CHAPTER-5
CURRENT WORK OF THE INTERNATIONAL LAW COMMISSION

The Vienna Convention on the Law of Treaties, 1969 has codified a system of reservations, which may arguably be considered as representing the relatively viable and acceptable elements of various models followed till then by States. From then onwards it has been a reference point in international treaty law whenever an issue relating to reservations arose. Though the reservations regime of the Vienna Convention constitutes a uniform procedure, applicable to all multilateral treaties, with certain exceptions as prescribed therein, its residual character was intended to allow State parties to adopt a different system of reservations in respect of a Convention if they found that to be suitable to that Convention and also acceptable to them. However, the problem of reservations in international law remains to be as debatable even after the Vienna Convention came into force as it was prior to the adoption of the Convention. This may be not because it is mistake ridden but because it is felt to be inadequate to address the problem in its entirety. Thus the practice of States with regard to reservations has not been in strict conformity with the Vienna Convention regime at all times. So also are the findings of international adjudicatory and treaty bodies as discussed earlier. This inevitably led to various propositions to fill in the gaps in the Convention and formulate a comprehensive system of reservations. It has also been suggested that treaties of certain variety, particularly human rights treaties, need a separate system of reservations because of their special character. As a culmination of all this a proposal was made in this regard

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1 Article 20 provides for different systems applicable for treaties with limited number of contracting parties and for the constituent instruments of intentional organizations.
in the Sixth Committee at the Forty Sixth session of the General Assembly of the United Nations in 1990 to include in the long term programme of work of the Commission on the topic “the legal effect to be given to reservations and objections to reservations to multilateral conventions”, which in turn led the planning group of the International Law Commission (herein after referred to as the Commission) to take a view to adopt that suggestion in 1992. Accordingly a member\(^2\) of the Commission prepared a general outline\(^3\) in 1993 highlighting the main problems that had been raised, the relevant instruments on the issue, existing doctrinal positions and the advantages and disadvantages of codification. In pursuance of the conclusion of the outline that a detailed study of the topic was warranted, the Commission decided to proceed with the study, endorsed by the General Assembly.\(^4\) Accordingly the Commission appointed Alain Pellet as the Special Rapporteur for the topic “the law and practice relating to reservations to treaties” on 22 July 1994.\(^5\) The Special Rapporteur submitted his first report in 1995.\(^6\)

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\(^2\) This member was Alain Pellet who was later to be designated as Special Rapporteur on the topic of reservations to treaties.


\(^4\) Resolution 48/31 of 9 December 1993 thus reads:

*endorses* the decision of the International Law Commission to include in its agenda the topics “The law and practice relating to reservations to treaties” and..., on the understanding that the final form to be given to the work on these topics shall be decided after a preliminary study is presented to the General Assembly.


5.1. First Report, 1995

The first report of the Special Rapporteur on the law and practice relating to reservations included a detailed description of the Commission's earlier work on the topic and the outcome of that work, and a brief list of the problems posed by the topic and noted that so far as reservations are concerned there are gaps and ambiguities in the relevant Vienna Conventions, namely the Convention on the Law of Treaties of 1969, the Convention on Succession of States in respect of Treaties of 1978, and the Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986. Therefore it was felt that the topic should be considered further in the light of the practice of states and international organisations. The report also made suggestions on the scope and form of the Commission's future work on the topic.

In this report an attempt was made by the Special Rapporteur to highlight the problems that were confronted by States and international organisations in their practice. These problems were classified, based on their nature, into two categories, by the Special Rapporteur: The first was about the ambiguities of the provisions relating to reservations in the Vienna Conventions and the second category of problems was about the gaps left in those provisions. The prominent among the ambiguities that attracted the attention of the Special Rapporteur is the doctrinal controversy between the standpoints of permissibility and opposability of reservations. From the permissibility standpoint it is argued that "the issue of permissibility is the preliminary issue. It must be resolved by reference to the treaty and is essentially an issue of treaty interpretation; it has nothing to do with the question of whether, as a matter of policy, other parties find the reservations acceptable or not. The consequence of finding a reservation 'impermissible' may be
either that the reservation cannot be accepted by a party holding it to be impermissible or 
that the impermissible reservation nullifies the state's acceptance of the treaty as a 
whole.”7 In contrast to this view it is argued from the opposability standpoint that “the 
validity of a reservation depends solely on the acceptance of the reservation by another 
contracting state.”8

The arguments of the permissibility school and the opposability school were 
seemed to have originated from the ambiguity of article 19(c) of the 1969 Vienna 
Convention, which deals with the test of compatibility with the object and purpose of the 
convention. The permissibility school proposes an objective test to assess the validity of a 
reservation irrespective of the opinions of the other parties to the treaty, whereas the 
opposability school advocates the subjective determination of validity of reservations by 
other states parties. Thus the Special Rapporteur felt that “[i] irrespective of the merits (or 
otherwise) of each of these theses, it is certain that these contrasting positions reflect the 
doctrinal unease that the representatives of States seem to share with regard to the regime 
for the acceptance of reservations and objections to reservations which was introduced by 
articles 20 and 21 of the 1969 Vienna Convention, was restated in the 1986 Convention 
and is, to say the least, lacking in clarity.”9

Along with the above stated problem the Special Rapporteur attempted to identify 
the other ambiguities in the reservations regime of the Vienna Conventions. He identified 
the following questions to be of significance which require attention in any future work:

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7 D.W.Bowett, 'Reservations to Non-Restricted Multilateral Treaties', British Yearbook of 
9 ILC Document, n.6, p.54.
- What is the precise meaning of the expression “compatibility with the object and purpose of the treaty”?

- When should a convention be regarded as a limited multilateral treaty (art.20, para.2)?

- Is an impermissible reservation null and void in itself and does its nullity give rise (or not give rise) to the nullity of the expression of consent by the state (or international organisation) to be bound?

- Is an impermissible reservation null and void regardless of the objectives that may be made?

- Can the other Contracting States or international organisations accept an impermissible reservation?

- What are the effects of such acceptance?

- If due note has not been taken (by whom?) of the impermissibly of a reservation, can the reserving state replace it with another reservation or withdraw from the treaty?

- Are the contracting states free to formulate objections irrespective of the impermissibility of the reservation?

- Must they, or should they, indicate the grounds for their objections?

- What exactly are the effects of an objection to a permissible reservation?

- And to an impermissible reservation?

- How are such effects distinguishable from the effects of an acceptance of the reservation where the objecting state does not clearly express the intention that the treaty should not enter into force as between it and the reserving state?

- In such a case, can the objecting state exclude the applicability of treaty provisions other than those covered by the reservation?

- And is the reserving state required to accept such a conclusion?

- Lastly what is the precise meaning of the expression “to the extent of the reservation.”

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10 Ibid., pp.57-58.
Apart from these ambiguities the Special Rapporteur further identified the gaps that exist in the Vienna Conventions. He classified them into three categories, namely (1) gaps of general nature, (2) problems connected with the specific object of certain treaties or provisions, and (3) problems arising from certain specific treaty approaches. He promptly pinpointed the problem of reservations to human rights treaties under the second category i.e., problems connected with the specific object of certain treaties or provisions. However, he was cautious enough to underscore that the concept of special problems of reservations of reservations to human rights treaties is not in itself a very precise one. But he recognised the specific character of human rights treaties so far as they are intended to be applicable to all human beings without any discrimination.

The other problems identified as gaps in the Vienna Conventions are reservations to bilateral treaties, distinction between reservations and interpretative declarations, effects of reservations on the entry into force of the treaty, problems of succession of states in respect of treaties, reservations to constituent instruments of international organisations, reservations to provisions codifying customary rules, reservations and additional protocols and reservations and the bilateralisation approach.

With regard to the status of the regime of reservations it was felt by the Special Rapporteur that "even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by Article 2, paragraph 1(d), and Articles 19 to 23 have now acquired customary force." Accordingly he felt that

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11 Ibid., pp.58-68.
12 Ibid., p.64.
13 Ibid., pp.58-68.
14 Ibid., p.71.
the Commission might proceed with the task of filling up the gaps and removing the ambiguities in the existing regime without making any amendments to it. However, he left it to the Commission to decide upon the form to be adopted for accomplishing the task. It may be in the form of draft articles additional to existing treaties, consolidated draft articles, a ‘guide to practice’ model clauses or a combination of these forms.

The Commission discussed this report at its forty seventh session. While introducing the first report for discussion before the Commission the Special Rapporteur said that the question of reservations to treaties was not terra incognita for the Commission as it was discussed before it in earlier occasions also. He also explained various aspects and related developments with regard to the law of reservations. He made a reference in his speech to the arguments that were put forward concerning the applicability of Vienna Convention regime on reservations to human rights treaties. Thus the broad framework within which he would proceed with the task is summarised in the following manner:

In short, he would suggest that the existing articles of the 1969, 1978 and 1986 Vienna Conventions should be treated, in principle, as sacrosanct unless, during the course of the work on the topic, they proved to be wholly impracticable, which he did not think would be the case. The one point, therefore which he would make very firmly was that the Commission should not call into question something that already existed and did not, after all, work too badly. That did not mean of course that there was nothing to do. Where possible and desirable ambiguities should be removed, but not necessarily altogether, for complete clarity was not always a virtue in international law. An attempt must also be made to fill any gaps, if only to avoid any anarchical developments. Those were the

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only two objectives that the Commission should set for itself— and hence for its Special Rapporteur.  

Thus the system of reservations under the Vienna Conventions found to be worth continuing by filling the gaps that were revealed by the previous practice. It is worth recalling here that the practice of states particularly after the 1969 Convention, with regard to reservations has been always in reference to the Vienna Convention regime and most of the interpretations were made within that broad framework only. The understanding of the Special Rapporteurs about the relevance of the existing Vienna Convention regime reflects the view that with all its lacunae this system represents the long practice of international community particularly after the advisory opinion of the ICJ in the Genocide Convention case in 1951. The Special Rapporteur had drawn certain conclusions from the Commission’s consideration of the first report, which were as follows:

(a) The Commission considers that the title of the topic should be amended read “Reservations to treaties;
(b) The Commission should try to adopt a guide to practice in respect of reservations. In accordance with the Commission’s statute and its normal practice, this guide would take the form of draft articles whose provisions, together with commentaries, would be guidelines for the practice of states and international organisations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;
(c) The above arrangements shall be interpreted with flexibility and, if the Commission feels that it must depart from them substantially, it would submit new proposals to the General Assembly on the form the results of its work might take;

16 Ibid., p.151.
(d) There is a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.\textsuperscript{17}

These conclusions received the general approval of the Commission and also of the Sixth Committee of the General Assembly. In the view of the Special Rapporteur these conclusions were intended to be used a basis for consideration in accomplishing the task of preparing a report on the topic.

The Commission authorised the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, states and international organisations, particularly those which are depositories of multilateral conventions.\textsuperscript{18} This decision of the Commission received the acceptance of the General Assembly which in its resolution 50/45 of 11 December 1995, invited states and international organisations, particularly those which are depositories, to answer promptly the questionnaire prepared by the Special Rapporteur on the topic concerning reservations to treaties. In pursuance of this decision the Special Rapporteur prepared a detailed questionnaire which was circulated to member states of the United Nations, members of the specialised agencies and the parties to the Statute of the International Court of Justice. Similar questionnaire was also circulated to international organisations that are depositories of multilateral treaties. By the time fifth report of Special Rapporteur was prepared in 2000, 33 States\textsuperscript{19} and 24 international organisations\textsuperscript{20}

\textsuperscript{17} Official Records of the General Assembly, Fiftieth Session, Supplement No.10 (A/50/10), para 491.

\textsuperscript{18} Ibid., para.493.

\textsuperscript{19} These countries are; Argentina, Bolivia, Canada, Chile, Colombia, Croatia, Denmark, Ecuador, Estonia, Finland, France, the Holy See, Germany, India, Israel, Italy, Japan, Kuwait, Malaysia,
replied either fully or partially to the questionnaire. This exercise was primarily intended
to find out multitude of practices and opinions on the topic, as it was clear that there was
no unanimity in views of the states and international organisations. It would also be of
immense value as states have adopted different methods, many a time not strictly abiding
by the Vienna Conventions regime on reservations. So also with regard to international
organisations which are depositories of multilateral treaties.

5.2. Second Report, 1996

The Special Rapporteur has prepared the second report21 on reservations to
treaties and introduced the same before the Commission at its forty-eighth session in
1996. It was discussed by the Commission in 1997.

In this report the Special Rapporteur went further than his first report, on the basis
of the discussions of the Commission.22 The Commission’s opinion was in favour of
preparing a guide to practice in respect of reservations while preserving what has been
achieved through the Vienna Conventions in the past. It was suggested that the draft

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Mexico, Monaco, New Zealand, Panama, Peru, Republic of Korea, San Marino, Slovakia,
Slovenia, Spain, Sweden, Switzerland, the United Kingdom And the United States.


articles of the guide to practice would be accompanied by commentaries and also model clauses, if necessary, with the objective of minimising disputes with regard to reservations in the future. While clarifying the role of the model clauses it was stated that "[t]he sole aim will be to encourage states to incorporate in certain specific treaties the model clauses concerning reservations, which derogate from general law and are better adapted to the special nature of these treaties or the circumstances in which they are concluded. This would have the advantage of adapting the legal regime concerning reservations to the special requirements of these treaties or circumstances, thus preserving the flexibility to which both the Commission and the representatives of states are rightly attached, without calling in question the unity of the general law applicable to reservations to treaties." Thus, these model clauses were intended to serve the purpose of meeting the requirements of treaties which the contracting parties would consider to be of special character and which need a different legal regime of reservations. As the treaties are of wide varieties in nature the model clauses will provide attractive models to adopt to special requirements.

Another significant aspect of this exercise is the residuary character of the guide to practice that would be prepared. The decision to include model clauses itself signifies that the proposed guide to practice would be as much flexible as to accommodate other methods of making reservations. States are at liberty to adopt any other method of reservations if they consider it to be of more suitable to a particular Convention. "It will therefore consist of general rules designed to be applied to all treaties, whatever their scope in cases where the treaty provisions are silent. However, like the actual rules of the

Vienna Conventions and the customary norms which they enshrine, these rules will be purely residual where the parties concerned have no stated position; they can be considered binding and the negotiators need to do is incorporate the specific clauses relating to the reservations into the treaty.”

With this backdrop the Special Rapporteur prepared a provisional general outline of the study. This outline has been divided into five parts, namely; (I) Unity or diversity of the legal regime for reservations to multilateral treaties (reservations to human rights treaties), (II) Definition of reservations (III) Formulation and withdrawal of reservations, acceptances and objections, (IV) Effects of reservations, acceptances and objections, (V) Fate of reservations, acceptances and objections in the case of succession of states, and (VI) The settlement of disputes linked to the regime for reservations. Accordingly the first part on unity or diversity of the legal regime for reservations to treaties (reservations to human rights treaties) was dealt with in the second report itself by the Special Rapporteur.

While dealing with the diversity of treaties the prominent view identified was with regard to reservations to normative treaties, which has received much attention particularly in the context of reservations to human rights treaties. As discussed earlier in chapter III many human rights treaty bodies respond in different ways while dealing with reservations. These opinions have expressly underscored the special character of human rights treaties, which was markedly different from other treaties. The underlying assumption of all these views is that human rights treaties, unlike the other contractual

24 Ibid., p.11.
treaties, are normative and non-reciprocal in nature. Therefore the obligations assumed under these treaties are obligations *erga omnes*. This has been the view, which received stress in the ICJ advisory opinion in the *Genocide Convention* case\(^\text{26}\) and has been reiterated, in the subsequent opinions of the international bodies. The ICJ held in that case:

In such a convention (as the *Genocide Convention*) the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently in a Convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.\(^\text{27}\)

Further it is observed with regard to normative treaties that:

It is this peculiarity of 'normative' Conventions, namely, that they operate in, so to speak, the absolute, and not relatively to the other parties- i.e., they operate *for each party per se*, and not *between the parties inter se* - coupled with the further peculiarity that they involve mainly the assumption of duties and obligations, and do not confer direct rights or benefits on the parties *qua* states, that gives these Conventions their special character.\(^\text{28}\)

Concurring with the ICJ's observation\(^\text{29}\) it is viewed that "[i]t is in the human rights field, however, that these peculiarities have most frequently come to light,"\(^\text{30}\) though treaties covering other topics also constitute normative characteristics.


\(^{27}\) Ibid, p.23.


\(^{29}\) *Genocide Convention* case, n. 26, p. 23.

\(^{30}\) ILC Document, n. 25, p13.
However, the Special Rapporteur significantly pointed out the difficulty in categorising the human rights treaties as special as there was much less of homogeneity among them and also the varying significance of different provisions in a single treaty.\(^{31}\) Another significant feature highlighted by the Special Rapporteur is the dual character of human rights treaties. He opined that “as a rule, provisions that protect human rights have a marked “normative” character, human rights treaties also include typically contractual clauses.”\(^{32}\) Therefore emphasis was laid on human rights treaties with a broader view on the body of law-making multilateral treaties.\(^{33}\)

Consent of States is an integral constituent of treaty law. No treaty can be applicable in respect of a state, which has not expressed its consent to be bound by it. A reservation comes into play only when consent is expressed by a state to a treaty. Securing consent to a treaty is therefore directly linked to the issue of reservations, as the discretion of a State to decide to give its consent to be bound by a treaty includes its right to condition its consent with limitations. The primary purpose behind any multilateral treaty is to be made applicable to as many states as possible i.e., to achieve universal acceptance. For it to achieve universal acceptance all the provisions of the treaty should become acceptable to States, which is not always possible. Therefore, States become parties to the treaty by way of making reservations to certain provisions with which they have differences even at the cost of integrity of treaty. Understanding this complex interrelationship, the report opined that “[t]he rules applicable to reservations must therefore strike a dual balance between (a) the requirements of universality and integrity

\(^{31}\) Ibid., p. 13.

\(^{32}\) Ibid., p.14.

\(^{33}\) Ibid., p.15.
of the treaty and (b) the freedom of consent of the reserving state and that of the other states parties, it being understood that these two "dialectical pairs" overlap to a large extent.\(^\text{34}\)

The Vienna Convention regime of reservations has been critiqued largely from the standpoint of human rights treaties either for its gaps or for its unsuitability. However, the authors of this regime clearly intended it to be applicable to all the treaties without any exceptions. The issue of distinction between different kinds of multilateral treaties came before the Commission when the 1969 Vienna Convention was being prepared. However the Commission responded negatively to that idea and held that there was no need to make such distinction between different kinds of multilateral treaties\(^\text{35}\). Emphasising this aspect Special Rapporteur Pellet stated in his second report that the Vienna Conventions regime of reservations was clearly intended to be applicable to all the treaties without making any distinction on the basis of their nature or their object. Therefore having considered the views in favour of making a distinction between different kinds of treaties it was concluded by the Commission to have a single regime of reservations for all categories of treaties.

5.3. Appropriateness of Reservations to 'Normative' Treaties

The most controversial question debated in the Commission has been the appropriateness of reservations to normative treaties, which also include human rights treaties. Alain Pellet, the Special Rapporteur, pointed out that this issue was being

\(^{34}\) Ibid., p.19.

\(^{35}\) The International Law Commission recorded in its report: "...The Commission also decided that there were insufficient reasons for making a distinction between different kinds of multilateral treaties other than to exempt from the general rule those concluded between a small number of states for which the unanimity rule is retained", *Yearbook of International Law Commission*, vol. II (1966), p.223.
debated since the days of ICJ advisory opinion in the Genocide Convention case and later at the academic and institutional level. The Special Rapporteur has summarised the substantive arguments of those who oppose reservations to normative treaties including human rights treaties and of those who favour reservations to these treaties.

At the outset of the discussion on this issue, the Special Rapporteur pointed out that it was a debate with no possible conclusions and “that there can be no objective answer to the question of whether the drawbacks of reservations to these instruments outweigh their advantages or vice versa”. The underlying assumption that can be deduced from this view is that it endorses neither of the views fully. Thus Pellet said:

The “truth” probably lies somewhere in between; every thing depends on the circumstances and the purpose of the provisions in question. However, leaving the question unanswered presents a few drawbacks; it is true that the first subparagraph of Article 19 of the Vienna Convention on the Law of Treaties sets out the principle of the right to formulate reservations; however, like all rules governing reservations (and like the vast majority of other rules) set out in these conventions, this is an optional residual rule which negotiators can reject if they find it useful to do so. If they feel that the treaty does not lend itself to the formulation of reservations, they need only insert a clause expressly excluding them, which is precisely the case contemplated in article 19, subparagraph (a).

Without emphasising much on the conceptual grounding of the contending arguments the Special Rapporteur attempted to negotiate with the issue by relying on the practice of states in the background of Vienna Conventions regime. Accordingly he relied upon the argument that “the usefulness of reservations in the area of human rights is

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36 ILC Document, n. 25, p.25.
37 Ibid., p.31.
38 Ibid., p.31.
borne out concretely by the fact that very few conventions concluded in this area exclude reservations and that this option is available even when a treaty is concluded among a small number of states. It is also obvious that the periodic calls for withdrawal of reservations to human rights treaties elicit only a faint response, which would seem to point up the usefulness of such reservations. The Special Rapporteur also pointed out that the issue of reservations to normative treaties including human rights treaties 'depends on the circumstances and the purpose of the provisions in question'. These circumstances may include the conditions in which a treaty is implemented i.e., the social, economic and cultural conditions of a state party. Many a time states parties express their inability to implement the treaty provisions in their country for various domestic reasons. This situation is more glaring in the case of reservations made to the Women's Convention. In the case of treaties of this nature, if the reservations were totally prohibited, it would obviously lead many states to keep away from it. Thus the permissibility or impermissibility of reservations to normative treaties including human rights treaties vary from case to case and it may not be possible to arrive at an objective and blanket conclusion on the issue. However, it may be possible to conceive an objective answer from the jurisprudential point of view for it is always welcomable to achieve certainty in law, keeping in view the variations in the domestic circumstances of states, it may not be possible to arrive at specific single answer which would be applicable to all circumstances. With this understanding the Special Rapporteur attempted to put an end to a long drawn debate. Though this conclusion is neither

39 Ibid., p.30.
40 Ibid., p.31.
innovative nor extension to the existing one but it certainly put an authoritative end to the debate.

5.4. Adopting the Vienna Regime to Multilateral ‘Normative’ Treaties

Having concluded that reservations per se are not bad in respect of normative treaties including human rights treaties the Special Rapporteur proceeded with the issue of adaptability of Vienna regime of reservations to normative treaties including human rights treaties. He found this issue to be of significant as he stated that “the real legal question here is not whether or not it is appropriate to authorise reservations to multilateral normative treaties, but whether, when contracting parties remain silent on the legal regime of reservations, the rules set out in the 1969 and 1986 Conventions can be adopted to any type of treaty, including “normative” treaties, including in the field of human rights treaties.”

Having formulated this question he was conscious enough to answer it and said:

In truth, it would seem hard to argue that the answer to this question must be in the affirmative. Should one do so, however, it is not because reservations are a “good” thing or a “bad” thing in general or for normative treaties are for human rights, but because the rules which are applicable to them under the Vienna Conventions strike a good balance between the concerns raised by the advocates of reservations and those raised by their opponents, and provide a reasonable answer to their respective arguments on which a position need no longer be taken.

It is found to be so possible because of certain characteristic features of the Vienna regime which were incorporated into it expressly by the authors of these

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41 Ibid., p.32.
42 Ibid., p.32.
conventions. The Special Rapporteur found particularly two important features, namely, flexibility and adaptability of the Vienna regime, and its suitability to the particular characteristics of 'normative' treaties.

Further, the important components found by the Special Rapporteur, of the Vienna regime that make it flexible are; the object and purpose test, the system of acceptances and objections, and its residuary character.

The test of compatibility of a reservation with the object and purpose of the convention as it is enshrined under Article 19 subparagraph (c) of the Vienna Conventions is found to be an important principle accommodating flexibility as it "makes it pointless to modify a reservation in terms of the object of the treaty, for the object is taken into account in the very wording of the basic rule."\textsuperscript{43}

The second component that make the Vienna regime flexible is the system of acceptances and objections provided under Article 20, paragraphs 3, 4, and 5 and Articles 21 and 22 of the Vienna Convention which regulate the acceptances and objections which modifies the legal relations of the State parties in respect of the reserving State.

The third flexible component of the Vienna regime is its residual character, which allows the state parties to adopt any other system of reservations by rejecting the Vienna regime, or they can prohibit reservations \textit{in toto} if they feel it necessary. This regime is applicable only when a treaty is silent about reservations or if it has been expressly accepted as a system governing the reservations of a particular treaty.

The second characteristic feature that makes the Vienna regime adaptable to the normative treaties including human rights treaties is its suitability to the particular

\textsuperscript{43} Ibid., p.33.
characteristics of normative treaties. To demonstrate this proposition the Special Rapporteur has refuted the prominent arguments of the proponents of the view that the Vienna regime was not suitable to normative treaties including human rights treaties. The Special Rapporteur listed three important arguments of the proponents of the above view. First, the Vienna regime of reservations undermines the integrity of rules, as these treaties require uniform implementation second, this regime is incompatible with the absence reciprocity in commitments under these treaties. Third, it would act against the equality between the parties.\(^\text{44}\)

While dealing with the argument relating to the integrity of the treaty, the Special Rapporteur accepted that the Vienna regime did not guarantee the absolute integrity of the treaty. However he justified it by saying that the concept of reservations itself was incompatible with the notion of integrity, which was an undeniable fact. This view underscores the inevitability of negation of the integrity of a treaty once reservations are accepted. The only option left, as observed in the report, is to prohibit reservations altogether. However in case where reservations were not prohibited, the report said that the essence of the treaty was preserved by the Vienna regime in different ways, namely, first, the test of object and purpose provided under Article 19 subparagraph (c) prohibited reservations which are incompatible with the object and purpose of the treaty. Second, provisions concerning \textit{jus cogens} do not permit reservation against them. A reservation to a provision constituting \textit{jus cogens} is not permitted, as derogation from such a provision is not allowed under general international law.

\(^{44}\) Ibid., p.35.
Another argument against the suitability of Vienna regime is that the normative treaties including human rights treaties are non-reciprocal in character. They provide for obligations for achieving common goals and do not constitute any bilateral or plurilateral legal relationships. Hence a reservation made by a state relieves only that state from such obligation but does not release the other from such obligations. Therefore the Vienna regime is not suitable for this kind of treaties.

While answering this argument the Special Rapporteur observed that in such circumstances Article 21 paragraph 3, which provide for reciprocal effect of reservations do not apply. Another important and striking observation that was made by the Special Rapporteur in this context was as follows:

But, unless it is by "doctrinal decree", reciprocity is not a function inherent in a reservations regime and is not in any way the object such a regime. Integrity and universality are reconciled in a treaty by preserving its object and its purpose, indecently of any consideration having to do with the reciprocity of the parties' undertakings, and it is hard to see why a reciprocity that the Convention rules out would be reintroduced by means of reservations.45

Having said so, he made two proposals. They are:

- Either the provision to which the reservation applies imposes reciprocal obligations, in which case the exact balance of rights and obligations of each party is guaranteed by means of reservations, acceptances and objections, and article 21, paragraph 3 can and must be applied in full;
- or the provision is "normative" or "objective", and states do not expect reciprocity for the undertakings they have given, there is no point then in speculating about possible violations of a "reciprocity" which is not a precondition for the parties' undertakings, and the provisions of article 20,

Another issue raised by those who oppose application of the Vienna regime to normative treaties including human rights treaties is that it affects the equality between the state parties. The essence of this argument is that as these treaties are of no-reciprocal character, reservations made to them would result in inequality because the reserving State would be released from its obligation to the extent of reservation but the other parties are not so relieved from their obligations in the same manner even if they make objections to such reservation. The Special Rapporteur’s response was that the reservation helped to bring equality by making the reserving State to be partially bound by the treaty than leaving it outside the treaty system without any obligations. The provisions of the Vienna regime guarantee the equality between the contracting parties. Pellet suggested that by virtue of Article 20 paragraph 4 the objecting State can prevent the reserving State from becoming a party in relation to itself and that would maintain equality as it would not be considered as a party to the treaty so far as the objecting State is concerned. The Special Rapporteur pointed to the contradiction in the arguments of those who spearhead the cause of equality of treaty relations and said:

Furthermore, both the arguments based on the loss of equality between the parties and that based on non-reciprocity are difficult to comprehend in that it is hard to see why and how they could apply in the case of treaties which are specifically not based on reciprocity of obligations between the parties but rather constitute clusters of unilateral undertakings pursuing the same ends. It is illogical to suggest that each contracting party should

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46 Ibid, p.41 (Emphasis original).
consent to be bound only because the others will do likewise, since its obligations are not the counterpart of those assumed by the others. 47

The essential argument of the Special Rapporteur with regard to equality between the parties and the non-reciprocity of treaty relations, is that when the normative treaties including human rights treaties themselves do not strictly follow the reciprocity it cannot therefore be argued for inclusion of equality and reciprocity through reservations.

5.5. Applicability of the Vienna Regime to Human Rights Treaties

As observed earlier in this study the question of reservations has attained so much significance and focus of attention from the academics and others in the recent past. It is not an exaggeration to say that the issue of reservations has drawn so much attention particularly in the context of human rights treaties and largely because of the varying responses from the human rights treaty monitoring bodies. These responses not only posed the larger question of permissibility of reservations to normative treaties including human rights treaties, but it is also doubted whether these treaty bodies do possess the legal authority to determine the validity of reservations to these treaties.

Before addressing this question the Special Rapporteur attempted to clarify the validity of the criterion of object and purpose of the treaty as provided under Article 19(c) of the Vienna Conventions which was originally propounded by the International Court of Justice in its advisory opinion in the Genocide Convention case. 48 Having observed the practice of states and international bodies at length Pellet arrived at the conclusion that the test of compatibility of reservations with object and purpose of the

47 Ibid., p.43-44.

treaty would remain as a valid test in respect of normative treaties including human rights treaties.

5.6. Determination by the Monitoring Bodies of the Permissibility of Reservations

The Vienna regime on reservations does not speak about the role of the treaty monitoring bodies in authoritatively determining the permissibility of reservations. There are other models that provide for collegiate system to determine the permissibility of reservations.49 Apart from these methods the Special Rapporteur suggested that the human rights treaty monitoring bodies might approach the ICJ and seek its advisory opinion with regard to the permissibility of reservations to these treaties. It is also observed that there is nothing that legally prevents these bodies from making a request to the Economic and Social Council or the General Assembly to seek advisory opinion of the ICJ on the permissibility of reservations to human rights treaties.

Though conventional mechanisms of this kind are available for determining the permissibility of reservations the treaty monitoring bodies entrusted this responsibility to themselves and dealt with matters of this nature50.

The views expressed justifying the assumption of powers by these bodies, to determine the permissibility of reservations were also summarised by the Special Rapporteur as follows. These views include the following: that these treaties are of special character and the Vienna regime system of acceptances and objections is not suitable; that as these treaties are objective nature they need objective control; that it

49 Article 20 paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination provides for this system.

50 For example, The European Commission on Human Rights in the Temeltasch case, The European Court of Human Rights in the Belilos Case and the Human Rights Committee General Comment No.24.
would not be possible for these bodies to perform their general monitoring functions without determining the exact obligations of the parties and finally that the objections system would not really function properly.

The Special Rapporteur refuted many of such arguments as he was inclined to accept the competence of these treaty-monitoring bodies to determine the permissibility of reservations. However, he found the reasons for such competence of these bodies in the performance of their functions, which requires the exact determination of the obligations of the States parties. He observed:

In fact, from the standpoint of the reservations regime, the truly special nature of the 1966 Covenant on Civil and Political Rights the European and Inter-American Conventions on Human Rights, as well as many instruments of more limited scope, is not that they are human rights treaties, but that they establish bodies for monitoring their implementation. Once such bodies are established, they have, in accordance with a legal principle that is well established and recognised in general international law, the competence that is vested in them by their own powers. This is the only genuinely convincing argument in favour of determination of the permissibility of reservations: these bodies could not perform the functions vested in them if they could not determine the exact extent of their competence vis-a-vis the states concerned, whether in examining applications by states or by individuals or periodic reports or in exercising a consultative competence.51

It is therefore not because of their undeniably special nature that human rights treaties require determination of the permissibility of reservations formulated in respect of them, by monitoring bodies, but rather because of the “ordinariness” of these bodies. Being established by treaties, they

derive their competence from those instruments and must verify the extent of that competence on the basis of the consent of the state parties and of the general rules of the law of treaties. 52

The position taken by the Special Rapporteur seems to have been primarily based on the functional necessity as it is essential for those bodies established under the treaty to define its own competence in relation to the extent of obligations undertaken by the parties. Without assessing the extent of the impact of reservations it is not possible to demarcate the competence of these bodies.

Apart from these bodies there are also other methods which can be resorted to for determining the permissibility of reservations. These customary methods may be of judicial or arbitral settlement of issues. The report of the Special Rapporteur argues for the complementarity among these methods and suggests that in determining the permissibility of reservations these bodies should take into account the views expressed in the form of acceptances and objections and similarly state parties should also pay attention to the decisions of these bodies.

5.7. Consequences of Findings of Monitoring Bodies

Having accepted that the treaty bodies are competent to determine the permissibility of reservations the question that falls for consideration is the consequence of those findings particularly in the case where a reservation made by a state party is found impermissible. Arguably the possible solution that has emerged from the previous findings of the monitoring bodies is that the reservation which was found impermissible may be severed from the consent of the state to be bound by the treaty and the entire treaty would remain in force in respect of that state. This was the position adopted by the

European Court of Human Rights in the *Belilos case*\(^{53}\) and the *Loizidou case*\(^{54}\) and also by the Human Rights Committee in its General Comment no.24.\(^{55}\) However this position would lead to serious legal problems with regard to the consent of State parties. It would be detrimental to the basic precept on which treaties are based i.e., the consensual character of treaties which means that the treaties are established on the basis of the consent of the contracting parties.\(^{56}\) Thus, it is the state parties who decide whether they are bound by the treaty or not. In the case of consent accompanied by reservations a body other than that state cannot assume the power to declare that the reservation is impermissible and the consent is valid making the state bound by the entire treaty obligations. It is for the states to declare whether it would continue to be a party to the treaty without its reservation, which has been declared invalid. Emphasising on this point the Special Rapporteur said:

> [i]t would seem odd, moreover, for the monitoring bodies to be able to go further than the states themselves can do in their relations *inter se*. Under the Vienna Conventions and in accordance with practice, only two possibilities are open to them: exclusion of application of the provision that is the subject of the reservation (art.21, para.1 [a]) or of the treaty as a whole (art.20, para.4 [b]); but the conventions do not even contemplate the possibility that the full treaty might come into force for the reserving state.\(^{57}\)


\(^{54}\) See Loizidou case.


\(^{56}\) See Article 38(1) of the statute of the International Court of Justice.

\(^{57}\) ILC Document, n. 25, p.75.
Keeping these factors in view, the Special Rapporteur suggested that when a reservation is found impermissible by a monitoring body it would be appropriate to declare the consent of state whose reservation is declared impermissible as invalid.

The next relevant question was with regard to the binding nature of the findings of these bodies. While stating that it depends on the powers that these bodies have been vested which vary from body to body, Pellet said that “[i]t is nevertheless clear that by ratifying the treaties which establish these bodies, the states parties undertake to execute them in good faith, which implies at least that they will examine in good faith the comments and recommendations made to them by bodies concerned.”

Accordingly the options left for a state whose reservation has been declared impermissible is that either to withdraw the reservation or to terminate its participation in the treaty. This situation would force a state either to remain in the treaty by accepting the obligations in toto or to leave the treaty, which would go against the concept of universality of acceptance of treaties. The Special Rapporteur suggested an intermediate solution by which a state may be allowed to modify its reservation, which has been declared impermissible to make it compatible with the object and purpose of the treaty. As pointed by the Special Rapporteur this solution is incompatible with the Vienna regime as the latter allows formulations of reservation only at the time of signing, ratifying, accepting or acceding to a treaty as provided under article 19. However the Special Rapporteur, with a view to accommodate this intermediate solution, endeavoured to make it compatible with the Vienna regime in the following manner.

In the first place, if we consider that the state has never in fact expressed a valid consent to be bound by the treaty, the “regularisation” of its

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58 Ibid, p.79.
reservation would seem, in fact, to be concomitant with the expression of its consent to be bound. Secondly, and above all, if, as seems inevitable without serious prejudice to the fundamental principle of consent which underlies every treaty commitment, the reserving state can give up its participation in the treaty, it is difficult to see why it could not equally well modify the sense of its reservation, so as to make it compatible with the object and purpose of the treaty, and thus permissible. This solution, which is not incompatible with the Vienna rules, has the advantage of reconciling the requirements of integrity and universality that are inherent in any reservations regime.59

Along with the above stated observations the Special Rapporteur also attached a draft resolution base on the main conclusions contained in his two reports which was intended for adoption by the Commission addressing the General Assembly so that it may be brought to the attention of the states and other parties for clarification of legal aspects of the matter. This draft resolution read as follows:

The International Law Commission,

*Having considered*, at its forty-eighth session, the question of the unity or diversity of the juridical regime for reservations,

*Aware* of the discussion currently taking place in other forums on the subject of reservations to multilateral normative treaties, and particularly treaties concerning human rights,

*Desiring* that the voice of international law be heard in this discussion,

1. *Reaffirms* its attachment to the effective application of reservations regime established by articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986, and particularly to the fundamental criterion of determining the permissibility of reservations;

2. *Considers* that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a

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59 Ibid, p.82.
satisfactory balance between the objectives of preservation of integrity of the text of the treaty and universality of participation in the treaty;

3. **Considers** that these objectives apply equally in the case of reservations to normative multilateral treaties, including in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions are fully applicable to reservations to such instruments;

4. **Nevertheless considers** that the establishment of monitoring machinery by many human rights treaties creates special problems that were not envisaged at the time of the drafting of those conventions, connected with determination of the permissibility of reservations formulated by States;

5. **Also considers** that, although these treaties are silent on the subject, the bodies which they establish necessarily have competence to carry out this determination function, which is essential for the performance of the functions vested in them, but that the control they can exercise over the permissibility of reservations does not exclude the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate, by the organs for settling any dispute that may arise concerning the implementation of the treaty;

6. **Is also firmly of the view** that it is only the reserving State that has the responsibility of taking appropriate action in the event of incompatibility of the reservation which it formulated with the object and purpose of the treaty. This action may consist in the State either forgoing becoming a party or withdrawing its reservation, or modifying the latter so as to rectify the impermissibility that has been observed;

7. **Calls** on States to cooperate fully and in good faith with the bodies responsible for determining the permissibility of reservations, where such bodies exist;

8. **Suggests** that it would be desirable if, in future, specific clauses were inserted in multilateral normative treaties, including human rights treaties,
in order to eliminate any uncertainty regarding the applicable reservations regime, the power to determine the permissibility of reservations enjoyed by the monitoring bodies established by the treaties and the legal effects of such determination;

9. Expresses the hope that the principles enunciated above will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the areas of human rights; and

10. Suggests to the General Assembly that it bring the present resolution to the attention of States and bodies which might have to determine the permissibility of such reservations.  

The second report of the Special Rapporteur was discussed by the Commission at its forty-ninth session in 1997. After elaborate discussions the Commission decided to transmit the draft resolution prepared by the Special Rapporteur to the Drafting Committee without arriving at a final decision as to the form of the text. The Commission considered the response of the Drafting Committee at its 2509th, 2510th and 2511th meetings on 10, 11 and 14 July 1997 and adopted preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.  

These preliminary conclusions were as follows:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Convention on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;

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2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties;

7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;
8. The Commission notes that the legal force of the findings made by monitoring bodies in exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon states to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;

10. The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty;

11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12. The Commission emphasises that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

These preliminary conclusions adopted by the Commission are systematic summation of the findings of the Special Rapporteur in his second report as they have included all the conclusions arrived at by him on crucial issues.

5.8. Appraisal

With a view to eliciting opinions from various quarters the Commission decided to send its preliminary conclusions to the human rights monitoring bodies. The Special Rapporteur by way of writing letter dated 24 November 1997, through the Secretary of the Commission transmitted the copies of the preliminary conclusions and of the chapter V of the Commission's report on the work of its forty-ninth session to the chairmen of
human rights bodies with universal membership\textsuperscript{63} and to the presiding officers of a number of regional bodies\textsuperscript{64} for their comments. By the time fifth report on reservations to treaties was presented by the Special Rapporteur in the year 2000 chairman of two monitoring bodies\textsuperscript{65} and the presiding officer of the eighth and ninth meetings of the chairmen of bodies established pursuant to human rights instruments have sent their observations.

The work of the Commission also evoked the Asian African Legal Consultative Committee\textsuperscript{66} to organise a special meeting on 'reservations to treaties' on 14\textsuperscript{th} April 1998, during its 37 annual session in New Delhi.\textsuperscript{67} The participants discussed various aspects of the problem. The majority participants were of the view that the right to formulate and express reservations to one or more provisions of a Convention was an attribute of State sovereignty and power to make or express reservation could only be restricted by a treaty.\textsuperscript{68} Thus they felt that they "could not accept paragraph 5 of the

\textsuperscript{63} Letters were sent to the chairmen of the Committee on Economic, social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child.

\textsuperscript{64} Letters were sent to the presiding officers of the African Commission on Human and Peoples' Rights, the European Commission on Human Rights, the European Court of Human Rights, the Inter American Commission on Human Rights and the Inter American Court of Human Rights.

\textsuperscript{65} They are: The Chairman of the Human Rights Committee and the Chairman of the Committee Against Torture.

\textsuperscript{66} The Asian African Legal Consultative Committee was established in November 1956 with an objective of creating a regional forum for consultation and co-operation amongst its member States.

\textsuperscript{67} A group of experts was invited to make presentations on the topic and it included B.Sen (Member of the UNIDROIT Governing Body and Former Secretary-General of the AALCC), M.K. Nawaz, R.P. Anand, V.S. Mani, Y.K. Tyagi and S.K. Verma. Delegates of the eight member States-China, Egypt, Ghana, India, Islamic Republic of Iran, Kuwait, Sri Lanka and Sudan and Sweden from among the Observer States and also delegates of the International Law Commission and the Organization of Islamic Conference made presentations.

\textsuperscript{68} Asian African Legal Consultative Committee, Report and Selected Documents of the thirty-seventh Session, New Delhi, India (New Delhi, 1998), p.232.
A number of recommendations were also made in the course of this special meeting. They were summarised as follows:

(I) One view suggested that the International Law Commission undertake an empirical study of State behaviour and study the reservations to treaties and if feasible the motives thereof. It could thereafter seek to develop the reservation regime by way of interpretative codification.

(II) Another view emphasised the universal acceptability of the existing reservation regime and proposed that the gaps and lacunae could be filled by commentaries on the existing provisions of the Vienna Convention. He favoured the preparation of a guide to State practice rather than the formation of model clauses or a protocol.

(III) It was recommended that the ILC consider concluding its work on this topic not on the basis of "intuitive feeling" but on the basis of an empirical study of the behaviour of States.

(IV) The Commission should approach its future work on the subject with due caution and not be guided by the European precedents which may not always be relevant or appropriate to the universal context. One view was that a realistic stance would require taking note of the different political, social, economic and cultural milieu of States and accepting some reservations to treaties as the price to be paid for the promotion and achievement of universality.

The report of the Special Rapporteur and the preliminary conclusions made by the Commission have attempted to settle certain controversial issues with regard to...
reservations to treaties particularly in the case of human rights treaties. First of all the findings of the Special Rapporteur and the preliminary conclusions of the Commission clearly establish that reservations per se or not impermissible to human rights treaties. The argument that the rights enshrined in human rights treaties are universal in nature and hence derogation from these rights by way of reservations is not permitted no longer remains valid one in the light of the findings of the Special Rapporteur and the preliminary conclusions of the Commission. In a way, at the conceptual level, these conclusions aid the cause of the relativists who dispute the ‘Universalism’ in human rights treaties and argue for the relativist understanding of human rights based on cultural specificities. The findings and conclusions seem to be in keeping with the diversified character of the international society wherein different states are placed in conditions and circumstances that are specific to their own. In these circumstances it is necessary to accommodate unavoidable differences in the treaty system, as, after all, it is the consent of the states, the basic requirement of treaty law, which binds them with treaty obligations. Therefore it is the subjective decisions of the States parties which make them bound by the international obligations. As rightly pointed out by the Special Rapporteur “[t]his may be seen as an unfortunate situation, but it is a fundamental characteristic of international law as a whole and, as such, affects the implementation of any treaty, irrespective of its object.”

An example to this argument is the dissenting opinion of Judge Alvarez in the Genocide Convention case, who said; “These (multilateral conventions of a special character), by reason of their nature and of the manner in which they have been formulated, constitute an indivisible whole. Therefore, they must not be made the subject of reservations, for that would be contrary to the purposes at which they are aimed, namely, the general interest and also the social interest”. Genocide Convention case, n. 26, p. 53.

ILC Document, n.25, p.65.
Another controversial aspect which was attempted to be answered in the findings and conclusions is about the continuing validity of the Vienna regime to the reservations and its suitability and adaptability to the human rights treaties. Irrespective of the controversies emerged from various angles like the one between the permissibility school and the opposability school it was found to be the system governing the regime of reservations. Furthermore, it was also found to be suitable and adaptable to the human rights treaties. As observed by the Special Rapporteur and the Commission the flexible character of this system makes it suitable to the normative treaties. Moreover, accepting the Vienna regime in no way restricts the freedom of state parties nor obstructs the process of progressive development of international law as the whole regime is of residual in nature. However, it remains to be as reference constituting the features resulted from the long practice of states and international bodies. Particularly the test of compatibility with the object and purpose of treaty remains to be the most outstanding feature of the Vienna regime, which can be applied as an objective test irrespective of the peculiarities of a treaty. Unless a treaty prohibits reservations *intoto* the criterion of compatibility with the object and purpose of the treaty proved to be of most suitable system so far in respect of reservations to treaties.

The understanding of the Special Rapporteur and the Commission that can be considered as innovative in this regard is about the competence of treaty monitoring bodies. As rightly observed by the Special Rapporteur, these bodies were cautious in their approach with regard to the admissibility of reservations to respective treaties. 73 However, they changed this attitude over a period of time and expressed their opinions in clear

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73 Ibid., p.59.
terms on the issue of admissibility of reservations. In fact it is the practice and attitude of these treaty bodies with regard to their competence that made the Special Rapporteur and the Commission to accept the functional legitimacy that these bodies are claiming. However it is innovative from the point of view of the Commission’s understanding as observed in the preliminary conclusions, as this phenomenon was not perceived at the time of framing of the Vienna Conventions. But the Commission has declined to confer the power, as claimed by those bodies, to determine the admissibility of reservations and recognised this competence only to ‘comment upon and express recommendations’ with regard to the admissibility of reservations by the states, unless the treaty provides otherwise. Therefore the legal force of their findings has been limited only to the extent of the power given to them for the purpose of performing their general monitoring role. However in the case a reservation has been declared inadmissible the power to take action has been vested with the reserving state but not with the monitoring body. In conformity with the observation in General Comment No.24 the Chairman of the Human Rights Committee in his second letter in response to the preliminary conclusions of the Commission observed:

The Human Rights Committee shares the International Law Commission’s view, expressed in paragraph 5 of its preliminary conclusions, that monitoring bodies established by human rights treaties ‘are competent to

74 For example; Bellos case, the European Court of Human Rights and the General Comment no. 24 of the Human Rights Committee.
75 Paragraph 4 of the preliminary conclusions.
76 Paragraph 5 of the preliminary conclusions.
77 Paragraph 7 of the preliminary conclusions.
78 Paragraph 8 of the preliminary conclusions.
79 Paragraph 10 of the preliminary conclusions.
comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by states parties should respect conclusions reached by the independent monitoring body competent to monitor compliance with the instrument within the mandate it has been given.\(^{80}\)

This view of the Committee emphasises that the conclusions reached by the monitoring bodies on the admissibility of reservations should be accepted by the state parties whereas the Commission leaves it to the states parties to take appropriate decision in this regard.

The Committee against Torture also, in its response to the preliminary conclusions of the Commission, supported the view of the Human Rights Committee. It observed:

In addition, the Committee against Torture believes that the approach taken by monitoring bodies of international human rights instruments to appreciate or determine the admissibility of a reservation to a given treaty so that the object and purpose of that treaty are correctly interpreted and safeguarded is consistent with the Vienna Conventions on the law of treaties.\(^{81}\)

In this regard, paragraph 12 of the preliminary conclusion leads to contradictory conclusions when it is applied with regard to the power of the competent monitoring bodies. The European Court of Human Rights which is a regional body has held in the Belilos case that a reservation declared inadmissible may be severed from the provision to which it is made and the reserving state is bound by the entire treaty including the provision to which reservation was made. The Human Rights Committee also held similar view in its General Comment No.24. Be that as it may, based on paragraph 12 of

\(^{80}\) Cited in the fifth report on reservations to treaties by the Special Rapporteur, A/CN.4/508, p.5.

\(^{81}\) Cited by the Special Rapporteur in the fifth report on reservations to treaties, A/CN.4/508,p.7.
the preliminary conclusion the position adopted by the European Court of Human Rights would remain as a valid one and binding on the state parties where as in the case of findings of the Human Rights Committee it is left to the state party which would decide upon what action should be taken.

Highlighting this disparity between regional and universal bodies as included in paragraph 12 of the preliminary conclusions, the chairman of the Human Rights Committee in his letter dated 9 April 1998 in response to the preliminary conclusions held that:

Regional bodies are not only the international institutions, which participate in and contribute to the development of practices and rules. Universal monitoring bodies, such as the Human Rights Committee, play no less important a role in the process by which such practices and rules develop and are entitled, therefore, to participate in and contribute to it. In this context, it must be recognised that the proposition enunciated by the Commission in paragraph 10 of the preliminary conclusions is subject to modification as practices and rules developed by universal and regional monitoring bodies gain general acceptance.82

The Commission’s current work involves a comprehensive study of the problem of reservations to treaties in general and the matter is under active consideration as it is yet to come out with a final report on the issue. Thus the views of the treaty bodies, international organisations and States are expected to contribute to the study of the Commission in arriving at a comprehensive, most suitable and acceptable system of reservations.