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Richard W. Edwards Jr.  
*University of Toledo*

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# RESERVATIONS TO TREATIES

*Richard W. Edwards, Jr.\**

## INTRODUCTION

In the summer of 1961, Professor William W. Bishop, Jr., gave a series of lectures at the Hague Academy of International Law which were later published under the title "Reservations to Treaties."<sup>1</sup> This work was the most extensive treatment given by Professor Bishop to a single subject. This article examines the development of the law regarding reservations to treaties subsequent to Professor Bishop's 1961 Hague lectures.<sup>2</sup>

One would expect the law regarding the States bound by a treaty and the provisions of the treaty to which they are bound to be of such fundamental importance that the law regarding reservations would be clear and stable. This has not, however, been the case. Fourteen years after Professor Bishop's lectures, Judge José M. Ruda delivered lectures at the Hague Academy with the same title as Professor Bishop's, "Reservations to Treaties."<sup>3</sup> He began his lectures in 1975 with the statement, "The question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law."<sup>4</sup>

## REASONS FOR RESERVATIONS

While legal problems can arise with respect to reservations to bilateral treaties — and some of those problems will be explored near the end of this article<sup>5</sup> — officials and scholars have focused most of their attention on the legal regimes applicable to reservations to multilateral treaties, which have presented the most difficulties in practice.<sup>6</sup>

The subject matter of multilateral treaties has an immensely wide

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\* Professor of Law, University of Toledo.

1. Bishop, *Reservations to Treaties*, 103 RECUEIL DES COURS 245 (1961).

2. The words "treaty" and "international agreement" are used interchangeably throughout this article in accordance with international usage and without regard to distinctions in the usage of the two words in United States constitutional law.

3. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95 (1975).

4. *Id.* at 101.

5. See *infra* notes 172-185 and accompanying text.

6. See generally Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980); and Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71 (1982).

range, including, *inter alia*, rights respecting international waterways, trade and finance, alliances and military affairs, settlement of disputes, and creation of both general and highly specialized international and regional organizations. Multilateral treaties have also led to the creation and codification of legal regimes applicable to such diverse concerns as arms control, the conduct of military hostilities, educational and cultural exchanges, diplomatic and consular relations, international trade, intellectual property, the law of the sea, the use of the radio spectrum, and the protection of human rights. The number of nation States participating in treaties has greatly expanded in the period since World War II. International and regional organizations are not only the subjects of international agreements, they are also parties to international agreements. Individuals, although not parties to treaties, may be vested with enforceable rights under them.

The difficulty of fashioning agreed rules applicable to all parties to an international agreement has inspired the use of reservations. Although the definition of the term "reservation" will be examined later, a reservation can be roughly defined as a unilateral statement made by a State or international organization, when signing, ratifying, acceding, or otherwise expressing its consent to be bound by an international agreement, whereby it purports to exclude or to modify the legal effect of certain provisions of the international agreement in their application to that State or organization. Reasons for reservations include:

1. A State or international organization may wish to be a party to an international agreement while at the same time not yielding on certain substantive points believed to be against its interests.
2. A State or international organization may wish to be a party to an international agreement while at the same time not binding itself to certain procedural obligations, such as compulsory settlement of disputes in the form specified in a compromissory clause.
3. A State may wish to assure that its treaty obligations are compatible with peculiarities of its local law.
4. A State may want to preclude a treaty's application to subordinate political entities in a federal system or to foreign territories for which the State would otherwise have international responsibility.

These reasons could motivate any State, regardless of its form of government, to interpose a reservation when it expresses its consent to be bound by a treaty. Domestic processes of treaty approval in parlia-

mentary democracies may, in part, account for many reservations. Professor Bishop, writing in 1961, stated:

I would suggest that in large part the growth of reservations has resulted from increasing popular control over the ratification of treaties. . . . As soon as it is usual to have this "second look" at the treaty, by a group of people different from the individual or individuals who signed it, we are more and more likely to get reservations upon ratification.<sup>7</sup>

Professor Bishop appears to have been in error when he suggested that in "large part" the growth of reservations has resulted from popular control of the ratification process. The Soviet Union and other East European States appear to have been more inclined to make reservations to multilateral treaties than the United States and other parliamentary democracies.<sup>8</sup>

#### THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, entered into force January 27, 1980, and now binding on 58 States, contains in Articles 19-23 a system of rules on reservations to treaties.<sup>9</sup> The Convention was negotiated at one of the most important law-making conferences ever held — the Vienna Conference on the Law of Treaties in 1968 and 1969.<sup>10</sup>

There is also the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, done at Vienna, March 21, 1986,<sup>11</sup> which contains pro-

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7. Bishop, *supra* note 1, at 263-64. Reservations made by the United States to two treaties with Panama are examples. See *infra* notes 71-84 and accompanying text.

8. See Gamble, *supra* note 6, at 381-83, Table 4.

9. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969 (entered into force January 27, 1980), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *United Nations Conference on the Law of Treaties: First and Second Sessions, Vienna, 26 March - 24 May 1968 and 9 April - 22 May 1969 — Official Records, Documents of the Conference*, at 287, U.N. Doc. A/CONF.39/11/Add.2, U.N. Sales No. E.70.V.5 (1971) [hereinafter 1968-1969 Vienna Conference Documents], reprinted in 8 I.L.M. 679 (1969) and in 63 AM. J. INT'L L. 875 (1969). The States that have ratified or acceded to the Convention are listed, and information on reservations to the Convention is reported, in *Multilateral Treaties Deposited with the Secretary General. Status as of 31 December 1987*, U.N. Doc. ST/LEG/SER.E/6 at 767-74 (1988). The United States signed the Vienna Convention but has not ratified it.

10. The summary records and documents of the Vienna Conference on the Law of Treaties are published in three volumes: *United Nations Conference on the Law of Treaties: First Session, Vienna, 26 March - 24 May 1968 — Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.39/11, U.N. Sales No. E.68.V.7 (1969) [hereinafter 1968 Vienna Conference Record]; *United Nations Conference on the Law of Treaties: Second Session, Vienna, 9 April - 22 May 1969 — Official Records, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.39/11/Add.1, U.N. Sales No. E.70.V.6 (1970) [hereinafter 1969 Vienna Conference Record]; and 1968-1969 Vienna Conference Documents, *supra* note 9. Page references are to the English edition.

11. U.N. Doc. A/CONF.129/15 (1986), reprinted in 25 I.L.M. 543 (1986). See generally

visions applicable to reservations to international agreements to which one or more international organizations are parties. The 1986 Vienna Convention tracks virtually word for word the operative language in the definition of "reservation" (Article 2(1)(d)) and the articles dealing with reservations (Articles 19-23) in the 1969 Vienna Convention on the Law of Treaties. With respect to reservations, States have the same rights and obligations toward other States and international organizations under the 1986 Convention as they do vis-a-vis other States under the 1969 Vienna Convention. Under the 1986 Convention, international organizations have the same rights and obligations as States in their relations with States and with other international organizations. Even the article numbers of the 1986 Convention's reservation provisions track those of the 1969 Vienna Convention.<sup>12</sup>

Throughout this article the shortened term "Vienna Convention" refers to the Vienna Convention on the Law of Treaties. References to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations give its full title.

While many of the rules stated in the Vienna Convention on the Law of Treaties codify customary international law as it had developed to 1969, the rules of customary international law regarding reservations were sufficiently uncertain that it is best to think of the Vienna Convention rules as *de lege ferenda* in 1969. However, in the twenty years that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that treaty have come to be seen as basically wise and to have introduced desirable certainty.

Foreign offices have increasingly conformed their practices regarding both substantive issues (e.g., validity and legal effect of reservations) and procedural matters (e.g., time limits on objections to reservations and implied acceptance through acquiescence) to the rules specified in the Vienna Convention, even when not bound by the Convention as a treaty to do so. The United Kingdom, a party to the Vienna Convention, has adjusted its practice in making responses to reservations of other States to the provisions of Article 20, paragraphs

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Gaja, *A "New" Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary*, 1987 BRIT. Y.B. INT'L L. 253.

12. To the list of occasions when reservations may be formulated (signing, ratifying, etc.), the 1986 Convention, applicable to treaties to which international organizations are parties, adds "formally confirming," which is the name given to the ratification process in international organizations. Cf. Arts. 2(1)(d), 19, and 23(2) of the 1986 Vienna Convention with those same articles in the 1969 Vienna Convention. This addition does not alter any concepts embodied in the 1969 Vienna Convention on the Law of Treaties.

4 and 5, of the Vienna Convention without regard to whether the reserving State is or is not a party to the Vienna Convention.<sup>13</sup> The United States, which has not ratified the Convention, has adjusted its practice regarding reservations to the rules set forth in Articles 19-23 of the Vienna Convention.<sup>14</sup> This practice by a non-party is evidence that the rules regarding reservations stated in the Vienna Convention have now become standards that a prudent State follows.

The Organization of American States has also adapted its depositary procedures concerning reservations to Inter-American multilateral treaties to be consistent with the Vienna Convention.<sup>15</sup>

International tribunals in important cases have applied the definition of "reservation" in the Vienna Convention and rules stated in the Convention regarding reservations in cases where the Convention, as a treaty, was not binding. The Court of Arbitration in the *United Kingdom/France Continental Shelf* case, decided in 1977,<sup>16</sup> applied the Vienna Convention's definition of "reservation" to determine whether a French statement made when ratifying the 1958 Geneva Convention on the Continental Shelf was a reservation.<sup>17</sup> The tribunal applied the rule stated in Article 21(3) of the Vienna Convention when it held that the combination of a French reservation to Article 6 of the Shelf Convention and the U.K. objection to the reservation modified the application of Article 6, but did not exclude the article's application or exclude the application of the remainder of the Shelf Convention in the case before the Court.<sup>18</sup> The decision is evidence that Vienna rules on reservations have become customary law. Sir Ian Sinclair has commented:

Article 21(3) [of the Vienna Convention] states that the provisions to which the reservation relates do not apply as between the two states to the extent of the reservation. In the *United Kingdom/France Continental Shelf* case, the Court applied that rule in substance to determine the legal effect of the combination of French reservations and U.K. objections to the 1958 Continental Shelf Convention; it applied the substance

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13. For remarks of Sir Ian Sinclair, formerly The Legal Adviser, Foreign and Commonwealth Office, United Kingdom, see Panel Discussion, *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 1984 PROC. AM. SOC'Y INT'L L. 270, 273-74 [hereinafter 1984 A.S.I.L. Panel].

14. For remarks of Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, see 1984 A.S.I.L. Panel, *supra* note 13, at 278. See generally Frankowska, *Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988).

15. See 1973 DIG. U.S. PRACTICE INT'L L. 179-81.

16. *Delimitation of the Continental Shelf (United Kingdom v. France)*, 54 I.L.R. 6, 18 I.L.M. 397 (Ad Hoc Court of Arbitration, June 30, 1977).

17. See *infra* text accompanying notes 26-30.

18. See *infra* text accompanying notes 160-161.

of that rule notwithstanding that the French reservations had been formulated in June 1965, that the U.K. objections to those reservations had been transmitted to the Secretary General of the United Nations in January 1966, and that France had not, at the time of the arbitration in 1977, expressed its consent to be bound by the Vienna Convention.<sup>19</sup>

The European Court of Human Rights in the *Belilos Case (Belilos v. Switzerland)*, decided in 1988,<sup>20</sup> used the definition of the word "reservation" in the Vienna Convention to guide its decision in a landmark case to be explored later.<sup>21</sup>

States that would challenge the Vienna Convention rules concerning reservations carry the burden to demonstrate that the rules they challenge are today not *de lege lata*.

### THE CONCEPT OF "RESERVATION"

The term "reservation" is defined in the Vienna Convention on the Law of Treaties for the purposes of that Convention as follows:

"reservation" means 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.<sup>22</sup>

Two features of the definition in the Vienna Convention on the Law of Treaties deserve special attention. First, what are the consequences of looking to substance rather than the title of the statement to determine whether a particular statement styled, for example, as a "reservation" is or is not in law a reservation and to determine whether a statement styled as an "interpretative declaration" is or is not in law a reservation? Second, what are the consequences of not specifying in the definition that a reservation is a condition upon the expression of consent to be bound?

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19. 1984 A.S.I.L. Panel, *supra* note 13, at 274. France was the only State at the Vienna Conference on the law of Treaties in 1969 to vote against adoption of the Vienna Convention on the Law of Treaties, and it has not signed or acceded to the Convention.

20. 132 Eur. Ct. H.R. (ser. A), 10 Eur. Human Rights Rep. 466 (1988) [hereinafter *Belilos judgment*].

21. For a discussion of the issues concerning reservations to treaties presented in the case, see *infra* text accompanying notes 31-37, 61-69, 104-110, and 141.

22. Vienna Convention, Art. 2(1)(d).

The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *supra* note 11, in its Art. 2(1)(d) defining "reservation," after the word "ratifying," adds "formally confirming," to the list. Its text reads: "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, 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 or to that organization.

## IS FORMAL TITLE OR SUBSTANCE THE CRITERION?

The phrase in the Vienna Convention definition above, "however phrased or named," was added at the Vienna Conference on the Law of Treaties in 1968. This was the principal substantive change made in the definition proposed by the International Law Commission, and it was not a radical change.<sup>23</sup> The change incorporated into the text a concept previously accepted within the International Law Commission. The idea that the definition of "reservation" should encompass interpretative statements when they otherwise meet the definition of a reservation was agreed upon within the International Law Commission at least as early as 1962, and was made explicit in the commentary:

[S]tates, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations . . . as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.<sup>24</sup>

A proposal by Hungary that would have treated all statements of interpretation as reservations died in the Drafting Committee at the Vienna Conference.<sup>25</sup>

The implications of using a test that calls for an examination of the substance of a State's statement as compared to its title may not have been fully appreciated. In the relations of men and nations it always

23. For the text of the definition of "reservation" proposed by the International Law Commission, see Art. 2(1)(d) of the Draft Articles on the Law of Treaties with commentaries, adopted by the I.L.C. at its 18th Session (1966). *Report of the International Law Commission to the General Assembly on the Work of its 18th Session*, 21 U.N. GAOR Supp. (No. 9) at 21, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 172, 178, U.N. Doc. A/CN.4/SER.A/1966/Add.1, and in 1968-1969 *Vienna Conference Documents*, supra note 9, at 7. [hereinafter 1966 *I.L.C. Report*, with page references to 1968-1969 *Vienna Conference Documents*, supra note 9.]

Other changes in the definition made at the Vienna Conference on the Law of Treaties did not have significant substantive implications. In a drafting change, the verb "vary," which was used in the I.L.C. draft, was changed to "modify" in the final version of the Vienna Convention. The change harmonized the terminology in the definition with the terminology used in Art. 21, which sets forth the legal effects of reservations. See Ruda, supra note 3, at 107.

24. Commentary to Art. I(1)(f) of Draft Articles on the Law of Treaties, *Report of the International Law Commission to the General Assembly Covering the Work of its 14th Session*, 17 U.N. GAOR Supp. (No. 9) at 6, U.N. Doc. A/5209 (1962), reprinted in [1962] 2 Y.B. INT'L L. COMM'N 157, 163, U.N. Doc. A/CN.4/SER.A/1962/Add.1 [hereinafter 1962 *I.L.C. Report*, with page references to [1962] 2 Y.B. INT'L L. COMM'N.]

The same language agreed upon in 1962 is repeated in the I.L.C.'s commentary to its final draft articles on the law of treaties submitted to the Vienna Conference. 1966 *I.L.C. Report*, supra note 23, at 10.

25. U.N. Doc. A/CONF.39/C.1/L.23 (1968), reprinted in 1968-1969 *Vienna Conference Documents*, supra note 9, at 112. See 1968 *Vienna Conference Record*, supra note 10, at 23, 33, 35; 1969 *Vienna Conference Record*, supra note 10, at 346.



seems rational to look at the substance rather than the form in appraising communications. But, a substance test throws a burden on those at the receiving end (or tribunals that may decide disputes) to recognize a statement for what it is rather than for what it is titled. Sometimes a statement in a ratification instrument (or its equivalent) is not titled; had it been, it would, at least, have provided a starting point in deciding whether the statement is or is not a reservation.

International tribunals in two important cases have applied the Vienna Convention's definition of "reservation" to hold statements to be reservations when they were not labeled as such. In both cases the results appear sensible. In both cases the definition was applied as customary law because the Vienna Convention as a treaty was not binding on the parties.

The Court of Arbitration in the *United Kingdom/France Continental Shelf* case,<sup>26</sup> as a prelude to the task of delimiting the continental shelf boundary between France and the United Kingdom, had to decide the character of a statement made by the French Republic which was appended to its instrument of accession in 1965 to the Geneva Convention on the Continental Shelf. With respect to Article 6, paragraphs 1 and 2, of the Shelf Convention, the French statement said:

In the absence of a specific agreement the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

- if such boundary is calculated from baselines established after 29 April 1958;
- if it extends beyond the 200-metre isobath;
- if it lies in areas where, in the Government's opinion, there are "special circumstances" within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.<sup>27</sup>

Was the French statement respecting Article 6 in its third "if" clause a reservation or only an interpretative declaration? The Court of Arbitration held that it was a reservation. It said:

. . . [A]lthough the third reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation regime provided for in Article 6. This condition, according to its terms, appears to go beyond mere interpretation; for it makes the application of that regime dependent on acceptance by the other State of the French Republic.

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26. Delimitation of the Continental Shelf (United Kingdom v. France), 54 I.L.R. 6, 18 I.L.M. 397 (Ad Hoc Court of Arbitration, June 30, 1977).

27. *Id.* at para. 33. For the official French text, *id.* at n.1.

lic's designation of the named areas as involving "special circumstances" regardless of the validity or otherwise of that designation under Article 6. Article 2(1)(d) of the Vienna Convention on the Law of Treaties, which both Parties accept as correctly defining a "reservation", provides that it means "a unilateral statement, however phrased or named, made by a State . . . whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in its application to that State." This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State. This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this "reservation" is to be considered a "reservation" rather than an "interpretative declaration".<sup>28</sup>

The consequence of the Court's classification of the French statement as a "reservation" was that the Court had to apply it, assuming it was valid, together with the British objection to it.<sup>29</sup> If the French statement had been determined to be only an interpretative declaration, the Court could have taken it into account in interpreting the application of Article 6 of the Geneva Continental Shelf Convention to France, but would not have been bound to make the same interpretation as the French statement.<sup>30</sup>

In the *Belilos Case (Belilos v. Switzerland)*,<sup>31</sup> the European Court of Human Rights considered a challenge by an individual to the practice of the Swiss Canton of Lausanne of trying certain criminal offences before a police board with a right of appeal to the regular courts only on issues of law. Marlene Belilos, as applicant, claimed that her trial violated the provision in Article 6, section 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>32</sup> that, in the determination of any criminal charge, everyone is entitled to a hearing by "an independent and impartial tribunal." One of Switzerland's arguments in response was that it had made a reservation to Article 6 in its instrument ratifying the European Human Rights Convention in 1974. The Swiss statement, which was labeled "interpretative declaration," stated:

The Swiss Federal Council considers that the guarantee of fair trial in

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28. *Id.* at para. 55.

29. One member of the Court, Herbert W. Briggs, would have decided that the French reservation was not a valid one. See *infra* notes 112-113 and accompanying text.

30. For an examination of the legal effects arising from the combination of the French reservation and the British objection to it, see *infra* notes 160-161 and accompanying text.

31. *Belilos* judgment, *supra* note 20.

32. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No.5, amended by Protocol No. 3 (Europ. T.S. No. 45) and by Protocol No. 5 (Europ. T.S. No. 55).

Article 6, paragraph 1, of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.<sup>33</sup>

Mrs. Belilos argued that the Swiss statement, entitled "interpretative declaration," was just that and not a reservation. The European Commission on Human Rights, which considered the case prior to the Court's consideration of it, agreed with Mrs. Belilos:

After studying the wording of the declaration and the preparatory work the Commission is of the opinion that this by itself yields sufficient evidence for the conclusion to be reached that the declaration is a mere interpretative declaration which does not have the effect of a reservation. This sort of declaration may be taken into account when an Article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation. A further point should be mentioned, moreover. If a State makes reservations and interpretative declarations at the same time [as Switzerland had done], an interpretative declaration will only exceptionally be able to be equated with a reservation.<sup>34</sup>

In the European Court of Human Rights, Switzerland argued that the Commission was in error and that Switzerland's statement, despite its title, was a reservation. In its memorial Switzerland cited the definition of "reservation" in Article 2(1)(d) of the Vienna Convention on the Law of Treaties as stating general international law.<sup>35</sup> Without explicitly saying so, the European Court of Human Rights applied the definition set forth in Article 2(1)(d) of the Vienna Convention. It concluded that the Swiss statement should be treated as reservation:

The question whether a declaration described as "interpretative" must be regarded as a "reservation" is a difficult one . . . . In order to establish the legal character of such a declaration, one must look behind the title given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6(1) and to secure itself against an interpretation of that Article which it considered too broad.<sup>36</sup>

Having determined that the Swiss statement was a reservation to Article 6 of the European Human Rights Convention, the Court had to determine if the reservation met the requirements for reservations set forth in Article 64 of the European Convention. After concluding

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33. Belilos judgment, *supra* note 20, at para. 29.

34. Belilos v. Switzerland, Application No. 10328/83. Eur. Comm'n H.R., report of May 7, 1986, reprinted in 10 Eur. Human Rights Rep. 496 (1988), at para. 102.

35. Belilos judgment, *supra* note 20, at para. 42; Memorial of Switzerland in Eur. Ct. H.R., filed Feb. 27, 1987, at 12.

36. Belilos judgment, *supra* note 20, at para. 49.

that it did not, the Court had to consider whether or not Switzerland was bound by the European Human Rights Convention given its invalid reservation. These matters are discussed below.<sup>37</sup>

In the two cases discussed above, international tribunals held statements to be reservations that were not labeled as such by their authors. Nevertheless, labels are important. While they are not conclusive under the Vienna Convention's definition (which is probably now customary law), they can provide evidence of the authoring State's view of the statement's status. During the Vienna Conference, Sir Humphrey Waldock, the Rapporteur on the Law of Treaties for the International Law Commission, made the insightful comment: "In practice, a State making an interpretative declaration usually did so because it did not want to become enmeshed in the network of the law of reservations."<sup>38</sup> Sir Ian Sinclair and Derek Bowett have suggested that, even under the Vienna Convention, a State's own characterization of its statement as a "declaration" rather than a "reservation" should normally govern.<sup>39</sup>

It is important to bear in mind that, while an interpretative declaration that is not a reservation provides evidence of intention and understanding, it does not have the binding character of a reservation. Failure to object to another State's interpretative statement does not have any automatic legal effects.<sup>40</sup> Under the Vienna Convention, in the case of a reservation, failure to object does have automatic legal effects: it will be treated as acceptance by acquiescence.<sup>41</sup> Thus, a State acts at its peril in not objecting to a statement with which it disagrees if that statement might later be held to be a reservation. The United Kingdom used the following formula when faced with a Yugoslavian declaration on ratifying the 1968 Non-Proliferation Treaty:

. . . in so far as the statement may be intended to take effect as an interpretative declaration, Her Majesty's Government regret that they are not able to accept it. . . . in so far as it may be intended to take effect as a reservation, Her Majesty's Government must place on record their formal objection to the statement. . . .<sup>42</sup>

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37. For an examination of the issue concerning the Swiss reservation's validity, see *infra* notes 104-110 and accompanying text. For a discussion of the severability issue, see *infra* notes 61-69 and accompanying text.

38. 1968 Vienna Conference Record, *supra* note 10, at 137.

39. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 54 (2d ed. 1984); Bowett, *Reservations to Non-restricted Multilateral Treaties*, 1976-77 BRIT. Y.B. INT'L L. 67, 69.

40. McRae, *The Legal Effect of Interpretative Declarations*, 1978 BRIT. Y.B. INT'L L. 155, 169.

41. See *infra* notes 91-93 and accompanying text.

42. 1975 Gr. Brit. T. S. No. 125 (Cmd 6268) at 10, *quoted in* Bowett, *supra* note 39, at 69. See also *infra* note 139.

IS A RESERVATION NECESSARILY A CONDITION ON  
CONSENT TO BE BOUND?

Can a State ever be deemed to have consented to a treaty when a reservation it had made is ruled invalid? The answer may lie in the definition of the term "reservation." Professor Bishop began his Hague lectures with a discussion of definitions but did not himself offer one.<sup>43</sup> He did, however, emphasize: "The fundamental basis remains, that no state is bound in international law without its consent to the treaty. This is the starting point for the law of treaties, and likewise for our international rules dealing with reservations."<sup>44</sup> Sir Humphrey Waldock in his first Report on the Law of Treaties, for the International Law Commission in March 1962, advanced the following definition:

"Reservation" means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, *specifies as a condition of its consent to be bound by the treaty* a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. . . .<sup>45</sup>

The International Law Commission during its 1962 session altered the definition proposed by Sir Humphrey to read as follows: "'Reservation' means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, *whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.* . . ."<sup>46</sup>

What was the rationale for deleting the requirement that a reservation be a condition of the consent to be bound? The records of the International Law Commission's meetings during 1962 are not as helpful as one might hope. The only relevant published comment is a summary of a remark by Manfred Lachs during a meeting of the Commission on May 25, 1962:

On the whole the definition of reservations proposed by the special rapporteur [Waldock] in Article 1(l) was a sound one . . . . On the other hand he [Lachs] doubted whether the use in the definition of the word "condition" was appropriate; surely what was meant was more in the nature of a proviso.<sup>47</sup>

43. Bishop, *supra* note 1, at 249-55.

44. *Id.* at 255.

45. Waldock, *First Report on the Law of Treaties*, [1962] 2 Y.B. INT'L L. COMM'N 27, 31-32, U.N. Doc. A/CN.4/144 (Article 1(l) of proposed Draft Articles on the Law of Treaties)(emphasis added).

46. 1962 I.L.C. Report, *supra* note 24, at 161 (Article 1(l)(f) of Draft Articles on the Law of Treaties) (emphasis added).

47. *Summary Records of the Fourteenth Session*, [1962] 1 Y.B. INT'L L. COMM'N 142.

Roberto Ago in reply to Dr. Lachs stated in substance: "The Commission should not overlook the essential element of consent [necessary to a State's becoming a party to a treaty]."48 The *Yearbook* of the International Law Commission does not report the substance of any further discussion of the matter. Dr. Lachs' comment influenced the Commission's Drafting Committee. The Committee's deletion of the phrase "condition of its consent to be bound" was accepted by the full Commission near the end of its 1962 session, apparently without discussion.49 That decision was apparently not considered again by the International Law Commission, nor was it discussed during the Vienna Conference on the Law of Treaties. The definition of "reservation" in Article 2(1)(d) of the Vienna Convention as finally adopted makes no use of the word "condition."<sup>50</sup>

One is left to speculate whether the Commission in 1962 or the Vienna Conference on the Law of Treaties in 1968 and 1969 understood or contemplated that a State might become bound to a treaty to which it had made an invalid reservation.<sup>51</sup> Derek Bowett appears to be the first person in print to have recognized that, under the Vienna text, an invalid reservation does not automatically vitiate a State's consent to be bound by a treaty. Whether an invalid reservation has that effect is dependent upon whether the invalid reservation is or is not severable from the State's expression of consent to be bound.<sup>52</sup> Henry J. Bourguignon has written:

On the one hand, a state may consent to a multilateral treaty solely on the basis of a condition, expressed in a reservation — the classical meaning of a condition *sine qua non*. If the reservation should be found invalid, the state's intention to ratify the treaty would likewise be invalid. On the other hand, in most cases, the state has a predominant intention to be a party to the treaty, notwithstanding the possible subsequent invalidation of a reservation. Only the first category of reservation . . . should nullify the state's acceptance of the entire treaty obligations. For the second category of reservation, a determination that the reservation is invalid merely removes that reservation from consideration, but leaves

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48. *Id.* at 143.

49. *Id.* at 239-40.

50. *See supra* note 22 and accompanying text.

51. From the records of the Vienna Conference, it appears that no representative suggested that a State could continue to be a party to a treaty after a reservation it had made was definitively found to be invalid, unless it took the initiative to withdraw the reservation. The possibility of a tribunal severing the invalid reservation was not discussed. Representatives of Ireland and India stated that an invalid reservation deprived the State's expression of consent to be bound of legal effect. *1968 Vienna Conference Record, supra* note 10, at 122, 128. The Mexican representative, when he commented on the consequences of a judicial decision declaring a reservation invalid, did not mention the idea that the tribunal might sever the reservation. *Id.* at 112, 113.

52. Bowett, *supra* note 39, at 75-80.

the state fully bound by the treaty including the part to which the reservation was made.<sup>53</sup>

Deciding the severability question in the individual case is essentially a matter of construction of the State's ratification instrument (or its equivalent). It may, however, be difficult — even after examining the ratification instrument, the *travaux préparatoires* of the treaty, and parliamentary debates concerning ratification — to answer the question whether being a party to the treaty was more important to the State than preserving the rights it had thought it had protected with the reservation. The matter may be particularly sensitive where the reserving State is a parliamentary democracy and the parliament plays a real, and not just formal, role in the State's decisions to participate in international agreements. One is essentially assessing the political will of the State.

An analogy, but an imperfect one, can be made to declarations accepting the compulsory jurisdiction of the International Court of Justice under Article 36(2) ("optional clause") of the Court's Statute.<sup>54</sup> In the *Interhandel Case (Switzerland v. United States)*,<sup>55</sup> the World Court considered, but did not rule upon, the validity of the self-judging domestic jurisdiction reservation in the United States Article 36(2) declaration communicated to the Court in 1946. The validity of that reservation was addressed in separate opinions. In the view of Judge Hersch Lauterpacht, the reservation in the United States declaration accepting the Court's jurisdiction was both invalid and non-severable, thus invalidating the entire acceptance of "optional clause" jurisdiction by the United States.<sup>56</sup> With respect to the severability question, he wrote:

. . . [A] condition which, having regard to the intention of the party making it, is essential to and goes to the roots of the main obligation, cannot be separated from it. . . . A party cannot be held to be bound by an obligation divested of a condition without which that obligation would never have been undertaken.<sup>57</sup>

President Helge Klaestad<sup>58</sup> and Judge E.C. Armand-Ugon<sup>59</sup> thought the United States reservations were invalid but severable, and

53. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. — (1989) (forthcoming).

54. *Statute of the Court*, 1978 I.C.J. Acts & Docs. 59; 59 Stat. 1060; 3 Bevens 1179; 1984 U.N.Y.B. 1306.

55. *Interhandel Case (Switzerland v. United States)*, 1959 I.C.J. 6 (March 21, 1959).

56. *Id.* at 95, 101-19; see also *Case of Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 9, 55-59 (separate opinion by Judge Lauterpacht).

57. *Interhandel Case*, 1959 I.C.J. at 116-17.

58. *Id.* at 75, 76-78.

59. *Id.* at 85, 93-94.

thus concluded that the United States consented to the Court's jurisdiction.

Returning to the specific issue of the severability of invalid reservations to treaties, two international tribunals have dealt with this issue in their decisions. Herbert W. Briggs considered the severability issue as a member of the Court of Arbitration in the *United Kingdom/France Continental Shelf* case. In a separate declaration he stated that he, unlike the majority, would hold the French reservations to Article 6 of the Geneva Convention on the Continental Shelf to be invalid. He then stated that he would hold France to be bound by the Shelf Convention, including Article 6.<sup>60</sup>

The severability issue was faced head-on by the European Court of Human Rights when it decided the *Belilos Case (Belilos v. Switzerland)*.<sup>61</sup> As observed earlier, the Court held that a statement entitled "interpretative declaration" made by Switzerland in its instrument ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1974 was in law a reservation.<sup>62</sup> The Court also held that the Swiss reservation was invalid because it did not satisfy the requirements for reservations set forth in Article 64 of the European Human Rights Convention.<sup>63</sup> The Court then had to determine whether Switzerland was bound by the European Human Rights Convention (including Article 6, section 1, to which the invalid reservation was made) or whether its expression of consent contained a void condition that nullified that consent with the result that Switzerland was not a party at all.

The severability issue was not addressed in the memorials, but was addressed by Switzerland during the oral proceedings. Switzerland pointed out that, on the hypothetical assumption that the Court would hold the reservation invalid, there was respected authority for the proposition that a void reservation nullifies the State's expression of consent to be bound by the treaty. Swiss advocates cited, in particular, Judge Lauterpacht's separate opinions in the *Case Concerning Certain Norwegian Loans* and in the *Interhandel Case*.<sup>64</sup> However, presumably motivated by a desire to remain a party to the treaty, Switzerland

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60. Delimitation of the Continental Shelf (*United Kingdom v. France*), 54 I.L.R. 6, 131-32, 18 I.L.M. 397, 459 (Ad Hoc Court of Arbitration June 30, 1977) (separate declaration by Herbert W. Briggs). For further discussion, see *supra* notes 26-30, and *infra* notes 112-113 and accompanying text.

61. *Belilos* judgment, *supra* note 20. See generally Bourguignon, *supra* note 53.

62. See *supra* notes 31-37 and accompanying text.

63. See *infra* notes 104-110 and accompanying text.

64. Note of public hearings held Oct. 26, 1987 (morning). Eur. Ct. H.R. Doc. Cour/Misc (87) 237 at 45. For citations to Judge Lauterpacht's opinions, see *supra* note 56.



argued against this solution: "The Swiss Government considers that it would be obviously disproportionate, both in the view of the other Contracting Parties to the Convention and in that of Switzerland, to apply this solution in the Belilos case."<sup>65</sup>

Switzerland next argued that to hold the reservation to be invalid and to simply sever it from Switzerland's expression of consent to the treaty would violate the fundamental principle of consent which is the foundation of the law of treaties. The preservation of Swiss criminal procedures and federal-canton relations by means of the statement respecting Article 6 of the European Human Rights Convention was an integral part of Switzerland's ratification decision.<sup>66</sup>

Switzerland then offered the following solution: If the Swiss reservation was invalid, the invalidity was solely for "formal reasons" (i.e., excessive generality, failure of Switzerland to accompany its reservation with a statement of Swiss law).<sup>67</sup> Because any invalidity was not of a fundamental character while Switzerland's purpose in making the reservation was fundamental, Switzerland should be held to continue to be a party to the European Convention and allowed, at the same time, to reword its statement *a posteriori* in a manner that would comply with Article 64's requirements for reservations.<sup>68</sup>

The European Court of Human Rights rejected the proposed Swiss solution. It held that the Swiss reservation was invalid, severed the reservation, and further held that Switzerland remained bound by the treaty:

In short, the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, *it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration.* Moreover, the Swiss Government recognised the Court's competence to determine the latter issue, which they argued before it.<sup>69</sup>

The Court gave no further reasoning or explanation for its landmark decision on the severability issue, beyond the sentences quoted. The Court in the remainder of its judgment applied Article 6 of the European Convention as though Switzerland had never made any reservation to it.

This case appears to be the first time in the history of international

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65. Eur. Ct. H.R. Doc. Cour/Misc (87) 237 at 45.

66. *Id.* at 45-46.

67. See *infra* notes 104-110 and accompanying text. Cf. *infra* text accompanying note 129 (quoting concurring opinion of Judge J. De Meyer).

68. Eur. Ct. H.R. Doc. Cour/Misc (87) 237 at 46-48.

69. Belilos judgment, *supra* note 20, at para. 60 (emphasis added).

law that an international judicial tribunal has held a reservation to a treaty to be invalid. The decision is all the more remarkable because the Court held Switzerland to be bound by a treaty that it had ratified with an invalid reservation. It is unfortunate that the Court did not more fully discuss the legal foundation of its decision on the severability issue.

The Court probably made the right decision. Consider the magnitude of the political and legal problems that would have been created for the European human rights system if the Court had held that Switzerland was not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Consider the meaninglessness of the exercise had the Court, after determining that the reservation was invalid, given it the same effect as if it were valid. Perhaps this case shows that the severability issue, even when considered by a court, is more an issue for political judgment (in the best sense of the term) than for legal analysis.

#### RESERVATIONS DISTINGUISHED FROM INTERPRETATIVE STATEMENTS AND TREATY AMENDMENTS

Earlier in this article attention was given to difficulties in determining, in the individual case, whether a statement entitled "interpretative declaration" is or is not a reservation when a criterion based on substance rather than formal title guides the determination.<sup>70</sup> Before moving on, it may be useful to examine the distinct functions properly played by interpretative statements, reservations, and treaty amendments. This can best be illustrated by recalling the diplomatic maneuvering which surrounded the conclusion of two treaties between the United States and Panama.

Two bilateral treaties between the United States and Panama were signed at Washington, September 7, 1977, that under U.S. law required the Senate's consent to ratification:<sup>71</sup> the Panama Canal Treaty<sup>72</sup> and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.<sup>73</sup> After extensive debate in the

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70. See *supra* notes 23-42 and accompanying text.

71. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (1986); Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 258-66 (1983).

72. Panama Canal treaty, Sept. 7, 1977, United States-Panama, 33 U.S.T. 39, T.I.A.S. No. 10030, reprinted in 16 I.L.M. 1022 (1977). For the ratification instruments, see 17 I.L.M. 817-27 (1978). The full texts of ratification instruments appear only in I.L.M.

73. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, United States-Panama, 33 U.S.T. 1; T.I.A.S. No. 10029, reprinted in 16 I.L.M. 1040 (1977). For the text of the ratification instruments, see 17 I.L.M. 817-20, 827-35 (1978). The full texts of ratification instruments appear only in I.L.M.

United States Senate and a close vote there on consent to ratification, the United States and Panama concluded a protocol of exchange of ratification instruments in Panama on June 16, 1978, effective April 1, 1979. The treaties entered into force on October 1, 1979.

The United States ratification instrument for the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal required amendment of Articles IV and VI of the Treaty,<sup>74</sup> and Panama agreed to the amendment of those articles.<sup>75</sup> The amendment route was used because the changes gave additional rights to the United States not stated in the original text, including the right "to act" against any threats to peaceful transit of vessels through the Canal and the right to go to the "head of the line" of vessels in emergency. A basic concept of a reservation is that, while it may exclude or modify the application of certain provisions in relation to the reserving State, it should not impose new contractual obligations on other parties. Although the treaty was a bilateral treaty between the United States and Panama, the treaty was accompanied by a protocol to which other States were invited to adhere.<sup>76</sup> Participation in the protocol resulted in an adhering State enjoying certain rights granted to third States by the bilateral treaty and undertaking certain related obligations. A consequence of the amendment of the bilateral treaty was that States that were parties to the protocol recognized rights of the United States in addition to those stated in the original text of the bilateral treaty.

The United States ratification instrument for the Treaty on Permanent Neutrality stated as a "condition" upon the exchange of ratification instruments that Panama and the United States sign a protocol regarding the effect of the treaty on the potential scope of future agreements between the two States.<sup>77</sup> This was done in the protocol on exchange of ratification instruments.<sup>78</sup>

The United States ratification instruments for the Panama Canal Treaty and the Treaty Concerning Permanent Neutrality stated a number of "reservations." These related to, *inter alia*, construction of other inter-oceanic canals, financial matters, administration of certain cemeteries, flying of the United States flag, and conformance of the

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74. 33 U.S.T. at 3-4, T.I.A.S. No. 10029 at 3-4, 17 I.L.M. at 827-28.

75. 33 U.S.T. at 31-32, T.I.A.S. no. 10029 at 31-32, 17 I.L.M. at 817-818.

76. Protocol to the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, opened to accession by all States Sept. 7, 1977, 33 U.S.T. 27, T.I.A.S. No. 10029 at 27, *reprinted in* 16 I.L.M. 1042 (1977).

77. 33 U.S.T. 4-5, T.I.A.S. No. 10029 at 4-5, 17 I.L.M. 828-29.

78. Protocol of Exchange of Instruments of Ratification on the Panama Canal Treaties, 33 U.S.T. 31-33, T.I.A.S. No. 10029 at 31-33, 17 I.L.M. 817-19.

treaty obligations with United States internal law.<sup>79</sup> The United States ratification instruments included "understandings" of key words and terms in several articles as well as "understandings" regarding the obligations imposed by each treaty taken as a whole.<sup>80</sup>

Panama exchanged ratification instruments with the United States, with certain "understandings" of its own. Panama's understandings were stated in general terms. They could be described as responsive to United States reservations and understandings as well as arising from interpretative concerns of its own concerning the two treaties.<sup>81</sup>

In the amendment of the Treaty on Permanent Neutrality, the United States and Panama joined in a change that explicitly expanded the rights of the United States and imposed additional obligations on Panama and other States. In contrast, the reservations by the United States loosened constraints imposed by the two treaties on the United States. Panama did not object to those reservations, but did state its own understandings regarding the effect of them.

The use of treaty amendments, reservations, and interpretative understandings in connection with the two Panama Canal treaties demonstrates that these tools can be employed to perform distinctly different functions in the treaty-making process. Reservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party. Interpretative statements may sometimes be reservations, but they need not always be. Interpretative statements may play an important role in the interpretative process and aid the parties in gaining a mutual understanding of each other's beliefs regarding commitments under a treaty. To do this, they need not go so far as to actually modify the effect of obligations imposed by the treaty. Such statements are normally understood not to bind other parties unless accepted as agreed interpretations.<sup>82</sup> In the case of the Panama Canal treaties, there was agreement that the treaties would be applied in accordance with the United States understandings but there was no similar ex-

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79. 33 U.S.T. 5-7, T.I.A.S. No. 10029 at 5-7, 17 I.L.M. 829-31 (Treaty Concerning Permanent Neutrality); 33 U.S.T. 41-43, T.I.A.S. No. 10030 at 3-5, 17 I.L.M. 820-22 (Panama Canal Treaty).

80. 33 U.S.T. 7-9, T.I.A.S. No. 10029 at 7-9, 17 I.L.M. 831-33 (Treaty Concerning Permanent Neutrality); 33 U.S.T. 43-45, T.I.A.S. No. 10030 at 5-7, 17 I.L.M. 822-24 (Panama Canal Treaty).

81. 33 U.S.T. 33-34, T.I.A.S. No. 10029 at 33-34, 17 I.L.M. 819-20, 834-35 (Treaty Concerning Permanent Neutrality); 33 U.S.T. 33-34, T.I.A.S. No. 10029 at 33-34, 17 I.L.M. 825-27 (Panama Canal Treaty). The full texts of Panama's ratification instruments appear only in I.L.M. See also *infra* note 84 and accompanying text.

82. See generally McRae, *supra* note 40.

pllicit agreement regarding the application of Panama's understandings. The Protocol of Exchange of Instruments of Ratification states: "Both governments agree that the Treaties . . . will be applied in accordance with the above-mentioned amendments, conditions, reservations and understandings."<sup>83</sup> The "above-mentioned" instruments were all initiatives from the United States side. Panama's understandings stated in its ratification instruments are set out later in the protocol but all that the protocol did was to record them.<sup>84</sup>

Benefits can be gained by interpretative declarations that clarify and communicate beliefs about treaty obligations, especially about the interface of treaty commitments and internal law. The United Nations Convention on the Law of the Sea<sup>85</sup> recognizes this. Article 309 of that treaty prohibits reservations except those expressly permitted by other articles of the Convention. Article 310 explicitly recognizes the right to make interpretative declarations:

*Article 310*

*Declarations and Statements*

Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.<sup>86</sup>

83. Protocol of Exchange of Instruments of Ratification Regarding the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal and the Panama Canal Treaty, June 16, 1978, Panama-United States, 33 U.S.T. 31-32, T.I.A.S. No. 10029 at 31-32, 17 I.L.M. 817-818 (1978).

84. 33 U.S.T. 33-34, T.I.A.S. No. 10029 at 33-34, 17 I.L.M. 819-20.

Several years after the two treaties entered into force, questions were raised in the United States Senate about Panama's statement of "understandings" included in the ratification instruments. Did Panama's statement undercut Panama's acceptance of the treaty amendments initiated by the United States and its reservations and, thus, constitute a "counter-reservation"? If so, should the Senate have reviewed the Panamanian statement? Should the United States have allowed it to be included in the ratification instruments without response? Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, in a statement before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, June 23, 1983, said that "the Panamanian statement is not an amendment or reservation in either form or substance." He cited Art. 2(1)(d) of the Vienna Convention on the Law of Treaties as supplying the proper criterion for determining whether the Panamanian statement of "understandings" was or was not a reservation. Dalton's statement appears in 78 AM. J. INT'L L. 204-07 (1984). See also 1977 DIG. U.S. PRAC. INT'L L. 375-77.

85. United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 and Corr. 1-11 (1982) (done at Montego Bay, Dec. 10, 1982; not yet in force), reprinted in 21 I.L.M. 1261 (1982).

86. *Id.* at art. 310. See Gamble, *The 1982 U.N. Convention on the Law of the Sea: A "Midstream" Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV. 627 (1987); Oxman, *Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 247-49 (1981).

## FORMALITIES

The Vienna Convention on the Law of Treaties states a number of formal requirements for reservations, express acceptances of reservations, and objections. All of these actions must be formulated in writing and communicated to the other contracting States and other States entitled to become parties to the treaty.<sup>87</sup> Normally a reservation accompanying an instrument expressing consent to be bound (e.g., a reservation stated in an instrument of ratification) in the case of a multilateral treaty will be delivered to the depositary named in the treaty; and the depositary will communicate the reservation to the other States.<sup>88</sup> In the case of a bilateral treaty, the ratification instrument including the reservation will be exchanged with the opposite party, and the protocol of exchange will recite acceptance.

The Vienna Convention provides that if the reservation was formulated when signing the treaty subject to ratification, acceptance, or approval, the reserving State must formally confirm the reservation when later expressing its consent to be bound.<sup>89</sup>

Unless the treaty provides otherwise, a reservation can be withdrawn at any time, and the consent of a State which has previously accepted the reservation is not required for its withdrawal. Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of the withdrawal has been received by that State.<sup>90</sup>

Unless the treaty otherwise provides, an objection to a reservation must be made within the time limit specified in the Vienna Convention or the right to make the objection is lost. The Vienna Convention specifies that an objection must be made by the end of a period of twelve months after the State was notified of the reservation or the date on which the objecting State expresses its consent to be bound by the treaty, whichever is later.<sup>91</sup> An objection to a reservation must be communicated not only to the reserving State but to all other contracting States and other States entitled to become parties to the treaty.<sup>92</sup>

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87. Vienna Convention, *supra* note 9, at Art. 23. The procedural articles concerning reservations in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, *supra* note 11, state rules that are identical to the rules in the 1969 Vienna Convention on the Law of Treaties.

88. See Vienna Convention, *supra* note 9, at Arts. 76-78.

89. *Id.* at Art. 23.

90. *Id.* at Art. 22.

91. *Id.* at Art. 20(5).

92. *Id.* at Art. 23.

Unless the treaty otherwise provides or is a constituent instrument of an international organization, the Vienna Convention never requires that an acceptance of a reservation be express. The Vienna Convention states conditions under which a reservation must be accepted by at least one other contracting party or by all parties in order for the reserving State to be constituted as a contracting State, but the acceptance will be implied by silence. The Convention states that, unless the treaty provides otherwise or is the constituent instrument of an international organization, a reservation is considered to have been accepted by a State through acquiescence if it has made no objection in writing to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.<sup>93</sup>

The introduction of a specific time limit for making objections to reservations, the requirement that objections be in writing, and the concept that failure to object within the time limit amounts to acceptance represent major contributions of the Vienna Convention in establishing and clarifying the law regarding reservations. These provisions went beyond the codification of customary law which prior to the Vienna Convention was understood to place no specific time limit on the making of objections to reservations.<sup>94</sup> Given the conforming practice of States when not bound by the Vienna Convention, the Vienna rules on these matters are in the process of becoming customary rules binding on States independent of the Convention.<sup>95</sup>

The Vienna Convention contains no procedure for a State that has withdrawn a reservation to reintroduce it or for a State to introduce a new reservation after it has expressed its consent to be bound by the treaty. The only avenues open for such a State are to persuade its treaty partners to amend the treaty or for it to withdraw from the treaty and then rejoin it with the new reservations, assuming that it is possible for the State to withdraw and rejoin the particular treaty.

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93. *Id.* at Art. 20(5).

94. See 1984 A.S.I.L. Panel, *supra* note 13, at 274 (comments of Sir Ian Sinclair). See also 1966 I.L.C. Report, *supra* note 23, at 27-28 (International Law Commission's commentary).

95. See *supra* notes 13-14 and accompanying text.

The International Law Commission in its draft of Article 20(5) of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations did not require international organizations to object to reservations within a stated time limit. This was changed at the Vienna Conference in 1986 to treat the passage of twelve months, or the date on which the objecting organization expresses its consent to be bound, whichever is later (the same period as for States in both that convention and the 1969 Vienna Convention on the Law of Treaties), as constituting acceptance by an international organization. Gaja, *supra* note 11, at 259.

## OBJECTIVE TESTS OF RESERVATION VALIDITY

Professor Bishop in his 1961 Hague lectures made a plea that reservation clauses be included in treaties: "May one here interpose a plea for a greater appreciation of the importance of well-formulated formal [reservation] clauses in treaties, drafted by those who combine experience with technical treaty problems, and imaginative understanding of the subject-matter of the particular treaty."<sup>96</sup> Despite Professor Bishop's plea, it is quite common for treaties to be totally silent about whether reservations are permitted or prohibited. Many treaties do, however, contain provisions regarding reservations that are permitted or prohibited. These are of great variety.

A treaty may expressly prohibit any reservations. Conventions adopted within the International Labour Organisation fall in this class.<sup>97</sup> A treaty may prohibit all but specified reservations. For example, the United Nations Convention on the Law of the Sea of 1982 provides in Article 309: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."<sup>98</sup> The earlier Convention on the Continental Shelf of 1958 used a reverse form. It provided in Article 12: "At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than articles 1 to 3 inclusive."<sup>99</sup>

It is not unusual for a treaty to expressly permit specified reservations while being silent as to others. A number of treaties in the human rights field fall in this class. The European Convention on the Suppression of Terrorism of 1977 authorizes a carefully circumscribed reservation to the extradition obligation of Article 1 in its application to political offences, but is silent as to reservations to other articles.<sup>100</sup> The Convention Against Torture and Other Cruel, Inhuman or De-

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96. Bishop, *supra* note 1, at 325.

97. See Memorandum of the International Labour Office (*Reservations to the Convention on Genocide*), 1951 I.C.J. Pleadings 216 (May 28, 1951), 34 I.L.O. Off. Bull. 274 (1951). See also 1980 DIG. U.S. PRAC. INT'L L. 394-96 (United States Department of State memorandum, Nov. 25, 1980).

98. For citation and discussion, see *supra* notes 85-86 and accompanying text.

99. Convention on the Continental Shelf of 1958, *opened for signature* April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311. Articles 1, 2, and 3 define the term "continental shelf" and state certain fundamental rights regarding it, the superadjacent waters, and the air space above it. The reservation clause in the Convention figured in the holding of the International Court of Justice that Article 6 on delimitation, to which reservations were permitted, did not codify a customary rule of international law. *North Sea Continental Shelf Cases* (W. Ger. v. Denmark and W. Ger. v. Netherlands), 1969 I.C.J. 3 (Feb. 20, 1969).

100. European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, Art. 13, Europ. T. S. No. 90, 15 I.L.M. 1272 (1976). For the texts of reservations to Article 1 and to other articles of the Convention, see 16 I.L.M. 1329 (1977).



grading Treatment or Punishment of 1984,<sup>101</sup> concluded under the auspices of the United Nations, is another example.

Article 28 of the Torture Convention explicitly grants a State Party the right to declare that it does not recognize the competence of the Committee against Torture, established by the Convention, to make inquiries and recommendations pursuant to Article 20. Article 30 permits a reservation to the compulsory dispute settlement provisions set forth in Article 30. The Convention's silence regarding reservations to other articles appears to have been interpreted by the German Democratic Republic ("G.D.R.") to permit other reservations,<sup>102</sup> while Greece and Spain in objecting to a declaration by the G.D.R. to Articles 17(7) and 18(5) have asserted that, since the Torture Convention explicitly authorizes certain reservations, other reservations are precluded.<sup>103</sup>

A fundamental concept underlying treaty provisions expressly authorizing reservations and of treaty provisions expressly prohibiting all or certain types of reservations is that reservations to treaties may be valid or invalid and that the reservation provisions of the treaty set forth objective criteria for determining validity or invalidity apart from the process of acceptance and objection by other States.

Objective criteria stated in a treaty can provide guidance to a depositary in raising questions about a reservation. Objective criteria can structure the reservation and response process in which the parties engage. Objective criteria may also provide a role for judicial institutions. The *Belilos Case (Belilos v. Switzerland)*, decided by the European Court of Human Rights in 1988,<sup>104</sup> illustrates issues in the judicial review of the validity of reservations.

As discussed earlier, the Court in the *Belilos Case*, brought by an individual applicant, examined a Swiss "interpretative declaration" contained in its instrument ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>105</sup> in 1974. Switzerland claimed that the statement, despite its title, was a reserva-

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101. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, *opened for signature* Dec. 10, 1984, U.N. G.A. Res. 39/46 Annex (Dec. 10, 1984), 39 U.N. GAOR Supp. (No. 51) (A/39/51) at 197 (entered into force, June 26, 1987).

102. For the text of the declarations of the German Democratic Republic and discussion of objections to it, see *infra* notes 129-140, 165 and accompanying text.

103. Objections of Greece and Spain received on Oct. 6, 1988 by the U.N. Secretary-General as depositary of the Torture Convention.

104. *Belilos* judgment, *supra* note 20. See generally *supra* notes 31-37, 61-69 and accompanying text.

105. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, *amended by* Protocol No. 3 (Europ. T.S. No. 45) and *by* Protocol No. 5 (Europ. T.S. No. 55).

tion and not a mere interpretative statement, and the Court ultimately held that was correct.<sup>106</sup>

Mrs. Belilos and the European Commission of Human Rights both argued that, assuming the Swiss statement was a reservation to Article 6 of the European Convention, it did not satisfy the requirements of Article 64 which regulates reservations to the treaty. That article prohibits reservations of a "general character." It also requires that any reservation "contain a brief statement of the law concerned." The text follows:

*Article 64*

(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 permitted under this Article.

(2) Any reservation made under this Article shall contain a brief statement of the law concerned.<sup>107</sup>

Switzerland argued that review of its reservation for validity was beyond the Court's authority. Further, no State had ever objected to the Swiss reservation. Switzerland found support in the scholarship of Pierre-Henri Imbert. In his view the Commission and the Court could, at most, review the validity of a reservation during the period when the parties may make objections. He had argued that, once the reservation has been accepted, expressly or through acquiescence, by all of the reserving State's treaty partners, it is not subject to further challenge by those States nor in proceedings before the Commission or Court.<sup>108</sup>

The Commission's counter-argument was that where a treaty makes provision for judicial review of the obligations undertaken by the States and expressly limits the making of reservations, the judicial bodies have jurisdiction to review the validity of reservations in cases that come before them. The Court was persuaded by the Commission's argument. It stated its holding in crystal clear language: "The silence of the depositary and the Contracting States does not deprive the Convention institutions [Commission and Court] of the power to

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106. See *supra* notes 31-37 and accompanying text.

107. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 105, at Art. 64. For a discussion of the *travaux préparatoires* of Art. 64 and practice under the article, see Bourguignon, *supra* note 53, at 11-19.

108. See Imbert, *Reservations to the European Convention on Human Rights Before the Strasbourg Commission: The Temeltasch Case*, 33 INT'L & COMP. L.Q. 558, 589-90 (1984). See also P. IMBERT, LES RÉSERVES AUX TRAITÉS MULTIPARTÉRAUX 90-97, 134-40, 174-78, 193-196 (1979); Imbert, *Reservations and Human Rights Conventions*, in PROTECTION OF HUMAN RIGHTS IN EUROPE 87, 112-17 (I. Maier, ed. 1982).

make their own assessment."<sup>109</sup>

The Court proceeded to examine the validity of the Swiss reservation. It determined that it did not comply with the requirements of Article 64 and was, therefore, invalid. The Court then dealt with the severability issue and, as discussed earlier, it severed the invalid reservation from Switzerland's ratification of the European Human Rights Convention, and applied Article 6 of the Convention as though Switzerland had never made the reservation.<sup>110</sup>

Issues as to the validity of reservations may also arise even when the reservation is apparently authorized by the treaty. The Vienna Convention on the Law of Treaties states: "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides."<sup>111</sup> One might suppose that an objection to such a reservation is without legal effect. That is not as simple as it might seem. A reservation, for example, may appear to comply with an authorizing provision but, when analyzed, be seen to go beyond it. One member of the Court of Arbitration in the *United Kingdom/France Continental Shelf* case,<sup>112</sup> Herbert W. Briggs, was of the view that the French reservation considered by the Court in that case was invalid because in its conception it went beyond Article 6 of the Geneva Convention on the Continental Shelf, to which reservations were permitted, and modified rights of other States under Articles 1 and 2, to which reservations were not permitted. He pointed out that France's peremptory determination that Granville Bay was a "special circumstance" should not bind the Court if, applying customary law and Articles 1 and 2, it was not.<sup>113</sup>

The decision of the European Court of Human Rights in the *Belilos Case* and Professor Briggs' separate declaration in the *United Kingdom/France Continental Shelf* case may frighten some foreign office lawyers because of the long passage of time between the State's adherence to the treaty in question and the court's determination of a reservation's invalidity. That is not particularly shocking to persons

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109. *Belilos* judgment, *supra* note 20, at para. 47.

110. The Court held that the trial of Mrs. *Belilos* by a cantonal police board (with appeal to the regular courts only permitted on issues of law) violated the provisions of Article 6, section 1, of the European Convention that in the determination of any criminal charge the defendant is entitled to a hearing by "an independent and impartial tribunal." See generally Bourguignon, *supra* note 53.

111. Vienna Convention, *supra* note 9, at Art. 20(1).

112. *Delimitation of the Continental Shelf (United Kingdom v. France)*, 54 I.L.R. 6, 18 I.L.M. 397 (Ad Hoc Court of Arbitration, June 30, 1977). See generally *supra* notes 26-30, 59-60 and accompanying text.

113. 54 I.L.R. at 131-32, 18 I.L.M. at 459 (separate declaration of Herbert W. Briggs). The French reservation appears in the text accompanying note 27, *supra*.

familiar with constitutional litigation in the United States. The U.S. Supreme Court in *Reid v. Covert*<sup>114</sup> held in 1957 that a provision in international agreements of the United States, in use from as early as 1942, violated the constitutional right of civilian citizens to have criminal charges tried by a jury.

### THE OBJECT AND PURPOSE TEST

The International Court of Justice in its famous 1951 advisory opinion in *Reservations to the Convention on Genocide*,<sup>115</sup> considered the legal effects of the silence of the Genocide Convention regarding reservations. Prior to that International Court of Justice opinion, most Western scholars were of the view that when a treaty is silent regarding reservations, a reservation must be accepted by all other contracting parties in order for the reserving State to be constituted as a party to the treaty.<sup>116</sup>

The World Court in its *Genocide* opinion marked out a procedure whereby the reserving State could be constituted as a party to the Genocide Convention with respect to States that accepted the reservation and not with respect to any State that objected to the reservation and opposed the entry into force of the Convention between that State and the reserving State. In addition to specifying the legal effects of acceptances and objections to reservations, the Court articulated a criterion for appraising the validity of reservations to the Genocide Convention to which States were to refer when formulating reservations and when deciding whether or not to accept or to object to them. The Court stated:

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 that 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 a 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 it is the compatibility of a reservation with the object and purpose of

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114. *Reid v. Covert*, 354 U.S. 1 (1957).

115. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 (Advisory Opinion, May 28, 1951).

116. See Bishop, *supra* note 1, at 274-78. Inter-American practice accepted greater flexibility. *Id.* at 278-81.

the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.<sup>117</sup>

There has been much discussion since 1951 about whether the object and purpose test articulated by the Court in the *Genocide* opinion is an objective or subjective test and whether it can be applied to multilateral treaties generally. The International Law Commission in a 1951 report to the United Nations General Assembly stated: "The Commission believes that the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention, applied by the International Court of Justice to the Convention on Genocide, is not suitable for application to multilateral conventions in general."<sup>118</sup>

During the years that followed, the Commission modified its view. By the time it concluded its work on the law of treaties, the object and purpose test had become "holy writ" applicable to reservations to all treaties. The Vienna Convention on the Law of Treaties provides:

*Article 19*

*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 in 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.<sup>119</sup>

In its preparation of the draft articles that became the Vienna Convention on the Law of Treaties, the International Law Commission had to reconcile the self-evident correctness of the compatibility test articulated by the World Court in the *Genocide* opinion and the barriers to its objective application. Sir Hersch Lauterpacht, in his fourth alternative draft of an article on reservations in 1953, proposed that a reservation's compatibility with the object and purpose of a treaty be determined by a special "chamber of summary procedure" of the International Court of Justice.<sup>120</sup> Although Sir Hersch repeated the idea in 1954,<sup>121</sup> it was not pursued by the Commission. Sir Humphrey Waldock in 1962 proposed that a State, when formulating a reservation, "shall have regard to the compatibility of the reservation with the

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117. 1951 I.C.J. at 24.

118. [1951] 2 Y.B. INT'L L. COMM'N 123.

119. Vienna Convention, *supra* note 9, at Art. 19.

120. [1953] 2 Y.B. INT'L L. COMM'N 90, 133-34.

121. [1954] 2 Y.B. INT'L L. COMM'N 123, 131-33.

object and purpose of the treaty."<sup>122</sup> This formulation made it clear that the application of the compatibility test was for each State and would not be second guessed by other States, organs of international organizations, or judicial tribunals.

Statements made by members of the International Law Commission during the 1962 session indicated that they were uneasy about Sir Humphrey's formulation, yet recognized problems in applying the compatibility test. Antonio de Luna García said that the compatibility test was "reasonable in principle" but "impracticable in the absence of any authority to decide the question of compatibility." He said that it would appear that each State would be free to judge for itself the compatibility of a reservation.<sup>123</sup> Although the reasons are not clear, the International Law Commission decided by the end of its 1962 session that the compatibility test should be stated as an objective test rather than a principle to which a State "shall have regard." The statement agreed upon by the International Law Commission in 1962,<sup>124</sup> with only minor editing changes, was carried forward into Article 19(c) of the Vienna Convention, quoted above.

The International Law Commission in its 1962 report to the United Nations General Assembly made the following comment which was repeated in identical language in its final report on the law of treaties in 1966:

. . . the Commission was agreed that the [World] Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objection to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty.<sup>125</sup>

Sir Humphrey's original draft, had it been accepted, would have frozen the compatibility test so as to be never more than a subjective test. While Judge José M. Ruda has described the compatibility test, even in its present form in Article 19(c), as a "mere doctrinal assertion,"<sup>126</sup> it is stated as a legal obligation. To have an objective character and be more than a doctrinal assertion, it is not necessary that Article 19(c) determinations always be made by impartial tribunals or

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122. [1962] 2 Y.B. INT'L L. COMM'N 27, 60.

123. [1962] 1 Y.B. INT'L L. COMM'N 160. See also *Id.* at 168, 227.

124. 1962 I.L.C. Report, *supra* note 24, at 176 (Art. 18(1)(d) of the Draft Articles on the Law of Treaties as reported by the I.L.C. to the U.N. General Assembly in 1962).

125. *Id.*; 1966 I.L.C. Report, *supra* note 23, at 25.

126. Ruda, *supra* note 3, at 190.

through a collegiate process.<sup>127</sup> It is enough if there is the potential for impartial appraisal. In the case of some treaties, Article 19(c) may be applied by an organ of an international organization. International tribunals may be called upon in the future to apply Article 19(c) in cases analogous to the *Belilos Case*, discussed earlier.<sup>128</sup> Also, one should not be overly cynical about the conduct of foreign offices. In the author's experience, legal advisers take treaty obligations, especially reservation decisions, very seriously. Finally, there is always a problem about articulating a standard that States are to apply without any higher body to handle disputes regarding compliance. This is not dramatically different from many other treaty provisions. The principal difference is that the standard relates to the very assumption of a treaty obligation.

It may also be assumed all too quickly that the acceptance and objection process definitively determines the effects of reservations and the object and purpose test is operationally irrelevant. The fallacy of such an assumption is illustrated by an examination of the declaration of the German Democratic Republic to Articles 17(7) and 18(5) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.<sup>129</sup> The G.D.R. made a reservation, expressly authorized by Article 28, declaring that it does not recognize the competence of the Committee against Torture, established by the Convention, provided for in Article 20 (which is one of the several articles dealing with the competence of the Committee).<sup>130</sup> The G.D.R. also made a reservation, expressly authorized by Article 30, to the compulsory dispute settlement provisions contained in Article

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127. At the 1968 session of the Vienna Conference, Japan, Korea, and the Philippines introduced a proposal that would have determined compatibility by comparing the number of acceptances with the number of objections within a defined period of time after the reservation was communicated. Australia introduced a similar proposal. U.N. Docs. A/CONF.39/C.1/L.133/Rev.1 and L.166 (1968), reprinted in 1968-1969 *Vienna Conference Documents*, *supra* note 9, at 133, 136. The three-country proposal was voted down and the Australian proposal withdrawn. See generally 1968 *Vienna Conference Record*, *supra* note 10, at 109-35.

The International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352, provides in Article 20(2) for collegiate determination:

A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

No reservations have attracted the required number of objections to be considered incompatible or inhibitive. *Multilateral Treaties Deposited*, *supra* note 9, at 112-13.

128. See text accompanying notes 103-110, *supra*.

129. Convention Against Torture, *supra* note 101.

130. *Multilateral Treaties Deposited*, *supra* note 9, at 174-75.

30.<sup>131</sup> When the G.D.R. ratified the Torture Convention on September 9, 1987, it made an additional statement that was not expressly authorized by the Convention:

The German Democratic Republic declares that it will bear its share only of those expenses in accordance with article 17, paragraph 7, and article 18, paragraph 5, of the Convention arising from activities under the competence of the Committee as recognized by the German Democratic Republic.<sup>132</sup>

Articles 17(7) and 18(5) relate to the responsibilities of all States Parties for the expenses of the Committee against Torture. Since the Committee performs a variety of functions under the Convention, the German Democratic Republic's declaration appears to unilaterally redistribute the financial burdens of the parties. The declaration has attracted objections.<sup>133</sup> Those of Denmark, Austria, Canada, Sweden, and Norway are of particular interest.

Denmark stated that the declaration has "no legal basis in the Convention or in international treaty law."<sup>134</sup> Austria stated that the declaration "cannot alter or modify, in any respect, the obligations arising from that Convention for all States Parties thereto."<sup>135</sup> Canada stated that the declaration is "inadmissible under Article 19(c) of the Vienna Convention on the Law of Treaties."<sup>136</sup> Sweden stated that the declaration is "incompatible with the object and purpose of the Convention and therefore is invalid according to Article 19(c) of the Vienna Convention on the Law of Treaties."<sup>137</sup> Norway stated that the declaration is "without legal effect, and cannot in any manner diminish the obligation of a government to contribute to the costs of the Committee in conformity with the provisions of the Convention."<sup>138</sup>

What is significant about the declaration of the German Democratic Republic is that it does more than exclude or modify the legal effect of certain provisions of the Torture Convention in their application to the G.D.R. The declaration, if effective as a reservation, appears to redistribute among all of the parties the financial burdens

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131. *Id.*

132. *Id.*

133. The texts of the objections have been communicated by the U.N. Secretary-General as depositary of the Torture Convention. Those received in 1988 will appear in *Multilateral Treaties Deposited with the Secretary-General, Status as of 31 December 1988*, U.N. Doc. ST/LEG/SER.E/7 (1989) (forthcoming).

134. Objection of Denmark received by the U.N. Secretary-General on Sept. 29, 1988.

135. Objection of Austria received by the U.N. Secretary-General on Sept. 29, 1988.

136. Objection of Canada received by the U.N. Secretary-General on Oct. 5, 1988.

137. Objection of Sweden received by the U.N. Secretary-General on Sept. 28, 1988.

138. Objection of Norway received by the U.N. Secretary-General on Sept. 29, 1988.



imposed by the Convention. It should be apparent that such a reservation is incompatible with the object and purpose of a Convention that creates shared central organs with obligations imposed on all parties to finance them. If the financial burdens are to be redistributed, that should be done by an amendment of the Convention, not through a reservation. One may hope that the German Democratic Republic will decide to withdraw its declaration or will interpret it to apply only to activities of the Committee against Torture that are *ultra vires* as a consequence of the G.D.R.'s permitted reservation to Article 20.<sup>139</sup> Otherwise, this case may test the limits of the diplomatic process to deal with impermissible reservations.<sup>140</sup>

Courts may in the future be positioned to rule upon the compatibility of a challenged reservation with the object and purpose of a treaty. The European Court of Human Rights in its judgment in the *Belilos Case* did not find it necessary to apply an object and purpose test, because the European Convention on Human Rights contained a specific article regarding reservations. Nevertheless, Judge J. De Meyer's concurring opinion, packing enough ideas into three paragraphs to create an agenda for litigation in years to come, cut to the core of the compatibility issue:

The object and purpose of the European Convention on Human Rights is not to create, but to recognise, rights which must be respected and protected even in the absence of any instrument of positive law.

It is difficult to see how reservations can be accepted in respect of provisions recognising rights of this kind. It may even be thought that such reservations, and the provisions permitting them, are incompatible with the *jus cogens* and therefore null and void, unless they relate only to arrangements for implementation, without impairing the actual substance of the rights in question.

This is the only spirit in which Article 64 of the Convention should be interpreted and applied; at most, that Article may allow a State to give itself, as a purely temporary measure, "at the time of" the signature or ratification of the Convention, a brief space in which to bring into line any laws "then in force in its territory" which do not yet sufficiently respect and protect the fundamental rights recognised in the Convention.<sup>141</sup>

Is the compatibility of a reservation with the object and purpose of the treaty an appropriate subject for judicial determination? Some

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139. The United Kingdom, at the time it deposited its instrument of ratification of the Torture Convention with the U.N. Secretary-General on Dec. 9, 1988, made a declaration that appears to interpret the G.D.R. declaration in this manner, and for that reason the U.K. did not object to it. The U.K. reserved the right to object in the future.

140. For further discussion, see *infra* text accompanying note 165.

141. 132 Eur. Ct. H.R. (ser.A); 10 Eur. Human Rights Rep. 493 (provisional translation).

would argue that the parties are the masters of their treaties.<sup>142</sup> But, should dispute settlement clauses in treaties be read to exclude examination of the validity of reservations? Probably not. The European Court of Human Rights set an important precedent in the *Belilos Case* by ruling upon the validity of the Swiss reservation.

#### RESERVATIONS TO MULTILATERAL TREATIES: THE EFFECTS OF ACCEPTANCES AND OBJECTIONS

Most writers who have addressed the subject of reservations to treaties have centered their attention on the process of acceptance and objection to reservations to multilateral treaties and the legal effects of objections. When Professor Bishop delivered his Hague lectures, this was a subject of lively controversy. The basic issue was whether concepts articulated by the International Court of Justice in its 1951 advisory opinion in *Reservations to the Convention on Genocide*<sup>143</sup> should be applied to multilateral treaties generally.

A basic concern in human rights treaties is to gain the widest possible participation while insuring the integrity of the treaty. If a State can become a party to a multilateral treaty with reservations that "gut" its obligations with the acceptance of some States and over the objections of other parties, the uniformity of obligations under the treaty and the force of its obligations may be weakened. On the other hand, if one or a few States, by objecting to a reservation that does not significantly undercut the obligations imposed by the treaty, can prevent a State from becoming a contracting party, the goal of wide participation can be frustrated.

The International Court of Justice in its *Genocide Convention* opinion articulated a standard for appraising whether a reservation is permitted or prohibited when a treaty is silent with respect to reservations. That test, discussed earlier, is whether the reservation is compatible with the object and purpose of the treaty.

Recognizing that there might be differences of view among States on the application of that standard to various reservations to the Genocide Convention, and that there was no impartial body constituted under the treaty to pass on the question, the Court articulated a set of rules that essentially treat relationships under a multilateral treaty to which reservations are made as a matrix of bilateral relationships. The

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142. See Summary Records of the Fourteenth Session, [1962] 1 Y.B. INT'L L. COMM'N 142-43 (comments of Manfred Lachs and Roberto Ago). See also Imbert, *supra* note 108.

143. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Opinion, May 28, 1951).

Court, by a vote of seven to five, advised the United Nations General Assembly:

(a) that if a party to the [Genocide] Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it 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 [Genocide] Convention, it can in fact consider that the reserving State is a party to the Convention.<sup>144</sup>

A number of prominent Western European scholars were of the view that the rules set forth in the *Genocide Convention* advisory opinion should be limited to the special circumstances of that treaty which combined what might be described as a "pledge to the goodness of motherhood" with potentially significant obligations to be enforced through the dispute settlement clause to which a number of States, especially East European States, had made reservations.

Sir Hersch Lauterpacht in his 1953 report as Rapporteur on the Law of Treaties for the International Law Commission proposed unanimity of acceptance as the basic rule: "A signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by a reservation or reservations not agreed to by all other parties to the treaty."<sup>145</sup>

When Professor Bishop delivered his Hague lectures in 1961, the question whether the rules articulated by the World Court in its *Genocide Convention* opinion should be applied to multilateral treaties generally or limited to general multilateral treaties in the human rights field had not yet been resolved within the International Law Commission. After a detailed examination of the history of reservations to multilateral treaties and consideration of the values of treaty integrity and of wide participation, Professor Bishop urged that the *Genocide Convention* concepts be applied to multilateral treaties generally: "Unless the parties to the treaty have included in it a provision that all must accept reservations before they are effective, there is no adequate reason to give each party a 'veto' over participation in a treaty by another State with reservations."<sup>146</sup>

The following year, in 1962, Sir Humphrey Waldock, as Rapporteur on the Law of Treaties for the International Law Commission, proposed that the rules articulated by the International Court of Jus-

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144. *Id.* at 29-30.

145. *Law of Treaties*, [1953] 2 Y.B. INT'L L. COMM'N 90, 91, 123, U.N. Doc. A/CN.4/63 (Draft Art. 9).

146. Bishop, *supra* note 1, at 338.

tice in its *Genocide Convention* advisory opinion be applied, with several defined exceptions, to multilateral treaties generally.<sup>147</sup> His proposals with minor modifications were accepted by the International Law Commission<sup>148</sup> and later by the Vienna Conference on the Law of Treaties.<sup>149</sup> They are embodied in Articles 20 and 21 of the Vienna Convention on the Law of Treaties.

The "Genocide Opinion" rules are stated as residual rules and three other rules take precedence over them.

First, the treaty can set forth its own rules. Article 20(1) states: "A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides."<sup>150</sup> Second, Article 20(2) states a special rule for treaties negotiated by a limited number of States:

When it appears from the limited number of negotiating States and the object and purpose of the treaty that the application of the treaty *in its entirety* between *all* the parties is an *essential condition* of the consent of each State to be bound by the Treaty, a reservation requires acceptance by all parties.<sup>151</sup>

That is, an objection by one party to a reservation to such a treaty, accompanied with a statement that it opposes the entry into force of the treaty with respect to the reserving State, prevents the reserving State from becoming a party to the treaty with respect to any State.

Third, to ensure the integrity of treaties constituting international organizations, Article 20(3) provides: "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."<sup>152</sup> A reservation to a treaty adopted within an international organization requires the acceptance of the competent organ of the organization if that is required by a relevant rule of the

147. See Sir Humphrey Waldock, *First Report on the Law of Treaties*, [1962] 2 Y.B. INT'L L. COMM'N 27, 60-68, U.N. Doc. A/CN.4/144 (especially draft Art. 18(4)(b)(ii)).

148. See 1962 I.L.C. Report, *supra* note 24, at 175-82; 1966 I.L.C. Report, *supra* note 23, at 22-29.

149. See generally Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 509-14 (1970).

150. Vienna Convention, *supra* note 9, at Art. 20(1).

151. Vienna Convention, *supra* note 9, at Art. 20(2) (emphasis added).

152. Vienna Convention, *supra* note 9, at Art. 20(3).

The Union of Soviet Socialist Republics, in a note of Nov. 4, 1953, to the Director-General of the International Labour Organisation, accepted the obligations of the I.L.O.'s Constitution with a provision that reference of a dispute under Article 37 of the Constitution to the International Court of Justice would require consent of the parties to the dispute in the individual case. The I.L.O. Director-General treated the Soviet Union's acceptance as "incomplete." Subsequently, the Soviet Union in an instrument of April 24, 1954, accepted the obligations of the I.L.O. Constitution without the earlier reservation. 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 213-14 (1968).

organization.<sup>153</sup>

In all other cases that do not fall under any of the preceding three rules, and unless the treaty otherwise provides,<sup>154</sup> the following system stated in Article 20(4) is applicable:

- (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
- (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
- (c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.<sup>155</sup>

The Vienna Convention contemplates that there may be objections to reservations, pursuant to Article 20(4), even when the reservation is compatible with the object and purpose of the treaty. That is, objections can be made to a reservation on policy or legal grounds other than its incompatibility with the object and purpose of the treaty. Indeed, an objecting State is normally not required to give a reason for its objection. In this respect the Vienna Convention differs from the words of the World Court's opinion in the *Genocide Convention* case.<sup>156</sup> Multilateral treaties concluded under the auspices of the United Nations and other organizations of world-wide scope where wide participation is desired will normally be categorized under this fourth paragraph of Article 20.

Difficulties can potentially arise in determining whether paragraph

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153. Art. 5 of the Vienna Convention on the Law of Treaties, *supra* note 9, provides: "The present Convention applies . . . to any treaty adopted within an international organization without prejudice to the relevant rules of the organization." The International Labour Organisation has a "no reservation" rule applicable to its conventions. See *supra* note 97 and accompanying text. See also Art. 101(1) of the International Health Regulations, *quoted infra* note 154.

154. See Art. 20(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, *quoted supra* note 127. Art. 101(1) of the International Health Regulations, adopted by the World Health Assembly of the World Health Organization, Boston, July 25, 1969, 21 U.S.T. 3003, T.I.A.S. 7026, 764 U.N.T.S. 3, requires that reservations to the regulations be accepted by the World Health Assembly:

If any State makes a reservation to these Regulations, such reservation shall not be valid unless it is accepted by the World Health Assembly, and these Regulations shall not enter into force with respect to that State until such reservation has been accepted by the Assembly or, if the Assembly objects to it on the ground that it substantially detracts from the character and purpose of these Regulations, until it has been withdrawn.

Art. 107(1) of the former International Sanitary Regulations, adopted by the World Health Assembly, Geneva, May 25, 1951, 7 U.S.T. 2255, T.I.A.S. 3625, 175 U.N.T.S. 215, is identical.

155. Vienna Convention, *supra* note 9, at Art. 20(4). Acquiescence can be treated as acceptance. See *supra* text accompanying notes 91-93.

156. See 1968 *Vienna Conference Record*, *supra* note 10, at 133, (answer given by Sir Humphrey Waldock, expert consultant to the Vienna Conference, to a question put by the Canadian representative).

2 or paragraph 4 of Article 20 applies to a treaty negotiated outside the United Nations or other body of world-wide scope and that is silent about reservations. "Limited number" is not a precise term. Further, what inferences and presumptions are appropriate if the treaty does not say whether it is intended to be applied in its entirety? If the treaty meets both the "limited number of negotiating States" test and the "entirety" test, then the reservation requires acceptance, at least through acquiescence, of all parties. If the treaty meets one test, but not the other, then paragraph 4 of Article 20 applies.

Article 21 states the legal effects of reservations that are formulated in accordance with the rules of Article 19, are accepted in accordance with the rules of Article 20, and meet the procedural requirements of Article 23:

*Article 21*

*Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20, and 23:

(a) modifies for the reserving state in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies these provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.<sup>157</sup>

The rule articulated in the last paragraph of Article 21 was probably not customary law at the time of the Vienna Conference on the Law of Treaties. Indeed, Article 21(3) reversed the presumption stated in the International Law Commission's draft.<sup>158</sup> All of the rules stated in Article 21 appear to be customary rules today.

Normally an objection has the effect stated by the objecting State in the bilateral relations of the reserving and objecting States. If the objecting State does not consider itself in treaty relations with the reserving State and clearly in writing says so, that ends the matter. Examples are the objections of the United Kingdom to reservations made by Syria and Tunisia to the dispute settlement provisions of the Vienna Convention on the Law of Treaties. The United Kingdom rejected

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157. Vienna Convention, *supra* note 9, Art. 21.

158. See 1966 *I.L.C. Report*, *supra* note 23, at 28 (Art. 19 in the I.L.C.'s Draft Articles on the Law of Treaties).

contractual relations with the two States under the Vienna Convention.<sup>159</sup> An exception is where the reservation falls within a category of reservations expressly permitted by the treaty, in which case no valid objection can be made to it.

In the absence of a statement from the objecting State that it does not consider itself in treaty relations with the reserving State, the objection only prevents the provisions of the treaty to which the reservation applies from binding the two States in their relations with each other. This rule, stated in Article 21(3) of the Vienna Convention, was applied as customary law by the Court of Arbitration in the *United Kingdom/France Continental Shelf* case, decided in 1977.<sup>160</sup>

The United Kingdom had objected to French reservations to Article 6 of the Geneva Convention on the Continental Shelf, but had not stated the effect of its objection. The Court held that France and the United Kingdom were in treaty relations under the Shelf Convention. It further held that the combination of the French reservations to Article 6 and the United Kingdom objection to those reservations resulted in part, not all, of Article 6 being excluded from treaty relations between the two States:

Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.<sup>161</sup>

Derek Bowett has commented on a difficulty that can arise in applying the rule in paragraph 3 of Article 21:

The practical difficulty may be that of determining precisely what part of the treaty is affected by the reservation and must therefore be omitted from the agreement between the two Parties. It may be a whole article, or a sub-paragraph of an article, or merely a phrase or word within the sub-paragraph. There can be no rule to determine this, other than the rule that by normal methods of interpretation and construction one must determine which are the "provisions," the words, to which the reservation relates.<sup>162</sup>

Sometimes the objecting State does not want to reject contractual

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159. *Multilateral Treaties Deposited*, *supra* note 9, at 773.

160. *Delimitation of the Continental Shelf* (United Kingdom v. France), 54 I.L.R. 6, 18 I.L.M. 397 (Ad Hoc Court of Arbitration, June 30, 1977).

161. *Id.* at para. 61.

162. Bowett, *supra* note 39, at 86.

relations entirely with the reserving State, but sees the reservation as having a broader impact on relations under the treaty than the reservation purports to have. The objecting State may state in its objection instrument that more of the treaty does not apply bilaterally between the two States than only the article (or parts of the article) to which a reservation was made while at the same time allowing the remainder of the treaty to bind the two States bilaterally. That is what Sweden did when it objected to reservations by Tunisia to Article 66(a) and by Syria to the Annex (dispute settlement provisions) in the Vienna Convention on the Law of Treaties. Sweden rejected treaty relations with the two States under all of the substantive provisions of Part V of the Convention that were excluded from the Convention's compulsory dispute settlement procedures by the Syrian and Tunisian reservations.<sup>163</sup> The actions of Sweden should be seen as consistent with Article 21(3) of the Vienna Convention.<sup>164</sup> The application of the phrase "extent of the reservation" in Article 21(3) is not solely to be determined by the reserving State but must take into account the action of the objecting State.

The concept of a multilateral treaty as a matrix of bilateral relations, embodied in Articles 20(4) and 21 of the Vienna Convention, is inappropriate to some treaty provisions, such as those relating to the composition or financing of shared central institutions. It may not be possible to modify the provision to which the reservation relates in accordance with Article 21(1) in the relations of the reserving and accepting States, to not apply the provision in accordance with Article 21(3) in the relations of the reserving and objecting States, and at the same time to apply the provision in accordance with Article 21(2) in the relations among the other parties *inter se*. What is the solution in such a case? It is to recognize that reservations to such treaty provisions are incompatible with the object and purpose of the treaty under the rule stated in Article 19(c) and are inadmissible with respect to all parties. The declaration of the German Democratic Republic with respect to Articles 17(7) and 18(5) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, discussed earlier,<sup>165</sup> appears to be an example of such a reservation

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163. *Multilateral Treaties Deposited*, *supra* note 9, at 773. See also *Id.* (objections of New Zealand to the Syrian and Tunisian reservations). The United States has indicated that, if and when it ratifies the Vienna Convention, it will repeat objections similar to those of Sweden to the Syrian and Tunisian reservations. *Id.* at 774.

164. See generally Sztucki, *Some Questions Arising from Reservations to Vienna Convention on the Law of Treaties*, 1977 GER. Y.B. INT'L L. 277. See also 1984 A.S.I.L. Panel, *supra* note 13, at 283,284-86 (an interesting exchange among Maria Frankowska, Richard D. Kearney, and Sir Ian Sinclair).

165. See *supra* notes 129-140 and accompanying text.



that cannot lawfully be made.

### THE TIME DIMENSION

When does a State become a party to a multilateral treaty which it ratifies with a reservation? Does it become bound at the time it deposits its instrument of ratification or is there a "waiting period" while other States consider whether or not to object to the reservation? The particular treaty can, of course, address the issue.

Under Article 20 of the Vienna Convention on the Law of Treaties, if the reservation is expressly authorized by the treaty, there is no requirement for subsequent acceptance by other contracting States and the ratification is effective upon deposit.<sup>166</sup> On the other hand, if the reservation under the rules of the Vienna Convention requires acceptance, the reserving State is not constituted as a party until its reservation has been accepted.<sup>167</sup> If a State makes a reservation to a general multilateral treaty that is neither expressly authorized nor prohibited by the treaty, it is not constituted as a party until the reservation is accepted by at least one other contracting State.<sup>168</sup> If no State expressly accepts the reservation, the State may not become constituted as a party until a year has passed and the reservation is accepted through acquiescence.<sup>169</sup>

The Inter-American Court of Human Rights, in its 1982 Advisory Opinion on *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*<sup>170</sup> wrestled with the application of these rules to reservations to the American Convention on Human Rights.<sup>171</sup> The Court was persuaded that ratifications of the American Convention should become effective as early as possible. Consistent with achievement of this result, the Court in a unanimous opinion concluded that reservations to the American Convention that are compatible with the object and purpose of that treaty do not require acceptance by any other States (either expressly or through acquiescence). The Court reasoned that the concept of a multilateral treaty as a matrix of bilateral relations, embodied in Article 20(4) of

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166. Vienna Convention, *supra* note 9, at Art. 20(1).

167. *Id.* at Art. 20(2)-(4).

168. *Id.* at Art. 20(4). See *supra* text accompanying notes 155-156.

169. *Id.* at Art. 20(5). See *supra* text accompanying notes 91-93.

170. *The Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion No. OC-2/82 (Sept. 24, 1982), Ser. A, No. 2, reprinted in 22 I.L.M. 37 (1983) and in 3 HUMAN RIGHTS L.J. 153 (1982).

171. American Convention on Human Rights, Nov. 22, 1969, OAS T.S. No. 36, at 1, OAS Off. Rec. OEA/Ser. L/V/II.23 doc.21, rev.6, reprinted in 9 I.L.M. 673 (1970)(entered into force, July 18, 1978).

the Vienna Convention on the Law of Treaties, is not appropriate for international human rights conventions accompanied with judicial institutions. The Court advised that instruments of ratification or accession that include reservations, all of which are compatible with the object and purpose of the American Convention on Human Rights, are effective upon deposit.

### RESERVATIONS TO BILATERAL TREATIES

Professor Bishop, speaking about bilateral treaties, said that a reservation or amendment proposed by one party must be accepted by the other or there would be no treaty concluded.<sup>172</sup>

The International Law Commission, in a comment on its final draft articles on reservations, stated:

A reservation to a bilateral treaty presents no problems because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement — either adopting or rejecting the reservation — the treaty will be concluded; if not, it will fall to the ground.<sup>173</sup>

The reservations section of the draft articles on the law of treaties in the final version prepared by the International Law Commission was entitled "Reservations to Multilateral Treaties."<sup>174</sup> During the Vienna Conference, Hungary proposed that the words "to Multilateral Treaties" be deleted from the heading. This proposal was adopted by the Plenary Session's Drafting Committee on April 29, 1969.<sup>175</sup> The heading to the section containing Articles 19-23 is now simply entitled "RESERVATIONS." Neither the word "multilateral" nor the word "bilateral" appears anywhere in Articles 19-23, nor does either term appear in relevant definitions in Article 2.

Do Articles 19-23 of the Vienna Convention on the Law of Treaties apply to bilateral treaties? The President of the Vienna Conference during the last detailed consideration of the reservation articles in the Plenary Session, on April 30, 1969, said that "the procedures laid down in the articles on reservations that the Conference had considered were not applicable to bilateral treaties."<sup>176</sup>

The authority for the Conference President's statement is unclear. The Drafting Committee had not been unanimous on whether the res-

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172. Bishop, *supra* note 1, at 267.

173. 1966 *I.L.C. Report*, *supra* note 23, at 23.

174. *Id.* at 22.

175. 1969 *Vienna Conference Record*, *supra* note 10, at 28.

176. *Id.* at 37.

ervations articles should or should not apply to bilateral treaties.<sup>177</sup> The President of the Conference appears to have labored under the belief that it is logically impossible to make a "reservation" to a bilateral treaty. As a law student, he said, he had been taught that such an idea was a contradiction in terms, for when one party to such a treaty proposed a change, that constituted a new proposal, not a reservation.<sup>178</sup> The Chairman of the Drafting Committee said that "some members of the Drafting Committee had thought that the practice of certain States might convey the impression that reservations could be made to bilateral treaties."<sup>179</sup> This seems like an overly hesitant statement when one looks at the use of treaty amendments and of reservations (which clearly performed different functions) in the ratification process of the Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal.<sup>180</sup> Other examples of reservations to bilateral treaties could be cited.<sup>181</sup>

One may question the weight that should be given to the above-mentioned statements of the President of the Conference and the Chairman of the Drafting Committee. One may even wonder whether they can be relied upon at all in interpreting Articles 12-23 of the Vienna Convention. The articles of the Vienna Convention dealing with interpretation of treaties treat the examination of such statements as "supplementary means" of interpretation. Article 32 states:

*Article 32*

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 [entitled "*General rule of interpretation*"], or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.<sup>182</sup>

The text of the Vienna Convention's provisions on reservations

177. *Id.*

178. *Id.*

179. *Id.*

180. See *supra* notes 70-84 and accompanying text.

181. See, e.g., the exchange of notes, Dec. 23, 1986, between the United Kingdom and the United States concerning the application to Hong Kong of the U.K.-U.S. Supplementary Extradition Treaty, signed June 25, 1985. 1988 Gr. Brit. T.S. No. 6 (Cm 294) at 6-7. See also Treaty Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, United States-Canada, 1 U.S.T. 694, 699, T.I.A.S. No. 2130 at 7 (U.S. reservation). The United States reservation was the subject of litigation in *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), *vacated*, 355 U.S. 64 (1957). For Bishop's comments, see Bishop, *supra* note 1, at 317-22.

182. Vienna Convention, *supra* note 9, at Art. 32.

makes no distinction between bilateral and multilateral treaties, so the meaning that one would expect to result from applying the general rule of interpretation, stated in Article 31, is that the reservation articles apply to both multilateral and bilateral treaties. A cursory examination of the *travaux préparatoires* does not confirm that, but actually leaves the matter ambiguous given the statement of the President of the Vienna Conference. Further examination of the *travaux* does not resolve the matter but instead suggests that action was taken at the Conference, without strenuous objection, but with differing views on whether there would be any impact on bilateral treaties.

The U.S. Executive Branch, in testimony before the Senate, has cited Article 2(1)(d) of the Vienna Convention as stating the correct criterion for determining whether a particular statement is a reservation to a bilateral treaty. The Assistant Legal Adviser for Treaty Affairs cited Article 2(1)(d) in response to a question about whether Panama's statement of "understandings" in ratification instruments for the bilateral Panama Canal treaties was a "counter-reservation," which the Senate should have reviewed.<sup>183</sup>

The rules set forth in Articles 19-23 of the Vienna Convention on the Law of Treaties can be applied to bilateral treaties without absurd or unreasonable results. Legal advisers to foreign offices would be well advised to conduct themselves on the assumption that the definition of "reservation" in Article 2(1)(d) and the rules in Articles 19-23 apply to reservations to bilateral treaties. A starting point is Vienna Convention Article 20(2), which states:

When it appears from the limited number of negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.<sup>184</sup>

Since there are only two parties to a bilateral treaty, it should be obvious that the treaty is intended to be applied in its entirety between them. Thus, any reservation requires acceptance by the other party.

Paragraph 5 of Article 20, which applies to reservations under paragraph 2, states:

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

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183. See *supra* note 84.

184. Vienna Convention, *supra* note 9, at Art. 20(2).

later.<sup>185</sup>

In accordance with the quoted rule, acquiescence amounts to acceptance. This is a potentially serious matter, and there is nothing in the texts of Articles 19-23 that in any way suggests that paragraph 5 of Article 20 is not applicable to bilateral treaties. Foreign offices must be vigilant in reviewing and responding to reservations made to bilateral treaties. This should be simple where treaties state that they are only to enter into force after the exchange of ratification instruments. States should follow the practice of formally and promptly responding to diplomatic notes concerning reservations to agreements that are subject to acceptance or approval as well as those for which consent to be bound is expressed by ratification.

Problems in applying the other provisions in Articles 19-23 of the Vienna Convention to reservations to bilateral treaties should be readily manageable. For example, the requirement in Article 23 that reservations, and objections to reservations, be in writing is easily fulfilled.

#### CONCLUSION

The time that has passed since Professor Bishop delivered his Hague lectures in 1961 will look long or short depending on one's age and perspective on life. During that period the law concerning treaty reservations has stabilized. The topic is not one of lively debate as it once was. Calm has been introduced by the Vienna Convention on the Law of Treaties negotiated two decades ago. However, the Vienna Convention — perhaps the most successful international effort at codification ever undertaken — has not frozen the law. Rather, the rules in the Convention structure its future development.

It is appropriate in this volume dedicated to the memory of my friend, Bill Bishop, to close with a statement he made near the end of his Hague lectures that gives perspective on the matters discussed in this article:

When we try to evaluate the institution of reservations as a part of the treaty-making process, we must agree that they can serve a very useful purpose despite the complications and annoyances they introduce. . . . Much can be said for the mechanism of reservations as a means to get partial agreement where total agreement proves impractical or impossible, and partial agreement seems worth while.<sup>186</sup>

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185. Vienna Convention, *supra* note 9, at Art. 20(5).

186. Bishop, *supra* note 1, at 336.