ON THE PROTECTION OF HUMAN RIGHTS, THE ROME STATUTE AND RESERVATIONS TO MULTILATERAL TREATIES

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This essay will deal with the issues unresolved by the 1969 Vienna Convention on the Law of Treaties (VCLT), reservations and declarations to human rights treaties. In fact, declarations to treaties were left out entirely from the scope of the VCLT. This article will also analyse in depth the general development of the institution of the reservations to treaties including the current work on this topic by the International Law Commission and the recent jurisprudence of the International Court of Justice. The essay takes into account the relevant jurisprudence of the European and Inter-American Courts of Human Rights and provides an extensive analysis of the legal character of declarations attached to the Rome Statute of the International Criminal Court.

I. INTRODUCTION

Reservations to treaties in general1, and in particular to human rights treaties2 are one of the very few aspects of the law of treaties that have sparked intense discussions, often reflecting very conflicting views, both in the doctrine and practice of international law. Reservations have been a subject of numerous publications and are frequently referred to

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as a necessity, albeit a burdensome one. The problems with reservations have been on the agenda of the International Law Commission (ILC) since 1993 when the ILC began work (which is still on-going) on the subject (See Part IV — The Work of the ILC on Reservations and the report of the Special Rapporteur “The Law and Practice Relating to Reservations to Treaties”). Some of the topics, which have been discussed by the ILC, relate directly to the subject matter of the present essay, i.e., declarations and reservations submitted by States to treaties. The appending of declarations to the Statue of the International Criminal Court (ICC Statute or Rome Statute) and reservations to human rights treaties are closely linked and a distinction between the two is often problematic. This essay will analyse in depth the general development of the institution of the reservations to treaties including the current work on this topic by the ILC. It will also provide an extensive analysis of the legal character of declarations attached to the Rome Statute, as well as take into account the relevant jurisprudence of the European and Inter-American Courts of Human Rights on the reservations to human rights treaties. Part II of the essay will cover the 1951 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Reservations to the Genocide Convention Advisory Opinion or Advisory Opinion). It will focus on the findings of the International Court of Justice (ICJ) in relation the Genocide Convention, with reference to the parallel work of the ILC. Part III will consider the regime under the 1969 Vienna Convention on the Law Treaties (VCLT) and its link to the Reservations to the Genocide Convention Advisory Opinion. It will discuss the issues unresolved by the VCLT. Part IV will provide details of the work of the ILC on reservations. Part V will address the declarations concerning the ICC statute. Part VI will discuss the contemporary practice of reservations to human rights treaties by selected human rights regimes. Part VII concludes the essay. Finally, a very recent judgment of the ICJ passed in 2006 is of great importance to the subject matter of this essay and so a post-script of the judgment and its implications has been included at the end of this essay.

II. THE RESERVATIONS TO THE GENOCIDE CONVENTION ADVISORY OPINION

At the time of the rendering of the Advisory Opinion by the ICJ, the ILC was in the initial stages of its work on the codification and the progressive development of the law of treaties, which resulted in the adoption of the VCLT. It was aware of the issues brought to the attention of the Court by the request for the Advisory Opinion. However, the focus of this part will mainly be on the specific findings of the ICJ in relation to the Genocide Convention, with some references to the parallel work of the ILC. The Reservations to the Genocide Convention Advisory Opinion established new foundations in the practice of reservations to treaties. 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. 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. However, in the 1920s and 1930s an interesting


4 For in-depth analysis of the views of the ILC on these issues, see J. Klabbers, “On Human Rights Treaties, Contractual Conceptions and Reservations” in Reservations to Human Rights Treaties and the Vienna Convention, supra note 2 at 149.
regional practice developed between American States, which softened the rigidity of the above-described rule and allowed the acceptance of reservations that were not based on unanimity. As a result, under one multilateral treaty, a nexus of various relationship between States parties was developed. A treaty was unchanged between States, which accepted it without any reservations; it was in a changed form as between States, which made reservations to certain treaty provisions and States that accepted these reservations; and it was not in force as between States, which made reservations and States, which did not accept them.5

The general practice of States was completely transformed by the Reservations to the Genocide Convention Advisory Opinion, a very important and influential Advisory Opinion. The Genocide Convention does not have a rule on reservations. States therefore started to append various reservations to this Convention and the Secretary General of the United Nations (a depositary of the Convention) was uncertain which States should count in the determination of the date of entry into force of the Convention.

The United Nations General Assembly (UNGA) consulted both the ICJ and the ILC and these bodies came up with divergent views For discussions on the ILC’s view, see Part V below. The UNGA requested the ICJ to render the Advisory Opinion on the following questions:

I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving States and: (a) the parties which object to the reservation? (b) those which accept it?

III. What would be the legal effect as regards the answer to Question I if an objection to a reservation is made: (a) by a signatory which has not yet ratified? (b) by a State entitled to sign or accede but which has not yet done so?

Interestingly, the Court observed that these three questions “are purely abstract in character”. The Court in fact did not refer to any actual existing or future reservations or objections to reservations. Rather, the Court observed that Question I referred to the problem “whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it”.6 Therefore, the Court clearly announced that it wished to make a statement on the permissibility of reservations to this Convention, and not judge in any manner reservations, which had been already made or would be made. The Court further made several other fundamental pronouncements on the States’ behavior in relation to reservations, which is conditioned by the type of multilateral agreement to which the reservations are appended. The findings of the Court are without doubt the foundations for contemporary understanding of the different kinds of multilateral international agreements, and resulting from this distinction, differentiated treatment of reservations.

First of all, the Court analysed the current practice of States in relation to reservations from the point of view of the character of a treaty as a “contract”. Therefore, the Court explained:

...in its treaty relations a State cannot be bound without its consent, and that consequently no reservation can be effective against any State without its agreement thereto. It is also a generally recognized principle that a multilateral convention is the result

6 Supra note 3 at 21.
of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decision or particular agreements, the purpose and raison d’être of the convention. To this principle was linked the notion of integrity of the convention as adopted, a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all contracting parties without exception, as would have been the case if it had been states during the negotiations.7

However, in the Court’s view, a “variety of circumstances” results in a “more flexible application” of the principle of integrity. These circumstances are the following: the universal character of the United Nations, under whose auspices the Convention was created; and the very broad degree of participation, as defined by Article IX of the Convention.8 The Court stated that:

Extensive participation in conventions of this type has already given rise to greater flexibility in the international practice concerning multilateral conventions. More general resort to reservations, very great allowance made for tacit assent to reservations, the existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations— all these factors are manifestations of a new need for flexibility in the operation of multilateral conventions.9

The Court very astutely observed that the absence of the provision concerning reservations in a treaty did not signify the prohibition of reservations, but rather a wish not to invite too many of them. In the absence of such a provision, there are other factors to be taken into account in determining the possibility of making reservations, as well as their validity and effect, such as the character of a multilateral convention, its purpose, provisions, mode of preparation and adoption.

In order to fulfill this task in relation to the Genocide Convention, the Court analysed the special characteristics of the Genocide Convention. The origins of this Convention indicate that it was the intention of the United Nations to punish genocide as a crime under international law, “involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations...” 10

The Court stated that this conception results in principles that bind States even without a treaty obligation and that both the convention and the cooperation required freeing mankind from such crimes, are universal. Next, the Court examined the aim of this Convention, which is purely of a humanitarian and civilising purpose (i.e. safeguarding the very existence of certain human groups and the endorsement of the most elementary principles of morality). Therefore, the character of such a convention is different from other conventions: Contracting States do not have their own interests; they have one common interest, i.e. the accomplishment of these exalted purposes, which are the raison d’être of this Convention.

From this, it follows that a convention of this type is not characterised by involving individual interests of States, or the achievement of a perfect contractual balance between

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7 Ibid. at 21.
8 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S 277, Article IX: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”.
9 Supra note 3 at 21-22.
10 Ibid. at 23.
rights and obligations. The above considerations guided the Court in its analysis of the reservations to the Genocide Convention.

The Court said as follows:

The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.\(^\text{11}\)

Therefore, the Court laid down a principle that only certain reservations were admissible. 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 which only permits a reservation upon the acceptance by all the parties, as evidenced by the practice of such organisations as the Organisation 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”.\(^\text{12}\)

As to the consequences of the objections to a reservation, the Court envisaged the following possibilities:

It may be that the divergence of views between the parties as to the admissibility of a reservation will not in fact have any consequences. On the other hand, it may be that certain parties who consider that the assent given by other parties to a reservation is incompatible with the purpose of the Convention, will decide to adopt a position on the jurisdictional plane in respect of this divergence and to settle the dispute which thus arises either by special agreement or by procedure laid down in Article IX of the Convention. Finally, it may be that a State, whilst not claiming the reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.\(^\text{13}\)

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\(^{11}\) *Ibid.* at 25. In his Dissenting Opinion, Judge Alvarez classified treaties of the same type as the Genocide Convention as the “new international constitutional law”, established in the “general interest” at 24. It may be also noted that during the codification of treaties by the ILC, Sir Gerald Fitzmaurice presented a classification of treaties depending on the type of obligation: “concessory or reciprocal”, “integral” and “interdependent”. The first type of obligations is based on a “mutual interchange of benefits between parties” (Article 18, Third Report on the Law of Treaties, UN Doc. A/CN.4/115. Y.I.L.C., vol. II at 20 [Third Report]; the second type are those obligations which are “self-existent, absolute and inherent (to) each party” (Third Report, Article 19). An example of such an obligation is the 1948 Genocide Convention. These obligations are directed “towards all the world rather than towards particular parties”; the third type of obligations are where “the participation of all parties is a condition of the obligatory force of the treaty”, such as a disarmament treaty. (Second Report on the Law of Treaties, UN. Doc. A/CN.4/107, Y.I.L.C., Vol. II at 16).

\(^{12}\) *Supra* note 3 at 27.

\(^{13}\) *Ibid.*
The Court also explained that until the ratification of a treaty, the objection of the signatory State does not have an immediate effect. The Court made the following final pronouncements:

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

On Question II: ...(a) that a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, can in fact consider that the reserving State is not a party to the Convention; (b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention;

On Question III: ... (a) that an objection to a reservation made by a signatory State which has no yet ratified the Convention can have legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to other States of the eventual attitude of the signatory State; (b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.

Judges Guerrero, Read McNair, and Hsu Mo attached a very strong dissenting opinion in which they challenged the classification of reservations into “compatible” and “incompatible”. According to the dissenting judges, such a division would result in a corresponding classification of the provisions of the Convention into two categories: of minor and major importance:

when a particular provision formed part of ‘the object and purpose of the Convention’, a reservation made against it would be regarded as ‘incompatible’, and the reserving State would not be considered a party to the Convention; when a particular provision did not form part of ‘object and purpose’, any party which considered a reservation made against it to be ‘compatible’ might regard the reserving State as a party. Any State desiring to become a party to the Convention would be at liberty to assert that a particular provision was not a part of ‘the object and purpose’, that a reservation against it was ‘compatible with the object and purpose of the Convention’, and that it had therefore a right to make that reservation-subject always to an objections by any of the existing parties on the ground that the reservation is not ‘compatible.

The judges pointed out one of the weaknesses of the system advised by the Court, which in fact is one of the unresolved problems of the reservations regime under the VCLT, (See further below for a discussion of this issue) i.e. a total reliance on the individual subjective decision of a State concerning the appraisal of the compatibility of a reservation. According to them, the only objective assessment could be done by referring the issue of the compatibility of a reservation to an independent judicial organ (See further below for a discussion of the practice of certain human rights courts).

At the time of the rendering of the Advisory Opinion, the ILC, in the course of the codification and progressive development of the law of treaties, was also occupied with the question of reservations to multilateral treaties.

It may be said that although the Rapporteurs and the members of the ILC acknowledged the special character of human rights and humanitarian law treaties, they were not convinced.

14 Supra note 3, see Joint Dissenting Opinion of Judges J.G Guerrero, Lord A. McNair, J. Read and Hsu Mo.
that these treaties merited a special regime of reservations (as advised by the Court) and until the submission of the report by the last Raporteur, Sir H. Waldock, the Commission maintained that the “contractual” approach to reservations was fully adequate to deal with all sorts of agreements.

The findings of the Court in the Reservations to the Genocide Convention Advisory Opinion, may be summarised as follows:

(i) The treaties of the type of the Genocide Convention are different from the treaties of a “contractual” character;

(ii) from the above follows that the complete integrity or completeness of a treaty is not necessary since the treaty does not regulate inter state relationships but aims at widest possible participation;

(iii) the freedom of the reservations is limited by the compatibility with the object and the purpose of the Convention;

(iv) states, which object towards certain reservations as incompatible with the object and purpose of the Convention, do not have treaty relationships; and

(v) states may object towards certain reservations even though they find them compatible with the object and purpose of the Convention. In such an event, the treaty relationship between the reserving and objecting State is modified by the reservation.

III. THE REGIME OF RESERVATIONS AND THE VCLT

The provisions on reservations in the VCLT follow the main structure of the Reservations to the Genocide Convention Advisory Opinion. However, the system of reservations caused several problems both in the practice and theory of the law of treaties, as it 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). These difficult problems proved to be particularly difficult in human rights treaties where reservations raise many question concerning their permissibility and/or compatibility with the object and purpose of a treaty.

The general outline of the VCLT regime on reservations can be found in Articles 19-23 of the VCLT. Article 2(1)(d) defines a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Article 19 of the VCLT introduced a general freedom to formulate reservations to treaties. Article 20 deals with the acceptance and objections to reservations to the treaty. Article 20 (4a) introduced the general rule that a reserving State becomes a party to a treaty when either expressly or tacitly the reservation has been accepted by at least one other State. This general rule has three variations: Article 20 (1) when reservation is expressly authorised by a treaty, no subsequent acceptance is

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16 Sucharipa-Behrmann, supra note 1 at 63-88.


Formulation of Reservations:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation on question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.
necessary; Article 20 (2) in treaties with the limited participation, when it is apparent from
the number of States and the object and purpose of the treaty that the application of the
treaty in its entirety between all parties is an essential condition of each State to be bound
by the treaty, a reservation has to be accepted by all the parties; Article 20 (3) when a
treaty is a constituent instrument of an international organisation, a reservation requires
the acceptance by the competent organ of this organisation.\textsuperscript{18} Article 20 (4b) laid the rule
that an objection to a reservation by another contracting party does not preclude the entry
into force of the treaty between the reserving and objecting State unless the objecting State
expresses such an intention.

There is a presumption of a tacit acceptance of the reservation by a State in cases where
there is no objection raised within twelve months after the notification of the reserva-
tion, or by the date when it expressed its consent to be bound by the treaty, whichever
is later (Article 20 (5)). A reservation modifies the provisions of the treaty to which it is
attached, to the extent the reservation is allowed between the reserving and the accept-
ing States. It is applied reciprocally (Article 21 (1a-b)). The treaty relations between
the accepting state and other treaty parties are not modified (Article 21 (2)). Article 21
(3) regulates the relationship between the reserving and objecting State, when the treaty
is not excluded as between these States. The treaty enters into force between these two
States, save the provisions of the treaty, which were the subject of the objected reservation.
These provisions of the VCLT gave rise to doubts as to whether there is any difference
between the relationship of States, which accepted the reservation, and the States, which
objected to the reservation, but did not exclude the treaty relationship between themselves
save the objected provisions, when the reservation excludes the application of the provi-
sions. There is a difference in the case of a modifying reservation, for in the case of an
accepted reservation; there is a reciprocal modification of treaty provisions. In the event
of the objected reservation (without the preclusion of the treaty relationship), the provision
would not apply between two States.\textsuperscript{19} The most difficult and, to a large degree, unre-
solved question is the problem of the reservations of the type envisaged in Article 19 (c) i.e.
when their permissibility is conditioned on the determination of the object and purpose
of the treaty.

In relation to this issue, there are two fundamentally distinct schools of thought: the
permissibility school and the opposability school. The former is based on the premise
that if a reservation is impermissible, i.e. incompatible with the object and purpose of
the treaty (a test which is based on the objective criteria) it is invalid from its inception
and the acceptance by other parties to the treaty will not validate it. Most British schol-
ars adhere to this viewpoint.\textsuperscript{20} The logical consequence of this approach is that such a
reservation does not have to be objected to. However, as Klabbers aptly observed “This
has an advantage of ignoring the need for objections, but the drawback that the system
thus envisaged does not work, for how else can be determined that reservations are imper-
missible except by means of objections?”\textsuperscript{21} Therefore, “currently...one cannot conclude
from the silence of a State whether it accepted a reservation or believed that this reser-
vation was impermissible, thus \textit{ab initio} null and void, thereby making a reaction not
necessary.”\textsuperscript{22}

Having ascertained the compatibility of the reservation with the object and purpose of
the treaty, the parties may proceed to the second stage \textit{i.e.} to adopt the decision on the
acceptance or the rejection of the reservation based on other than the compatibility criteria (e.g. political considerations).

It is often argued that such an interpretation of Article 19 (c) is supported by the wording of Articles 19 (A State may... formulate a reservation unless) and 21(1), “which spells out the legal effects of reservations and objections. It only applies to reservations ‘in accordance with Articles 19, 20 and 23’. Thus, if a reservation is inadmissible pursuant to Article 19 because of incompatibility with the object and purpose of the treaty the legal consequences of reservations and objections spelled out in Article 21 do not apply.”

However, a different view is expressed by the school of opposability, which is based on the premise that the permissibility of a reservation depends exclusively on the acceptance of the reservation by another State. Therefore, the compatibility test is a subjective decision, whose sole criterion is the acceptance or the objection to a reservation by a State. The question, which remains unresolved, is the legal status of impermissible reservations. There are two possibilities: (1) the State making such a reservation would be a party to a convention if upon request it withdraws its reservation. If it does not due to the fact it was an indispensable condition of its consent to be bound, then its consent be bound will be invalidated by the reservation; (2) the impossible reservation can be severed from the expression of consent to be bound by a State. The problem of impermissible reservations has particular importance in the area of human rights treaties (See Part V below).

IV. THE WORK OF THE ILC ON RESERVATIONS

The gaps and the lack of clarity in the regime of reservations in the VCLT prompted the ILC to undertake in 1993 a topic “The Law and Practice Relating to Reservations to Treaties”, on which Professor Allain Pellet was appointed a Special Rapporteur. Thus far he has submitted ten reports.

Professor Pellet identified in his first report, a number of problems to be analysed, such as the issue of permissibility of reservations and the regime of objections to reservations; questions of reservations to bilateral treaties, interpretative declarations (an issue not covered by the VCLT); the effect of reservations on the entry into force of a treaty; reservations to human rights treaties; reservations to treaties and the succession of States to treaties; reservations to provisions codifying jus cogens, the settlement of a dispute related to the regime of reservations and the applicable rules.

Five major substantive problems predominated in the discussion within the ILC that followed this first report: (i) the definition of reservations, the distinction between them and interpretative declarations and the differences in the legal regimes which govern the two legal institutions; (ii) the doctrinal dispute between the “permissibility” and “opposability” schools; (iii) the settlement of disputes; (iv) the effects of succession of States on reservations and objections to reservations; (v) the question of unity or diversity of the legal regime applicable to reservations based on the object of the treaty to which they are made.

Furthermore, the ILC found the following problems the most difficult: the question of the very definition of reservations; the legal regime governing interpretative declarations; objections to reservations; and the rules applicable to certain types of treaties such as human rights treaties. The ILC has been dealing with reservations to treaties in its entirety. However, of particular interest to this essay, is how it approached reservations to human rights treaties.

23 Ibid.
24 Ibid.
26 See e.g. J.M. Ruda, supra note 2 at 190.
and declarations appended to treaties. However, certain general considerations regarding the regime of reservations to treaties merit discussion, as they form a general background to all types of reservations. In particular, the debate on the permissibility/opposability issue is an important one. This problem was especially well commented on in the tenth Special Rapporteur’s report as well as reflected in the report of the ILC to the General Assembly in 2005. It must be said at the outset that the work of the Commission, has not led to any final conclusions as yet; the process is still ongoing. The ILC has reached some preliminary conclusions and only a few Articles of the Draft Guidelines have been approved by the Commission.

At its forty-eighth session in 1996, the Rapporteur submitted his second report on reservations to normative multilateral treaties, including human rights treaties. At its forty-ninth session in 1997, the Commission adopted preliminary conclusions on the issue of reservations to normative treaties, including human rights treaties. In Resolution 52/156, the General Assembly, took note of the Commission’s preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties to provide any additional comments. The views submitted by the Special Rapporteur in his 1996 report merit a broader consideration, as they reflect the controversies surrounding reservations to human rights or humanitarian (normative) treaties. He set out two prevalent views concerning reservations to such treaties. One, according to which the general regime of reservations would not apply to such treaties due to their legal nature, does not lend itself to the formulation of reservations (The view is further reaching than that expressed by the ICJ in its 1951 Advisory Opinion). Pellet, however, endorsed the second view expressing a less simplistic approach, which is based on the premise that such treaties also contain many contractual-type (synallagmatic) provisions. He also rightly pointed out in this context, the function of the legal regime of reservations being the striking of a balance between the interests in widening participation in a convention and maintaining the integrity of the Convention or preserving the ratio contrahendi of the treaty’s very purpose. The Rapporteur also looked at the problem of normative treaties from the standpoint of the consensus basis of the Vienna Convention, i.e. the problem of finding the balance between the freedom of consent of the reserving State and that of other States parties. Pellet noted that the travaux préparatoires clearly indicate that its draftsmen were aware of the problem of normative treaties but were striving to establish a general, balanced regime applicable to all types of treaties. He also noted that the basic characteristics of the “Vienna regime”, i.e., its flexibility and adaptability, had enabled it to meet the particular needs and special features of all types of treaties and resulted in the ruling out by the ILC of any exception in favour of normative treaties. Pellet stressed the advantages of the regime of the 1951 Advisory Opinion, in particular, the universal flexibility of formulation of reservations. He was also of the view that the VCLT regime was suited to all types of treaties, including normative treaties. He enumerated all aspects of the Vienna Convention, which makes this system applicable

32 Ibid at para. 157.
34 Supra note 31 at para. 118.
35 Supra note 31 at para. 119.
36 Supra note 31 at paras. 121-122.
37 Supra note 31 at para. 124.
The Special Rapporteur observed that, in practice, the basic criteria of the object and purpose of the treaty were also applied to human rights treaties (including those without reservation clauses). This fundamental principle was included in many human rights treaties and the practice of States, therefore the particular nature of normative treaties had no effect on the reservation regime. The most interesting part of his report concerns the role of human rights treaty monitoring bodies. This is a new and fascinating as well as a most controversial development, which is in accordance with the postulates of the dissenting judges in 1951. Pellet identified two main opposing positions. One was that the State Parties to the human rights treaties were the sole masters of the admissibility of reservations. The other was that the monitoring bodies were authorised to decide whether reservations were permissible; and draw all the necessary consequences of such determination, such as the decision that the reserving States were bound by the treaty as a whole, including those provisions they made reservations to. The Special Rapporteur did not support both these positions and according to his view, the ILC should be the body to provide an answer based on law. In Pellet’s view, human rights bodies were entitled to assess whether reservations were permissible when it was necessary to discharge their functions; however, they could not have more competence than necessary to discharge their main responsibility. Human rights treaty bodies have an obligation under the treaty to monitor the implementation of a treaty, including the use of the faculty of reservations (such as the European Court of Human Rights (ECtHR)). The bodies of a jurisdictional nature can adopt binding decisions on the parties as well as non-binding decisions of a consultative nature (to be considered by States in good faith). However, without a decision of a State concerned, these bodies could not draw any consequences from such an assessment. The only exception he allowed was the powers of regional bodies such as the ECtHR, whose powers reflected close community ties. Such a particular solution could not, however, be transposed on a global level, as it would contravene consensual bases of treaty co-operation between States. In this particular respect, Pellet disagreed with the Human Rights Committee (HRC) seeking to act as a sole judge of the permissibility of reservations. Pellet reached two main conclusions as to the problem of reservations to human rights treaties:

a. First, it was undeniable, that the law had not been frozen in 1951 or 1969; issues which had or had scarcely arisen at that time had since emerged and called for answers; the answers could be found in the spirit of the “Vienna” rules”, although they must be adapted and extended, as appropriate, whenever that was found to be necessary;

38 Para. 126 of the VCLT states

(a) the regime of reservations established by the 1969 and 1986 Vienna Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, regardless of their object, with the exception of certain treaties concluded by a limited number of parties and the constituent instruments of international organisations, for which some limited exceptions were made;

(b) because of its flexibility, the regime was suited to the particular characteristics of normative treaties, including human rights instruments;

(c) while not ensuring their absolute integrity, which was scarcely compatible with the actual definition of reservations, it preserved their essential content and would guarantee that it was not distorted;

(d) this conclusion was not contradicted by the arguments alleging the so-called violations of the principles of reciprocity and equality between the parties: is such a violation occurred it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections were badly compatible with the actual nature of normative treaties, which are not based on reciprocity of the undertakings given to the parties; and

(e) there is no need to take a position on the advisability of the authorizing reservations to normative provisions, including those relating human rights: if it was considered that they must be prohibited, the parties were entirely free to exclude them or limit them as necessary by including an express clause to this effect in a treaty, a procedure which was perfectly compatible with the Vienna rules, which were only of a residual nature.

39 Supra note 31 at para. 129.

40 Supra note 31 at paras. 128-132.
b. secondly, is should be borne in mind that the normal way of adapting the general rules of international law to particular circumstances was to adapt appropriate rules by the conclusion of treaties — and that could be easily done in the area of reservations though the adoption of derogating reservation clauses, if the parties saw a need for them.41

The majority of the members of the Commission agreed with the conclusions of the Special Rapporteur. However, some members expressed the view that the question of reservations to human rights treaties was a very controversial matter and that it could not be settled until the end of the project, “since the ‘unity’ of the legal regime of reservations was not satisfactory and was a major lacuna in the Vienna Conventions... by their very nature, human rights treaties even formed a separate category”.42 The Commission’s members were also very divided on the subject of the role of monitoring bodies in relation to reservations. Some members of the ILC strongly supported the view that States should decide on the permissibility of reservations, with “consent being the linchpin of the law of treaties and the foundation of the principle pacta sunt servanda”. Whatever the regional system, the bodies monitoring universal human rights treaties did not have such a competence, unless it was expressly bestowed upon them.43 Another group of members were of the view that “the recent practice of monitoring bodies deserved to be borne in mind. Since the regime of reservations between States did not function satisfactorily, it was incumbent on those bodies to ensure proper implementation of the treaty of which they were guardians...particularly on the regional level”.44 The decisions adopted by such bodies as to the permissibility of reservations were also subject to various divergent and polarised views. Some members assessed the role of the monitoring bodies as only of a purely advisory character, bringing the attention of States parties to reservations in question instead of exercising a kind of “creeping jurisdiction”. The question discussed also related to the issues of severability of reservations. Although, not strictly in conformity with the Vienna Convention, such practice could be treated as the progressive development of law, or building of some type of the “objective duties”, as in the case of the ECtHR (See Part V(c) below). However, another view that was expressed is that the question was not whether a reservation could be severed from the body of a treaty, but rather a question of the interpretation of the intention of States.

In 1997 and 1998, the ILC did not reach any final conclusions as to the regime of reservations to human rights treaties or the role of monitoring bodies in this respect. The Special Rapporteur chose a classical method of dealing with reservations to human rights treaties and found that the regime of the Vienna Convention fully fulfills the exigencies of such treaties. The first phase of work of the ILC on the topic of reservations to human rights treaties did not bring any clarification to these issues and left the doubts unresolved. In light of the lack of any conclusions, the Commission sent a questionnaire to many monitoring bodies for comments.

In his tenth report, the Special Rapporteur, dealt with the sensitive issue of the “purpose and object of the treaty” which of course is very relevant for reservations to human rights treaties.45 Draft Guidelines 3.1.5 and 3.1.6 set out thus far only very general rules.

Draft Guideline 3.1.5 reads as follows:

Definition of the Object and Purpose of the Treaty

41 Supra note 31 at para. 134.
42 Supra note 32 at para. 129.
43 Supra note 32 at para. 135.
44 Supra note 32 at para. 136.
For the purpose of assessing the validity of reservations, the object and purpose of the treaty means the essential provisions of the treaty, which constitutes its raison d’etre.

Draft Guideline 3.1.6 reads as follows:

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].

It is clear that the Special Rapporteur applied the principles of treaty interpretation set out in Article 31 and 32 as the method of determining the object and purpose of the treaty. He was of the view that the purpose and object of the treaty were not fixed at the time the treaty was concluded. Therefore, the subsequent practice of States must be taken into account. This view is not shared by many scholars and remains controversial. The inclusion of the rules of treaty interpretation into the process of the determination of the object and purpose of the treaty, although intellectually very stimulating, leaves some doubts as to the practical implementation of such a principle. Such a procedure would involve a lengthy and contentious process, as is often the case with the interpretation of treaties.

This general rule proposed by Pellet was supplemented by a specific rule concerning human rights treaties, in relation to a particular aspect, i.e., the reservation formulated to safeguard the application of internal law. The view of the Special Rapporteur was that it was impossible to deny a State the right to formulate a reservation in order to maintain the integrity of its internal law, provided that the State did not undermine the object and purpose of the treaty.

Draft Guideline 3.1.12 reads as follows:

Reservations to Human Rights Treaties: To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account should be taken of the indivisibility of the rights set out therein, the importance that the right which is the subject of the reservation has within the general architecture of the treaty, and the seriousness of the impact the reservation has upon it.

As to Rule 3.1.7, the Special Rapporteur followed the practice set by the ruling of the ICJ in the 1969 North Sea Continental Shelf Cases. As explained by the Special Rapporteur, States made reservations to such provisions in order to avoid the consequences of “conventionalisation” of the customary rule.

As to Rule 3.1.9, the Special Rapporteur was of the view that such reservations were only prohibited if it was acknowledged that jus cogens had effects outside the framework of Articles 53 and 64 of the Vienna Convention, i.e., outside the realm of the law of treaties. Consequently, the invalidity of such reservations is derived mutates mutandis from the principles established by Article 53 of the Vienna Convention. As to reservations to non-derogable rules, they often contain norms jus cogens, however, Professor Pellet, was guided in drafting Rule 3.1.11 by the practice of the Inter-American Court of Human Rights.

It has to be said that the set of rules proposed by the Special Rapporteur was met with some objections by the Members of the Commission. Many reservations were raised against

the core rule, i.e., the use of the notions of “raison d’être” and “core content”. It was observed that such notions are vague, difficult to define and elusive. The Commission said as follows:

Treaties expressed the intention of the States that had concluded them, and one could only conjecture as to the real meaning of that intention, as advisory opinion of the International Court of Justice on reservations to the Convention against Genocide had made clear. The notion of object and purpose of the treaty was determined subjectively by each State. Very often it is questionable whether a treaty had a specific object and purpose, since it was the outcome of a complex process of negotiations and exchanges. Accordingly, some member wondered whether a definition of that notion was possible or even necessary. In any event, it would be extremely difficult to define; there would always be a part that would remain a mystery.47

The Commission’s members were similarly skeptical about the rule on reservations to the norms *jus cogens*. They expressed the view that there might be cases in which a reservation to a provision establishing a rule of *jus cogens* was possible and not necessarily incompatible with the object and purpose of the treaty, for the reasons which are applicable to reservations to norms of customary law. The prohibition of such reservations should be categorical only if the reserving State, by modifying the legal effect of such provision, attempted to introduce a rule contrary to *jus cogens*. Finally, some doubted the rationale of such a rule because reservations contrary to *jus cogens* would automatically be incompatible with the object and purpose of a treaty.48 Thus far, the Commission has adopted provisionally a limited set of guidelines on reservations to treaties.

In general, the work of the ILC on this topic has proved to be far more time consuming than expected. After thirteen years of deliberations, the Commission has not come out with definite conclusions. In particular, the problems of the reservations to human rights treaties are still not resolved. The reports of the Special Rapporteur provided much intellectual stimulation, but the practical issues still remain, and the general conclusions and practice of human rights treaties monitoring bodies continue to be fragmentary and incoherent. It may also be mentioned, that despite views to the contrary, the flexibility regime introduced by the ICJ in the Genocide Convention has not been discarded by the ILC.

V. RESERVATIONS TO HUMAN RIGHTS TREATIES

A. Introduction

Reservations to human rights treaties gave rise to a renewed interest in the law of treaties. The main issue was the impressibility of certain reservations with the object and purpose of some of the human rights treaties, i.e. the area covered by Article 19(c) of the VCLT. Indeed, this development is not devoid of irony since Article 19(c) mirrored the *Reservation to the Genocide Convention Advisory Opinion* which was specifically designed to deal with treaties of such a non-reciprocal character, but proved in practice to be difficult to apply in the absence of an organ or an international mechanism to decide about the impressibility and its consequence. As, mentioned above, it was exactly one of the issues, which prompted Judges Guerrero, Read, McNair, and Hsu Mo to submit their Dissenting Opinion wherein they predicted that the regime suggested by the Court would require some international supervision in the event of a disagreement as to the impermissibility of reservations and their consequences. The

47 Supra note 32 at para. 413.
48 Supra note 32 at para. 420.
Court’s findings in the Reservations to Genocide Convention Advisory Opinion were based on a conviction that human rights treaties are different in character. This was confirmed by the jurisprudence of the human rights courts, as, inter alia, the ECtHR (See Part V.(c) below) and the Inter-American Court of Human Rights. This latter court provided the following definition of the lack of reciprocity in human rights treaties:

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... 

B. The Human Rights Committee

Against this background, the practice of the HRC and the courts set up by certain human rights regional treaties will be examined. The Committee issued in 1994 the famous General Comment 24 of Reservations to the International Covenant on Civil and Political Rights. The Committee was alarmed by the numerous reservations made by the various States. There were 127 States parties to the Covenant and 150 reservations were made. The International Covenant on Civil and Political Rights (ICCPR) lacks provisions on reservations therefore the test of the “object and purpose” had to be applied. The HRC examined the unacceptability of reservations in light of this test.

The Committee submitted that impermissible reservations might include those made against treaty provisions codifying the norms of international customary law, jus cogens or derogable or non-derogable treaty provisions. Interestingly, the HRC rejected the obvious link between reservations to non-derogable rights and incompatibility, although such reservations will have to be convincingly justified by a State. There are also derogable rights of great importance. The HRC emphasised throughout the Comment the special character of human rights treaties, in which States do not owe obligations reciprocally vis-à-vis other States but to their individuals to observe human rights standards. Therefore, the HRC assessed the system under the VCLT as inappropriate for reservations to the treaties of this type. However, as observed above, the Court devised this system exactly for such human or humanitarian rights treaties.

Professor Redgwell, as a leading proponent of the permissibility school, wrote: “...the Committee’s analysis is correct, but only in so far as permissible reservations are concerned.

52 General Comment, supra note 51 at para. 1.
53 General Comment, supra note 51 at para. 10.
The Comment does not appear to distinguish between permissible and impermissible reservations in this regard”. However, as noted above, this would appear to be the correct interpretation of Articles 19, 20 and 21 of the VCLT — a two-tiered approach in which if the impermissible reservation fails, there is the practice of States based on the opposability criterion as the sole standard. This is perhaps the reason behind the HRC’s lack of differentiation between permissible and impermissible reservations, and it therefore chose to satisfy itself with general observations. The HRC adhered to the ECHR method of dealing with unacceptable reservations, i.e., severance of the offending reservation (See Part V(c) below) by the HRC (which would act as an independent international organ), as a result of which the Covenant will be operative for the reserving party as if the reservation had not been entered.

This approach has been severely criticised by several governments, e.g., those of the United Kingdom and the United States. The UK Government observed that the system actually adopted under the Genocide Convention conforms to the requirements of human rights treaties, as the Court stated in its Advisory Opinion and that, ultimately, it is a matter for the parties to the treaty themselves to decide what is the test of incompatibility and, although the test should be objective, it is difficult to imagine a reservation as incompatible with the object and purpose of the treaty if none of the parties object on this ground. The US Government observed that a reservation included in its instrument of ratification forms an integral part of its consent to be bound and therefore the Committee cannot sever the reservation arbitrarily.

The HRC applied this approach in Kennedy v. Trinidad and Tobago. This case concerns the reservation of Trinidad and Tobago that limits the competence of the HRC to hear petitions from prisoners on death row. Unlike Jamaica, which withdrew from the First Optional Protocol, Trinidad and Tobago withdrew from it and then re-accessed with this reservation. After the re-accession, the HRC received the communication from Rawle Kennedy, a convicted murderer in a jail in Port of Spain.

The Committee admitted the communication. The HRC applied the test of Article 19 of the VCLT on whether the reservation was compatible with the purpose and object of the treaty (the Optional Protocol). The HRC decided (by a margin of nine to four) that the reservation made by Trinidad and Tobago was invalid and announced that the offending reservation should be stricken and Trinidad and Tobago considered a party to the First Optional Protocol in its entirety. The HRC decided that the reservation of Trinidad and Tobago was unacceptable since it singled out a certain type of persons—prisoners under the sentence of death. Therefore it constituted “a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for that reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol”. However, in Francis Hopu and Tepoaitu Bessert v. France, the French declaration could have been read in light of Comment 24 as an impermissible reservation. Nevertheless,

54 See Redgwell, supra note 51 at 404.
56 “Trinidad and Tobago re-accesses the Optional Protocol to the International Covenant on Civil and Political Rights with reservation to Article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out the death sentence on him and any matter connected therewith”.
57 The Kennedy case, supra note 55 at para. 6.7. On 27th March 2000 (effective as on 27 June 2000), the Government of Trinidad and Tobago withdrew from the First Optional Protocol to the International Covenant on Civil and Political Rights.
the HRC, by the majority decision, decided to permit the reservation. The HRC relied on earlier decisions made prior to the General Comment.58

Of great importance, however, is the 1998 letter sent by the Chairman of the Human Rights Committee in which she said:

Two main points must be stressed in this regard. First in the case of human rights treaties providing for a monitoring body, the practice of that body, by interpreting the treaty, contributes-consistent with the Vienna Convention-to defining the scope of the obligations arising out of the treaty. Hence, in dealing with the compatibility of reservations, the views expressed by monitoring bodies necessarily are part of the development of international practices and rules relating thereto. Second, it is to be underlined that universal bodies, such as the Human Rights Committee, must know the extent of the States parties’ obligations in order to carry out their functions under the treaty by which they are established. Their monitoring role itself entails the duty to assess the compatibility of reservations, in order to monitor the compliance of States parties with the relevant instrument. 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. The Human Rights Committee shares the International Law Commission’s view, expressed in paragraph 5 of its Preliminary Conclusions, that monitoring bodies established by human rights treaties ‘are competent to comment upon and express recommendations with regard, inter alia, the admissibility of reservations by States, in order to carry out the functions assigned to them’. It follows that States parties should respect conclusions reached by an independent monitoring body competent to monitor compliance with the instrument within the mandate it has been given.59

C. The European Court of Human Rights

The ECtHR is a regional court, established on the basis of the 1950 (European) Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), as amended by Protocol number 11.

This court has a very interesting practice with regard to reservations to the ECHR.60 Unlike the ICCPR, it has a specific provision concerning reservations. Article 57 reads as follows:

Reservations: 1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be

58 Schienin, supra note 51 at 52.
permitted under this article. 2. Any reservation made under this article shall contain a brief statement of the law concerned.

There is a body of caselaw illustrative of the approach adopted by the ECtHR, of which the best-known are the following cases: the 1982 Temeltasch case (the European Commission of Human Rights);61 the 1988 Belilos case;62 the 1990 Weber case;63 and the 1995 Loizidou case.64 In the Temeltasch, Belilos and Loizidou cases, the offending Interpretative Declarations resulted in their severance as invalid from the consent to be bound of Switzerland and Turkey.65 It must be noted that the ECtHR ruled in the above cases on the character of the Interpretative Declarations and then found out that they were in fact reservations.66

As early as 1982 in the Temeltasch case, the European Commission of Human Rights applied the procedure, which has since become the standard approach adopted by the ECtHR in relation to the offending reservations. The Commission in this case relied on the Reservations to the Genocide Convention Advisory Opinion and emphasised the specific nature of human rights and the need for the establishment of public order of free democracies of Europe.

The Commission observed that the character of the Convention is different from any other contractual treaty as it is of an objective, not a reciprocal character, and for that reason benefits from collective enforcement.67 In the Loizidou case the Court analysed the so-called “territorial restriction” of Turkey, which limited the territorial application of the Convention in relation to Articles 25 (right to individual petition) and 46 (compulsory jurisdiction of the Court) of the Convention. These Turkish declarations were commented upon by many States, which either “reserved” their position pending the decision of the organs of the Court; noted their disagreement with such a “interpretative declaration”; assimilated it to a reservation; or treated them as invalid in light of Article 64 (on reservations). The Court observed that these Articles were “essential to the effectiveness of the Convention system” since they outline the responsibilities of both the Court and the Commission.68 Interestingly, the Court relied on the rule of interpretation of treaties as enshrined in Article 31 of the VCLT in order to reach the decision. The Court based its interpretation on the premise that the Convention is a living instrument, and therefore “must be interpreted in the light of the present -day conditions” and that this principle is “firmly rooted in the Court’s case-

61 Temeltasch v. Switzerland, 5 May 1982, DR 31 at 120.
62 Belilos v. Switzerland, 29 April 1988, Series A, no. 132. Switzerland’s interpretative declaration was formulated as follows: “The Swiss Federal Council considers that the guarantee of fair trial in Article 6, paragraph 1 (art. 6-1) of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations of the determination of such a charge”.
64 Loizidou. Turkey (Preliminary Objections), 23 March 1995, Series A no. 310.
65 In the Weber case, it was a reservation.
66 Such types of interpretative declarations are sometimes called “qualified interpretative reservations”, which are in fact reservations, see D.M. McRae, “The Legal Effect of Interpretative Declarations” (1978) 49 B.Y.I.L. 155.
67 Supra note 61 at paras. 62-64.
68 Supra note 64 at para. 70. At the time of ratifying the Convention, Turkey made the following statement: “The Government of Turkey...declares to accept the competence of the European Commission of Human Rights and to receive petitions according to Article 24...of the Convention subject to the following: (i) the recognition of the right of petition extends only to allegations concerning acts or omissions of public authorities in Turkey performed within the boundaries of the territory to which the Constitution of the Republic of Turkey is applicable... and “The Government of Turkey acting in accordance with Article 46...of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory ipso facto, and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention...performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey”.
law”^69 Therefore, provisions of Articles 25 and 46 could not be interpreted exclusively “in accordance with the intentions of their authors as expressed more that forty years ago”.^70 The Court further explained that restrictions, which were deemed acceptable at that time by the minority of the present Parties, are of little evidential value.

The Court then proceeded to determine the object and purpose of the Convention, which as the instrument for the protection of individual human beings “requires that its provisions be interpreted and applied so to make its safeguards practical and effective”.^71 Further, the Court stated that in order to determine whether Parties may impose restrictions on their consent to be bound under Articles 25 and 46, it was necessary to ascertain the ordinary meaning to be accorded to the terms of these provisions in their context and in the light of their object and purpose. Together, within this context, the Court took into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” (Article 31 paragraph (3 b) of the VCLT).

The Court reached, inter alia, the following conclusions:

If, as contended by the responded Government, substantive or territorial restrictions were permissible under the these provisions, Contracting Parties would be free to subscribe to separate regimes of enforcement of Convention obligations depending on the scope of their acceptances. Such a system, which would enable States to qualify their consent under the optional clauses, would not only seriously weaken the role of the Commission and the Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public). Moreover, where the Convention permits States to limit their acceptance under Article 25… there is an express stipulation to this effect…” In the Court’s view, having regard to the object and purpose of the Convention system as set out above, the consequences for the enforcement of the Convention and the achievement of its aims would be so far-reaching that a power to this effect should have been expressly provided for. However no such provision exists in either Article 25 or 46…^73

Further it stated:

In the Court’s view, the existence of such restrictions clause governing reservations suggests that States could not qualify their acceptance of the optional clauses thereby effectively excluding areas of their law and practice within their “jurisdiction” from supervision by the Convention’s institutions. The inequality between Contracting States which the permissibility of such qualified acceptance might create would, moreover, run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realization of human rights.^74

…the context within which the International Court of Justice operates is quite different from that of the Convention institutions. The International Court is called on inter alia to examine any legal dispute between States that might occur in any part of the globe with reference to principles of international law. The subject-matter of a dispute may relate to any area of law. In the second place, unlike the Convention institutions, the role of the International Court in not exclusively limited to direct supervisory functions in respect of law-making treaty such as the Convention. Such a fundamental difference in the role and purpose of the respective tribunals, coupled

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^69 Supra note 64 at 71.
^70 Ibid.
^71 Supra note 64 at para. 72.
^72 Supra note 64 at para. 74.
^73 Supra note 64 at para. 75.
^74 Supra note 64 at para. 77.
with the existence of a practice of unconditional acceptance under Articles 25 and 46... provides a compelling basis for distinguishing Convention practice from that of the International Court.\textsuperscript{75}

Therefore, the Court considered that in light of the character of the Convention, the ordinary meaning of Articles 25 and 46 in their context and in light of their object and purpose and the practice of the Parties, the restrictions \textit{ratione loci} attached to these Articles as invalid. The Court examined the text of the declarations and the wording of the restrictions to determine whether these restrictions can be severed from the instruments of acceptance or whether they constitute an integral and inseparable part. It concluded that they could be separated from the text, leaving intact the acceptance of the optional clauses.

The \textit{Belilos} case was of a slightly different character. Switzerland made two reservations and two interpretative declarations when it ratified the Convention. The Court observed that having made such a choice, Switzerland could not then claim that the “mere” interpretative declaration in question was a “qualified” interpretative declaration, when it was in fact a reservation; and that the silence of the depositary and the Contracting parties at the time of depositing this declaration by Switzerland did not indicate its acceptance by the Parties and did not deprive the institutions of the Convention from making their own assessment. The Court acknowledged the importance of the intention of the parties from the type of instrument appended and that Switzerland intended to make the reservation but eventually opted out for declaration. The Court examined the legal character of the declaration by analysing its substantive content. It is interesting to note that the Court in this case, unlike the Commission in the \textit{Temeltasch} case, did not assimilate this Interpretative Declaration with a reservation, but examined “the validity of the interpretative declaration in question, as in the case of a reservation.”\textsuperscript{76} It analysed this instrument to consider whether it fulfilled the requirements of Article 64. First of all, the Court decided that the declaration was of a “general”, unlimited character (thus prohibited). It was too vague, too broad to determine its precise meaning and scope. It also was not accompanied by “a brief statement of the law concerned”, as prescribed by paragraph 2 of Article 64. The purpose of this Article is to provide a guarantee that a reservation does not go beyond the provisions expressly excluded by the reserving State. Therefore, the Court rejected this declaration as invalid and stated that Switzerland was bound by the Convention irrespective of the validity of the declaration.\textsuperscript{77} Marks had identified four factors which underlined the Court’s decisions. The first was the “age” factor, \textit{i.e.}, States that had ratified the Convention at the initial stages of its existence had attached fewer reservations in order not to disturb the equality between the Parties. The Court felt that it could favour the integrity of the Convention over the need to secure strictly contractual participation. The second was the “isolation” factor. In contractual-type treaties, reservations operate reciprocally, with all the effects attached to such a system. In the case of the ECHR (a human right treaty), which has an objective effect, the impact of decisions as in the \textit{Belilos} case remains isolated. The third factor related to the role of the supervisory organs, \textit{i.e.} under the Convention’s regime the final decision on reservations must rest on the Court, which limits the sovereignty of the Parties and has an impact on the treaty as a contract theory. The fourth factor appears to be the most persuasive, \textit{i.e.} the Court’s consideration of the Convention as an “integration mechanism”, which purports to establish the common European public order in the area of human rights, and transcend and replace the individual national orders of the States Parties.\textsuperscript{78}

It must be noted that the so-called “Strasbourg approach” has met with many critical comments. Baratta, for example, rightly points out that although Switzerland consented to

\textsuperscript{75} Supra note 64 at para. 84.

\textsuperscript{76} Supra note 62 at para. 49.

\textsuperscript{77} Supra note 62 at para. 60.

\textsuperscript{78} Marks, supra note 60 at 385-386.
the Court’s severance of its interpretative declarations (reservations) in the above-mentioned cases, Turkey on the other hand, “rejected the assumption that its conditions to the acceptance of the Court’s jurisdiction were invalid and produced no juridical effects”. The same author observes that the Court’s approach is not fully endorsed by the practice of the European States as evidenced by Resolution 1233 (1993) on reservations made by the Member States to the Council of Europe, adopted by the Assembly on 1 October 1993, which appealed to the Member States to exercise a cautious review of their reservations, withdraw them if deemed possible and explain in a reasoned report to the Secretary General any decision not to do so. Equally inconclusive was the 1995 Vienna meeting of the Chief Legal Advisors to the Foreign Ministries of six European States. He further notes that the principle of consent to be bound by a treaty should not be disregarded in relation to the human rights treaties, notwithstanding their character as “normative” treaties, that the fictional intent should not be ascribed to States and that at this stage of the development of international law it is not an easy task to distinguish between various types of impermissible reservations. As indicated above the ILC had mixed views on the severability of reservations by the monitoring bodies.

D. The Inter-American Court of Human Rights

The system adopted by the Inter-American Court of Human Rights in 1982 in its influential Effects of Reservations on the Entry into Force Advisory Opinion appears to be preferable to some scholars (albeit with many objections). The Effects of Reservations on the Entry into Force Advisory Opinion interpreted Articles 74 and 75 of the American Convention in relation to reservations in light of the VCLT provisions. First of all in order to advise on Article 75, the Court analysed the object and purpose of the American Convention, according to Article 31 of the VCLT. Furthermore, the Court observed:

the reference Article 75 to the Vienna Convention raises almost as many questions as it answers. The provisions of that instrument dealing with reservations provide for the application of different rules to different categories of treaties. It must be determined, therefore, how the Convention is to be classified for the purposes of the here relevant provisions of the Vienna Convention, keeping in mind the language of Article 75 and purpose it was designed to serve.

The Court concluded that the reference in Article 75 to the VCLT was intended to mean Article 19 (c) of the VCLT. Therefore, reservations made by States must conform to the

79 Baratta, supra note 2 at 416. See above for the comments of the various governments to the HRC General Comment 24.
80 Baratta, supra note 2 at 416-417.
81 Baratta, supra note 2 at 419-420.
82 See Part III of this article.
83 See e.g. Craven, supra note 49 at 507-510.
84 Article 74 reads as follows:

“1 This Convention shall be open for signature and ratification by or adherence of any member state of the Organisation of American States. 2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organisation of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence. 3. The Secretary General shall inform all member states of the organisation of the entry into force of the Convention”. Article 75 reads as follows: “This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.”
85 Supra note 3 at para. 20.
Object and purpose of the American Convention and the primary aim of the reference to the VCLT in Article 75 is to design a very liberal system permitting States to participate in this Convention. The Court then went on to ascertain which provisions of Article 20 applied to a reservation to this Convention. In the opinion of the Court, only paragraphs 1 and 4 of the VCLT were applicable. Paragraph 2 was inapplicable “because the object and purpose of the Convention is not (the) exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality. Moreover, the Convention is not the constituent instrument of an international organisation. Therefore, Article 20(3) is not applicable”. In relation to Article 20(4) of the VCLT, the Court was of the view that it was designed to fulfill the needs of traditional multilateral international agreements, which were based on the reciprocity of States, for their mutual benefit, with a mechanism that accommodates a great number of States participating or wishing to participate in a treaty (in particular a rule that the acceptance of a reservation by only one State is sufficient for a reserving State to become a party to a treaty). However, the character of human rights treaties is different and the Convention “must be seen…[as] a multilateral legal instrument of framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction”.

Finally the Court reached the following conclusions:

In this context, it would be manifestly unreasonable to conclude that the reference in Article 75 to the Vienna Convention compels the application of the legal regime established by Article 20(4), which makes the entry into force of a ratification with a reservation dependent upon acceptance by another State. A treaty which attaches such great importance to the protection of the individual that it makes the right of individual petition mandatory as of the moment of ratification can hardly be deemed to have intended to delay the treaty’s entry into force until at least one other State is prepared to accept the reserving State as a party. Given the institutional and normative framework of the Convention, no useful purpose would be served by such a delay” and that “Accordingly, for the purpose of present analysis, the reference in Article 75 to the Vienna Convention makes sense only if 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.

Craven observes that although the above-described system is more suitable for human rights law treaties (non-reciprocal), it has certain inconsistencies and drawbacks. First of all, this system seems to indicate that the act of ratification has the nature of a unilateral act of a State and therefore other States have no legal interest in its quality. Furthermore, the same author opines that in rejecting the relevance of Article 20(4) of the VCLT, the Court at the same time denied the relevance of Article 20(1) of the VCLT (the opposability of the reservation).

As to the shortcomings of this system, he observes that the process of acceptance or objection to a reservation has a dual function: it preserves the rights and interest of other States within the contractual structure and at the same time, preserves the integrity of the

86 Supra note 3 at paras. 22 & 25.
87 Ibid. at para. 25.
88 Supra note 3 at para. 26.
89 Supra note 3 at para. 28.
90 Supra note 3 at para. 33.
91 Supra note 3 at paras. 34 and 35.
treaty (both these functions in human rights treaties are quite discreet). However, if the functions entrusted on States by Article 20 (4) are rejected, the permissibility of a reservation will not be questioned and the integrity of the treaty may be threatened. Finally, the crucial question is that of enforcement or supervision. If States do not have direct interest in the participation of other States in the Convention, what about their interest in compliance? “Ultimately, therefore, it would seem that the critical point around which the discussion of reciprocity turns is that of ‘enforcement’ and the characteristics of the ‘supervisory’ regimes instituted within human rights treaties”.92

E. Other Solutions

Finally, some human rights treaties have adopted a so-called “collegiate” system of reservations whereby a special mechanism is put in place to deal with the character of reservations. An example of such a system is a regime of reservations adopted in the International Convention on the Elimination of All Forms of Racial Discrimination. Article 20 provides that a reservation is held to be incompatible with the object and purpose of a Convention if at least two thirds of the States parties object to it. However, Professor Pellet, as Special Rapporteur to the ILC, discovered this system to be inoperative. He also observed that in practice States very rarely invoked their old reservations. The Chairman of the Committee on the Elimination of racial Discrimination has also stated that when considering reports of States Parties, the Committee has “better things to do than ‘opening a legal struggle with all the reservation States and insisting that some of their reservations have no legal effect…which could distract the Committee from its main task’, which is the promotion of a uniform application of the Convention. Such a practice of objecting to reservations “could distract States parties from issues concerning its implementation. ‘A fruitful dialogue between the reserving State and the Committee may (be) far more beneficial for promoting the implementation of the Convention by (the) respective State”.93 In general, the Committee of this Convention has a far more cautious approach to the issues of reservations that the HRC. In its 2003 preliminary report, the Committee was of the view that in principle the provisions of the VCLT on reservations should be followed, observing the requirement of compatibility with the object and purpose of the treaty. The Committee emphasised the fact that the issue of reservations is essentially within the jurisdiction of States, notwithstanding the special character of the human rights treaties and that reservations form an integral part of the consent to be bound by a State.94 The view on the suitability of the VCLT to the reservations under this Convention conforms with that of Professor Pellet who is of the view that the VCLT regime is adequate for human rights treaties and that one of its commendable features is that it leaves the parties to the treaty free to decide on reservations.95

The Committee on the Elimination of Discrimination against Woman has adopted a similarly cautious approach.96 The general impression is that human rights bodies under Professor Pellet’s review were more eager to engage in dialogue with reserving States and

92 Craven, supra note 49 at 510 (see also 507-509).
94 M. Kjærum, “Approaches to Reservations by the Committee on the Elimination of Racial Discrimination” in Reservations to Human Rights Treaties, supra note 2 at 67-77.
to encourage them to withdraw reservations rather than to decide on the permissibility of these reservations. However, the practice of the Committee is not very encouraging. As observed by Schöpp-Schilling, the Committee tried several approaches, such as requesting States to withdraw, reconsider or explain offending reservations and not to submit reservations against the object and purpose of the Convention. This request has “not [been] heeded” by the newly ratifying States.97 However, the same author more positively states that some of the new Parties explain their reservations in a fairly precise manner. However, at the same time “these explanations may not be acceptable and do not solve the problem of the impressibility of these reservations.”98

It appears that the practice on reservations under the Convention against Torture and Other Cruel, Inhuman of Degrading Treatment or Punishment is more straightforward and there are no real problems with reservations. This derives from the absolute character of the Convention and its very clear definition of torture.99 The Chairman of its Committee wrote as follows in 1998:

In addition, the Committee against Torture believes that the approach taken by monitoring bodies international human rights instruments to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted is consistent with the Vienna Conventions on the law of treaties.100

F. Conclusions on the Reservations to Human Rights Treaties

It appears to be paradoxical that the Reservations to the Genocide Convention Advisory Opinion, in which the Court designed the regime of reservations specifically for human rights and humanitarian law treaties, has been deemed unsatisfactory by many human rights institutions (including the human rights courts) established on the basis of human rights treaties. It may be that the Court’s system in the Genocide Convention was designed for a smaller number of States with fewer divergent interests; it could therefore rely on an individual assessment by a State Party of the character of the reservations, even in treaties of such a special character.

Some of the institutions in question appraised this regime as ill-suited for the normative, objective character of the human rights treaties. However, as it may be recalled, that was the very feature of the Genocide Convention (as observed by the Court), which prompted it to establish this particular system. It appears that the regime as designed by the Court is at present (at least judging by the practice of certain human courts) more suited for the “mainstream” treaties of a contractual character. The above analysis shows that there is no one established practice of dealing with the reservations to human rights treaties. For example, the practice exemplified by the ECtHR is based on a strongly conceived system of international supervision in relation to the reservations to the ECHR. In contrast, various bodies established by human rights treaties, believe in a more persuasive approach, e.g., asking a State to withdraw the offending reservation rather than pronouncing it impermissible. However, it is an undisputed fact, which cannot be over-emphasised, that the role of the human right courts and monitoring bodies has evolved dramatically since the Reservations to the Genocide Advisory Opinion, and even if not all the bodies are as powerful as the Human Rights Committee or the European Court of Human Rights and the Inter-American

97 H.B. Schöpp-Schilling, supra note 2, in Reservations to Human Rights Treaties at 36
98 Ibid.
99 B. Sorensen & P. Dalton, “The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Restrictions and Reservations” in Reservations to Human Rights Treaties, supra note 2 at 79-93.
100 Cited in Report, supra note 59 at para. 13.
Court of Human Rights, they have certainly changed the classical practice on reservations to treaties to suit the protection of the rights of an individual.

Craven conceptualised the general theoretical background of the divergent approaches to human rights treaties. This scholar identified three main schools of thought (models) in relation to the approaches to human rights treaties, depending largely on the perceived structure of international law: “formalist”, “purposive” and “cognitivist”. Briefly these three models may be summarised as follows. The first model is based on the acknowledgement of the legal reciprocity of human rights treaties. They are only non-reciprocal in the sense that they lack any clear sociological or material exchange. The second model regards the human rights treaties as non-reciprocal, protecting the rights of an individual. Such a model (and all its variations) requires certain procedural rights for States in order to carry out the purpose of the regime and also to protect it (but not to pursue their own specific legal interests). It may be said that this regime acknowledges a form of sociological but not legal reciprocity. The third model is based upon the constitutive nature of legal regimes, i.e. embodying certain “collective values”. In this system, participating States assume obligations to all other States collectively. Individual interests of States exist only insofar as they correspond with this collective.

However, as Craven concludes:

Ultimately, each of these three approaches as to the nature and form of human rights treaty draws upon particular facets of those institutions: first they are treaties (the formal), secondly, they embody ‘human rights’ (the purposive) and, thirdly, they institute some form of discrete legal regime (the cognivist)... Current practice, it seems, attempts to meld these competing conceptions... On the issue of reservations, for example, each approach offers a radically different answer. For example, in determining the effect of a putatively ‘incompatible’ reservation, an emphasis on the instrument’s form might suggest that compatibility should be determined by unanimous consent. An emphasis upon its existence as a ‘regime’, by contrast, might suggest that the matter should be determined by the (presumptively) competent institutions, while an emphasis on teleology might suggest that the benefits of universal ratification outweigh the disadvantages of partial commitment. That no one approach is fully explanatory, however, reflects not only the evident complexity of the treaties themselves, but also the apparent tensions that are maintained within existing conceptions of international law.

VI. RESERVATIONS AND THE ICC STATUTE

A. Introduction

Article 120 states very succinctly “No reservations may be made to this Statute”. Therefore, the system adopted in this instance is not a “flexible” approach of the Genocide Convention, but a strict system of no reservations. However, this Article...
has to be read in conjunction with Article 124 (Transitional Provisions), which provides:

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

These two articles introduce a distinctive feature to the ICC Statute system. From the point of view of the law of treaties, the ICC Statute has a number of distinguishing features:

It bears the mark of strong political and diplomatic differences over certain major issues, and shows the difficulty of ironing them out. The existence of these difficulties differences and of their partial solution manifests itself in many ways...first of all, unlike most multilateral treaties concluded under the auspices if the United Nations, in the case of the Rome Statute there hardly exist preparatory works reflecting the debates and negotiations that took place at the Rome Diplomatic Conference. The need for informal, off -the -record discussions clearly arose out of the necessity to overcome major rifts in a smooth manner and in such a way as to avoid states losing face by changing their position. Secondly, it is striking that the text was drafted in one language (English) and that for months after its adoption no official text was available in the other five languages, which, pursuant to Article 128, are 'equally authentic'. Thirdly, one must emphasize the fact that on some crucial issues the Rome Conference failed to take action and simply put off any decision until amendments to the Statute are adopted: this holds true for the definition of the crime of aggression (Article 5), for the articulation of the elements of crimes (Article 9 (1) and for the determination of weapons whose use is contrary to the prohibition that cause superfluous suffering or are inherently indiscriminate (Article 8(2)(b)(xxi)). Fourthly, it is surprising that while Article 120 provides for no reservations may be made to the Statute. Article 124, entitled 'Transnational Provisions', in fact provides for reservations narrowing the jurisdiction of the Court...Admittedly, these are the reservations whose purpose and contents, as well as duration in time, are predetermined by the Treaty. The fact remains, however, that, on account of their object and scope, they cannot be regarded as reservations proper.


106 Supra note 105 at 145-146; Article 124 is as follows: “Transitional Provision: Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.”
B. History of Article 120

The final 1994 Draft of the Rome Statute presented by the ILC did not include the provisions on final clauses and reservations. The ILC commented that reservations to the Statue and accompanying Treaty should be prohibited or "limited in scope". However, in 1995, the so-called "Siracusa Draft" allowed some limited scope for reservations. They related to the Prosecutor's powers to conduct on-site investigation in the territory of the state party (with or without its consent). In 1966, the updated Siracusa Draft defined the right to make reservations in accordance with the Vienna Convention. The question of reservations came up again on the agenda after the Secretariat's submission of the final clauses in 1997 without a reservation rule. As mentioned above, this rule was subject to much criticism by many States.

Various working groups were involved in the drafting of the ICC Statute. Many provisions were adopted by general agreement, i.e., consensus without voting. Therefore the provisions were a compromise, patiently negotiated. The Final Draft discussed by the Preparatory Committee was based on the so-called “Zupthen Draft”, which included the formulation prohibiting reservations in Article 92(B).

The Final Draft suggested three options: (i) complete prohibition of reservations; (ii) either express permission of reservations to certain Articles or express prohibition of reservations to certain Articles or; (iii) no provisions on reservations (the application of the Vienna Convention rules). The special group which discussed that matter did not reach any conclusions and eventually the text that was accepted was that proposed by the Bureau of the Committee of the Whole as Article 109, which prohibited all reservations. This solution was controversial and criticised by States, which were aware of the domestic political consequences of the acceptance of certain definitional questions concerning crimes, in contrast to States in favour of strong jurisdiction over core crimes, i.e., for prohibition of reservations.

The prohibition of reservations to the Rome Statute is considered to be one of the reasons (admittedly minor) for the US refusal to ratify the ICC Statute. As Schabas says:

For example, Ambassador Scheffer has noted that the prohibition of reservations in Article 120 of the Statute is excessive. Even had the United States administration tried to submit the Statute, Article 120 would have frustrated the Senate with its penchant for reservations, understandings, declarations and provisos, and made ratification impossible. At Rome, those who argued for an absolute prohibition on reservations claimed it would avoid the disputes that afflict interpretation and application of many human rights treaties. But this has not proven the case, and despite Article 120, many states have formulated complex 'declarations' that, in some cases at least, seem to amount to a 'unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, and approving or acceding to a treaty, whereby it purports to exclude to modify the legal effect of certain provisions of the treaty in their application to that State. In other words, a reservation.

The ICC Statute is similar to the 1982 United Nations Convention on the Law of the Sea in the sense that it is a package deal that has emerged after long and tedious negotiations. This Convention also prohibits reservations. The ICC Statute is a unique multilateral treaty with a dual character; on one hand, it deals with issues of humanitarian and human rights law,
the criminal law and, on the other hand, it establishes the international court. Therefore the question of reservations is substantively different from those of the Genocide Convention or generally of the human rights treaties. The manner in which it was negotiated also differed from other treaties of a similar character.

C. Interpretative Declarations — General Comments

One of the most daunting problems in the law of treaties is the distinction between reservations and interpretative declarations.\textsuperscript{113} The Rome Statue is a case in point, as States Parties have attached many interpretative declarations to it.

Interpretative Declarations are not in principle excluded. The role of interpretative declarations issued by states is to interpret the treaty, to define a State’s understanding of its obligations under the treaty. The VCLT does not include any definition of interpretative declarations. McRae distinguished two types of interpretative declarations: “mere interpretative declarations” (a State’s statement on its interpretation of a treaty or part thereof) and a “qualified interpretative interpretation” (a State makes a condition of its participation in a treaty subject to a particular interpretation of a treaty). The latter type of declarations should be viewed as a reservation, since “the declaring State is purporting to exclude or to modify the terms of the treaty. Thus the consequences attached to the making of reservations should apply to such (a) declaration”.\textsuperscript{114} Therefore, rules of the Vienna Convention on reservations should apply to qualified interpretative declarations. The legal character of the acceptance of or objection to a mere interpretative declaration is more problematic. The practice of States is inconclusive. The problematic issue of interpretative declarations is on the ILC’s agenda within the scope of its project on reservations to treaties.

In 1999, the Special Rapporteur A. Pellet, presented the definitions of interpretative declarations and conditional interpretative declarations:

\begin{enumerate}
\item Definition of Interpretative Declarations: ‘Interpretative Declaration’ means a unilateral statement, however phrased or named, by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions;
\item Conditional Interpretative Declarations: a unilateral act formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby the State or an international organization subjects its consent to be bound by a treaty or a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.\textsuperscript{115}
\end{enumerate}

He enumerated the reasons why States are compelled to make interpretative declarations:

the need for a margin of flexibility in respect of human rights treaties which tend to touch on matters of particular sensitivity to States, particularly when the terms of the convention are backed up by the monitoring mechanisms which ensures a dynamic interpretation of the instrument; as a proof that States take their obligations seriously; opportunity to harmonize their domestic law with requirements of the convention while obliging them to abide by most important provisions.\textsuperscript{116}

As the practice of the ECtHR demonstrates, instruments with different names may have the same objective. As the ILC stated, such instruments “can be called ‘reservations’ by some

\textsuperscript{113} See McRae, \textit{supra} note 66, a seminal article on this subject.
\textsuperscript{114} \textit{Ibid.} at 161.
\textsuperscript{115} \textit{Report of the Commission on its work at its Fifty- First Session}, UN GAOR, 54\textsuperscript{th} Sess., UN Doc. A/54/10 (1999) [1999 ILC Report].
States; interpretative declarations by others and nothing all by others still. In some cases, a State will employ various expressions that make it difficult to tell whether they are being used to formulate reservations or interpretative declarations...”\textsuperscript{117}

The ensuing substantial discussion within the Commission is clear evidence of the difficulties of finding a clear divisive line between all the categories: reservations and declarations, and other types of unilateral statements appended to international treaties. The ILC observed that the necessary distinction between reservations and interpretative declarations is often blurred as the use of such terminology is inconsistent the practice of States and international organisations is uncertain; and the declarant’s objectives are sometimes ambiguous.\textsuperscript{118} The members of the Commission emphasised the definitional clear and fast problems of the distinction between conditional interpretative declarations and reservations. Although almost identical in legal character and consequences, according to some members of the Commission, they could not be fully assimilated. The Draft Article on the Distinction between Reservations and Interpretative Declarations which states “The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce” did not disperse these doubts. As the Commission rightly observed, it is very difficult to apply a test in practice, which would authoritatively make the distinction possible and feasible, as States and international organisations seldom explain their intentions and often go to great lengths to disguise them. Therefore, the efforts of the ILC elucidated many murky points but did not resolve the matter.

D. The ICC Statute and Interpretative Declarations

There were numerous declarations and statements appended to the Statute, as well as several objections to some of the declarations. Many declarations were made to Article 87, paragraphs 1 and 2 of the Rome Statute. From the outset, the ability to append declarations to Article 124 has been widely criticised. It is thought that the this kind of permissible declarations is in fact a reservation, as it modifies the scope of obligations and should not be permitted as it disrupts the integrity of the treaty and relates to its fundamental provisions.\textsuperscript{119} However, very few States have utilised this possibility and some commentators have assessed that the scope of this declaration is not as wide as it would appear, as no acceptance of the Court’s jurisdiction is required by the State whose nationals have committed a crime in the territory of a State party. On the other hand, nationals of a State non-party to the Rome Statute are subject to the State’s jurisdiction when they commit a crime in the territory of a State party without any requirement to accept the Court’s jurisdiction.\textsuperscript{120}

As to general Declarations, in particular, the so-called Interpretative Declaration of Uruguay resulted in several objections:

As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the Statute insofar as it is competent in this respect and in strict accordance with the Constitutional provisions of the Republic. Pursuant to the provisions of part 9 of the Statute entitled “International Corporation and Judicial Assistance”, the Executive shall within six months refer to the Legislature a bill establishing the procedures for ensuring the application of the Statute.

\begin{footnotes}
\item[117] International Law Commission, Commentary on the Definition of Interpretative Declaration, UN GAOR, UN Doc. A/54/10 (1999), para. 6.
\item[119] Hafner, supra note 104 at 1225.
\end{footnotes}
Several States, including the Netherlands, Sweden, Finland, Germany, the United Kingdom, Norway and Denmark, submitted objections to this declaration. All the objecting States interpreted this declaration as a reservation and therefore not in accordance with Article 120 of the Rome Statue. For example, Germany stated:

The Government of the Federal Republic of Germany has examined the Interpretative Declaration to the Rome Statue of the International Criminal Court made by the Government of the Eastern Republic of Uruguay at the time of its ratification of the Statute.

The Government of the Federal Republic of Germany considers that the interpretative Declaration with regard to the compatibility of the rules of the Statute with the provisions of the Constitution of Uruguay is in fact a reservation that seeks to limit the scope of the Statute on a unilateral basis. As it is prohibited in article 120 of the Statute that no reservation may be made to the Statute, this reservation should not be made. The Government of the Federal Republic of Germany therefore objects to the abovementioned “declaration” made by the Government of Eastern Republic of Uruguay. This objection does not preclude the entry into force of the Statute between the Federal Republic of Germany and the Eastern Republic of Uruguay.121

Other States, such the Netherlands and Finland, also appraised the declaration made by Uruguay to be in fact a reservation and as such invalid. Both States invoked the general principle that a party may not invoke its internal law as justification for its failure to perform the treaty. Both States stated that the Statute would become operative between the Uruguay and these two States “without Uruguay benefiting from its reservation.”122 Uruguay replied as follows to Germany’s statement:

It is noted for all necessary effects that the Rome Statue has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction. Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the State. The interpretative declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind.123

Several comments may be made about the above statements. Uruguay followed a path that has often been taken by many States, i.e., appending a declaration, which is in fact a disguised reservation. What then is the correct procedure to follow in such cases? As noted above, the Commission, observed the almost identical character of the so-called conditional interpretative declarations and reservation, however, it also stated that these two institutions could not be totally assimilated.

The Commission findings are as inconclusive as the States’ practice. Apart from the question of impermissibility of reservations to the Rome Statute (also disguised as interpretative declarations), Uruguay’s declaration is incorrect from the point of view of its subject matter, i.e., contrary to the principle enunciated in Article 27 of the VCLT:

Internal Law and Observance of Treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform the treaty. This rule is without prejudice to article 46.

121 Ibid.
123 Ibid.
Uruguay’s reply does not really explain the content of the declaration at all. However, the responses of some States to this interpretative declaration clearly indicate that there is no coherent or uniform practice relating to such declarations (or for that matter reservations), a fact which was stressed by the ILC in its tenth report (2005). In this report the ILC observed the “infinite variety” of the reactions of States objecting to reservations: some of them are just observations, or as the Commission phrased it (“misgivings”) to the reservations without a formal objection; or “reservations dialogue”, where a State informs the objecting State why it thinks that the reservation should be withdrawn, clarified or modified. Such communications may be real objections, but they may also open a dialogue that might lead to an objection although it may result in the modification or withdrawal of the reservation. Finally, the objecting State may produce what Professor Simma terms a “super-maximum” effect, which involves not only the determination that the objected reservation is invalid, but also that the treaty as a whole applies in the relations between the States. The reactions of Finland and the Netherlands to Uruguay’s “declaration” have “super-maximum” effect as the Statute enters into force between these States and Uruguay but without the benefit of the reservation. Presumably, this was also the intention of Germany phrased, however, in less compelling terms.

There was also a host of other declarations, which might raise some doubts, although those were not commented on or objected to by States. An example is that of Colombia which made eight interpretative declarations. However, one particular declaration caused Amnesty International concern. It reads as follows:

1. None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia. Colombia declares that the provisions of the Statute must be applied and interpreted in a manner consistent with the provisions of international humanitarian law and, consequently, that nothing in the Statute affects the rights and obligations embodied in the norms of international humanitarian law, especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional thereto. Likewise, in the event that a Colombian national has to be investigated and prosecuted by the International Criminal Court, the Rome Statute must be interpreted and applied, where appropriate, in accordance with the principles and norms of international humanitarian law and international human rights law.

2. With respect to articles 61(2)(b) and 67(1)(d), Colombia declares that it will always be in the interests of justice that Colombian nationals be fully guaranteed the right of defense, especially the right to be assisted by counsel during the phases of investigation and prosecution by the International Criminal Court.

3. Concerning article 17(3), Colombia declares that the use of the word “otherwise” with respect to the determination of the State’s ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.

4. Bearing in mind that the scope of the Rome Statute is limited exclusively to the exercise of complementary jurisdiction by the International Criminal Court and to the cooperation of national authorities with it, Colombia declares that none of the provisions of the Rome Statute alters the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia.

5. Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory.

6. In accordance with article 87(1)(a) and the first paragraph of article 87(2), the Government of Colombia declares that requests for cooperation or assistance shall be transmitted through the diplomatic channel and shall either be in or be accompanied by a translation into the Spanish language.
None of the provisions by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with principles and norms of international law accepted by Colombia”. Considering the fact that the Court has not jurisdiction over political crimes, it would appear that such a declaration is redundant. However, according to Amnesty International, such a declaration is troublesome, in light of the 2005 Colombian Justice and Peace Law, which grants political status to the members of paramilitary forces by defining all their activities, which might include the perpetration of crimes against humanity and war crimes, as sedition, which is classified as a political offence under Colombian law. 1991 Law prohibits the extradition of those guilty of political offences. As it was phrased by the Amnesty International: “The fundamental principle of the Rome Statue is the jurisdiction of the Court is complementary to the duty -not the power or faculty-of every state to exercise its criminal jurisdiction over those responsible for crimes under international law...Therefore, the declaration made on amnesties and pardons, complemented with legislation (Law 975 and Law 782) which leads to de facto impunity for those responsible for crimes under international law, contravenes Colombia’s duties under international law, particularly under the Rome Statute.127

A similar declaration by Malta also belongs to the category of objectionable declarations. It relates to granting pardons:

No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence. The prerogative of mercy will be exercised in Malta in conformity with its obligations under International Law including those arising from the Rome Statute of the International Criminal Court”. Amnesty International comments on this Declaration as follows: “To the extent that this provision is intended to grant a pardon with full legal effects in Malta, is such a pardon were granted for crimes under international law such as genocide, crimes against humanity or war crimes prior to final decision on the merits of the case in another jurisdiction, such pardon would be contrary to international law. In particular it would be inconsistent with Malta’s obligation under the Preamble of the Rome Statute to exercise its jurisdiction over such crimes”. The preamble states that: “It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

Amnesty International further identifies the categories of declarations which might undermine the cooperation of States with the Court, as embodied in Article 86 of the Statute which states that States agree to “cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court”. An example is this declaration made by Australia:

Declaration:

The Government of Australia, having considered the Statute, now hereby ratifies the same, for and on behalf of Australia, with the following declaration, the terms of which have full effect in Australian law, and which is not a reservation:

Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute

127 Supra note 120 at 20.
any alleged crimes. For this purpose, the procedure under Australian law implement-
ing the Statute of the Court provides that no person can be surrendered to the Court
unless the Australian Attorney-General issues a certificate allowing surrender. Aus-
tralian law also provides that no person can be arrested pursuant to an arrest warrant
issued by the Court without a certificate from the Attorney-General.

Australia further declares its understanding that the offences in Article 6, 7 and 8 will
be interpreted and applied in a way that accords with the way they are implemented
in Australian domestic law.

Amnesty International submitted a very detailed critique of this declaration. The most
serious objections Amnesty International expressed relate to the fact that the issues of admis-
sibility of investigating and prosecuting of crimes are within the realm of the Court itself,
not the State notwithstanding the primacy of national jurisdiction. Under Article 17, the
Court has the power to determine that a case is admissible where the national decision is not
taken in order to protect the person from criminal investigation; or (broadly speaking) in
the case of national proceedings that are not independent and partial. Therefore, Australia’s
statement that the case will be inadmissible before the Court when it is under investigation
or similar proceedings of the State is incorrect. Similarly, the right of the Attorney General
to refuse the issuance of a certificate allowing surrender or arrest, is also in contravention
of the Rome Statute, in particular Articles 86 (States parties “shall, in accordance with the
provisions of the Statue, cooperate fully with the Court in its investigations and prosecutions
of crimes within the jurisdiction of the Court” and 88 (“States Parties shall ensure that there
are procedures available under national law of all the forms of cooperation”). What this
means is that States are obliged under international law to ensure that their implementing
legislation do not create obstacles to such cooperation. Therefore, measures which would
delay the full and prompt compliance with such a request, e.g., two separate certificates
issued by the Attorney General at his or her absolute discretion, do not conform with the
international obligations under the Rome Statute. Finally, the statement that the “under-
standing that the offences in Articles 6, 7 and 8 will be interpreted and applied in a way in
accordance with the way they are implemented in Australian domestic law”, has given rise
to serious doubts. Several States objected to similar declarations submitted by other States.

France was one of the States in favour of reservations to the Rome Statute. It submit-
ted eight declarations upon ratification.128 No States objected to these declarations. The

128 France
I. Interpretative declarations:
1. The provisions of the Statute of the International Criminal Court do not preclude France from exercising
its inherent right of self-defence in conformity with Article 51 of the Charter.
2. The provisions of article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional
weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other
rules of international law applicable to other weapons necessary to the exercise by France of its inherent
right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in
the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment
adopted in accordance with the provisions of articles 121 and 123.
3. The Government of the French Republic considers that the term ‘armed conflict’ in article 8, paragraphs
2 (b) and (c), in and of itself and in its context, refers to a situation of a kind which does not include the
commission of ordinary crimes, including acts of terrorism, whether collective or isolated.
4. The situation referred to in article 8, paragraph 2 (b) (xxiii), of the Statute does not preclude France from
directing attacks against objectives considered as military objectives under international humanitarian
law.
5. The Government of the French Republic declares that the term “military advantage” in article 8, paragraph
2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific
elements thereof.
6. The Government of the French Republic declares that a specific area may be considered a "military
objective" as referred to in article 8, paragraph 2 (b) as a whole if, by reason of its situation, nature, use,
second French Declaration may be a particular cause for concern, as according to Amnesty International, it is aimed at limiting the Court’s jurisdiction. As Amnesty International observed:

Nothing in the Rome Statute suggests that conduct amounting to a war crime when committed with conventional methods ceases to be a war crime when committed with nuclear weapons. Amnesty International considers therefore, that the second French declaration is really a prohibited reservation because it seeks to limit the scope of war crimes.\(^{129}\)

New Zealand and Sweden commented upon the above declaration by France.\(^{130}\) The declaration submitted by the United Kingdom also merits attention.\(^{131}\) The statements made by the UK in relation to the Additional Protocol were in fact reservations.\(^{132}\) In the view of Amnesty International, the reference to reservations to the 1977 Protocol, which the

location, total or partial destruction, capture or neutralization, taking into account the circumstances of the moment, it offers a decisive military advantage.

The Government of the French Republic considers that the provisions of article 8, paragraph 2 (b) (ii) and (v), do not refer to possible collateral damage resulting from attacks directed against military objectives.

7. The Government of the French Republic declares that the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in article 8, paragraph 2 (b) (iv), must be weighed objectively on the basis of the information available at the time of its assessment.”

II. Declaration pursuant to article 87, paragraph 2: Pursuant to article 87, paragraph 2, of the Statute, the French Republic declares that requests for cooperation, and any documents supporting the request, addressed to it by the Court must be in the French language.

III. Declaration under article 124 Pursuant to article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.

\(^{129}\) *Supra* note 120 at 34.

\(^{130}\) The Government of New Zealand made the following statement: “The Government of New Zealand notes that the majority of the war crimes specified in Article 8 of the Rome Statute, in particular those in Article 8 (2) (b) (i)-(v) and 8 (2) (e)-(iv) (which relate to various kinds of attacks on civilian targets), make no reference to the type of the weapons employed to commit a particular crime. The Government of New Zealand recalls that the fundamental principle that underpins international law is to mitigate and circumscribe the cruelty of war for humanitarian reasons and that, rather then being limited to weaponry of an earlier time, this branch of law evolved, and continues to evolve, to meet contemporary circumstances. Accordingly, it is the view of the Government of New Zealand that it would be inconsistent with principles of international humanitarian law to purport to limit the scope of Article 8, in particular Article 8 (2), to events that involve conventional weapons only”.

\(^{131}\) “The United Kingdom understands the term “the established framework of international law”, used in article 8 (2) and (e), to include customary international law as established by State practice and *opinio juris*. In that context the United Kingdom confirms and draws the attention of the Court its view as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of the 8th June 1977.”

\(^{132}\) “(a) It continues to the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons. (c) Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time (m) The obligations of Article 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe these obligations. If the adverse party makes a serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population of against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measure otherwise prohibited by Articles in question to the extent that it considers such measure necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles.”
UK “confirms and draws the attention of the Court” to is a prohibited reservation within the meaning of Article 120 of the Rome Statute.\textsuperscript{133}

A different question altogether arises in relation to this “declaration”:

…If the adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measure(s) otherwise prohibited by Articles in question to the extent that it considers such measure(s) necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles

This would appear \emph{prima facie} impermissible in light of the international law of countermeasures, in so far as the measures relate to Articles 51 (Protection of Civilian Population) and 54 (Protection of Objects Indispensable to the Survival of the Civilian Population). The language used, which refers to “measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles…”, indicates that this is a countermeasure. As Professor Crawford explained, “Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved”.\textsuperscript{134}

However, Article 50 of the ILC Articles on State Responsibility (Obligations not affected by countermeasures) imposes certain limitations on countermeasures and clearly states: “Countermeasures shall not affect…[b] obligations for the protection of fundamental human rights; [c] obligations of a humanitarian character prohibiting reprisals…”.

These countermeasures may be called “reciprocal countermeasures” and refer to countermeasures which involve suspension of the performance of obligations towards a responsible State if such obligations mirror or are directly related to the breached obligation. However, as Crawford writes: “…for some obligations, for example concerning those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have non-reciprocal character and are not only due to other States but to the individuals themselves.”\textsuperscript{135} It appears therefore that the above mentioned part of the UK Declaration is not in conformity with the law of countermeasures, apart from being a \emph{de facto} reservation.

However, it must be taken into consideration that there is doubt as to whether some of these provisions are norms of customary international law.\textsuperscript{136} According to Professor Greenwood’s analysis in several of his essays on this subject, it is unclear whether some of the provisions concerning the treatment of civilian populations (or the environment) during armed conflict are customary international law or perhaps some of the provisions such as Article 54 (1), are “a blend of customary law and innovative provisions which are not easy

\textsuperscript{133} Supra note 120.


\textsuperscript{135} Ibid.

to disentangle but, most of it is likely to become part of customary law with little difficulty if it does not already have that status.137 A different but related question is what constitutes a military object, therefore rendering the principle of distinction sometimes difficult to apply. Other basic principles, e.g., the principle of proportionality also raise such thorny questions. Although considered to be of a customary law character by the majority of States, the United States did not adhere to this view.138

The same author draws the following conclusions:

the definition of a military object in Article 52 (2) is generally regarded as declaratory of customary law... The presumption of civilian status in Articles 50 (3) and 51 (3) is not regarded as declaratory of custom.... The principle of proportionality laid down in Articles 51 (5) (b) and 57 ) (2) (a) (iii) is generally accepted part of customary law, notwithstanding doubts expressed before the conflict. Its(s) application continues, however, to be problematic, particularly with regard to long-term damage... The principle of the protection of cultural objects (Article 53) was probably treated as part of customary law... Practice during the conflict tell(s) us little about the status of the Article 54 provisions regarding objects indispensable to the survival of civilian population, although there is some indication that they were treated as part of the customary law... The conflict seems likely to have give added impetus to the emergence of a rule of customary law forbidding the use of methods or means of warfare likely to cause widespread long-term and severe damage to the natural environment.139

In conclusion, it may be said that many of the interpretative declarations appended to ratifications of the Rome Statue are in fact disguised reservations. As Professor Pellet and the ILC have already pointed out, there is no uniform system in international law which States follow in such situations. As observed above, some States have adopted the “maximum effect” procedure, whereby rejecting the “declaration” and accepting the relationship between the declaring State and themselves without the benefits of the declaration. Other States have objected to certain declarations, without specifying the effects of such objections; or just noted the incompatibility of declarations with the purpose and object of Rome Statute. The only common ground of all these reactions has been the assimilation of declarations with reservations. Therefore some of these reactions have been identical to those expressed sometimes by States in relation to impermissible reservations.

VII. Conclusions

As stated above, the Reservations to the Genocide Convention Advisory Opinion marked a revolutionary and completely novel approach to reservations to treaties, in the case of a special type, based on non-reciprocal obligations of States, in which an individual is the beneficiary. With minor changes, this system was endorsed by the ILC in its work on the codification and the progressive development on the law of treaties and subsequently adopted by the VCLT, which addresses the issue of reservations to all treaties. Therefore, it serves as the universal regime of reservations. As observed above, this regime is subject to many divergent interpretations, in particular with regard to the impermissibility of reservations and the legal effects of such reservations.

It appears that it was not the Court’s intention to devise a general regime for reservations and to depart from the well-tested regime under the League of Nations, a system, however, that would have been impossible to uphold in view of the number of States participating in international relations and the various subject-matters regulated by treaties. However,
several human rights bodies of the judicial and quasi-judicial nature (such as the ECtHR, the Inter-American Court of Human Rights and the HRC), found this system inadequate for dealing with human rights treaties due to their particular character, the very reason, this regime was introduced by the ICJ. The system was meant to provide for universal participation in the *Genocide Convention*, and therefore was flexible and freed from the limiting requirement of unanimity. The flexibility, however, is the reason that the reservations of some States are formulated in a manner which appears not to conform, in the opinion of other States, judicial organs or the organs of the certain human rights Conventions with the object and purpose of the treaty. Therefore, the novel, flexible approach of the Court, which was supposed to secure universal participation in human (humanitarian) rights conventions, has proved in some cases to be the reason for its unsuitability. This is the paradox, with which the human rights courts and the organs set by the human rights conventions are confronted. The system of reservations under the VCLT has become the general system, the development of which initially was not envisaged by the Court, but was fostered by the work of ILC on the law of treaties and later the Vienna Diplomatic Conference.

The question thus arises whether the regime of reservations under the VCLT is at all adequate for human rights treaties. The view of the human rights courts (such as the ECtHR and the Inter-American Court of Human Rights), as well as the approach of the majority of the HRC members appears to be in favour of an independent, third-party system that is empowered to make pronouncements as to the permissibility of reservations. However, the condemnation of the VCLT as being totally inadequate to deal with reservations in human treaties would be a simplification, as this is not the only view expressed. As observed by Scheinin, after the General Comment No. 24, the HRC adopted a less strict approach in dealing with objectionable reservations and some of the organs established by human rights law treaties express the view that the VCLT is quite suitable, and that ultimately, States are the masters of their consent to be bound by a treaty. Also, Special Rapporteur Pellet’s view was that the VCLT regime is so universal that it suits human rights treaties, which after all are treaties in a general sense, admittedly with special features, but so are many other treaties in various fields of international law.

Due to the complicated and inconsistent character of the practice of States and human rights bodies in relation to reservations to human rights treaties, there is not an undisputed and generally accepted view concerning the suitability (or the lack thereof) of the VCLT and therefore the total condemnation of the VCLT regime appears to be inappropriate.

An interesting analysis of the provisions of the VCLT in relation to its (possible) applicability to human rights treaties was offered by a member of the HRC, Scheinin who looked at the VCLT from the viewpoint of a positivist as well as less positivist approach. He postulated that a positivist approach could draw from Article 20 (3). For example, Constituent instruments are the ICCPR and its two Optional Protocols and the “competent organ” is the HRC, whose acceptance of the reservation would be a necessary requirement. A less positivist view, preferred by Scheinin, is that Article 20 (3), expresses a more general view, that Articles 20 and 21 of the VCLT do not mirror the norms of customary international law and are not automatically applicable in relation to multilateral treaties, whose subject matter is the protection of third parties and which impose an obligation on States to allow the monitoring of their compliance with the treaty by an international court or an independent expert body. Scheinin notes yet another manner of approaching the VCLT is to assume that it does not regulate impermissible reservations at all and therefore

a legal positivist would conclude that reservations that are contrary to the object and purpose (Article 19) of a human rights treaty are simply prohibited by the Vienna Convention...A person looking beyond positivism would then move to a

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140 “When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of this organisation”.
A holistic reading of the Vienna Convention, trying to understand it as a reflection of norms of customary international law and leaving room for solutions emanating from international and State practice as to the consequences of impermissible reservations.141

Finally, the same author expresses a very balanced view on the role of the HRC in relation to questionable reservations. According to him, it is not proper for human rights bodies to pronounce that a State is not party to a treaty due to the impresible nature of its reservation, and that severability of such a reservation is not the only option. Scheinin is of the view that any interpretation of a reservation, which may result either in its application or severance, merits hearing the arguments of the parties explaining the meaning of the reservation in the circumstances of the case. He says this speaks strongly against *ex officio* application of reservations and in favour of an approach where a State party must both invoke its reservation and explain its effect in the circumstances of a case, before the Committee can apply a reservation.142

As explained above, the ICC Statute is a really a *sui generis* treaty and the rule on reservations reflects this. However, that rule generated a great number of interpretative declarations, some of which are in fact reservations. This is a new phenomenon principally in relation to human rights (humanitarian) treaties, whereby the prohibition on reservations, or the limited capacity to do so, compels States to make interpretative declarations, which are in fact disguised reservations. As observed above, there is a multitude of reactions of States to such instruments, which, however, lack coherence and uniformity. They of course resemble the reactions of States to reservations, which are considered to be incompatible with the purpose and object of the treaty.

Thus, finally, we may say that notwithstanding the difficulties with the application of the Genocide Convention regime to reservations to the human rights treaties, the 1951 Advisory Opinion was a landmark pronouncement of the Court, in fact one of the most influential and groundbreaking Advisory Opinions ever rendered. The Court turned the world’s attention to the exceptional, non-reciprocal character of the human (humanitarian) law treaties, acknowledged the importance of such treaties and accordingly designed a flexible system to accommodate universal participation. This is the everlasting legacy of the Genocide Convention although this system has become (somewhat paradoxically) a blueprint for the general regime of reservations in the VCLT, admittedly not entirely free from certain unresolved issues. The reservation system of the Genocide Convention was designed for a treaty with a smaller number of States Parties, without a strong treaty-established supervisory organ. This regime (adopted later in the VCLT) could not entirely conform to the expansion of the number of States, with different political and cultural regimes and to the contemporary phenomenon of the extensive supervisory functions of the treaty-based international organs. However, as illustrated above, the quest for a new regime to replace the one by the Genocide Convention has not been met with full success. As noted elsewhere in this essay, the practice of HRC was strongly opposed by certain States and criticised by some human rights lawyers. In other human rights treaties, the organs “softened” their approach to the reservations or regime in place (e.g., the collegiate system) was not implemented.

VIII. POST-SCRIPT

The question of reservations to the 1948 Genocide Convention and the 1951 Advisory Opinion was very much brought to the world’s attention by the very recent 2006 judgment of the ICJ in the Case Concerning Armed Activities on the Territory of the Congo (New

141 Scheinin, supra note 51 at 45, see also pages 43-44.
142 Ibid. at 55.
Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application].¹⁴³ This case presented an opportunity to revisit the Reservation to the Genocide Convention Advisory Opinion. It concerned several issues pertaining to reservations to Article IX (settlement of disputes) of the 1951 Convention. Congo claimed that Rwanda withdrew its reservation to Article IX by virtue of 1995 décré-loi 014/01. However, as the Court stated, this withdrawal was effected in Rwanda’s internal legal order, which produces different legal effects from such action in the international legal order. Likewise, the Court did not acknowledge that the binding effect of the 2005 statement of the Rwandan Minister of Justice before the United Nations Commission on Human Rights constituted a unilateral undertaking having legal effects, in relation to withdrawal of the reservation. The Court did not rule out the binding force of such statements made by the Minister of Justice, assessed only on the basis of the nature of the functions exercised since:

The Court notes, however, with increasing frequency in modern international relations other persons representing a State in specific fields may be authorised by that State to bind it by their statements in respect to matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials”.¹⁴⁴

…It is the Court’s view that the possibility cannot be ruled out in principle that a Minister of Justice may, under certain circumstances, bind the State he or she represents by his or her statements. The Court cannot therefore accept Rwanda’s argument that Ms Mukabagwiza could not, by her statement, bind the Rwandan State internationally, merely because, of the nature of the functions that she exercised.¹⁴⁵

The Court examined the legal effect of this statement in light of the circumstances in which it was made and its content. It stated that the statement was too imprecise and general to constitute a binding declaration of intent. The Claimant State asserted that Rwanda’s reservation was invalid, as it prohibited the Court from safeguarding a peremptory norm on the prohibition of genocide (jus cogens) and emphasised the erga omnes character of rights and obligations in the Genocide Convention. The Court, however, explained again that two different issues must be distinguished: the characterisation of the norm as of jus cogens character and the basis for the Court’s jurisdiction, which is always based on the consent of the Parties. Further, the Democratic Republic of the Congo (DRC) claimed that the reservation was invalid, because of its incompatibility with the object and purpose of the Genocide Convention, evidenced by the prohibition of reservations by Article 120 of the Rome Statute. However, as the Court observed, the prohibition in Article 120 does not have bearing on the Genocide Convention, which does not prohibit reservations. Moreover, Rwanda’s reservation relates to procedural and not substantive obligations, and therefore cannot be said to be incompatible with the purpose and object of the Genocide Convention. Finally, the contention of the DRC that the reservation conflicts with the peremptory norm of general international law cannot be justified by the current state of international law, which does not consider the submission to the ICJ’s jurisdiction in order to settle disputes under the Genocide Convention as such a norm.¹⁴⁶

The judgment of the Court provoked a number of robust separate and dissenting opinions. Of particular relevance was the Joint Separate Opinion of Judges Higgins, Koijmans, Elaraby, Owada and Simma.¹⁴⁷ The judges commented on paragraph 67 of the judgment

¹⁴⁴ Ibid. at para. 47.
¹⁴⁵ Ibid. at para. 48.
¹⁴⁶ See similar arguments in relation to the jurisdictional basis on Article 22 of the 1965 Convention on Racial Discrimination.
relating to the compatibility of Rwanda’s reservation with Article IX of the object and purpose of the Genocide Convention.\textsuperscript{148} The judges observed that in recent years there has been a tendency to view the 1951 \textit{Advisory Opinion} as permission for a completely free regime in the matter of reservations, in the sense that if the purpose and object of the treaty should be considered by the reserving and objecting States, “everything in the final analysis is left to the States themselves” (paragraph 4 of the Separate Opinion). The judges observed that the proper reading of the 1951 \textit{Advisory Opinion} is too sweeping and that the Court was answering one particular question against a certain background (as has been noted by the present author in this study. The question put forward to the Court in reality concerned the reservations to Article IX of the Genocide Convention, which subjects disputes arising therefrom to the jurisdiction of the Court.

The Court was quite aware of the dangers involved, \textit{i.e.}, a nexus of diverse reciprocal commitments within the structure of a multilateral convention. Evidence of this is in certain formulations of the Advisory Opinion, as well in the Joint Dissenting Opinion of the Judges McNair, Guerrero, Read and Hsu Mo (See Part II above). Since the rendering of the 1951 \textit{Advisory Opinion}, a multitude of human rights conventions has been established with many reservations, therefore the assumption of the Court in 1951 that the test of the compatibility of reservations with the object and purpose of the convention, “with a view to balancing the freedom to make reservations and the scrutiny and objections of other States, has not been realized: a mere handful of States do this. For a great majority, political considerations seem to prevail".\textsuperscript{149} The 1951 \textit{Advisory Opinion} of the Court could not deal with several issues concerning reservations, which emerged in the intervening years, such as the role of monitoring bodies in assessing the compatibility of reservations with the object and purpose of the treaty in many multilateral human rights treaties. Likewise, the Court did not comment on the powers of the various human rights courts, such as the European Court of Human Rights, in relation to the severability of incompatible reservations. Thus, the Court in 1951, “did not settle all matters relating to reservations...The Court’s Advisory Opinion in 1951 set out the law as what it was asked, and no more; and did not foreclose legal developments in respect of hitherto uncharted waters in the future”.\textsuperscript{150}

The judges made a very important statement in paragraph 16 of the Opinion, where it was expressly stated that the practice of such bodies should not be treated as making an exception to the law determined by the 1951 Advisory Opinion, but rather as a development to cover what the Court was not requested to do, and to address the new issues which subsequently arose. The judges also observed that the fact that the reservation concerns jurisdiction rather than substantive issues does not necessarily result in compatibility with the object and purpose of a convention. Conversely, reservations to substantive issues are not always incompatible with the object and purpose of a treaty. The practice of courts and monitoring bodies has to be assessed as further development of 1951 \textit{Advisory Opinion} and not as a deviation therefrom in order to conform to contemporary realities. The judges further noted that Article IX of the Convention also includes disputes over “fulfillment of the Convention” not only over interpretation of the Convention, but also disputes which may be referred to the Court that concern “those relating to the responsibility of a State for genocide”. Therefore “it is not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is the matter that the Court should revisit for further consideration”.\textsuperscript{151}

It must also be mentioned that Judge Koroma in his Dissenting Opinion strongly supported the view that reservations to a dispute settlement clause are contrary to the object and

\textsuperscript{148} “Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under this Convention.”

\textsuperscript{149} Para. 11 of Joint Separate Opinion, \textit{supra} note 147.

\textsuperscript{150} Para. 13 of Joint Separate Opinion, \textit{supra} note 147.

\textsuperscript{151} Para. 29 of Joint Separate Opinion, \textit{supra} note 147.
purpose of a treaty if the provision is at the core of the convention, such as the prevention of genocide that is at the heart of the Genocide Convention. Therefore the DRC’s failure to object to the Rwandan reservation should not prevent the Court from examination of the reservation. Human rights treaties are not based on reciprocity, but established to protect an individual. He is also of the view that the formulation of Article IX (disputes relating to the “fulfillment” of the Convention” “including those relating to the responsibility of a State”) gives sufficient basis for the Court’s enquiry into a State’s responsibility for genocide.152

These opinions clearly indicate that the 1951 Advisory Opinion constitutes the starting point, the basis for further development of the Court’s ideas, which find their continuation in human rights treaties and the practice of the human rights courts and tribunals. Reservations to Article IX of the Genocide Convention should thus be read in light of this evolutionary approach.
