally invoke a reservation and its actual use.

2.4.3. *Relationship between a reserving and an objecting party*

Under the traditional unanimity rule, a reservation would be struck down by an objection. The reserving state could not become a party to the treaty unless it does so without the reservation. Under the more flexible approach as adopted in the VCLT, the opposability of a reservation is established by individual acceptance (with specified exceptions), and an objection will not affect such opposability *vis-à-vis* accepting states, nor even preclude relations under the treaty between the objecting and the reserving party unless the objection expresses otherwise. So, the need arises for a rule governing the relationship between a reserving and an objecting party.

The basic rule as defined in VCLT Article 21(3) is that in case of an objection not precluding treaty relations with the reserving party, the provision to which the reservation relates does not apply between the two states to the extent of the reservation. In the case of a reservation that excludes the application of a treaty provision the result is the same as that in the relationship between a reserving and an accepting party. The result is different when the reservation is meant to modify the application of a provision. In the case of an acceptance, the provision to which the reservation relates will be applied as modified by the reservation, and in the case of an objection the provision in question will not be applied to the extent of the reservation.

It is not clear what is meant by the phrase “to the extent of the reservation” in Article 21(3). It may imply that the provision is not inapplicable *in toto*, but still applies to some extent. This was exactly the question in the *Anglo-French Continental Shelf Arbitration* case. Whereas France contended that its reservations to Article 6 of the 1958 Geneva Convention on the Continental Shelf and the objection to them raised by the United Kingdom would make the said article inapplicable, the United Kingdom argued that the effect of its rejection of the French reservations was to render them wholly unopposable and, even if they were opposable, the French reservations could not render Article 6 inapplicable *in toto*, but at the most “to the extent of the reservations”.⁵⁵ The Tribunal concluded:⁵⁶

“Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and

⁵⁵ 54 ILR 51.

⁵⁶ *Ibid.* at 52.

this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.”

The decision thus clarifies some of the uncertainties around the phrase “to the extent of the reservation”.

2.5. Withdrawal of reservations and of objections

Reservations and objections can be withdrawn at any time unless the treaty in question otherwise provides. Such withdrawal is a unilateral act which could affect the bilateral relationship between the reserving and the accepting States or between the reserving and the objecting states. The VCLT does not specify the effect of withdrawal of reservations and of objections, probably because the effect would be self-evident or can be easily inferred from the underlying principles of the reservation system. The effect of a withdrawal of a reservation would be to restore the applicability of the original provision to which the reservation relates. As for an objecting state which has excluded treaty relations with the reserving state, there is no reason why it would not be prepared to enter into treaty relations with the latter state now that the obstacle to the treaty relationship no longer exists.

In the case of withdrawal of a reservation, neither the consent of the parties that have accepted the reservation nor that of the objecting state is required. It has been suggested that a valid reservation constitutes a contractual stipulation which may not be varied without the consent of the other state.⁵⁷ Since a reservation is to modify or exclude a provision of a treaty for the benefit of the reserving state and to the detriment of the integrity of the treaty, the withdrawal of the reservation which will restore the integrity of the treaty would be very much in line with the interests of the originally accepting party, and thus its consent should not be required. It would be absurd to assume that the accepting state might be opposed to the restoration of the integrity of the treaty. It should, on the contrary, be presumed that the parties to a treaty would wish a reserving state to abandon its reservations. In fact, it is on this theory of freedom of withdrawal of reservations on a unilateral basis that Article 22(1) is formulated⁵⁸:

“A withdrawal will take effect in relation to another party only when the notification thereof has been received by the relevant parties, in the case of reservations by another party, and in the case of objections by the reserving State.”

⁵⁷ CERETTI, cited in RUDA, loc.cit.n.17 at 201.

⁵⁸ RUDA, *ibid*.

2.6. Procedure regarding reservations

Article 23 of the VCLT sets out procedural requirements for the formulation of reservations, the express acceptance, the raising of objections, and the withdrawal of reservations and objections. One requirement is that all these acts should be in writing. A reservation made at the time of signing a treaty which is subject to ratification, acceptance or approval, must be formally confirmed at the time of expressing consent to be bound and is considered to be made on the date of such confirmation. On the other hand, an acceptance or objection does not need any confirmation. Clearly only express acceptance need be given in writing. As tacit acceptance is presumed from non-reaction or silence, it will certainly not be required to be in writing or in any form at all.

Although procedural requirements or formality rules at first glance seem to play no essential role in assessing the validity of a reservation, there are occasions when such requirements are given a substantive weight. In the *Belilos* case, the European Court of Human Rights relied on the requirements of Article 64 of the Convention to evaluate the validity of a Swiss reservation to Article 6. Article 64 allows reservations “in respect of any particular provision of the Convention to the extent that any law then in force in the territory, is not in conformity with the provision”. It requires that a reservation shall not be of a general character and be accompanied by a “brief statement of the law concerned”. The Court ruled that the reservation did not satisfy the two requirements because the reservation was couched in terms that were too vague or broad for it to be possible to determine their exact meaning and scope, and that a brief statement of the law concerned is not a purely formal requirement but a condition of substance. Thus, the Swiss reservation was held to be invalid.⁵⁹ In contrast, in the *Temeltasch* case the European Commission of Human Rights held that the Swiss reservation which referred expressly to Article 6(3)(e) of the Convention could not be regarded as a reservation of a general character. The Commission further stated that although Switzerland had failed to comply with the requirement of Article 64(2) on submitting a brief statement of the law concerned, that failure was not sufficient to invalidate the reservation.⁶⁰ The Commission’s basic point of departure was that “[t]his question cannot ... be considered *in abstracto*, i.e. the approach cannot be whether non-compliance with this formal requirement automatically invalidates any reservations or declarations made in this way.”⁶¹ It did point to the possibility that a reservation made in breach of the requirements of Article 64(2) might not be regarded as contrary to the Convention and invalid.

⁵⁹ *Belilos v. Switzerland* (1988), 88 ILR 667-671.

⁶⁰ European Commission, *Temeltasch v. Switzerland* (1982), 88 ILR 630-632.

⁶¹ *Ibid.* at 631-632.

3. CONSIDERATION OF SOME PRACTICAL ISSUES

3.1. Distinction between a reservation and an interpretative declaration

The distinction between a true reservation and an interpretative declaration has been the most difficult issue to decide in state practice. For various practical reasons, states often take full advantage of the vagueness and ambiguity with regard to the distinction between the two. Sometimes a statement is deliberately couched in such vague terms that it could be easily taken as an interpretative declaration. It may thus escape objections while the author of the statement could assert that the statement in fact amounts to a reservation whenever it considers that to be in its interest to do so. In fact the present rules on reservations are designed to the advantage of the reserving state, based on the presumed right to make reservations. Besides, in practice particular weight is accorded to the intentions of the reserving state.

A further analysis of the *Belilos* case shows the complexity and subjectivity involved in the distinction between a reservation and an interpretative declaration. When ratifying the ECHR, Switzerland had made two 'reservations' and two 'interpretative declarations' in a single instrument of ratification, which read in part: "[T]he Swiss Federal Council [...] declares that the Convention ... is ratified with the following reservations and interpretative declarations ...", and in respect of Article 6(1), under the heading of *interpretative declarations*, "... considers that the guarantee of fair trial in Article 6, paragraph 1 of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge".⁶² On the one side, the applicant contended that the declaration could not be equated with a reservation and the European Commission also concluded that the declaration did not have the effect of a reservation in view of the wording and preparatory work of the declaration and of the fact that Switzerland had made both reservations and declarations at the same time in which case the latter could only exceptionally be equated with the former.⁶³ On the other side, the Swiss government relied on the concept of qualified interpretative declaration in asserting that the declaration was a reservation by nature. It explained that in its practice the criteria for distinguishing the two concepts were not absolute and the concept of a reservation in international law embraced any unilateral declaration designed to preclude or modify the legal effect of certain treaty provisions.⁶⁴ Instead of following the basic rules of treaty interpretation, the Court immediately went to look into the original intention of the drafters of the statement and found that the original intention was to make a reservation though the name of

⁶² 88 ILR 657-658.

⁶³ *Ibid.* at 663.

⁶⁴ *Ibid.* at 663-665.

the statement was changed when presented. Thus, the interpretative declaration was held to be a reservation. The facts being the same, the Commission and the Court came to quite different conclusions regarding the nature of the same statement. In the present case, the distinction between a reservation and an interpretative declaration should not be difficult to draw if the general rules of treaty interpretation had been followed in their normal order. It is very clear from the specific wording of the declaration and the context in which the term 'interpretative declaration' was used, that the declaration should be seen as an interpretation or understanding of a treaty provision. Only when the ordinary meaning of the term in its context is not clear should subsidiary means of interpretation be resorted to. This is also true for investigating the intention behind the terminology employed.

The difficulty of distinguishing a reservation from an interpretative declaration is further exacerbated by the definition of a reservation in Article 2(1)(d) of the VCLT, particularly the reference to 'however phrased or named'. Both jurisprudence and doctrinal analysis have been misled by the idea that the criterion to separate the two is whether a given statement purports to exclude or modify the legal effect of certain provisions in their application. Distinction has been made between 'a mere interpretative declaration' and 'a qualitative interpretative declaration', the latter being assimilated to a reservation.

The concept of reservation has been subject to a too broad interpretation and application. The phrase 'purports to' in Article 2(1)(a) has been given an excessive meaning, which is partly responsible for blurring the two distinctive legal terms and concepts which have their own rules of operation. Both reservation and interpretation have been employed in practice to vary the legal effect of a provision in its application to the parties. In the case of a reservation, the provision which is subject to the reservation is clear in its meaning, and what the reserving state intends to achieve is to exclude or modify the legal effect of such a relatively clear provision in its application. In the case of an interpretative declaration, the provision to which the declaration relates is not clear in its meaning, and what the declarant intends to do is to give an interpretation thereof while not excluding or modifying the legal effect of its application once the correct interpretation is established by the application of the rules on treaty interpretation. It may be easier to distinguish the two terms in concept than in practice. Though it is difficult to draw a clear line in most cases, it is possible to achieve a practical and reasonable result on the basis of the intention of the declarant which may be recovered from the provisions of the treaty and the terms used in the statement, in light of the principles of treaty interpretation and techniques, and taking into consideration the attitudes of other parties. As any statement is supposed to carry a meaning by the words used, it "has to be construed in accordance with the natural meaning of its terms".⁶⁵ As long as they are clear, no further investigation of the intentions behind them or resort to the preparatory process is needed. There should be a basic presumption that

⁶⁵ *Anglo-French Continental Shelf Arbitration*, 54 ILR 48.

“States were bound by their public statements and that there was no need to inquire at all costs their unspoken intentions” and “declarations in no way affected the scope and meaning of the instrument of ratification, which were exclusively determined by the treaty itself”.⁶⁶

3.2. Compatibility with the object and purpose of the treaty

Since the advisory opinion in the *Reservations* case, the term ‘object and purpose’(OP) of a treaty has become popular in the law of treaties. It has been employed as the key criterion for the validity of a reservation. It seems to be an objective yardstick as every treaty would have its object and purpose. But seldom does a treaty have clear provisions on its object and purpose. As a matter of fact, the concept is so abstract that it can hardly be considered objective. Although its sources may be objective, the identification of the object and purpose is the result of subjective activities by states parties which involve the parties’ appreciation and evaluation of the facts such as the agreed treaty text, the background of treaty negotiation and the preparatory work that have lead to the conclusion of the treaty.

The meaning of object and purpose of a treaty was taken as a well-established concept by the ILC when introducing the term into the VCLT, as the expression “had been used by the International Court of Justice and ... was found in many legal texts”⁶⁷. In the VCLT, the phrase can be found in Articles 19(c), 20(2), 31(1) and 60(3)(b) in respect of reservations, interpretation and breach of a treaty respectively. The ILC made no comments on any of these occasions when presenting its proposals to the diplomatic conference. This might be an indication that no need was felt to provide an explanation or definition of terms with an apparently uncontroversial and generally accepted meaning in the context in which they were used. It is open to question whether the phrase as used in Article 19(c) refers to a single OP or to any among several OPs. It has been suggested that there may be more than one OP in a treaty, in which case the principal OP would apply. The question seems not to be a valid one, as the expression should be understood as an abstraction of the deeper intentions behind the essential provisions of a treaty in the context of its negotiation background. Some would relate the OP to the relativity of the integrity of a treaty whereby treaty provisions may be designated as important or unimportant, essential or non-essential and substantive or procedural. All this may have some relevance here, but the OP is more complex. It is the generality achieved by subjective appreciation of all these facts, together with other relevant circumstances. It has a dual character of objectivity and subjectivity. It is because of this that in practice the OP operates in different ways.

⁶⁶ C.TOMUSCHAT, in YILC 1995-I at 155.

⁶⁷ Vienna Conference, *Official Records*(1968) at 415-416.

In a more subjective mode of operation, the OP test is applied by each individual party based on its own appreciation of the facts and specific situations involved, and from its point of view, including its political judgement and considerations. It is applied both in the context of Article 19(c) and Article 20(2) of the VCLT. In the way it is stated in Article 19(c), the OP is far from being a prohibitive and objective rule which alone will establish the permissibility of the reservation, like the rules referred to in Article 19(a) and (b). Due to the dominant subjective elements of the OP, the question whether a reservation is compatible with the OP will be assessed by the other parties as a result of their individual subjective appreciation in the context at hand. For example, in Article 20(4) and (5) the only exception to the applicability of the rules concerned is where “the treaty otherwise provides”. While Article 19(a) and (b) can be said to belong to such an exception, Article 19(c) may not. Understanding of the provisions in this way may lead to the application of Article 20(4) and (5) in determining the compatibility of a reservation with the OP of a treaty. As the ICJ stated in the *Reservations* case:

“As no State can be bound by a reservation to which it has not consented, it necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention.”⁶⁸

The Court seems to place primary emphasis on the reaction of individual parties in assessing the compatibility of a reservation with the OP of the treaty. The ILC in its earlier draft adopted the view of the ICJ that the compatibility with the OP should be “taken into account both by states formulating a reservation and by states deciding whether or not to consent to a reservation that has been formulated by another state”.⁶⁹ Although the ILC considered the compatibility requirement as essential for the permissibility of a reservation, it still regarded Article 19(c) as operating on a different basis than (a) and (b), in that (c) is a matter of appreciation by other parties and must be read in close conjunction with the provisions on acceptance of and objections to reservations. In this sense, the compatibility with the OP serves as a guide to conduct rather than as a prescriptive norm.⁷⁰

State practice provides little clarity on the application of the OP criterion. But the relatively few and inconsistent objections referring to the compatibility criterion in any case demonstrates that the criterion is employed by states as a guide in objecting to reservations. Though incompatibility with the OP would seem to result in the invalidity of the reservation so far as its opposability *vis-à-vis* the objecting state is concerned, in most cases such incompatibility does not preclude treaty relations between the objecting and reserving parties. For ex-

⁶⁸ ICJ Rep.1951:26.

⁶⁹ YILC 1962-II: 66.

⁷⁰ GREIG, loc.cit.n.13 at 86.

ample, the objections from Italy, Israel and the United Kingdom to a reservation made by Burundi to the 1973 Convention on Crimes against Internationally Protected Persons precluded the establishment of treaty relations on the ground of incompatibility of the reservation with the OP.⁷¹ In another case, however, the objections from eleven European states to the second reservation of the United States to the Covenant on Civil and Political Rights (CCPR) clearly stated that the reservation is incompatible with the object and purpose of the Covenant or with the specific article in question, but that their objections did not constitute an obstacle to the entry into force of the Covenant between them and the United States.⁷² There are cases of objections on the ground of incompatibility with the OP which do not state their effect at all. Should Article 20(4)(b) apply, the objections would not preclude treaty relations with the reserving State.

In an ideal situation of objective application of the OP criterion by a judicial body, the OP is moving from a mere guide to conduct to a legal norm on the basis of which the permissibility of a reservation can be determined. In the *Reservations* case the ICJ has pointed to the possibility of having the issue of compatibility objectively determined on the jurisdictional plane.⁷³ Under the ECHR and ACHR, the respective courts of human rights have been vested with the power to interpret and apply the Conventions including the competence to determine the validity of reservations. These regional judicial bodies have ruled on the invalidity of reservations in several cases, and given advisory opinions regarding the issue. Although there is no case directly dealing with the application of the compatibility of a reservation with the object and purpose of the treaty, the courts have at least set precedents for the judicial determination of the validity of reservations. It should be noted that in this jurisprudence the responses from other states parties have almost been disregarded except in one case (ECHR, *Loizidou* case)⁷⁴ where such responses were accorded marginal relevance.

3.3. Reservations and customary norms

Treaties and custom are the two main sources of international law. A customary rule may be codified or be reflected in a treaty, while a treaty might be evidence of custom or at least affirm state practice that could lead to the formation of a custom. The two sources are inter-related and co-exist. Even when a customary rule is identical with a treaty rule, it remains of practical value to

⁷¹ *Multilateral Treaties deposited with the Secretary-General, status as at 31 December 1994*, at 696-697.

⁷² *Multilateral Treaties deposited with the Secretary-General, status as at 31 December 1996*, at 131-134.

⁷³ ICJ Rep. 1951: 26.

⁷⁴ *Loizidou v. Turkey* (Preliminary Objections) (1955), 103 ILR 622-661.

distinguish between them. The ICJ in the *Nicaragua* case rejected the US argument that norms of customary international law concerned with self-defence had been subsumed and superseded by Article 51 of the United Nations Charter. The Court concluded that “customary international law continues to exist and to apply separately from international treaty law, even where the two categories of law have an identical content”.⁷⁵ The independent identity of treaties and custom has a direct bearing on the topic under discussion.

Reservations can not be made in respect of custom, although there exists a similar mechanism for the exclusion of the opposability of a customary rule, by way of raising persistent objection in the process of rule-formation. Is it possible to make a reservation to a treaty provision that embodies or reflects a customary rule? There are divergent views on this question. In the *North Sea Continental Shelf* cases, the ICJ seems to reject the possibility to make reservations to a customary rule of international law. The Court expressed its view in the following terms:

“[I]t is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; ... whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.”⁷⁶

The main purpose here was to prove that treaty provisions that are subject to reservations or not excluded from reservations are not regarded as declaratory of previously existing or emergent rules of customary law. Judge PADILLA NERVO in his separate opinion makes the point more straightforward by observing that

“[n]o right is conferred to make unilateral reservations to articles which are declaratory of established principles of international law. Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations. It follows that if the Convention by express provision permits reservations to certain articles this is due to recognition of the fact that such articles are not the codification or expression of existing mandatory principles or established binding rules of general international law, which as such are opposable not only to the contracting parties but also to third States.”⁷⁷

⁷⁵ 76 ILR 349.

⁷⁶ 41 ILR 68.

⁷⁷ *Ibid.* at 113.

But Judges MORELLI, LACHS and SØRENSEN gave an opposite view on the matter. They de-linked the faculty of making reservations from the status of a provision as a rule of international customary law. As Judge SØRENSEN put it: “[T]he faculty to make reservations to a treaty provision has no necessary connection with the question whether or not the provision can be considered as expressing a generally recognised rule of law”.⁷⁸

It is mostly contended that a treaty provision containing a customary rule cannot be the subject of a reservation. The view has been held that “it is surely out of the question to enter reservations to a treaty provision that has been construed to be a rule of general international law, or to a treaty enshrining such provisions”.⁷⁹ The Human Rights Committee of the CCPR in its General Comment No.24(52) stated that “provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be subject to reservations”.⁸⁰ This proposition is doubtful with respect to a rule of customary law (except *jus cogens*) which, by its very nature as *jus dispositivum*, is subject to modification by treaty law.⁸¹ Furthermore, customary rules, so long as they appear in a treaty, are treaty provisions in the context of the treaty. In the realm of treaty relations, they are operating as treaty rights and obligations and are subject to the rules relating to treaty interpretation and application. A reservation made in respect of such a provision would affect the legal effect and applicability of the treaty provision as such. It would not affect the operation of the identical rule as a customary norm where the rule in its customary form has been established independently of the treaty provision. If the formation of the customary rule resulted from the treaty provision in question, a reservation with respect to this latter provision would certainly be a relevant factor that should be taken into account when acknowledging the emergence of a customary rule.

It has been asserted that even if it is as a rule possible to make reservations to a treaty provision reflecting a customary rule, that would not apply to a rule containing *jus cogens*.⁸² Norms of *jus cogens*, by their nature, are rules that cannot be contracted out by a treaty. *Jus cogens* is a customary norm of a special character that is accepted and recognized by the international community of States as a whole and that can only be modified by a norm of general international law having the same character (VCLT Art.53). A treaty is void if it conflicts with such a norm. So it is logical to conclude that a reservation to a treaty provision that reflects a norm of *jus cogens* would not be permitted and thus be devoid of any legal effect.

⁷⁸ Ibid. at 222.

⁷⁹ P. WEIL, “Towards relative normativity in international law”, 77 AJIL(1983) 440.

⁸⁰ Human Rights Committee of ICCPR, General Comment No.24(52), 2 IHRR (1995) No.1:10-15 at 11.

⁸¹ Comment by M. NOWAK, 16 HRLJ(1995) 381.

⁸² Ibid.; Judge SØRENSEN, 41 ILR at 222.

However, if one approaches the matter from the other side, the conclusion might be different. A norm of *jus cogens* is conceptually never a treaty norm that can be modified by the consent of the parties to the treaty. A treaty provision can reflect or embody a norm of *jus cogens*, without *per se* being the *jus cogens* norm. Thus, a treaty provision is separable from a norm of *jus cogens*. A reservation to a treaty provision that reflects a norm of *jus cogens* would not affect the substance of the (customary) norm, but will vary the legal effect of the norm as a treaty provision while not affecting the effect of the norm which operates independently of the treaty. So, it is possible to suggest that a reservation to a treaty provision that reflects a norm of *jus cogens* might be permitted although it will have no impact on that norm in terms of substance.

It may seem not quite useful to distinguish between a treaty provision reflecting a norm of *jus cogens* and the norm of *jus cogens* itself, since the applicability of the substance of the norm can not be modified by a reservation. There are, however, practical considerations that may underlie the desire to distinguish the form from the substance of a norm of *jus cogens*. The *Nicaragua* case has confirmed the practical value of making reservations to a treaty provision that contains elements of a customary rule.

3.4. Severability of an invalid reservation

The VCLT does not provide rules on the legal consequence of an absolute invalid reservation which conflicts with the permissibility criteria of Article 19 (a) or (b), though it does set forth rules on the effect of a relative invalid reservation which is objected to by a party, *inter alia*, on the ground of incompatibility with the object and purpose of the treaty and a preclusion of treaty relations. In the case of an absolute invalid reservation, there seem to be two possibilities: (i) the invalid reservation invalidates the reserving state's act expressing its consent to be bound by the treaty and the reserving state does not become a party to the treaty; (ii) the invalid reservation is severable and the reserving State is bound by the treaty without the reservation.

The first possibility is a widely accepted view in both theory and practice. It is consistent with the consensual nature of treaty obligations. A reservation is a condition placed by the reserving State on its consent to be bound by the treaty. If the reservation or the condition on its consent is found to be invalid, the corollary is that the consent to be bound does not become effective.

The second possibility is put forward by BOWETT who writes:⁸³

"There is a patent contradiction in the expression of will by the State. There is the expression of a will to be bound by the treaty, as evidenced in the act of ratification or accession or even signature (if that is intended to be binding); and then there is the expression of a will to impose a condition, in the form of a res-

⁸³ BOWETT, loc.cit.n.31 at 75-76.

ervation, which is in contradiction with the intention to be bound by the treaty precisely because the reservation is not permissible under the treaty. Which expression is to prevail?"

By asking the question, he seems to presuppose the possibility of severance under certain conditions. After comparing it with a reservation to the optional clause of the ICJ Statute where Judge LAUTERPACHT envisaged a severability, Professor BOWETT comes to the conclusion that if it can be objectively determined that the state's paramount intention is to accept the treaty, then the invalid reservation can be struck out and disregarded as a nullity.⁸⁴ The crucial issue is, who shall have the authority to make such a determination of the state's intention. The European Court of Human Rights, following BOWETT's thesis, ruled in *Belilos* and *Loizidou* that the reservations in question were invalid and that the Convention was binding upon the reserving states. Encouraged by this practice, the Human Rights Committee of the CCPR asserted in its General Comment 24(52) that "such a[n] [invalid] reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without the benefit of the reservation".⁸⁵

These practices are neither in conformity with the basis of the law of treaties, nor acceptable to states. The French observation in response to the General Comment stated that "agreements, whatever their nature, are governed by the law of treaties; they are based on the consent of States and the reservations are the conditions which the States attached to their consent. Necessarily, therefore, if the reservations are deemed incompatible with the purpose and object of the treaty, the only consequence that may be drawn from this is to state that the consent is not valid and to decide that States are considered not to be parties to the instrument concerned".⁸⁶ It has also been pointed out that arbitrarily disregarding the reservation might entail the risk of discouraging states from ratifying human rights treaties or even lead to denunciations by the existing parties.⁸⁷

The possible severability of a reservation should be distinguished from disregarding an invalid reservation by external bodies. It has been suggested that "severability of a kind may well offer a solution in appropriate cases, although its contours are only beginning to be explored in State practice".⁸⁸ It would certainly be congruous with the consensual character of treaty commitments for the reserving state to draw its conclusions as to the consequence of the determination of a reservation as being invalid. The state would have two options: either withdraw the reservation and become a party to the treaty or, if the reser-

⁸⁴ Ibid. at 77.

⁸⁵ Loc.cit.n.80 at 15.

⁸⁶ A.PELLET, *Second Report on the Law and Practice Relating to Reservations to Treaties* (1996), UN Doc. A/CN.4/477 and Add.1 at 76.

⁸⁷ UK observation on General Comment No.24(52), in 66 BYIL (1995) at 659-660.

⁸⁸ Ibid.

vation is in fact an essential part of its to consent, withhold its consent to be bound by the treaty.

3.5. Separate rules for human rights treaties?

There has been a misunderstanding according to which the VCLT rules on reservations were designed for the exclusive application to treaties of a reciprocal nature. Thus its applicability to human rights treaties was called into question. Although General Comment 24(52) recognized that reservations to the Covenant are governed by international law, it criticized the rules on objections to reservations, which were believed to be inappropriate for addressing the issue of reservations to human rights treaties since these were “not a web of inter-State exchanges of mutual obligations”.⁸⁹ The General Comment further claimed that it necessarily falls to the (Human Rights) Committee to decide the validity of a reservation to the CCPR. Does this justify a separate reservation regime for human rights treaties? In order to find an answer to that question, it is necessary to recall the development of the present rules and the basic nature of reservations to treaties.

From the drafting history of the VCLT it is clear that the Convention seeks to establish a single regime applicable to reservations to treaties regardless of their nature and their object.⁹⁰ The ILC even looked specifically at the regime governing reservations to human rights treaties, including the CCPR, but did not find it necessary to make the matter the subject of a special, different, rule like the two other exceptions where different rules apply (Art.20(2) and (3)). In its opinion in the *Reservations* case where the general, flexible, approach was pronounced, the ICJ stated that

“[t]he [Genocide] Convention was manifestly adopted for a purely humanitarian and civilizing purpose. ... In such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention.”⁹¹

The Court concluded that

“[t]he 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.”⁹²

⁸⁹ Loc.cit.n.80 at 14.

⁹⁰ PELLET, loc.cit.n.86 at 24.

⁹¹ ICJ Rep. 1951: 24.

⁹² Ibid.

Thus the special nature and objectives of human rights treaties were well taken into consideration in the formation of the present reservation rules. In fact, it was “in the light precisely of those characteristics of the Genocide Convention, and in the light of the desirability of widespread adherence to it, that the Court set out its approach towards reservations”.⁹³

The central element of the present system of reservations that is considered to be not appropriate for human rights treaties is the possibility of objections being raised by an individual state in relation to reservations. It is suggested that a state's objection operates on the basis of reciprocity, while there is no reciprocity in human rights treaties.⁹⁴ Apart from whether or not there is reciprocity in such treaties, however, reciprocity is not the sole element of the objection rule though it does play a part wherever appropriate. It is not necessarily true that the reciprocity rule applies whenever there is a reservation, regardless of whether the treaty provision in question can be applied reciprocally. As has been eloquently argued by Professor PELLET,

“...unless it is by ‘doctrinal decree’, reciprocity is not a function inherent in a reservations regime and is not in any way the object of such a regime. Integrity and universality are reconciled in a treaty by preserving its object and its purpose, independently of any consideration having to do with the reciprocity of the parties’ undertakings, and it is hard to see why a reciprocity that the convention rules out would be reintroduced by means of reservations.”⁹⁵

It should be noted that the essence of a treaty is the mutuality of consent by states. Treaties by their very nature consist of a reciprocal exchange of obligations and undertakings. By giving its consent to be bound by a treaty, a party is committed to obligations *vis-à-vis* other parties to the treaty, a breach of which would give rise to state responsibility on the part of the breaching party. If such a reciprocal nature of obligations is to be called into question, it will be the whole treaty system that is under challenge. In that extreme event, the protection of human rights would have to look for new media whereby its object and purpose could be effectively achieved.

The argument that the integrity of a human rights treaty would be at risk in the face of reservations is not irrefutable. A reservation by its nature serves to exclude or modify the application of certain treaty provisions, thus admittedly eroding the much-desired perfect integrity of a treaty. On the other hand, by infringing minor aspects of the integrity, a larger number of States would be able to participate in the treaty, thus enhancing the universality of the treaty, which is equally essential for the efficacy of the treaty. By its true nature, the rules governing reservations to a treaty should strike a delicate balance between the pursuit of integrity and that of universality of the treaty. Absence of reservations certainly enhance the integrity of the treaty. But integrity itself is not

⁹³ UK observation, loc.cit.n.87 at 656.

⁹⁴ See General Comment No.24(52), loc.cit.n.80 at 10-15.

⁹⁵ PELLET, loc.cit.n.86 at 41.

the ultimate aim of treaties. Furthermore, reservations are a 'necessary evil'⁹⁶ resulting from the current state of the international society and, consequently, cannot be qualified at the ethical level. They are part of the hard reality of international relations and closely connected with the very basis of international law. Taken in a more positive sense, it has been argued that they are an essential condition of life, and the dynamics of treaties that promote the development of international law in the process.⁹⁷

As international treaties are characterized by the consent of the states parties, reservations being part of the treaty system are also governed by the principle of consent. The ICJ stated in the *Reservations* case that "[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".⁹⁸ This illustrates the need to give equal consideration to the will of the reserving state and that of the objecting state and to maintain a necessary balance.

Finally, the flexible nature of the present system lies in its residual rule: serving as a safeguard in case of silence of the treaty on the matter. It is always open for a specific treaty to set forth its own rules on reservations. It can prohibit any reservation or have different procedures for their formulation, acceptance, objection, as well as the effects thereof. It can also provide for an objective determination mechanism or a judicial body to assess the validity of a reservation. With so many options at the disposal of the parties to a treaty, there is indeed hardly any need for a separate set of rules on reservations to treaties relating to certain special subject-matters, such as human rights.

So there is really no gap or defect in the system, although problems might arise which are inherent to the treaty in question. The absence of special provisions in a treaty relating to the matter of reservations indicates, either that the parties have consented to rely on the operation of the general rules on reservations, or that the parties have been unable to lay down such rules because of disagreement.

4. CONCLUSIONS

It seems appropriate to draw the following conclusions with regard to the operation of the current system on reservations.

1. Starting from the traditional requirement of unanimous acceptance the reservations system has been brought up to date in line with the changed reality of the international legal order. The increased number of states, the new procedures of treaty-making, the need for a widest possible participation in a treaty while not endangering the essence of the treaty, and the consensual nature of

⁹⁶ R. AGO, YILC 1965-I: 151.

⁹⁷ PELLET, loc.cit.n.86 at 28.

⁹⁸ 18 ILR 368.

treaty obligations, have combined in militating in favour of the flexible approach as at present reflected in the VCLT provisions.

2. The success of the present reservations system lies in a well-stricken balance between integrity and universality of the treaty, neither of which can be sacrificed in favour of the other.

3. The key concept of the current flexible system is the required compatibility with the object and purpose of the treaty. It is both a criterion for the formulation of reservations and a guidance for the response by other parties. It is a seemingly objective criterion, but is normally applied on the basis of the subjective appreciation of individual parties. The chances for judicial determination of the compatibility with the object and purpose of a treaty are rare due to the reality and inherent deficiencies of the structure of international law.

4. There are some uncertainties and ambiguities in the current system which are, however, not fatal. They can be resolved according to the basic principles of treaty law and with a view to a fundamental balance between the integrity and the universality of the treaty and between the ideal and the reality of the international legal order.

5. The vitality of the present system lies in its flexibility and adaptability. The system is designed for general applicability, but it is a set of residual rules to be applied only where a treaty does not provide special provisions. It is open for any specific treaty to develop its own rules on reservations to that treaty.

6. The present system also applies to human rights treaties. There is no need to devise a separate and different system for human rights treaties. If there were a need for such special rules, these can be accommodated in the text of the treaty in question either at the time of conclusion or through amendment as agreed by the parties.