The Problem of Reservations to Human Rights Treaties: A New Challenge to the Traditional Concept of International Law

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Abstract: This article aims at analyzing the evolution of the debate regarding the issues that arise when States make reservations to human rights treaties, whose ultimate goal is inevitably compromised by any form of limitation to their content. This kind of treaties are in fact meant to protect individuals, while traditional international treaties (as envisaged by the Vienna Convention on the Law of Treaties) simply regulate the relationships among sovereign States. Through the analysis of the different approaches of several scholars, and in particular in the light of the Human Rights Committee's General Comment No. 24, the article tries to compare the criteria that could be put in place in order to answer to the question of whether reservations should be deemed admissible in the first place, which should be the limitations, and who are the subjects best suited to carry on such evaluations and establish the consequences of invalid reservations.

Keywords: Human rights; international law; General Comment No. 24; Human Rights Committee; legal reservations.

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1. *Introduction*

The debate over the relation between reservations and human rights treaties can and should be viewed in the light of how this kind of conventions influences and challenges the traditional international legal system[1]. The Human Rights Committee's General Comment No. 24, in addressing the matter of reservations to the International Covenant on Civil and Political Rights (ICCPR)[2], has indeed proved rather controversial. It is possible to identify three main issues in the analysis of this specific legal matter: whether reservations to human rights treaties can be accepted, who should in principle be competent to assess their admissibility and what should be the consequences of inadmissible reservations.

A necessary premise of such an analysis is undoubtedly the recognition of the peculiarities of human rights treaties, whose specific historical and philosophical implications cannot be ignored: many authors have indeed recognized a "special character"[3], a sort of "declaratory and objective nature"[4] that makes such treaties more similar to pledges than to contracts among states[5]. Establishing a system of *erga*

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1. See generally Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2012).

2. *General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, International Covenant on Civil and Political Rights (CCPR) General Comment No. 24, UN Human Rights Committee, 1382nd meeting (November 2, 1994), UN Doc. CCPR/C/21/Rev.1/Add.6.

3. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, *International Human Rights Law* 98 (Oxford University Press 2nd ed. 2013).

4. *Id.* at 100. See Olivier De Schutter, *International Human Rights Law* 118 (Cambridge University Press 2nd ed. 2014); European Commission of Human Rights, app. no. 788/60, *Austria v. Italy* (1961).

5. See generally Lea Brilmayer, *From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements*, 77 British Yearbook of International Law 163 (2006).

omnes obligations not bound by reciprocity[6], these *sui generis* treaties have even been considered "morally declaratory"[7], thus beyond states' consent. To some extent this special character is recognized by positive international law (for example through the prohibition of retaliation in case of breaches)[8], but the issue of reservations still appears rather controversial[9].

2. *Admissibility of Reservations*

In its General Comment No. 24, the Human Rights Committee recognizes both the benefits and the risks deriving from the acceptance of reservations to the Covenant. On the one hand, the possibility to ratify only part of the content might encourage more states to join the treaty[10]; on the other, multiple or ambiguous reservations might determine a loss of effectiveness of the agreement and, consequently, prove detrimental to legal certainty – as it could become impossible to establish the obligations of each state[11]. Nonetheless, the appreciation of the essential role played by reservations in human rights treaties can already be found in the 1951 advisory opinion on the Genocide Convention by the International Court of Justice (ICJ)[12]. In that instance, the traditional approach to reservations – under which they had to be accepted by all the contracting parties – was deemed not flexible enough for the universal ambitions of human rights agreements. The Court therefore claimed that reserving states could be considered parties even if their reservations had been objected to, although the compatibility of said reservations was to be assessed with regard to "the object and purpose"[13] of the Convention.

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6. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 99 (cited in note 3); De Schutter, *International Human Rights Law* at 113 (cited in note 4); CCPR General Comment No. 24 para. 17 (cited in note 2).

7. Brilmayer, *From 'Contract' to 'Pledge'* at 171 (cited in note 5).

8. See Vienna Convention on the Law of Treaties art. 60(5).

9. See Andrea Gioia, *Manuale di diritto internazionale* 65 (Giuffrè 5th ed. 2015).

10. See CCPR General Comment No. 24 para. 4 (cited in note 2).

11. See *id.* para. 12.

12. International Court of Justice, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, advisory opinion, 1951 ICJ Reports 15.

13. *Id.*

It appears evident, however, that the risks of reservations to this kind of treaties are noteworthy. More than one scholar has indeed pointed out that states might decide to ratify said conventions solely for the reputational advantages this is going to grant them, "free riding"[14] human rights whilst frustrating their goals through reservations[15]. The hazard of creating a "two-speed protection" of human rights should also be considered, as well as the chance that controversial reservations might undermine the authority of the treaty, as in the case of the numerous and extended reservations to the Convention on the Elimination of All Forms of Discrimination against Women[16].

Nevertheless, it must be kept in mind that through reservations states can ratify human rights conventions whilst protecting their own cultural and religious traditions[17], or whilst in the process of adapting domestic legislation to international standards of protection[18]. Indeed, human rights treaties rarely expressly exclude reservations (even though they might include some specific limitations to them)[19]. In addition, it has been observed that reservations normally concern minor issues[20], and that no general prohibition can be inferred from states' practice[21]. It is therefore reasonable to consider them as a "necessary evil"[22] that allows a compromise between the need for wide

14. Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 106 (cited in note 3)

15. See Brilmayer, *From 'Contract' to 'Pledge'* at 191–192 (cited in note 5); Rhona K.M. Smith, *Textbook on International Human Rights* 165 (Oxford University Press 7th ed. 2016).

16. See *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*, Meeting of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, 16th meeting (June 28, 2010), UN Doc. CEDAW/SP/2010/2.

17. See Smith, *Textbook on International Human Rights* at 164 (cited in note 15).

18. See Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 International & Comparative Law Quarterly 390, 390 (1997).

19. See Manfred Nowak, *Introduction to the International Human Rights Regime* 56 (Martinus Nijhoff 2003).

20. See Ineta Ziemele and Lasma Liede, *Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6*, 24 European Journal of International Law 1135, 1139 (2013).

21. See *id.*

22. Smith, *Textbook on International Human Rights* at 165 (cited in note 15).

ratification and the integrity of the treaty itself (although their eventual elimination should remain the final goal)[23].

3. *Criteria of Admission*

Evidently, even considering reservations admissible, not all them should be allowed: the ICJ's criterion of compatibility with the "object and purpose" of the treaty is central in this respect and has been incorporated in article 19(c) of the Vienna Convention on the Law of Treaties (VCLT). The Human Rights Committee in the General Comment No. 24, though, took one step further by claiming that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant"[24]. This clearly clashes with the regime established by the Vienna Convention, whereby the admissibility of a reservation is assessed by the other states parties through objections; however, in the General Comment No. 24 such regime is deemed "inappropriate to address the problem of reservations to human rights treaties"[25]. The system implemented by the Vienna Convention has in fact been accused by some scholars of lacking clarity and thus being unsuited for human rights treaties[26]: illustrative of this problem are the United States reservations to the ICCPR, that have been objected by eleven states, all of whom expressly stated that their objections did not preclude the entry into force of the Covenant in their relations with the United States[27]. De facto, state objections usually either have a merely political significance (with almost no concrete effects)[28], or base any practical consequence on reciprocity, which does not characterize human

23. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 799 (Oxford University Press 3rd ed. 2013); Smith, *Textbook on International Human Rights* at 165 (cited in note 15).

24. CCPR General Comment No. 24 para. 18 (cited in note 2).

25. *Id.* para. 17.

26. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3). See generally Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 European Journal of International Law 437 (2002).

27. See Redgwell, *Reservations to Treaties* at 394, 406 (cited in note 18).

28. See Gioia, *Manuale* at 64 (cited in note 9).

rights treaties[29]. Nevertheless, the VCLT does not make any distinction between these conventions and other kinds of agreements, and it has even been argued that in its drafting the role of human rights bodies was not envisaged at all[30]; moreover, it has been noted that this regime mainly regulates the relations between the reserving and the objecting state[31], and only with regard to permissible reservations[32], hence leaving many aspects of the matter uncovered. In addition, it must be noted that states tend to be reluctant to object other parties' reservations to human rights treaties, for they have no direct interest and incentive to do so[33]: in this respect, the competence of monitoring bodies offers the guarantee that, in case of questionable reservations, the main concern is going to be the protection of human rights ("*in dubio pro libertate et dignitate*")[34].

The General Comment No. 24 has nevertheless met quite an opposition in the international legal panorama: particularly significant were the observations of France, the United Kingdom and the United States, which underlined how the ICCPR did not confer this kind of competence to the Committee and that therefore its acts were not to be considered legally binding[35]. Moreover, in his 1995 report on reservations, Special Rapporteur Alain Pellet could find no common basis for the provision of a special regime for human rights conventions, as the VCLT was deemed appropriate for all treaties (and in fact the majority of them explicitly referred to it)[36]. However, in its 2011 *Guide to*

29. See Korkelia, *New Challenges to the Regime of Reservations* at 439 (cited in note 26); CCPR General Comment No. 24 para. 17 (cited in note 2).

30. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1144 (cited in note 20).

31. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 American Journal of International Law 531, 532 (2002).

32. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1140 (cited in note 20).

33. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3); De Schutter, *International Human Rights Law* at 131 (cited in note 4).

34. See Nowak, *Introduction to the International Human Rights Regime* at 35 (cited in note 19).

35. See *Report of the Human Rights Committee to the General Assembly*, 51st session (September 16, 1996), UN Doc. A/51/40, 117–119; *Report of the Human Rights Committee to the General Assembly*, 50th session (October 3, 1995), UN Doc. A/50/40, 131–139.

36. See Redgwell, *Reservations to Treaties* at 391 (cited in note 18); Alain Pellet, *First Report on the Law and Practice Relating to Reservations to Treaties: Preliminary*

Practice on Reservations to Treaties, the International Law Commission recognized the competence of monitoring bodies (alongside states parties and dispute settlement bodies) over the permissibility of reservations – but at the same time it specified that the legal force of their findings should not exceed the powers given to them by the treaty itself[37]. In fact, one of the main issues with the General Comment No. 24 was precisely the fact that the Committee based its competence on the functional necessity of it, rather than on any legal basis[38]. As a final consideration, it can be argued that if the treaty does not establish any monitoring body, a precisely regulated system of states' control is nevertheless more desirable than the regime established by the VCLT: an excellent example is that of the International Convention on the Elimination of All Forms of Racial Discrimination, wherein a majority of two-thirds of the states parties is required to declare a reservation inadmissible. In conclusion, as in human rights treaties we witness an "axiological" rather than a "consensual" approach to reservations, a clearly establish mechanism of validity assessment is undoubtedly fundamental[39].

4. *Consequences of Inadmissible Reservations*

In yet another crucial passage, the Committee proceeded in claiming that "[t]he normal consequence of an unacceptable reservation is ... that the Covenant will be operative for the reserving party without benefit of the reservation"[40]. This observation too was met with strong opposition[41], since in the international legal panorama there is no consensus over what the effects of invalid reservations should

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Report, International Law Commission, 47th session (May 2–July 21, 1995), UN Doc. A/CN.4/470.

37. See *Report of the International Law Commission to the General Assembly*, 63rd session (April 26–June 3 and July 4–August 12, 2011), UN Doc. A/66/10, 37–38.

38. See Korkelia, *New Challenges to the Regime of Reservations* at 459 (cited in note 26).

39. See Moeckli, Shah, and Sivakumaran, *International Human Rights Law* at 108 (cited in note 3).

40. CCPR General Comment No. 24 para. 18 (cited in note 2).

41. See *Report of the Human Rights Committee to the General Assembly*, 51st session (September 16, 1996), UN Doc. A/51/40, 119; *Report of the Human Rights Committee*

be: some believe that the reserving state should not be considered party to the treaty anymore, while others affirm that the invalid reservation should simply be severed[42]. To make matter worse, there is no established custom on such matter, and treaties do not address it either[43]. Nevertheless, the Inter-American Court of Human Rights and the European Court of Human Rights have adopted the so-called severability approach[44], as can be observed in the *Belilos*[45] and *Loizidou*[46] cases. Both these rulings, however, have been accused of lacking explanation regarding the rationale behind this type of approach: in the *Belilos* case, for example, it was succinctly affirmed that Switzerland's reservation to article 6 of the European Convention on Human Rights was of a "general character", and therefore in violation of article 64 (now article 57) thereof. In the *Loizidou* case, moreover, the Court declared invalid (and consequently severed) Turkey's reservation to article 1 of Protocol 1 to the Convention, plainly disregarding several statements made by the same state that clearly indicated that said reservation was fundamental to its consent to be bound by the treaty. In these instances, the judges underlined the constitutional nature of the Convention and its fundamental role in the light of European public order: considerations that, in some observers' opinion, lead the Court to bend the limits of states' consent in order to strengthen the protection of human rights[47]. The Human Rights Committee, nevertheless, has recalled such jurisprudence to defend its own position – although a parallel does not appear completely convincing, because these two courts are in fact both judicial bodies established for regional treaties

to the General Assembly, 50th session (October 3, 1995), UN Doc. A/50/40, 134–135, 138–139.

42. See generally Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 European Journal of International Law 413 (2000).

43. See Ziemele and Liede, *Reservations to Human Rights Treaties* at 1142 (cited in note 20).

44. See Goodman, *Human Rights Treaties* at 532 (cited in note 31).

45. *Belilos v. Switzerland*, 10 EHRR 466 (1988).

46. *Loizidou v. Turkey (preliminary objections)*, 20 EHRR 99 (1995).

47. See generally Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 Melbourne Journal of International Law 155 (2004).

that have acquired a sort of "constitutional character"[48] over time, unlike the Human Rights Committee.

The severability approach undoubtedly challenges the principle of state consent, since it leads to situations where a state is bound by a provision it explicitly wanted to avo*id.* However, it has been correctly noted that it is possible to distinguish between "critical" and "accessory" reservations, only the former being fundamental to a state's consent: therefore, there might be situations in which a state's intention to be bound by the treaty overrides its concern with the effects of the reservation (in fact a bona fide state clearly does not want to enter an invalid reservation)[49]. Ryan Goodman has also underlined how under many circumstances considering a state no longer a party to the treaty might be detrimental for its overall interests – as in the case of newly established democracies trying to reach internal stability[50]. The "transaction costs" of exiting and re-entering a treaty without the invalid reservation must not be underestimated either[51], while considering a state still bound always leaves the possibility for the state itself to withdraw from the treaty if it wants to[52]. From a different point of view, noteworthy is also "the increasing importance of being seen to adhere to human rights treaties"[53]: leaving to the states the burden of withdrawing might actually push them to remain parties. From what has been said, it appears evident that the state's intention (at the time it ratified the treaty)[54] should be regarded as the key criterion to establish whether a reservation can be severed, as has been recognized by the International Law Commission[55] as well as several authors[56].

48. Ziemele and Liede, *Reservations to Human Rights Treaties* at 1136 (cited in note 20).

49. See Goodman, *Human Rights Treaties* at 555 (cited in note 31).

50. See *id.*

51. See *id.*; De Schutter, *International Human Rights Law* at 142 (cited in note 4).

52. See Goodman, *Human Rights Treaties* at 538 (cited in note 31); Korkelia, *New Challenges to the Regime of Reservations* at 465 (cited in note 26).

53. Redgwell, *Reservations to Treaties* at 407–408 (cited in note 18).

54. See Goodman, *Human Rights Treaties* at 539 (cited in note 31).

55. See *Report of the International Law Commission to the General Assembly*, 63rd session (April 26–June 3 and July 4–August 12, 2011), UN Doc. A/66/10, 43–44.

56. See, for example, Goodman, *Human Rights Treaties* at 531 (cited in note 31).

This criterion is also implicitly recognized in the General Comment No. 24 (the "normal" consequence being severability)[57], although in the *Trinidad* case[58] the Committee has been accused of not being impartial in the establishment of such intention, as it directly applied the severability approach[59]. In fact, before the events of the case, Trinidad and Tobago had denounced and re-acceded the Optional Protocol to the International Covenant on Civil and Political Rights, with the addition of a reservation to article 1 – therefore excluding the Committee's competence over individual communications. The Committee found such reservation inadmissible – perfectly in line with what it had established in its General Comment No. 24 ("[B]ecause the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant"[60]). However, it blatantly ignored that the operation carried out by Trinidad and Tobago, as well as the motivation adduced, had made it quite clear that such reservation was fundamental to the state's consent; instead, the Committee applied the severability approach, therefore considering the state bound by the Covenant and the Optional Protocol without the reservation[61]. The *Trinidad* case indeed shows how the *sine qua non* condition of the severability approach is the implementation of a precise system for assessing the validity of reservations[62]. It goes without saying that without the states' cooperation the system will not work – as can be observed considering

57. See Korkelia, *New Challenges to the Regime of Reservations* at 460 (cited in note 26).

58. *Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No. 845/1999 (Kennedy v. Trinidad and Tobago),* Human Rights Committee, 67th session (October 18–November 5, 1999), UN Doc. CCPR/C/67/D/845/1999.

59. See Joseph and Castan, *The International Covenant on Civil and Political Rights* at 818 (cited in note 23).

60. CCPR General Comment No. 24 para. 13 (cited in note 2).

61. See generally Francisco Forrest Martin et al., *International Human Rights and Humanitarian Law: Treaties, Cases, and Analysis* (Cambridge University Press 2011).

62. See Redgwell, *Reservations to Treaties* at 408 (cited in note 18).

the refusal by the United States to withdraw those reservations to the ICCPR that the Committee has declared invalid[63].

5. *Conclusion*

In conclusion, it is argued that reservations to human rights treaties should be accepted, but only after an admissibility assessment system has established their permissibility. In fact, although they inevitably create a gap in the protection of individuals, reservations also introduce an element of flexibility that allows states to catch up with the international standards of protection of human rights (through the adoption or the modification of national legislation), therefore eventually leading to an overall improvement in the implementation of said treaties[64]. Nevertheless, although permissible, reservations should still be viewed as a necessary evil, and the ultimate goal should remain their eventual elimination (after they have depleted their function as a bridge between states and a universal and shared level of protection of human rights). It is here argued that the most appropriate actors to carry out such incumbency appear to be the monitoring bodies: the system implemented in the VCLT, in fact, proves unsuited to be applied to human rights treaties, as it heavily relies on States to take action – while they will most likely not interfere with each other's reservations on such matters. The competence of these monitoring bodies should be carefully outlined from the beginning or through successive amendments to the specific convention, in order to avoid accusations of impartiality. However, in the absence of such bodies, a system of states' votes could be implemented. Should a reservation be found invalid, the State will be considered bound by the treaty without the benefit of said reservation, unless it is assessed that it was fundamental to its consent (therefore taking into consideration whether the reservation was "critical" or "accessory"). These conclusions should be read in the light of the fact that, although States are still the

63. See Nowak, *Introduction to the International Human Rights Regime* at 58 (cited in note 19).

64. See generally Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 Cardozo Law Review 1095 (2000); Darren J. O'Byrne, *Human Rights: An Introduction* (Pearson 2003).

protagonists of the international legal system, its fulcrum appears to be slowly shifting "from the protection of sovereigns to the protection of people"[65]. This determines a loss of simplicity[66] but, as Reisman put it, "[i]f complexity of decision is the price for increased human dignity on the planet, it is worth it"[67].

65. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 American Journal of International Law 866, 872 (1990).

66. See Christopher Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 European Journal of International Law 447, 470 (1993).

67. Reisman, *Sovereignty and Human Rights* at 876 (cited in note 65).