



RESERVATIONS TO UN HUMAN RIGHTS TREATIES: SOVEREIGN STATES SEEKING TO AVOID THEIR OBLIGATIONS?

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Abstract. This article explores specific reservations that are being declared to international treaties intended to protect human rights, and also whether the 1969 Vienna Convention on the Law of Treaties is sufficient to ensure such rights. The author considers if reservations declared by a state(s) are incompatible with the object and purpose of a treaty, and what consequences might follow if such a declaration(s) is made. To this end, the article investigates the practice of states that are party to the International Covenant on Civil and Political Rights, International Covenant on Social and Economic Rights, United Nations Convention on the Rights of Persons with Disabilities, and the United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment. These treaties were selected because they lay down significant principles for the protection of specific human rights, and also because they are frequently challenged through reservations which seek to alter fundamental provisions. On a theoretical level the regulation of reservations does not appear to be problematic, however on closer examination various reservations point to the inadequacy of current regulation in the 1969 Vienna Convention in terms of the protection of human rights. Accordingly, this article considers a major group of states that seek to become parties to treaties pertaining to human rights, but then make reservations with the intention of diluting fundamental provisions. Specifically, this applies to Islamic countries whose reservations claim incompatibility with Islamic law and by reference to their own cultural diversity. By objecting to the reservations, state parties must decide whether or not their reservation is compatible with the object and purpose of the treaty. According to provisions of the 1969 Vienna Convention on the Law of Treaties, a treaty may prohibit reservations for some or all of the treaty's provisions, which complicates the position of state parties. Indeed, the withdrawal of reservations can be considered more problematic after analysis of practical cases of various states than it is shown in theory. The author's analysis is intended to ascertain whether or not the 1969 Vienna Convention on the Law of the Treaties régime is suitable for the process of making reservations to the human rights treaties, and how the applicable regulation could be improved and thereby offer possible solutions to the problems outlined above.

Keywords: human rights, reservations, harmful practice, object and purpose of the treaty, Vienna Convention on the Law of Treaties, International Covenant on Civil and Political Rights, International Covenant on Social and Economic Rights, United Nations Convention on the Rights of Persons with Disabilities, United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment

Introduction

For several decades, reservations to human rights treaties have sparked intense discussions, often reflecting conflicting views both in the doctrine and practice of international law. The 1969 Vienna Convention on the Law of the Treaties (hereinafter - VCLT)² defines a “reservation” as a unilateral statement made by a State when signing (however phrased or named) as ratifying, formally confirming, accepting, and 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.

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² The Vienna Convention on the Law of Treaties was adopted on 23 May 1969, entered into force on 27 January 1980.

Just how important reservations are can be seen with the commencement in 1994 by the International Law Commission of The United Nations of its work on “the law and practice relating to reservations to treaties”. Yet, it was only in 2011 during its sixty-third session that the Commission adopted detailed guidelines, “Guide to practice on Reservations to Treaties”. While this document offers advice and guidance on the issue of reservations, it has failed to solve the treaty issues surrounding human rights with regard to reservations.

When the treaty itself expressly prohibits a reservation, there can be no space for subsequent consideration of reservation. However, the absence of a prohibition on reservations in the treaty does not necessarily mean that all reservations in general are permitted. States can only make reservation in the absence of express prohibition or permission if they perform a test that the reservations are compatible with the object and purpose of the treaty. Therefore, it is important to consider the reactions of other States that are parties to that treaty, i.e. make objections to the reservations.

Any discussion of reservations must take into consideration the legal powers of various bodies that comprise the United Nations, including significant documents such as the relevant reports, observations and announcements that assist in the interpretation of treaty provisions. With this in mind, the author will analyze the practice of international courts, monitoring bodies, as well as the works of the most significant researches in international law such as A. Pellet, M. N. Shaw and others.

One concern is whether state objections determine the invalidity of the reservation, or whether or not a reservation can be invalidated independently of state objection. Sh. Dey asserts: “it is difficult to reconcile with the progressive development of human rights if the consequences of the invalid reservation oust the reserving state from the scope of the treaty, or denounce the applicability of ‘the provisions to which the reservation relates’ between the objecting and reserving state” (Dey, 2018, 2). Hence, the article considers what practical issues remain important while implementing human rights instruments at the national level in the light of reservations made to treaties.

It is instructive to note that following international UN treaties are subject to the highest number of reservations: Convention on the Elimination of All Forms of Discrimination against Women (hereinafter - CEDAW); International Covenant on Civil and Political Rights (hereinafter -ICCPR); International Covenant on Social and Economic Rights (hereinafter - ICSEER); United Nations Convention on the Rights of the Child (hereinafter -CRC); United Nations Convention on the Rights of Persons with Disabilities (hereinafter – CRPD); United Nations Convention against torture and other Cruel, Inhuman or Degrading Treatment (hereinafter – CAT); as well as the regional human rights instrument, the European Convention of Human Rights and Fundamental Freedoms (hereinafter ECHR). For the purposes of this article, the focus will be on specific reservations made to the following UN treaties: ICCPR; ICSEER; CRPD; and CAT.

In summary, this article analyzes the VCLT régime related to reservations, and also distinguished what reservations might be incompatible with object and purpose of the specific treaties. “The long-standing universality versus integrity debate is facilitated by the VCLT reservations rules, rules that are frequently described along the lines of complex, ambiguous, and often counterintuitive. Applying these general reservations rules to human rights treaties that are challenged for many of the same reasons creates a system of ambiguity and confusion about the obligations owed by states. This perpetuates the failure of many State Parties to actually implement human rights obligations. As the cornerstone of international law, treaties demand clear legal rules yet, in practice, it is obvious that states relish the imprecise nature of the reservations rules, particularly in relation to human rights treaties” (McCall-Smith, 2014, 263). The article describes the various practices of states manifested in reservations. Finally, the paper seeks to identify how human rights treaties might be protected from invalid reservations that diminish the importance and integrity of landmark international treaties on human rights.

The methodology used in the analysis was comparative conduct, i.e. a comparison of international legal documents and regulations of the 1969 Vienna convention in the field of reservations. The historical methodology examined the genesis and evolution of the main rights and freedoms implicit in UN conventions. The legal methodology

employed was a study of the differences in definitions of “objects” and “purpose” of the treaty, the notion of reservations and the specification of human rights treaties (whether or not those treaties fall under 1969 Vienna convention’s régime).

1. General Issues of Reservations Régime

“The power of making reservations to international treaties grows out of the principle of “sovereignty of states”, so states can claim that they will not be bound with some particular provisions of an international treaty which they do not give their consent” (Yamali, 2004, 4). Consider also, “the international treaties, in particular the multilateral ones, are the results of a crucial need to regulate the relations between states and to provide stability and a control on the relations. In this context it can be said that treaties may lose their effectiveness if states are unwilling to enforce them, in other words if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty” (Shaw, 2008, 915).

Article 27 of VCLT provides that a state may not invoke the provisions of its internal law as justification for its failure to perform its obligations under an articular treaty. “While the possibility of formulating reservations may be considered as an exception to this rule, since reservations are made because of the non-conformity of domestic law with international law, the ‘right’ to formulate reservations can never go so far as to give priority to domestic law in general, since this would not constitute implementation of the treaty in good faith” (Kamminga, Sheinin, 2009, 165). Even though the States should follow this requirement while formulating particular reservations, analysis of reservations to human rights treaties suggests that some states try to obey such regulation, justifying their reservations to the treaty provisions by claiming that they are incompatible with national legislation, customs and religious norms.

Taking a narrow view, “the International Court of Justice (hereinafter – ICJ) for the first time formed practice and had the opportunity to explain its approach to the effects of reservations to a multilateral human rights treaty in its 1951 advisory opinion on Reservations to the Genocide Convention. The Reservations to the Genocide Convention Advisory Opinion established new foundations in the practice of reservations to all multilateral treaties that protects human rights, as well. It may be said that until then the general practice of States concerning reservations was based on the so-called “unanimity rule” or the “League of Nations” rule.” (Augustauskaitė, 2017, 105). According to Fitzmaurice, “under this principle, all parties to the treaty had to consent to all reservations. This was a very inflexible rule, which although securing the integrity of the treaty, did not attract wider participation” (Fitzmaurice, 2006, 134). Probably that is why this rule was not adopted in 1969 Vienna Convention. However, in the authors’ view, this specific rule might be efficient in human rights treaties.

Of particular interest is the fact that the Genocide Convention did not have a rule on reservations when it was adopted in 1948, which may have encouraged certain to States to append various reservations to the Convention. The Court also explained that “the contractual rule of absolute integrity is not relevant in relation to the Genocide Convention, and that there is no absolute rule of international law that only permits a reservation upon the acceptance by all the parties, as evidenced by the practice of such organizations as the Organization of American States. However, it must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention; should this desire be absent, it is quite clear that the Convention itself be impaired both in its principle and in its application” (Fitzmaurice, 2006, 137). It is obvious that in this case, the ICJ established a new foundation in the practice of reservations to all multilateral treaties that protect human rights by explaining the mostly accepted view regarding the determination of validity of specific reservations.

In 2006, the ICJ delivered its judgment on jurisdiction and admissibility in the case concerning armed activities in the territory of the Congo opposing the Democratic Republic of the Congo (DRC) to Rwanda (ICJ Report, 2006, 6). In this case, the DRC sought to invoke the jurisdiction of the ICJ on the basis of (among other treaty provisions) Article 22 of Convention on the Elimination of All Forms of Racial Discrimination (CERD) (ICJ Report, 2006,

9), while Rwanda argued that the ICJ had no jurisdiction as it was precluded by its reservation to Article 22 (ICJ Report, 2006, 10). Furthermore, “the ICJ found that they had no jurisdiction in the case, as two-thirds of the state parties had not objected to the reservation. Again, the ICJ also found that they did not have jurisdiction under the Genocide Convention as Rwanda had a reservation precluding the ICJ’s jurisdiction. The ICJ found that this reservation was not incompatible with the object and purpose of the treaty. In a joint separate opinion, Judges Higgins, Elaraby, Kooijmans, Owada, and Simma observed that since the 1951 opinion there have been many developments in international law that could not be taken into consideration, including the creation of human rights treaties, which have monitoring bodies—something seemingly unique to the human rights treaties” (Yamali, 2004, 33). The Court declared another important information: “We take the view that it is rather a development to cover what the Court was never asked at the time, and to address new issues that have arisen subsequently” (Subsidiary opinion, ICJ, 2006, 69). According to analysis in international law, “the ICJ asserts that there is no schism in international law. By asserting the unique characteristics of human rights treaties and the unity and coherence of international law, the ICJ attempts to placate both the traditionalists in international law and those looking for new interpretations for the purpose of furthering social justice” (Yamali, 2004, 34). The author upholds this provided position that human rights treaties are special instruments for human rights protection. Therefore, there cannot be united rule for all the mechanism of reservations to international treaties.

Following the practice of ICJ, monitoring bodies, controversy and disputes over reservations continues. “Instead of settling the issue, there has been a proliferation of working groups, reports and academic articles working out the “problem” of reservations since the ICJ issued their opinion, despite the appointment of the Special Rapporteur, Alain Pellet, and draft reports issued by the ILC” (Monforte, 2017, 2).

Even though the ICJ developed practice on a case-by-case basis, and highlighted the main features of the reservations, questions of validity of reservations and what are the legal consequences of invalid reservations (especially those made to the human right treaties) remain unanswered. Furthermore, the bilateral treaties do not include the case of reservations since “an agreement between two parties cannot exist where one party refuses to accept some of the provisions of the treaty” (Shaw, 2008, 915).

Any analysis of problems of reservations made to the multilateral treaties must take into account the régime of the VCLT. According to the norms of this document, there are three main elements of reservation. “Firstly, the reservation has to be unilateral act. Secondly, the state can be made only when entering the treaty. It cannot be made sometime after the treaty is entered and valid for the parties. A reservation must be formally confirmed by the State at the time of expressing its consent to be bound by a given treaty (Article 23 (2)), when ratifying, accepting or approving it” (Korkelia, 2000, 443). Thirdly, the purpose of the reservation is to modify or to exclude the legal effect of certain provisions.

The VCLT régime clearly provides that even if the state does object to a reservation, the multilateral treaty may still be in force between the objecting state and the reserving state. However, it should be mentioned that if the objecting state has declared that it does not regard the reserving state as a party to the treaty, then the treaty does not govern only their relations. The treaty is not in force between them, although it may remain in force in their relations with the other state parties.

It should be mentioned that in terms of reservations, VCLT followed the main structure of the Reservations to the Genocide Convention Advisory Opinion. However, “the system of reservations causes several problems in both the practice and theory of the law of treaties. VCLT has left gaps in the regulation of fundamental issues (such as the permissibility of reservations), and certain other provisions were ambiguous, such as the “object and purpose” of a treaty which, generally, is not well defined in the VCLT” (Korkelia, 2002, 440). “These problems proved to be particularly difficult to solve in human rights treaties, especially those relating to Islamic law where reservations raise many questions concerning their permissibility and/or compatibility with the object and purpose of a treaty.” (Augustauskaitė, 2017, 106).

A reservation to the treaty is legal only when it conforms to the object and purpose of that treaty. Is it possible to identify the illegal reservation, and what are the real consequences of illegal reservations? These aspects are of vital importance to human rights treaties. Article 19(c) of the VCLT prevents a state from formulating a reservation which is incompatible with the object and purpose of the treaty. “This provision reflects the view taken by the ICJ in the Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide” (Moloney, 2004, 155). The major issue is how to determine whether the reservations are valid and most important here is whether the states by themselves are competent enough to decide this. The author believes this question deserves in-depth analysis, as the consequences of invalid reservations are crucial.

Besides those issues mentioned above, a perennial question has been whether the VCLT régime has sufficient authority to ensure adherence to human rights treaties. Even though treaties on human rights set the rules for the protection of individuals, first of all the states have certain obligations towards each other while entering the treaties. Reservations made by the state parties have certain influence not only for individuals of those states but also to the rest of the treaty members. While drafting the guidelines “Guide to practice on Reservations to Treaties”, International Law Commission (hereinafter – ILC) expressed their position that VCLT régime is suitable for all treaties, including human rights ones. The author would like to agree on the position that “human rights treaties have some features that are different from the other multilateral treaties. First at all, human rights treaties do not create reciprocal relationships between states parties but envisage some obligations upon the states in the interest of individuals, in order to create an objective régime of protection of human rights” (Korkelia, 2002, 3). To be more specific, the individuals are the main subjects of those treaties (that receive certain rights and duties). The author concurs with this view which was also expressed in Human Rights Committee Comment No. 24 (General Comment 24 (52), 1994), and will demonstrate in this article that the VCLT régime is not enough to preclude invalid reservations to human rights treaties.

Another problematic issue related to reservations is how to determine correctly object and purpose of the treaty. We could not find a clear definition of the object and purpose in VCLT, although Article 19 (c) of VCLT explains it as “core obligations” of the treaty. The following question is who can decide on those core obligations. “Firstly, every treaty should have a clear and distinct “object and purpose” in order to distinguish what reservation is permissible and reserving state would not deny the obligations to the fundamental provisions of the treaty. Furthermore, as there are state parties who can object to the reservations and decide the validity of the reservation (its conformity with object and purpose), the monitoring bodies have to state clearly what provisions are considered to be essence of the treaty in their comments.” (Akstinienė, 2013, 465). This will be considered later in more detail.

Let us consider the declarations themselves. It is sometimes the case that States attempt to hide their reservations under the guise of interpretative declarations. Also problematic is making a distinction between interpretative declarations and reservations, which need to be explicitly addressed through further discussion. We should remind ourselves that reservations and interpretive declarations are two different legal concepts. Whereas a “reservation” is intended to modify or exclude the legal effect of certain provisions of a treaty, the purpose of an “interpretative declaration” is to specify or clarify the meaning of a whole treaty or to certain of its provisions. Analysis of these legal concepts would suggest that if a reservation has direct legal effects, an interpretative declaration is most of all related with the methodological problem of interpretation, although having associated legal consequences. In order to compare reservations and interpretative declarations, we should apply the general rule of interpretation of treaties which is set out in Article 31 of the VCLT, that follows the rule “it shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Other scholars in this field believe that the context of the interpretative declarations deserves careful scrutiny.

With so many opinions as to who is best qualified to determine the validity of reservations to human rights treaties, expert opinion emphasizes the role of the monitoring bodies that are established under various international treaties. According to the reports on how the state parties implement treaties in national system and how they

ensure the protection of human rights, these monitoring bodies prepare relevant information to other state parties of the treaties about the relevant situation in various countries. According to these reports, if the state party that entered invalid reservation does not comply national legal system with treaty norms, other state parties should demand the withdrawal of invalid reservations that were entered, because the reserving state clearly avoids taking responsibility and implementing the treaty in its national law system. “International human rights law and the competencies of the human rights treaty bodies are evolving to meet the demands of an expanding and interconnected world society. The work of the treaty bodies, comments from observers, the acquiescence of the States and the ILC Guide to Practice point to the competence of treaty bodies to determine the validity of reservations as well as to indicate the legal effect of invalidity” (McCall-Smith, 2011, 521).

“Even though there are no doubts that treaty bodies are the main observers on how the states implement the obligations under international treaties, the problem is that the reports of UN bodies do not have a binding effect. Furthermore, the fact remains that so long as the view of the monitoring body is not legally binding, there is the possibility that the view of other state parties may differ from the monitoring body’s view” (Ando, 2013, 977). Therefore, one of the main suggestions is that the member states of the international human rights treaties should give more power to such treaty bodies. Furthermore, their decisions, mostly known as recommendations, should become binding documents to the state parties.

2. Reservations under the International Covenant on Civil and Political Rights

Having adopted the Universal Declaration, the international community then agreed on two covenants that spelled out in more detail the rights embodied in the declaration. These were the International Covenant on Civil and Political Rights (often referred to as the political covenant) that was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force 23 March 1976. The other landmark document was the International Covenant on Economic, Social and Cultural Rights (often referred to as the economic rights covenant) which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 3 January 1976. These documents are legally binding on the member states that ratified them.³ It is important that the state parties to the international treaties can make reservations to those parts of the treaty that seem to be problematic and cannot be applied in national level, as long as these reservations are not contrary to the object and purpose of the particular treaty.

Following the opinion in international law, “both of these covenants incorporated understandings based on the declaration, many of which have important implications with regard to gender and reproductive rights. These include the right of women to be free of all forms of discrimination, the right of freedom of assembly and association, and family rights. The political covenant, *inter alia*, recognizes the rights to “liberty and security of the person” (Article 9) and “freedom of expression”, including “freedom to seek, receive and impart information and ideas of all kinds” (Article 19); and affirms that “no marriage shall be entered into without the free and full consent of the intending spouses” (Article 23)” (Women rights are human rights, 48).

According to the High Commissioner for Human Rights, the Covenant’s goal is “to promote “the inherent dignity and equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”. To further this goal the Covenant proffers twenty seven articles which give individuals around the world various civil and political rights “without regard to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (The Office of the United Nations High Commissioner for Human Rights).

³ However, many member states of international community have not done so, and many others have done so only with substantial reservations.

As of 20 May 2020, there are 74 signatories and 173 State parties to the International Covenant on Civil and Political Rights. There are over 150 reservations made to this Covenant. “Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. “Others are couched in more general terms, often directed to ensuring the continued paramount of certain domestic legal provisions. The number of reservations, their content and their scope, may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. The Human Rights Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a state is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.” (Akstinienė, 2013, 462).

The author will show certain examples of reservations in this section. Article 26 on equality and non-discrimination is subject to 6 reservations, two of which have been objected to by other states (General Comment No. 24, 1994, 1). There is only one reservation (by France) to the minority rights provision in Article 27, and even that reservation has been contested by way of an objection. Three hereditary monarchies have entered a reservation in respect of Article 3 (equal rights of men and women) in the issue of succession to the throne. Kuwait’s much more general reservation to Article 3 has been subject to objections by other states.

Reservations made by state parties that are close to the topic of this article deserve further mention. For example, Islamic countries usually make reservations that directly relate to culture practice and religious belief.

Consider the 46 Islamic States which have ratified the ICCPR, 14 of them having formulated reservations, with reservations based on equality as follows:

- (a) Algeria: a reservation to Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses);
- (b) Bahrain: a reservation to Article 3 (equality of men and women in civil and political rights), Article 18 (freedom of religion) and Article 23 (family and marital rights);
- (c) Kuwait: a reservation to Article 2 paragraph (1) (guarantee of all rights in the Covenant without discrimination of any kind), Article 3 (equality of men and women in civil and political rights), Article 23 (equal rights and responsibilities of marital spouses),
- (d) Mauritania: a reservation to Article 23 paragraph (4) (equal rights and responsibilities of marital spouses).

Pakistan is a particular case in point. This country accepted the UN’s International Covenant on Civil and Political Rights (ICCPR) on 23 June 2010. Upon ratification, however, the country entered a great number of reservations to Articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the Covenant. As to the reservations that were entered in relation to Articles 3 (equal right of men and women), according to General comment No. 24, the Islamic Republic of Pakistan declares that the provisions of Articles 3 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Shariah* laws.

The question arises here whether the reservations are compatible with the international law provisions and follows the object and purpose test. It has to be noted that in General Comment 24, the UN’s Human Rights Committee has laid down general rules on incompatibility of reservations with the ICCPR. As an example, the reservation under Article 3 made by Islamic Republic of Pakistan is unspecific. General Comment 24 states “it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved.” Moreover, the reservation is not transparent, but refers to a domestic legal document which is not easily understandable by other State, and which is subject to changes and interpretation.

It is doubtful whether the hierarchy of norms is lawful at all. By indicating that the mentioned ICCPR articles only apply as far as they are in line with Pakistan’s Constitution, the reservation introduces a de facto hierarchy of norms by which national law supersedes international obligations.

No real international rights or obligations have been accepted which is contrary to what General Comment 24 requires. In a leading commentary on VCLT there was note: “reservations aimed at preserving the integrity of internal law may go against a treaty’s object and purpose in view of their often undetermined and sweeping nature” (Vilinger, 2009, 272).

Pakistan’s far-reaching reservations do not pass these tests, and may be regarded as unlawful and inapplicable. Such reservations are damaging in undermining the application of the ICCPR in Pakistan’s legal and political practice, and also may expose Pakistan to objections from other States that are party to the treaty. Therefore, Pakistan’s reservations to the ICCPR are incompatible with international law.

Given the consequences of impermissible reservations, “it would be useful for the Government of Pakistan to consider withdrawing its reservations, failing which those remaining could be made specific and not subject to domestic legislation. The Government should report to the UN Human Rights Committee and benefit from the Committee’s expertise in identifying which areas of Pakistani legislation may need amendments in light of ICCPR obligations” (Vilinger, 2009, 272).

It is also worth to mention the objections made by the other state parties. They declared that the reservations made by the Islamic Republic of Pakistan are incompatible with the object and purpose of ICCPR. “The governments of the state parties recall that, according to customary international law as codified in VCLT, a reservation incompatible with the object and purpose of a treaty is not permitted.⁴ It is in the common interest of States that they respect treaties to which they have chosen to become party, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.” (Akstinienė, 2013, 464).

The author would like to attribute another important note to the objections for these reservations of the Islamic Republic of Pakistan. Some state parties argued “it is unclear to what extent The Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and therefore raises concerns as to the commitment of The Islamic Republic of Pakistan to the object and purpose of the Covenant. Moreover, the parties consider that the reservations to the Covenant are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” (Akstinienė, 2013, 464).

To sum up, “at least two different forms of state practice emerge under the ICCPR: that of reserving states in entering, modifying and withdrawing their reservations; and the practice the Human Rights Committee in relation to reservations by states. As mentioned previously, the possibility to consider a state as a party to the ICCPR without the benefit of its impermissible reservation is absent from the text of the VCLT. However, this silence can be attributed to other states in objecting to the reservations by reserving states. A third form of state practice could be said to emerge through states’ action/inaction in respect of the pronouncements made by the fact that the VCLT only regulates the consequences of permissible reservations and objections to them.” (Akstinienė, 2013, 464). What is very important to mention, that after General Comment No 24 by Human Rights Committee was released, state parties started objecting to the reservations even more explicit when they think the reservation is incompatible with the object and purpose of the ICCPR. This practice follows a sufficient path in order to reduce the number of impermissible reservations.

3. Reservations under the International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (hereinafter – ICESCR) was adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December

⁴ Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Denmark, Ireland, Italy, Latvia, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Uruguay made objections to the reservations of Pakistan

1966, following almost 20 years of drafting debates. It finally gained the force of law a decade later, entering into force on 3 January 1976.

ICESCR contains “some of the most significant international legal provisions establishing economic, social and cultural rights, including rights related to work in just and favorable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education and to enjoyment of the benefits of cultural freedom and scientific progress” (Aust, 2007, 33). The Preamble of the Covenant recognizes, *inter alia*, that economic, social and cultural rights derive from the “inherent dignity of the human person” and that “the ideal of free human beings enjoying freedom of fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights.” Furthermore, the overarching principles of the Covenant are: (1) equality and non-discrimination in regard to the enjoyment of all the rights set forth in the treaty; and (2) States parties have an obligation to respect, protect and fulfil economic, social and cultural rights.

As of 20 May 2020, the Covenant has 71 signatories, with 170 States party to this Covenant thereby voluntarily undertaking to implement its norms and provisions. Compliance by States parties with their obligations under the Covenant and the level of implementation of the rights and duties in question is monitored by the Committee on Economic, Social and Cultural Rights.⁵

The Committee works on the basis of many sources of information, including reports submitted by States parties and information from such United Nations specialized agencies.⁶ It is also important in the scope of reservations. Even though the state parties that made objections to the reservations did not preclude enter into force the treaty between them and the reserving states, these above mentioned institutions monitor how the state parties implement the norms of the ICESCR and informs rest of the parties how they keep their obligations (with the reservations made to the ICESCR also) under the treaty.

Approximately 27 percent of the States parties to the Covenant had entered several declarations and reservations of varying significance to their acceptance of the obligations under the Covenant. Yet, “unlike most other human rights treaties, the Covenant lacks a specific clause on declarations and reservations” (Manisuli, 2008, 315).

The Committee on Economic, Social and Cultural Rights (CESCR or the Committee) has made important comments on the reservations to ICESCR topic. As to the extent of the article, it is important to mention that the Committee in its Comment No. 16, stated that “Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR (General Comment No 16, 2005, para 16-17). Therefore, these articles formulate object and purpose of the ICESCR. Upon ratification of the ICESCR, some states have limited their legal obligations under the Covenant by formulating reservations, at times disguised as ‘declarations’, ‘understandings’, ‘explanations’, or ‘observations’, to some of the Covenant provisions (Manisuli, 2008, 15).

⁵ The Committee on Economic, Social and Cultural Rights is the supervisory body of the International Covenant on Economic, Social and Cultural Rights. It was established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the ICESCR.

The ECOSOC is the primary body dealing with the economic, social, humanitarian and cultural work of the United Nations system. ECOSOC oversees five regional economic commissions and six "subject-matter" commissions, along with a sizeable system of committees and expert bodies. ECOSOC is composed of 54 member States, elected by the United Nations General Assembly for three-year terms. The Committee on Economic, Social and Cultural Rights is composed of eighteen independent experts. Members of the Committee are elected by ECOSOC by secret ballot from a list of persons who qualify as "experts in the field of human rights" and who have been nominated for that purpose by the States parties. Members are elected for four years and are eligible for re-election.

⁶ As International Labor Organization, United Nations Educational, Scientific and Cultural Organization, World Health Organization, Food and Agriculture Organization of the United Nations (from the Office of the United Nations High Commissioner for Refugees, and from the United Nations Centre for Human Settlements (Habitat) and others).

As stated earlier in this section, what is in question is whether or not the reservations made to the ICESCR are permissible. “In accordance with the rules of customary international law that are reflected in Article 19(c) of the VCLT, reservations can therefore be made, provided they are not ‘incompatible with the object and purpose of the treaty’” (Neumayer, 2007, 397).

The Committee of ICESCR clearly stated that a State party by making reservations cannot justify its non-compliance with these core obligations, which are ‘non-derogable’. “One reason for core obligations of ICESCR rights being considered non-derogable is because their suspension is irrelevant and unnecessary to the legitimate control of the state of national emergency. For example, the undertaking to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind and to ensure the equal right of men and women to the enjoyment of all ESC rights in Articles 2 and 3 would deserve greater rather than less importance in times of national emergency so as to protect vulnerable groups against discrimination” (Hüfner, 2010, 17). Therefore, the Committee once again explained the circumstances on making reservations to core obligations of the treaty.

Another question is who should determine the validity of the reservation to ICESCR. According to S. Manisuli, “the compatibility of the reservation with the object and purpose of the treaty is subject to assessment by the competent (judicial and quasi-judicial) bodies. The compliance of States with their obligations under the Covenant is monitored by the CESCR. It can effectively monitor the measures adopted and the progress made if it can determine the extent of each State party’s obligations under the Covenant, and this necessarily involves addressing the issue of the legality of reservations. In particular, whether a reservation is permissible, and whether it is compatible with the object and purpose of the Covenant” (Manisuli, 2008, 15). This statement is really important because the Committee attributed itself a role as much important as the state parties in terms of evaluating the compatibility of reservations.

As the Committee has stated, “when a State has ratified the Covenant without making any reservations, it is obliged to comply with all of the provisions of the Covenant. It may therefore not invoke any reasons or circumstances to justify the non-application of one or more Articles of the Covenant, except in accordance with the provisions of the Covenant and the principles of general international law” (CESCR, Concluding Observations: Morocco, 1994, para 9).

It is arguable whether the ICESCR is under an obligation or only has the option of entering into a ‘reservations dialogue’ with States. According to the role of Committee, it would seem that a ‘reservations dialogue’ with relevant States is more of an obligation than an option. “Therefore, as a body monitoring the Covenant, the ICESCR should consistently determine (a) whether a statement is a reservation or not; and (b) if so, whether it is a valid reservation; and (c) to give effect to a conclusion with regard to validity” (Hampson, 2004, para 27). It is obvious that according to the practice of monitoring bodies and general rules of international treaty law, reservations to the ICESCR must be interpreted according to the relevant principles of general international law within the general context of the Covenant, taking into account its object and purpose.

The next question deserving of an answer is: what is the legal outcome of an invalid reservation? Regarding ICESCR, if a reservation is found to be incompatible with the object and purpose of the Covenant, it should be considered invalid. “It follows that such an invalid reservation is to be considered null and void meaning that a state party will not be able to rely on such a reservation and, unless a State’s contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation” (Goodman, 2002, 531). Therefore, it is very important to evaluate the relevance of reservations with the possibility to withdraw them if possible. “As yet there have been no major difficulties with States parties to the ICESCR on the subject of reservations, even where the Committee examined the Articles to which reservations were made.” (Manisuli, 2008, 20). The author will consider the most problematic reservations further in this article.

The most problematic reservations to human rights treaties including the ICESCR are those which render the treaty subject (or some of its core provisions) to a national constitution or domestic law generally of a reserving state.

“Such countries as Egypt, Kuwait formulated specific Islamic reservations. Both labelled them as interpretative declarations. Yet this is contradicted by other states that made objections to those declarations” (Brems, 2001, 274).

The declaration by Egypt states, “taking into consideration the provisions of Islamic *Shariah* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.” It must be noted that although *Shariah* makes extensive provisions for economic social and cultural rights, it is far from complying with international human rights standards regarding equality between men and women, which is one of the key obligations States have to fulfil under the ICESCR. “Kuwait made interpretative declaration regarding Article 2, paragraph 2, and Article 3, stating that although the Government of Kuwait endorses the worthy principles embodied in Article 2, paragraph 2, and Article 3 as consistent with the provisions of the Kuwait Constitution in general and of its Article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwait law” (Chirwa, 2016, 16).

As mentioned previously, we first decide whether such interpretative declarations are not reservations by their nature and do not violate the object and purpose of the treaty. With regard to the declarations and the reservation made by Kuwait upon accession, the governments of other state parties in their objections noted that according to the interpretative declaration regarding Article 2, paragraph 2, and Article 3 the application of these articles of the Covenant is in a general way subjected to national law. Other state parties consider this interpretative declaration as a reservation of a general kind. The Governments are of the view that such a general reservation raises doubts as to the commitment of Kuwait to the object and purpose of the Covenant and would recall that a reservation incompatible with the object and purpose of the Covenant shall not be permitted. They also noted, “it is in the common interests of States that all parties respect treaties to which they have chosen to become parties, as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. However, the other states do not preclude the entry into force of the Covenant between Kuwait and them.” (Chirwa, 2016, 20). Again, if the state party makes interpretative declarations, the other state parties can object to it and express their opinion if they think it is a reservation, and furthermore, question if this reservation covered under interpretative declaration is compatible with the object and purpose of treaty.

There is no legal obligation under the ICESCR, and no express provision for the withdrawal of reservations, however it would be in accordance with the Covenant’s object and purpose, and the spirit of the VCLT to envisage that laws and practices which necessitated existing reservations in some states would be examined carefully, progressively amended or repealed to ensure that the states parties complied, without reservation, with all the Covenant’s provisions. This has certainly occurred on some occasions,⁷ and some of the reservations withdrawn appear clearly to have been incompatible with the object and purpose of the Covenant.⁸ Indeed, it is pointless to maintain reservations, which are incompatible with the object and purpose of the Covenant since these reservations are invalid in law. However, the formal removal of such reservations is still useful as an indication of a State’s commitment to its human rights obligations.

To conclude, the abovementioned examples describe the main features of the interpretative declarations: the state parties can declare that the interpretative declaration has features of a reservation. If the state party does so, the consequences differ from the declarations themselves. Furthermore, if the other state parties find declaration as a reservation, they must decide whether it is incompatible with the object and purpose of the Covenant. While

⁷ The States that have withdrawn some reservations to the ICESCR (on the dates shown in the brackets) include: Belarus (30 September 1992); Denmark (14 January 1976); Democratic Republic of Congo (21 March 2001); Malta (upon ratification 13 September 1990); New Zealand (5 September 2003)

⁸ For example, on 21 March 2001 the Government of the Democratic Republic of the Congo informed the Secretary-General that it had decided to withdraw its reservation made upon accession which read as follows: ‘Reservation: The Government of the People’s Republic of the Congo declares that it does not consider itself bound by the provisions of Article 13, paragraphs 3 and 4 (...) In our country, such provisions are inconsistent with the principle of nationalisation of education and with the monopoly granted to the State in that area.

making arguments for and against, and why the objecting states agree that those reservations are compatible with the object and purpose or not, they must decide if they wish to maintain relations with the reserving state. Despite finding the reservation incompatible with their own position, more often than not the other state parties maintain relations with the reserving state. Thus, the reserving state can either withdraw the reservation (that is incompatible with the object and purpose) or follow its arguments and continue to implement the treaty with the reservations. However, those general reservations are not transparent, for example other state parties may not be familiar with the religious norms or national legislation of the reserving states. For these reasons the reservations might violate obligations under the treaty. Nonetheless, after analysis of the reservations to ICESCR and objections to them, it would appear that the objections serve as an expression of opinion rather than a strict position on determining the validity of the reservation.

4. Reservations under CAT and CRPD

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter - CAT) was signed on 4 February 1985 and entered into force on 26 June 1987. As of 20 May 2020, the Convention has 83 signatories and 169 States are parties to this document. The purpose of the Convention is “to prevent and eradicate the use of torture and other cruel, inhuman or degrading treatment or punishment and to ensure accountability for acts of torture” (Guide to Reporting to the Committee against Torture, 2018, 5).

The Convention against torture does not exclude the possibility that States may enter reservations at ratification or accession to the treaty. Indeed, this Convention explicitly provides that reservations may be done in order to exclude certain provisions related to visits described in Article 20 (per Article 28) and the resolution of disputes (Article 30 (1)).

Furthermore, voluntary declarations may be made at any time after ratification or accession in order to allow communications by States and individuals to the Committee against Torture.⁹ Reservations to the CAT have been limited: 48 State parties entered reservations to the treaty while entering it. However, several have since been withdrawn and only 38 reservations remain operative.

Many of the reservations describe areas explicitly permitted in the CAT but a few are legally problematic and have provoked numerous objections. The International Law Commission encourages States to conduct a periodic review of reservations made to the treaty and to consider, whether they continue to serve the purpose and encourages withdrawing the reservations that are no longer needed. Such review should take into account the importance of preserving the integrity of the treaty, the usefulness of reservations made, and developments in human rights protection.

As a matter of routine, the Committee against Torture recommends the removal of reservations during its interactive dialogues with State parties. It should be noted that according to Article 21 and 22 declarations may be made at any time after ratification or accession to the Convention. Such declarations provide Committee against Torture competence to hear those communications or complaints from State parties and individuals, alleging violations of the Convention.

Both articles describe voluntary procedures, either of which the States may choose to accept or reject. “Where a State does not make the voluntary declaration, the Committee will have no jurisdiction to hear complaints. Approximately one third of all State parties have made declarations under Article 21 and 22, and therefore accepted the competence of the CAT to consider complaints from States parties and individuals. The quasi-judicial function of the CAT is not an appeal procedure. The Committee only has the competence to determine whether there is a violation of the Convention and make recommendations for how such a violation may be redressed” (Cali,

⁹ The Committee against Torture was established pursuant to Article 17 of the Convention and began to function on 1 January 1988. The Committee Against Torture is the body of 10 [independent experts](#) that monitors implementation of the [Convention](#).

Montoya, 2017, 9). The procedure therefore helps to consider whether national implementation of the Convention is in full compliance with international law, human rights principles and recommends State parties to take remedial steps where it is necessary.

Perhaps the most interesting reservations are those relating to cultural, religion rights. “The CAT has attracted 16 religion-based reservations (representing around 35% of all reservations), extended by three States Parties. These religion-based reservations have in turn received 69 objections from 28 States. Article 16, under which each State Party commits “to undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment” has received the highest number of specific religion-based reservations (four reservations, two entered by Pakistan - withdrawn in 2011 - and two by Qatar)” (Çalı, Montoya, 2017, 25).

Other standing reservations concern those provisions that regulate the definition of torture or degrading treatment (Article 1), and the criminalization of acts considered as torture (Article 4). These reservations tend to make reference to domestic legislation, which is influenced by, or rooted in, broader religious precepts. “Examples of these restrictive acts are the reservation entered by Qatar to Article 1, which conditions its implementation to its compatibility with the Islamic *Shariah* law; and the (now withdrawn) reservation entered by Pakistan, which conditioned the applicability of the provisions of Article 4 to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the *Shariah* law.” (Çalı, Montoya, 2017, 28).

In general, religion-based reservations under these various articles seek to secure a 'opt out' from States' obligations under the treaty for long established and/or traditional that in many cases are derived from or associated with religious belief or religious law. The vague nature of many of these reservations, and the severity of the nature of human rights violations associated with torture, may explain why so many of the reservations have been the subject of objections by other States parties. The curious exception to this rule is a declaration by the Holy See, which has not received any objections despite the fact that the reservation limits the application of the treaty “insofar as it is compatible, in practice, with the peculiar nature of that State” (Çalı, Montoya, 2017, 30). This analysis again shows that States want to maintain those general reservations, especially ones related to cultural, religion justification. This is puzzling in terms of how the international community tries to deal with those reservations: whether to be strict and object to them or to be open to the dialogue for longtime commitments.

The Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol were adopted on 13 December 2006 and entered into force on 3 May 2008. As of 20 May 2020, there are 163 signatories and 181 parties to this Treaty and its Optional Protocol. These documents are very significant because they came into existence through a forceful call from persons with disabilities around the world to have their human rights respected, protected and fulfilled on an equal basis with others.

Despite only being adopted in 2006, the CRPD has rapidly attracted a large number of ratifications - and reservations. However, “a relatively small proportion of those reservations (around a quarter - compared with over three quarters in the case of, for example, the CEDAW) are based on religion or belief. None of the religion-based reservations to the CRPD have been the subject to objections from other States parties.” (Çalı, Montoya, 2017, 25)

What is particularly interesting in the case of the CRPD, is that Muslim-majority States that entered religion-based reservations to older treaties, like the CRC and the CEDAW (e.g. Algeria, Bangladesh and Saudi Arabia), ratified the CRPD with no general reservations (the exceptions to this rule are Qatar and Iran) and/or no specific reservations (the exception being Egypt). “It is noteworthy that prior to its ratification of the CRPD, Saudi Arabia had entered general reservations to all core human rights conventions at the time of ratification. Yet, it decided not to do so for the CRPD.” (Cali, Montoya, 2017, 9). This does not mean, of course, that religion-based reservations are entirely absent from the CRPD. “Such reservations, where they exist, are clustered around two treaty articles: Article 23 on respect for home and the family (12 reservations); and Article 25 on health (nine reservations) (Smith, 2003, 2).

These reservations, put forward by six countries - Catholic-majority Lithuania, Malta, Monaco and Poland, together with Israel and Kuwait - mostly relate to those treaty provisions dealing with the sexual and reproductive rights of persons with disabilities (Article 25 (a)), and “the rights and responsibilities of persons with disabilities, with regard to guardianship, ward-ship, trusteeship, adoption of children or similar institutions” (Article 23 (3)) (Smith, 2003, 2).

It is important to note that the reservations to Article 25 (a), which refers to right of persons with disabilities to have “the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health” make no direct reference to religion.” (Smith, 2003, 4). However, they are attributed to the religious concerns in Catholic states - in such sensitive questions of abortion, the conception of life, and the rights of the unborn child.

In the case of the CAT, ICCPR, CRPD and ICERD, the use of general reservations is comparatively limited, though where they do exist (or have existed), religion or belief has been one of the main motivations. Regarding the CAT, only Qatar and the Holy See have ever entered general religious reservations to the treaty - Qatar subsequently withdrew its reservation in 2012. According to data provided, Saudi Arabia is the only country with a general reservation to the ICERD (Smith, 2003, 5). However, those general reservations create the biggest danger for the lack of implementation of human rights in national level and leave a huge gap in enforcement of international norms between the State parties.

Conclusions

1. To conclude, there are different opinions of competitive authors and international organizations, as well as monitoring bodies, whether reservations are a necessity in order to imply minimal standards for individuals’ protection in various countries around the world, or are they a break in the advancement of protections for human rights throughout the world. As the analysis showed, the purpose of making reservations varies in regard of different countries. It is reasonable to assert that there is no single solution applicable to all countries. Instead, we need to understand the political, social and economic conditions that exist in countries, and work with local and international agencies such as the NGOs. Their experience and reach could help to ensure the necessary protection of human rights.

2. The question to what extent the régime of VCLT is applicable to the human rights documents has been raised numerous times in this article. Despite treaties on human rights setting the rules for the protection of individuals, the states have certain obligations towards each other while entering the treaties. In the process of drafting the guidelines, the International Law Commission expressed the view that the VCLT régime is for all treaties, including human rights ones. That said human rights treaties have features that differ from the other multilateral treaties, so that, by itself, the VCLT régime cannot resolve the matter of reservations in the world.

3. Within the analysis followed in this article, we might conclude that two UN human rights mechanisms in particular - the Treaty Bodies and the NGOs - could play an important role. Treaty bodies should engage in a substantive exchange about the justification of standing reservations, and the relationship between relevant treaty provisions and the contemporary domestic status quo as it pertains to issues of religion, belief, culture, or tradition. The reserving states should must keep reservations under active (re)consideration, and to this end State parties to the treaties should initiate processes of domestic consultation, reflection and, potentially, reform. Over time this may render any reservations either unnecessary or obsolete.

4. There are two different forms of making reservations under the ICCPR: the traditional practice of making reservations while entering, modifying and withdrawing them; and the new approach of the Human Rights Committee in relation to reservations by states. Following the practice under General Comment No. 24 objections by states have become more explicit when according to other parties a reservation is incompatible with the object

and purpose of the ICCPR. However, according to author's view, this is not enough in order to reduce the number of incompatible reservations.

5. Analysis of various practice under human rights treaties clearly shows that States want to maintain those general reservations, especially ones related to cultural, religion justification. This is puzzling in terms of how the international community tries to deal with those reservations: whether to be strict and object to them or to be open to the dialogue for long time commitments. Again, the subsequent practice of monitoring bodies, NGOs show that there is a significant number of withdrawn reservations. Therefore, a set of different measures should be taken into consideration while trying to diminish the number of reservations.

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