THE LEGAL EFFECT OF RESERVATION TO HUMAN RIGHTS TREATIES:

LACUNAE LEFT OUT BY THE VCLT RESERVATION REGIME AND THE SUPPLEMENTATION OF ILC GUIDE TO PRACTICE ON RESERVATION

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INTRODUCTION

The Guide to Practice on Reservations to Treaties (ILC Guide) is the work of the International Law Commission (ILC) on reservation. In doing so, ILC attempted to put forward the Guide to be a supplementation to the lacunae left out by the VCLT reservation regime and to answer a number of arguments made by human rights bodies, courts and academics regarding the compatibility of reservation related to the special characteristics of human rights treaties.

This essay comprises five parts. In addressing the issues with the reservation to human rights treaties, and the work of the ILC and its Special Rapporteur Professor Pellet, the first part will provide a background to the topic. The second part will focus on the arguments raised in the debate of the characteristics of human rights treaties, the permissibility of reservation and the relationship with the reservation regime under the 1969 Vienna Convention on the Law of Treaties (VCLT). The third part will provide specific examples and contemporary discussions on reservation allowed under the human rights treaties by way of approaches taken by the human rights bodies. It also will focus on the issue of the consequences of impermissible reservations. The fourth part will concern the ILC guidelines and reflect on their contribution to the development of international treaty law on human rights treaties. The fifth part will be the conclusion.

BACKGROUND: RESERVATION

Reservation is a divergent regime of treaty relations. One multilateral treaty could cover a variety of bilateral relationships between states. In 1951, when working on the codification of the law of treaties on VCLT, the ILC and the first Rapporteur favoured returning to the system of unanimity, i.e. the system under the League of Nations (Hill, 2016). However, the *Advisory Opinion of the International Court of Justice (ICJ) in the Genocide Convention*[1] made a parallel development and a turning point related to reservation (Lijnzaad, 1995). This advisory opinion influenced the development of reservation under the regime of the VCLT.

Initially the advisory opinion was concerned of the Genocide Convention. However, the ILC adopted it later as part of its regime. The Genocide Convention does not have provisions on reservations. When the states deposited instruments of ratification with the Secretary-General, however, they also appended reservations. In particular, the reservations concerned article 9, which was the settlement of dispute procedure, and the forum of settlement of dispute procedure in relation to the interpretation of the Genocide Convention resides with the ICJ.

The General Assembly asked the ICJ for an advisory opinion on whether reservations are applicable. The court articulated the dilemma as being between the universality and the integrity of the Convention. The court made a progressive development, noting that the Genocide Convention is normative, meaning it regulates the position of an individual. It is different from contractual Conventions, which only related to contractual relationship between states. Therefore, universality of participation is necessary in recognizing the special characteristic of the Convention. The ICJ expressly stated that the core issue of the Convention is the universality participation. The court made the decision on the basis of 'object and purpose', which occurs when the reservations are not expressly allowed or prohibited in the treaty. However, in the dissenting opinion judges challenged the outcome of the court on the basis of objectivity of the assessment of 'object and purpose'—an objective organ is important to assess the object and purpose of the treaty. On one hand, the joint dissenting opinion was treated as reactionary and went against with the notion of universality. On the other hand, it is

[1] The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide by Resolution 260 on 9 December 1948.

progressive because it went straight to the heart of the matter. It created the struggle of who must now assess the object and purpose of the treaty.

This must be seen with the ICJ's decision in 2006 on the Genocide Convention in *Democratic Republic of Congo (DRC) v Rwanda*. In this case, there was reservation by Rwanda as to article 9. DRC argued the reservation was invalid because it violated *jus cogens*, the peremptory norms. However, the court viewed the settlement of dispute resolution as not a peremptory norm; therefore, the reservation of article 9 was permitted, noting that such reservation could not be regarded as a lack of legal effect.

The dissenting judges, however, criticised the judgement on the basis of the development of international law, noting 'there is a new trend in the area of reservations, which is exemplifying by the Human Rights Committee (HRC) practice and European Court of Human Rights (ECHR) which put in doubt the safer approach attributed to the ICJ Advisory Opinion on Genocide Convention.' This was a subjective way to decide the object and purpose of the reservation. The judges noted that 'indeed it's clear that the practice of IJC reflects the trends of courts and tribunals to pronounce the compatibility of object and purpose when the need arises' (Democratic Republic of the Congo v. Rwanda, 2006). However, they also noted that the law had changed, and the court's decision on such an important matter, regarding the compatibility of the treaty, should be looked upon differently. They also said that article 9 was not only about the interpretation and the application of the Convention, but also the fulfilment of the Convention. The judges cast into doubt whether the state should still in facility of appending reservation. This judgement was seen as the continuation of the Advisory Opinion of ICJ on Genocide Convention, even though it departed from the idea that states no longer had the authority to decide the validity of reservation, but an independent treaty institution.

After the Advisory Opinion on object and purpose test, the ILC decided to depart from the unanimity test. The VCLT articles on the regime of reservations are loosely formulated, which is not a negative aspect. Although such aspects tend to give flexibility to the VCLT regime, there are certain gaps that led the ILC to undertake a project on reservation with Professor Pellet as the Rapporteur to develop the practical guide (*The Guide to Practice on Reservation*

to Treaties). This was highly criticised by the states before second readings and the Sixth Legal Committee.

VCLT articles 19–21 contain the substantive matters of reservations, whereas articles 20, 22 and 23 deal with procedural aspects of the reservation. Article 19 substantively set out the whole range of reservation. It says the reservation can be held in scenarios reflecting on state practices, such as the prohibition of reservations as in the Rome Statute, permit reservation or permit only certain reservations, such as Geneva Convention on the High Seas.[2] It can also be silent on reservation, such as the Genocide Convention (Goodman, 2002). Reservations are required to be made at the time when the state signs or ratifies the reservations.[3] Therefore, late reservations should not be invalid, however in practice they have been allowed (Redgwell, 1993). It is not a good practice, because the reservation is a part of consent to be bound, and it basically narrows the scope to be bound by the treaty. It is true that by reservations the state can either modify or exclude treaty obligations.

The definition of reservation is prescribed in VCLT article 2, as 'reservations are unilateral statement however framed or named by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify legal effect of certain provisions of the treaty in their application to the state.'

Article 20 deals with the acceptance and objection of reservations. As a rule, acceptance of a reservation is unnecessary when it is expressly authorised by a treaty. Therefore, in this case, the party that makes the reservation can be a party of the treaty without another party approving the reservation. However, in some cases the treaty preserves the unanimity rule, and all of the parties are required to accept (Aust, 2013). Reservations can be made only at time of negotiating the treaty in this case, and where the reservation does not breach the object and purpose of the treaty, such as regional treaties (Neumayer, 2007). In all other cases as a rule, acceptance by another contracting party constitutes the reserving state to be a party to the treaty in relation to the other accepting states, if or when the treaty is enforced. In such case, only one acceptance is enough to allow the party to the treaty. However, it is to be noted that an objection

[2] Available at http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf
[3] Article 19 of the VCLT 1969.

by another contracting state of the treaty does not preclude the existence of treaty relations between those states unless a contrary intention is definitely expressed by the objecting state (Girshovich, 2014).

The legal effect of reservation is reciprocal. That means the accepting state also is bound by the benefit of the reservation. Reservation only changes the treaty relationship between two states—the accepting one and the objecting one—and therefore, such reservation does not affect third parties, i.e. treaty as it is enforced. It is also to be noted in the case when the state objecting does not oppose the existence of the treaty relations between itself and the reserving state; the treaty relationship between two states will be in existence to the extent of reservation. A good example is the reservation of Iceland to the International Whaling Commission.[4]

There have been three gaps left by the VCLT regime. The first gap is the legal consequences of invalid reservation, which Professor Pellet's draft purported to explain (Pellet, 2013). The invalid reservations are based on two schools of thought: one is the opposability, which is subjective and expresses that the states are the masters of the treaties, while the other is impermissibility objective, which the VCLT deals with, expresses that the incompatible reservations are invalid. Thus, in the current context, the treaty reservations have been explained through the impermissibility school. The second gap is interpretative declaration, which is not reservation. Interpretative declarations purport by a state upon declaration to interpret at any time and simply show how to understand the convention, except qualified reservation as described by the ECHR on Switzerland's declaration (Milanovic & Sicilianos, 2013). The third gap is the reservations to the human rights treaties (Pellet, 2013).

The problem comes with the VCLT in relation to human rights treaties, due to their special legal characteristic. The VCLT was formed in related to bilateral contractual relationship between states, whereas the human rights treaties are multilateral (Milanovic & Sicilianos, 2013). However, it is noteworthy that Professor Pellet observed in his first report that the approach of having different legal characteristic to the human rights treaties are nonsensical, because every aspect of different treaties has different characteristics and not every human rights treaty provisions are normative characteristic. However, he later pointed out that the

[4] Available at https://iwc.int/_iceland

VCLT regime is sufficient, but needs certain modifications (Pellet, 2013). The proposal of what Professor Simma calls the 'super maximum effect' is also a recommendation followed by the Guide, which requires the reserving party either to take away the reservation, which is not compatible with the object and the purpose of the treaty, or there were no treaty relations between the states (Simma, 1998). However, it is to be noted, that states such as the United States, the United Kingdom and the Netherlands do not like the strong approach, because the practice of the state in reservation is enriched and varied.

SPECIAL CHARACTERISTICS OF HUMAN RIGHTS TREATIES AND IMPERMISSIBILITY OF RESERVATION

The ICJ in the case of Advisory Opinion on *Reservations to the Genocide Convention* pronounced that the human rights treaties have special characteristics. In recognizing the special characteristic of the Genocide Convention, the court examined the origin of the Convention, and pointed out, that it was the intention of the United Nations to recognize genocide as a crime punishable under the international law. It also indicated that the purpose of the Convention is to bind States, which could have been any way possible without a treaty due to the nature of crime and of *jus cogens*; therefore, such reservation does not make any sense. In recognizing the special character, the court articulated that these special characteristics differ from other Conventions, because contracting parties cannot have their own interest, but the common interest to evade genocide.

Thus, in examining the object and purpose of the Convention, the court indicated that the intention is to 'limit both the freedom of making reservation and that of objecting them.' Furthermore, in the dissenting opinion Judges Guerrero, McNair and Mo indicated that one of the unresolved problem under the VCLT reservation regime is the total reliance on the state's subjective decision on the compatibility of the reservation, where it must have been only done by an objective assessment by an independent judicial organ. The case of *DRC v Rwanda*, explained above, reaffirmed the position of the ICJ regarding the special characteristic of the Convention.

Such recognition of the special characteristic of the human rights treaties then followed in General Comment No 24 of the HRC (1994). It describes the special characteristics of human right 'are not a web of inter-state exchange of mutual obligation.' It says that the International Covenant on Civil and Political Rights (ICCPR) in particular, but also other human rights treaties concern the individual rights of people and they cannot have the principle of inter-state reciprocity (Baylis, 1999).

Inter-American Court of Human Rights (IACHR) on the Advisory Opinion on the Effect of Reservations on the Entry into Force on the American Convention on Human Rights defines its special characteristic as follows (1982):

The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction…

The ECHR also articulated quite similar approach in defining the characteristic of the human rights treaties. The court indicates that the European Convention of Human Rights (ECHR) is 'a constitutional instrument of European pubic order in the field of human rights' and cannot have the application of state practice in related to the reciprocal agreements (Chrysostomos, Papachrysostomou and Loizidou v. Turkey, 1991).

The Advisory Opinion on Genocide Convention sets a tone for the individual courts to take up the effect of impermissible reservations. Judge Hersch Lauterpacht in *Norwegian Loans* case articulates the effects of the impermissibility (France v. Norway, 1957). Although the case was in another context, the judge articulates under the optional clause of article 36(2) of the statue, the declaration accepting the jurisdiction of the courts is invalid, but rightfully pointed out that the intention of the accepting state is important with regard to the severance of the clause related to the acceptance of the jurisdiction of the court. This case establishes that the state consent is

important in determining the effects of the impermissible reservation. It was the same view applied in the case of *Interhandel*, where the court addressed the intention of the US when it submits to the jurisdiction of the court (Switzerland v. United States of America, 1959). In the case of Nicaragua, the court adheres to the view in the case of Norwegian Loans of reassuring invalidity of the self-judging reservation (Nicaragua v. United States of America, 1984). This case law indicates that even before the ECHR and the IACHR developed the approaches, the doctrine of severability of impermissible reservation was a part of the legal thinking.

However, the growing nature of international human rights law, number of new treaties, reservations and effectiveness of the monitoring bodies have certainly brought the notion of impermissible reservation into the discussion. The human rights monitoring bodies have instigated the practice of assuring their competencies to sever impermissible reservations. This approach is contrary to the settings of the VCLT, as it indicated the non-application of the reserved provisions objected to article 21(3) or article 20(4)(b) of the treaty as a whole. In addressing the conflict, Professor Pellet points out consensually in the Second Report (Meron, 2006), but acknowledges that beyond the scope of the VCLT the monitoring bodies will not have the competence to sever a reservation. However, Scheinin, in addressing General Comment No 24, articulated that an established human rights body for the purpose to interpret the treaty and monitor compliance has the competency to address the permissibility of reservation. Thus, the question on the validity of human right bodies on the competency to address the permissibility is actually a question of interpretation of treaties. Scheinin (2004) also pronounced that the consequence of an impermissible reservation is severability.

The ILC attempted to articulate impermissible reservation in general and in more specific situations related to the *jus cogens* rules and human right treaties. The ILC examined primarily the effect of VCLT article 19(c), which articulates that the fundamental criteria for the permissibility of reservation is the compatibility of reservation with the object and purpose of treaty. Thus, primarily it is appropriate to assess with regard to human rights treaties, whether a reservation complies with the object and purpose of that treaty, where no special characteristic was not taken into consideration (Coccia, 1985). However, the ILC articulated that merely allowing for the reservation would prejudice the integrity of the treaty, and thus it points out the reservation for the minor issues as different from the reservations that would go contrary to

the object and purpose of the treaty (Klabbers, 2004). Hence, under classical approach of the reservation, if the state objects to the reservation, such reservation either can be withdrawn or the reserving party cannot be a member of the treaty at all. Hence, there were no consequences of reservation.

However, Professor Pellet in the Second Report provided arguments of whether the reservations are compatible with the special characteristics, and whether the VCLT could be adapted even at the absence of any special rules between the parties. Klabbers (2004) points out the distinctive perspectives; the contractual one and the *ordre public* vision of the treaty. Klabbers (2004) articulates that the reservations required to be seen with the *ordre public* vision within the contractual settings. These settings clarify that the VCLT reservation regime regulates only the permissible reservations, and are compatible with the object and purpose of the treaty. Article 21 offers legal effect only to the reservation made accordance with articles 19, 20 and 23. The reservations that do not comply with the VCLT criteria, i.e. the impermissible reservations that have not been spoken wisely in the discussion of the VCLT, have certainly created misunderstandings with the scope of human rights bodies favouring the severability option.

CONTEMPORARY DISCUSSIONS ON RESERVATION ALLOWED UNDER THE HUMAN RIGHTS TREATIES

Human rights treaties are not exception to the fact that the reservation to multilateral treaties is acceptable. Although in one hand number of human rights treaties provided flexible approach with the reservation, there are treaties provide no provisions in related to reservation (Byrnes, 1989). However, the Advisory Opinion and the VCLT has recognized that the state can make reservation to human rights treaties if no specific provision prohibits reservation. The scope of reservations permitted under human rights bodies can be drawn from the guidance given by the treaty bodies, courts and other institutions (Alston & Crawford, 2000).

The ECHR pronounces that the reservation to the Convention must be made at the moment it is signed or ratified by the member state. It also addresses that such reservation must be related

to the specific law in force at the moment of ratification (Liepājnieks v. Latvia, 2010). The ECHR further denotes under article 57 the reservation cannot be made on general character; furthermore, it should contain a brief statement. These criteria for permissibility differ from the other human rights treaties, based on the precision, lack of focusing on the object and purpose of the treaty (Hathaway, 2002). However, article 57 does not advise going against the object and purpose of the Convention to evaluate the permissibility of the reservation (Belilos v Switzerland, 1988).

In the cases of *Temeltasch* and *Belilos,* neither the European Commission nor the ECtHR addressed the argument that the interpretive declaration does not violate the object and purpose of the ECHR. In the case of *Temeltasch,* the Commission relied on the decision of the Advisory Opinion. The Members of the Commission Kiernan and Gözübüyük in their dissention opinion in the case of Temeltasch noted the need for the precision of reservation in related to the ECHR (Temeltasch v. Switzerland, 1983).

The issue of permissible reservation related to other human rights treaties was approached in another way. Article 28(2) of the Convention on the Elimination of Discrimination against Women (1979) and article 51(2) of the Convention on the Rights of Child (1989) take the approach of the VCLT, and specify reservation which is incompatible with the objective and purpose of the treaty to be impermissible. On the other hand, article 42(1) of the Convention Relating to the Status of Refugees (1951) prohibits reservation to the core provision. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) prohibits reservations whatsoever. The International Convention on the Elimination of All Forms of Racial Discrimination (1969) goes one step further by following the VCLT's approach and articulating the reservations that are incompatible with the object and purpose are impermissible, on the one hand, and establishing a different process for assuring the compatibility of reservation on the merits of object and purpose of the Convention on the other, by the rejection of two third of the member states. It also overrides the procedure prescribed in the VCLT. It is to be noted that the VCLT deals with permissible reservation, and while on any absence of particular regulation articles 20 and 21 will be effective to evaluate the legality of reservation.

Evaluating the consequences of the impermissible reservation to the human right treaties is complex because there is no treaty regulation, and the limited international or regional customary international principles are available in this context. Furthermore, the characteristics of human rights treaties are silent on the matter (Ferreira & Ferreira-Snyman, 2005). Moreover, apply the same legal effect to the permissible reservation and impermissible reservation is not logical, particularly in related to the reservation of human rights.

In the case of *Belilos* (1988), the Swiss interpretive declaration on ECHR—that the Swiss 'consider that the guarantee of a fair trial is intended solely to ensure ultimate control by the judiciary over the acts and decisions of the public authorities'—was noted as a reservation by the ECtHR and pronounced invalid. The court held that the reservation fundamentally limited the scope of the right to a fair trial. Marks (1977) points out the following aspects underlined the decision of the court. First, the states that ratified the Convention earlier ensured a minimal amount of reservation to not disturb the balance between the parties. The court considered such action favoured the integrity of the Convention over the requirement of contractual participation. Second, due to the nature of ECHR, the isolation factor had an objective effect on reservation. Third, the nature of ECtHR, which by treaty pronounce the validity of the reservation, limits the authority of the state parties and makes the treaty under the contractual theory. Last, ECtHR considered ECHR an 'integration mechanism' that intends to form a common aspect of human rights around Europe and which replaced the individual sovereign's authority on national orders related to human rights. However, the decision neither provided the effect of the impermissible reservation, nor validated the membership of the reserved state (Marks, 1997).

For instance, in the case of *Loizidou* (1995), Turkey accepted the right of petition to the Commission and the jurisdiction of ECtHR but issued a declaration under articles 25 and 46 to limit the scope within the territorial boundaries of the country. The court held that the declaration under articles 25 and 46 must be considered invalid and impermissible. The court focused on the object and purpose test, noting the articles were 'essential to the effectiveness of the Convention system.' The court reaffirmed the decision made in *Ireland v United Kingdom* (1978) that the system of human rights is not based on the concept of reciprocity between states, but rather on the objective standard of protecting basic rights.

The above examples bring criticisms. First, the doctrine of severability applied by the ECHR can be simply misplaced by the state's consent to be bound by the ECHR. Second, as Baratta pointed out, the court's approach had not been fully recognized by the member states in the matter of severability (Baratta, 2000). Resolution 1233 of 1993 is a good example, which appealed to the member states to carefully assess their reservation and invited them to withdraw any reservation contrary to the nature of universality.

In its *Advisory Opinion on Restrictions to the Death Penalty* (1983), the IAHCR interpreted articles 74 and 75 of the American Convention. The court relied on the text of reservation and its literal meaning in noting of reservation (Schabas, 1994), holding that:

Accordingly, for the purpose of present analysis, the reference in Article 75 to the Vienna Convention makes sense only is it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with (the) object and purpose of the treaty. As such, they can be said to be governed by Article 20 (1) of the Vienna Convention and, consequently, do not require acceptance by any other State party.

Another approach was adopted by the HRC in General Comment No 24 (1994), which noted that irrespective of the fact that a member state made an unacceptable reservation, the reservation will be severable; thus, the ICCPR will be effective for the reserving party. The HRC based its decision on the fact that the impermissible reservation may include the norms of customary international law and derogable or non-derogable provisions of the treaty; hence, it is not only about the link between the reservation and non-derogable rights and incompatibility must be justified by the State, but also some derogable rights, which may compatible to the object and purpose of the treaty (Redgwell, 1994). However, it avoided distinguishing permissible and impermissible reservation, as pointed out by Professor Redgwell. However, it observed the method of ECtHR in dealing with unacceptable reservation, as Professor Fitzmaurice pointed out (Fitzmaurice, 2006). However, the states, including the UK and the US, criticized the approach of the HRC. The UK noted it is up to the parties to decide the test of incompatibility, although the test should be objective. The US noted that, because there is a ratification instrument in place as an integral part of the reservation, the

HRC has no authority to server reservation (Fitzmaurice, 2006). France, on the other hand, criticized that such adoption would undermine the limitation set out by the VCLT, as in the VCLT would be applicable to the impermissible reservation (Moloney, 2004).

This approach was nonetheless applied in *Kennedy v Trinidad and Tobago* (1999), where the HRC applied the test of article 19 to the Optional Protocol Trinidad and Tobago re-accessed and pointed out that the reservation made by the states are invalid because it discriminated against a certain type of prisoner under the sentence of death. However, in *Francis Hopu and Tepaitu Bessert v France* (1993), although the declaration made by the French was deemed an impermissible reservation in light of Comment 24, the HRC decided to permit the reservation. However, Professor Fitzmaurice (2006) points out that the letter sent by the Chairman of the HRC must be seen as of greater importance in this context. The letter noted:

When a monitoring body has reached a conclusion about the compatibility of a reservation, it will be in conformity with its mandate, base its interaction with the State party thereon. Furthermore, in the case of monitoring bodies dealing with the individual communications, a reservation to the treaty, or the instrument providing for individual communications, has procedural implications on the work of the body itself. When dealing with an individual communication, the monitoring body will therefore decide on the effect and scope of reservations for the purposes of determining the admissibility of the communication. (ILC Fifth Report, 1993)

REFLECTION ON THE GUIDELINES ADOPTED BY THE ILC IN RELATED TO HUMAN RIGHTS TREATIES

The second report of Special Rapporteur Professor Pellet, which indicates that the VCLT was adequate in recognizing the characteristic of human rights treaties, was discussed in the 48th session of the ILC. However, in the discussion, it was noted that the role of human rights treaty bodies must be taken into account in relation to the reservation, which had not been recognized in the VCLT drafting (Pellet, 2013). Professor Pellet's report addressed the controversies around the reservation to the human right treaties.

Professor Pellet put forward two views. One view was the inapplicability of the general regime of reservation due to the legal scope of the treaties, which is a further step of the development made by the ICJ in the Advisory Opinion. The other view was based on the contractual aspect, in which the balance between the wider number of participants and the integrity of the treaty on ensuring the *ratio contrahendi* must be established (Fitzmaurice, 2006).

Professor Pellet also addressed the concern regarding the normative treaties in relation to the consensus to the VCLT, and the problem of balancing between the freedom of consent of the reserving state and the other parties. He noted that the *travaux préparatoires* indicates that the VCLT lawmakers were aware of the struggle of normative treaties, but highly focused on establishing a general regime applicable to all treaties (Pellet & Müller, 2011). The VCLT primarily aimed for flexibility and compliance, Professor Pellet points out, and set out to meet, the criteria of all types of treaties, which required at this point for the ILC to develop a different approach towards the normative treaties. He recognized the fundamental development made by the Advisory Opinion, particularly in relation to the universal flexibility. However, he also observed the distinction made by the Advisory Opinion with regard to the object and purpose test for recognizing the compatibility of human rights treaties (Pellet & Müller, 2011).

The ILC adopted the Guideline of 'reservation to general human rights treaties' during the 59th session, which was a part of a chapter addressing the incompatibility of reservation with regard to the object and purpose of treaties. The ILC addressed the permissible reservations under the VCLT and the impermissible ones that are outside the legal scope of the Convention (Report on the Work of Fifty-Ninth Session, 2007). Incompatibility was tested through the Guideline of 3.1.15, which put forward three questions to be answered 'No'. The first question was whether the reservation impairs any essential element of the treaty. The second question was whether such reservation violates to the general thrust of the treaty. The third question was whether the reservation compromises the treaty's real purpose of existence, i.e. *raison d'etre.* The Guideline of 3.1.6 addressed what is meant by the determination of the object and purpose of the treaty:

Determination of the object and purpose of the treaty-

> 1. In order to determine the object and purpose of the treaty, the treaty as a whole must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context.
>
> 2. For that purpose, the context includes the preamble and annexes. Recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion, and the title of the treaty and, where appropriate, the articles that determine its basic structure [and subsequent practice of the parties]. (Report on the Work of Fifty-Ninth Session, 2007)

On the other hand, Guideline 3.1.12 addressed about the function of the object and purpose test of reservation, particularly with regard to human right treaties. The Guideline concluded that the indivisibility, interdependence and interrelatedness of the rights, which were taken from the Vienna Declaration and Programme of Action along with the test provided under Guideline 3.1.15, must be ensured in assessing the compatibility of reservation with the object and purpose (Declaration, 1993).

These paragraphs are the direct inspiration of the Vienna Declaration, which is a milestone achievement in the development of international human rights law. Convention not only addressed the notions of indivisibility, interdependence and interrelatedness regarding human rights, but also addressed the interdependence of democracy, human rights and development (Hernández & Simma, 2011). However, as McCall-Smith points out, irrespective of the concern that human rights and freedoms were categorized into three generations in the era after the fall of the Berlin Wall, the Vienna Declaration was inscribed in such a way as to recognize the individual nature of regional and national aspects in relation to human rights (McCall-Smith, 2014). That paragraph 5 of the Convention, which addressed the end of politically distinctive human rights era, was stronger than the earlier drafts is to be noted (Fournier, 2010). The ILC's work on reservation of human rights treaties is an advanced development in the technicality of laws on reservation, added to the integrationist approach of the ILC on substantive human rights law (Pellet, 2013). In addition to the observation presented in relation to the flexibility of the VCLT in accommodating the special characteristics of human rights

treaties with regard to the compatibility of reservation of human rights treaties, it introduced the indivisibility test of human rights related to the permissibility of reservation.

Guideline 3.1.5.6 is the ultimate version of the Guide to Practice presented to the General Assembly on the 'reservations to treaties containing numerous interdependent rights and obligations.' It required taking into account the interdependence and the significance of the provision which is to be reserved, within the scope of the treaty in assessing the compatibility of the reservation with the object and purpose of the treaty which particularly contains interdependent rights and obligations (Pellet & Müller, 2011). This approach is distinctively different from the previous approach of ILC in relation to the human rights treaties (Guide, 2011). This approach has generalized the debate on the permissibility. The ILC admitted that the interdependent rights and obligations might have been indexed in other areas of international law treaties; thus, the reservation on interdependent rights may opt additional consequences for those treaties (Ziemele & Liede, 2013). This approach has its own valid reasons. First, there are a number of other law-making treaties similar to the human rights treaties, hence recognizing *ordre public*, the special character of normative treaties, is important. Second, those treaties also go beyond the nature of non-reciprocal obligations. Third, because the ILC has given specific commentaries to the issues raised in the context of human rights treaties, the general approach is sufficient irrespective of the notion that human rights treaties are the embodiment of values and provide rights to individuals and groups.

The ILC also addressed the theoretical conflict between the notion of reciprocity and the perspective of *ordre public* in relation to reservation by providing more general value, i.e. the principle of indivisibility, which technically offered the human rights discourse to make impact on the clarification of the approaches to the impermissibility in the reservation process. The principle of indivisibility also clarified the nature of the perspective of *oredre public* in a way to recognize multilateral conventions without conflicting the traditional drafting enforcing approaches of treaties (Ziemele & Liede, 2013).

Permissibility of Reservation: Human Right Treaty Bodies

There were criticisms that the VCLT provisions were incompatible with the practice of human rights bodies in examining the permissibility of reservations. However, as mentioned earlier in

this essay, such criticisms cannot be taken into consideration without knowing the agreement of the states in relation to the particular human rights treaty (Chinkin & Gardner, 1997). The ILC adopted in the 61st session draft Guideline 3.2, which addressed the fundamental misunderstanding alleged. First, the draft pointed out that human rights treaty bodies could assess the permissibility of reservations by looking at their functions and compatibility of reservations with object and purpose. Second, in assessing, the human rights treaty bodies must not go beyond their mandates. However, within the authority, it is to be noted that the regional courts have the power to make binding decisions.

Third, although the human rights treaty bodies can examine the impermissibility of a reservation, such action must not invalidate the authority of the state under VCLT articles 20, 21 and 23 regarding their power to accept or object to the reservations made by the reserving state (McRae, 2012). Certainly, this provision has extended the scope of the human right treaty bodies, as they now could impose states over their own preference to define their legal obligation under the prescribed treaty. However, irrespective of the ordinary process of the right of a state to submit a reservation, and the right of the other states which are parties to the particular treaty to accept or object such reservation from the reserving state, the human rights treaty bodies now have the power to address the permissibility and compatibility of a reservation (Chung, 2016).

This initiative also opened a new pathway for conversation between the human rights treaty bodies and the reserving state, and to distinguish the object and purpose of the treaty from any other reservation. This development was not initially one the VCLT avoided, but simply was not envisaged while drafting the VCLT. However, the ILC has clarified it.

Consequence of Invalid Reservation

The Guidelines addressed the consequence of invalid reservation. Although a number of provisions addressed the implications, the following are vital in making the laws related to human rights treaty reservation much more practical.

First, the consequences of reservation, which are impermissible due to the fact they are either prohibited by the treaty or contrary to the object and purpose of the treaty, and the authority to sever impressible reservation were initially addressed by Guideline 3.3.1. This provision reaffirmed the requirement of VCLT article 19 and particularly clarified that the competency to comply with the object and purpose does not merely cover the expressed requirement of the treaty, but also the implied requirement (Pellet, 2013).

Second, Guideline 3.3.3 clarified that individual acceptance, either expressed or implied as according to VCLT article 20(5), cannot justify the permissibility of a reservation. Thinking back of the decision made by the ECtHR in the cases of *Temeltasch* and *Belilos* to the argument made by Swiss of the tactic acceptance received to their interpretative declaration does not go against the object and purpose of the treaty is no longer relevant (Chung, 2016). As such, under the ECHR, even if the reservation neither satisfied the object nor the purpose of the treaty, without objection it cannot be considered permissible. Hence, the other parties' lack of objection will not be so important to the notion of permissible reservation anymore.

Third, under international law, state responsibility is prescribed as a breach of international law. However, so far, the states that made reservation to the specific provisions of the human right treaties were not accountable for such violation or restriction to human rights because of their reservation. However, Guideline 3.3.2 pointed out 'that the formulation of an impermissible reservation does not engage the international responsibility of the state which formulated it.' This raises the question of if a state formulates an impermissible reservation, would that state still be considered as fully compliant with its responsibility? The ILC's answer to the question is yes (Pellet & Müller, 2011). However, the approach of the ILC has generated a number of criticisms.

Fourth, the ILC addressed the consequences of all kinds of reservation. It does not merely cover part three with particular reference to Guidelines 3.3.1 to 3.3.3 of impermissible reservation, but also the invalid reservation addressed in part two. That means that part four of the Guideline speaks invalid reservation, which are prohibited due to the fact it is incompatible with the object and purpose of the treaty but also which are formally invalid (Hill, 2016). Guideline 4.5.1 expressed the consequence of invalid and impermissible reservation. The legal effect of the

invalid reservation under Guideline 4.5.1 is devoid, i.e. null and void. Guideline 4.5.1 is the outcome of the reservation practice the ILC viewed not only according to the state practice but also the approaches of ECHR, IACHR and HRC. The ILC noted that the lacuna of the VCLT in this regard was not deliberate, but the result of a failure to foresee the uprising nature and the special characteristic of human rights treaties. However, the Committee pointed out that 'the principle that an invalid reservation has no legal effect is part of positive law. This principle is set out in the second part of guideline 4.5.1.'

Fifth, Guideline 4.5.3 addressed the doctrine of severability, prescribing the status of the reserving state of invalid reservation. It indicates the status depends on the intention of the reserving state either to be bound by the treaty without enjoy the reservation or to not be bound. It points out otherwise that the reserving state expressly indicate or establish a distinctive motive contrary to the intention of the treaty provision, the reserving state will be considered by the human rights treaty bodies as a member state to the treaty. However, irrespective of the fact that the treaty body considers the reserving state to be member of the treaty, the reserving state can express its motive not to be bound by the treaty without enjoying the benefit of reservation. Such expression must be made within twelve months of the date of the establishment of that treaty body (McCall-Smith, 2014). This initiative reflects the views of Judges Higgins and Owada and others in the joint dissenting opinion in *Democratic Republic of Congo v. Rwanda*.

CONCLUSION

The approach of the ILC and Professor Pellet has certainly addressed the fundamental arguments left out in the VCLT on reservation to treaties, particularly human rights treaties. Primarily, the special characteristic of human right treaties has been acknowledged from the primary distinction made by the Advisory Opinion on the Genocide Convention. From two possibilities either to reserve or object the reservation, the ILC, along with the development primarily made by the ICJ and other courts, have certainly developed the possibility for the treaty body to intervene in pronouncing the validity of the reservation not only with whether it complies with the object and purpose, but also in scales of indivisibility, interdependence and

interrelatedness of rights. Consequences of impermissible reservations, the role of human rights bodies and balancing their role with the primary interest of state have been addressed by the ILC more accurately. A new doctrine of severability in the context of reservation to treaties in the international law has been put forward. These initiatives have, as stated above, created an opportunity for the states and treaty bodies to have dialogue on advancing human rights through treaty law. Impermissibility requires assessment in each context of each treaty hereinafter.

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