CHAPTER-1

INTRODUCTION

Developments following the Second World War at the international level led to a great initiation for the conception, recognition and protection of human rights under international law. This process started with the inclusion of these rights in the provisions of the Charter of the United Nations. The preamble to the Charter itself asserts that the Peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person". The other provisions that deal with human rights in the Charter are Articles 13, 55, 56, 62, 68 and 76. Thus the process that started with the Charter gained momentum with the adoption of Universal Declaration of Human Rights, 1948 subsequently leading to the adoption of International Covenant on Economic, Social and Cultural Rights, 1966 and the International Covenant on Civil and Political Rights, 1966 and other conventions. In fact the recognition of human rights of individuals, conceptually, marks a new turn in international law as the individual came to be accepted as subject of international law as against the traditional notion that

international law regulates the relations between States only. In the beginning of the twentieth century itself the controversy about the status of the rights of the individuals existed. Thus Oppenhiem observed:

Several writers maintain that the Law of nations guarantees to every individual at home and abroad the so-called rights of mankind without regarding whether an individual be stateless or not and whether he be a subject of a member-State of the Family of Nations, or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion and likes, the rights of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee, since the law of Nations is a law between States, and since individuals cannot be subjects of this law.²

This confusion about the status of individual in international law continued to remain till the Advisory Opinion delivered by the Permanent Court of International Justice in the case concerning the Jurisdiction of the Courts of Danzig.³ The Court’s view in this Advisory Opinion that individuals constituted subjects of international law negated the erstwhile doctrine which emphasised that international law governed relations between States only. In a way it paved the way for the individual rights to become part of


³ This dispute arose with regard to an agreement between Poland and Danzig regarding regulating the conditions of employment of Danzig officials who were taken over into Poland railway service. Poland argued that the agreement was an international treaty which created rights and obligations as between Poland and Danzig only and as that agreement was not incorporated into Polish municipal law did not create rights and obligations for individuals. Thus it was argued that Poland’s responsibility was limited to that owed to Danzig. Therefore it was further argued by Poland that Danzig Courts before which the officials had brought an action in the matter, had no jurisdiction. The Court rejected this contention. PCIJ, Advisory Opinion No.15, Series B, No.15, pp.17-21.
international law. But it took some more time for the international community to recognise rights of the individual in a treaty form. It is only in the Charter of the United Nations that these rights of the individual are recognised as constituting subjects of international law. Thus "[i]t is in the Charter of the United Nations that the individual human being first appears as entitled to fundamental human rights and freedoms".\textsuperscript{4} The process that started with the Charter gained momentum in the following years. In 1945 itself the Preparatory Commission of the United Nations recommended that the Economic and Social Council should establish a Commission on Human Rights for the purpose of preparing an International Bill of Rights. Accordingly, the Commission was established in 1946 and started its work on the preparation of the International Bill of Rights. Initially it was decided that this Bill should contain three parts, namely, a Declaration, a Convention containing legal obligations, and also measures of implementation, i.e., a system of international supervision or control. Accordingly, as a first step, a drafting committee was appointed to prepare the Declaration. Finally the Declaration was adopted by the UN General Assembly on 10 December 1948 with forty-eight votes in favour, none against and eight abstentions( the Soviet bloc, South Africa and Saudi Arabia)\textsuperscript{5}.

As it was intended to formulate a comprehensive International Bill of Rights, the Commission on Human Rights engaged itself in the preparation of a Covenant on human rights. Initially the Commission prepared a text on civil and political rights, but, in view of the strong position adopted by the Third World and socialist countries, the General

\textsuperscript{4} Lauterpacht, n. 2, p. 33.

\textsuperscript{5} The UN General Assembly Resolution 217(III).
Assembly decided that economic, social and cultural rights should also be included. In the process of preparation, the Economic and Social Council recommended to the General Assembly to reconsider its decision, as there were conceptual and operational differences in the two categories of rights. Accordingly, the General Assembly, after lengthy discussions, decided in 1952 that there should be two separate Covenants namely, a Covenant on Civil and Political Rights and a Covenant on Economic, Social and Cultural Rights. The apparent division between these two categories of rights reflected the conflicting interests of the international community. The law inevitably reflected contending ideologies between East and West. Thus, quote B.S. Chimni in this context, who observes:

> It is common place to state that international law does not evolve in a vacuum but reflects the structures and processes which constitute the international system. To put it differently, it means that the dominant actors in the system are able to write their interests into law (and further, control its evolution through usurping the hermeneutic moment).

This view is aptly demonstrated in the process of the making of international human rights law. Though it is difficult to realise one set of rights without the other, the civil and political rights have been categorised as ‘first generation rights’, and economic, social and cultural rights have been categorised as ‘second generation rights’. The civil and political rights are identified with the eighteenth century Declarations on the Rights of Man and on the other hand economic, social and cultural rights are argued as to be

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6 Resolution 421(V) of 4 December 1950.
7 Resolutions 543(VI) and 545(VI) of 5 February 1952.
the product of the Socialist October Revolution and the subsequent developments. There are certain other collective rights which are categorised as 'third generation rights' which include the right to self-determination, right to development and the right to peace. There is also another proposal to include rights of indigenous peoples as 'fourth generation rights'.

The division of human rights into various generations also signifies the prioritisation in the application of these rights. It also led to the supremacy of civil and political rights over economic, social and cultural rights. Thus it is felt that:

There is as yet little or no conceptual or organisational linkage between international agencies and fundamental notions of human rights. There is likewise no adequate recognition of the inherent connections between civil and political rights, and economic, social and cultural rights, and third generation rights, including peace and development. The priority and immediacy of civil and political rights over economic, social and cultural rights also reflects from the provisions of the Covenants itself. It is argued that the Covenant on economic, social and cultural rights is promotional in nature which does not require immediate implementation. Paragraph 1 of Article 2 is cited as an example to substantiate this standpoint. This provision reads:

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Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

On the other hand it is further argued that the civil and political rights are immediate in nature.\textsuperscript{15}

Thus there seems to be a clear division between these two categories of rights in terms of their ideological basis. This distinction is also substantiated by the fact that these two categories of rights require different policy and institutional mechanisms for their implementation. The economic, social and cultural rights require comprehensive measures for their assurance. These measures warrant an active intervention from State parties to bring about the required changes and availability of adequate resources to make the rights realisable.

As a result of the work of the Commission on Human Rights the International Covenant on Economic, Social and Cultural Rights\textsuperscript{16} and the International Covenant on Civil and Political Rights\textsuperscript{17} were adopted by the UN General Assembly. The process of international human rights law making has not ended with the adoption of two covenants only. Though the two Covenants established a broad framework of rights covering wide

\textsuperscript{15} Ibid, p. 33-34.

\textsuperscript{16} This Covenant was adopted by the UN General Assembly Resolution A/RES/2200 A(XXI), on 16 December 1966 and entered into force on 3 January 1976. See, Craven, n. 10.

\textsuperscript{17} This Covenant was adopted by the UN General Assembly Resolution A/RES/2200 A (XXI), on 16 December 1966 and entered into force on 23 March 1976. Generally, see; Marc J. Bossuyt, \textit{Guide to the “Travaux Preparatoires” of the International Covenant on Civil and Political Rights} (Dordrecht, 1987); on the drafting of the two covenants, also see; K.P. Saxena, \textit{"International Covenants on Human Rights"}, \textit{Indian Yearbook of International Affairs} (1966-7), pp.596-613.
range of issues, a need was felt for the adoption of other conventions addressing specific issues. The primary purpose of these conventions is to give a focused attention to a particular issue keeping in view the gravity of violation of rights in that regard. One of the important conventions of such nature is the International Convention on the Elimination of All forms of Racial Discrimination\textsuperscript{18}. This Convention was signed and came into force before the adoption of two Covenants. The primary purpose of this Convention is to fight against racial discrimination and thus it is “resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination”.\textsuperscript{19}

Another important Convention intended to fight against discrimination is the International Convention on the Elimination of All Forms of Discrimination Against Women\textsuperscript{20}. Similarly other Conventions that can be included in this category of


\textsuperscript{19} Preamble of the Convention, UNTS, vol.660, p.195.

\textsuperscript{20} This Convention was adopted by the United Nations General Assembly on 18 December 1979 and came into force on 3 September 1981. For a discussion on the Convention, generally see: Andrea E. Stumpf, “Re-examining the UN Convention on the Elimination of All Forms of Discrimination
conventions are the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984\textsuperscript{21} and the Convention on the Rights of the Child, 1989\textsuperscript{22}.

Apart from these treaties, international human rights law has developed at the regional level also. The important regional conventions are, namely, the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{23}, the


American Convention on Human Rights\(^{24}\) and the African Charter of Human and Peoples’ Rights\(^{25}\). These Conventions are intended to protect human rights at regional levels. However they are in no way meant to be contradictory or conflicting with the existing corpus of international human rights law and on the other hand they are intended to be in step with the Universal Declaration of Human Rights\(^{26}\).

As observed earlier, international human rights law is primarily intended to empower the individuals and States assume obligations by way of becoming parties to the conventions. However, it does not suffice to become parties to these conventions unless these obligations are complied with. Thus, compliance with these conventions requires an active role of State parties as it warrants policy and legislative changes for the implementation of human rights obligations\(^ {27}\). It is also undeniable that the obligation to protect human rights of individuals in a State lies with that State only. Therefore it is State parties which are expected to take required measures for the implementation of human rights obligations that they have assumed by way of becoming parties to them. Thus some form of supervisory system is considered to be a suitable mechanism for the purpose of overseeing the compliance with these convention obligations. Thus it is the European Convention on Human Rights which is the forerunner in establishing

\(^{24}\)This Convention was signed on 22 November 1969 and entered into force on 18 July 1978.


\(^{26}\)Preambles of these three regional conventions expressly emphasise the significance of the Universal Declaration of Human Rights.

\(^{27}\)Generally see, Benedetto Conforti and Francesco Francioni ed., Enforcing International Human Rights in Domestic Courts (The Hague, 1997).
monitoring bodies to look into the implementation of the Convention provisions at the
domestic level\textsuperscript{28}. Similar method has been adopted by the American Convention on
Human Rights also\textsuperscript{29}. Though not on the similar lines, in terms of competence and
functions, but with similar intention some of the human rights conventions adopted under
the UN system also contain provisions establishing treaty bodies\textsuperscript{30}. With varying powers
these bodies are primarily intended to look after the implementation of Convention
provisions by closely monitoring the actions taken by State parties. The European and the
American Conventions establish courts entrusting them with the power of adjudicating
upon the disputes arising out of the implementation of the respective conventions. On the
other hand, the UN human rights treaties do not empower the treaty bodies to adjudicate
upon the disputes; however, the Committee on the Elimination of Racial Discrimination
under the Racial Discrimination Convention, the Human Rights Committee under the
ICCPR and the Committee Against Torture under the Torture Convention are empowered
to receive individual complaints\textsuperscript{31}.


\textsuperscript{29} Article 33 of the American Convention on Human Rights, 1969.

\textsuperscript{30} The provisions that deal with establishing treaty bodies are: Article 8 of the International
Convention on the Elimination of All forms of Racial Discrimination, 1965; Article 28 of the
International Covenant on Civil and Political Rights, 1966; Article 17 of the International
Convention on the Elimination of All forms Discrimination Against Women, 1979; Article 17 of
the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,
Covenant on Economic, Social and Cultural Rights does not contain a provision for the
establishment of a treaty body. However, Articles 16 to 25 of the Covenant entrust various
responsibilities to the United Nations Economic and Social Council (ECOSOC) for the
supervision of the Covenant's implementation. Further the ECOSOC created the Committee on
Economic, Social and Cultural Rights with the task of assisting it in the monitoring of
implementation of the Covenant particularly by way of examination of periodic reports submitted
by State parties.

\textsuperscript{31} Article 14(1) of the Racial Discrimination Convention reads:

A state party may at any time declare that it recognizes the competence of the Committee to
receive and consider communications from individuals or groups of individuals within its
jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in
Thus the procedures established are meant to influence State parties for the prompt implementation of the treaty obligations at the domestic level. However, States are confronted with many obstacles in the implementation of international legal obligations in general and human rights obligations in particular. Post World War era has witnessed the emergence of many new States in the international community as a result of decolonisation. Many of these new States have been participating in the international law making in general and the human rights law making in particular. This situation, however, should in no way lead us to the conclusion that the law that has emerged in the last fifty years, in which process new States are active participants, is in toto acceptable to all these States. This is so not because of the subjective preferences of the Governments in power are contradictory to the emerging international legal regime but because the existing material conditions in these States are considered to be not in perfect consonance with the emerging legal regime. Thus commenting on the international situation in the context of implementation of international human rights law, it is observed:

We cannot ignore the ideological division of the world, any more than we can disdain the diversity of perception which stems from differences in culture and history; they lie at the heart and core of this Convention. No Communication shall be received by the Committee if it concerns a State Party which has not made a declaration.

Under the ICCPR individual complaints are permitted either directly or through representatives to the Human Rights Committee about a State Party for the violation of the Covenant provisions provided that State Party has ratified or otherwise acceded to the Optional Protocol to the Covenant.

Similarly Article 22(1) of the Torture Convention reads as follows:

A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
international implementation and provide the keys to an understanding of the human rights situation anywhere, anytime.\textsuperscript{32}

Thus the dichotomy of willingness in accepting emerging international law and the unwillingness to comply with it fully in domestic practice is a reflection, on the one hand, of compulsion to accept the international legal regime due to the compelling international demands and on the other to restrain itself from the application of international legal regime due to the incompatible economic, social, political, cultural and ideological conditions at the domestic level. This dichotomy continues to exist in practice, particularly, of newly emerged States. Therefore, a need is felt to employ a legal mechanism to avoid a patent contradiction between international obligations and their full compliance at the domestic level.

As stated above, participation of a large number of States has complicated the multilateral treaty making, as it is always difficult to reach a consensus due to the contending interests and ideological preferences. Despite the fact that every effort is made to reach the unanimous conclusion in the treaty making, it is the principle of majority that works ultimately in the event of unresolvable differences. Therefore States holding a minority view are also bound by the majority view in case the former become parties to such a treaty. Therefore it is felt imperative to have a legal mechanism to avoid such obligations with which States have differences in treaties. This phenomenon is more apparent in the case of multilateral human rights treaties as they regulate issues which directly influence domestic policies warranting them to take required measures for their implementation. Human rights treaties also cover those issues which are embedded in the

economic, social, political and cultural milieu of a State. Any active intervention by States at the legislative level would invite opposition from the civil societal structures wherever the international human rights norms are found contradictory to the existing domestic value systems.

Therefore the practice of reservations, which is considered as an important constituent of treaty law finds favour among States while they becoming parties to treaties. This practice allows States to become parties to a treaty while avoiding those provisions which they found to be unacceptable to them. It is a well established principle of international law that States cannot be held obliged to norms which they have not consented to. As a large number of States are becoming parties to multilateral treaties it is inevitable that only through the co-ordination of the wills of States a treaty comes into existence. In that process it is also inevitable that States not only concede some of their interests but also are compelled to abide by certain obligations which constitute part of the treaty and with which they have disagreement. Thus it becomes necessary for States to reserve their consent in respect of those parts of a treaty with which they have disagreement. Therefore reservations serve dual purpose of facilitating States to become parties to a treaty and at the same time avoiding the unacceptable obligations therein. It is this significant feature of reservations that contributes to its importance in the treaty law.

As the nature of international law has undergone many changes in the last century in keeping pace with the changing structure of international society, so also the concept of reservations33. It was the unanimity rule which governed the practice of reservations

prior to and under the League of Nations system. Till the issue of reservations was brought before the international Court of Justice in the *Genocide Convention* case the unanimity rule was considered as the suitable mechanism to decide the validity of reservations. There was also a parallel system that emerged in the practice of the Organisation of American States (OAS) which was considered to be more flexible and well suited to multilateral treaties. Later on the test of compatibility of a reservation with the object and purpose of a treaty as propounded by the ICJ in the *Genocide Convention* case ushered in a new phase in the law of reservations. Finally the subsequent work of the International Law Commission which resulted in the form of the Vienna Convention on the Law of Treaties 1969 contains both the compatibility test and the flexible system as developed by the Organisation of American States. The Vienna Convention reservations regime is intended to be applicable to all treaties irrespective of the subject matter they deal with.

**Importance of the Study**

As observed above the practice of reservations has attained legitimacy with its recognition in the Vienna Convention on the Law of Treaties. The Vienna Convention reservations regime is also intended to be applicable to all treaties except in those cases where a treaty expressly adopts a different system of reservations or prohibits reservations *in toto*. However, the practice of reservations raises many conceptual and practical difficulties when it is applied to human rights treaties. The primary concern of human rights law is the rights of the individual claimed against States unlike the other branches of international law wherein the law primarily governs relations between States.

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32 *ICJ Reports, 1951*, pp. 15-69.
Thus the large part of human rights norms is considered to be universal in nature and applicable to all individuals irrespective of their economic, social, political and cultural background. It is also argued that some of the human rights norms, such as the prohibitions of Genocide, Slavery and Torture, have achieved the status of *jus cogens*. Therefore it is averred that any form of deviation from the human rights norms would be to the detriment of the universality of human rights. Extension of this logic to the practice of reservations also leads to the conclusion that reservations are not allowed to human rights treaties as they help States avoid certain obligations they find highly objectionable. Therefore any form of reservations would necessarily affect the implementation of human rights norms which States are expected to comply with without fail.

The arguments expounded in favour of reservations are also apparently reasonable as they highlight the constraints of States in the application of human rights norms. There is an argument challenging the universality of human rights on the ground that these ‘so-called’ universal human rights are not applicable everywhere, as States differ in economic, social and cultural conditions. This cultural relativist view emphasises the specificities of various societies and argues that human rights discourse has to be located in these specificities. Another standpoint in favour of reservations is the constraint of inconsistency of domestic law with international legal obligations. Thus it is felt that wherever there is a contradiction between intentional law and domestic law States are inclined to reserve the treaty provision to avoid their implementation by way of amendment to their existing domestic law.

The present thesis primarily aims at studying the maintainability of reservations to human rights treaties. The problem of reservations is analysed and assessed in the light of the contending arguments with reference to the practice of States. As the issue has also
been taken to the treaty bodies the study also analyses the views of these bodies. As the practice of reservations is primarily regulated by the Vienna Convention reservations regime, the study is undertaken with reference to the Vienna Convention regime and its suitability to human rights treaties. Focus is also laid on the transformation that the practice of reservations underwent prior to its formulation in the Vienna Convention system. Though there are diverse opinions about the differences between reservations and interpretative declarations, the study sticks to the definition provided in the Vienna Convention as it does not embark on the analysis of difference between reservations and interpretative declarations.

The present study is divided into seven chapters. The present chapter, as seen already, briefly deals with the emergence of human rights law at the international level, particularly under the UN system. It covers the monitoring mechanism established under these treaties. It further includes the significance of reservations in respect of multilateral treaties in general and human rights treaties in particular.

The next chapter deals with the concept of reservations under international law. It enquires into the emergence of practice of reservations as an important constituent of treaty law. As the practice of reservations has undergone many changes over a period of time this chapter focuses on the landmark developments resulted from the practice of States. The unanimity rule followed under the League of Nations system, the flexibility system of Organisation of American States and the test of compatibility of reservations with the object and purpose of the convention as propounded by the International Court of Justice in its advisory opinion in the Genocide Convention case are also studied. This chapter also focuses on the developments subsequent to the Genocide Convention case particularly the work undertaken by the International Law Commission. It covers the
reports prepared by James Brierly, Gerald Fitzmaurice, Hersch Lauterpacht and Humphry Waldock as Special Rapporteurs of the International Law Commission on the law of treaties. It analyses the developments on the issue before the International Law Commission till the work of the Commission got crystallised into the Vienna Convention on the Law of Treaties, 1969. Finally this chapter studies the reservations regime of the Vienna Convention as enshrined in Articles 19-23 of the Convention. It highlights the characteristic features of the Vienna Convention regime namely, the compatibility test, flexible system of acceptances and objections in respect of multilateral treaties, application of unanimity rule in respect of treaties with limited number of contracting parties and the method of competent body decision in respect of constituent instruments of international organisations.

The third chapter covers the practice of reservations in respect of human rights treaties. It primarily focuses on the major arguments in favour of and against making of reservations to human rights treaties. The arguments it analyses against the making of reservations to human rights treaties are the universality of human rights treaties and the \textit{jus cogens} character of human rights norms. The arguments that it covers in favour of reservations to human rights treaties are cultural relativism and inconsistency of domestic laws with international law.

The fourth chapter surveys the emerging international jurisprudence on the concept of reservations to human rights treaties. It primarily focuses on the findings of the human rights treaty bodies, namely European Commission on Human Rights, European Court of Human Rights, Inter-American Court of Human Rights and the Human Rights Committee. This chapter also analyses the principal findings of these

The fifth chapter deals with India's practice in respect reservations to human rights treaties. These treaties include the Genocide Convention, the Racial Discrimination Convention, the two Covenants, the Women's Convention and the Child Rights Convention.

The sixth chapter deals with the current work of the International Law Commission on reservations to treaties. It covers the five reports submitted so far by the Special Rapporteur Alain Pellet till 2000. It includes the preliminary conclusions arrived at by the Commission on the topic of reservations to normative multilateral treaties including human rights treaties and the response of various bodies to these conclusions.

The seventh chapter encompasses the conclusions drawn from the study and the recommendations.