CHAPTER-2

RESERVATIONS AND THE LAW OF TREATIES

Though treaties have a long history of their presence\(^1\), the concept of reservations, which is an important part of modern treaty law, is a rather late entrant. As there is no difference between amendment and a reservation in case of bilateral treaties, this kind of reservation had been made to the bilateral treaties of Amity, Commerce and Navigation between United States of America and Great Britain entered into at London on November 19, 1794 in which case the US Senate passed a resolution for inclusion of an article to exclude a particular part of Article 12 of the treaty\(^2\). Multilateral treaties seem to have emerged much later in time than bilateral treaties in the field of international law practice of States. Correspondingly reservations also entered into multilateral treaties at a later stage. One of the earliest examples of a reservation to a multilateral instrument was Act of the Congress of Vienna of June 9, 1815, wherein the Swedish-Norwegian plenipotentiary made a reservation beneath his signature\(^3\).

Generally reservations are made at the time of signing, ratifying or adhering to a treaty. It is generally made in the form of a written statement. Reservations at the time of signature are made in the form of a statement on the original treaty itself beside or below the signature of the representative of the reserving State. If it is at the time of ratification

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\(^3\) Ibid., p.262.
or adherence, reservations are usually included in the instrument of ratification or adherence and sometimes they are attached in a separate instrument collateral to a treaty⁴.

By its very nature a large part of international law remains to be optional as "[e]very sovereign State possesses the prerogative to decide whether or not enter into any international agreement"⁵. International law attains this character due to the dissimilarities in economic, social, political, cultural and other spheres of the respective States. This internal mechanism of requiring the will of States vis-à-vis international legal obligations is very much ingrained in the making of international law. Thus the primacy accorded to treaties, by way of listing them first among the sources of international law under Article 38 of the Statute of the International Court of Justice⁶, observes Lauterpacht, underlines the significance of the consent of States for obligations in international law. He says:

The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance both with correct legal principle and with the character of international law within the State. The rights and duties of States are determined, in the

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⁴ Ibid., p.251.
⁶ Article 38 reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

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first instance, by their agreement as expressed in treaties—just as, in the case of individuals their rights are specifically determined by any contract, which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question.7

In the case of international customary law it is the persistent objector rule which allows a State to claim that a particular legal principle is not applicable to it on the ground that it has been persistently objecting to such rule from its inception8. In principle it allows the objecting State to avoid observing that customary legal principle, unless it is a jus cogens, in which case no State has any unilateral right to derogate from it.

The concept of reservations also emerged in recognition of rights of the sovereign States to opt out of any particular obligation of a treaty and to avoid imposition of any particular international norm against their will, while still opting for other obligations or norms of the treaty. The international treaty making is thus an exercise in approximation of the views of the States9.

Consent is an important factor in the formation and operation of international law. Under international customary law also the persistent objector rule allows States to declare that a particular principle is not binding on it, unless it is a jus cogens. The consent of the parties is much more important in the case of treaty law. The process of multilateral treaty making has geared up since late nineteenth and early twentieth

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centuries. With the gradual increase in the number of multilateral treaties it became imperative on the part of the international community to evolve certain mechanism to attain as much consensus as possible in the treaty making. As the number of parties participating in the treaty making increased it became much more difficult to come to a common understanding in conclusion of treaties. The concept of reservations, which had emerged during late eighteenth century out of the practice of State parties, has gained much importance. As States started resorting to reservations quite often in their practice, the concept of reservations has come to occupy an important position in treaty making and has become an indispensable constituent of treaty law.

2.1. Difference between Bilateral and Multilateral Treaties

There is a difference between bilateral and multilateral treaties so far as the effect of reservations is concerned. In case of a bilateral treaty if a reservation is made by one party and accepted by the other, then the treaty comes into operation as modified by the reservation. In case the reservation is not accepted by the other party, the reserving State should either withdraw the reservation or both parties should come to an understanding to enter into a new instrument agreeable to both the parties. In case of bilateral treaties reservation acts as an amendment\(^{10}\) to the treaty whereby the provision to which reservation is made is excluded or modified in operation. This is not the same with multilateral treaties. Even if a reservation is made by a party to a multilateral treaty, the treaty will be in effect as modified between the reserving State and other State parties but

\(^{10}\) The difference between an amendment and a reservation is that an amendment modifies the treaty between all the parties to the treaty and will become operative as modified between all the parties after the amendment, but in the case of reservations it will be modified only between the reserving state and the other states but not between states other than the reserving state, who have accepted the treaty without reservations.
remains operational in its original form between those parties who have accepted the treaty without reservations.

2.2. The League of Nations System

In the early days, reservations to bilateral treaties were considered and judged on the model borrowed from the law of contract principles of offer and acceptance. Reservation to a bilateral treaty used to be considered as a counter-offer to be accepted by the other party if it were to be a valid treaty. A State whose reservation has not been accepted by the other party is left with the option of either opting out of the treaty or withdrawing the reservation. Application of these principles was later extended to multilateral treaties also. Same principles of contract law were applied to multilateral treaties in which the consideration for the acceptance of the contract by any one party is its acceptance by others. Since by their very nature multilateral treaties are the result of an approximation of the wills of all participant States, every provision of a treaty may not be fully acceptable to every member State but they accept it in return for securing the general acceptance of other States. In such circumstances no State was allowed to make reservations unilaterally without the consent of other State parties. Reservation of a party is valid if it is accepted by other State parties to the treaty. In such a case it is understood that other parties have accepted the offer of the party concerned to accept the treaty without certain provisions as a sufficient consideration for their acceptance of the treaty as a whole. This was the understanding, which was prevalent during the late nineteenth

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13 Ibid., p. 142.
and the early twentieth centuries among States so far as the treaty making in general was concerned.

The question of reservations arose before the League of Nations with regard to the Austrian reservation to the Second Opium Convention for the Suppression of the Illicit Traffic in Dangerous Drugs which was signed at Geneva on February 19, 1925 under its auspices. This convention contained a provision, which prescribed, that the Convention would remain open for signature for any member of the League of Nations until September 1925. On September 30, 1925 the Austrian government, which did not participate in the conference, signed the Convention but with a reservation expressing its desire not to accept certain provisions relating to the supply of documents with regard to the shipment of drugs and furnishing of statistics. In response to this reservation the British government requested the Secretary-General of the League to place the issue before the Council of the League of Nations for its consideration since the matter was of an important nature. The British government also made a suggestion that the issue of the particular reservation made by the Austrian government should be referred to the Opium Advisory Committee in an effort to find a solution. Another suggestion made by the British government was that the question of reservations should be sent to the Committee of Experts for the Progressive Codification of International Law, and these suggestions were adopted by the Council on 17 March 1926. On the request of the Council of the League of Nations, the Committee of Experts for the Progressive Codification of International Law appointed a Sub-Committee\(^\text{14}\) to study the aspect of admissibility of reservations to treaties. The report prepared by the Sub-Committee was adopted by the

\(^{14}\) This Sub-Committee was composed of M. Fromageot (Rapporteur), M. Diena and A.D. McNair.
Committee on 24 March 1927. This report was adopted by the Council of the League of Nations on 17 June 1927.

The report prepared by the Committee of Experts categorically argued in favour of the principle of unanimous consent for the admission of reservations to multilateral treaties. The report said that “in order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void”\textsuperscript{15}. After discussion the Council passed a resolution clarifying its position as far as reservations were concerned. The resolution said that it “requests the Secretary General to be guided by the principles of the report regarding the necessity for acceptance by the all the contracting states when dealing in future with reservations made after the close of a conference at which a convention is concluded, subject of course, to any special decisions taken by the conference itself”\textsuperscript{16}. The resolution further ‘called the attention of conferences on technical subjects to the fact that in cases where the text of a convention contained, in the opinion of the signatories, certain articles to which reservations could be made without prejudice to the other articles, a method similar to that adopted by the customs conference\textsuperscript{17} might certainly be recommended’. The League of Nations has made its position abundantly clear regarding the admission of reservations.


\textsuperscript{16} Ibid., p.176.

\textsuperscript{17} The Convention on Customs Formalities 1923 provided that if the Council decided it, the subsequent reservations should be accepted after consulting the Economic Committee, when all the permitted reservations were embodied in a separate protocol.
with the unanimous consent of all the signatory States and their permissibility in cases where it was specifically mentioned in the relevant convention allowing reservations as in the case of the Cuban reservations to the Protocol on the Revision of the Statute of the Permanent Court of International Justice. In that case Cuba while ratifying the Statute made certain reservations to the provisions of the Protocol which were not accepted by a number of signatories. In this context the Council of the League of Nations adopted a resolution on September 25, 1931 which stated that “a reservation can only be made at the moment of ratification if all the other signatory states agree or if such a reservation has been provided for in the text of the convention.” Before the emergence of the League of Nations it had been a common practice that if a reservation had to be allowed to a convention by a signatory to it, it had to be accepted by all other signatories to that convention. The League of Nations in its practice in the treaty making adopted this position, without much change. But there seemed to have emerged a general opinion regarding the admissibility of reservations if they were specifically allowed in the convention itself. It can be deduced from the resolutions adopted by the League of Nations that a reservation can be made by a party irrespective of the objections made by the other parties if that reservation is specifically allowed by the text of the convention. Here also the underlying assumption is that only with the unanimous consent of the contracting parties provisions would be included in the text of the convention allowing reservations to certain provisions. But certainly there was a shift in the approach of States

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18 See “Harvard Research in International Law”, n.1, pp.904-905.
in recognising the necessity of allowing certain reservations, which was not the general practice prior to the League system

2.3. The Pan-American System

Apart from the attempts made by the international community under the League of Nations system keeping in view the practice of States till then, almost around the same time another model, which in many respects different from the method followed till then, known as Pan-American system of reservations, was evolved. This system was developed and practised by the Organisation of American States, earlier known as the Pan-American Union. In 1928, the sixth Inter American Conference adopted the Havana Convention on Treaties. Article 6 of this Convention dealt with the aspect of reservations. It read as follows:

‘Ratification must be unconditional and must embrace the entire treaty. It must be made in writing pursuant to the legislation of the State. In case the ratifying State makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance. In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation’.

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19 For the examples of conventions prior to the League system, see Malkin, n. 12.

Subsequently the Governing Board\textsuperscript{21} of the Pan-American Union appointed a Commission for the formulation of rules and regulations regarding the deposit of treaties. Later on the Governing Board had approved the report prepared by the Commission. The resolution adopted by the Governing Board contained six rules of procedure\textsuperscript{22} regarding the deposit of ratification of multilateral treaties and three separate rules with regard to the juridical status of treaties ratified with reservations.

These three rules are as follows:

With regard to the juridical status of treaties ratified, with reservations, which have not been accepted [by other States], the Governing Board of the Pan-American Union understands that:

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.

\textsuperscript{21} This was the depository of all the instruments of ratification and accession of the treaties signed at the Inter-American conferences.

\textsuperscript{22} These six rules are:

1. To assume the custody of the original instrument.

2. To furnish copies thereof to all the signatory governments.

3. To receive the instruments of ratification of the signatory States, including the reservations.

4. To communicate the deposits of ratifications to the other signatory States and, in the case of reservation, to inform them thereof.

5. To receive the replies of the other signatory States as to whether or not they accept the reservations.

6. To inform all the States, signatory to the treaty, if the reservations have or have not been accepted. 'International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide', \textit{Pleadings, Oral Agreements, Documents}, 1951, p.16
3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.

There was a difference between these rules and the rules framed under the 1928 Havana Convention. Under the Havana Convention the treaty relations between the reserving State and other contracting States would be affected to the extent of the application of the clause to which reservation was made. So far as the other provisions of the treaty were concerned the relations remained unaffected. A State making the reservation could have normal treaty relations with the State objecting to the reservation excluding that part of the treaty to which reservation was made. But under the rules adopted by the Governing Body of the Pan-American Union, a State which ratified the treaty with reservations would not have any treaty relations with the State objecting to its reservations.

The system enshrined in these three principles was also quite different from the League of Nations system in certain respects. Under the League as discussed earlier, if an objection was made by single State could stop the reserving State from becoming a party to the treaty. But under the PAU rules inspite of objections made by one or more than one States, a State could become a party with reservations but there would not be any treaty relations between the reserving and the objecting States.

Under the League of Nations system an objection by a single State could stop the reserving State from becoming a party to the treaty where as under PAU rules even the acceptance of reservation by one State entitled the reserving State to become a party to the treaty. The PAU principles on reservations upheld the principle of national
sovereignty of States, which was categorically emphasised under Article 7 of the 1928 Havana Convention on treaties. Article 7\textsuperscript{23} of the Havana Convention reads as follows:

Refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form. In case of refusal it shall be communicated to the other contracting parties.

This system not only recognised the sovereign right of States to make reservations but also apply the same rule to other States, to whom particular reservation might mean infringing upon their sovereign right, by legitimising the non-existence of treaty relations between the reserving and objecting States. Notwithstanding the significance of the principle of national sovereignty of States as enshrined in Article 7 of the Havana Convention this system formulated the procedure which facilitated the maximum participation with the recognition that reservations could not be imposed on the other parties to a treaty against their will\textsuperscript{24}.

The PAU system had given a scope to a peculiar kind of treaty relations among the parties to a treaty. Very interestingly a State could be a party to a treaty without having any treaty relations whatsoever with another State party making reservations. It ultimately resulted in the piece meal effectiveness of treaty provisions among State parties\textsuperscript{25}. There could be different relations between different sets of parties within the same treaty framework. There was another important criticism that was levelled against the PAU system of reservations regarding the multilateral treaties of normative character.

\textsuperscript{23} Treaties and Conventions, n.20, pp.21-24.


It was said that this system might be workable so far as the treaties of contractual nature were concerned, but in case of treaties of normative character, like human rights treaties, this system was not regarded as admissible. This seemed to be true to some extent because a State party could make any reservation, which might be contradictory to the normative edifice of a treaty. Another criticism that was made against it was that it made an open invitation to formulate reservations without putting any conditions whatsoever on States. Under this system there was no general objective method through which the validity of a reservation could be tested. It was opined that lack of any restriction on the act of making reservations would result in detriment in the case of treaties of normative character. Unlike the treaties of contractual nature, the observance of normative treaty obligations did not depend upon the nature of a State’s relation with other States but in relation to itself. In the case of normative treaties the obligation was both general and absolute and it arose by the mere fact of becoming a party to it. It was further argued that, though the Pan-American system claimed to give equal right to the reserving State to make reservations to the portion of a treaty repugnant to its interests and to the objecting State to object the reservations which it felt contradictory to its interests, it was more advantageous to the reserving State than to the objecting State in the case of normative treaties. The objecting State, despite its objection, was still itself obliged to apply the treaty in full, and was not relieved from any part of its obligations but the reserving state was relieved of from obligations to the extent of reservations.

26 Ruda, n.24, p.122.
27 Ibid., p.122.
29 Ibid., p.15
Keeping in view the criticisms made from different quarters on various aspects and also taking note of the other developments outside the PAU system on the issue of reservations, several attempts were made under the PAU system to bring about changes in the existing structure. Inter American Juridical Committee and Inter-American Council of Jurists made several attempts to formulate alternative model to the existing three rules. Though these alternative models were put forward at various points of time the standard system adopted by the Governing Board of Pan-American Union in 1932 was followed till 1973 in which year a new system was adopted by the General Assembly of the Organisation of American States.

2.4. The International Court of Justice and the Genocide Convention Case

The Secretary-General of the United Nations, which was established after the Second World War as the successor to the League of Nations, is the depository of the treaties adopted under its auspices. Till the issue of Genocide Convention arose, the Secretary-General of the United Nations followed the system of reservations that was in vogue under the League of Nations.

The United Nations took initiative to frame a Convention on Genocide and this Convention was adopted by the General Assembly on December 9, 1948 and opened for

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30 Article 102 of the Charter of the United Nations provides as follows:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.
signature on December 11, 1948\textsuperscript{31}. During the drafting of the Convention it was discussed and decided not to include a provision relating to the issue of reservations. Four of the forty-three states that signed the convention, Byelo-Russia, Czechoslovakia, Ukraine and USSR signed it subject to reservations. Philippines made reservations at the time of ratification. Among the six States acceded, Bulgaria made a reservation. Ecuador, Guatemala, Australia, Salvador, Vietnam, and UK have expressed their inability to accept the reservations.

Encountered with the problem of whether or not to accept the reservations the Secretary-General submitted a memorandum to the General Assembly seeking its opinion. While explaining the situation he was confronted with in the case of Genocide Convention he described the practice followed by the Secretariat till then and stated:

In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and acceptance of reservations, the Secretary General, in his capacity as depository, has held to the broad principle that a reservation may be definitely accepted only after it has been ascertained that there is no objection on the part of any of the other states directly concerned. If the convention is already in force, the consent, express or implied is thus required of all states, which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definitive deposit only with the consent of all states which have ratified or acceded by the date of entry into force.\textsuperscript{32}

\textsuperscript{31} Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the UN General Assembly on 9 December 1948 and came into force on 12 January 1951, UNTS, vol. 78, p. 277.

The Secretary General described the necessity of continuing the unanimity rule in case of treaties made under the UN because these conventions were of normative character and not of contractual character. This memorandum was discussed before the Sixth Committee of the General Assembly and it was recommended that the matter might be submitted both to the International Court of Justice and the International Law Commission for their opinion.

As a result of it the General Assembly adopted a resolution on November 16, 1950 asking the International Court of Justice for an advisory opinion on the following questions.

"In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a state ratifying or acceding to the convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

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

II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving state and:

A) The parties which object to the reservation?

B) Those which accept it?

III. What would be the legal effect as regards to the question I if an objection to a reservation is made:

A) By a signatory which has not yet ratified?

B) By a State entitled to sign or accede but which has not yet done so?"\(^{33}\)

\(^{33}\) General Assembly Resolution, 478(V).
Thirteen States along with three international organisations namely, International Labour Organisation, Organisation of American States and the Secretary General of the United Nations, submitted their written statements. Oral statements were also made on behalf of the Secretary General of the United Nations and the governments of France, Israel and the United Kingdom before the Court.

The opinion of the Court was delivered by a vote of 7 to 5 on May 28, 1951. At the outset the International Court of Justice recognised the significance of the sovereign rights of states while undertaking the treaty obligations. The Court said:

It is well established that in its treaty relations a state cannot be bound without its consent, and that consequently no reservation can be effective against any state without its agreement thereto. It is also a generally recognised that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and raison d'être of the convention.34.

The Court also recognised the importance of the notion of the integrity of the convention which emphasised on the requirement of unanimous acceptance of reservations, a principle derived from the law of contract, as having the undisputed value as a principle in the treaty making. While doing so the Court categorically mentioned about the special nature of the Genocide Convention and the universal character of the United Nations under whose initiative the Convention was framed. Taking note of the absence of a provision regarding reservations in the Genocide Convention, the Court remarked:

34 Genocide Convention Case, ICJ Reports, 1951, pp.15-69, p.21.
The character of a multilateral Convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect. In the specific issue of permissibility of reservations to the Genocide Convention, the Court opined that the origin, character and objects of such a Convention had to be gone into while considering the issue of reservations and objections to it. The Court further stated:

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

35 Ibid., p.22
36 Ibid., p.24.
The Court responded negatively while commenting on the sovereign right of States to make any reservations on the ground that it would lead to a complete disregard of the object and purpose of the Convention. It also refused to accept the rule that reservation could be made with the express or tacit assent of all the contracting parties. The Court said that this theory was based on the concept of contract i.e., the absolute integrity of a convention, which it felt, did not appear to have transformed into a rule of international law. The Court arrived at an understanding that other than compatibility test "any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes"\(^{37}\).

Before answering the questions posed by the General Assembly, the Court made itself clear regarding the rule that would be applied to the reservations to the Genocide Convention. Underlining the specific character of the Genocide Convention which was adopted for a purely humanitarian and civilizing purpose, the Court said that the contracting parties did not have any interests of their own except the common interests namely the accomplishment of those high purposes which were the \textit{raison d'etre} of the Convention\(^{38}\).

Having arrived at such an understanding derived from the notion of normative character of treaties the Court attempted to formulate an objective criterion of "object and

\(^{37}\) Ibid., p.24.

\(^{38}\) Ibid., p.23.
purpose of the convention” which could be applied to the conventions of normative
nature. Though the decision was meant to be applicable to the Genocide Convention
only, the ‘compatibility test’ criterion remained as an important principle in the law of
reservations to treaties which later came to be accepted in Article 19 of the Vienna

The Court, seven votes to five answered to the three questions posed by the
General Assembly in the following manner\textsuperscript{39}.

On question I:
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.
Otherwise that state can not be regarded as being a party to the
convention.
On question II
(a) that if a party to the convention, objects to a reservation which it
considers to be incompatible with the object and purpose of the
convention, it can in fact consider that the reserving state is not a party to
the convention;
(b) that if, on the other hand, a party accepts the reservation as being
compatible with the object and purpose of the convention, it can in fact
consider that the reserving state is a party to the convention;
On question III
(a) that an objection to a reservation made by a signatory state which has
not yet ratified the convention can have the legal effect indicated in the
reply to question I only upon ratification. Until that moment it merely

\textsuperscript{39} Ibid., pp. 29-30.
serves as a notice to the other state of the eventual attitude of the signatory state;
(a) that an objection to a reservation made by a state which is entitled to sign or accede but which has not yet done so, is without legal effect.

In the joint dissenting opinion Vice President Guerrero, Judges Sir Arnold McNair, Read and Hsu Mo, expressed their inability to accept the doctrine propounded by the majority opinion in defence of the unanimity rule. The dissenting opinion said, "we believe that the integrity of the terms of the convention is of greater importance than mere universality in its acceptance". It further said that the 'object and purpose test' formulated by the majority opinion did not have any legal basis in international law nor it had been practised earlier by any international judicial body. It also opined on the inviability of its application.

Judge Alvarez in his individual dissenting opinion identified four categories of multilateral treaties of international significance: (a) those which seek to develop world international organisation or to establish regional organisations (b) those which seek to determine the territorial status of certain States (c) those which seek to establish new and important principles of international law (d) those seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals. While asserting that both the principles of 'unanimity rule' and the 'compatibility test' are not satisfactory methods, Judge Alvarez opined that reservations should not be allowed in the case of above mentioned four categories of conventions and in particular on genocide. If the reservations were maintained in case of these conventions, it should be clearly

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40 Ibid., p.46.  
41 Ibid., p.51.
enshrined in the convention and in such case those conventions would be considered as ordinary multilateral conventions and not fundamental conventions of international law.

The following points may be made on this case. First, this was the first case in which an international judicial body dealt with the issue of reservations to multilateral treaties and held that they were maintainable, of course, subject to certain conditions. From this judgement it can be deduced that the reservations per se are not bad in law. Second, the International Court of Justice rejected the traditional ‘unanimity rule’ based on the contractual notion of absolute integrity of a convention which was practised by the League of Nations and later on by the United Nations till then. Third, having taken note of it, the ICJ had also rejected the more flexible system of reservations followed by the Pan-American Union. The ICJ also responded negatively to the sovereign right of the states to make any reservations they wished while becoming a party to the treaty. Fourth, with a view to find a balance between the notion of integrity of the convention and the universality of participation by states, the Court’s attempt to formulate a new objective principle which was altogether different from those in practice till then led to certain new uncertainties which the court failed to address. These difficulties were very well highlighted and explained in the dissenting opinion delivered by four judges. One, the new rule propounded by the majority opinion had no legal basis in international legal system. Two, dissenting judges also opined that it was difficult to classify the provisions of the Convention as to which of them constituted object and purpose of the Convention and which did not. Three, the issue of deciding the object and purpose of the Convention was left to the discretion of the individual states. It would create new confusion regarding

42 Ibid., p.54-55.
the relation of the states which so far accepted and which have not accepted a reservation. Fifth, there was a suggestion by the majority opinion that the dispute can be referred to the ICJ, but eight States already made reservations to Article IX of the Genocide Convention, which deals with the settlement of disputes. Sixth, regarding the objections not based on the incompatibility it was suggested that with an understanding between the reserving State and objecting state the convention would enter into force between them excepting those provisions affected by reservations. This would lead to a situation where different States came to different understanding and ultimately the reserving State would become a party with some States and would not become a party with some others. Thus there would be tiers of bilateral treaty relationship leading to the fragmentation of the multilateral treaty in its acceptance and operationalisation by States. This would also lead to the problems with regard to the role of the depository of a Convention in respect of its entry into force, as there would be no consensus as to whose reservation was compatible and whose reservation was not.

Nevertheless, by bringing up the new concept of compatibility test the ICJ set a new norm in the law of reservations.

2.5. Work of the International Law Commission

At its first session itself the International Law Commission (ILC) selected the topic of the ‘law of treaties’ as one of the prioritised areas on which it intended to work.

for the codification. James L. Brierly was elected as Special Rapporteur for the law of
treaties. Brierly prepared a report on the law of treaties, which included the topic of
reservations as well. There was a large measure of agreement on the general principles on
this topic as formulated in the report and particularly on the issue that a reservation
required the consent of all parties to become effective. But it was also felt that further
consideration was required of the application of these principles to various situations that
might arise in the making of multilateral treaties. On November 16, 1950 the General
Assembly of the United Nations in its resolution while requesting the International Court
of Justice on the question of reservations to Genocide Convention also invited the
International Law Commission:

(a) in the course of its work on the codification of the law of treaties, to
the question of reservations to multilateral conventions both from the point
of view of codification and from that of the progressive development of
international law; to give priority to this study to report there on,
especially as regards multilateral conventions of which the Secretary
General is the depository, this report to be considered by the General
Assembly at its sixth session,
(b) In connection with this study to take account
of all the views expressed
during the fifth session of the General Assembly, and particularly in the
Sixth Committee.

of Public International Law (Manchester, 1970), M. El Baradei, Thomas M. Frank and R.
Trachtenberg, The International Law Commission: The Need for a New Direction (New York,
Development of International Law: A UNITAR Study of the Role and Use of the International

Resolution 478(V), n.33.
In response to this resolution a report was prepared by Brierly, Special Rapporteur on the issue of ‘reservations to multilateral treaties’,\(^{46}\) in 1951. As the same matter was before the International Court of Justice for its advisory opinion on the request of the General Assembly it was stated that the report was of a tentative character.

The Brierly report did not go into the aspects of principle that would be followed regarding reservations. It had taken for granted the need for a unanimous consent of the parties to treaties\(^ {47}\). But it discussed elaborately on the form of modalities to be adopted while accepting or objecting to reservations. Without going into formulating a legal regime, the report said that the ‘Commission should recommend that an article be included in treaties stating the practice to be followed therein as regards reservations.’\(^ {48}\) Accordingly the report contained model clauses of four categories for the purpose of inserting them into various treaties at the time of preparation.\(^ {49}\) They were: (1) Admissibility of Reservations (2) States entitled to be consulted as to reservations (3) Depository’s functions (4) Procedure for objections. These articles were formulated in a flexible way that they could be adopted in varying situations.

The matter of reservations again came for discussion before the International Law Commission in the third session in response to the earlier resolution no. 478(V) of 1950 of the General Assembly. In this report the Commission had elaborately discussed various practices that were in vogue till then, particularly the practices of the League of Nations, Organisation of American States and the United Nations.


\(^{47}\) Ruda, n. 24, p.148.

\(^{48}\) Yearbook International Law Commission, n. 46, p.4.

\(^{49}\) Ibid, p.16-17.
The Commission while examining the practice followed under the OAS system recognised the specific character of the OAS and concluded that such practice was mainly meant for the purpose of attaining as many number of ratifications as possible. While emphasising that the past practice of the OAS failed to convince that the universality was necessarily promoted by it, the Commission said that this practice was suitable in case of those conventions, which required the universal acceptance. But the Commission refused to apply the same method to other multilateral conventions where the integrity and uniform application of the convention were more important considerations than its universality. It said that it was likely to be the case with conventions drawn up under the auspices of the United Nations.\textsuperscript{50}

The Commission also felt in its report that the principle of compatibility of a reservation with the object and purpose of the treaty evolved by the ICJ in the Genocide Convention case was also not suitable to multilateral conventions in general. This principle required that the provisions of a convention needed to be classified into two categories of which one constituted the object and purpose of the treaty and another did not. The Commission felt that this classification would be made by States on their subjective understanding which would result in different States categorising the same provisions in different ways and referring the matter for judicial decision would result in delay. The report said that as long as the application of the criterion of compatibility

\textsuperscript{50} Ibid, p.128.
remained a matter of subjective discretion, the status of the reserving State vis-à-vis the
convention remained uncertain.51

The Commission opined in the report that multilateral conventions were
diversified in character and object that, when the negotiating States had omitted to deal in
the text of a convention with the admissibility or effect of reservations, no single rule
uniformly applied could be wholly satisfactory. The Commission felt that its problem
was not to recommend a rule, which would be perfectly satisfactory, but that which
seemed to it to be the least unsatisfactory and to be suitable for application in the majority
cases52. The Commission came to a conclusion that such a rule was to be found in the
practice followed by the Secretary-General of the UN with certain modifications. In the
opinion of the Commission the practice of the Secretary-General of the United Nations
i.e., the unanimity rule could be applied suitably to multilateral treaties in general than
the one propounded by the ICJ or the practice of the OAS.

The report while suggesting that the provisions relating to admissibility and non-
admissibility of reservations should be inserted at the time of preparation itself clarified
its position regarding the general rule to be followed in the absence of such provisions.
The Commission suggested that, in the absence of contrary provisions in any multilateral
convention and of any organisational procedure applicable, the following practice should
be adopted with regard to reservations to multilateral conventions, especially those to
which the Secretary-General of the United Nations was the depository.

51 Ibid., p.128.
52 Ibid., p.129.
(1) The depository of a multilateral convention should upon receipt of each reservation, communicate it to all states which are or which are entitled to become parties to the convention.

(2) The depository of a multilateral convention, in communicating a reservation to a State which is entitled to object, should at the same time request that State to express its attitude towards the reservation within a specified period, and such period may be extended if this is deemed to be necessary. If, within the period so specified or extended, a state fails to make its attitude towards the reservation known to the depository, or if, without expressing an objection to the reservation, it signs, ratifies, or otherwise accepts the convention within the period, it should be deemed to have consented to the reservation.

(3) The depository of a multilateral convention should communicate all replies to its communications, to all States which are or which are entitled to become parties to the Convention.

(4) If a multilateral convention is intended to enter into force as a consequence of signature only, no further action being requisite, a State which offers a reservation at the time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

(5) If ratification or acceptance in some other form after signature is required to bring a multilateral convention into force,

(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

(b) A State which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed or ratified or otherwise accepted the convention;
when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but before the expiration of this period; provided however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving state from becoming a party, if within a period of twelve months from the time of the making of its objection, the objecting State has not ratified or otherwise accepted the convention.\(^{53}\)

The matter of reservations was again discussed by the International Law Commission in 1953. The report was, this time, prepared by Sir Hersch Lauterpacht who was appointed as the Special Rapporteur on the law of treaties after the resignation of Sir James Brierly.

This report stated that the unanimity rule applied by the United Nations till the ICJ delivered its judgement on reservations must be regarded as still constituting to be the existing rule of international law. However it did not hesitate to hold that it was not now of the view that it constituted a satisfactory rule and that could be maintained.\(^{54}\) The Commission also declined to accept the sovereignty principle, which said that States had unlimited power to make reservations despite the objections, and the flexible system of OAS. Keeping this finding in view the report formulated four alternative draft proposals to the existing rule of unanimous consent, which was reiterated under Article 9.\(^{55}\)

Article 9 read as follows:

\(^{53}\) Ibid., pp. 130-31.


\(^{55}\) Ibid., pp. 123-136
A signature, ratification, accession or any other method of accepting a
multilateral treaty is void if accompanied by a reservation or reservations
not agreed to by all other parties to the treaty.

Alternative drafts 'A' read:

If, in any case where a multilateral treaty does not expressly prohibit or
restrict the faculty of making reservations, a state signs, ratifies, accedes to
or otherwise accepts the treaty subject to a reservation or reservations
limiting or otherwise varying the obligations of any article or articles of
the treaty, the following procedure shall apply in the absence of any other
provisions in the treaty:

1. Whenever a treaty provides that it shall enter into force on a specified
   number of States finally becoming parties thereto, the fact that a State has
   appended a reservation or reservations to any article of the treaty is not
   taken into account for the purpose of ascertaining the existence of the
   requisite number of parties to the treaty.

2. If within three years of the treaty having entered into force less than
two-thirds of the States accepting the treaty, whether they have accepted it
with or without reservations, agree to the reservation or reservations
appended by a State, that State, if it maintains the reservation, ceases to be
a party thereto. If, at the end of that period and as the result of the
operation of the rules stated, the number of parties is reduced below the
requisite number stipulated for the entrance of the treaty into force, the
treaty is dissolved.

3. If, at the end of or subsequent to the period referred to above, a
reservation is agreed to expressly or tacitly by two-thirds or more of the
total number of the States accepting the obligations of the treaty, then the
State making the reservation is deemed to be a party to the treaty of all
parties thereto subject to the right of the other parties not to consider
themselves bound by the particular clause of the treaty in relation to the
State making the reservation.
4. A State is deemed to have agreed to a reservation made by another State if, within three months of the receipt of notification of the reservation in question, it has not forwarded to the depository authority a statement containing a formal rejection of the reservation.

In this alternative proposal Hersch Lauterpacht rejected all the models that were there in practice till then and introduced new method, according to which the validity of a reservation would be decided on the basis of the majority rule. If the required number of States did not accept the reservation then the reserving State would not remain as a party. Another important feature of this alternative was the provisional entry into force of the convention with the help of the States making reservations. But once the stipulated period was over and the number of parties remained was less than what was required after the application of the majority rule, then that treaty stood dissolved.

Alternative draft B

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty, the following procedure shall apply in the absence of any other provisions in the treaty;

1. The text of the reservations received shall be communicated by the depository authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depository authority that it disagrees with their reservation, it shall be deemed to have accepted it.

2. Unless, after an interval prescribed but the convention, two-thirds of the States qualified to offer objections have accepted the reservation, the reserving State, if it maintains its reservation, will not be considered a party to the treaty.
3. If two-thirds or more of the States referred to in paragraph 2 agree to the reservation, the reserving State will be considered a a party to the treaty subject to the right of any party not to apply to the reserving State the provision of the treaty in respect of which a reservation ha been made.

This alternative also followed alternative draft ‘A’ as far as the majority rules i.e., acceptance by two-thirds states was concerned for the validity of reservations. According to this alternative the text of the reservations would be communicated to the interested parties by the depository and if they did not object to it within three months that reservation would be considered valid and the reserving State would become a party to the treaty if it is accepted by two-thirds or more of the ratified States in a stipulated time prescribed by the convention. This was subject to the right of any party not to apply to the reserving State the provision of the treaty in respect of which a reservation was made.

Alternative draft C

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty;

1. The parties or the organ of an international organisation responsible for establishing the text of the treaty shall designate a committee, appointed in a manner to be agreed by them, competent to decide on the admissibility of reservations made by any Government subsequent to the establishment of the text of the treaty.

2. The text of the reservations received shall be communicated by the depository authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an
interested State does not notify the depository authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the committee, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

This alternative put forward a proposal, which was altogether different from the alternative drafts 'A' and 'B'. This draft proposed that the parties or the organ of an international organisation responsible for making of the treaty should designate a committee, to decide upon the admissibility of reservations made by any State. If a State objected to a reservation made by another State within a period of three months, then on the request of the reserving State, the Committee would decide whether that reservation would be admissible or not. If it declared that reservation was inadmissible then the reserving State would not become a party to the treaty.

Alternative draft D

If, in any case where a multilateral treaty does not expressly prohibit or limit the faculty of making reservations, a State signs, ratifies, accedes to or otherwise accepts the treaty subject to a reservation or reservations limiting or otherwise varying the obligations of any article or articles of the treaty the following procedure shall apply in the absence of any other provisions in the treaty:

1. The parties or the organ of an international organisation responsible for establishing the text of the treaty shall request the International Court of Justice to designate under its Rules a Chamber of Summary Procedure to decide on the admissibility of reservations made by a Government subsequent to the establishment of the text of the treaty.
2. The text of the reservations received shall be communicated by the depository authority to all the interested States. If, on the expiry of a period of three months following the receipt of such communication, an interested State does not notify the depository authority that it disagrees with the reservation, it shall be deemed to have accepted it.

3. If a reservation is objected to by a State qualified to object, then it shall be competent for the Chamber of Summary Procedure, at the request of the State making the reservation, to decide whether the reservation is admissible. If the reservation is declared inadmissible then the State in question cannot become a party to the treaty if it maintains the reservation.

This alternative proposed a slightly different model from that of the alternative ‘C’. Under this draft, the parties or the organ of an international organisation responsible for making of a treaty would request the ICJ to designate a chamber of summary procedure to decide upon the admissibility of reservations to which objections were made by another State within a period of three months. The chamber of summary procedure would take up the issue at the request of the State making the reservation. If it found that the reservation was inadmissible then the State making the reservation could not become a party to the treaty.

In all the four draft proposals it was stated that they were applicable in cases where the concerned treaties did not contain any procedure about the admissibility or inadmissibility of reservations in its text. All the four draft proposals were alternative models to the existing ones. As stated earlier though the report accepted the ‘unanimity rule’ as the existing law but it declined to accept it as a satisfactory rule, thus, Article 9 in the report was proposal de lege lata and the alternatives were advanced de lege ferenda.⁵⁶

⁵⁶ Ruda, n. 24, p. 156.
In his second report in 1954 Lauterpacht added 'unless otherwise provided by the
treaty'\(^{57}\) to Article 9 of his first report. Along with this there was a discussion on the
opinion of various countries within the Commission on the question of reservations to
the proposed covenant on human rights. There was no change in the four alternative draft
proposals mentioned in the previous report.

In 1956 the International Law Commission had before it another report prepared
by Sir Gerald Fitzmaurice who took over as the Special Rapporteur from Sir Hersch
Lauterpacht. Article 13 (L) of this report defined reservation as follows.\(^{58}\)

A reservation is a unilateral statement appended to a signature, ratification,
accession or acceptance, by which the state making it purports not to be
bound by some particular substantive part or parts of the treaty, or reserves
the right not to carry out, or to vary the application of that part or parts:
but it does not include mere statements as to how the state concerned
proposes to implement the treaty or declarations of understanding or
interpretation, unless these imply a variation on the substantive terms or
effect of the treaty;

This definition clearly articulated that a reservation to be considered as so must, in
its effect, deviate from the original text and a mere statement or a declaration did not
come under this category. This report included the category of plurilateral treaties, apart
from bilateral and multilateral treaties which constituted the treaties that were entered
into by a limited number of States for purposes specially involving those States.


The Fitzmaurice report rejected the previous one prepared by Sir Hersch Lauterpacht and his alternative models and went back and adopted the traditional 'unanimity rule' with slight modifications. Thus:

If a reservation meets with objection, and if the objection is maintained notwithstanding any explanations or assurances given by the reserving state, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn. 59

This rule was made a little liberal in case of reservations to those treaties, which were in force for not less than five years. In respect of these treaties 'the reservation need only be circulated to and be met with absence of objection on the part of the states actually parties to the treaty at the date of circulation, so long as these number not less than twenty percent of the states originally entitled to become parties'. 60

Further the report said that in case the treaty itself provided certain reservations then it was presumed that other reservations other than those provided in the treaty would not be allowed. This report also prohibited reservations to those provisions under which disputes regarding interpretation or application of treaty could be referred to the ICJ or other international tribunal, to arbitration, conciliation, or by other specified means. Reservations were also prohibited in case of bilateral and plurilateral treaties unless it was specifically permitted in the treaty or States expressly agreed there to. It also permitted tacit acquiescence if no objection was expressed before the signature and in case of reservations made at the later stage it could be assumed as had been accepted if no objection was expressed within a period of three months. The effect of a reservation

59 Ibid., p.115.
60 Ibid., p.115.
was limited to that part of the treaty to which reservation was made and the reserving state was allowed to derogate from that part of the treaty. The other parties to the treaty were also allowed to do the same vis-à-vis the reserving State and it did not affect the relations between States, other than the reserving states, *inter se*.

After the resignation of Sir Gerald Fitzmaurice from the ILC in 1961, Sir Humphry Waldock was appointed as the Special Rapporteur on the law of treaties. At this time the Commission had taken a decision to change the scheme of its work from an expository statement of the law to the preparation of draft articles which would help as a basis for the formulation of a multilateral convention. Having recognised the necessity of having a multilateral convention on the law of treaties, the Commission had two considerations in mind while taking this decision. They were:

*First*, an expository code, however formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new states have recently become members of the international community. *Secondly*, the codification of the law of treaties through a multilateral convention would give all the new states the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations. 61

Sir Humphry Waldock submitted his first report in the year 1962 on the conclusion, entry into force and registration of treaties 62. So far as the issue of

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reservations was concerned this report took a position, which was altogether different from the past Special Rapporteurs. It largely adopted the model followed by the Organisation of American States. The matter of reservations was discussed in the report under three articles, i.e., Article 17, on power to formulate and withdraw reservations; Article 18, on consent to reservations and its effects; and Article 19, on objections to reservations and its effects. 63

Article 1(L) of the Waldo draft said:

Reservation' means a unilateral statement whereby a state, when signing, ratifying or acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that state and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to variation in the legal effects of the treaty, does not constitute a reservation. 64

Article 17 of the report said that if it was not expressly prohibited or restricted a State was free to formulate a reservation when signing, ratifying, acceding to or accepting a treaty. An important feature of this report on reservations was that it included the test of compatibility in it.

The draft Article 17(2) (a) said:

When formulating a reservation......a state shall have regard to the compatibility of the reservation with the object and purpose of the treaty. 65

63 Ibid., pp.60-62.
64 Ibid., pp.31-32.
65 Ibid., p.60.
This was for the first time that the ILC gave some recognition to the compatibility test albeit with certain amount of hesitation. Prior to this report the ILC never included the compatibility test propounded by the ICJ in the *Genocide Convention* case in 1951, in its previous reports. The Special Rapporteur having accepted that the Court’s principle had a value as a general concept, felt that there was certain difficulty in using it as a criterion of a reserving state’s status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States. Because of these reasons the Special Rapporteur tentatively inserted the compatibility principle for the consideration of the Commission without attaching any sanction to it while proposing the flexible Inter American System.66

Article 17 of the report contained the procedure to be followed with regard to the making of reservations. Articles 18 and 19 of the report dealt with the “Consent to Reservations and its Effects” and “Objection to Reservations and its Effects” respectively which embodied the flexible PAU system. Article 18 stated that a reservation by a State was operative against another State only with the consent of the latter. This Article further provided for the method of expressing consent to reservations and also the effect of reservations to which consent had been given. Article 18(5)(a)(i) stated that a reservation made in accordance with other provisions exempt the reserving State from the provisions to which reservation had been made to the extent of the effect of the reservation. Article 18(5)(a)(ii) provided for reciprocal application of this exemption for other States parties in the application of the treaty provisions to which reservation was

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66 Ibid., p.65-66.
made. Article 18(5)(b) stated that reservation operates between the reserving State and other States but did not affect the treaty relations between other parties *inter se*.

With certain exceptions in the case of plurilateral treaties, Article 19(a) empowered States to object to reservations which were “not specifically authorised by the terms of the treaty”. This article provided for different forms of expressing objections to reservations. Article 19(3)(a) stated that an objection to a reservation should be made within twelve calendar months from the date on which the objecting State was formally communicated of the reservations. In the case of multilateral treaties if an objecting State was not a party to the treaty when that communication was made it could make an objection at the time of executing an act necessary for it to become a party to the treaty.

The impact of objections to reservations was different on different categories of treaties in cases where the reservation had not been withdrawn: In the case of bilateral treaties, the treaty no longer would be in existence, in the case of plurilateral treaties, unless the treaty should otherwise provide or another rule be in application under the constitution or usages of an international organisation or under a decision of its competent organ, the reserving State should be excluded from participation in the treaty. In the case of multilateral treaties an objection excluded the entry into force of the treaty as between the objecting State and the reserving State, but it no way affects the relations between the reserving State and the other States who have not made objections. The decision of the competent organ of the concerned organisation

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67 Article 19(4)(a), Ibid., p.62.
68 Article 19(4)(b), Ibid., p.62.
69 Article 19(4)(c), Ibid., 62.
invalidating the reservation should stop the reserving State from becoming a party in the
case of treaties, which were the constituent instruments of international organisations.\textsuperscript{70}

The report submitted by the Special Rapporteur Humphry Waldock on the
conclusion, entry into force and registration of treaties was considered by the
International Law Commission at its 636\textsuperscript{th}-672\textsuperscript{nd} meetings and accordingly the
Commission adopted a provisional draft of articles. The issue of reservations under the
title “reservations” was adopted under Articles 18, 19, 20, 21 and 22 with the headings,
‘formulation of reservations’, ‘acceptance of and objection to reservations’, ‘the effect of
reservations’, ‘the application of reservations’ and ‘the withdrawal of reservations’
respectively\textsuperscript{71} unlike the three articles proposed by the Special Rapporteur. Certain
modifications and changes were made to the proposals made by the Special Rapporteur.
The adopted version of the definition of reservations reads as follows:

Article 1(1)(f):

Reservation means a unilateral statement made by a state, when signing,
ratifying, acceding to; accepting or approving a treaty, whereby it purports
to exclude or vary the legal effect of some provisions of the treaty in its
application to that state.\textsuperscript{72}

The category of plurilateral treaties has been done away with but unanimity rule
was considered to be applicable in the case of treaties concluded between a small number
of parties. In the case of treaties, which were constituent instruments of international
organisations, it was accepted that the decision of the competent organ of that
organisation would determine the validity of reservations.

\textsuperscript{70} Article 19(4)(d), Ibid., 62.
\textsuperscript{71} Ibid., pp.175-176.
\textsuperscript{72} Article 1 (1)(f) of the Draft, Ibid., p.161.
Seventeenth session of the General Assembly considered this report of the International Law Commission and many delegations in the Sixth Committee accepted the report with certain comments and suggestions.

Accordingly the draft adopted by the Commission in 1962 was sent to the governments for their comments. Taking into consideration the observations made by the governments and the delegations the Special Rapporteur submitted his fourth report in 1965 which dealt with the issue of reservations under Articles 18-22. These five draft articles were on “Treaties Permitting or Prohibiting Reservations”, “Treaties Silent Concerning Reservations”, Procedure Regarding Reservations”, “The Application of Reservations” and “The Withdrawal of Reservations” respectively. The headings of the first three articles of this report were different from the previous report and there were also certain changes and re-arrangements in the text of these articles based on the suggestions and comments by certain countries and delegations on the previous report. Poland and Denmark argued against the inclusion of criterion of compatibility, which was now included under Article 19(1) of the present draft. The proposed draft in the fourth report of the Special Rapporteur also included, under Article 19(5) that acceptance by one State party alone is sufficient for a reserving State to become a party to a treaty.

At its seventeenth session in 1965 the International Law Commission discussed the 1962 draft articles, opinions of the Governments and also the 1965 proposals by the Special Rapporteur. Finally the Commission approved the new draft articles at this

74 Ibid, pp.45-56.
75 Ibid, pp.161-162.
session and commentaries thereto at the eighteenth session in 1966. The General Assembly in its resolution 2045 (XX), in 1965 took note of the Commission’s report and a decision was taken in its resolution 2166(XX) in 1966, to convene the United Nations Conference on the Law of Treaties which took place at Vienna from 26 March to 24 May 1968 and from 9 April to 22 May 1969.

2.6. The Vienna Convention Regime on the Law of Reservations

Years of background work undertaken by the International Law Commission on the law of treaties had culminated in the form of Vienna Convention on the Law of Treaties at Vienna which was adopted on May 23, 1969 and entered into force on January 27, 1980. The legal regime governing the issue of reservations to treaties has been incorporated in the Vienna Convention under section 2 of part II in Articles 19 through 23.

2.6.1. Definition

Article 2(1)(d) of the Vienna Convention defines ‘reservations’ as follows:

Reservation” means a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.

This definition does not make any express reference to the status of interpretative declarations, which have received a considerable attention in the international law

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78 Ibid.,
The basic criterion that seemed to have guided the International Law Commission in determining the nature of a statement as reservation is that its potential to ‘limit or vary’ the legal effect of the provision to which that statement has been attached. In fact this was expressly clarified by Sir Humphry Waldock in his first report on the law of treaties. While defining the term “reservation” he added to the definition that “[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation”. But later on this sentence was removed from the draft. This issue was also discussed in the Vienna Conference and finally the present text has been approved which is intended to cover all the statements having the potential to exclude or to modify the legal effect of the provisions of a treaty. Under this definition it is not the name with which a statement has been formulated but its potential to exclude or to modify the legal effect of the provisions that determines whether it is a reservation or not.

2.6.2. Article 19: Formulation of Reservations

Article 19 of the Vienna Convention deals with ‘formulation of reservations’. It reads as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
(a) the reservation is prohibited by the treaty:
(b) the treaty provides that only specific reservations, which do not include the reservation in question, may be made; or


*Yearbook of the International Law Commission*, n. 61, p.31-32.

See Mc Rae, n.79.
(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty." 82

Paragraph (c) of this article includes the ‘object and purpose test’ evolved by the International Court of Justice in the Genocide Convention Case. However this principle is applicable to those treaties which are not covered by paragraphs (a) and (b). The spirit of Article 19 seems to be that states as sovereign independent entities are entitled to make reservations except under three conditions mentioned in paragraphs (a)(b) and (c). A reservation can not be made if the treaty itself prohibits it. Likewise a State also can not make reservations if only specified reservations are permitted by the treaty which do not include the reservation in question. Therefore, the test of compatibility with the object and purpose of a treaty is applicable where the treaty is silent about the permissibility or non-permissibility of reservations. If a reservation is prohibited by the treaty then there is no need of application of the test of object and purpose. Likewise if a specified reservation is permitted by the treaty, it may be presumed that the State parties felt that the permitted reservation is not incompatible with the object and purpose of the treaty, hence does not require the application of test once again. However there would be circumstances, which warrant the application of the object and purpose test. Such is the case where a treaty permits reservations to specified articles but not specified reservations. It is argued that “if the treaty specifies as prohibited or permitted the actual reservations which may be formulated, there is no place for the incompatibility criterion; but if the treaty merely provides that reservations (unspecified as to type or kind) may be made to particular articles of the treaty, this does not exclude the ‘incompatibility’
criterion in relation to such reservations". Therefore it is felt that "[t]his distinction between reservations which are specified as permissible (and which need no subsequent acceptance unless the treaty so requires) and the specification of articles to which reservations may be made is of extreme importance". It is important because a state can make a reservation, to an article to which reservation is permitted by the text of the treaty, which in its operation may go beyond that particular article and may be detrimental to other aspects of the treaty or other treaties to which reservation is not permitted. Therefore a clear distinction needs to be made between permissibility of specified reservations and permissibility of reservations to specific articles, the latter case warranting the applicability of test of object and purpose.

There is another situation, which also warrants application of test of compatibility of a reservation with the object and purpose of a treaty. It is that even in the cases where the treaty contains a provision permitting certain specified reservations, other reservations other than those permitted may be made, subject, of course, to the test of compatibility. With regard to article 19(b), contrary to Commission’s understanding that if a reservation is permitted others are not permitted, it is argued that "to exclude reservations not specifically mentioned, it is now not sufficient for the treaty in question to provide that certain reservations are permitted, it has to state that “only” these reservations are permitted. If the treaty contains a provision permitting certain reservations, this does not mean that a State could not formulate others". This view has been substantiated by the

84 Ibid, p.47.
85 Ruda, n. 24, p.181.
fact that the word “only” has been added before the ‘specified reservations’ in Article 19(b) at the instance of Poland which has expanded the scope of the application of compatibility test even in the cases of treaties which contain a provision regarding reservations. Thus as Ruda opines:

Under the Vienna Convention, other reservations may be formulated in addition to those authorised by the treaty, provided that they are not incompatible with the object and purpose of the treaty. It is therefore no longer “in cases when the treaty contains no provisions regarding reservations” that a reservation compatible with the object and purpose of the treaty could be formulated: even in cases of treaties containing provisions concerning reservations, certain other reservations may be made, provided that they are compatible with the object and purpose of the treaty. \(^{86}\)

2.6.3. Article 20: Acceptance of and Objections to Reservations

A general opinion among States with regard to the redundancy of the unanimity rule and the need for a more flexible system of reservations is reflected in the provisions of the Vienna Convention as they have subscribed to the basic tenets of the PAU system with certain modifications along with the object and purpose test evolved by the ICJ. Article 20 of the Vienna Convention deals with acceptance and objection to reservations. Article 20(1) says that an expressly authorised reservation does not require any acceptance by the contracting States unless the treaty requires it. It is generally understood that each and every provision of a treaty is discussed threadbare before it is accepted to become a part of the treaty. Therefore paragraph 1 of Article 20 is based on the presumption that States incorporate a provision permitting particular reservation only

\(^{86}\) Ibid., p.182.
after having satisfied that those reservations will not be incompatible with the object and purpose of the Convention. Hence, such reservation need not be accepted, subsequently, by the other contracting parties.

Paragraph 2 of Article 20 deals with reservations to that category of treaties which have been classified as plurilateral treaties by Fitzmaurice in his report submitted to the International Law Commission and the "restrictive multilateral treaties" by the French delegation at the Vienna conference. But, paragraph 2 Article 20 does not use the word plurilateral treaties and instead it uses the phrase 'limited number of negotiating states'. This paragraph reads that:

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

This provision is a vestige of classical 'unanimity rule' which has been rejected by States in respect of multilateral treaties. However, the Vienna conference found this principle to be of still relevant in respect of treaties which have been entered into by limited number of contracting parties and the object and purpose of the treaty requires its applications in toto. Therefore two-condition need to be satisfied for the unanimity rule to be applicable. First, there should be only limited number of contracting parties to the treaty. Second, the object and purpose of the treaty should require that the acceptance by all the parties in toto is essential. In its commentary on the final draft articles the

87 Yearbook of the International Law Commission, n.58, p.115.
88 Vienna Convention, n.77.
Commission opined on this issue that, "while the limited number of negotiating States is an important element in the criterion, the decisive point is their intention that the treaty should be applied in its entirety between all the parties". However, the Convention does not provide any mechanism to decide as to what are the specific parameters to classify treaties under this category. It may not be that difficult to classify a treaty on the basis of the first condition of limited number of parties but it may not be always feasible to apply the second condition. If a treaty has been entered into by limited number of contracting States and that treaty does not contain any provision regarding reservations, then it may be presumed that there is no consensus on the issue of inclusion of a provision dealing with reservations. Therefore, there are bound to be differences with regard to the requirement of acceptance of a reservation by all other parties at a later stage, as it is always difficult to achieve consensus on the question of object and purpose of a treaty.

Paragraph 3 of Article 20 is another exception, like paragraph 2, from the general system adopted in the Convention. This provision deals with reservations to constituent instruments of international organisations. Unless the instrument provides otherwise, acceptance of the competent organ of that organisation is required for a reservation to be a valid one. In the case of these treaties the State parties do not have any say with regard to the acceptance or objection to a reservation. The flexible system of individual acceptance/objection to reservations is found to be unsuitable so far as the constituent instruments of international organisations are concerned. It is of relevance to quote a paragraph of Ruda, even at the risk of being lengthy, as he has succinctly highlighted the problems of interpretation of this provision:

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89 Yearbook of the International law Commission, n. 76, p.207.
Paragraph 3 presents several problems of interpretation. First, in some instances it is not easy to determine whether an instrument is the constituent instrument of an international organisation, as in the case of the International Convention on Telecommunications, which is supplemented by rules and amendments. Secondly, the position of India in relation to the IMCO Constitution illustrates the fact that it is not clear who is to decide whether a declaration is or not a reservation; in case of doubt, if the depository submits the relevant text to the competent organ, this will apparently not give rise to any problem, because such organ will decide whether there is or is not a reservation which requires to be accepted; on the other hand, if the depository interprets what is really a reservation as a mere declaration, the purpose of paragraph 3 will be frustrated, because the reservation will be accepted by the depository without the intervention of the competent organ. Thirdly, sometimes it is not easy to determine which is the competent organ, and also it is not clear what should be done if the reservation is formulated before the organ is established. In the latter case, it seems that the reservation cannot have legal effect until the proper organ within the organisation has been established; no other juridical solution is foreseeable.

However with all its anomalies as mentioned above, paragraph 3 presents a different model which has not received much attention from the international community but got the recognition from certain quarters. Therefore “paragraphs 2 and 3 constitute lex specialis to be applied as an exception to the lex generalis provided for in paragraph 4”. As these two models enshrined in paragraphs 2 and 3 represent two different methods of assessing the validity of reservations, the treaties which do not come under these two models...
paragraphs are governed by paragraph 4 of Article 20. This is the procedure, which is intended to govern the large body of multilateral treaties. Sub paragraph (a) of paragraph 4 says that a reservation accepted by another contracting State would make the reserving State a party in relation to the accepting State if and when the treaty is in force between those States. Irrespective of the responses of other States a reserving State would enter into treaty relation with the accepting State. Substantiating this provision subparagraph (c) states that acceptance of a State’s reservation by at least one other contracting State would entitle the former to become a party to the treaty. As against the unanimity rule of acceptance by all other State parties these provisions provide for an acceptance by a single contracting State to constitute a reserving State a party to a treaty. This is the procedure, which has been adopted from the PAU system of reservations. Subparagraph (b) of paragraph 4 states that an objection made by a State to the reservation of another State would not affect the treaty relations between them unless a contrary intention is expressed by the objecting State. This provision is quite opposite to the draft article of the Commission, which read:

Article 17 (4) of the Commission’s draft read as follows:

An objection by another contracting state to a reservation precludes the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is expressed by the objecting state. 93

This procedure adopted by the Commission in its final draft was taken from the PAU system which provided that the treaty relations between the objecting and reserving States would get severed the moment an objection was made by a State. This position has been reversed by the Vienna Conference and accordingly objecting State would remain as

a party in relation to the reserving State unless a contrary intention is expressed by the objecting State. Under the subparagraph (b) it is up to the objecting State to make a definite statement not to have any treaty relations with the reserving State. Merely an objection does not amount to non-existence of treaty relations. Some States felt that the procedure under subparagraph (b) would encourage states to make reservations and contrary to it the procedure in the Commission's report would discourage States from making reservations. However, at the instance of the USSR the provision has been accepted in the present form by making amendment to the Commission's draft article.94 The amendment proposed by the USSR to draft Article 17(4) and accepted in the present form of subparagraph (b) of paragraph 4 of Article 20 is perceived as having far reaching effects in the treaty relations. Thus it is argued that:

In effect, however, a quiet revolution in the law had taken place: The contractual construction of reservations, according to which at least the tacit consent of other contracting parties was necessary for reservations to become effective and for treaty relations to be established between the two States, had been abandoned in favour of a unilateral right of the reserving State.95

Implied consent as has been provided under paragraph 5 of Article 20 is another mode of acceptance of reservations which arguably, favours the reserving States. Under this provision, in the absence of any other system provided in the treaty, if a State fails to object to a reservation within a period of twelve months after it has been notified of it or by the date on which it expresses its consent to the treaty, whichever is later, that State is

94 See Ruda, n. 24, p.191-93.
deemed to have accepted that reservation. This provision may be interpreted as favourable to the reserving State, in the sense that if a state fails to object to a reservation for reasons other than that of legal nature, but out of practical constraints, it is understood as consented to that reservation.

2.6.4. Article 21: Legal Effects of Reservations and of Objections to Reservations

Article 21 of the Vienna Convention deals with the legal effects of reservations and of objections to reservations.

Article 21 reads as follows:

1. A reservation established with regard to another party in accordance with Articles 19, 20 and 23:
   (a) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation: and
   (b) Modifies those provisions to the same extent for that other party in its relations with the reserving State.
2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.
3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation. 96

Though it is not expressly provided subparagraphs (a) and (b) of paragraph 1 are applicable to treaty relations of a reserving State vis-à-vis the accepting States, the objecting State's relations are governed by the paragraph 3. Subparagraph (a) and (b)

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96 Vienna Convention, n. 77.
authorise the reciprocal exclusion of treaty obligations to the extent of the reservation between the reserving State and the accepting State. Paragraph 3 deals with the status of the treaty relations of objecting State with the reserving State. As provided by Article 20 paragraph 4(b) an objecting State would remain as a party vis-à-vis the reserving State unless a contrary intention is expressed. Thus, paragraph 3 of Article 21 is applicable when the objecting State does not express not to have treaty relations with the reserving State. In such a situation, paragraph 3 provides, the provisions to which the reservation relates do not apply between the two States to the extent of the reservation. The net result of both sub paragraphs (a) and (b) of paragraph 1 governing the relations between the reserving State and accepting State and the paragraph 3, governing the relations between the reserving State and objecting State seems to be the same so far as effect on treaty relations is concerned. So far as the treaty relations with the reserving State are concerned both the accepting and the objecting States have similar effect. Whether it is an acceptance or an objection it does not make any effect on the treaty relations. However, the text of the provisions suggests that the framers of the Convention intended to maintain a difference between the two situations. Sub paragraphs (a) and (b) of paragraph 1 contain the word “modifies” where as paragraph 3 reads as “do not apply”. So far as the effect of provisions to which reservation is made with regard to relations between reserving State and accepting State it modifies to the extent of reservation and where as with regard to the relations between the reserving State and the objecting State the provisions do not apply to the extent of reservation.

After the Soviet amendment to Article 20 paragraph 4 (b), the conference adopted paragraph 3 of Article 21 in the following manner:
When a state objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the reservation has the effects provided for in paragraphs 1 and 2.97

Thus by adopting this text, the effect of objections was also intended to be like that of acceptance of reservations. However an amended version of above text, in the present form, was adopted with a view to making a difference between acceptance and objection to reservations. Clarifying this, the sponsors of this amendment observed that effect of an acceptance and an objection is the same when the reservation excludes a provision from the treaty, but when a reservation is intended to interpret or modify the provision without excluding it then the effect of acceptance and objection would be different. In the latter case the provision to which such reservation is made would not apply between the reserving and the objecting State to the extent of the reservation.98

Ruda succinctly explains the patent contradictions and ambiguities in Article 21 of the Vienna Convention in the following manner:

Doubts have been expressed as to the proper interpretation of Article 21, paragraph, (3) in the light of this disorganised debate. In the case of a reservation directed to excluding the application of a given clause, there is no problem: the clause in question does not apply in the relationship between the reserving and the objecting states, but the rest of the treaty enters into force between them, if the objecting state is not opposed to this. In other words, the objection has the same legal effect as the acceptance...

If the reservation is directed only to modifying, and not to excluding, the application of a clause, it seems, according to the explanations given by the authorities of the conference, that it would also not be applicable between the reserving and the objecting States, in the circumstances

97 Cited in Ruda, n.24, and p.198.
98 See Ruda, n 24, p.199.
contemplated by Article 20, paragraph 4 (b). If this is a correct interpretation of the debate, there is undoubtedly a difference between an acceptance of, and an objection to, a reservation directed only to modifying a clause: because in the case of acceptance, the clause the subject of the reservation will be applied in the modified form established by the reservation, while in the case of an objection it will not be applied at all. However, the phrase “to the extent of the reservation”, intended in the text of Article 21 paragraph 3, does not fit in with the interpretation given at the conference. A textual interpretation of this phrase leads to the result, contrary to the explanations given, that the clause to which the reservation relates may be applied to a certain extent, “to the extent of the reservation”, whatever this may be, even when there is an objection. In the case of a reservation the intention of which is not to exclude but to modify the application of a clause, this clause should, therefore, be applied between the objecting and the reserving state “to the extent of the reservation”. This textual interpretation of the convention leads us to think that ultimately the legal effects of an objection and an acceptance of a reservation are identical, when the treaty remains in force between the objecting and reserving States.99

Thus the treaty relations would remain in operation between the reserving state and the accepting state and the objecting state, mutatis mutandis, as governed by subparagraphs (a) and (b) of paragraph 1, and paragraph 3 of Article 21. Paragraph 2 of Article 21 establishes the unmodified existence of treaty relations between the other parties i.e., those states whose relations inter se are not affected by reservations and acceptances, and objections to it.

2.6.5. Article 22: Withdrawal of Reservations and of Objections to Reservations

Article 22 deals with withdrawal of reservations and of objections to reservations. This article also recognises the reciprocal recognition of rights of both reserving and objecting States to withdraw their reservations and objections at will without any permission from their counterparts or other State parties. Paragraph 1 says that unless the treaty otherwise provides, a reserving State can withdraw its reservation without getting any consent from the State which accepted its reservation. Though it is not stated in the provision it is implied that the permission of the objecting State is not required since it has already made it clear that it is against reservation. Similar way an objection of a State can also be withdrawn by it at any time. Subparagraph (a) of paragraph 3 says that the withdrawal of reservation comes into operation in relation to another contracting State on its receipt of notice of the withdrawal. Similarly subparagraph (b) says that the withdrawal of reservation will come into operation when notice of it is received by the reserving State.

It may be relevant to mention here that the ‘withdrawal procedure’ incorporated under Article 22 is silent about the withdrawal of acceptances made to reservations. It is difficult to deduce, ‘from this silence’, any conclusions with regard to the withdrawal of acceptances at any time as is done in the case of reservations and objections. This deliberate omission could have been done to safeguard the status of the reserving State as the acceptances are directly linked to the existence of the reserving State as a party to the treaty. Assuming that the treaty allows withdrawal of acceptances and all the acceptances of a reservation of a State have been withdrawn, then the reserving State would no longer remain as a party and it might even lead to the collapse of the entire treaty if the reserving State’s participation is essential for the coming into force of that treaty. In that situation
the only option left would be that that reservation should be withdrawn by the reserving State for its continuance as party to the treaty. This hypothetical situation would be contrary to the Vienna Convention framework of reservations, which was intended to be a flexible system of reservations, biased in favour of the freedom of States to make reservations.

Further the Vienna Convention is also silent on the effect of withdrawal of reservations and objections. As a result of withdrawal there would be certain changes creating new treaty obligations between States. "The obligations assumed under the treaty by these States are modified by the withdrawal of reservations or obligations. Moreover, should a State object to a reservation and declare its intention that the treaty should not enter into force between itself and the reserving State, and should the latter subsequently withdraw the reservation, such withdrawal creates a new juridical relationship and does not merely modify the pre-existing relationship, because in such circumstances one must consider that the treaty has, on the withdrawal, entered into force between the two States".¹⁰⁰ These questions remain unaddressed by the Vienna Convention leaving them to the future interpretation by a judicial body or a competent organ.

2.6.6. Article 23: Procedure Regarding Reservations

Article 23 provides the procedure regarding reservations. Paragraph 1 states that reservations, express acceptances and objections should be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty. In this paragraph the word 'acceptance' is preceded by 'express' because only

express acceptances can be formulated in writing as the implied acceptances are the result of the silence on the part of States as provided under paragraph 5 of Article 20. Paragraph 2 states that reservation made at the time of signature should be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. On the contrary, an express acceptance or an objection made to a reservation prior to confirmation of the reservation need not be reconfirmed. Thus an express acceptance or objection made to a reservation formulated at the time of signature would be in operation without confirmation in respect of such reservation which has been confirmed when the State making it expressed its consent to be bound the treaty.

Like the formulation of reservations, express acceptances and objections, paragraph 4 of Article 20 also requires the withdrawal of reservations and objections to be formulated in writing.

2.7. Appraisal

In an appraisal of the Vienna Convention provisions on reservations, one's attention is inevitably drawn to the residual character of these provisions in their application to treaties. Many of these provisions are applicable to a treaty unless the treaty otherwise provides. If a treaty contains a procedure, which is different from the procedure laid down under the Vienna Convention, it is the former, which would prevail on the latter. Paragraphs (a) and (b) of Article 19 are of residual character to the extent of excluding the application of paragraph (c) of Article 19 as both the provisions are meant to govern the treaties containing provisions on reservations as mentioned in these two paragraphs. Therefore paragraph (c) is applicable only in cases where the treaty does not
contain provisions as stated under paragraphs (a) and (b). Some of the important provisions like the acceptance of objection to reservations, particularly Article 20, paragraph 4 is also framed as residual rule and is applicable only when a particular treaty does not contain provisions of similar nature. In case a particular treaty contains provisions of a similar nature providing different procedure it is the latter that would prevail. So also with regard to paragraph 1 of Article 20. Similarly the procedure laid down with regard to withdrawal of reservations and of objections to reservations under Article 22 is also of residual character which is not applicable in cases where a different procedure is contained in the treaty concerned. Apart from accommodating the flexible system, keeping in view the varying and fluid nature of opinions of States on the issue the framers of the Vienna Convention seemed to have left States free to evolve different systems of reservations to suit the subject matter of treaties concerned.

A significant feature of the reservations regime of the Vienna Convention is the test of compatibility of reservations with the object and purpose of the treaty concerned, which was evolved by the International Court of Justice in the Genocide Convention case. The test which was intended to be an objective criterion for assessing the validity of reservations by the ICJ has entered into the Vienna Convention entailing certain ambiguity in its application. As noticed already, the patent omission in the Convention in this respect is the absence of any procedure to determine objectively as to what constitutes the object and purpose of the Convention and how a particular reservation is incompatible with such object and purpose? In the absence of any such express procedure a dispute with regard to the determination of compatibility of a reservation with the object and purpose of the treaty may be referred for adjudication by the ICJ.
Determination of compatibility of a reservation has been left to the subjective consideration under Article 20. Sub paragraph (a) of paragraph 4 of Article 20 enables a reserving State to become a party in relation to another State if the latter accepts the former’s reservation individually. This can happen with or without subjecting such reservation to the test of compatibility. It is left to the accepting State to decide subjectively whether or not a reservation is compatible with the object and purpose of the treaty. Thus, though the test under paragraph (c) of Article 19 was intended to be an objective one, it has ultimately been left to the subjective assessment by Article 20 paragraph 4. Therefore a reserving State can become a party to a treaty under subparagraph (c) of paragraph 4 of Article 20 on the acceptance of such reservation by one another State, which means, even if a reservation made by a State is considered as incompatible by all the parties, except one, then also a State can become a party to the treaty based on the acceptance by only one State. As a theoretical proposition, the doctrine of good faith can be employed to avert this kind of situation for the State parties need to act in good faith while determining the compatibility of reservations with the object and purpose of the Convention. However, “In the last analysis, under this system, the validity of reservation depends solely on the acceptance of the reservation by another contracting State. It is of course to be presumed that a State has no interest in accepting a reservation which conflicts with the object and purpose of the treaty, but such considerations may of course be displaced, for example, in favour of political motivations; there is nothing to prevent a State accepting a reservation, even if such
There also exists another doubt with regard to the distinction between permissibility and acceptability of reservations. Article 19 (c) says that a State can make a reservation unless it is incompatible with the object and purpose of the treaty. Here the question arises as to whether a State can object to a reservation, which is compatible with the object and purpose of the treaty. This leads to confusion as to whether permissibility and acceptability are two different things or they constitute only one element in it. Two methods have been proposed to understand this situation, i.e., one tier test and two-tier test. Under the one tier system, it is understood that an objection to a reservation can be made by a State only when that reservation is incompatible with the object and purpose of the Convention. If the reservation is found to be compatible with the object and purpose it is understood as has been accepted by the other State since an objection cannot be made to a compatible reservation. On the other hand, under the two-tier system a State can make an objection to a reservation, even though it is compatible, on the ground of unacceptability. Here a distinction is made between permissibility and acceptability of reservations. For a reservation to be valid it has to be both permissible and acceptable. The issue of "permissibility" is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the

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101 Ruda, n.24, p.190.
103 See Ibid.
question of whether, as a matter of policy, other parties find the reservation acceptable or not. The consequence of finding a reservation ‘impermissible’ may be either that the reservation alone is a nullity (which means that the reservation cannot be accepted by a party holding it to be impermissible) or that the impermissible reservation nullifies the State’s acceptance of the treaty as a whole”.¹⁰⁴ This distinction enables States even to object to a reservation which is compatible with the object and purpose of the Convention, therefore permissible as “[t]he issue of opposability is the secondary issue and presupposes that the reservation is permissible”.¹⁰⁵ “Whether a party chooses to accept a permissible reservation, or object to it, or object to both the reservation and the entry into force of the treaty as between the reserving and the objecting States is a policy decision and, as such, is not subject either to the criteria governing permissibility or to judicial review. It is implicit in the distinction between permissibility and opposability that an objection can be made other than on the grounds of incompatibility”.¹⁰⁶

It is not clear from the treaty provisions as to which system of the above two is intended to be applicable. “The text of Article 19(c) does not favour either interpretation over the other”¹⁰⁷. However the position adopted by the International Court is similar to the two-tier system wherein a State can object to a reservation on ground other than that of incompatibility. In the Genocide Convention case the Court said:

¹⁰⁴ Bowett, n.83, p.88.
¹⁰⁵ Ibid., p.88.
¹⁰⁶ Clark, n.102, p.303.
it may be that a State, whilst not claiming that a reservation is incompatible with the object and purpose of the Convention, will nevertheless object to it, but that an understanding between that State and the reserving State will have the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.\footnote{Genocide Convention case, n.34, p.27.}

In certain cases the State practice also seems to support the two-tier system. However the confusion about the legality and applicability of these two models would continue as long as the treaty remains silent about it.

The principle of reciprocity, the purpose of which is to maintain the balance of interests, constitutes an important part of international law making. By reciprocity a balance need to be maintained between the parties so that there would not be any variations in the obligations. Thus the parties to a treaty should have equal obligations while entering into a treaty framework. Therefore it is significant to know whether reciprocity is observed in treaty relations in the context of Vienna Convention reservations regime. As observed earlier Article 19(c) declares the impermissibility of a reservation which is incompatible with the object and purpose of a treaty. As argued earlier the Vienna Convention does not provide any mechanism to apply this test and a State can remain as a party to the Convention along with a reservation which is incompatible with the object and purpose of the Convention provided one other State accepts such reservation. The subjective determination of the validity of a reservation as provided under subparagraph (a) and (b) of paragraph 4 of Article 20 would arguably benefit a State making an impermissible reservation. However subparagraph (b) of paragraph 4 of Article 20 may be interpreted as a compensatory provision as it empowers
the objecting State to declare that the treaty in question is not applicable between them in toto. However as provided under Article 20 (5) it is for the objecting State to respond within the stipulated time and declare that it objects to the reservation. On the contrary the reserving State would benefit from the reservation from the moment it came into force irrespective of the reactions of other States. Therefore the onus lies on the objecting State to declare whether it wants to continue treaty relations or not. It is argued that there is no equilibrium maintained with regard to the position of reacting States under the reservations regime. In the case of accepting States though Article 21(1) provides for mutual modification of the provision concerned there found to be “latent limitations upon the scope of the principle of reciprocity”. This imbalance is found to be of overt in respect of certain category of States as “it is possible to envisage treaty provisions imposing particular obligations on one party or group of parties, so that there can be no reciprocity with regard to those obligations”. In such cases a reservation made to a provision may not have a reciprocal advantage on the other parties as provided under Article 21(1)(b). So also with regard to human rights Conventions where the obligations are owed to individual persons than to other States mutually.

Another significant feature of the Vienna Convention reservation regime is that apart from formulating a flexible system of reservations it also accommodates the classical ‘unanimity rule’ as still valid in respect of certain categories of treaties. This rule is made applicable to those treaties wherein there are only limited number of

110 Ibid., pp.332-333.
111 Ibid., p.333.
negotiating States, and the object and purpose of the treaty requires the application of the treaty *in toto* as provided under paragraph 2 of Article 20. Similarly paragraph 3 requires that for the validity of a reservation made to the constituent instrument of an international organisation it has to be accepted by the competent organ of that organisation. Ruda feels that “the majority rule has been accepted in this paragraph, because in most international organisations decisions are taken by a majority vote, simple or qualified as the case may be”.112

As discussed earlier paragraph 4 of Article 20 deals with the flexible system of acceptance and objections to reservations wherein the subjective decision of an individual State would decide the validity of reservations. Thus, paragraphs 2, 3 and 4 of Article 20 deal with three different situations respectively. In the first case it is the acceptance by all the parties that determine the validity of a reservation, in the second case it is the acceptance by majority States and in the third instance it is the acceptance by a single State which makes the reservation valid and in turn making the reserving State a party to the treaty. Therefore “[a]ll three criteria have been incorporated into the Vienna Convention, in order to provide for different situations”.113 However, whether this flexibility augurs well in respect of reservations to human rights treaties will be discussed in the light of the arguments from contending conceptual standpoints about the maintainability of reservations to human rights treaties.

112 Ruda, n.24, p.187.
113 Ibid, p.185.