CHAPTER-4
INTERNATIONAL JURISPRUDENCE

Though the Vienna Convention on the Law of Treaties provided, arguably, a comprehensive system of reservations there have been diverse views on its applicability to human rights treaties. Some of the human rights treaties also included separate provisions governing reservations.\(^1\) Many human rights treaties also contain provisions establishing treaty bodies.\(^2\) These bodies in various cases discussed the issue of reservations and findings of these bodies were very significant as they evolved new methods in the application of law of reservations. The important cases discussed here are, namely, (1) *UK-French Continental Shelf* Case decided by the Court of Arbitration, (2) the *Temeltasch* Case by the European Commission of Human Rights (3) the *Belilos* Case by the European Court of Human Rights (4) Advisory Opinion of the Inter American Court of Human Rights on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights (5) the Advisory Opinion with Regard to Questions Relating to the Interpretation of the Provisions in the American Convention on Human Rights Concerning the Death Penalty by the Inter American Court of Human

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1. See Chapter 2 for details.
2. These provisions are:


142
4.1. The UK-French Continental Shelf Arbitration

After the advisory opinion delivered by the International Court of Justice in the Genocide Convention case, a major judicial determination of problem of reservations was undertaken by the Court of Arbitration in the UK-French Continental Shelf case in 1977. The facts of the case were around the issue of the continental shelf boundary between the United Kingdom of Great Britain and Northern Ireland and the French Republic. The bone of contention was with regard to the continental shelf boundary between the parties in the English channel westwards from a point 30 minutes west of the Greenwich meridian out into the South-western Approaches (or Atlantic Sector) as far as the 1,000 metre Isobath. Negotiations to resolve the dispute mutually having failed, both the countries came to an agreement to refer the matter to an arbitral tribunal, through the Arbitration Agreement of 10 July 1975. Accordingly arbitral court was constituted to decide upon the matter.

There was a contention with regard to the law applicable to the settlement of dispute. This contention arose out of the reservation entered by the French government to Article 6 of the 1958 Geneva Convention on the Continental Shelf while becoming a party to it, and this reservation was objected to by the United Kingdom.

Article 6 of the Convention read as follows:

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1. Where the same continental shelf is adjacent to the territories of two or more states whose costs are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent states, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and rules another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date and reference should be made to fixed permanent unjustifiable points on the land. 5

The French Republic had deposited its instrument of accession to the Convention on 14 June 1965 with the following reservation appended to it. This reservation stipulated, inter alia, in respect of Article 6, paragraphs 1 and 2:

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

Ibid.

144
- If such boundary is calculated from baselines established after 29 April 1958:
  - If it extends beyond the 200-meter isobath;
  - If it lies in areas where, in the Government's opinion, there are special circumstances within the meaning of Article 6, paragraphs 1 and 2, that is to say; the Bay of Biscay, the Bay of Granville, and the Sea areas of the Straits of Dover and of the North Sea off the French Coast.  

The United Kingdom, having received the notification of France's instrument of accession and of its declaration, addressed a communication to the UN Secretary-General as the depository of the Convention, which contained an objection to the French reservation. The British objection declared that "the Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic".

Both parties were in agreement that the question of reservations had to be settled according to the law governing the issue of reservations to multilateral treaties in the years 1965-1966 when the French Republic made its reservations to the 1958 convention and the United Kingdom transmitted its objection. There was a consensus between them that the law governing reservations at that time was undergoing a major evolution. But there was a disagreement with regard to the exact state of the law governing reservations in the years in question and also about the practice

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Lauterpacht, n.3, p. 15.

During this time International Law Commission was in the process of formulating the law on reservations which ultimately crystallised in the form of Articles 19 to 23 of the Vienna Convention on the Law of Treaties. See *Yearbook of the International Law Commission*, vol. II (1966), and for the Vienna Convention on the law of Treaties, 1969 see, UNTS, vol.1155, reprinted in *International Legal Materials*, vol.8, 1969, pp. 679-713.
followed by the parties themselves with regard to the question of unanimous consent to reservations.

The Court of Arbitration was of the view that the evolution of the law governing reservations then was relevant only when a treaty did not itself contain the provisions dealing with reservations. Since Article 12\(^8\) of the 1958 Convention on the continental shelf provided for making of reservations, the Court was of the view that “the evolution of the law of reservations between 1951 and 1966 has only a marginal interest in the present connection”\(^9\).

The French Republic averred in its memorial that since the United Kingdom refused to accept its reservations to the 1958 Convention, it did not become operational between them. It further argued that even if it was considered to have come into force between them, Article 6 of the Convention was not in operation between them as the United Kingdom had refused to accept its reservations to this article. The United Kingdom, *inter alia*, argued that its statement “unable to accept” the French reservations was not a formal objection, but merely a declaration of the United Kingdom’s inability to accept them\(^10\).

Having gone through the arguments of both the parties the Court concluded that the Geneva Convention of 1958 on the continental shelf was a treaty in force, between

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\(^8\) Article 12 read as follows:

(1) At the time of Signature, ratification or accession, any State may make reservations to articles of the Convention other than to Article 1 to 3 inclusive.

(2) Any contracting State making a reservation in accordance with preceding paragraph may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

\(^9\) Lauterpacht n.3, p.43.

\(^10\) Ibid., p.45.
them. The Court also made further observations with regard to the French reservations and United Kingdom's objections. It opined that the first reservation to Article 6 “is both a true reservation and a reservation to Article 6 itself, not to the general rules of international law regarding straight baselines”.\textsuperscript{11} It further said that “the reservation does not seek to protect the French Republic against the use of straight baselines by other States in any context other than the delimitation of the continental shelf; and, when entering into a new obligation, under an entirely new Convention, with respect to the use of the equidistance method in the delimitation of the continental shelf, no rule of international law precluded the French Republic from formulating a reservation regarding the role of straight baselines in the application of that method as a condition of its acceptance of that new obligation”.\textsuperscript{12} Likewise the Court also upheld the validity of the second and third reservations of the French Republics to Article 6.

While commenting on the third reservation of France the Court ruled:

The Court thinks it sufficient to say that although the third reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French on its acceptance of the delimitation regime provided for in Article 6.\textsuperscript{13}

To arrive at this conclusion the Court relied on the definition of reservations provided under Article 2 (1) (d) of the Vienna Convention on the Law of Treaties which stresses on the potential of a statement to 'purport to exclude or modify the legal effect of certain provisions of the treaty in its application to that State'. Highlighting the difficulties

\textsuperscript{11} Ibid., p 48.
\textsuperscript{12} Ibid., p.48.
\textsuperscript{13} Ibid, p. 48.
involved in the making of distinction between reservation and interpretative declaration it is observed:

The boundary line between a declaration interpreting the treaty and a reservation modifying its legal effect may well be blurred and both the court’s characterisation of this as a reservation and its acceptance of “elements of interpretation” within a reservation suggest that in cases of doubt the court would favour whichever view appeared more consistent with the intention of the State making the alleged reservation. Although it certainly adds to the complexity of the process, that approach can be justified, for in many instances the distinction between a reservation and an interpretative declaration will only be found by looking at the intention underlying the making of the statement.14

The French government further contended that since its reservations were valid under Article 12 of the 1958 Convention, Article 6 as a whole was not in operation vis-à-vis the United Kingdom as it had rejected the reservations. The Court found validity in both the arguments of French Republic, which said that the establishment of treaty relations between itself and the United Kingdom were dependent on both accepting to be mutually bound by its provisions and of the United Kingdom which said that its rejection was limited to the reservations above and not to Article 6 as a whole. It also rejected both the views, of the French government, that the effect of its reservations was to render Article 6 as a whole inapplicable, and of the United Kingdom, that the reservations were not opposable to it hence Article 6 applied without modifications. It rejected this view of French Government on the ground that “it attributes to the rejection a scope wider than its

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terms justify". Its reasoning for the rejection of United Kingdom’s view was that it would allow the rejection unilaterally to set aside express conditions placed by the French Republic on its consent to be bound by the article and to attribute such an effect to the rejection of the reservations is not easy to reconcile with the principle of mutuality of consent in the conclusion of treaties.

Finally the Court concluded that the Article 6 was inapplicable between the French Republic and the United Kingdom to the extent, but only to the extent, of the reservations. For this the Arbitral Court depended on Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the principle of mutuality of consent. However, it was of the view that:

For quite different reason the practical significance of the French reservations to Article 6 in the present proceedings is very small. This is because... the combined effect of the reservations and of the United Kingdom’s rejection of them, is to render the rules of customary law applicable where application of the equidistance principle under Article 6 is excluded by one of the French reservations and because, in the circumstances of the present case, the rules of customary law lead to much the same result as] the provisions of article 6.

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15 Lauterpacht, n.3, p.52.
16 Ibid., p.52.
17 Ibid., p.52.
18 Article 21, paragraph 3 reads:
When a State objecting to a reservation agrees to consider the treaty in force 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.
19 Lauterpacht, n. 3, p.54.
Though the Court did not establish any outstanding legal principles in this case but it seems to be relevant for the purpose of the present study to understand the views expressed by it while delivering the judgement.

4.2. The Temeltasch Case

The European Commission of Human Rights was for the first time confronted with the problem of reservations to its basic human rights, treaty i.e. the European Convention on Human Rights in the case of Alpaslan Temeltasch vs Switzerland.\(^{20}\)

The facts of the case were as follows: The applicant Alparslan Temeltasch was a Dutch national of Turkish origin. He was arrested by the Swiss authorities who found some quantity of drugs in his car. The Court of the first instance acquitted the applicant but ordered him to pay part of the Court costs which included costs of language interpretation, (as the applicant did not understand the French, the language used in the Courts). Challenging this order the applicant filed an appeal before the Criminal Court of Cassation. In his appeal the applicant relied on the judgment of the European Court of Human Rights of 28 November 1978 in Luedicke, Belkacem and Koe case, wherein the Court held that “the right protected by Article 6(3)(e) entails, for anyone who cannot speak or understand the language used in Court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred”.\(^{21}\) He also argued that the order of the Court of the first instance asking him to pay the interpretation costs was contrary to Article 6(3) (e) of the Convention. He further argued that the interpretative declaration made by the Swiss Federal Council to


Article 6 (3) (e) was not a valid reservation as it did not expressly refer to a law then in force, as required by paragraph 2 of Article 64 of the Convention. The Criminal Court of Cassation dismissed the appeal and the applicant later filed a public law appeal before the Swiss Federal Court. The Federal Court also dismissed the appeal and held that the interpretative declaration made by the Swiss Federal Council was a valid reservation and complied with the formal requirements of Article 64 of the convention. Having exhausted all the domestic remedies, the applicant filed an application before the European Commission of Human Rights. The Commission was asked to decide upon the issue whether the Swiss interpretative declaration to Article 6 (3) (e) of the Convention should be regarded as a valid reservation and whether it complied with the requirement of Article 64 of the Convention.

Before going into the merits of the case the Commission decided upon the question of its competence to go into the issue of determining the validity of reservation and interpretative declarations. The Commission held that it was competent to decide upon the issue of validity of reservations keeping in view the specific nature of the Convention. This decision of the Commission established a new practice but it raises certain issues with regard to the procedure of acceptance and objections made by other parties to a reservation made by one State when it became a party to a treaty. The Commission held that:

even assuming that some legal effects were to be attributed to an acceptance or an objection made in respect of a reservation to the convention this could not rule out the Commission’s competence to decide
the compliance of a given reservation or an interpretative declaration with
the Convention.\footnote{Temeltasch case, n. 20, p.430.}

Though this position does not contradict in express terms with the procedure of
acceptance and objections to reservations in the Vienna Convention on the Law of
Treaties, it certainly limits the authority of State parties to treaty to determine the validity
of reservations. Articles 20 and 21 of the Vienna Convention enshrines a procedure\footnote{See Articles 20 and 21 of the Vienna Convention on the Law of Treaties, n. 7.}
with regard to the acceptance or objections by State parties to a reservation made by
another State and its effects on the treaty relations \textit{inter se}. The Vienna Convention
regime on reservations does not empower either the supervisory organ or any treaty
bodies to look into the validity of reservations. On the other hand it empowers State
parties either to accept or object to a reservation of another State and based on its position
the treaty relations are defined. In a way the finding of the Commission would lead to an
uncertain situation when a reservation of a State party is declared invalid on the
complaint of an individual many years after that State became a party to the convention.
A State becomes a party to the convention subject to certain reservations, which were
accepted by one or many States. But the future decision of the supervisory body
invalidating the reservation on the complaint of an individual would lead to uncertainties
and doubts about that State’s status and the treaty’s coming into force.

Nevertheless this decision of the Commission about its competence to decide
upon the validity of reservations strengthens the criterion of compatibility of reservations
to the object and purpose of a treaty provided under Article 19(c) of the Vienna
Convention on the Law of Treaties. Empowerment of a supervisory organ would lead to
an objective assessment of the object and purpose of the treaty, which is not always so in
the case of individual State parties assessing it, largely based on their subjective
interpretations.

In support of its decision the Commission cited its previous finding\textsuperscript{24} and the
judgement of the European Court of Human Rights.\textsuperscript{25} The Court in the latter case ruled
that the obligations \textit{enshrined} in the Convention were not of classical nature with
reciprocal rights and obligations but they were meant to be as objective obligations which
every State party had to comply with.

Thus the Court held:

\begin{quote}
Unlike international treaties of the classic kind, the Convention comprises
more than mere reciprocal engagements between Contracting States. It
creates over and above a network of mutual bilateral undertakings,
objective obligations which, in the words of the preamble, benefit from a
collective enforcement.\textsuperscript{26}
\end{quote}

Hence

\begin{quote}
the Commission considers that the very system of the convention confers
on it the competence to consider whether, in a specific case, a reservation
or an interpretative declaration has or has not been made in accordance
with the Convention.\textsuperscript{27}
\end{quote}

The applicant's main grievance was with regard to the payment of interpretation
costs as ordered by the domestic courts. Article 6 (3) (e) of the European Convention on
Human Rights says:

\begin{quote}
\textsuperscript{24} Austria v. Italy, Application No 788/60, 7, Coll. p.23.
\textsuperscript{26} Ibid., p.25.
\textsuperscript{27} \textit{Temeltasch} case, n.20, p.431.
\end{quote}
Everyone charged with a criminal offence has the following minimum rights,... to have the free assistance of an interpreter if he cannot understand or speak the language used in Court.\(^28\)

While ratifying the Convention the Swiss government made a declaration to Article 6(3)(e), as follows:

The Swiss Federal Council declares that it interprets the guarantee of... the free assistance of an interpreter, in article 6 paragraph 3 (e) of the convention, or not permanently absolving the beneficiary from payment of the resulting costs.\(^29\)

The applicant argued that this declaration made by the Federal Council was not a valid reservation as it did not comply with the requirements provided under Article 64 of the European Convention. Article 64 states:

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

2. Any reservation made under this article shall contain a brief statement of the law concerned.\(^30\)

The applicant submitted that the Swiss declaration to Article 6 (3)(e) did not contain a brief statement of the law concerned as required by Article 64 (2) of the Convention.

While determining the nature of the Swiss declaration the Commission relied upon the


\(^{29}\) Temeltasch case, n. 20.

\(^{30}\) After the amendment made to the European Convention on Human Rights by the Optional Protocol II content of Articles 64 and 64(2) have been included under Article 57(1) and 57 (2) of the Convention respectively.
definition\textsuperscript{31} of reservation in the Vienna Convention on the Law of Treaties, International Law Commission’s commentaries and expert opinions. It also took into consideration the view expressed by D.N. Rae\textsuperscript{32} who drew a distinction between a “mere interpretative declaration” and a “qualified interpretative declaration”. He said, “the first is where a state attaches to its instrument of acceptance a statement that simply purports to offer an interpretation of the treaty, or part of it. This may be called a mere interpretative declaration’. The second situation is where a state makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty. This may be called a ‘qualified interpretative declaration’\textsuperscript{33} The latter declaration is nothing less than reservation.

Keeping these factors in view the Commission examined the terms of the Swiss declaration and the \textit{travaux preparatoires} of the Switzerland’s ratification of the Convention. It held that both the terms of the declaration and the \textit{travaux preparatoires} showed the intention of the Swiss government that it wanted to confer the status of a formal reservation on its interpretative declaration to Article 6 (3) (e). As submitted by the Swiss government the Commission held that the declaration was formal reservation restricting the application of Article 6(3)(e) in respect of Switzerland.

Having held that the interpretative declaration by the Swiss government was a formal reservation, the Commission approached the second question, raised by the applicant, namely, whether the interpretative declaration was made in accordance with

\textsuperscript{31} Article 2 (1) (d) of the Vienna convention on the Law of Treaties, n. 7.


\textsuperscript{33} Ibid., p. 160.
Article 64 of the Convention. As stated above Article 64(2) requires that a brief statement of the domestic law (which contradicted with the provision of the Convention) be appended to the reservation. In the present context the Swiss Government did not attach anything on the national law that contradicted the Convention while making the reservation. Hence, the applicant argued that the interpretative declaration made by Switzerland was not a valid reservation. Countering this argument the Swiss government submitted that in the case of a federal State like Switzerland where there was no standardised single law, it need not be required to mention all the sources of cantonal law. The Commission rejected this argument and held that Switzerland violated Article 64(2). Nevertheless, having said so, the Commission viewed that the issue could not be decided in the abstract sense and said that it could only decide it with regard to the present case. The Commission opined:

The formal requirement in Article 64(2) of the Convention is essentially a supplementary condition, which must be interpreted together with Article 64(1). It is recalled that the latter requires a reservation to refer to 'any law then in force' and prohibits reservations of a general character. This concern probably underlies the existence of Article 64(2). In other words, the information requested of States making a reservation should help to avoid the possibility of reservations of a general character being made. In this respect, as the Commission has already found, Switzerland's interpretative declaration is beyond reproach.34

The Commission ruled:

It is beyond question that the obligation on a State to append to its reservation a brief statement of the law or laws in intends to keep in force-

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34 *Temeltasch case*, n.20, p.436.
which in principle are not consistent with the Convention- also enables other Contracting Parties, and the organs of the Convention and any person concerned, to be informed of this legislation. This is an important factor and as regards the problem before the Commission, it is essential to take account of the scope of the Convention provision whose application a State intends to prevent by means of a reservation or an interpretative declaration. The necessity of including a statement of the law is much greater where a very wide provision of the Convention is concerned, e.g. Article 10, then in the case of a provision of a more limited application e.g. Article 6(3)(e). In the former case, it is possible that a reservation made in breach of the requirements of Article 64(2) could be regarded as contrary to the Convention and as not having the effects intended by the State making it.

In the instant case, however, Switzerland's interpretative declaration refers to a provision-article 6(3) (e)- which lays down a very specific principle; the free assistance of an interpreter. Consequently, the failure by Switzerland – an omission which it would have been desirable to avoid- to include a brief statement of the national laws that were contrary to this principle did not prove to be decisive in the circumstances of the present case. Indeed, the very terms of the interpretative declaration were sufficient to make the applicant or his lawyer aware that the principle of the free assistance of an interpreter could not as such be involved against Switzerland. 35

Commenting on the contradiction in the above finding it is held:

One cannot but be struck by the contrast between the starting point (the need to enable contrary parties, the organs of the Convention and any person concerned to obtain information concerning the legislation of the

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State making the reservation) and the conclusion (in this case, that the non-compliance by Switzerland with paragraph 2 was not decisive because the applicant or his lawyer could have realised, on the basis of the terms of the interpretative declaration taken by themselves, that Switzerland was not bound by Article 6(3)(e)) of this line of reasoning. In reaching such a conclusion, does the Commission not substantially reduce the usefulness of paragraph 2, having very correctly stressed its importance?\textsuperscript{36}

Having said that the Switzerland’s failure to attach a brief statement of law to its interpretative declaration amounts to violation of Article 64(2) the Commission should not have concluded that it was not decisive in the present case as the purpose of Article 6(2) was to eliminate the possibility of States making reservations which were of general character irrespective of the nature of reservations or interpretative declarations. This finding also leads to a wrong conclusion that if the terms of the reservation or interpretative declaration clear in their meaning it is not mandatory to comply with the requirement of Article 64(2) of the Convention, if the issue is not decisive to a particular case. The purpose of this provision is not for avoiding ambiguous wording of reservations but for avoiding ambiguous nature of reservations, and also to indicate the factual basis – in terms of conflicting domestic law – of the reservation. Good faith fulfilment of obligations in respect of making of reservations demanded full compliance of Article 64.

The finding of the Commission that it was competent to determine the validity of reservations should make the State parties more responsible while making reservations as

it is not only the acceptance and objection of the State parties that matters but it is the supervising organ, if any, that would sit in judgement over the validity of reservations. Even after years of ratification with a reservation, such reservation can be formally held invalid. This may even lead to uncertainty of treaty relations with States accepting such reservation. In a way it restricts the right of States to make reservations in so far as it retains the power at the first instance to determine the validity of reservations. With its finding that the Swiss government’s interpretative declaration was a formal reservation, the Commission classified and established that with whatever name or phrase a reservation is described under, it was its potential to exclude or modify the effects of a relevant provision of the treaty which determines whether it is a mere interpretative declaration or a formal reservation. Thus the Temeltasch case upholds the criterion established under Article 2(1) (d) of the Vienna Convention on the Law of Treaties. Yet, the relaxation of requirement of complying with Article 64 (2) of the European Convention in the present case would certainly lead to some confusion and uncertainty. Probably, a provision seeking this sort of requirement is made for the first time in the European Convention, and with this finding of the Commission, it may be understood as not different from other conventions at least in cases where the wording of the reservation is not ambiguous.

4.3. The Belilos Case

After the Temeltasch case the Strasbourg institutions got another opportunity of dealing with the issue of reservations to the European Convention on Human Rights in
the Belilos case. This case was brought before the European Court of Human Rights and was decided in 1988. The Court held that the reservation made by Switzerland was invalid. "This was the first time that an international court has held a reservation to a treaty invalid." As the European Commission of Human Rights did not refer the Temeltasch case to the European Court of Human Rights, the Court here got the opportunity to deal with the issue in detail going into various aspects of the problem of reservations and the consequent results if a reservation was held invalid by an international body.

Facts of the case, which led to the decision on certain important issues, were as follows. Mrs Marlene Belilos was fined 200 Swiss Francs by the Police Board for the city of Laussanne, Switzerland for taking part in an unauthorised demonstration. Contesting this conviction Mrs Belilos made an appeal to the Police Board. In its order the Police Board confirmed the punishment but reduced the fine to 120 Swiss francs. Challenging this decision Mrs Belilos filed an appeal before the Court of Criminal Cassation of the Canton of Vaud. She based her arguments on Article 6 of the Europe Convention on Human Rights (the right of individuals to fair trial). She argued that the Swiss Police Board did not have any power to adjudicate upon her offence, as it was contradictory to the requirements of Article 6. The Criminal Cassation Court dismissed her appeal. Mrs. Belilos filed a public law appeal before the Swiss Federal Court. Here she argued that by allowing the Police Board to make factual determinations that were not subjected to review by an independent and impartial judicial body, Switzerland had violated

Article 6 of the European Convention on Human Rights. The Federal Court dismissed the appeal and held that Switzerland’s interpretative declaration to Article 6 of the European Convention limited its application and did not require review by a judicial body to re-examine the facts of the case.

Later on Mrs. Belilos applied to the European Commission on Human Rights. In its report the Commission held that the declaration attached by the Swiss Government was not a valid reservation within the meaning of Article 64 of the convention and it was only a mere expression of the Swiss government’s understanding of Article 6. The Commission further held that if the declaration was considered a reservation, it would not be a valid reservation since it did not comply with the requirement of Article 64 of the Convention.

Subsequently both the Swiss government and the Commission referred the matter to the European Court of Human Rights. Prior to going into the merits of the case, the Court decided upon the issue of its competence to decide on the question of validity of a reservation to the Convention. Without much discussion on this issue the Court relied upon Articles 45\(^\text{39}\) and 49\(^\text{40}\) of the Convention and held that it had the competence to go

\(^{39}\) Article 45 reads:

The jurisdiction of the Court shall extend to all cases covering the interpretation and application of the present Convention which the high contracting parties or the Commission shall refer to it in accordance with article 48.

\(^{40}\) Article 49 reads:

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". But after the amendment of the European convention of Human Rights by protocol No. 11, in 1994 the essence of article 45 and 49 were included under article 32 which states:

(1) The Jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the convention and the protocols there to which are referred to it as provided in Articles 33, 34 and 37.
into the matter of validity of reservations to the Convention. Regarding its jurisdiction the Court held:

The Court's competence to determine the validity under Article 64 of the Convention of a reservation or, where appropriate, of an interpretative declaration has not given rise to dispute in the instant case. That the Court has jurisdiction is apparent from Article 45 and 49 of the Convention, which were cited by the Government and from Article 19 and the Court's case law.41

This view is similar to the one expressed by the European Commission on Human Rights in the Temeltasch Case. But this position is found to be faulty in certain respects. It is argued by Pierre-Henry Imbert that:

The weakest point seems to me the power, which would be given to such organs to decide on the validity of reservations at any time. In an application ten, or maybe even thirty years after the reservation was made, the European Commission or Court, for example, could tell a State that its reservation was not valid. This entails a risk for the organ itself, since such a decision might lead to a phenomenon of "rejection" by States similar to that from which, to a certain extent, the International Court of Justice has suffered. One must not forget that a reservation is a form of protection for the State, which makes it. It accepts that its reservation is submitted to the judgement of the other Contracting Parties during a certain period and it considers that in the absence of a contrary opinion at the end of this period its reservation has been accepted. To tell a State several years later, in the course of the examination of an application, when perhaps tempers are raised and feelings more sensitive, that this protection is no longer effective because its reservation is considered illegal is really going very far.42

(2) In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Bélios Case, n. 37, pp.466-502.

This argument subscribes to the system of acceptances and objections established under the Vienna Convention on the Law of Treaties. But, it is argued that this system is inadequate in the case of human rights. Thus if is observed:

This system works well when the member States have sufficient self interest to object. When a State perceives that its particular interests will be adversely affected by some other State’s reservation, it has a strong incentive to object to it. The system of acceptance and objection works in an atmosphere of reciprocal self-interest found in traditional commercial type multilateral agreements but falters badly when applied to most human rights treaties.\(^{43}\)

It is further substantiated that:

Although in the past thirty-five years a significant number of reservations and interpretative declarations to the European Convention have been submitted by the ratifying States, no formal acceptance of a reservation or objection to a reservation has even been made by any number of States. Under the European Convention, the process of acceptance and objection has proved futile. Article 64 requires an effective policing mechanism. Futility is a poor policeman.\(^{44}\)

Having held that it has jurisdiction, the Court went ahead with the issue of the status of the Swiss government’s interpretative declaration to Article 6 of the European Convention. The Swiss Government argued before the Court that the interpretative declaration made by it to limit the application of Article 6 paragraph (1) \(^{45}\) was intended to be a reservation within the meaning of Article 64\(^{46}\) of the Convention. The Swiss government’s declaration reads as follows:

\[^{43}\text{Bourguignon, n. 38, p.368.}\]
\[^{44}\text{Ibid, p.369.}\]
\[^{45}\text{Article 6 paragraph 1 reads: In the determination of his civil rights and obligations or of any criminal charge against him every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law....}\]
\[^{46}\text{Article 64, n.28.}\]
The Swiss Federal Council considers that the guarantee of fair trial in Article 6(1) of the Convention, in the determination of civil rights and obligations or any criminal charge against the person in question is intended solely to ensure ultimate control by the judiciary over the acts or decisions of the public authorities relating to such rights or obligations or the determination of such a charge.\footnote{Belitos Case, n.37, p.475.}

Article 6 paragraph 1 reads:

> In the determination of his civil rights and obligations or of any criminal charge against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.\footnote{European Convention, n. 28.}

As the European Convention had not defined a reservation, the Swiss Government relied upon the definition provided by the Vienna Convention on the Law of treaties. The Vienna Convention provides under Article 2 (1) (d) that “reservation” means “a unilateral statement, however phrased or named”\footnote{Vienna Convention, n. 7.}. Thus it was not the label that mattered but the intention of a State “to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”\footnote{Ibid.}. Thus the Swiss government argued that though its written statement was categorised as an interpretative declaration, in its application it was intended to limit the effect of Article 6 of the Convention. As Article 6 guarantees fair trial, the Swiss government intended to mean it as “ultimate control by the judiciary over the acts or decisions of the public authorities”. The Swiss government’s main purpose of formulating this interpretative declaration was “to prevent any interpretation of Article 6 which would conflict with the “ultimate control
by the judiciary” as known within the Cantons at that time”. It wanted to avoid the situation where the compliance with Article 6 of the Convention was to maintain fuller judicial supervision of the administrative courts in civil and criminal cases in the Swiss Cantons. The Swiss government also clarified that as to why it named two of its statements as reservations and remaining two as interpretative declarations. Though, both categories are considered same in their meaning and effect, the Swiss government submitted that where there was an undeniable incompatibility between a treaty provision and a statement then it was considered a reservation. But in the cases of ambiguity with regard to the incompatibility of statements with a treaty provision then it was categorised as interpretative declaration. The Swiss government’s categorical insistence and emphatic assertion conveyed the message clearly that the purpose of making interpretative declaration was to limit the application of Article 6 of the Convention to make it suitable to its domestic system of judicial administration and to avoid any future legal confrontation. The European Court of Human Rights was convinced with the arguments of the Swiss Government. It relied upon the Vienna Convention on the Law of Treaties for the definition of “reservations” to decide upon the question whether or not the interpretative declaration made by the Swiss government was a reservation. The Court observed:

In order to establish the legal character of such a declaration, one must look behind the titles given to it and seek to determine the substantive content. In the present case, it appears that Switzerland meant to remove certain categories of proceedings from the ambit of Article 6 (1) and to

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51 Bourguignon, n. 38, p., 372.
52 Article 2 (1) (d) of the Vienna Convention n.7.
secure itself against an interpretation of that article which it considered to be too broad.\footnote{See Bourgignon, n.38.}

Thus the Court concluded that irrespective of the name given to a statement, it amounted to a reservation when it was intended to exclude or modify the legal effect of the provisions of a treaty. Thus, it held, the Swiss interpretative declaration was a formal reservation.

The Court went further and examined whether the Swiss reservation complied with the requirements of Article 64 (1) and (2)\footnote{European Convention, n.28.}. As observed earlier the European Convention system has a different procedure, which is specific to it, which requires that the compliance with Article 64(1) and (2) (now Article 57 (1) and (2) respectively) is an indispensable one to become a valid reservation. It requires that a State may “make a reservation in respect of any particular provision of convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article”. This article further tries to limit the possibility of making reservations of general character as it demands that “any reservation made under this article shall contain a brief statement of the law concerned”.\footnote{Article 57 (2) of the European Convention, Ibid.}

The Swiss government had put forward various arguments to convince the Court that its interpretative declaration satisfied the requirements of Article 57 (1) and 57 (2). It submitted that its declaration was not of a general character as it was intended to limit judicial supervision of administrative decisions to a review of questions of law. It argued
that a three-pronged test was required to determine the character of a reservation. The three steps of the test were as follows. First, a reservation could be categorised as a general reservation if it did not refer to a specific provision of the convention. The second step was that a reservation was a general reservation if it was made in a way, which made it impossible to define clearly its scope. The third step was that a reservation could be classified as general reservation if it was incompatible with the object and purpose of the convention. The first two steps of the test were evolved by the European Commission of Human Rights in the *Temeltasch case*\(^{56}\) and the third step was formulated by the International Court of Justice in its advisory opinion in the *Genocide Convention Case*.\(^{57}\)
The Swiss government argued that its declaration satisfied the three requirements of the test. The declaration clearly mentioned Article 6, paragraph 1 and the relevant part relating to fair hearing. Regarding the second step of the test, the Swiss government argued that if it was interpreted keeping its original intention in view it was not impossible in defining its exact scope. Regarding the third step of the test it argued that the declaration was not incompatible with the object and purpose of Article 6 as it guaranteed fair hearing. As a result, Switzerland submitted, the interpretative declaration was not in violation of Article 64(1).

The next question was its compliance with Article 64(2), which required the attachment of brief statement of the law concerned along with the reservation. As an answer to this requirement Switzerland referred to the general practice of States in this regard. It stated that there emerged a general practice, which was flexible and under

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\(^{56}\) *Temeltasch case*, n.20, see also Imbert, n. 36.

\(^{57}\) Advisory opinion of the ICJ in the *Genocide convention case*, *ICJ Reports*, 1951, pp.15-69.
which states did not comply with requirements of Article 64(2). It stated that it became a practice that other States also submitted reservations without appending the brief statement of law. Switzerland tried to legitimise its omission by pointing to the general practice of the Secretary-General of the Council of Europe who was the depository of the Convention. Like in other cases, the Secretary General did not raise any objection with regard to the interpretative declaration and reservation made by Switzerland. It also pointed out the fact that other member States also did not raise any objection even though they had the opportunity to do so when they were notified by the Secretary General of the Council of Europe.

In this regard Switzerland also submitted another dimension of the problem which was relevant in the case of federal States. It argued that as Switzerland was a Federal State compliance with Article 64 (2) would require it to mention the inconsistent provisions of all its twenty-six cantons, which was a cumbersome exercise. As the language of the declaration clearly conveyed its meaning, it was argued, it was sufficient to satisfy the requirement. The Swiss government also argued that it indirectly satisfied the requirement of Article 64(2) as its report to the parliament along with the declaration mentioned that the federal criminal law allows cantons to try minor offences before the administrative authority.

The Court was not impressed by the averments of the Switzerland government. The Court held that the interpretative declaration made by the Swiss government lacked precision and clarity. The phrase “ultimate control by the judiciary” did not disclose any exact meaning as to whether it allowed that the facts of case were heard and determined.

58 See Bourguignon, n. 38.
by the Court. It was held that the operative language of the Swiss declaration was very ambiguous and did not convey the exact essence of it. Therefore the interpretative declaration was held to be of a general character not satisfying the requirements of Article 64(1). Regarding the attachment of a brief statement of the law concerned as required by Article 64(2) the Court heard the arguments of the Swiss government and emphasised the significance of its compliance. The Court ruled that this requirement was intended to ensure "that a reservation does not go beyond the provisions expressly excluded by the state concerned". Thus the Court did not accept the argument of the Swiss government regarding the difficulties of the federal States in compliance with Article 64(2). Therefore it was concluded that the Swiss interpretative declaration which was a formal reservation was of a general character and did not contain a brief statement of the law concerned hence amounted to violating the requirements of Article 64(1) and 64(2) and consequently invalid.

Having held that the Swiss declaration was invalid the Court made a significant assertion by holding that Switzerland continues to be as a party to the European Convention. It was held:

In short, the declaration in question does not satisfy two of the requirements of Article 64 of the Convention, with the result that it must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration. This finding of the Court poses a major challenge to a fundamental notion of treaty law that a State cannot be bound by a treaty without its consent. If a State consents to become

59 Ibid.
60 Belilos Case, n.37, p.487.
a party to a treaty subject to certain reservations and in the case if such reservations are held invalid, as is done in the present case, it would be, at least, legally reasonable to leave it to the concerned State the decision whether or not to continue as a party to the treaty. Apart from the view that Switzerland is bound by the European Convention, there are also other options, which could be resorted to by the Court. They are that along with the decision that Switzerland’s declaration is invalid, its ratification could also be declared invalid. The other option is that Switzerland could be declared as continuing as a party to the Convention except that part of Article 6 to which invalid declaration was made.61

The Judgement of the Court dealt with few important issues and established certain significant points. First of all, the Court found itself to be competent to determine the validity of reservations made by the State parties irrespective of the views expressed by either States in the form of their acceptances and objections. As this issue was left untouched by the Vienna Convention on the Law of Treaties and also does not find any express mention in the European Convention, the judgement is of significant value as far as the reservation system is concerned. Second, the judgement reinforced the definition of the reservation as given in the Vienna Convention in its letter and spirit as it held that irrespective of the name given to it a statement attached by a State to a treaty provision may be considered as a formal reservation if it is intended to exclude or modify the legal effect of that provision. It is of significant value because many states attach statements naming them as interpretative declarations though in essence they are intended to exclude or modify the legal effect of the provision. Third, this judgement underscored the

importance of the precision of the reservations. Though it appears to be relevant to the European Convention on Human Rights it will have wider acceptance, as the reservations of general character would certainly go against the purpose of the convention. Lastly, this judgement had reversed the views of the European Commission of Human Rights expressed in the Temeltasch case and held that the compliance with article 64(2) is compulsory as brief statement of law concerned would inform the other member States of the inconsistent part of the domestic law and would help in making the correct assessment of the validity of reservations. Though this judgement is more relevant to human rights treaties, its importance cannot be denied in the case of other treaties as the issues involved were of general importance.


At the regional level another important framework of human rights has been the American Convention on Human Rights, evolved by the members of the Organisation of American States. This Convention provides for a mechanism of its own with supervisory bodies to deal with the disputes and complaints relating to human rights violations. It as an Inter-American Commission on Human Rights and an Inter-American Court of Human Rights.

In the present case the practice of reservations by States compelled the Inter-American Commission of Human Rights to make a request to the Inter-American Court of Human Rights on June 28, 1982 for its advisory opinion on the effect of reservations

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on the entry into force of the American Convention on Human Rights. The Court in its advisory opinion clarified its position on the issues raised by the Commission.

In its request the Commission submitted the following question to the Court:

From what moment is a State deemed to have become a party to the America Convention on Human Rights when it ratifies and adheres to the convention with one or more reservations; from the date of the deposit of instrument of ratification or adherence or upon the termination of the period specified in Article 20 of the Vienna Convention on the law of treaties?

The Commission further noted that its request called for the interpretation of article 74 and 75 of the American Convention.

Before addressing the Commission’s request, the Court first dealt with the issue of its competence to deal with the matter and concluded that it had the authority to render advisory opinion as requested by the Commission. The Court also opined that the Commission also has the power to request for an advisory opinion of the present nature.

With regard to the main issue before the Court, the central question was the interpretation of Articles 74 and 75 of the convention. Article 74 (2) reads as follows:

Ratification or adherence to this convention shall be made by the deposit of an instrument of ratification or adherence with the general secretariat of the Organisation of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres

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64 Ibid., pp.38-39.
65 Ibid., p.39.
thereafter, the convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.\textsuperscript{66}

Article 75 provides:

This Convention shall be subject to reservation only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.\textsuperscript{67}

Keeping in view the reference made to the Vienna Convention on the Law of Treaties in Article 75 the Court examined the relevant provisions of the Vienna Convention dealing with the issue of reservations. At the outset the Court wanted to establish which were the relevant provisions of the Vienna Convention to which reference was made in Article 75 of the American Convention. In the Court's view "the reference in Article 75 to the Vienna Convention was intended to be a reference to paragraph (c) of Article 19 of the Vienna Convention".\textsuperscript{68} Article 19 of the Vienna Convention on the formulation of reservations provides:

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

(a) The reservation is prohibited by the treaty:

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

(c) In cases not falling under subparagraph (a) and (b) the reservation is incompatible with the object and purpose of the treaty\textsuperscript{69}

In the opinion of the Court paragraphs (a) and (b) of Article 19 of the Vienna Convention were not relevant to the American Convention as it neither prohibited

\textsuperscript{66} American Convention, n.62.
\textsuperscript{67} Ibid.
\textsuperscript{68} Advisory Opinion, n.63, p.44.
\textsuperscript{69} Vienna Convention, n.7.
reservation *in toto* nor it specified the permissible reservation. Therefore the Court concluded, "Article 75 must be deemed to permit States to ratify or adhere to the Convention with whatever reservations they wish to make, provided only that such reservations are not "incompatible" with the object and purpose of the Convention".70 The Court was of the view that the drafters of the Convention intended to formulate a liberal system of reservations. It examined the draft Inter-American Convention on Human Rights prepared by the Inter-American Commission on Human Rights and the relevant provisions on reservations. It has also examined the views expressed by various States on the draft articles on reservations. It concluded that "it is impossible to read the drafting history of the Convention without recognising that the primary purpose of the reference to the Vienna Convention in Article 75 was to provide for a system that would be very liberal in permitting States to adhere to the convention with reservations".71 It was, therefore, held that the parties to the Convention could make whatever reservations they feel necessary except that such reservations should not be incompatible with the object and purpose of the Convention.

Next important provision of the Vienna Convention in relation to the present case was Article 20, which dealt with acceptance of and objection to reservations.72 It was

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70 Advisory Opinion, n. 63, p. 44.
71 Ibid., p. 46.
72 Article 20 of the Vienna Convention reads:

1. A reservation expressly authorized by a treaty, does not require any subsequent acceptance by the other contracting State unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirely between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.
necessary here to decide as to which paragraph of Article 20 was relevant to the American Convention, which was the main issue before the Court in the present case. The Court observed that paragraph 2 of Article 20 is not applicable to the Convention as "the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality".73 Paragraph 3 of Article 20 would not also apply, as the American Convention was not the constituent instrument of an international organisation. With regard to paragraph 4 of Article 20, the Court felt that the system provided thereunder was meant for traditional multilateral international agreements whose object was to provide reciprocal exchange of rights and obligations among State parties. Keeping in view the nature of treaties and the international community, the Court held that the procedure established under paragraph 4

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3. When a treaty is constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the proceeding paragraphs and unless the treaty otherwise provides:

   (a) Acceptance of another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other state if or when the treaty in force for those States.

   (b) An objection of another contracting State to reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting States.

   (c) An act expressing a States consent to be bound by the treaty and containing a reservation is effective as soon as at least on other contracting State has accepted the reservation.

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

73 Advisory Opinion, n. 63, p. 46.
of Article 20 of the Vienna Convention relevant. But the Court drew a line between traditional multilateral treaties and the modern human rights treaties:

The court must emphasise, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.74

The Court also cited similar views expressed by the European Commission on Human Rights in the case of *Australia v. Italy*,75 International Court of Justice in its advisory opinion on reservations in the *Genocide Convention case*76 and Article 60 (5)77 of the Vienna Convention on the Law of Treaties. The Court further referred to the procedure under which a private party can file an application against any State immediately after that State ratified the American Convention78. But this is not possible

74 Ibid., p. 47.
75 *Austria v. Italy, European Yearbook of Human Rights*, vol. 4 (1960).
76 *Genocide Convention case*, n.57.
77 This article deals with termination, suspension, and operation of treaties on a consequence of its breach. Article 60(5) reads as follows:

Paragraph 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

78 This procedure is provided under Article 44 of the American Convention. It reads as follows: Any person or group of persons, or any nongovernmental entity legally recognized in one or more member States of the organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.
in the case of a State complaining against another State, which requires the express acceptance of the jurisdiction of the Commission by both States. Thus the individual is accorded utmost primacy in the Convention framework. The Court was of the view that having given so much importance to the individual and having provided for individual petitions against the States immediately after the ratification of the convention, it was unreasonable to conclude that the reference to the Vienna Convention in Article 75 was intended to delay the entry into force of the Convention in respect of a reserving State until another State accepted the reservation. In the Court’s view, the applicable provisions of the Vienna Convention to the present case were Article 19 (c) and Article 21 (1). In support of its conclusion about the relevance of Article 20 (1) the Court held:

that article 20 (1) in speaking of “a reservation expressly authorised by a treaty”, is not by its terms limited to specific reservations. A treaty may expressly authorise one or more specific reservations or reservations in general. If it does the latter, which is what the Court has concluded to be true of the Convention, the resultant reservations, having been thus expressly authorised, need not be treated differently from expressly authorised specific reservations. The Court wishes to emphasise, in this connection, that unlike Article 19 (b), which refers to “specified reservations”: Article 20 (1) contains no such restrictive language, and

This procedure is laid down under Article 45 of the Convention. It reads as follows:

1) Any State Party may, when it deposits its instrument of ratification or of adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2) Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3) A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.
therefore permits the interpretations of Article 75 of the Convention adopted in this opinion.\textsuperscript{80}

Accordingly it was concluded that the reservations made to the convention which were compatible with the object and purpose of the convention did not require any acceptance by the State parties as they were authorised under Article 20 (1) of the Vienna Convention. In case a State has an objection to the compatibility of a reservation with the object and purpose of the Convention it can approach the adjudicating and supervisory bodies established under the Convention system to arrive at a conclusion except that a reservation of a State need not have the acceptance of other States and its instruments of ratification or adherence come into force immediately after the deposit as provided under article 74 of the Convention.

The advisory opinion of the Inter-American Court is significant in two ways. First, it made a distinction between traditional international law treaties and human rights treaties\textsuperscript{81}. This distinction was made keeping in view the nature of human rights treaties, their implementation and the status of State parties vis-à-vis human rights treaties. This understanding was made on the basis that the traditional international law treaties are made between the State parties with a view to share common rights and obligations. Whereas the human rights treaties enable the individuals of the State parties to make claims against their own States as well as other States. Primacy is given to the individual under the human rights treaties unlike the other treaties wherein the treaty relations are defined in terms of States. This understanding led the Court in the present case to

\textsuperscript{80} Advisory Opinion, n. 63, p. 49.

\textsuperscript{81} As seen already, similar view was also taken by the European Commission of Human Rights in the Temeltasch Case, n. 20.
conclude that since the human rights treaties were different in nature they also needed different rules for their interpretation. Second, the Court interpreted and applied the reservations regime of the Vienna Convention in a liberal way to suit the human rights treaties of the nature of the American convention. As such Article 20 (1) has been interpreted as authorising reservations of general character, which consequently, do not require any acceptance from the other State parties. This interpretation would give more scope for the States to make reservations in the cases where a mention is made in the Convention as was done in the Article 75 of the America Convention.

4.5. Advisory Opinion of the Inter-American Court of Human Rights with Regard to Questions Relating to the Interpretation of the Provisions in the American Convention on Human Rights Concerning the Death Penalty

The Inter-American Court of Human Rights was once again requested by the Inter-American Commission on Human Rights, to render its advisory opinion on the question relating to reservations vis-à-vis the Convention. In its communication of April 15 and 25, 1983 the Commission requested the Court to give its advisory opinion on the following questions relating to Article 4 of the Convention:

1). May a government apply the death penalty for crimes for which the domestic legislation did not provide such punishment at the time the American Convention on Human Rights entered into force for the said State?

2). May a government on the basis of a reservation to Article 4 (4) of the Convention made at the time of ratification, adopt subsequent to the entry into force of the Convention a law imposing the death penalty for crimes not subject to this sanction at the moment of ratification.  

82 Inter American court of Human Rights, Advisory Opinion with Regard to Questions Relating to the Interpretation of the Provisions in the American Convention on Human Rights Concerning the
Explaining the circumstances that led to the making of this request, the Commission said that there existed certain differences of opinion between it and the government of Guatemala with regard to the interpretation of last sentence of Article 4 (2) of the Convention and also the effect of reservation of Guatemala to Article 4, paragraph 4.

Article 4 of the Convention, which is relevant here, deals with the issue of the right to life and the imposition of death penalty and reads as follows:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent Court and in accordance with a law establishing Such punishment enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in States that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time of the crime was committed, were under 18 years of age or over 70 years of age, nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or communication of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is

pending decision by the competent authority.\textsuperscript{83}

Guatemala, while ratifying the Convention attached a reservation to Article 4 paragraph 4 of the Convention. This reservation reads as follows:

The Government of the Republic of Guatemala, ratifies the American Convention on Human Rights, signed in San Jose, Costa Rica, on the 22nd of November of 1969, making a reservation with regard to article 4, paragraph 4, of the same, in as much as the constitution of the Republic of Guatemala, in its Article 54, only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes.\textsuperscript{84}

The purpose of posing this issue to the Court was to find out whether a reservation framed in this manner by a State could be invoked by it to impose death penalty for crimes to which such punishment was not applicable when that State ratified the convention. The reservation made by Guatemala was mentioned as an example of cases of such nature. Guatemala, citing the reservation, argued to impose death penalty to common crimes connected with political crimes, which were not punished with such penalty previously.

Reacting to the Commission’s request to the Court, the Guatemalan government asked the Court not to render its advisory opinion, as it did not have jurisdiction. It also raised an objection with regard to merging of the dispute over the jurisdiction of the Court along with the merits of the request. The Court refused to accept these objections and held that it had jurisdiction to render its advisory opinion in the present issue.

\textsuperscript{83} American Convention on Human Rights, n.62, p. 673.
\textsuperscript{84} Advisory Opinion, n. 82, pp. 323-24.
Having concluded that it had the jurisdiction to render advisory opinion the Court went ahead to consider the merits of the case. While going into the first question posed by the Commission (with regard to Article 4(2) of the Convention) the Court had relied upon the rules of interpretation provided in the Vienna Convention on the Law of Treaties.\(^8^5\) The method of interpretation adopted in the Vienna Convention gives primacy to the text and the Court felt that the application of this objective criterion of interpretation that looked to the text themselves was more suitable and appropriate than the subjective criterion that sought to ascertain only to the intent of the parties, keeping in view the specific nature of human rights treaties.\(^8^6\) The Court then proceeded to analyse Article 4. Article 4 guarantees the right to life of every person in its first paragraph and deals with the application of death penalty and restriction on it in the remaining paragraphs. The Court felt that there were multiple forms of restrictions on the imposition of death penalty. Without strictly prohibiting the punishment of death penalty the Convention mechanism imposed as many restrictions so that the death penalty was

\(^8^5\) Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties deal with interpretation of treaties.

Article 31 (1) reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 32 reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to conform the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31

(a) Leaves the meaning ambiguous or obscure; or

(b) Leaves to a result, which is manifestly absurd or unreasonable.

\(^8^6\) Advisory Opinion, n. 82, pp. 336-37.
imposed in least possible circumstances. Therefore, the court while answering the first question posed by the commission said.

...in interpreting the last sentence of Article 4(2) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", (Vienna Convention, Art. 31 (1)). There cannot be the slightest doubt that Article 4 (2) contains an absolute prohibition that no State party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. No provision of the Convention can be relied upon to give a different meaning to the very clear text of Article 4 (2), in *fine.*

Accordingly, it was held that there was an absolute prohibition on the imposition of death penalty to the crimes for which such penalty was not provided by the domestic law previously.

With regard to the reservations to the Convention the Court made certain observations. It tried to establish a relationship between the compatibility of reservations with the object and purpose of a Convention and non-derogability of certain rights provided in it. In the present case, the Convention provided under Article 27 for

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88 Article 27 of the American Convention, reads:

(1) In time of war, public danger, or other emergency that threatens the independence or security of a State party, it may take measures derogating from its obligations under the present convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language religion, or social origin.

(2) The foregoing provision does not authorise any suspension of the following articles: Article 3 (Right to judicial personality), Article 4 (Right to life, Article 5 (Right to Human
suspension of certain rights during certain emergency situations but this suspension does not include those non-derogable rights including the right to life guaranteed by Article 4. Accordingly the Court felt that "a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it". The Court also made a distinction between a reservation which restricted certain aspects of a non-derogable right and a reservation which deprived that right totally. Applying this to the present context, it held that the reservation mentioned here was not of the latter category and hence it could not be considered as incompatible with the object and purpose of the Convention. Since the reservations have the effect of excluding or modifying the provisions of a treaty, they became an integral part of that treaty and, therefore, they should be interpreted in accordance with the principles of general international law and such interpretation should be made in such a way that was consistent with the object and purpose of the convention. The Court also concluded that principles provided in Article 29 of the Convention were also applicable to the reservation as it became part of the treaty. Accordingly:

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Article 6 (Freedom from slavery), Article 9 (Freedom from Ex post facto laws), Article 12 (Freedom of conscience and religion), Article 17 (Right of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to participate in Government), or of the judicial guarantees essential for the protection of such rights.

Any state party avoiding itself of the right of suspension shall immediately inform the other states parties, through the Secretary General of the organisation of America States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

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Advisory Opinion, n. 82, p.341.

Article 29: Restrictions regarding Interpretation:

No provision of this Convention shall be interpreted as
the court is of the view that the application of paragraph a) of Article 29 compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognised in the Convention to a greater extent than is provided for in the reservation itself.\textsuperscript{91}

In its attempt to answer the second question of the Commission the Court rephrased it in the following manner:

may a State that has made a reservation to Article 4(4) of the Convention, which article prohibits the application of the death penalty to common crimes related to political offences, validly assert that the reservation extends by implication to Article 4(2) and invoke the reservation for the purpose of applying the death penalty to crimes to which that penalty did not previously apply notwithstanding the prohibition contained in Article 4(2)?\textsuperscript{92}

Having understood the question as above the Court felt that Article 4(2) and 4(4) were meant to serve two different purposes. While the former prohibited the imposition of death penalty to all future crimes, the latter prohibited imposing of death penalty for political offences and related common crimes. The latter was obviously intended to prohibit the capital punishment for the crimes, which were subjected to such punishment previously. Accordingly:

\begin{enumerate}
\item[a)] Permitting any State party, group, or person to suppress the enjoyment or exercise of the rights and freedom recognised in this convention or to restrict them to a greater extent than is provided for herein.
\item[b)] Respecting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State party by virtue of another convention to which one of the said States is a party;
\item[c)] Providing other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government: or
\item[d)] Excluding or limiting that the America Declaration of the Rights and Duties of Man and other international acts of the same nature may have.
\end{enumerate}

\textsuperscript{91} Advisory Opinion, n. 82, p.342.

\textsuperscript{92} Ibid., p.343.
above and beyond the prohibition contained in Article 4(2), which deals with the extension of the application of capital punishment, Article 4(4) adds a further prohibition that bars the application of the death penalty to political offences related to common crimes even if such offences were previously punished by that penalty.  

Thus, a reservation made to Article 4(4) would allow a State to impose capital punishment for political offences and related common crimes, which were the subject of the such punishment previously. But in no way could such reservation be applied to Article 4(2) to impose death penalty on future political offences or any common crimes as it prohibited death penalty to all future crimes in toto. "It follows that a State which has not made a reservation to paragraph 2 is bound by the prohibition not to apply the death penalty to new offences, be they political offences, related common crimes or mere common crimes. On the other hand, a reservation made to paragraph 2, but not to paragraph 4, would permit the reserving State to punish new offences with the death penalty in the future provided, however that the offences in question are mere common crimes not related to political offences. This is so because the prohibition contained in paragraph 4, with regard to which no reservation was made, would continue to apply to political offences and related common crimes."  

In the present context the Guatemala's reservation said that Article 54 of its constitution "only excludes from the application of the death penalty, political crimes, but not common crimes related to political crimes." The Court viewed that if this reservation was interpreted applying ordinary meaning to terms, it modified Article 4(4)
in the following manner; “in no case shall the capital punishment be inflicted for political offences” by excluding that part of the article which talked about common crimes related to political offences, to which reservation was made. The Court was, therefore, of the view that no other form of modification could be deduced from the reservation and in no way could be interpreted as a reservation to Article 4 (2) also. Thus the Court gave its answer to the Commission’s second question as follows:

that a reservation restricted by its own wording to Article 4(4) of the Convention does not allow the government of a State Party to extend by subsequent legislation the application of the death penalty to crimes for which this penalty was not previously provided for. The Court also clarified that the opinion delivered in the present context was also relevant to other reservations of similar nature apart from Guatemala’s reservation.

In its findings the Court made an important observation with regard to the compatibility of a reservation with the object and purpose of a Convention. The test of compatibility of a reservation with the object and purpose of the Convention was propounded by the International Court of Justice in its advisory opinion on the question of reservations to Genocide Convention. Though the International Court formulated this test with regard to the maintainability of reservations to treaties, it could not define as to what exactly was the object and purpose of a treaty. This uncertainty also seeped into the Vienna Convention on the Law of Treaties, which includes the test of compatibility of a reservation with the object and purpose of the treaty without defining it. In the present opinion Court expressed a view which would provide a parameter to elicit the object and

96 Ibid., p.345.
97 Ibid., p.346.
98 Genocide Convention Case, n.57.
purpose, at least, of those human rights Conventions which contain the catalogue of non-derogable rights. In its view, non-derogable fundamental rights of the American Convention constitute core of it and therefore constitute the object and purpose of the Convention. Consequently a reservation made with a view to exclude or modify the legal effect of these non-derogable fundamental rights would be an incompatible reservation with the object and purpose of the Convention. Non-derogable rights are those rights, which cannot be suspended by a State party even during the times of exigencies. Therefore these rights constitute the core of the Convention and object and purpose of a Convention is to protect this part of the Convention in any circumstances. Arguably this observation has provides an answer to some extent to issues of reservations to those human rights treaties which contain non-derogable rights. Though it may not be possible to apply this finding to the treaties other than human rights treaties, as the latter have different characteristics, it is significant to the extent of establishing a parameter on the object and purpose of, at least, some of the human right treaties.

Another significant observation of the Inter-American Court was that the interpretation methods as provided in the Vienna Convention on the Law of Treaties would equally apply to the reservations. As a valid reservation constitutes part of the Convention same methods of interpretation as applicable to the provisions of the treaty would be followed in the case of reservation also. The effect of this finding would be to restrict the possibility of interpreting the reservations to their language and scope by the States. This objective interpretation would also help the other State parties to derive a near uniform meaning from the reservations and would reduce the scope for subjective conclusions.
4.6. Human Rights Committee General Comment No. 24 (52)

As a treaty body Human Rights Committee was established under Article 28 of the International Covenant on Civil and Political Rights. Having recognised the significance of reservations to the Covenant in general and to the human rights treaties in particular the Committee came forward with its opinion in the form of General Comment expressing its view on various aspects of the issue. The Committee's Comment is relevant as it reaffirms certain views of other international bodies and also differs in certain respects. While describing the reasons for its General Comment on the issue of reservations to the Covenant the Committee held:

The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of State Parties. It is important for State Parties to know exactly what obligations they, and other State Parties, have in fact undertaken. And the Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must

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99 Article 28 reads as follows:
1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereafter provided.
2. The Committee shall be composed of nationals of the State Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

100 Article 40 (4) empowers the Committee to make general comments. It reads:
The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties the committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

101 General Comment No. 24 (52) of 2 November 1994 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto in relation to declarations under Article 41 of the covenant, Adopted by the Committee at its 1382nd meeting (fifty second session). Doc. CCPR/C/21/Rev.1/Add.6. International Legal Materials vol.34, no. 3 (1995). pp. 839-46.
know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.\textsuperscript{102}

The Committee seemed to have been compelled to express its views as it found that the reservations regime under the Vienna Convention on the Law of Treaties was inadequate in governing the reservations to the human rights treaties. It was of the view “that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties”.\textsuperscript{103} In this Comment the Committee analysed the principles of international law that apply to the making of reservations, analysed the role of State parties in relation to the reservations of others, addressed the role of the Committee itself in relation to reservations and made certain recommendations to present States parties for a review of reservations and to those States that are not yet parties about legal and human rights policy consideration to be borne in mind with regard to reservations.\textsuperscript{104} Like many human rights treaties the Covenant does not contain a provision either permitting or prohibiting reservations. Thus, the relevant provision that governs the reservations to the Covenant is Article 19 (c) of the Vienna Convention on the Law of Treaties which provides that a State can make reservations which are compatible with the object and purpose of the Convention.

Taking note of difficulties in identifying the exact provision which constitute the object and purpose of Covenants, the Committee felt that “[i]n an instrument which articulates very many civil and political rights, each of the many articles and indeed their

\textsuperscript{102} Ibid., p.841.

\textsuperscript{103} Ibid., p.845.

\textsuperscript{104} Ibid., p. 841.
interplay, secures the objectives of the Covenant.\textsuperscript{105} This view reflects the general conceptual dilemmas faced by the international legal community since the days of formulation of object and purpose test by the International Court of Justice in 1951\textsuperscript{106}. Another observation made by the Committee is about the peremptory norms and international customary law. The Committee said:

Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve \textit{inter se} application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and \textit{a fortiori} when they have the character of peremptory norms) may not be the subjects of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their

\textsuperscript{105} Ibid., p. 842.

\textsuperscript{106} \textit{Genocide Convention} case, n.57.
economic, social and cultural development, would be incompatible with
the object and purpose of the Covenant. Equally, a reservation to the
obligation to respect and ensure the rights and to do so on a non-
discriminatory basis (article 2(1)) would not be acceptable. Nor may a
State reserve an entitlement not to take the necessary steps at the domestic
level to give effect to the rights of the Covenant (Article 2(2)).

It is well established under international law that there should not be any
derogation from *jus cogens* norms. However the Committee has included international
customary law norms also along with *jus cogens* norms as constituting the object and
purpose of the Covenant. Thus it was a further expansion of the scope of the object and
purpose of the Covenant. Further the Committee examined the significance of non-
derogable provisions of the Covenant in identifying the object and purpose of the
Covenant. While recognising the importance of non-derogable rights as their operation
could not be suspended even during the times of emergency the Committee was of the
view that these provisions do not necessarily constitute the object and purpose of the
Covenant. It was of the view that there were other important provisions in the Covenant
but were not categorised as non-derogable. Therefore it felt that “while there is no
automatic correlation between reservations to non-derogable provisions, and reservations
which offend against the object and purpose of the Covenant, a State has a heavy onus to

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107 General Comment, n. 101.

108 Article 4 of the Covenant on non-derogable rights, reads:

1. In time of public emergency which threaten the life of the nation and the existence of which is
officially proclaimed the states parties to the present convent may take measure derogating from
their obligations under the present Covenant to the extent strictly required by the exigencies of the
situation, provided that such measures are not inconsistent with their other obligations under
International Law and do not involve discrimination solely on the ground or race, colour, sex,
language, religion and social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under
this provision.
justified such a reservation”.\footnote{General Comment, n. 101, p. 843.} This view of the Committee contradicts the opinion expressed by the Inter American Court of Human Rights in its advisory opinion. It may be recalled that the Inter-American Court held that a reservation made to a non-derogable right was incompatible with the object and purpose of Convention.\footnote{Advisory Opinion, n. 82.} According to the Committee “\textit{a fortiori}, a reservation to a provision from which derogation may be made does not ipso facto render the reservation compatible with the object and purpose of the Covenant”.\footnote{General Comment, n. 101.}

But the Court further added therein that a reservation made to restrict certain aspects of the non-derogable right but not the whole of it was considered to be not incompatible with the object and purpose of the Convention. The Committee’s opinion, on the other hand, was that “each of the many articles, and indeed their interplay, secures the objectives of the Covenant”.\footnote{Catherine J. Redgwell, “Reservations to Treaties and Human Rights Committee, General Comment No. 24 (52)”, \textit{International and Comparative Law Quarterly}, vol. 46, no. 2 (1997), p. 462.} Therefore the criterion of non-derogability is not exactly valid one to assess the object and purpose of the Covenant.

A significant observation was made by the Committee with regard to the supportive guarantees mentioned in the Covenant for the fuller realisation of benefits from the rights mentioned therein. As the supportive guarantees ensure the implementation of obligation of the Covenant the Committee felt that these guarantees also constituted the object and purpose of the Covenant. Accordingly reservations made to disempower the Committee to perform its duties would also amount to be incompatible
with the object and purpose of the Covenant. Reservations made with an intention of not presenting the report to the Committee or intended to restrict the Committee from interpreting the Covenant provisions would also be incompatible with the object and purpose of the Covenant. Clearly, the Comment establishes that it is not just the plain rights that constitute the object and purpose but it is as important to recognise the Covenant mechanism meant to ensure those rights as an essential part of the object and purpose of the Covenant. This position cautions the State parties which ratify the conventions for various reasons other than their commitment to human rights application as it compels them to recognise and abide by the requirements to ensure the observance of covenant provisions.

The Committee in its comment held most significantly that the reservations regime of the Vienna Convention on the Law of Treaties did not provide any institutional mechanism to decide upon the question of validity of reservations. Determination of validity of reservations has been left to the subjective assessment of the parties to the treaties. These subjective assessments also did not lead to any conclusion as the Vienna Convention did not provide any mechanism to declare a reservation invalid in respect of all other States parties. A State party could declare that it did not have any treaty relations with a reserving State if it felt that that reservation was incompatible with the object and purpose of the Convention and hence invalid.¹¹³ Therefore “the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties and the Covenant specifically, is not a web of inter-State exchanges of mutual obligations. They

¹¹³ See the first chapter for a detailed discussion
concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. This conclusion that was arrived at by the Committee carries considerable weight as it has been derived from the practice of State parties to the Covenant with regard to reservations. It is significant to note here that it is not only in the case of the Covenant but in the case of other human rights treaties also States are not very particular about the validity of reservations and the consequent treaty relations in relation to the reserving States. There is no consistency and strict adherence to the reservations regime of the Vienna Convention in the practice of States in the case of human rights treaties. The opinion of the Committee seems to be true to a large extent as human rights treaties provide for individual rights against the State parties and do not confer any benefits on the State parties directly. This situation inevitably warrants the role of some impartial international body to decide upon the question of validity of reservations. Thus the Committee felt that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the covenant. This is in part because, States parties are likely to be subjective if they were to be the final judges of the issue of compatibility in relation to human rights treaties and will greatly harm the interests of the beneficiaries i.e., the individuals. It is also because it is a task that the Committee, as the sole monitory body established by the treaty, cannot avoid in the performance of its functions".

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114 General Comment, n. 101, p.845.
115 General Comment, n. 101, p.845.
Having justified its competence to determine the validity of reservations to the Covenant, the Committee also expressed its stand on an invalid reservation. It was of the view that a State making an invalid reservation would remain as a party to the Covenant by severing the invalid reservation attached to it. Accordingly the Covenant was applicable to the party without the effect of the reservation. This position is altogether different from the Vienna Convention system of reservations. Though the Vienna Convention prohibits the reservations which are incompatible with the object and purpose of the Convention, its does not have any provision severing the State party's reservation altogether and compelling it to remain as a party to the treaty. This position of the Committee, on the other hand, is similar to the one held by the European Court of Human Rights in the *Belilos* case.\(^{116}\) It leads to certain conceptual difficulties with regard to the consent of States. A basic principle of international law in general and treaty law in particular is that, except in respect of *jus cogens*, a sovereign State cannot be a party to an intentional obligation without its consent. In the present case if a State consents to become a party to the Covenant subject only to the acceptance of its reservation, severance of its reservation by asking it to continue its adherence to the treaty would amount to compelling such a State to abide by obligations which it has not fully consented to. As seen already, this issue had already come before other bodies. The response of the European Court of Human Rights was similar to the above position. In *Belilos* case\(^ {117}\) the Court held that a State could remain as a party to the Convention by severing its invalid reservation from the provision to which it is made. There has been a

\[^{116}\text{*Belilos* case, n. 37.}\]

\[^{117}\text{Ibid.}\]
general consensus among the international bodies constituted under the human rights treaties that the human rights treaties stand apart from other treaties. In fact, prior to human rights bodies it was the International Court of Justice, which held that the human rights treaties are of such nature, which is different from other treaties. But the question that remains unanswered is that does the difference in nature, of human rights treaties, warrant the negation of basic requirement under general international law to make a human rights treaty binding on State parties by severing their reservation which constituted a part of their consent to become a party to a human rights treaty? The answer that is provided by the Committee is that human rights treaties do require such special treatment irrespective of the contrary principles of general international law. Commenting on this situation, M.K. Nawaz observed:

The European precedents may not always be completely relevant or appropriate to the universal context, for the former is grounded in a system of supervision clearly distinct from the latter. Uncritical acceptance of the General Comment would only bring the doctrine closer to the one repudiated by the Vienna Convention regime. Therein lies the snag! The Human Rights Committee can no more limit States’ authority and functions as regards human rights treaties than the United Nations Secretary-General as regards other multilateral treaties.

The Committee stressed that reservation should be very specific referring to a particular provision and that there should not be so many reservations to act against the integrity of the Covenant. It also observed that the reserving State should indicate the domestic law provisions and the practices, which contradict with the Covenant

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118 Genocide Convention case, n.57.
obligations to which reservation has been made. This requirement is similar to the one provided under Article 57 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The Comment also suggested that States should provide explanation for the time period they require to make the domestic laws consistent with the Covenant obligations and that reservations should also be withdrawn as soon as possible.

4.6.1. Response of States

The General Comments made by the Committee are not 'legally' binding, and States are entitled to make their observations on them to the Committee. Accordingly some States have expressed their observations on General Comment No. 24 (52). The United Kingdom made its observations on four issues: namely 1. the legal regime regulating reservations to the Covenant, 2. the criteria for assessing compatibility with the object of the purpose of the Covenant, 3. the power to determine compatibility with the object and purpose, and 4. the legal effect of an incompatible reservation. On the issue of legal regime regulating reservations to the Covenant the UK has taken a view that is different from the Committee’s. In its view modern law of reservations to multilateral treaties originated with advisory opinion of the ICJ in the Genocide convention case. It pointed out that the method formulated by the ICJ in that opinion was keeping in view the specific character of Genocide Convention as a human rights

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120 European Convention, n. 28.
121 Article 40 (5) States: The states parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this Article.
treaty wherein the contracting States parties did not have any interests of their own and the Convention was intended to uphold the common cause. Hence:

[...]he argument that the existing rules of international law are inadequate to cope with the human rights treaties rests in any case,...... on a mistaken assumption.123

Refuting the opinion of the Human Rights Committee that the human rights treaties are not a web of inter-state exchanges of mutual negotiations and the principle of reciprocity has no place, the UK observed in the first place that, ICJ did not approach the problem of reservations in this manner in its *Genocide Convention* opinion, second, that it was not the view taken by other international bodies such as European Court of Human Rights and third interstate complaints and the invocation of Covenant by one state against the other with regard to protection of human rights of individuals under Article 41 of the Convention show that in a very real and practical sense even the substantive provisions of the Covenant are indeed regarded as creating a network of mutual bilateral agreements.124 Therefore,

the legal effect of any particular reservation to a human rights treaty is an amalgam of the terms of the treaty and the terms and import of the reservation, in the light of the reactions to it by the other treaty parties and in the light, of course, of any authoritative third-party procedure that may be applicable.125

The United Kingdom made it very clear that it was not in favour of a separate method of reservation for human rights treaties and views that the present regime of

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123 Ibid., p. 193.
124 Ibid., p. 194.
125 Ibid., p. 195.
reservations had to be applied taking into consideration the special characteristics of every treaty.

With regard to the criterion for assessing compatibility with the object and purpose of the Covenant, the UK agreed with the Committee's view that it was difficult to determine the object and purpose in the case of treaties of Covenant nature. But the UK differed with the view that provisions which represented the customary international law might not be the subject of reservations. Here the UK made a distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law. 126

On the competence of the Committee to determine compatibility of reservation with the object and propose of the Covenant, the UK felt the need for an objective third party procedure. In the present context it also endorsed the committees role to assess the status of reservations as it became inevitable for it in the discharge of its functions under Articles 40, 41 and the first optional protocol. But it differed with the Committee's view that it had the power to 'determine' the status reservation and the view that 'it is an inappropriate tasks for states parties'. 127

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Following reasons were given by the UK for its differences with the Committee's views:

(a) Even if it were the case (as the General Comment argues but the United Kingdom doubts; See paragraph 3-5 above) that the law on reservations is inappropriate to address the problem of reservations to human right treaties; this would not of itself give rise to a competence or power in the Committee except to the extent provided for in the covenant; any new competence could only be created by amendment to the covenant, and would then be exercisable on such terms as we laid down.

(b) No conclusion as to the status or consequences of a particular reservation could properly determinative unless it were binding not only on the reserving state party but on all the parties to the covenant, which would in turn automatically presuppose that the parties had undertaken in proper form a prior legal obligation to accept it.

(c) There is qualitative distinction between decision judicially arrived at after full legal argument and determination made without the benefit of a judicial process.
Finally on the issue of legal effect of an incompatible reservation the UK expressed a difference of views on the severability of reservations. In its view Articles 20 and 21 of the Vienna Convention were applicable to the Covenant. Therefore the finding of the ICJ in the *Genocide Convention* opinion, which ruled that when a reservation was incompatible with the object and propose of the convention, that the reserving State cannot be regarded as being a party to the Convention, would be relevant to this kind of situations. In the British view, severability might be useful in certain cases but severance would separate the reservation along with the provision in respect of which it was made as a condition the reserving State for remaining a party to this Convention. It was so because a State is not bound by the obligations to which it has not given its consent. Hence the UK felt that the method applied by the ICJ was a sound approach suitable for those reservations which were incompatible with the object and purpose of the Convention. According to it if a reservation was incompatible the State making such reservation could not become a party to the Convention unless that reservation was withdrawn.

As the contents of the Comment have the far reaching effect the United States also made observations on it. It focused on the issues of (1) Role of the committee (2) Acceptability of reservation: Governing legal principles (3) Specific reservation (4) Domestic implementation and (5) Effect of invalidity of reservations.128

The United States observed that to say that not accepting the Committee’s views on the interpretation of the Covenant would amount to acting against the object and purpose of the Covenant was a departure from the Covenant scheme. The Covenant did

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not impose on State parties an obligation to accept the Committee’s interpretations of the Covenant. Therefore it was not necessary to make reservations to the Committee’s competence as it did not have such competence under the Covenant. At the most it could be understood as that the reservations could not be made to the requirement of reporting to the Committee. The US also found the Committee’s assertion that it had the power to determine the validity of reservations as problematic. In its view “it (this view of the Committee) appears to reject the established rules of interpretation of treaties as set forth in Vienna Convention on the Law of Treaties and in customary international law”. The Committee’s position of denying State parties the discretion to determine their treaty obligations by way of not giving legitimacy to their acceptance and objections to reservations was contrary to the Covenant scheme and international law, according to the US.

With regard to the acceptability of reservations, the US stated:

It is clear that a state cannot except itself from a peremptory norms of international law by making a reservation to the Covenant. It is not at all clear that a state cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations. From this observation of the United States it may be understood that a reservation could be to a peremptory norm made but it could be done only when the reserving State wanted to enforce that peremptory norm in some other way which was different from the Covenant scheme. The inherent danger involved in it was that reservations could be made to all the peremptory norms of the Covenant on the same ground and could be

129 Ibid., p.199.
130 Ibid., p.200.
argued as the United States did. The Committee's view that a reservation to a norm of customary international law is incompatible with the object and purpose of the covenant was also found by the United States as contrary to international law. In fact, in the United States' view the whole understanding of the Committee about the object and purpose of the Covenant was faulty. In its view "[t]he object and purpose was to protect human rights, with an understanding that there need not be immediate, universal implementation of all terms of the treaty", and also it was "to secure the widest possible adherence, with the clear understanding that a relatively liberal regime on the permissibility of reservations should therefore be required."

On the issue of specific reservations, the US questioned the methodology of the Committee with regard to its understanding of international customary law. Many of the norms that were mentioned in paragraph 8 of the Comment, in US view, were not really part of international customary law. Citing the example of death penalty, the US said that though there was a general understanding that death penalty in general and juvenile death penalty in particular should be opposed it could not be deduced from the practice of States that there was a blanket prohibition on it in international customary law. The United States also argued that the Committee's view that reservations could be made to particular clauses of article 14 but not a general reservation to the right to fair trial could be extended to other subjects mentioned in paragraph 8.

While seeking clarification from the Committee, the US observed that the method of severability of invalid reservation was against the established legal practice and principles of international law. It was of the view that the reservations contained in its

131 Ibid., p.200.
ratification constituted the integral part of its consent to be bound by the Covenant obligations hence they could not be severed. It felt that determining a reservation, as invalid would nullify the entire ratification, not just the invalid reservation. Hence the US view:

The general view of the academic literature is that reservations are an essential part of a state's consent to be bound. They cannot simply be erased. This reflects the fundamental principle of the law of treaties: Obligation is based on consent. A state which does not consent to a treaty is not bound by that treaty. A state which expressly withholds its consent from a provision cannot be preserved, on the basis of some legal fiction, to be bound by it. It is regrettable that General Comment 24 appears to suggest to the contrary. 132

It is not surprising that the States had responded to the General Comment made by the Human Rights Committee. As the contents of the Comment would have far reaching effect on the relation of the State parties vis-à-vis the Covenant, the observations made, in particular by the United States, included loaded statements reflecting their resentment to the Comment. Though worded differently, both the United Kingdom and the United States differed with the assertion of the Committee on its competence to interpret the Covenant provisions and the determination of validity of reservations. While the United Kingdom appeared to endorse the competence of the Committee subject to certain limitations, the United States outrightly rejected the Committee's assertion of its competence and described it to be "contrary to the Covenant schemes and international law". 133 There is also opposition to the Committee's view that the provisions that

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132 Ibid., p. 203.
represent the international customary law might not be the subject of reservations. United Kingdom’s views on reservations to international customary law and United States’ view on reservations to peremptory norms of international law seemed to be similar in their approach. UK stated that in its views “there is a clear distinction between choosing not to enter into treaty obligations and trying to opt out of customary international law”. The United States observed that “[I]t is not at all clear that a State cannot choose to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations”. In both these statements it was intended that acceptance of certain peremptory or customary norms did not necessarily mean that they should be accepted in a particular treaty form. Accordingly making reservation to a treaty norm of such nature should not, automatically, be construed as an opposition to that norm per se.

France also sent its observation to the Committee expressing its opinion on various aspects of the Comment. The Comment evoked so much of response that a bill was also introduced in the US Senate aiming at withholding funds to the Human Rights Committee until the General Comment no. 24 (52) was withdrawn.

4.7. Cumulative Effect of International Jurisprudence

There seems to have emerged an implied consensus among the treaty bodies on their competence to determine the validity of reservations. This assertion made by the treaty bodies with regard to their competence is in apparent disregard to the reservations regime of the Vienna Convention on the Law of Treaties. This is so because under the

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134 UK’s observations, n. 122,p. 195.
135 United States’ Observations, n. 128,p. 200.
136 This Bill was introduced by Mr. Helms on 9 June 1995.
Vienna Convention the ultimate authority to determine the effect of reservations lies with State parties. The treaty bodies are also not expressly empowered by the respective treaties to decide on the validity of reservations. In the light of the findings of these bodies a State’s ratification of a treaty along with a reservation no longer remains valid on its acceptance by at least one contracting State alone as provided under Article 20(4)(c) of the Vienna Convention. Any time such reservation may be declared invalid by the treaty body concerned if an issue involving such reservation is brought before such body.

On the other hand it will also lead to uncertainty regarding the status of objections in the event of a reservation being declared valid. It is not clear whether such finding automatically invalidates all the objections made by State parties thereby reinstating the treaty relations between the reserving State and the objecting States who have expressly declared that there would not be any treaty relations with the reserving State as provided under Article 20(4)(b) of the Vienna Convention.

Thus, the positions taken by the treaty bodies have left many questions unanswered. They lead to uncertain situation when they hold that a particular reservation made by a State party is invalid. It is not clear whether or not the reserving State remains a party to the treaty without the benefit of its reservation. In case it is assumed that that State would no longer be considered a party to the treaty, the coming into force of the treaty would remain uncertain in case continuation of that State as a party to the treaty is essential for the treaty’s coming into force. It is more problematic when an adjudicatory body holds a reservation invalid sometime after the entry into force the treaty as it raises a doubt whether that treaty continues to be in force or not.
To overcome this uncertain situation in the _Belilos_ case an attempt was made by the European Court of Human Rights by upholding that the invalid reservation could be severed from the treaty and that the State which made the invalid reservation would remain as a party to the treaty but without the benefit of that reservation. This was also the view of the Human Rights Committee in its General Comment no. 24 (52). However, this position provides a practical answer, but leaving behind contradictions at the conceptual level. The general premise on which international law is based is that no state is bound by the international obligations unless it has been consented to by that State. In other words, it is only the consent of the State that binds it by international obligations. When consent is expressed by a State party to a treaty along with a reservation that consent should be construed as subject to that reservation only. Therefore severing reservation from its acceptance to the treaty would amount to making the obligations binding on a state party which has, in fact, decidedly not expressed its total consent. Reservations are generally made by the states to avoid certain obligation in the treaty with which they have differences. The practice of reservations is also evolved to encourage more number of States to become parties to the treaties by making reservations to those provisions which the they feel that they have difficulties in implementing them. Hence a reservation constitutes an integral part of the consent and severing it would amount to imposing obligations on States, which they have not consented to and are not inclined to accept. Therefore it is contrary to the well-established norms of international law.

Another important issue that has gained the acceptance of all the bodies in their opinions is the test of compatibility with the object and purpose of the treaty, a concept
which has been developed by the International Court of Justice in the Genocide convention case. This test has been accepted by all the parties as the guiding principle while determining the validity of reservations. Though there have been differences as to what constitutes the object and purpose of a treaty, from its inception the test of compatibility has been applied as a general criterion and as an objective test for assessing the validity of a reservation. With regard to what constitutes the object and purpose of a treaty, the opinion of the Inter-American Court of Human-Rights\textsuperscript{137} is a step forward in holding that it is the non-derogable rights of the American Convention on Human Rights which constitute the object and purpose of that Convention and that no reservation can be made to them. This finding may be made applicable to those human rights treaties, which contain the category of non-derogable rights. On the other hand the Human Rights Committee declined to equate non-derogable rights with the object and purpose of the Convention. Though the Inter American Court of Human Rights’ view helps as a parameter in the absence of any other method, the Human Rights Committee’s observations are extremely relevant as it may not always be possible in the case of every human rights treaty to locate or confine its object and purpose in or to non-derogable rights.

There also appears to be a consensus with regard to the distinctions between reservations and interpretative declarations. It is not the name, with which that statement is called, but its potential to exclude or modify the legal effect of the concerned provision that decides whether that statement is a reservation or not. A statement phrased as a mere interpretative declaration may in its interpretation modify or exclude the legal effect of

\textsuperscript{137} Advisory Opinion, n.82.
the provision and also on the contrary a statement phrased as reservation may result in a mere interpretation of a particular provision. Therefore the definition provided under Article 2(1)(d) of the Vienna Convention on the Law of Treaties received acceptance by the international bodies. This criterion is certainly significant as it helps in overcoming the misleading situations that are created due to the reservations/declarations with which the States modify their statement in their ratifications.