



**RESERVATIONS TO HUMAN RIGHTS TREATIES AND THEIR EFFECT ON HUMAN
RIGHTS REGIMES**

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ABSTRACT

This thesis analyzes the phenomenon of reservations to human rights treaties. The main aim is to understand the effect that reservations have on human rights regimes. The thesis focuses on the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights. The aim is achieved through comparative examination of reservations to these human rights treaties, case law of the competent courts and comments of the UN Human Rights Committee. The thesis shows that reservations can be either beneficial or detrimental for human rights regimes depending on the circumstances. The final chapter draws this border line and gives advices on how to make reservations that would be advantageous for human rights regimes.

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INTRODUCTION

Reservations to human rights treaties raise controversies in international law. States when signing, ratifying, accepting, approving or acceding to a treaty can make reservations, interpretative declarations or understandings. Reservation is a “unilateral statement, however phrased or named [...] whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State,”¹ while when the state expresses its understanding of the provision, it would rather be an interpretative declaration or an understanding of the state.² This thesis aims to analyze reservations to the treaties. Secondly, the work focuses on human rights treaties that establish special legal regime(s) of human rights protection and their nature is different from general multilateral treaties, which establish mutual obligations of the parties. Thus, it is still questionable what legal regime should be used for the reservations to human rights treaties and there is no uniform opinion about the effect of such reservations.

This legal field has been already researched by scholars. For instance, there is a compilation of research on the correlation between human rights treaties and the Vienna Convention regime.³ Another scholar Liesbeth Lijnzaad devoted her research to reservations to UN - Human Rights treaties.⁴ These works made a sufficient contribution to the development of the special regime of reservations to human rights treaties; however, the question of the effect of these reservations still remains debatable.

¹ Vienna Convention on the Law of Treaties, May 23, 1969. art. 2.1(d).

² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994),” November 2, 1994., para.3

³ Ineta Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony of Reconciliation* (Martinus Nijhoff, 2005), <http://lup.lub.lu.se/record/741411>.

⁴ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, vol. 38 (Martinus Nijhoff Publishers, 1995).

The thesis analyzes the effect of reservations to human rights treaties on human rights regimes. It argues that apart from the detrimental effect on human rights regimes, reservations might also be useful. In order to substantiate this argument the author analyzes the criteria of permissibility of reservations, the reasons why States make reservations and the effect of reservations on the obligations of States. Three treaties and therefore three jurisdictions with different reservations' regime are compared in this thesis: the International Covenant on Civil and Political Rights,⁵ the European Convention on Human Rights⁶ and the American Convention on Human Rights.⁷ The thesis contains comprehensive analysis of the provisions of the treaties and the reservations made by States Parties, comments made by the UN Human Rights Committee and positions of competent courts. The thesis has limited scope and does not analyze neither procedural issues nor the competences of the European Court of Human Rights, the American Court of Human Rights and the UN Human Rights Committee regarding the reservations to relevant treaties.

The first chapter talks about the validity of the reservations under these treaties. The second chapter focuses on the effect of the specific reservations to these treaties on human rights regimes using examples of reservations to the provisions establishing right to liberty and right to fair trial. The final chapter talks about the effect of such reservations on the human rights regimes and proposes to divide the reservations in two categories: those reservations that are necessary for the securement of the human rights regime and those that are detrimental to this regime. It also presents recommendations on how to improve regulations on reservations in order to make them beneficial for the human rights regime(s).

⁵ International Covenant on Civil and Political Rights, December 16, 1966.

⁶ European Convention on Human Rights, November 4, 1950.

⁷ American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32), November 22, 1969.

CHAPTER 1: VALIDITY OF RESERVATIONS TO HUMAN RIGHTS TREATIES

The general reservations' regime is regulated by the Vienna Convention, but a treaty can also contain provisions on the regulation of the reservations to it. The International Covenant on Civil and Political Rights (hereinafter the ICCPR) does not have any provision regulating reservation to the Covenant, while the European Convention on Human Rights (hereinafter the ECHR) allows only certain types of reservations.⁸ At the same time the American Convention on Human Rights (hereinafter the ACHR) can be "...subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties".⁹ However, the issue on how to establish validity of reservations to human rights treaties still remains controversial. Therefore, this chapter aims to address the issues of whether there are any general criteria of the permissibility of reservations to human rights treaties and whether the Vienna Convention is generally applicable in case of human rights treaties. It also focuses on the mechanism of the object and purpose of the treaty test and the special regime of the reservations under the ECHR. These issues will help to understand which reservations to the human rights treaties are permissible and how to deal with the impermissible reservations. This knowledge is necessary in order to analyze specific reservations discussed in the second Chapter.

1.1. Requirements for permissibility of reservations

First of all, human rights treaties should be distinguished from other multilateral treaties, because human rights treaties establish the obligations of the states before their citizens, not before other states as other multilateral treaties do. The European Commission of Human Rights in its decision in *Austria v. Italy* pointed out the different character of the obligations undertaken by the States Parties to the ECHR, the main purpose of which is "...to protect the

⁸ European Convention on Human Rights, November 4, 1950, art. 57

⁹ American Convention on Human Rights 'Pact of San Jose, Costa Rica' (B-32). November 22, 1969, art.75

fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.”¹⁰ Moreover, it stated that:

“...the purpose of the High Contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to [...] establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law.”¹¹

The Human Rights Committee in its General Comment № 24 says that “Such treaties, and the Covenant [ICCPR] specifically, are not a web of inter-State exchanges of mutual obligations.”¹² Therefore, a State Party to human rights treaties has duties before its citizens on its territory, while before the other States Parties “it owes to fulfil its promise to implement this right.”¹³

There is a conflict in the nature of the human rights treaties itself. The law on treaties has a different nature from international human rights law: while law of the treaties is based on the *lex scripta* or on the agreement of the parties, international human rights law is based on the idea of inherent human rights.¹⁴ At the same time, no special regime for the reservations to human rights treaties is established. The International Law Commission in 2011 during its sixty-third session adopted the Guide to Practice on Reservations to Treaties.¹⁵ Analyzing the

¹⁰ Austria v. Italy. Decision of the Commission as to the Admissibility (European Commission of Human Rights 1961).p.19

¹¹ Ibid.p.18

¹² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”para 17

¹³ Johanna Fournier, “Reservations and the Effective Protection of Human Rights,” *Goettingen J. Int’l L.* 2 (2010): 437., p.446

¹⁴ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties.*, p.399-400

¹⁵ International Law Commission, “Guide to Practice on Reservations to Treaties” (Commission’s report covering the work of the sixty-third session (A/66/10, para. 75)/Yearbook of the International Law Commission, 2011, vol. II, Part Two, 2011).

guidelines it appears that there is “...no provision concerning a special regime applicable only to reservations to human rights treaties”¹⁶ Therefore, art. 19 of the Vienna Convention should be applied. According to this article, a state may formulate a reservation to a treaty when signing, ratifying, accepting, approving or acceding to a treaty 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.¹⁷

When analyzing reservations to the ICCPR it is important to consider General Comment No. 24 of the Human Rights Committee¹⁸ that specifically deals with the issues of reservations to the ICCPR. Apart from the requirement to satisfy the object and purpose test, which is going to be discussed in the next subchapter, reservations should be specific and transparent: “Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto.”¹⁹ Moreover, the Committee pointed out that “it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved.”²⁰ These observations of the Human Rights Committee make the regime of reservations under the ICCPR similar to the regime under the ECHR that which prohibits general reservations.²¹

¹⁶ Nisuke Ando, “Reservation to the ICCPR and the Human Rights Committee: Personal Experience of Its Former Member,” in *Der Staat Im Recht. Festschrift Für Eckart Klein Zum 70. Geburtstag*, Schriften Zum Öffentlichen Recht, ISSN 0582-0200 ; Band 1232 (Berlin: Duncker & Humblot, 2013), 1405. p.981

¹⁷ “Vienna Convention on the Law of Treaties.” May 23, 1969, art.19.

¹⁸ Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”

¹⁹ Ibid. para.19

²⁰ Ibid. para.20

²¹ “European Convention on Human Rights.”, November 4, 1950, art.57

Another additional criteria established by the Committee extremely relevant in terms of accessing the permissibility of the reservations is that after making all the reservations a State should not end up with “a limited number of human rights obligations, and not the Covenant as such.”²² Moreover, “reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law.”²³ Thus, basically a State in order to make permissible reservations should satisfy the following criteria:

- a number of obligations undertaken should not be smaller than a number of reservations made;
- a State should accept not only those guarantees which already exist in the domestic law, but also undertake new obligations;
- reservations should not be contrary to the object and purpose of the treaty.

A different approach regarding reservations is established by the American Convention on Human Rights. According to article 75 of the ACHR “The Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties.”²⁴ This basically means that reservations should satisfy basic requirements enshrined in the Vienna Convention, particularly they should be written and communicated in a proper way. Furthermore, if a reservation is made by a State when signing a treaty it should be confirmed then when expressing its consent to be bound by the treaty.²⁵ In addition, the reservation should comply with the object and purpose test.²⁶

²² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”, para.19

²³ Ibid.

²⁴ American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (B-32). November 22, 1969, art.75

²⁵ Vienna Convention on the Law of Treaties. May 23, 1969, art. 23

²⁶ Ibid. art. 19 (c)

Initially there were two options on how to regulate the regime of reservations under the ACHR: “to allow reservations only in respect of inconsistent national constitutional provisions [...or] delete all reference in the convention to reservations, leaving the power to reserve subject to general international law”²⁷ Article 75 of the ACHR had to be a compromise, while in fact it enforced the second option, because currently reservations under the ACHR are regulated by the general international law.²⁸

The Inter-American Court on Human Rights issued two Advisory Opinions regarding the ACHR: on the effect of reservations on the entry into force of the American Convention on Human Rights²⁹ and on the Restrictions on the Death Penalty.³⁰ It is important to consider the first opinion in this research. Art. 20 of the Vienna Convention basically establishes two regimes for the acceptance of the reservations: art. 20(1) which states that “...reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.”³¹ and art. 20(2), which defines the situations when acceptance of other Parties to the convention is required for the reservation to be valid.³² In the former case the Vienna Convention establishes a 12-month rule, according to which a reservation is valid if by the end of twelve months period no objection was raised.³³ Thus, the moment when the reservation to the ACHR becomes valid is questionable: it is either the moment when it is made or the end of the twelve months period.

²⁷ Susan Marks, “Three Regional Human Rights Treaties and Their Experience of Reservations,” in *Human Rights as General Norms and a State’s Right to Opt Out. Reservations and Objections to Human Rights Conventions*/Christine M. Chinkin; J.P. Gardner, Centenary Series / British Institute of International and Comparative Law. Public International Law, 1997, 54–55.

²⁸ Ibid.

²⁹ The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75). Advisory Opinion (Inter-American Court of Human Rights 1982).

³⁰ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights) (Inter-American Court of Human Rights 1983).

³¹ Vienna Convention on the Law of Treaties. May 23, 1969, art. 20(1)

³² Ibid. art. 20(2)

³³ Ibid. art. 20(5)

The Inter-American Court of Human Rights pointed out that “...the reference in Article 75 to the Vienna Convention makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty”³⁴ Considering the judicial nature of the convention as a humanitarian one the Court concluded that ACHR can be “...governed only by Article 20 (1) of the Vienna Convention and, consequently, does not require acceptance by any other State Party.”³⁵

Consequently, the regime of reservations established by the Vienna Convention is applicable in case of the ICCPR and the ACHR with some differences and clarifications established by the Human Rights Committee and the Inter-American Court of Human Rights. Therefore, for the ICCPR and the ACHR the “object and purpose test” is of crucial importance, while application of the Vienna Convention regime is still dubious in case of the ECHR and is going to be presented subsequently.

1.2. Compliance with the Object and Purpose of the Treaty

Although there is no general agreement on how to decide on permissibility of reservations, the Human Rights Committee in the General Comment № 24 talks about the object and purpose test³⁶ as a mechanism to decide on permissibility of reservations.³⁷ The object and purpose test for the first time was invoked by the International Court of Justice in the

³⁴ The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75). Advisory Opinion (Inter-American Court of Human Rights 1982). para 35

³⁵ Ibid.

³⁶ Vienna Convention on the Law of Treaties. , May 23, 1969, art.19(c)

³⁷ Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”

Genocide case.³⁸ The Court took a flexible approach, deciding that “a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention.”³⁹ Therefore, it follows that the main criteria in determining permissibility of the reservation is the object and purpose of the treaty, but not the acceptance by other parties.

The object and purpose test is highly criticized by the scholars. It was said that it is hard to establish the object and purpose of the treaty and different interpretation of it by the states would lead to confusion.⁴⁰ “It is self-evident as it is opaque.”⁴¹ The critique is credible, but at the same time currently the object and purpose test is probably the only one more or less precise criterion on establishing impermissibility of reservations.

The Human Rights Committee defined the object and purpose of the ICCPR as the creation of “legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.”⁴² According to the opinion of the UN Human Rights Committee, in order to assess compatibility of reservation with the object and purpose of the treaty “the overall effect of a

³⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion (International Court of Justice 1951). May 28, 1951

³⁹ Ibid.p.18

⁴⁰ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties*..p.404

⁴¹ Ibid.

⁴² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).” para.7

group of reservations, as well as the effect of each reservation on the integrity of the Covenant”⁴³ should be taken into consideration.

The issue of the object and purpose of the treaty might seem connected with a notion of non-derogable rights. However, non-derogability is connected with a state of emergency, not with the object and purpose of the treaty.⁴⁴ “At the same time, suspension of some rights may be impermissible, even though they are not listed as derogable, because they are essential for the maintenance of the rule of law and the protection of non-derogable rights.”⁴⁵

Among the reasons for the right to be non-derogable are irrelevance of the suspension of certain rights to the control of the state of national emergency, impossibility of derogation or extreme importance of a certain right for the rule of law (for instance, peremptory norms of international law).⁴⁶ “While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.”⁴⁷

The International Law Commission establishes that reservation is incompatible with the object and purpose of the treaty if “(i) it impairs an essential element, (ii) if it is necessary to the general thrust of the treaty, (iii) if it thereby compromises the *raison d’être* of the

⁴³ Ibid. para. 19

⁴⁴ Jeremy McBride, “Reservations and the Capacity of the States to Implement Human Rights Treaties,” in *Human Rights as General Norms and a State’s Right to Opt Out. Reservations and Objections to Human Rights Conventions*/Christine M. Chinkin; J.P. Gardner, Centenary Series / British Institute of International and Comparative Law. Public International Law (London : B.I.I.C.L, 1997), 163.

⁴⁵ Ibid.

⁴⁶ Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).” para. 10

⁴⁷ Ibid.

treaty.”⁴⁸ The Commission uses the criteria of “...indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it”⁴⁹ to assess compatibility of a reservation with the object and purpose of the treaty. A former member of the Human Rights Committee stated that “the object and purpose of the Covenant is, on the one hand, to clarify legally binding human rights standards which are universally applicable and states parties have agreed to implement in their domestic law. On the other hand, the Covenant sets up an international mechanism to monitor domestic implementation by states parties of the universally applicable human rights standards.”⁵⁰ Thus procedural reservations as to exclude the obligations to implement standards or to deny the committee’s monitoring competence are not permissible and substantial reservations that contradict “customary rules of international human rights law, particularly *jus cogens* norms, are not permitted.”⁵¹ The Human Rights Committee in its General Comment № 24 reiterates its competence to determine compatibility of the specific reservation with the object and purpose of the Covenant and with general international law.⁵²

As for the consequences of the impermissible reservations, there is a severability rule, which was established for the first time by the European Court of Human Rights in *Belilos v Switzerland*.⁵³ The Human Rights Committee summarizes this rule as follows: “...a

⁴⁸ International Law Commission, *Report on the Work of its Fifty-Ninth Session* (7 May to 5 June and 9 July to 10 Aug. 2007), GAOR 62nd Session, Supp. No. 10 (A/62/10), p. 75

⁴⁹ *Ibid.*, p. 65

⁵⁰ Nisuke Ando, “Reservation to the ICCPR and the Human Rights Committee: Personal Experience of Its Former Member.”, p. 979

⁵¹ *Ibid.*

⁵² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”, para 18.

⁵³ *Belilos v. Switzerland*, App. no 10328/83 (European Court of Human Rights April 29, 1988).

reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”⁵⁴ At the same time this approach does not resolve the problem with the reservations that are both incompatible with the object and purpose test and are essential part of the state’s consent. Apparently in this case the state should not be a party to the treaty at all; however, such approach will undermine the idea of the universality of human rights and will probably constitute more danger to the human rights regime than in case if the state will continue to be a party to the treaty with the reservation in force.

Hence, there are different views on the object and purpose of the treaty and the compatibility of the reservation with it should be decided on a case-by-case basis taking into account the overall effect of the group of reservations and the effect of the certain reservation on the *raison d’etre of the treaty*.

1.3. Special reservations’ regime under the European Convention on Human Rights

The reservations’ regime of the European Convention on Human Rights is different from the ones under the Covenant on Civil and Political Rights or the American Convention on Human Rights, because the latter contains the regulation on the reservations. Article 57 of the ECHR does not allow general reservations at all and allows reservations “...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.”⁵⁵ At the same time the State which makes the reservation is required to provide a brief statement of the law concerned.⁵⁶ This makes the

⁵⁴ Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”, para.18

⁵⁵ European Convention on Human Rights. November 4, 1950, art.57(1)

⁵⁶ Ibid. art.57(2)

ECHR different from the ICCPR, because the ECHR establishes a special regime for the⁵⁷ reservations and therefore only those reservations that comply with this criterion are permissible.⁵⁸ Protocol 6 to the Convention prohibits any reservation to it at all.⁵⁹ At the same time the ECHR does not have any provision regulating compatibility of the reservation with the object and purpose of the convention. Thus, the rule of art 57 of the ECHR is being called a significant departure from the general norm of the Vienna Convention - object and purpose of the treaty test.⁶⁰

Apparently art. 57 of the ECHR “intended to permit states to preserve temporarily national laws which at the time of ratification did not conform with the convention”⁶¹ and to provide the states with the time to amend respective provisions in order to bring them into line with the human rights standards enshrined in the Convention.⁶² The European Court on Human Rights decided on a number of cases about the reservations to the Convention. In the *Belilos* the ECtHR adjudged that the reservation is unacceptably general if it is “couched in terms that are too vague or broad for it to be possible to determine exact meaning and scope”⁶³ In *Chorherr* the Court developed its understanding of the requirement to provide the brief statement of law concerned and adjudged that it is not necessary that the substance of laws be fully described, but it has to be “possible for everyone to identify the precise laws concerned

⁵⁷ *Belilos v. Switzerland*, Application adyufi (European Court of Human Rights 1988).

⁵⁸ Vienna Convention on the Law of Treaties. May 23, 1969, art. 19(b)

⁵⁹ “Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty,” April 28, 1983. art. 4

⁶⁰ Susan Marks, “Three Regional Human Rights Treaties and Their Experience of Reservations,” p. 46.

⁶¹ *Ibid.*, p. 36 referring to the Council of Europe, Collected Edition of the “*travaux préparatoires*” of the European Convention on Human Rights, Vol. IV, p. 170-172; *see also* Bourignon “The *Belilos* case: New Light on Reservations to Multilateral treaties” p. 356-360

⁶² Concurring Opinion of Judge De Meyer/*Belilos v. Switzerland*, Application adyufi (European Court of Human Rights 1988).

⁶³ *Belilos v. Switzerland*, App. no 10328/83 (European Court of Human Rights 1988). para 55

and to obtain...information regarding them”⁶⁴ At the same time failure to provide brief statement of the law concerned is enough to invalidate the reservation.⁶⁵

Thus, the reservations’ regime under the ECHR is more precise and narrowly-construed, it does not allow general reservations and requires the States to provide the statements of their domestic law to justify reservation. The reservations’ regime of this type sufficiently decreases the risk of the adoption of reservations that would undermine the human rights regime established by the Convention.

Since the ECHR does not have any reference to the object and purpose test the following question arises: Are the requirements of article 64 of the ECHR and the requirement of compliance with the object and purpose test mutually exclusive or should both of them be satisfied for the reservation to be valid? Unfortunately, this issue has not been reviewed before the Court yet, but scholars view these requirements as complementary, but not mutually exclusive ones.⁶⁶ Moreover, Marks suggested that the compliance of the reservations with the object and purpose test has already been reviewed under the criteria of generality under art. 57 of the Convention and therefore generality criterion de-facto constitutes the test of incompatibility. However, this still keeps open the question of permissibility of the reservations that are not general, but are still contrary to the object and purpose of the treaty.⁶⁷

In the case the reservation is impermissible, the Court should pay attention to the intentions of the State and then make a conclusion according to which of the intentions prevail: intention to

⁶⁴ Susan Marks, “Three Regional Human Rights Treaties and Their Experience of Reservations,” p. 45. referring to the case of *Chorherr c. Autriche*, App.no 13308/87 (European Court of Human Rights August 25, 1993), paras.20-21

⁶⁵ *Ibid.*, 44.

⁶⁶ *Ibid.*, 47.

⁶⁷ *Ibid.*, 47-48.

make a reservation or intention to be bound by the convention.⁶⁸ As already mentioned , the ECtHR in *Belilos* introduced the concept of severability, which means that in case the reservation is declared inadmissible, the state is still bound by the treaty but without the benefit of reservation.⁶⁹

Thus, the ECHR has a special reservations' regime that allows to make reservations only in case if domestic law of the state-party is not in conformity with the provision of the Convention and to provide a brief statement of that law, also reservations of general character are not permitted.⁷⁰ At the same time reservations to the Convention should also satisfy the requirement of compatibility with the object and purpose of the treaty.

Hence, there is no special regime for the reservations to the human rights treaties in the international law and the Vienna Convention regime is applicable. Currently the object and purpose test is used in order to decide on permissibility of reservations and impermissible reservations are severable. The ECHR contains specific reservations' clause, which allows only certain types of reservations.

⁶⁸ Ibid., 50–51.

⁶⁹ *Belilos v. Switzerland*, App no 10328/83, (European Court of Human Rights April 29, 1988), para 60.

⁷⁰ European Convention on Human Rights, November 4, 1950, art. 57(1)

CHAPTER 2: EFFECT OF THE RESERVATIONS ON THE CERTAIN OBLIGATIONS OF THE STATES

This Chapter aims to analyze certain reservations to the ICCPR, the ECHR, the ACHR and their effect on the obligations of the states regarding right to fair trial and right to liberty. Reservations might be divided to the following groups: 1) Reservations that exempt states from the obligations with regard to certain rights; 2) Reservations that do not affect the scope of the obligations of the state; 3) Reservations that change the scope of the obligations of the state.⁷¹ The last category is the most popular and the most problematic at the same time. For the purpose of this analysis it is important to remember that “...while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.”⁷²

For the purpose of analysis in this Chapter it is important to remember that reservations to certain rights are acceptable if they do not affect the core of the right.⁷³ “There is also unlikely to be any problem in meeting the core objective where the reservation seeks to use different means to those prescribed by the treaty so long as they are actually effective.”⁷⁴ Moreover, the Inter-American Court went even further stating that even though reservations to the non-derogable rights are incompatible with the object and purpose of the treaty, the “...reservation

⁷¹ This classification was already proposed in the paper written by Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies,” December 20, 2013.

⁷² Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”, para.8

⁷³ Jeremy McBride, “Reservations and the Capacity of the States to Implement Human Rights Treaties.”,p.172-173

⁷⁴ Ibid. p.173

which restricts only the certain aspect of the non-derogable right without depriving the right as a whole of its basic purpose could be acceptable.”⁷⁵

2.1. Reservations that exempt states from the obligations regarding certain rights

The states use these reservations in case if they do not want to be bound by the obligations with regards to specific rights at all. Such reservations exclude protection of these certain rights within the jurisdiction of the state. States make reservations of this type to the provisions establishing right to public hearing, right not to be punished twice for the same offence and right to appeal. Majority of such reservations are made by the States to the provisions establishing rights to free legal assistance and compensation for miscarriage of justice.

Belize and Bahamas temporarily reserved the right not to guarantee compensation for the wrongful imprisonment. The justification is the following: “the problems of implementation are such that the right not to apply that principle is presently reserved.”⁷⁶ It is important to remember that such reservations are connected with financial capacities of the state and refusal of the states to be bound by such obligations might be motivated not simply by their unwillingness, but rather by their incapacity to provide the protection of the right on the required level. Moreover, McBride argues that “...many of the reservations motivated by financial, infrastructure and technical difficulties will satisfy the criterion of still fulfilling the minimum core of the right.”⁷⁷

⁷⁵ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights) Advisory Opinion OC-3/83 (Inter-American Court of Human Rights September 8, 1983)., para.61

⁷⁶ Reservations of Barbados to art. 14 p. 3(d) of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁷⁷ Jeremy McBride, “Reservations and the Capacity of the States to Implement Human Rights Treaties.”, p.170

However, several States indicated that such reservations are only temporary measure due to some domestic conditions and the states expressed their intent to withdraw these reservations later. For instance, Bangladesh did this regarding the right to compensation for the miscarriage of justice.⁷⁸ “Guyana, Malta and Trinidad and Tobago stated that it is impossible for them to guarantee execution of the right to compensation for the miscarriage of justice now.”⁷⁹ However, such wording also implies possibility to withdraw these reservations in future.

Therefore, opting out for such reservation in case if the state is not able to ensure certain right on its territory should not be understood as an action undermining the object and purpose of the Convention. However, these reservations should not be in force forever, meaning that the reservation should rather provide the state with a time to ensure compliance with the provision than an excuse for permanent non-compliance.

However, this category also comprises the reservations that are made by the state without any financial reasons behind. For instance, the press and the public can be excluded from hearings in Denmark and the state is also not bound by the obligation to guarantee the right to appeal and the right not to be punished twice for the same offence.⁸⁰ “In some cases, Danish legislation is less restrictive than the Covenant [...]; in other cases, Danish legislation is more restrictive than the Covenant...”⁸¹ This reservation in fact was made by the state because the state does not want to change its domestic law. It is dangerous to justify the non-compliance

⁷⁸ Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies.” referring to Reservations of Bangladesh to the art. 14 p. 6 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁷⁹ Ibid. referring to Reservations of Malta, Guyana and Trinidad and Tobago to art.14 p. 6 of the ICCPR/ access: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en

⁸⁰ Reservations of Denmark to the art.14 of the ICCPR/ access:

https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en

⁸¹ Ibid.

with the treaty by the domestic law, because it can reduce the amount of the guarantees to those which already existed in the domestic law of the state.⁸² Moreover, the states cannot invoke their domestic law to justify the failure to comply with the obligation under the treaty.⁸³ However, in the present case Denmark pointed out that the domestic law might provide higher or lower degree of protection, thus, even after making a reservation there is still protection of the minimum core of the right and there are no sufficient reasons to believe that it would be contrary to the object and purpose of the Covenant.

Another right that is subject to number of such reservations is segregations of accused persons from convicted ones and separation of accused/convicted juvenile and accused/convicted adult persons.⁸⁴ For instance, the Netherlands do not want to be bound by such obligations and justify their decision by the fact that the ideas about treatment are changing too often⁸⁵. Sweden reserved the rights not to comply with the obligation to segregate juvenile offenders from adults⁸⁶. Even though these reservations do not extremely affect the right to liberty as a whole, they still undermine the human rights regime established by the Covenant regarding the right to liberty without any sufficient justification.

There is only one reservation of this type under the ACHR⁸⁷ and it is notable that there are no such reservations under the ECHR at all. There might be different reasons for this, which would be discussed in the third Chapter, but in case of the ECHR this phenomenon is caused by the special reservations' clause that in fact precludes existence of this type of reservations.

⁸² Subchapter 1.1 of the Chapter 1 of this thesis referring to the General Comment 24 of the UN Human Rights Committee, para.19

⁸³ Vienna Convention on the Law of Treaties. May 23, 1969, art.27

⁸⁴ International Covenant on Civil and Political Rights. December 16, 1966, art.10 p.2,3

⁸⁵ Reservations of the Netherlands to the art. 10 p. 2 and 3 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁸⁶ Reservations of Sweden to the art. 10 p. 3 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁸⁷ Reservation of Dominica to art. 8.2(e) of the ACHR/ access: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

2.2. Reservations that modify the scope of the rights

This category comprises the reservations that limit application of the rule on the territory of the state, but do not fully suspend it. It is the largest and in fact might be the most problematic category. These reservations can be divided into two categories: 1) those that do not affect the core of the right and in fact do not preclude necessary level of protection of the right within the state; 2) those that generally preclude existing of certain right on the territory of the state, but with some exceptions, where the state allows existence of some guarantees. The first category is acceptable, while the permissibility of the second one is questionable and under certain circumstances such reservations might be contrary to the object and purpose of the treaty.

Substantively these reservations affect the right to the public hearing, right to be tried in presence and right to free legal assistance. With regard to the right to liberty reservations affect obligations to segregate accused persons from convicted persons, or segregate accused/offenders persons from adult accused/offenders.⁸⁸

A number of reservations were made regarding the right to be tried in presence. For instance, Venezuela made reservations to the ICCPR and the ACHR permitting trying *in absentia* persons accused of an offence against the *res publica*.⁸⁹ Australia allows “...accused person who disturbs the orderly conduct of the trial or whose presence would impede the questioning of another accused person, of a witness or of an expert can be excluded from participation in

⁸⁸ Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies.”

⁸⁹ Reservations of Venezuela (Bolivarian Republic of) to the art. 14 p. 3(d) of the ICCPR/ access: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en and reservations of Venezuela to art. 8 p.1 of the ACHR/ access: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

the trial...”⁹⁰ Therefore, the general rule for Venezuela and Australia will be that they do guarantee the right to be tried in presence, however, under exceptional circumstances, like offences against *res publica*, for example, the state is not obliged to guarantee this right and therefore can derogate from it. In this case the core of the right is not affected and thus the reservation is permissible.

Another type of such reservations is when the state does not apply in full certain guarantees. For instance, the governments of Belize and Barbados do not apply the guarantee of free legal assistance in full according to the 3 (d) of article 14 of the ICCPR stating that “the problems of implementation are such that full application cannot be guaranteed at present.”⁹¹ From this reservation follows that the state does provide the guarantee of free legal assistant so far as it is possible now. Therefore, this reservation should be permissible. However, ideally the state should have established the time limit after the expiration of which the guarantee of free legal assistance would be exercised in full.

At the same time, German reservation to the provision establishing right to be tried in presence sufficiently limits this right: “Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing before the court of review”.⁹² This reservation is substantially different from the previous ones. It changes the essence of the obligation transforming it from the obligation of the state to ensure public hearing to the discretion of the court to provide a

⁹⁰ Reservations of Australia to art. 14 p. 3(d) of the ICCPR,
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁹¹ Reservations of Belize and Barbados to art.14 p.3(d) of the ICCPR/access:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁹² Reservations of Germany to art. 14 p.3(d) of the ICCPR/access:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

person with the benefit of public hearing.⁹³ In fact this type of reservations affects the core of the right and might be unacceptable. Another German reservation that denies full guarantee of the right to judicial review in the cases of criminal offences of minor gravity of a decision not imposing imprisonment⁹⁴ is also controversial.

Similar reservation was made by the Barbados to the ACHR. The State explicitly stated that they do not provide any legal assistance in criminal proceedings, except for specific cases, like homicide and rape.⁹⁵ Basically this reservation precludes existence of the right to legal aid provided by the state on the territory of Barbados with two exceptions. This reservation also affects the core of the right and might be problematic in the light of permissibility.

The vast majority of the reservations under the ECHR regarding right to fair trial are about the right to public hearing. The states made reservations that they guarantee right to public hearing with certain exceptions. For instance, Croatia “cannot guarantee the right to a public hearing before the Administrative Court in cases in which it decides on the legality of individual acts of administrative authorities.”⁹⁶ Austria, Estonia, Liechtenstein also partially limit the right to public hearing.⁹⁷ Finland does not provide right to an oral hearing “insofar as

⁹³ Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies.”

⁹⁴ Ibid. referring to the Reservations of Germany to art. 14 p. 5 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

⁹⁵ Reservations of Barbados to art. 8 p.2 (e) of the ACHR/ access:

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

⁹⁶ Reservations of Croatia to art. 6 of the ECHR/ access:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=1&DF=26/03/2014&CL=ENG&VL=1>

⁹⁷ Reservations of Austria, Estonia, Liechtenstein to art.6 of the ECHR/access:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=1&DF=26/03/2014&CL=ENG&VL=1>

the current Finnish laws do not provide such a right.”⁹⁸ However, such reservations provide the protection of the core of the right and thus are permissible.

As to the right to liberty, majority of reservations is related to the obligation to segregate accused and convicted persons and juvenile accused/offenders from adult accused/offenders.⁹⁹ Australia (concerning both para 2 and para 3 of art 10) and New Zealand (concerning para 3) are not bound by these obligations when the mixing of juvenile and adult persons might be beneficial for such persons.¹⁰⁰ A number of states, for instance Denmark, Iceland, Finland and Luxembourg, made reservations which allow them to derogate from the right to segregate accused and convicted persons and juvenile accused/offenders from adult accused/offenders, however they do not provide any reason or justification for such reservation.¹⁰¹ At the same time Trinidad and Tobago and New Zealand made reservations to the same provisions, but justifying it by the lack of prison facilities.¹⁰² The reservations that allow states to derogate from the rule are vague and entitle state’s authorities with the some discretion; however, generally these reservations do not constitute serious threat to the right to liberty and should be permissible.

Most of the reservations to the right to liberty provision under the ECHR are those that are related to the disciplinary measures imposed on soldiers.¹⁰³ These reservations limit the

⁹⁸ Reservations of Finland to the art. 6 of the ECHR/access:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=1&DF=26/03/2014&CL=ENG&VL=1>

⁹⁹ International Covenant on Civil and Political Rights. December 16, 1966, art. 10 p.2,3

¹⁰⁰ Reservations of Australia and New Zealand to art. 10 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

¹⁰¹ Reservations of Denmark, Iceland, Finland to art. 10 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

¹⁰² Reservations of Trinidad and Tobago and New Zealand to art. 10 of the ICCPR/ access:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

¹⁰³ Reservations of Czech Republic, France, Russian Federation, Ukraine, Slovakia to art. 5 of the ECHR/access:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=1&DF=26/03/2014&CL=ENG&VL=1>

obligations of the states to the extent that their national law is not in conformity with the provision.

Hence the reservations that change the scope of the right guaranteed by the state are problematic and their permissibility should be decided on the case-by-case basis by the competent authority. A notion of the “core of the right” might be used as a criterion of the permissibility.

2.3. Reservations that do not change the scope of the obligations of the States

This type of the reservation does not really change the scope of the obligations of the state and does not affect the realization of the guarantee of the right on the territory of the state. Thus this type of reservations is controversial and controversial in a sense that it is questionable whether they are reservations or not.

For instance, Australian made a reservation to the art. 14 of the ICCPR, where specified that compensation for miscarriage of justice may be done by the administrative procedure.¹⁰⁴ Bahrain also made a reservation to the part 7 of the art. 14 of the ICCPR specifying that the person who “has been acquitted by Foreign Courts from offenses of which he is accused or a final judgement has been delivered against him and the said person fulfilled the punishment or 3) the punishment has been abolished by prescription”¹⁰⁵ cannot be a subject to legal proceeding.¹⁰⁶

¹⁰⁴ Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies.” referring to Reservations of Australia to art. 14 of the ICCPR/

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

¹⁰⁵ Reservations of Bahrain to art. 14, p.7 of the ICCPR/

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

¹⁰⁶ Oksana Siruk, “Effect of the Reservations to the Human Rights Treaties on the Positive Obligations of the States/Paper for the Individual v. State Conference/Central European University, Department of Legal Studies.”

Therefore, these reservations do not change the scope of the right guaranteed by the state, but rather rephrase the provision itself adapting it to the national legislation.¹⁰⁷ Human Rights Committee in its General Comment pointed out that “...if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.”¹⁰⁸ Thus, reservations of this type should be better considered interpretative declarations or understandings, because they do not exclude or modify the legal effect of the provision, but rather express the state's interpretation or understanding of the provision.

Hence, reservations can have different effect on the obligations of the State: they can either exclude existence of the certain right on the territory of the state or modify the scope of this right. It is interesting that under the ECHR there are no reservations that simply exclude the legal effect of the provision on the territory of the state, which is connected with the specific reservations' clause. The majority of the reservations are those that modify legal effect of provision. It is important to pay attention to the fact whether the reservation affects the very core of the right and may be impermissible or it rather makes an exemption from the general rule and is compatible with the object and purpose of the treaty test. Among the reservations analyzed in this Chapter majority of the reservations did not affect the very essence of right; however the question of permissibility should be reviewed on the case-by-case basis by the competent authority. There are also several reservations that do not change the scope of the right at all and in fact are interpretative declarations or understandings, but this question goes beyond the present research and such reservations would not be taken into analysis in the next Chapter.

¹⁰⁷ Ibid.

¹⁰⁸ Human Rights Committee, “Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).”para. 3

CHAPTER 3: EFFECT OF RESERVATIONS ON HUMAN RIGHTS REGIMES: NECESSARY OR DETRIMENTAL?

From the first sight it might look like reservations to the human rights treaties undermine the effect of these treaties and therefore have a negative effect on the human rights regimes as such. “There is no doubt that reservations to human rights are incompatible with the fundamental notion of human rights as being of universal application to every single human being. The overall aim is thus to reach a status in which there are no reservations to human rights treaties anymore, not because the reservation s is prohibited, but rather because they are no longer necessary.”¹⁰⁹ Moreover, some treaties, particularly Convention against Discrimination in Education, European Convention on Prevention of Torture and Inhuman or Degrading Treatment or Punishment, prohibit reservation at all. Indeed the absolute compliance of all State Parties with the rights standards established by the treaty would be the better option and will create ideal human rights regime.

However, not all the states are able to comply with all requirements established by the human rights treaties or simply do not want to. In this case they opt for reservations as a tool enabling them to be parties to the treaty, but not to be bound by certain provisions. Thus, some scholars even argue that reservations are important tool to build a human rights regime: “Appropriately formulated reservation could actually promote rather than hinder, the cause of human rights.”¹¹⁰ This chapter aims to discover the boundaries where the reservations are beneficial for the convention and where they become detrimental to the human rights regime.

¹⁰⁹ Fournier, “Reservations and the Effective Protection of Human Rights.”, p.440

¹¹⁰ Jeremy McBride, “Reservations and the Capacity of the States to Implement Human Rights Treaties,” in *Human Rights as General Norms and a State’s Right to Opt Out. Reservations and Objections to Human Rights Conventions*/Christine M. Chinkin; J.P. Gardner, Centenary Series / British Institute of International and Comparative Law. Public International Law (London : B.I.I.C.L, 1997), p. 121-122.

First of all, it is important to understand that the reservations to the human rights treaties are needed. The absence of the possibility to make reservations will lead to the situations where the states either accede to the treaties and do not comply with certain human rights standards, or do not accede to the human rights treaties at all. These both situations will undermine the effect of the treaties and the human rights regime as such. Therefore, reservations' regime should exist, but it must be properly regulated in order to encourage states to work on their human rights standards and overcome previous reservations.¹¹¹

The research shows that the most popular reservations are those that modify the scope of the guarantee within the state and partially change the obligations of the state. Such reservations can also be motivated by the reason that the state cannot ensure full implementation of the right at the moment, so that the state reserves the right to apply the provision to the extend it is able to ensure it now.

The most popular justification for making a reservation is the economic capacities of the states. States need to invest some resources in implementation of the human rights standards established by the international human rights treaties. And this is relevant not only to the rights that impose positive obligations on the states, but also the ones which entail negative obligations. For instance, right to privacy requires financing of the institutions that can monitor the storage of data to ensure this right, or prohibition of torture implies establishment of the institutions that ensure decent detention conditions, etc.¹¹² Moreover, sometimes there is also a need to organize trainings for personnel.¹¹³

Among other obstacles for the implementation of certain provisions should also be mentioned cultural and religious inherent characteristics of the states. Frequently states formulate

¹¹¹ Ibid., p. 123–124.

¹¹² Ibid., p. 128–129.

¹¹³ Ibid., p.129-130.

reservations to the human rights treaties because certain provisions contradict their domestic culture or religion. This might be the case with Muslim countries and gender equality, for example. Some states have features that are so deeply rooted into the society, so that it is almost impossible for them to accept another point of view on this issue. This is, for instance, death penalty in the United States and its famous reservation that allows apply death penalty as a punishment for minors or migration rules in the United Kingdom.¹¹⁴ States also opt for reservations in case the provision in the treaty clashes with the norm of the national constitution.¹¹⁵

While the former case, when the reservation is motivated by some characteristics of the society, might cause a dispute concerning their necessity, the first case, when the reservation is caused by some economic reasons, sounds persuasive. In a situation when the state is not able to implement certain guarantees established by the treaty it does make sense to use the reservation as a tool.

As we already saw on the examples of the reservations to the ICCPR, the ECHR and the ACHR, they do not extremely change the scope of the rights protected within the state. Majority of the reservations are those that modify the scope of the right. It evidences the fact that states do want to be bound by certain obligations, but in case when certain economical, technical conditions or present domestic legislation do not allow to do that they opt out for reservations. In this case reservations become a tool which allows the states to become parties to the treaties.

¹¹⁴ Ibid., p.154-156.

¹¹⁵ Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties," 154–156.

There are of course reservations that simply refer to the domestic law without any explanations or expression of any intend of the state to withdraw that reservation in future. Sometimes states can make such reservations without any referral to the domestic law or any other explanations. Such behavior of the states undermines the idea of the human rights treaties – establishment of the common human rights regime. However, at the same time the states do not make such reservations to the “whole rights”, for instance, the states never make reservations to the whole art. 14 of the ICCPR, while they can make reservation to the obligation to provide free legal assistance. Therefore, by this reservation the whole right to fair trial is not endangered, but only one of its elements. Thus, as far as this reservation does not affect the core of the right and does not preclude existence of the right to fair on the territory of the state, it should not be regarded as contrary to the object and purpose test. However, depending on the nature and quantity such reservation can endanger the existence of the right to fair trial, that is why such reservations are highly undesirable and should be withdrawn in future.

At the same time it might be dangerous to underestimate the total effect of such reservations on the human rights regime. The more states make such reservations – the less this particular guarantee becomes the part of the human rights regime. Hypothetically if the majority of the states will make similar reservation to the provision which establishes legal assistance provided by the country, then right to have free legal assistance will become rather a benefit for the citizens of the specific states, then a part of the common human rights regime. Similarly, attention should also be paid to the quantity and quality of the reservations made by the certain state, because reservations should be rather an exception for the state, than a common practice and the state cannot accede to the treaty with making reservations to all the

provisions that are not yet enshrined in the domestic law. In this case such accession would rather be a declaratory act, than a real contribution to the human rights protection.

Therefore, two groups of the reservations can be distinguished: those that are necessary for the establishment of the human rights regime and those that undermine this regime. Dangerous reservations are basically those that:

- do not provide any explanations or simply refer to the domestic law without any intend to change this domestic law in future
- too general reservations. For instance, Iran made a reservation to the Convention on the Rights of the Child: "...making reservations to the articles and provisions that may be contrary to the Islamic Sharia."¹¹⁶ Here it should be pointed out that religion is a sufficient reason to make a reservation, but in this case the state must be specific and mention all the provisions to which it makes reservations, to what extend and on the basis on what domestic law. However, in case of Iran's reservation it is absolutely unclear which obligations the state undertook and which it did not, it may cause conflicts based on the different interpretation.

Reservations of this type do not have other reasons behind, apart from the unwillingness to be bound by the certain obligations arising from the provisions of the treaty. These reservations are dangerous, because they make treaty a declaratory document, but not a legal instrument and therefore, they endanger the international human rights regime by making it declaratory without any sufficient legal implications within the states.

¹¹⁶ Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties.", p.175.

At the same time possibility to make reservations might be useful for the international human rights regime. However, certain conditions have to be complied with:

- *The human rights treaty should contain a reservation clause.*¹¹⁷ This clause should be precise and narrowly-construed¹¹⁸; it has to establish certain reservations that allowed under this treaty. Also the reservation clause should indicate the core provisions to which no reservations are acceptable. The research showed that even though the ACHR does have a reservation clause, it is so broad, that it does not establish any new criteria or regulations on reservations regime. Therefore, in case if the ACHR did not have a reservations clause, it would make no actual difference: reservations under the ACHR would be regulated by the Vienna Convention – the same as they are now. However, the good example is the reservations' clause of the ECHR. It establishes certain type of reservations allowed under this treaty and therefore minimizes the risk of undermining human rights regime, established by the treaty. Moreover, the research showed that there are no reservations under the ECHR that would absolutely exclude the legal effect of the certain provision within the jurisdiction of the state. Art. 57 of the ECHR is a good example of the well-written reservations clause.

- *Reservations should be allowed to the extent where existing domestic legislation conflicts with the international human rights instrument*¹¹⁹

Therefore, the states should present specific provision of domestic law or specific economic, religious, cultural or other conditions that prevent state from implementing the provision now.

- *Reservations should be made for certain period of time*¹²⁰

¹¹⁷ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties.*, p.421-423

¹¹⁸ Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties.", p.177-182.

¹¹⁹ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties.*, p.421-423.

The reservations should be used as a tool that provides states with some time to change its domestic law, economic, technical or other conditions that prevent state from implementing the provision of the treaty. An interesting solution was proposed by Liesbeth Lijnzaad: she proposed that after the expiration of the certain established period of time the reservation should disappear unless the state made a prior notification expressing its intention to be bound by convention during the another fixed period of time.¹²¹ Otherwise, without such rule the reservations might become permanent. For instance, in 1989 San Marino made a reservation to the art. 3 of the Protocol 7 promising to implement in the domestic law the principle of the compensation for the miscarriage of justice within to 2 years. However, this haven't been done till today.¹²² A similar point of view was presented by the Human Rights Committee, particularly the Committee stated that the "reservation should be withdrawn at the earliest possible moment."¹²³ Moreover, the states when making the reservation are encouraged to explain the period of time which is needed to change the domestic legislation.¹²⁴

For instance, in 1995 Lithuania made a reservation to the art. 5(3) of the ECHR with the time-limit of 1 year by the time Convention comes into force in Lithuania. Thus, after one year the reservation was no more valid and the human rights protection standards under art. 5(3) of the Convention were fully implemented in the Republic of Lithuania.¹²⁵

¹²⁰ Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties." p.177-182, see also: Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties.*, p.421-423.

¹²¹ Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties.*, p.421-423.

¹²² Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties." p.177-182. referring to reservations of San Marino to the Protocol 7 to the ECHR/ access:

<http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=117&CM=1&DF=31/03/2014&CL=ENG&VL=1>

¹²³ Human Rights Committee, "Human Rights Committee, General Comment 24 (52), General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).", para.20

¹²⁴ Ibid.

¹²⁵ Jeremy McBride, "Reservations and the Capacity of the States to Implement Human Rights Treaties." p.181; see also:

<http://sim.law.uu.nl/SIM/Library/RATIF.nsf/f8bbb7ac2d00a38141256bfb00342a3f/0d3435bb6e42afec41256bfe003fa4d9?OpenDocument> Netherlands Institute of Human Rights, Utrecht School of Law: Declarations and

However, in case if the state made such reservation, but did not change the law and the reservation is still in force, it is "...questionable whether a continued failure to address the deficiency..."¹²⁶ would be acceptable. Moreover, the reservations should be in force as long as they are required by the circumstances and the preservation of the reservation, which is not necessary any more might even amount to the infringement of the object and purpose of the treaty "...for the failure to make all possible improvements."¹²⁷ Thus when the actual circumstances do not justify the reservation, the reservation might be regarded as incompatible with the object and purpose of the treaty.¹²⁸

- *The treaty should establish or empower the organ responsible for the compatibility of the reservations under the treaty.* The ECHR and the ACHR have their control bodies (the court) that makes the procedure of the analysis of the reservations legitimate and simply easier. At the same time the ICCPR had not have such body till the Human Rights Committee established its own competence.

Thus, it can be concluded that reservations are a useful mechanism, which encourage states to become parties to the treaties. For instance, it allows states which do not have required level of protection of human rights yet become party to a treaty and subsequently change the domestic law. Also it allows states which have certain cultural or religious issues that do not allow them to accept specific provisions become parties to the treaties without being bound by certain obligations that are contrary to their culture or religion. However, at the same time reservations are also dangerous mechanism that can sufficiently undermine the human rights

reservations by Lithuania made upon ratification, accession or succession of the ECHR, accessed on March, 18 2014.

¹²⁶ Ibid., p.170.

¹²⁷ Ibid.,p.175

¹²⁸ Ibid., p.171-175.

regime which was planned to be established by the treaty. Thus, reservations' regime should be used carefully and therefore be properly regulated.

CONCLUSION

The thesis elaborated on the issue of reservations to human rights treaties focusing on the validity of reservations, their effect on the obligations of the state and therefore effect on human rights regime established by the treaty. Even though reservations to human rights treaties are different in their nature from the reservations to any other ordinary multilateral treaty, there is no special legal regime regulating them. Thus, the reservations are subject to the rules of the Vienna Convention on the Law of the Treaties, however, special reservations' regime might be also established by the treaty itself. It was proved that the reservations' clause under the ACHR is rather declaratory, because it does not invent any new rule, but simply refer to the Vienna Convention, while the reservations' clause under the ECHR is an example of a well-written reservations' clause.

The analysis of the reservations under specific human rights treaties showed that majority of reservations are those that modify the scope of the right established by the treaty to the extent that national law of the State is not in conformity with such provision. Such reservations are useful, because they allow States to become Parties to the treaties even if some legislation within their jurisdiction does not comply with the standard established by the treaty. However, this rule implies that State has to amend its domestic legislation soon and withdraw the reservation. This is also relevant to any economical or technical inability to implement the guarantee at the time of acceding to the treaty. Ideally this is how the mechanism of reservations should look like.

However, unfortunately, States do not always change their national legislation or they might even do not provide the statements of such laws or any other explanations when acceding to

the treaty. Such conduct of the States undermines standards of human rights protection established by treaties and consequently undermines human rights regime as such. Under certain circumstances such reservations might be considered contrary to the object and purpose of the treaty since the object and purpose of human rights treaty is basically the creation of international or regional human rights regime.

Therefore in order to avoid such conduct by the States it was proposed that every human rights treaty should contain a reservations' clause that would only allow reservations to the extent that any national legislation is not in conformity with the provision of a treaty. Reservations should be temporary with certain time-limits. Moreover, a treaty should establish or empower a control body competent to decide on the permissibility of reservations.

This research can be used for the further scholarship in this field as well as for the practical implications of the recommendation presented in the thesis.

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