

1999

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Recommended Citation

Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L LAW. 277 (1999).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol17/iss2/4>

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General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties

By
Elena A. Baylis*

I.

THE CONTROVERSY

A. *Introduction*

The idea of “human rights” became a watchword of international politics in the wake of the atrocities of World War II. Since that time, the general concept of a universal, inalienable set of rights has been given legal content through the development of international treaties defining those rights and purporting to bind the treaties’ signatories to respect them. However, in reality these treaties have not proved to be binding. States have signed the treaties and then flouted their precepts with impunity.¹

The United Nations Human Rights Committee (hereinafter “Committee”) has long faced such an enforcement problem in its administration of the International Covenant on Civil and Political Rights (hereinafter “Covenant”). As the Covenant’s administrator, it is the Committee’s responsibility to review the states parties’ compliance with the Covenant. Rather than agreeing to the Covenant as it is written, many states have submitted reservations indicating that they do not consent to particular Covenant provisions. By creating such reservations, states parties can remain in technical compliance with the Covenant while engaging in practices that the Covenant condemns. By the 1990s, such reservations had become so commonplace and comprehensive that often states did not in fact agree to any change in their laws or policies by signing the Covenant.

In 1994, in response to this problem, the Committee issued General Comment 24 (hereinafter “the Comment”), a statement of the Committee’s revolutionary new policy on reservations. Rather than leaving the issue of reservations to the states parties, the Committee itself would judge the validity of reservations. Rather than allowing a state to define the limits of its obligations under

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1. See Louis Henkin, *Preface to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* x (Louis Henkin ed., 1981) [hereinafter *INTERNATIONAL BILL OF RIGHTS*].

the Covenant, the Committee would sever reservations it deemed invalid, leaving the state a full party to the treaty without the benefit of its reservations. At first blush, General Comment 24 appears to contradict decades of international law on reservations and to usurp powers properly held by the states parties to the Covenant. However, the language and analysis of the Comment, which form the foundation for its controversial conclusion, were drawn from the established literature on reservations to multilateral treaties. Although the express terms of the Covenant provide the Committee with limited administrative powers, by the time it generated the Comment, the Committee had already taken on a relatively aggressive role in addressing reservations and other compliance issues. The states parties had tacitly accepted the Committee's authority to carry out that role.

This article assesses General Comment 24's significance and legitimacy both in relation to the express terms of the Covenant, and in the context of the established international standards for reservations and the practices that developed under the Covenant. Section I provides basic background information about the Covenant, the Committee's practice of issuing general comments, and the Comment itself. Section II reviews international legal views on reservations and considers the extent to which the Comment is grounded in those standards. Section III addresses and critiques the functional justifications for the Comment in the context of the Covenant's goals and the Committee's administration practices. Finally, Section IV evaluates responses to the Comment and the prospects for mitigating some of the concerns it raises.

The Committee's purpose in producing General Comment 24 was to promote the effectiveness of the Covenant. In this sense, although the Committee was radically reconceiving both the scope of its own authority under the Covenant and the balance among notions of state sovereignty, consent and the Covenant's normative goals, it remained wedded to the traditional view that compliance with treaty terms defines treaty effectiveness. The Committee's action raises interesting questions about the nature of the obligations imposed in human rights treaties and regarding the tensions between a human rights treaty's legitimacy, authority, effectiveness and enforcement. General Comment 24 is certainly a step beyond prior international custom regarding reservations; it remains to be seen whether it is a step towards effective use of treaties to accomplish human rights goals.

B. The Covenant

The International Covenant on Civil and Political Rights is one part of what is known as the International Bill of Rights; the other two parts are the Universal Declaration of Human Rights (hereinafter "UDHR") and the International Covenant on Economic, Social and Cultural Rights.² Drafted over a period of almost twenty years, the Covenant was adopted by the United Nations General Assembly in 1966, and the process of ratification by states desiring to become

2. See *id.* at ix.

parties to the Covenant has been ongoing since that time.³ The Covenant is a multilateral treaty developed under the auspices of the United Nations, codifying and binding states parties to customary norms of international law regarding the civil and political rights of their own citizens.⁴ The Covenant enumerates civil and political rights inhering in the individuals of a state, including the rights to self-determination,⁵ life,⁶ freedom from torture,⁷ freedom of opinion and expression,⁸ and equality under the law.⁹ The Second Optional Protocol to the Covenant, which may be ratified separately from the Covenant, abolishes the death penalty.¹⁰

The Covenant is not limited to a declaration of rights such as that set forth in the UDHR; it also imposes obligations on states parties and establishes a Human Rights Committee composed of elected nationals of the states parties to administer the Covenant. However, the duties that the Covenant imposes upon the states are often discretionary by their terms, and the power of the Human Rights Committee to promote enforcement has been described as "sadly deficient."¹¹

The states parties do agree to "adopt such legislative or other measures as may be necessary" so that domestic law "give[s] effect" to the Covenant rights.¹² However, the Covenant does not mandate any specific measures, nor does it establish any general guidelines for implementation of this requirement. Furthermore, the states parties are allowed to derogate from most of the Covenant rights "in time of public emergency . . . to the extent strictly required by the exigencies of the situation," although some rights, such as freedom from torture, are non-derogable under any circumstances.¹³

Each state party also agrees to submit a report regarding its human rights conditions and its implementation of the Covenant to the Human Rights Committee within one year after the Covenant enters into force for that state, or upon the request of the Committee.¹⁴ However, the Committee does not have the power to perform a binding adjudication of the reports and cannot declare a state

3. See Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in* INTERNATIONAL BILL OF RIGHTS, *supra* note 1, at 3, 64.

4. See International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, Preamble, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter *Civil and Political Covenant*].

5. See *id.* art. 1.

6. See *id.* art. 6.

7. See *id.* art. 7.

8. See *id.* art. 19.

9. See *id.* art. 26.

10. See Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, *adopted* Dec. 15, 1989, G.A. Res. 44/128, 44 U.N. GAOR Supp. (No. 49) at 206, U.N. Doc. A/44/824 (1989) [hereinafter *Second Protocol*].

11. A.H. Robertson, *The Implementation System: International Measures, in* INTERNATIONAL BILL OF RIGHTS, *supra* note 1, at 332, 350; see also John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59, 62 (noting the weakness of the Committee's monitoring and enforcement capabilities).

12. Civil and Political Covenant, *supra* note 4, art. 2.

13. *Id.* art. 4.

14. See *id.* art. 40.

in violation of the Covenant.¹⁵ It is authorized only to make general comments on the reports for the consideration of the states parties and the Economic and Social Council of the United Nations.¹⁶

A state party may make a declaration recognizing the competence of the Committee to consider the claims of other states parties that it is not fulfilling its Covenant obligations, but is not required to do so.¹⁷ Furthermore, such a declaration "may be withdrawn at any time."¹⁸ If a complaint is made against a state party that has recognized the Committee's competence, the Committee is authorized to "hold closed meetings," and "call upon the States Parties concerned . . . to supply any relevant information."¹⁹ In the end, however, the Committee is only able to "make available its good offices to the States Parties concerned with a view to a friendly solution of the matter" and "submit a report" on the alleged violation.²⁰ If the states parties in conflict are unable to resolve their differences and if both consent, the Committee can appoint an *ad hoc* Conciliation Commission to review the matter.²¹ However, this Commission is authorized only to hold meetings, review documents, and issue a report.²² The reports issued by the Committee and the Commission are not binding on the parties. At the time that the Committee was formulating General Comment 24, no state party had filed a claim asserting that another state was in violation of its Covenant obligations.²³

The First Optional Protocol to the Covenant allows states parties to "recognize . . . the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."²⁴ The Protocol was written at the same time as the Covenant itself, but the drafters separated it from the Covenant for separate, optional ratification because they feared the inclusion of additional enforcement mechanisms might undermine acceptance of the entire Covenant.²⁵ Yet this additional enforcement regime does

15. See MARK J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 652-53 (1987) (citing U.N. Doc. A/6546, § 411) ("The Human Rights Committee . . . would not be empowered to criticize any State, nor to take any binding decisions."); Dinah Shelton, *Compliance Mechanisms*, in U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 149, 156 (Hurst Hannum & Dana D. Fischer, eds. 1993).

16. See Civil and Political Covenant, *supra* note 4, art. 40.

17. See *id.* art. 41.

18. While a withdrawal of the declaration takes effect immediately, it does not affect consideration of any complaints that were filed before the withdrawal. *Id.* art. 41(2).

19. *Id.* art. 41.

20. *Id.*

21. See *id.* art. 42.

22. See *id.*

23. See Shelton, *supra* note 15, at 157.

24. Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, 999 U.N.T.S. 302 (*entered into force* Mar. 23, 1976) [hereinafter First Protocol].

25. There was fierce debate among the drafters over whether to include the individual communications option within the treaty itself. Opponents argued that the procedure was too great an infringement upon state sovereignty, particularly because it would enable an individual to challenge the sovereignty of the highest institutions of her state. Supporters of the provision emphasized its many safeguards against frivolous attacks on a state's institutions and the fact that ratifying states

not harbor any drastic consequences for those who accept it. Even if the Protocol is ratified, the Committee can only demand a report on the violation and the action taken to investigate and remedy it; the Committee itself will take no further action, but will simply produce a report on such complaints for the benefit of the individual and state involved and for the Economic and Social Council.²⁶ Ratification of this protocol can also be denounced at any time.²⁷ In contrast to the lack of any claims filed by state parties, hundreds of individual communications had been filed with the Committee at the time that the Committee was considering the issue of reservations, although not all had been found admissible under the Covenant.²⁸

Thus, the Covenant's provisions for enforcement are meager. Indeed, the reporting system established by the Covenant is not really a direct enforcement mechanism at all. The Committee cannot impose binding judgments or punitive measures upon states parties that violate their Covenant obligations. The Covenant does not contemplate the possibility of the Committee acting upon the states parties in any way. Rather, what the Covenant permits is merely an evaluation process that might indirectly lead to enforcement of the Covenant rights through use of persuasion and publicity to create political pressure against a recalcitrant state party. The fundamental obstacle to using enforcement as a means to make the Covenant more effective is not that the Covenant aims at enforcement and does not succeed, but that the Covenant was not designed to be directly enforced at all.

Furthermore, the Committee's role as a fact-finder and its ability to use non-punitive mechanisms in response to violations are not sufficiently fleshed out in the Covenant provisions to permit it to successfully carry out these functions. While the Committee can request a report from a state at any time, its inability to accept information from other states or individuals without additional consent from a state party effectively curtails its investigatory capacity. It is unable to provide specific recommendations or to require a response to its comments from a state party.²⁹ A narrow reading of the Covenant would characterize the Committee's role as purely facilitative, lacking any real authority.

would not be subject to the individual communications provision unless they declared their acceptance of the provision (just as they must declare the competence of the Committee to consider complaints by other states parties). In the end, the drafters chose to compromise by creating the optional protocol, lest some of the opposing countries choose not to ratify the treaty solely on this account. See BOSSUYT, *supra* note 15, at 797-98 (citing U.N. Doc. A/6546, §§ 477-84).

26. See First Protocol, *supra* note 24, arts. 4, 6.

27. There is a three-month delay in the effectiveness of the denunciation, so that it does not affect consideration of claims filed up to three months following the denunciation. See *id.* art. 12.

28. See Shelton, *supra* note 15, at 160.

29. In his article on the effect of the Covenant upon U.S. criminal law, Professor John Quigley concludes that "this procedure will not provide effective international enforcement of U.S. obligations," noting that "states are loath to jeopardize relations, or to invite retaliatory filings," while the Committee "has few investigatory powers and has been reluctant to take other affirmative steps toward more effective monitoring." Quigley, *supra* note 11, at 62; see also Robertson, *supra* note 11, at 350-51 (discussing the "deficiencies" of the authority delegated to the Committee). However, the importance and enforcement of Committee opinions and comments could be improved even within the limited framework created by the Covenant. In his discussion of the implementation of article 10's provisions protecting detainees, Paul Williams suggests a number of suggestions, including

The Committee's limited powers can be attributed to the need to promote universal or near-universal acceptance of the treaty; stringent enforcement mechanisms would not be accepted by many states. It is true that, apart from enforcement, developing agreement on customary norms is itself a fundamental step toward the goal of persuading states to eventually accept higher standards in the human rights arena. However, the Covenant does not seek to promote its goals solely by obtaining states parties' theoretical agreement to the Covenant ideals through their initial ratifications. Rather, the Covenant created a reporting system that requires states to consider how the Covenant rights should be implemented and to enter into a dialogue with the Committee (and, optionally, with the other states parties and with individuals) about the process of bringing the promise of those rights to fruition. Much as the substantive provisions of the Covenant and other human rights treaties gave content to the general concept of human rights, the process of implementing Covenant provisions in domestic laws and procedures and of evaluating that implementation further determines the content of the specific rights guaranteed in the Covenant. In this context, it is troubling that the Covenant provisions defining this reporting system would permit a very superficial participation in the reporting process to comply with the requirements of the treaty.

Furthermore, because the Covenant does not establish an adjudication system with powers of coercion or punishment, the Covenant's legitimacy and authority are themselves the means it uses to promote its human rights norms. If ratification is a meaningless gesture that does not result at least in a thorough assessment of a state's human rights practices, the Covenant's legitimacy and authority are threatened, and, consequently, so is the integrity of the ideals the Covenant espouses.

C. The Committee's Practice of Issuing General Comments

Article 40 of the Covenant authorizes the Committee to "transmit its reports, and such general comments as it may consider appropriate, to the States Parties."³⁰ It does not, however, offer any instruction as to the appropriate scope or subject of these general comments, nor does it necessarily even seem to use the phrase "general comments" to describe a formal reporting mechanism. Rather, the most obvious significance of the phrase is that the Committee is not to be solely a depository of reports and information, but is authorized to analyze the information it receives and communicate its analysis to the states parties from time to time.³¹ The Covenant also fails to indicate the significance of

informal mechanisms for encouraging states to enforce Committee opinions. See PAUL R. WILLIAMS, *TREATMENT OF DETAINEES: EXAMINATION OF ISSUES RELEVANT TO DETENTION BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 88-93 (1990).

30. Civil and Political Covenant, *supra* note 4, art. 40(4).

31. The legislative history of the Covenant offers no enlightenment. There was apparently no discussion of the definition of the phrase "general comments" during the drafting process. The phrase initially used was "general recommendations," which merely mimicked the language used in the draft Covenant on Economic, Social and Cultural Rights. See BOSSUYT, *supra* note 15, at 629 (quoting U.N. Doc. A/2929, Ch. VII, § 176). At an early stage in the proceedings, some participants

those general comments in terms of their power to bind parties or change Covenant procedures. The Committee's development of its practice of issuing general comments created the mechanism by which a policy statement like General Comment 24 could be made; this process is also an interesting precursor to the expansion of authority the Committee later undertook in the Comment.

The question of the extent of the Committee's authority in evaluating states' reports and providing comments was much debated in the early years of the Committee's existence.³² The majority on the Committee "took . . . a liberal, purposive approach to the scope of [the Committee's] powers under article 40 bearing in mind the object of the Covenant to promote and ensure the observance of the civil and political rights recognized therein."³³ Using arguments that foreshadowed the Committee's justification of General Comment 24, these members focused on "the ineffectiveness of bland general comments" and reasoned that detailed evaluation of whether individual states were in compliance with the treaty was necessary for the process of reporting to be meaningful.³⁴

A minority group of Committee members, however, adopted a narrower view of the authority expressly granted to the Committee by the text of the Covenant. This coalition argued that there was no textual support for the claim that the Committee possessed authority to provide anything more than facilitation of the reporting process and that "no Rule of procedure adopted by [the Committee] . . . could give the Committee jurisdiction beyond that in the ICCPR."³⁵ In their view, "the only duty on States was to report and the 'dialogue' between the HRC and the States parties was purely voluntary in nature."³⁶

In 1980, the Committee issued a consensus statement reflecting the compromise its members had reached on the function of the general comments and reports.³⁷ Through this compromise, the Committee developed a very specific tool for communicating with the states parties from the ambiguous phrase "general comments." The consensus statement laid out guidelines for drafting the

expressed "doubt . . . whether the reports could be used for purposes other than information and study." *Id.* In 1966, the phrase "general comments" was substituted for "general recommendations," apparently without substantive discussion. *Id.*

32. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 89-93 (1994).

33. *Id.* at 89.

34. See *id.*

35. *Id.* at 91. Indeed, the textual support for authority to provide specific comments to each party was weak, comprising essentially the reference in article 40(4) to "reports," which the majority group viewed as potentially "refer[ring] to separate reports drawn up by the Committee in respect of each of the reporting States." *Id.* at 90. The minority view, which was the stronger textual analysis, was that the "reports" referred to were the Committee's reports to the General Assembly, and the general comments were "comments of a general character relating to matters of common interest to the States parties . . . but not in the form of suggestions or recommendations to particular States." *Id.* at 91.

36. *Id.*

37. Although article 39 of the Covenant requires that the Committee make its decisions by majority vote, the Committee tries to operate by consensus whenever possible. See Robertson, *supra* note 11, at 339-40. Its Rules of Procedure state that the Committee's "method of work normally should allow for attempts to reach decisions by consensus before voting." *Id.* at 340.

general comments. General comments should be "addressed to the state parties," "promote cooperation between states parties," summarize the Committee's experience in reviewing states' reports, suggest improvements in reporting and implementation, and encourage states and international organizations to act on behalf of human rights.³⁸ The Committee declared appropriate subjects for the general comments to be: submission of state reports, implementation of the Covenant's substantive requirements, questions regarding particular articles of the Covenant, and suggestions for cooperation between states and international organizations.³⁹ The Committee also affirmed "its aim of engaging in a constructive dialogue with each reporting state."⁴⁰

Once a consensus was reached on the appropriate form and subjects for general comments, the Committee began to promulgate its comments. To date, there are twenty-six comments on topics including states' responsibilities to children under article 24,⁴¹ states' general reporting obligations,⁴² protection of freedom of expression under articles 1-3,⁴³ and a call for a general ban on nuclear weapons.⁴⁴ While the comments sometimes refer obliquely to disputes with particular states parties, the subject is always one of significance to the states parties generally, and the comments are not used to explicitly review or condemn an individual state's practices.⁴⁵ The general comments often interpret the language of particular articles and define the scope of their mandates.⁴⁶

While the consensus statement settled the intra-Committee debate on the appropriate function and form for general comments, it did not determine the significance or authority of the general comments.⁴⁷ Just as article 40(4) did not define the appropriate content or context of the general comments, whether those comments constitute binding interpretations of the Covenant is also not discernible from the language of the treaty. In practice, the general comments developed into a tool to implement new procedural rules, interpret the meaning

38. MCGOLDRICK, *supra* note 32, at 92.

39. *See id.*

40. *Id.*

41. *See General Comment 17*, U.N. GAOR Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 173, U.N. Doc. A/44/40 (1989).

42. *See General Comment 1*, U.N. GAOR Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 107, U.N. Doc. A/36/40 (1981).

43. *See General Comment 10*, U.N. GAOR Hum. Rts. Comm., 38th Sess., Supp. No. 40, at 109, U.N. Doc. A/38/40 (1983).

44. *See General Comment 14*, U.N. GAOR Hum. Rts. Comm., 40th Sess., Supp. No. 40, at 162, U.N. Doc. A/40/40 (1985).

45. For example, General Comment 13 discusses the applicability of article 14's judicial safeguards in both the criminal and civil settings, mentioning that some states' reports had been deficient as a result of an erroneous belief that article 14 applied only to criminal trials. The General Comment does not, however, name the states involved or discuss particularities of any state's report. *See General Comment 13*, U.N. GAOR Hum. Rts. Comm., 39th Sess., Supp. No. 40, at 143, U.N. Doc. A/39/40 (1984).

46. *See, e.g., General Comment 11*, U.N. GAOR Hum. Rts. Comm., 38th Sess., Supp. No. 40, at 109, U.N. Doc. A/38/40 (1983) (discussing the substance of article 20 and the steps necessary to put it into effect); *General Comment 16*, U.N. GAOR Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 181, U.N. Doc. A/43/40 (1988) (discussing the meaning and ramifications of certain terms in article 17).

47. *See MCGOLDRICK, supra* note 32, at 93.

of the substantive terms of the treaty, or make advisory notes to the states parties. Neither the Covenant nor the Committee's practice prior to General Comment 24 laid any groundwork for the use of the general comments as a mechanism for expanding the Committee's sphere of authority. General Comment 24 therefore represents a revolutionary change, not only in the treatment of reservations, but also in the Committee's use of the general comment format as a means to change treaty obligations.

D. General Comment 24

Despite the limited obligations and enforcement mechanisms of the Covenant, many states have sought to further limit their responsibility under the Covenant by attaching reservations or declarations to their ratifications. By 1994, the number and extent of the proposed reservations threatened the integrity of the Covenant, which was already endangered by its weak adjudication and enforcement procedures.⁴⁸

The Covenant itself says nothing about the admissibility of reservations. Only the Second Optional Protocol mentions reservations, providing that "[n]o reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."⁴⁹ Therefore, except for reservations to the Second Optional Protocol, the express language of the Covenant does not govern the question of reservations.

It is in this context that the Human Rights Committee, faced with a devastating array of reservations and declarations, promulgated the controversial General Comment 24. Presumably aware of the furor the Comment would ignite, the Committee carefully couched its statement of purpose in descriptive terms: the Comment would "identify the [applicable] principles of international law," "address . . . the role of States Parties," "address . . . the role of the Committee itself," and finally, in its one admitted law-making act, "make . . . certain recommendations" to states parties regarding reservations.⁵⁰ In fact, since the Covenant does not discuss the issue of reservations, the Comment is entirely prescriptive, creating substantial powers for the Committee and imposing a new reservations regime.⁵¹

48. At the time the Comment was issued, 150 reservations had been entered by 46 states. See *General Comment 24*, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, ¶ 1, U.N. Doc. A/50/40 (1996). The U.S. ratification was particularly egregious, carrying five reservations, five understandings, and four declarations. See S. EXEC. REP. NOS. 102-23, 31 I.L.M. 645, 653-58 (1992).

49. Second Protocol, *supra* note 10, art. 2.

50. *General Comment 24*, *supra* note 48, ¶ 2.

51. The only precedent for the most controversial aspect of the General Comment, the decision to sever incompatible reservations from a ratification, was a solitary European Court of Human Rights case. See *Belilos* case, 132 Eur. Ct. H.R. (ser. A) (1987). The European Court of Human Rights has since affirmed the *Belilos* ruling and the severance policy in another case. See *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) [hereinafter *Loizidou* case]. In his discussion of General Comment 24, William Schabas characterized it as an act of "unaccustomed boldness . . . on the issue of reservations in general and on the U.S. reservations in particular." William A. Schabas,

General Comment 24 establishes three substantive policies to be applied to reservations to the Covenant: the Committee is to have legal authority to determine which reservations are permissible;⁵² the test for whether a reservation is permissible is to be whether the reservation is compatible with the Covenant's object and purpose;⁵³ and if a reservation is incompatible, it is to be severed and the reserving state is to be a party to the Covenant without its reservation.⁵⁴ These policies represent the full range of the spectrum in terms of their basis in international law and custom. The object and purpose test is the accepted standard for addressing the validity of reservations. In contrast, the policy of severing incompatible reservations is rarely utilized, and the Committee's claim of legal authority is quite controversial.

The Comment discusses the application of the object and purpose test to the Covenant at length, although (or perhaps because) this is the aspect of the Covenant with the most support in international legal custom.⁵⁵ It is only in a single paragraph at the beginning and a few paragraphs toward the end of General Comment 24 that the Committee justifies its claim that it has authority to adjudicate reservations.⁵⁶ It describes this evolution in its function as an inevitable result of the states parties' failure to put the Covenant into effect, both by making unsuitable reservations and by failing to object to other states' unsuitable reservations.⁵⁷ On the contentious issue of its decision to sever incompatible reservations, the Committee offers no explanation or justification whatsoever, but simply makes a flat statement of policy: "the normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."⁵⁸

Although the Committee did not elucidate the legal and practical issues raised by General Comment 24, these issues have a rich history in the international literature and practice on reservations. This literature and practice demonstrate that the policies of the Comment are neither as novel nor as extreme as they initially appear. Rather, these policies are a renewed attempt to address recurring, fundamental issues about the goals and functions of human rights treaties and about the rights and obligations of the sovereign states parties to those treaties.

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52. See *General Comment 24*, *supra* note 48, ¶¶ 16-18.

53. See *id.* ¶ 6.

54. See *id.* ¶ 18.

55. See *id.* ¶¶ 6-14, 19-20. Of course, while the use of the object and purpose test as determinative of a reservation's acceptability is well-established, the Committee's application of the test was quite broad, barring reservations to many provisions entirely. See, e.g., *id.* ¶ 8 (barring reservations to provisions "that represent customary international law"); *id.* ¶ 10 (barring reservations to non-derogable provisions); *id.* ¶ 11 (barring reservations to provisions requiring states to provide remedies for human rights violations or establishing monitoring procedures).

56. See *id.* ¶¶ 1, 17-18.

57. See *id.*

58. *Id.* ¶ 18.

II.

LEGAL PRECEDENT AND JUSTIFICATION

A. *The Foundation of International Reservations Law*

The Vienna Convention on the Law of Treaties⁵⁹ (hereinafter "Vienna Convention") and the International Court of Justice's (hereinafter "ICJ") decision in the *Genocide Convention* case⁶⁰ together form the foundation of the modern approach to reservations in international law and practice. In General Comment 24, the Human Rights Committee rejected certain elements of the reservations regime prescribed by these two documents. However, in so doing, the Committee relied on the principles developed in the *Genocide Convention* case and the Vienna Convention to justify its revolution in reservations practice. An understanding of the precepts and rationale of these statements is therefore essential to an analysis of the Comment.

1. *The Genocide Convention Case*

The ICJ's decision in the *Genocide Convention* case made two crucial changes to traditional reservations practice. The ICJ abandoned the long-standing requirement that all parties expressly assent to each state's reservations in favor of a policy that would permit a state to ratify a treaty even if some parties objected to its reservations. Also, instead of allowing each party to determine whether a state's reservation was acceptable according to its own private criteria, the ICJ established the object and purpose test as the standard for assessing reservations.⁶¹

Most multilateral treaties consist of corresponding reciprocal obligations between the states parties to the treaty. These treaties mirror traditional contractual obligations, and so the rights of the parties under such treaties have historically been understood in terms of two principles of contract law: negotiation and consent.⁶² The principle of negotiation requires that all the parties determine the elements of the treaty in good faith and have the power to object to any reservations put forward by another party that would impair the elements of the

59. Vienna Convention on the Law of Treaties, concluded May 23, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. While the Vienna Convention has not been universally ratified, its provisions have been generally accepted as a codification of modern treaty law. See Henkin, *Introduction to INTERNATIONAL BILL OF RIGHTS*, *supra* note 1, at 25. The United States is not a party to the Vienna Convention.

60. Reservations to Convention on Prevention and Punishment of Crime of Genocide, 1951 I.C.J. 15 (May 28) [hereinafter *Genocide Convention* case].

61. The United Nations General Assembly requested that the ICJ provide an advisory opinion on the legal effect of reservations to the Genocide Convention and on the status of states that had ratified with reservations if some, but not all, of the other states parties had objected to those reservations. While these questions were presented in the context of the Genocide Convention, the General Assembly did not ask the ICJ to adjudicate any particular reservation or even any class of reservations made to that Convention. Rather, the General Assembly sought an opinion on the theoretical issues in the context of the Convention's provisions. See *Genocide Convention* case, *supra* note 60, at 15-16. The ICJ expressly limited its ruling to the Genocide Convention, but this opinion has since become the cornerstone of modern treaty law on reservations. See *id.* at 20.

62. See *id.* at 21.

treaty.⁶³ The principle of consent requires that a state be bound only to treaty obligations to which it has consented.⁶⁴ Similarly, a state cannot limit other states parties' treaty rights by reserving a treaty provision unless the other states parties have consented to that reservation.⁶⁵ In the context of reciprocal treaty obligations, a state's sense of self-interest together with its understanding of its rights as defined by these two principles generally ensure that a state will object if another state offers a reservation that impairs the treaty.⁶⁶

In keeping with these principles, the established international custom prior to the *Genocide Convention* had been that a ratifying state's reservation to a multilateral treaty would not be accepted if any state party objected to the reservation.⁶⁷ Furthermore, the states parties' silence was not sufficient for a reservation to be accepted. Rather, the express assent of all the parties was required for a reservation to be admissible, since such express assent would have been necessary if the reservation's limitation of the treaty terms had been proposed during the negotiation process.⁶⁸ However, in the years immediately preceding the *Genocide Convention* case, multilateral treaties became increasingly complex, and additional accessions made long after the initial ratification became more commonplace. Accordingly, the lack of any objections from the states parties within some reasonable period of time after a ratifying state offered its reservations came to be interpreted as tacit consent to the reservations.⁶⁹ In the *Genocide Convention* case, the ICJ endorsed a system that was substantially more favorable than any prior practice to successful ratification regardless of reservations.

Developing a rationale that the Human Rights Committee echoed in General Comment 24, the ICJ distinguished human rights treaties, with their "universal" character and intent, from conventional multilateral treaties, which define commercial and territorial rights between individual states.⁷⁰ Such human rights oriented treaties are not negotiated among a limited number of parties for a limited purpose, but rather are produced to achieve majority agreement among world nations on global norms. The ICJ found that the conventional practice of relying on states parties to watchdog reservations without any guiding principles was not effective for such treaties.⁷¹ Consequently, the treatment of reservations to human rights treaties had already become more flexible in practice, although this development had not yet been formally acknowledged.⁷²

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. See LORD MCNAIR, *THE LAW OF TREATIES* 159-60 (1961).

68. *Id.* The Treaty of Versailles in 1919 and the Second Opium Convention of 1925 were the first treaties at which the parties formulated an active reservations policy. The policy of requiring express acceptance of reservations by all parties became the procedure followed by the League of Nations and then by the U.N. in their roles as depositaries of multilateral treaties. See *id.* at 165.

69. See *id.* at 161-63.

70. See *Genocide Convention* case, *supra* note 60, at 23.

71. See *id.* at 24.

72. *Id.* at 21.

The court noted as evidence of this new flexibility the “great number of reservations which have been made in recent years to multilateral conventions,” and the “existence of practices which go so far as to admit that the author of reservations which have been rejected by certain contracting parties is nevertheless to be regarded as a party to the convention in relation to those contracting parties that have accepted the reservations.”⁷³

The ICJ concluded that implementation of a presumption in favor of successful ratification was justified by the special nature of the Genocide Convention as a human rights treaty. In contrast to the contract-like structure of other multilateral treaties, the Genocide Convention and other human rights treaties have “a common interest” promoted by all the parties, so that “one cannot speak of the individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.”⁷⁴ Therefore, there was no direct harm to a state party if another state promulgated a reservation against some aspect of the Genocide Convention. Furthermore, it was particularly important to gain general acceptance of the ideals of the Convention, because of its norm-creating purpose. However, the goal of universal acceptance of the Convention must not be allowed to justify the admittance of reservations that would undermine the Convention’s substantive provisions. The ICJ therefore not only established a presumption in favor of ratification, but also created the object and purpose test to limit that presumption.⁷⁵

As a frame for the object and purpose test, the court defined two categories of objections to reservations. A party could object to a reservation in principle, but that objection would affect only the status of the reservation between the reserving state and the objecting state. An objection would jeopardize the reserving state’s ratification only if the objecting state raised it “on the jurisdictional plane,” giving rise to a dispute that must be settled according to the terms of the Convention. The objecting state was to distinguish between the two types of objections according to the object and purpose test; it should make an objection on the jurisdictional plane only if the reservation in question was incompatible with the object and purpose of the treaty.⁷⁶

The ICJ did not create a bright-line standard for application of the object and purpose test. Instead, it endorsed a case-by-case analysis of multilateral treaties to determine what sort of reservations, if any, could be made, and what their effect would be, based on the treaty’s “character[,] . . . purpose, provisions, mode of preparation and adoption.”⁷⁷ Applying this analysis to the Genocide

73. *Id.* at 21-22.

74. *Id.* at 23.

75. *Id.* at 24.

76. *See id.*

77. *Id.* at 22. This is the most precise articulation of the object and purpose test offered by the ICJ in the *Genocide Convention* opinion. The object and purpose test has frequently been criticized for being unadministrably vague, first and foremost in the dissent to the *Genocide Convention* case. *See id.* at 44.

It is interesting to note, in light of the United States’ later involvement in the question of reservations in the context of General Comment 24, that the essence of the object and purpose test and its underlying rationale were proposed by the United States in its written submission to the

Convention, the ICJ concluded that its purpose was universal acceptance of a common humanistic ideal.⁷⁸ Such a purpose, of course, is typical of human rights treaties generally.⁷⁹

The ICJ's opinion in the *Genocide Convention* case acknowledged the continuing importance of the principle of consent in international treaties, and it endorsed a practice that included a fundamental role for states parties' consent in the reservations process. In the context of human rights treaties, consent still serves as a safeguard of national sovereignty, but a state's consent has a different significance than in a traditional treaty, because it achieves a different result. Rather than creating a relationship of obligations and benefits between the parties, a state takes on obligations to third parties (individuals), and receives only the intangible benefits of prestige and the promotion of values it supports.

The ICJ identified and addressed two sources of tension in the administration of human rights treaties: the tension between national sovereignty and absolute ideals and obligations, and the tension between universal acceptance of a

Court. See Written Statement of the Government of the United States of America, 1951 I.C.J. Pleadings (*Genocide Convention* case) 23 (document undated). The United States first noted that there was no element of reciprocity in the Genocide Convention and that a reservation therefore did not affect other states parties. *Id.* at 25. The U.S. then proposed that the parties should consider the "terms, nature, history and purpose of the Genocide Convention," as well as "the intention of the parties and the circumstances of a particular case." *Id.* The U.S. concluded that "States entitled to ratify or accede may do so subject to reservations even if these are objected to by one or more other parties to the Convention." *Id.* It then suggested:

the character and purposes of the Genocide Convention and the exigencies of international relations, including the paramount need for co-operative relations so far as possible between as many States as possible, justify a liberal rule respecting reservations to the Genocide Convention, a rule which will promote maximum acceptance by the greatest possible number of States of the obligations defined by the Convention and will avoid either a general undermining of the standards accepted by many without reservation, or imposing any new obligations without the necessary consent of all upon whom they fall.

Id. at 31. With the exception of the last clause regarding consent, these are exactly the issues raised and the conclusions stated by the ICJ. The United States' concern throughout its statement appears to have been that states should not have the power to exclude other states from a treaty of such a universal character unless the reservations proposed are so egregious or fraudulent as to allow no state party to accept them or to cause a court to invalidate them. See *id.* at 43-44.

The United Kingdom, in contrast, argued that a treaty of the Genocide Convention's universal humanitarian purpose could not permit any reservations. In treaties with reciprocal duties and benefits, there is an incentive to limit one's reservations in order to gain the maximum benefit from the treaty. The Genocide Convention did not offer benefits but only obligations, so there was no incentive to limit reservations. Furthermore, states might be ratifying from the ulterior motive of desiring the prestige of having ratified, rather than for the purpose of a substantive commitment to the Convention. In this case, the temptation to ratify with many reservations is great, to gain the prestige but not the responsibility of becoming a party. In addition, any attempt to only partially limit the ability to ratify when objections are raised would lead to a complicated system in which states were parties with respect to some states but not all. Since there is no reciprocity between states in a human rights treaty, such a system would be nonsensical. See Written Statement of the United Kingdom, 1951 I.C.J. Pleadings (*Genocide Convention* case) 48, 62-70 (January, 1951).

78. The ICJ concluded that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation," and therefore "[t]he Genocide Convention was . . . intended by the General Assembly and by the contracting parties to be definitely universal in scope." *Genocide Convention* case, *supra* note 60, at 23.

79. See *infra* text accompanying notes 254-57.

treaty and treaty integrity. Whereas in a commercial or political treaty the parties can agree to whatever they think is reasonable, a human rights treaty establishes absolute, not relational, obligations. Because there are no tangible relational obligations and benefits, a state party cannot test the reasonableness of a reservation according to its own self-interest. The object and purpose test provides a new guiding principle for consent, thus permitting a ratifying state to exercise its sovereign right to limit its treaty obligations while protecting the fundamental goals of the treaty.

The ICJ opinion also recognizes that, in practice, there is tension between the universality and the integrity of human rights treaties. The success of such treaties depends not merely on the compliance of the states that do become parties, but also on the general acceptance of the treaty's precepts. Universality is more easily accomplished by allowing reservations, but too many reservations threaten treaty integrity. The object and purpose test is an attempt to strike a balance between these conflicting objectives, but these very issues nonetheless arise again in General Comment 24.

2. *The Vienna Convention on the Law of Treaties*

The Vienna Convention on the Law of Treaties codifies the *Genocide Convention* case's object and purpose test and presumption in favor of ratification.⁸⁰ The Vienna Convention enumerates several ways in which a reservation can be accepted, depending on the nature of the treaty itself. The primary system of acceptance permits varying statuses between the reserving state and each state party to the treaty. Once the reserving state has presented its reservation, the other states have twelve months to object. If they do not, they will be presumed to have accepted the reservation and the treaty will enter into force between each tacitly accepting state party and the reserving state.⁸¹ A state party can also expressly consent to the reservation, in which case the treaty will enter into force between that state party and the reserving state immediately.⁸² A reserving state will be considered to have successfully ratified and will be bound by its treaty obligations as soon as the first state party accepts its reservation.⁸³ The Vienna Convention also codifies the *Genocide Convention* case's dual structure of objections. If a state party objects, the treaty will nevertheless be presumed to be in force between the objecting and reserving states unless the objecting state expressly states that the treaty is not in force between them.⁸⁴

80. There is a lengthy discussion of the *Genocide Convention* opinion and its aftermath in the Commentary provided by the ILC accompanying the final draft of the Vienna Convention articles on reservations. See Commentary, ILC Final Draft, reprinted in THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES 188-92 (Dr. Ralf Gunter Wetzel, compiler; Professor Dr. Dietrich Rauschnig, ed. 1978) [hereinafter VIENNA CONVENTION TRAVAUX PRÉPARATOIRES]. The ILC concluded that "[t]he article [governing formulation of reservations], in short, adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty." *Id.* at 192.

81. See Vienna Convention, *supra* note 59, art. 20(5).

82. See *id.* art. 20(4)(a).

83. See *id.* art. 20(4)(c).

84. See *id.* art. 20(4)(b).

There are three exceptions to this typical process of ratification under the Vienna Convention. The first two exceptions represent opposite extremes. If the treaty expressly authorizes a particular reservation and does not require any additional measures on the part of the other contracting states, the reservation will be automatically accepted.⁸⁵ In contrast, if the application of the treaty to every state is particularly important due to the treaty's object and purpose and because there are few states ratifying, all parties must expressly accept the reservation.⁸⁶ The final exception arises only if the treaty is a "constituent instrument of an international organization," in which case "the acceptance of the competent organ of that organization" is required.⁸⁷

The Vienna Convention also takes up some of the questions of consent and national sovereignty that were raised in the *Genocide Convention* opinion. The authors saw potential for conflicting claims of national sovereignty in the relationship between a reserving state's right to reserve treaty provisions to which it does not wish to consent, and the right of other states parties not to have their treaty benefits limited by a reservation without their consent. In an attempt to avoid this conundrum, the authors separated a state's right to formulate a reservation from its right to successfully ratify with that reservation.⁸⁸ Provided that a treaty does not expressly forbid reservations or permit only certain enumerated reservations, a state can formulate any reservation that does not violate the object and purpose test, so that its national sovereignty is unrestrained by the reactions of the other states.⁸⁹ The states parties are then free to exercise their own sovereignty by objecting to reservations as they wish, although they are also to take the object and purpose test into account in doing so. Of course, this does not resolve the basic and important question of who has authority to decide whether the reservation is compatible with the object and purpose of the treaty, should a difference of opinion arise. As a result of this ambiguity, it is difficult in practice to avoid undermining the distinction that was supposed to separate

85. See *id.* art. 20(1).

86. See *id.* art. 20(2).

87. *Id.* art. 20(3). See discussion about the meaning of the term "constituent instrument," *infra* text accompanying notes 104-112.

88. See Vienna Convention, *supra* note 59, arts. 19-20. Before this distinction was made, commentators were turning somersaults trying to reconcile the conflicting aspects of state sovereignty. Certainly, the reserving state's sovereignty meant that it could not be bound to the agreement without its consent, and therefore, it must be able to append reservations. But the other states parties' sovereignty required that they fully consent to any reservations. Should the existing parties be able to shut out new parties? Should later-acceding parties have to agree unilaterally to a treaty even if they had been given no opportunity to negotiate terms? The distinction between formulation and acceptance obviously did not solve these problems, but it did provide a helpful way of ascertaining whether the reservation was possible as a preliminary matter and then turning to the question of whether others were willing to accept it. See DR. FRANK HORN, RESERVATIONS AND INTERPRETIVE DECLARATIONS TO MULTILATERAL TREATIES 111-12 (1988). However, in practice, the distinction may be so blurry as to be virtually irrelevant. See discussion *infra* note 90.

89. "A State may . . . formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty." Vienna Convention, *supra* note 59, art. 19.

the formulation stage, in which the reserving state was alone with the treaty, and the acceptance stage, in which the other states parties had a role to play.⁹⁰

The Vienna Convention creates a strong presumption in favor of ratification and acceptance of a reservation, codifying many elements of the ICJ's *Genocide Convention* decision. However, the Vienna Convention was designed to create general standards for use in all treaties,⁹¹ and therefore, its provisions are not always appropriate for the unique aspects of human rights treaties. Under the Vienna Convention, it is possible that a treaty will have entered into force between some states parties and not between others, if some states parties have objected to a state's reservations and others have not. In a traditional treaty which has reciprocal obligations and benefits between the parties, this rule produces a logical and direct relationship among the states parties, because contractual dynamics are at work. A state party will share obligations and benefits with those states parties which accept the terms of its ratification, and it will not share obligations and benefits with those which do not accept those terms. This rule does not have the same logic in a human rights treaty in which each state has obligations to individuals, not to the other parties. In a human rights treaty, the ratifying state's obligations remain the same, regardless of whether some states parties do not accept its reservations or ratification. The only relationship among the states parties is that each has agreed to promote the treaty values, and that each could attempt to enforce against the others their treaty obligations to third parties.

90. While this issue was raised during the drafting process, the final formulation does not seem to have resolved the problem. One member of the International Law Commission questioned the first draft's provision for the object and purpose test precisely on the grounds that it was "impracticable in the absence of any authority to decide the question of compatibility." Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, 390 (1989) (citing [1962] 1 Y.B. INT'L L. COMM'N 160). Several states noted the tension between the stages of assessing the appropriateness of a reservation. After the 1962 draft of the Convention, the Canadian government noted the possibility for confusion over whether the object and purpose test was to serve as the "basis on which a State may make a reservation . . . or on which it may object to a reservation" and requested that the drafters clarify that point. Comments of Governments, Canada, Waldock Report IV, *reprinted in* VIENNA CONVENTION TRAVAUX PREPARATOIRES, *supra* note 80, at 177. The Japanese government also objected to the apparent contradiction between the use of the object and purpose test at the formulation stage, "under which a reservation incompatible with the object and purpose of the treaty appears to be regarded as null and void," and the use of the test by objecting states parties "which appears to leave the application of the text (sic) of compatibility to the discretion of the individual parties." Comments of Governments, Japan, Waldock Report IV, *reprinted in id.* at 178. In its commentary on the final draft, the ILC acknowledged the interdependence of the two applications of the object and purpose test: "The admissibility or otherwise of a reservation under paragraph (c) [when the treaty itself does not govern the reservation], on the other hand, is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States; and this paragraph [article 19] has, therefore to be read in close conjunction with the provisions of article 17 [article 20 in the final version of the Convention] regarding acceptance of and objection to reservations." ILC Final Draft, Commentary to article 16, *reprinted in id.* at 192. The final conclusion appears to have been that the object and purpose test is the criterion that the *reserving* state should consider in the formulation process and that the *objecting* state should consider in choosing to make its objection. The first stage of formulation was apparently not intended to involve any evaluation by outside parties. However, the text of the Convention does not expressly make this distinction evident.

91. See Vienna Convention, *supra* note 59, arts. 1-2.

In this context, the Vienna Convention rule has a deleterious effect on treaty integrity. A state party which refuses to recognize a reserving state's ratification because it feels those reservations violate the object and purpose of the treaty will then be unable to enforce any treaty provisions against the reserving state because it has not recognized that state as a party. In order to enforce those obligations that a reserving state does undertake, the other states parties must accept its reservations, even if they conflict with the treaty's object and purpose. Contractual principles are not a useful guide for enforcement if contractual dynamics are not at work.

In addition to the problems specifically associated with human rights treaties, the Vienna Convention's provision defining the modifying effects of a reservation produces counterproductive results in a broad range of contexts.⁹² The Vienna Convention first provides that when a state party accepts a ratifying state's reservation, the reservation modifies not only the reserving party's duties to the accepting party, but also the accepting party's duties to the reserving party.⁹³ In other words, their obligations to each other remain reciprocal because the accepting state gets the benefit of the reservation in its relationship to the reserving state. This is reasonable, although it does not have much relevance to human rights treaties in which reciprocal and corresponding obligations do not exist. The Vienna Convention next provides that the reservation does not modify the treaty for the other, non-accepting states parties.⁹⁴ This provision is also reasonable. However, the Convention then goes on to declare that if an objecting state has objected to the reservation but nevertheless accepted the reserving state's ratification, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."⁹⁵ Under this formulation, there is little difference between accepting a reservation and objecting to it. If a state accepts the reservation, the reserved clauses are modified for both parties. If a state objects to the reservation, the reserved clauses do not take effect for both parties. The only distinction between objection and acceptance may be that the reservation only modified the clauses, while the objection eliminated them. This does not seem like a satisfactory, or even rational, result.⁹⁶ If a state party objects to a reservation, particularly in the context of a

92. Some members of the International Law Commission recently acknowledged this conundrum as well. See *infra* note 239.

93. See Vienna Convention, *supra* note 59, art. 21(1).

94. See *id.* art. 21(2).

95. *Id.* art. 21(3).

96. The legislative history does not resolve this problem, but it does suggest that the root of it lies in the Vienna Convention's focus on non-human rights oriented treaties. In the first draft of the Convention, a state's objection to another state's reservation would automatically prevent the entire treaty, not merely the reserved provisions, from coming into force between the objecting state and the reserving state. A state party's objection had no effect on whether the treaty entered into force between the reserving state and the other states parties. See art. 19(4)(c), Waldock Report I, reprinted in VIENNA CONVENTION TRAVAUX PRÉPARATOIRES, *supra* note 80, at 174. In the 1962 draft, this provision was revised so that the treaty would not come into force between the reserving state and the objecting state if the objection were based on incompatibility with the object and purpose of the treaty. This section does not address the question of the effect of objections based on other concerns, and it is unclear whether such objections were intended to be permitted. See art. 20(2)(b),

human rights treaty, presumably it does so because it believes that the reserving state should not be permitted to escape the requirements of that treaty provision. Elimination of the provision only exacerbates this problem.

Recognizing the unique nature of human rights treaties, the ICJ in the *Genocide Convention* case abandoned a reservations policy based on contractual analogies and moved to a procedure that focuses on the object and purpose of a treaty rather than assuming that reciprocal obligations are present. In so doing, it opened up human rights treaties to ratification with reservations to a degree previously unimaginable. The Vienna Convention codified the object and purpose test and developed an even stronger presumption in favor of successful ratification despite reservations, although it did not specifically address human rights treaties. The language and analysis of these documents would provide the framework for the Human Rights Committee's approach to reservations in General Comment 24. However, the seeds of the controversy that would culminate in General Comment 24 were also present in these documents. The *Genocide Convention* case and the Vienna Convention failed to resolve the conflicts between national sovereignty and absolute ideals and between treaty universality and treaty integrity.

ILC Draft 1962, *reprinted in id.* at 175. A number of states, including Australia, Denmark and the United States, objected to this ambiguity. See Government Comments, Waldock Report IV, *reprinted in id.* at 176-79. In the final ILC draft, the presumption was still that the treaty would not be in force between the objecting and reserving states, although the mention of the object and purpose test had been eliminated. See art. 17(4)(b), ILC Final Draft, *reprinted in id.* at 187.

It is unclear how this presumption might be coordinated with article 21 governing the modifying effect of reservation. Originally, article 21 simply stated that the reservation modified the treaty for the reserving state and that all other states could claim the modifying effects of the reservation in connection with the reserving state. See art. 21(1)(b), ILC Draft 1962, *reprinted in id.* at 195. It was the U.S. that suggested the addition of a provision to cover the situation in which the objecting state does not mean to exclude the reserving state from the treaty. The U.S. provided the language for the clause as well, with only a few minor changes: "Where a State rejects or objects to a reservation but considers itself in treaty relations with the reserving State, the provisions to which the reservation applies shall not apply between the two States." Comments of Government, United States, Waldock Report IV, *reprinted in id.* at 196. The comments of the Special Rapporteur and of the drafters of the ILC Final Draft indicate that they considered such a possibility to be an "unusual" or "special" one. Observations and proposals of the Special Rapporteur, Waldock Report IV, *reprinted in id.* at 196; Commentary, ILC Final Draft, *reprinted in id.* at 197. The implication appears to be that if a state party does not feel strongly enough about the other state's reservations to bar the reserving state from treaty relations, then just ignoring the controversial treaty provision is the best compromise. In human rights treaties, in which the decision not to eliminate the reserving treaty from treaty relations is the result of a serious concern with binding the reserving state to the treaty rather than an indication that the objection to the reservation is not fundamental, this compromise is nonsensical.

It is interesting to note that the possibility of creating a separate body or committee to adjudicate reservations has been suggested as part of a more general solution to the problems this reservations regime produces. In his discussion of the problem of the Vienna Convention's insufficient means for acting against objectionable reservations, Daniel Hylton proposed "establishing an authoritative decision-maker" in order to "depoliticize the process[,] . . . increase the consistency of determinations and better preserve the integrity of the agreement." Daniel N. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties' Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 448 (1994).

B. The Legal Basis for General Comment 24's Reforms

1. The Committee's Authority

The Committee claimed authority to adjudicate reservations to the Covenant on functional rather than legal grounds. The reason for this is obvious: the legal basis for the Committee's claim is weak. It is generally recognized that adjudication on the international level can take place only with the express consent of the parties. The International Court of Justice, the Inter-American Court of Human Rights, the European Court of Human Rights, and all other international tribunals possess jurisdiction over controversies between sovereign states only if the parties have consented to their jurisdiction.⁹⁷

If the Committee had been given sole authority over whatever controversies might arise, this would suggest that it should have jurisdiction over disputes involving reservations as well. However, the Committee was not given such authority; rather, its power was sharply delineated, and each area of jurisdiction requires separate express consent by the states parties. A state's ratification of the Covenant empowers the Committee only to request occasional reports and to produce its own "general comments."⁹⁸ A state must provide an additional declaration for the Committee to mediate inter-state controversies,⁹⁹ and ratification of the First Optional Protocol is necessary for mediation of a controversy between a state and an individual.¹⁰⁰ In short, the Committee is given authority over specific types of conflicts only by the express, formal consent of particular states parties through measures explained in the Covenant and its Protocols. The Covenant repeatedly states that the Committee has authority to evaluate these controversies only if a state has followed these procedures.¹⁰¹ Furthermore, while the question of reservations was not addressed explicitly in the Covenant, this silence does not indicate either an oversight or a belief that this issue was determined by the other powers allocated to the Committee. Rather, the drafters discussed the question of reservations but could not reach a consensus on the question of how reservations should be evaluated.¹⁰² Therefore, rather than include a reservations clause with which many states parties would not agree, no statement was made at all.¹⁰³ There does not seem to have been intention on the part of the drafters, or a belief on the part of the states parties, that the Committee should act on the question of reservations.

Article 20(3) of the Vienna Convention provides a potential basis for the Committee's authority to evaluate reservations. Article 20(3) empowers an in-

97. See, e.g., Statute of the International Court of Justice, art. 36. Such consent can be expressed by referring the particular controversy in question to the tribunal, through an arbitration clause in a contract or treaty, or through a general declaration of acceptance of the court's jurisdiction in any matters brought before it.

98. See Civil and Political Covenant, *supra* note 4, art. 40(4).

99. See *id.* art. 41(1).

100. See First Protocol, *supra* note 24, art. 1.

101. See *id.*; Civil and Political Covenant, *supra* note 4, art. 41(1).

102. See Pechota, *supra* note 3, at 53; LIESBETH LUNZAAD, RESERVATIONS TO U.N.-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 186 (1995).

103. See Pechota, *supra* note 3, at 53.

international organization to adjudicate any reservations to the treaty that is that organization's constituent instrument.¹⁰⁴ The Covenant is arguably the constituent instrument of the Committee in that it creates and contains the fundamental rules of the Committee. However, in the academic literature at the time of and following the Vienna Convention, this term has been used to indicate the charter or constitution of an independent international organization whose function and authority extends beyond the treaty that created it.¹⁰⁵ The Committee is not such an organization, nor is the Covenant a charter or constitution. The Covenant's primary function is not to establish the Committee; rather, it creates norms and obligations for states parties. The Committee is established solely to administer the Covenant and has no authority or function beyond that administration. The Committee is dependent on and subordinate to the Covenant, not established by and growing beyond it.

In addition, although the Committee itself made reference to Article 20(3) of the Vienna Convention,¹⁰⁶ it nevertheless did not claim to have authority under that provision. Rather, the Committee concluded that the provision that

104. "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." Vienna Convention, *supra* note 59, art. 20(3).

105. See, e.g., KAYE HOLLOWAY, MODERN TRENDS IN TREATY LAW: CONSTITUTIONAL LAW, RESERVATIONS AND THE THREE MODES OF LEGISLATION 524-30 (1967) (discussing constituent instruments, India's reservation to IMCO Convention); HORN, *supra* note 88, at 113-24, 346 (discussing reservations policies, describing constituent instrument as treaty containing constitution). The Vienna Convention itself does not define the term "constituent instrument," nor does its legislative history offer much guidance. A version of the constituent instrument provision was in place from the first draft of the treaty. See Waldock Report I, in VIENNA CONVENTION TRAVAUX PREPARATOIRES, *supra* note 80, at 173. Later in the drafting process, concerns were raised regarding what role states parties should play in evaluation of reservations to such treaties, particularly whether they should still have authority to object or whether the international organization should have total authority over the fate of the reservations. See Comments of Governments, Denmark, United States, Waldock Report IV, *reprinted in id.* at 177, 179. The United States was particularly concerned that it might be inappropriate to assign this sort of adjudicative function to an international organization and that such a grant of authority could impinge on the "integrity of commitments by States that ratify without reservations." *Id.* at 179. The ILC concluded in its commentary on its final draft that "in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations" and that therefore the constituent instrument provision would remain. ILC Final Draft, Commentary to article 17, *reprinted in id.* at 192. The ILC then referred to the practice of referring questions about reservations to "the body having authority to interpret the Convention in question." *Id.* (quoting *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235). If this were taken as the definition of an international organization which could claim the authority of the constituent instrument clause, this would be strong support for the Committee's position in General Comment 24. However, this reference appears to respond directly to the U.S.'s questioning of the IMCO Convention controversy as precedent. See Comments of Governments, United States, Waldock Report IV, *reprinted in id.* at 179. It also appears to have been a mere statement of practice on the part of the Secretary General, addressed to a situation in which the development of the practice of reviewing reservations had already occurred and was as significant to the Secretary-General's reaction as the character and authority of the body that developed it. See ILC Final Draft, Commentary to article 17, *reprinted in id.* at 192. It is certainly possible to interpret this reference as a definition, but this would leave open the question of why the Human Rights Committee did not simply develop a practice of reviewing reservations without any need for justification if it had the authority to do so.

106. See General Comment 24, *supra* note 48, ¶ 16.

governs the Covenant is that which allows *states* to object if a reservation violates the object and purpose of the treaty. The Committee then argued that the Vienna Convention is inadequate for human rights treaties and claimed power for itself on purely functional grounds.¹⁰⁷ If the Committee itself did not believe that the Covenant was its constituent instrument while justifying its decision to exercise power over reservations, but chose to disavow use of the Vienna Convention rather than rely on this provision, it is difficult to justify a broad reading of the term "constituent instrument" that would include the Covenant.

In practice, it appears that reservations to constituent instruments are automatically referred as a matter of right to the international organization in question and are not referred to the states parties for their objection.¹⁰⁸ Yet here, the Committee functioned for years without formally adjudicating reservations, and the states parties held the power to object if they wished (although generally they did not).¹⁰⁹ Neither the Committee itself, nor any of the other parties to the treaty, any other body of the UN, nor any academic commentator suggested during this time that the Committee ought to be reviewing the reservations as a matter of right under the Vienna Convention.¹¹⁰

Finally, while the Covenant serves the purpose of a charter in those provisions that create and organize the Committee, and therefore those provisions might be considered a constituent instrument over which the Committee would have power to adjudicate reservations, those are generally not the provisions in question here.¹¹¹ The reservations to which the Committee primarily objects in General Comment 24 are not reservations to the powers of the Committee, but reservations to the substantive obligations that the treaty imposes upon the states.¹¹²

Therefore, the traditional understanding of article 20(3) of the Vienna Convention would not define the Covenant as the constituent instrument of the Committee. While the literal terms of the constituent instrument provision could

107. *See id.*

108. *See* HORN, *supra* note 88, at 117.

109. *See* General Comment 24, *supra* note 48, ¶ 17.

110. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY at xxvi-xxvii (1993) (discussing doubts about Committee's competence to adjudicate reservations). McNair agrees with the Harvard Research Draft Convention that "[i]f all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve." McNAIR, *supra* note 67, at 424 (quoting Harvard Research Draft Convention art. 19, at 966). Under this analysis, the Covenant could not be understood to provide any authority over reservations to the Committee.

111. In opening, the Committee names categories of reservations that have been submitted, and this list does include a category of reservations "directed at the competence of the Committee." General Comment 24, *supra* note 48, ¶ 1. The Committee also notes that states may not reserve their obligation to submit reports to the Committee. *Id.* ¶ 11. But in focusing on the object and purpose test as the criterion for distinguishing inappropriate from appropriate reservations, the Committee naturally focused its attention, and its ire, upon reservations to the substantive guarantees of the treaty. *See, e.g., id.* ¶¶ 8-10.

112. For example, the U.S., with its plethora of reservations, declarations and understandings, did not reserve any of the provisions relating to the powers or organization of the Committee. *See* S. EXEC. REP. NOS. 102-23, *supra* note 48.

encompass the Covenant, this would be a new reading of that provision. Such an interpretation would constitute a purposeful expansion of the scope of the Vienna Convention's constituent instrument provision, as well as a broadening of the Committee's intended role under the Covenant.

Therefore, as a legal matter, the Committee's claim to have authority to adjudicate reservations is weak. It cannot draw this authority from the express language of the Covenant, nor from the consent of the parties. A broad reading of the Vienna Convention's constituent instrument provision would grant it this power, but this does not seem to be a reading that the Committee itself would promote. In order for the Committee to have legal authority over the reservations submitted by states parties, the express consent of the states parties would be required through ratification of an amendment to the Covenant or some similar means.¹¹³

Although the Covenant cannot be interpreted to authorize the Committee to adjudicate reservations, the Committee's functional justifications for its authority are not entirely without legal basis. Despite the limited facilitative role offered to the Committee under a narrow reading of the Covenant, the Committee has taken an active role in evaluating the reports offered by the states parties. Rather than passively accepting the reports proffered by the states in whatever condition they arrive and providing occasional responses, the Committee has established strict guidelines for the format and content of state reports. It subjects state party representatives to rigorous questioning regarding the content of the reports, including the appropriateness of the state's reservations.¹¹⁴

The acquiescence of the states parties in this development of the Committee's function bolsters the Committee's claim to the role of evaluating reservations, on both functional and legal grounds. The Vienna Convention requires that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" be considered in interpreting the treaty.¹¹⁵ The tacit acceptance by the states parties of the Committee's role as an adjudicator (and not merely a facilitator) legitimizes its claim that it needs this power over reservations to function as the administrator of the Covenant. Since the Committee's broader interpretation of its role seems to have been accepted by the states parties despite the plausibility of a narrower reading, this broader interpretation carries the validity of an established, accepted practice under the Vienna Convention. The question remains whether the Committee can or should take on additional power in order to effectively carry out this broader role.

2. *The Object and Purpose Test*

In General Comment 24, the Committee incorporated the object and purpose test as its method of analysis for reservations to the Covenant. Using the

113. See *infra* section II.B.2.a discussing alternatives available to the Committee.

114. See *infra* section III.A.2 discussing the Committee's practice.

115. Vienna Convention, *supra* note 59, art. 31(3)(b).

language of the Vienna Convention, the Comment states: "where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty."¹¹⁶ The Committee defined the object and purpose of the Covenant as the creation of "legally binding standards for human rights[,] . . . a framework of obligations which are legally binding[,] . . . [and] an efficacious supervisory machinery."¹¹⁷ It also applied the test in a manner relatively restrictive of reservations, entirely barring reservations to certain Covenant provisions: "[i]n an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant."¹¹⁸

Since its inception in the *Genocide Convention* case, the object and purpose test has gradually come to be accepted by the international community as the standard for the admissibility of reservations to multilateral treaties. It was codified as such in the Vienna Convention and has been consistently employed in treaties and cases before international tribunals since that time.¹¹⁹ The Covenant did not address the issue of reservations, and thus did not expressly authorize use of the object and purpose test. However, the test is so universally accepted as the customary norm that the Human Rights Committee's invocation of it in General Comment 24 was perhaps the only uncontroversial element of the document. The unresolved questions through multiple revisitations of the object and purpose test have been who should apply it and what its effect on reservations should be.

3. *The Effect of Incompatible Reservations*

Under General Comment 24, an unacceptable reservation does not affect a state's ratification as a whole. Instead, the reservation itself is simply nullified: "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation."¹²⁰ This level of presumption in favor of successful ratification is unprecedented; however, the general movement of international custom is toward such a presumption.

Prior to the *Genocide Convention* case, the presumption was that a reserving state could not become a party to a treaty unless all other states parties expressly accepted the reservation.¹²¹ This rule was followed by the League of

116. *General Comment 24*, *supra* note 48, ¶ 6.

117. *Id.* ¶ 7.

118. *Id.* ¶¶ 7, 8. The Committee offered as examples of Covenant provisions for which reservations were absolutely forbidden the ban on torture, slavery, and execution of pregnant women or children. *See id.* ¶ 8.

119. *See, e.g.,* American Convention on Human Rights, *opened for signature* November 22, 1969, 1144 U.N.T.S. 123; *Belilos* case, *supra* note 51; *Loizidou* case, *supra* note 51.

120. *General Comment 24*, *supra* note 48, ¶ 18.

121. *See* SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 54-56 (2nd ed. 1984).

Nations and by the United Nations until the *Genocide Convention* opinion.¹²² The *Genocide Convention* case and the Vienna Convention established a presumption in favor of successful ratification.¹²³ Under this new presumption, a state would only be excluded from the treaty if the reservation were found to have violated the object and purpose of the treaty. Any lesser objection would not exclude the reserving party from the treaty, nor was express assent to reservations required.¹²⁴ Since that time, the presumption in favor of ratification has become even more marked.

The Inter-American Court's opinion in the *American Reservation* case strengthened the presumption of successful ratification in the context of reservations to a human rights treaty. Under the Vienna Convention, tacit acceptance of a reservation by the states parties is established after a twelve-month waiting period has elapsed without any objections.¹²⁵ The question arose whether a reserving state would become a party immediately upon ratification of the Inter-American Human Rights Convention, or after its reservation had been tacitly accepted twelve months after ratification.¹²⁶ The Court was swayed by the Convention's focus on the rights of the individual, concluding that "the Convention must be seen for what in reality it is: a multilateral legal instrument or framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction."¹²⁷ In light of this focus on the rights of the individual, the Court determined that the Vienna Convention requirements should be interpreted in a way that would promote ratification by all parties at the earliest possible point. In order to achieve universal ratification swiftly, the twelve-month waiting period for tacit acceptance of a reservation by other states parties should not delay the date on which the Convention's provisions would take effect for the reserving state.¹²⁸

While the movement of the policies promoted by the *Genocide Convention* case, the Vienna Convention, and *American Reservation* case has been toward successful ratification, it has also been toward successful implementation of reservations. In this aspect, General Comment 24 diverges sharply from these major developments in treaty law. Even while it used the language and concepts of the *Genocide Convention* case to distinguish the Covenant from traditional multilateral treaties, the Committee criticized the flexible approach to acceptance of

122. *Id.*

123. See discussion *supra* Section II.A.

124. *Id.*

125. See Vienna Convention, *supra* note 59, art. 20(5). Section 1 of article 20 requiring no acceptance by the parties for reservations expressly authorized by the treaty was obviously inapplicable. Section 2 requiring explicit acceptance by all states parties and section 3 requiring the approval of the international organization were quickly dismissed because the Convention is neither "the exchange of reciprocal rights between a limited number of States" nor "the constituent instrument of an international organization." The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights, Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, 22 I.L.M. 37, 46 (1983) [hereinafter *American Reservations* case].

126. See *American Reservations* case, *supra* note 125, at 38-39.

127. *Id.* at 48.

128. See *id.* at 49.

reservations that was established in that case. In the Committee's view, this practice has actually undermined the ideals of the *Genocide Convention* case by permitting acceptance of reservations that violate the object and purpose of the treaty. The Comment, while advancing the presumption in favor of successful ratification and the distinction between human rights treaties and other multilateral treaties, does not promote a presumption for successful reservations.

There is, however, some precedent for the Comment's policy of severing incompatible reservations. The European Court of Human Rights (hereinafter "European Court") has twice applied this practice, in the 1987 *Belilos* case¹²⁹ and in the 1995 *Loizidou* case.¹³⁰ In the *Belilos* case, Mrs. Belilos, a Swiss citizen, brought a complaint against the Swiss government for violations of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial. The Swiss government had entered an interpretive declaration of article 6 when it ratified the convention.¹³¹ This interpretive declaration eliminated a certain class of administrative hearings, including the one to which Mrs. Belilos was a party, from the requirements of the convention. Because the declaration had not fulfilled several of the express procedural requirements of the treaty, the Court found that it was invalid.¹³² Nevertheless, the Court held that the Swiss ratification of the treaty was valid and that the Swiss government was still a party to the treaty.¹³³ The Court did not provide any analysis to justify this approach, neither did it even seem to regard it as unusual, stating simply that "it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration."¹³⁴

This opinion, however, is less of a departure from the European Convention than General Comment 24 is from the Covenant. The Court did find that tacit acceptance of the declaration by the states parties and the depositary did not settle the question of the declaration's legitimacy, stating: "The silence of the depositary and the Contracting States does not deprive the Convention institutions of the power to make their own assessment."¹³⁵ Yet, in the *Belilos* case, there was no doubt about the Court's authority to adjudicate the validity of the reservation; the European Convention expressly provided it with jurisdiction.¹³⁶ More importantly, the Swiss government had acknowledged at oral argument that it considered itself bound by the Convention regardless of the fate of the declaration and had furthermore "recognized the Court's competence to deter-

129. *Belilos* case, *supra* note 51.

130. *Loizidou* case, *supra* note 51.

131. See *Belilos* case, *supra* note 51, ¶¶ 29, 34. Although Switzerland offered a declaration rather than a reservation, all limitations on a ratification are adjudicated in the same way. Otherwise, a state could call its reservation a declaration or understanding and thereby avoid responsibility for it by elevating form over function. See *id.* ¶ 49.

132. See *id.* ¶ 60.

133. See *id.* ¶ 60.

134. *Id.*

135. *Id.* ¶ 47.

136. See *id.* ¶ 50.

mine . . . [that] issue.”¹³⁷ The European Court did not bind the Swiss government to the clause of the Convention that it had reserved without its consent, since it had openly confirmed a preference for being bound rather than forfeiting its ratification.¹³⁸

On the other hand, the practical implications of the European Court’s severance of Switzerland’s reservations are far more substantive than any effect the Committee’s severance of a reservation could have. A striking difference between the European Convention and the Covenant is that the European Court of Human Rights performs binding adjudication of the rights of the individuals and states under the European Convention. In contrast, the Committee can only request information and make non-binding comments. A party’s attempt to limit its consent through a reservation is quite significant to that state’s national sovereignty if there is a binding adjudication system in place with real world consequences for the state. In contrast, in the non-binding reporting system established by the Covenant, there are no tangible consequences for states parties which violate treaty provisions. In this respect, the incursion into a state’s ability to define the scope of its obligations represented by severance of a state’s reservation under the European Convention is a far more significant invasion of national sovereignty than under the Covenant.

The European Court followed a similar course once again in the *Loizidou* case. In this instance, Turkey had accepted the competence of the European Commission on Human Rights to hear individual claims regarding the European Convention for the Protection of Human Rights and Fundamental Freedoms, subject to a declaration containing five restrictions.¹³⁹ The Court held that Turkey’s restriction on the territories to which the Commission’s competence would apply was “tantamount to a disguised reservation” and should be analyzed as such.¹⁴⁰ The Court then struck down the territorial restriction, noting the express limits on reservations stated in the Convention, the “special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms,” and the essential nature of the reserved provisions to the object and purpose of the treaty.¹⁴¹

137. *Id.* ¶ 50.

138. However, although the Court’s authority to sever the reservation in the *Belilos* case was far more established than the Committee’s authority to sever reservations under the auspices of General Comment 24, its motivation was the same: the practice of state objections to reservations had proved inadequate to police the reservations system. In his article on the *Belilos* case, Henry Bourguignon reviewed the familiar argument that “[t]he 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.” Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT’L L. 347, 368 (1989). He then asserted that “[u]nder the European Convention, the process of acceptance and objection has proved futile,” pointing out that despite the many reservations to the Convention, “no formal acceptance of a reservation or objection to a reservation has ever been made by any member State.” *Id.* at 369-70.

139. See *Loizidou* case, *supra* note 51, ¶ 15.

140. *Id.* ¶ 68.

141. *Id.* ¶¶ 65-67, 70.

As in the *Belilos* case, the Court held that the invalidity of the reservation did not void the entire declaration accepting the Commission's competence. It offered several justifications for this decision. The Court first held that Turkey, "in drafting the terms of these declarations, had taken the risk that the restrictions would be declared invalid. It should not now seek to impose the legal consequences of this risk on the Convention institutions."¹⁴² This analysis shifts the presumption regarding reservations from the traditional understanding that a state wishes to be bound only to that to which it expressly consents to the position that a state indicates a general wish to be bound to all provisions of a treaty by ratifying the treaty. Reservations, which were previously indications of non-consent to be bound by certain provisions, are now merely indications of lesser preferences that do not affect the general presumption of consent to be bound to all treaty terms.¹⁴³

In the *Belilos* case, the presumption that Switzerland had not consented to be bound by those provisions of the treaty for which it had offered reservations or declarations was overcome by Switzerland's express statement that it wished to be bound by the treaty with or without its reservations. But in the *Loizidu* case, the burden was shifted from the adjudicator to the State to demonstrate that the state can be bound despite its failure to consent and to point out that the State may indicate non-consent in some way beyond presenting a reservation. This decision raises two questions. First, if presenting reservations is insufficient to demonstrate non-consent, what would be sufficient? Must states present express statements with each reservation or declaration explaining whether they would prefer to withdraw from the treaty rather than be bound by the reserved provision?¹⁴⁴ Second, why should the presumption be shifted? Implied consent does

142. *Id.* ¶ 91.

143. Richard Edwards notes that the 1962 draft of the Vienna Convention explicitly defined a reservation as a "condition of [a state's] consent to be bound by the treaty." Edwards, *supra* note 90, at 373 (citing Waldock, First Report on the Law of Treaties, [1962] 2 Y.B. INT'L L. COMM'N 27, 31-32, U.N. Doc. A/CN.4/144). This phrase emphasizing the reservation's importance to the matter of a state's consent was dropped by the next version of the treaty. See *id.* (citing 1962 I.L.C. Report, [1962] 2 Y.B. INT'L L. COMM'N 157, 161, U.N. Doc. A/CN.4/SER.A/1962/Add.1). There is no provision in the final version of the Convention which defines the significance of reservations for consent.

144. Henry Bourguignon has proposed an intermediate course of this nature. Although he does not suggest that an affirmative declaration should be filed by the state with its reservation, he points to Judge Lauterpacht's dissent in the *Interhandel* case as proposing an appropriate distinction between two different categories of reservations. Judge Lauterpacht argued that if the reservation in question "is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration." Bourguignon, *supra* note 138, at 381 (quoting *Interhandel* Case (Switz. v. U.S.), 1959 I.C.J. 6, 117 (Lauterpacht, H., dissenting)). In Bourguignon's view, the majority of reservations will not be of this "essential condition" sort, but will be subsumed by the state's "predominant intention to be a party to the treaty." *Id.* at 382. In these cases, he views the *Belilos* solution as appropriate. Of course, Bourguignon does not suggest any means of distinguishing between these two types of reservations. In the *Belilos* case, it was not difficult to determine how the reservation should be treated, because Switzerland had expressly stated its interest in remaining a party to the Convention, regardless of the outcome of the hearing. See *Belilos* case, *supra* note 51, ¶ 60. In his discussion of this issue, Richard Edwards suggested that "[d]eciding the severability question in the individual question in the individual case is essentially a matter of construction of the State's ratification instru-

not play a large role in the international law context; the concern with state sovereignty generally mandates express consent.

Shifting the presumption to one of consent to be bound by all treaty provisions would be a great boon to the Committee in its effort to substantiate its position on reservations. In the *Loizidou* case there was some precedent for the Court's decision. It could be argued that Turkey was placed on notice by the *Belilos* case, which interpreted the same treaty, and by its consent to grant jurisdiction to the European Court over any controversies. There were no prior cases interpreting the Covenant that would have placed the states parties on notice of the Committee's intended reservations policy, nor did the states parties grant jurisdiction to the Committee or any other international organization over Covenant-related controversies in general.

The European Court also concluded in the *Loizidou* case that "it was Turkey's main intention when she made her article 25 declaration on 28 January 1987 to accept the right of individual petition. It was this intention that must prevail."¹⁴⁵ The Court once again called attention to "the special character of the Convention as an instrument of European public order (*ordre public*) for the protection of individual human beings and its mission, as set out in article 19, 'to ensure the observance of the engagements undertaken by the High Contracting Parties'."¹⁴⁶ The Court then referred to its decision in the *Belilos* case as precedent.¹⁴⁷ Each of these considerations would also provide support for the Committee's claims in the Comment, but the question remains whether these factors are sufficient to override the lack of express consent by the states parties.

Finally, the European Court referred in the *Loizidou* case to the fact that all the other parties to the Convention but two had unconditionally accepted the Commission's competence. The Court found that this "consistent practice" should have placed Turkey on notice that its "restrictive clauses were of questionable validity under the Convention system and might be deemed impermissible by the Convention organs," especially since the Commission had previously argued to the Court that any jurisdictional reservations were impermissible.¹⁴⁸ This analysis would correspond to an argument that a state party to the Covenant would have been placed on notice that its reservations might be rejected if it enacted reservations that prevented the Covenant from having any effect on its domestic law and practice, thereby undermining the object and purpose of the Covenant.

ment." Edwards, *supra* note 90, at 375. He freely admits that this task may prove "difficult" even if all the pertinent records are available. *Id.* However, given the unattractiveness of the options offered by the Vienna Convention in the case of a human rights treaty (either functionally giving effect to the reservation or invalidating the state's ratification), Mr. Edwards considers taking on this difficult task to be "the right decision," even though he can offer no guidelines for those who would take it on. *Id.* at 378.

145. *Loizidou* case, *supra* note 51, ¶ 92.

146. *Id.* ¶ 93.

147. *See id.* ¶ 94.

148. *Id.* ¶ 95.

Thus, there is precedent for the Committee's proposal to sever incompatible reservations, but this precedent comes solely from two European Court cases which interpret the European Convention for the Protection of Human Rights and Fundamental Freedoms, and only one of these decisions actually preceded General Comment 24. Furthermore, these cases do not resolve the essential problem of presuming consent even though a state has expressly attempted to exempt itself from particular provisions through reservations. If there were ever a reason to presume non-consent, an express reservation shielding a state from certain requirements would seem to be sufficient justification.

III.

FUNCTIONAL JUSTIFICATIONS

A. *The Reservations Problem*

1. *The U.S. Example*

While the legal justification for the Comment may be weak, it is not difficult to see why the Committee felt it must take action. The U.S. ratification of the Covenant exemplifies the attitude toward reservations that spurred the Committee to produce General Comment 24. The United States accompanied its ratification with five reservations, five understandings and four declarations to twelve articles of the Covenant, ranging from article 7 on torture to article 26's anti-discrimination provisions.¹⁴⁹ The net effect of these reservations was to

149. The U.S. incorporated reservations to: article 20, to the effect that its provisions against incitement of discrimination, violence or war do not require restriction of free speech or association; article 6, reserving the right to impose the death penalty on minors; article 7, restricting its definition of cruel or inhuman punishment to that prohibited by the Constitution; article 15(1), reserving the right to impose the penalty in force at the time someone is convicted of a crime, even if a lighter sentence is thereafter made law; and article 10(2)(b) & (3), reserving the right to treat juveniles as adults in the criminal justice system. See S. EXEC. REP. NO. 102-23, *supra* note 48, at 653-55. The U.S. submitted an understanding to articles 2(1), 4(1) and 26, limiting their antidiscrimination provisions to comport with the American constitutional doctrines that some distinctions between people on the basis of categories are permissible when connected with a legitimate government objective or if they have disproportionate impact but not discriminatory intent. See *id.* at 655. It also offered an understanding of articles 9(5) and 14(6) relating to compensation for unlawful arrest and miscarriage of justice, stating that those articles would mean only that affected individuals would have a right to seek compensation, not a right to obtain it. See *id.* at 655-56. Its third understanding related to the requirement of articles 10(2) & (3) that those accused of crimes should be segregated from those convicted of crimes. The U.S. understands that provision to mean that segregation should take place where appropriate when balanced with other goals, including safety, deterrence and punishment. See *id.* at 656. The fourth understanding limits the rights to counsel, to compel testimony of witnesses and to avoid double jeopardy to their doctrinal meanings under domestic law. See *id.* The final understanding relates to the limits of the federal government's ability to implement the Covenant provisions because of the principles of federalism; while the federal government will remove impediments blocking states from implementing Covenant provisions which affect matters under their jurisdiction, it will not compel them to implement those provisions. See *id.* at 657. The U.S. also offered four declarations: first, the Covenant would not be self-executing and therefore would not create a private right of action for plaintiffs; second, the U.S. will not reduce any constitutional rights on the grounds that the Covenant allows derogation or reduction of certain rights under certain circumstances; third, the U.S. accepts the competence of the Committee to hear states parties' complaints; and fourth, that the article 47 clause allowing people to use their own natural resources should "be exercised only in accordance with international law," that is, that the U.S. feared it would be used to justify expropriation of U.S. assets abroad. See *id.* at 657-58. Obviously, not all these

eliminate every Covenant obligation that would require any change in U.S. law or practice. The U.S. rationale for its reservations does not mitigate this effect.

The U.S. Senate did not seem to understand that the Covenant is intended to call upon each ratifying country to re-examine its own human rights standards. Instead, it focused on the opportunity the ratification presented to castigate other countries for their human rights abuses. In discussing its recommendation that the United States declare its acceptance of the Committee's competence to hear complaints from states parties, the Senate Committee on Foreign Relations stated: "by accepting this competence, the United States will not only further enhance the effectiveness of the Human Rights Committee but also have an opportunity to play a more aggressive role in the process of enforcing compliance with the Covenant."¹⁵⁰ The Senate was properly concerned that the United States had undermined its credibility as a world leader on human rights issues by its long-standing failure to ratify the Covenant and other basic human rights documents. It is curious, however, that the Senate apparently believed that ratification would bolster U.S. credibility in the international community even if the ratification was a formality that did not signal an intention to subject U.S. human rights conditions to evaluation under the Covenant.

The Senate's ratification blatantly violated article 2(2) of the Covenant, which requires states parties to "adopt such legislative or other measures as may be necessary to give effect to the [Covenant] rights."¹⁵¹ The Senate Committee did acknowledge that there existed a "few areas where the [Covenant and U.S. domestic law] diverge," but noted that in each of these cases "the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States."¹⁵² The Senate Committee did not propose any change in U.S. law to accommodate the requirements of the Covenant, despite its claim that "[t]he [Senate] Committee recognizes the importance of adhering to internationally recognized standards of human rights."¹⁵³ Although "it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level," such consideration should take place at some undefined future date "through the normal legislative process."¹⁵⁴

Furthermore, not just the Covenant's requirements, but the general standards of international treaty law were arguably breached by the U.S. ratification. The Vienna Convention provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."¹⁵⁵ The U.S.

reservations, declarations and understandings individually represent threats to the Covenant; some of them bolster Covenant goals. However, they do have the effect of collectively preventing ratification of the Covenant from compelling any increase in the rights of individuals under U.S. law and practice.

150. *Id.* at 649.

151. Civil and Political Covenant, *supra* note 4, art. 2(2).

152. S. EXEC. REP. NO. 102-23, *supra* note 48, at 650.

153. *Id.*

154. *Id.*

155. Vienna Convention, *supra* note 59, art. 27. However, Lijnzaad believes this rule is not meant to be applied to reservations, but to post-ratification lapses in performance of treaty require-

failure to enact appropriate legislation to put the Covenant in force, together with its policy of reserving those Covenant provisions that conflicted with any part of its domestic law, seems on its face to be an invocation of internal U.S. law as a rationale for non-compliance with the Covenant's substantive human rights standards.

There are, of course, legitimate reasons for a ratifying state to reserve certain Covenant provisions. Some of the U.S. reservations relate to conflicts between competing human rights values, such as the tension between the Covenant's anti-propaganda provision and the First Amendment to the U.S. Constitution.¹⁵⁶ Because this conflict between the Covenant and U.S. domestic law is a question of achieving the proper balance between several human rights values, rather than a conflict between a human rights value and an economic or political value, this reservation does not threaten the purpose of the Covenant. In addition, issues of national sovereignty are always a concern when a state ratifies a treaty that grants jurisdiction, however limited, to an international organization. The U.S. Senate may have been concerned about submitting fundamental constitutional questions, on which the U.S. courts have created their own sophisticated body of analysis, to the scrutiny of the Committee. In formulating its reservations, the Senate may also have wished to ensure that existing domestic institutional mechanisms be permitted to take a gradual approach to correcting human rights practices that are acknowledged to be less than optimal but that are not amenable to simple solutions, such as race relations issues. Nor was it inappropriate for the United States, despite such concerns, to wish to participate in an international regime that would create a primary level of scrutiny for nations that have no internal system for correction of human rights abuses.

However, the Senate did not reserve only those provisions of the Covenant that implicated these legitimate concerns. Instead, it applied a blanket policy of reserving (whether through a reservation, declaration or understanding) all Covenant provisions that were in conflict with any federal or state law.¹⁵⁷ Further-

ments. According to her view, reservations that do not violate the object and purpose of the treaty are a legitimate exception to this rule. See LUNZAAD, *supra* note 102, at 191-92. Of course, it could be argued that the U.S. reservations do violate the object and purpose of the treaty and therefore represent a mere justification for failure to perform the treaty requirement and not a legitimate exception to the Vienna Convention rule.

156. Article 20 of the Covenant requires that advocacy of war or incitement to violence or discrimination based on racial, national or religious hatred propaganda be prohibited by law. See Civil and Political Covenant, *supra* note 4, art. 20. Arguably, this article requires legislation that would violate the First Amendment to the U.S. Constitution.

157. For example, the Senate approved a reservation to article 6(5) of the Covenant requiring that death sentences not be imposed on anyone younger than eighteen years, because some states allow the death penalty to be imposed on youths who are tried as adults for particularly heinous crimes. See S. EXEC. REP. NOS. 102-23, *supra* note 48, at 651-52. However, treaties preempt state law, so it would have been well within the Senate's power to approve a treaty that would necessitate a change in state law. Furthermore, this would not even be a great or difficult change for states to make; most states are already in compliance with this provision of the Covenant and those that are not would not face any serious administrative difficulties in coming into compliance. Nor is there anything approaching national social consensus on the appropriateness of applying the death penalty to anyone, let alone those under age 18, such that submitting to an international human rights standard would represent a betrayal even of such an informal consensus.

more, the lack of Covenant enforcement mechanisms should have ameliorated any concern that the Committee would interfere with the inner workings of U.S. law. The Covenant and the Committee cannot act upon a state party's domestic practices; rather, they operate by convincing the state to act upon its own practices.

Eleven states objected to the U.S. reservations, but none moved to block the U.S. ratification under the object and purpose test.¹⁵⁸ Under the Vienna Convention procedure, the U.S. reservations were then tacitly accepted one year after ratification. The U.S. ratification therefore eliminated any conflict between the Covenant and domestic law in favor of domestic law.

2. Human Rights Committee Practice Before the Comment

Over time, the Committee has gradually developed a fairly demanding program for its evaluation of states parties' periodic reports. This program, while expansive, does not contradict the express terms of the Covenant. However, it does exceed the role that the Covenant's drafters intended for the Committee. The states that participated in the drafting process vigorously debated how much authority the Committee should have over states parties, and even whether there should be a Committee at all.¹⁵⁹ Some states were concerned about the possibility that the complaint or reporting processes would be abused;¹⁶⁰ others feared that the procedures of an international body with adjudicative power over the states parties would necessarily infringe upon national sovereignty.¹⁶¹ The em-

158. See Gérard Cohen-Jonathan, *Les Réserves dans les Traités Relatifs aux Droits de L'Homme*, 4 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 915, 920 (1996).

159. France, Italy, Tunisia, the United States and Greece expressed concern that the existence of the Committee would increase "the risks of unwarranted attacks against States Parties and of international tension." BOSSUYT, *supra* note 15, at 508 (citing A/6546, § 198). France, together with Trinidad and Tobago, argued that "[t]he covenant would be an international treaty imposing reciprocal obligations on States; responsibility for the observance of its provisions should rest with States." *Id.* at 656 (citing A/2929, Ch. VII, § 64). Ironically, the United Kingdom, Sudan and Poland claimed that there were "no reasons for doubting that States parties would fulfil their obligations. There was nothing to prevent them from taking up cases of violations of the provisions of the covenant." *Id.* (citing A/2929, Ch. VII, § 65). However, a number of countries strongly supported the formation of the Committee, arguing that "only such an organ on (sic) the proposed committee could perform adequately the important tasks of fact-finding and conciliation contemplated in various proposals." *Id.* at 508-09 (citing A/6546, §§ 199-200).

160. Pakistan, the United Kingdom, Australia and Chile were concerned that "[g]reat harm might be done to States and even to the United Nations by a mass of irresponsible and mischievous allegations made for political or propaganda purposes." *Id.* at 656-57 (citing A/2929, Ch. VII, § 66).

161. The Soviet Union objected "to the inclusion of any reporting procedure in the Covenant on Civil and Political Rights on the grounds that any such procedure was contrary to the United Nations charter . . . and constituted a violation of national sovereignty." *Id.* at 617 (citing A/2929, Ch. VII, § 161). "Those who considered the procedure of the Committee contrary to national sovereignty, to international law and to article 2, paragraph 7, of the United Nations Charter opposed all procedures concerning complaints. In their view, each State party should make every effort to fulfil (sic) its obligations under the covenant, but no State party should set itself (sic) up a judge of the domestic actions of another. The right of individuals and groups to complaint against violations of their rights at the national level and the duty of States parties to ensure remedies for such violations were fully recognized in article 2 of the draft Covenant." *Id.* at 652 (citing A/2929, Ch. VII § 62). However, it was also recognized that while "restriction on national sovereignty was an unavoidable concomitant of the covenant . . . each State would be free to accept the covenant or not. What was involved was a

phasis upon fact-finding as the role of the Committee, as opposed to judgment or recommendations, emerged as an attempt to balance sovereignty concerns with the need for an effective assessment procedure.¹⁶² Although the drafting documents of the Covenant do not definitively determine the Committee's role, it is evident that the Committee was not intended to act as an adjudicator. The Committee's subsequent development in that direction has been at the instigation of the Committee itself.¹⁶³

voluntary relinquishment of some national sovereignty and not an invasion of it. Of course, every precaution should be taken in drafting the covenant in order to avoid adverse repercussions on the judicial and administrative processes of individual States." *Id.* at 658 (citing A/2929, Ch. VII, § 69).

Another serious concern was that the inclusion of a periodic reporting system, rather than an initial reporting requirement, might give the wrong impression to ratifying states. States might infer that the Covenant's rights were to be gradually attained, whereas the parties were actually expected to be in full compliance with the Covenant upon ratification. This fear seems to have been borne out by the parties' use of reservations to hedge incompatible practices for indefinite periods. In discussion of article 41 allowing the Committee to request any information from states parties in regard to state-filed complaints, there was debate over whether to expand the Committee's power to allow it to conduct an affirmative investigation if the accused state did not provide sufficient information. This was defended as necessary for effective fact-finding, since "without an inquiry on the spot [in past UN investigations] it was impossible to find out the real situation in regard to a particular matter within any country." *Id.* at 674 (citing A/2929, Ch. VII, § 104). However, this proposal was defeated because of concerns that it would infringe on national sovereignty and violate article 2 paragraph 7 of the UN charter. *Id.* at 674-75 (citing A/2929, Ch. VII, § 105). Once again the argument was made in favor of the proposal that "when States ratified the covenant they did so freely and willingly and were presumed to have agreed to such restrictions of their sovereignty as might be implied in the covenant." *Id.* at 675 (citing A/2929, Ch. VII, § 106). However, this view did not prevail.

162. *See id.* at 693 (citing A/2929, Ch. VII, § 109). While discussing article 41, which permits the Committee to request information from an accused state party regarding a state-filed complaint, the drafters considered expanding the Committee's power to allow it to conduct an affirmative investigation if the accused state did not provide sufficient information. Supporters argued that such authority was necessary for effective fact-finding, since "without an inquiry on the spot [in past UN investigations] it was impossible to find out the real situation in regard to a particular matter within any country." *Id.* at 674 (citing A/2929, Ch. VII § 104). However, opponents of the proposal undermined it with their fears that it would infringe on national sovereignty and violate article 2 paragraph 7 of the UN charter. *See id.* at 674-75 (citing A/2929, Ch. VII, § 105). The counter-argument was made that "when States ratified the covenant they did so freely and willingly and were presumed to have agreed to such restrictions of their sovereignty as might be implied in the covenant." *Id.* at 675 (citing A/2929, Ch. VII, § 106). In the end, this view did not prevail and the proposal was defeated. *See id.*

163. At one point in the drafting, the Covenant authorized the Committee to state its opinion about whether the Covenant had been violated if conciliation efforts were unsuccessful in a controversy under article 41. However, this was later changed so that the Committee was supposed to "confine itself to a 'brief statement of the facts.'" *Id.* at 680 (citing A/6546, §416). While some speakers felt this change greatly weakened the implementation machinery, the sponsors stated that the change "was consistent with the transformation of the Committee from an adjudicating body into an organ of conciliation, and that the brief statement of facts would, in any event, reflect all the facts which the Committee might ascertain." *Id.* In further debate over the authority of the Committee, the general decision was that

[t]he functions of the Committee are to be those of fact-finding and conciliation. Generally, it was emphasized that the work of the committee should not be of a judicial or compulsory character; rather, it should consist in the impartial establishment of facts and the lending of its good offices. A report on the findings of the committee and the publicity given to it would be an effective means of enforcement, since States might not accept any decision of the committee as mandatory. The opinion was expressed, however, that for the effective implementation of the covenant, the

In practice, the Committee has made a point of inquiring about most states' reservations when they submit their reports.¹⁶⁴ The case of Belgium is particularly instructive. Belgium offered five reservations and two declarations to the Covenant upon ratification. It indicated that it regarded its reservations as permanent, with one exception. It was willing to eventually withdraw its reservation limiting its commitment to total gender equity in light of domestic law requiring the Belgian sovereign and all successors to the crown to be male. After extensive questioning, the Committee "call[ed] upon Belgium to withdraw its reservations, and a member of the Committee [wa]s of the opinion that by failing to legislate along the lines of article 20 of the Covenant, Belgium [wa]s in breach of its obligations."¹⁶⁵ At least some members of the Committee seemed to regard questioning the validity of reservations as an integral part of their role. While the Committee was not able to offer a binding conclusion about the validity of a reservation prior to the Comment, it was clearly drawing conclusions nevertheless and offering them to the states parties as informal, oral comments.

The Committee has generally endorsed the use of transitional reservations. That is, a ratifying state should temporarily reserve those Covenant provisions with which it is not in compliance at the time of ratification and present a plan to remedy these inconsistencies. The state should then withdraw its reservations as it moves into compliance with each provision.¹⁶⁶ This recommendation should not, however, be mistaken for a pro-reservations stance. The Committee has been highly critical of states that have offered permanent reservations without intending to change their practices to conform to the Covenant.

In at least one instance, while discussing the Austrian ratification, the Committee and the state party both appeared to be frustrated by the limits of the Committee's power to address questions concerning reservations. Austria made a number of reservations to the Covenant, some in connection with other treaties it had signed and some relating to its internal law. In Austria's first report to the Committee, a discussion of those reservations ensued. Addressing a reservation preserving domestic administrative procedures, some members of the Committee "suggested that this reservation is incompatible with the Covenant."¹⁶⁷ The

decision of the commission should be mandatory and that the committee should be authorized to make recommendations or to suggest possible solutions.

Id. at 693 (citing A/2929, Ch. VII, § 109).

164. See LIJNZAAD, *supra* note 102, at 227-79 (reviewing Committee's meetings with representatives of each state party upon submission of the state's report). While the Committee usually takes a great interest in a state's reservations, there have certainly been occasions upon which it did not refer to them at all, for example in the case of Guyana. *Id.* at 249.

165. *Id.* at 239. The Committee reacted similarly to other states offering permanent reservations, including Congo and Iceland. See *id.* at 240, 250.

166. Finland did exactly this, offering seven reservations and indicating in its initial report that it intended to reform its system through legislation to accommodate the Convention and withdraw each reservation as it did so. By 1992, it had withdrawn four reservations. In its initial meeting with the Committee, a member of the Committee "praised" this temporary reservations approach. *Id.* at 242-43. In contrast, members of the Committee were critical of countries that did not reserve provisions with which they were not in compliance. The Committee criticized Barbados, among others, for this failing. See *id.* at 237.

167. *Id.* at 234.

Committee members then suggested orally that Austria withdraw several reservations.¹⁶⁸ In Austria's second report to the Committee, "[t]he Committee almost unanimously voice[d] concern about the large number of reservations formulated too generally and . . . suggested that Austria considers (sic) withdrawing reservations, and making them more specific."¹⁶⁹ Austria then sought clarification from the Committee about the status of a reservation that was intended to guarantee "the conformity of national legislation on the European Convention on Human Rights with the Covenant."¹⁷⁰ Austria took "the unusual step of asking for the assurance by (sic) the Committee that the reservation was not necessary, in which case it would be withdrawn."¹⁷¹ However, the Committee could not offer such assurance and "decided to postpone. . . answering the question."¹⁷²

Despite the intent of the Covenant drafters that the Committee possess very limited powers to make findings of fact and recommendations, the Committee has of its own accord taken on an aggressive role in questioning state parties about their reports. Through this process, the Committee's frustration with what it regarded as inappropriate reservations and with its impotence to deal with them became evident. The result was General Comment 24.

B. *The Effectiveness of the Committee's Action*

1. *The Rationale for General Comment 24*

The Committee's fundamental justifications for its decision to adjudicate and sever states parties' reservations were that they were undermining the Covenant's purpose and that no other body was properly situated to adjudicate those reservations.¹⁷³ The Committee focused first on the idea that unevaluated reservations obscure a state's treaty obligations. In order to evaluate a state party's report on its implementation of the Covenant, "the Committee . . . must know whether a State is bound by a particular obligation or to what extent."¹⁷⁴ The Committee also asserted that "[i]t is important for States Parties to know exactly what obligations they, and other States Parties, have in fact undertaken."¹⁷⁵

The Committee dismissed the methods instituted by the *Genocide Convention* case and the Vienna Convention as "inappropriate to address the problems of reservations to human rights treaties" because these methods depend on the objection of other states parties to invalidate a reservation.¹⁷⁶ Instead, since "[t]he principle of inter-State reciprocity has no place" in human rights treaties, "States have often not seen any legal interest in or need to object to reservations," regardless of the actual compatibility of those reservations with the Cov-

168. *See id.*

169. *Id.*

170. *Id.* at 234-35.

171. *Id.* at 235.

172. *Id.*

173. *See General Comment 24, supra* note 48, ¶¶ 1, 18.

174. *Id.* ¶ 1.

175. *Id.*

176. *Id.* ¶ 17.

enant.¹⁷⁷ Therefore, “[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant” because “it is an inappropriate task for States parties” and because “it is a task that the Committee cannot avoid in the compliance of its functions” because it must “take a view on the compatibility of a reservation” in order to “examine a State’s compliance.”¹⁷⁸

Although it is difficult to disagree with the Committee’s conclusion that reservations were undermining the Covenant’s reporting system, the Committee’s reasoning in support of the specific remedy it chose contains some inconsistencies. While it is desirable for everyone to understand what obligations each state party has undertaken, it cannot be argued that “it is important for States Parties to know exactly what obligations . . . other States Parties [have] undertaken” if “the principle of inter-State reciprocity has *no place*” whatsoever in human rights treaties.¹⁷⁹ The Committee seems to conceive of the Covenant as an agreement between individual states parties and the Committee, rather than an agreement among the states parties themselves.¹⁸⁰ Such a conception does not comport with an important role for the states parties in enforcing the treaty against each other. Furthermore, the Committee endorsed the general understanding that the duties imposed in human rights treaties are imposed on the individual states for the benefit of the individuals within each state’s territory.¹⁸¹ Thus, one state’s acts or omissions (or reservations) under the treaty do not affect another state’s obligations. Certainly, a party might wish to know whether another state had reserved certain provisions if it wished to object to a violation of the Covenant. However, as the Committee noted, the states parties are not in fact using this power of objection to safeguard the Covenant. Therefore, in reality, the states parties’ interest in each other’s reservations does not seem to extend beyond mere curiosity.

In addition, it is obvious that states parties would believe that they understood “exactly what obligations they . . . [have] undertaken” if they attached reservations and declarations to their ratifications; the purpose of such statements is precisely to clarify and limit the state’s duties under the Covenant. Ambiguity arises only if an outside entity purports to evaluate the validity of those reservations. It is only through the Committee’s own action in claiming power to perform such an adjudication that a state party might not know the extent of its own obligations, and so this ambiguity cannot itself be a justification for the Committee’s authority. If the text of the reservation were ambiguous, a clarification could be requested without purporting to adjudicate the reservation.

The Committee’s claim that it needs to know the extent of a state party’s obligations to perform its own functions is more compelling. In the context of

177. *Id.*

178. *Id.* ¶ 18.

179. *Id.* ¶¶ 1, 17 (emphasis added).

180. *See id.* ¶ 18.

181. *Id.* ¶ 8.

the reporting process, the Committee has developed the practice of questioning a representative of each state at the time its report is submitted and of offering oral and written comments on each state's compliance with the treaty.¹⁸² If the Committee is engaged in the practice of interpreting the treaty requirements and the state's compliance with them, it is bound by article 31 of the Vienna Convention, requiring it to consider "any instrument which was made by one or more parties in connection with the conclusion of the treaty."¹⁸³ Common sense would also require that the Committee take a state's reservations into account in evaluating its compliance with the Covenant. Therefore, a state's reservations are clearly relevant to the function the Committee is in fact performing.

Furthermore, if it is accepted that the Committee and the states parties cannot meet the Covenant requirements without a binding evaluation of the standing of reservations and declarations, the Committee is correct that it is in the best position to perform such an evaluation. The Covenant does not grant jurisdiction over controversies arising under it to an external tribunal.¹⁸⁴ Only the Committee has authority to receive complaints, or to appoint a special commission to hear them.¹⁸⁵ Only the Committee knows the relationship of each state party to the Covenant and understands how the Covenant is being implemented. Only the Committee could provide continuous and consistent oversight of reservations. These facts favor the Committee's view that it alone might possess the authority to adjudicate reservations.

Despite the superiority of the Committee over the states parties in terms of willingness and ability to enforce the Covenant, there remain two practical concerns about the effect the Comment will have on current and future states parties. First, states may be discouraged from initially ratifying the Covenant by a harsher reservations policy. After all, this fear was the reason the policy was initially so lax.¹⁸⁶ It remains to be seen what effect the Comment will have on future decisions to ratify. Not enough time has yet passed to identify any trend in the ratification process.

182. Prior to issuing General Comment 24, the Committee had made a practice of questioning reserving states about their reservations and making non-binding statements on the appropriateness of those reservations in the course of their responses to the state's general report to the Committee. Liesbeth Lijnzaad asserts that such non-binding evaluation was "without doubt within its mandate on the basis of article 40 of the Covenant." LIJNZAAD, *supra* note 102, at 193 n.46. Article 40 does not expressly authorize the Committee to inquire into reservations, but requires the Committee to evaluate "reports on the measures [states parties] have adopted which give effects to the rights recognized." Civil and Political Covenant, *supra* note 4, art. 40. It is certainly conceivable that, in this context, the Committee might inquire into the scope of a country's reservations or into the progress made into eliminating those reservations a country has characterized as temporary measures until appropriate changes in the state's law and practice can be made. However, it is not a requirement, as such, of article 40.

183. Vienna Convention, *supra* note 59, art. 31(2)(b).

184. Apparently, a reference to the ICJ was considered during the drafting of the Covenant, but discarded because of strong opposition, leaving the Convention with no adjudication mechanism because of lack of consensus. See Pechota, *supra* note 3, at 62.

185. See Civil and Political Covenant, *supra* note 4, arts. 41-42.

186. See Pechota, *supra* note 3, at 52-53.

More fundamentally, the Committee has overreached its actual power to enforce the Covenant. As an initial matter, the fact that the Committee needs to understand a state's reservation in order to constructively evaluate the state's reports only demands a clarification of the state's own understanding of the scope of its reservation.¹⁸⁷ This problem does not require the Committee to undertake the task of defining the reservation itself. On a more basic level, the Committee does not possess power to enforce the Covenant provisions; the most it can provide is a good tongue-lashing.¹⁸⁸ General Comment 24 has therefore put the Committee in the peculiar position of being able to sever a reservation it deems incompatible with the Covenant, without being able to enforce the originally reserved provision once it has severed the reservation.

While the Committee's approach to incompatible reservations in General Comment 24 has significant barriers to its effectiveness in practice, the attraction of this system is obvious. If a state's reservations are found to be incompatible with the object and purpose of the treaty (by whatever system of adjudication is considered appropriate), there are only four options: either the state will no longer be a party; the state will remain a party with its reservations in place; the state will remain a party except for those provisions to which it has attached incompatible reservations; or the state will remain a party to the entire treaty without the benefit of the incompatible reservations. The first option would be a disaster for human rights treaties, which have universality of acceptance as a significant goal.¹⁸⁹ The second option has never been officially utilized, since it would make the process of assessing reservations a futile one. The third option, as put into practice, is functionally equivalent to the second. If a state will not be held accountable for provisions to which it has attached incompatible reservations, it has succeeded in reserving those provisions, perhaps even more broadly than it initially intended. This was the solution adopted by the Vienna Convention, despite its jarring incongruity.¹⁹⁰ The fourth option is the one the Committee chose, and it has the advantage of avoiding the necessity of choosing between the integrity of the treaty and the success of a state's ratification. It also has the advantage of being the only option that can really remedy

187. Lijnzaad argues that reservations are not merely a matter about which the Committee might require clarification, but one which the Committee might well have to "interpret" as a "logical step in the work of the Committee." LUNZAAD, *supra* note 102, at 196. In my view, this depends entirely on whether one views the Committee as having an active or passive role in administering the Covenant. The language of the Covenant can accommodate either position.

188. See discussion *supra* Section I.B.

189. This is particularly troublesome when a major player such as the United States is one of the more serious offending parties. See Schabas, *supra* note 51, at 278-79 (discussing the effect of potential U.S. elimination as a state party to the Covenant). This was the international custom prior to the ICJ *Genocide* opinion. See *supra* Section II.A. Of course, there remains the question of whether a policy of severing a state's reservations will discourage ratification to an extent which also causes great harm to the goal of universal acceptance.

190. See Vienna Convention, *supra* note 59, art. 21(3). However, this provision may have been intended to take effect only if the objectionable reservation did not violate the object and purpose test, since it was qualified as applying only if the objecting state did not express that it wished to suspend treaty relations with the reserving state. See *id.* Also, the Vienna Convention did not focus on human rights treaties.

an inappropriate reservation. Under the option provided by the Vienna Convention, "[w]here there are objections to a reservation, the reserving state's position of advantage is . . . pronounced: If the reservation excludes the operation of a treaty obligation in whole or in part, an objection cannot revive that obligation against the reserving state."¹⁹¹ If the invalid reservation is severed, the treaty obligation that should never have been abrogated is revived in full force.

2. *The Effects of the Controversy*

While the policies established by the Comment would have been enough to stir up debate, the Committee's choice to make these changes by unilateral declaration was itself quite controversial. Although the process of creating international consensus is daunting and unwieldy, the Committee has done itself a disservice by failing to garner support from the states parties, since enforcement of the Covenant ultimately depends on their cooperation.

a. *Alternatives Available to the Committee*

The Committee did have other alternatives at its disposal which would not have required it to take such a controversial stand. One possibility would have been to amend the Covenant to expressly grant adjudicative power over reservations to the Committee. The Committee itself is not allowed to propose amendments; only the states parties have this power.¹⁹² Nevertheless, the Committee could have secured the cooperation of one or more states parties to propose such an amendment. This would have been a means to satisfy the consent and notice concerns that are so troubling in the Comment while formulating a more appropriate reservations regime. Of course, such an attempt might well have been unsuccessful or have been years in the process before succeeding.¹⁹³

The Committee could also have requested an advisory opinion from the International Court of Justice. Under article 96 of the United Nations Charter, only the General Assembly and the Security Council have general authority to request an advisory opinion on any legal issue from the ICJ.¹⁹⁴ Other UN organs and agencies must be authorized by the General Assembly to do so and can only request advisory opinions on "legal questions arising within the scope of

191. D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 334 (1994).

192. See Civil and Political Covenant, *supra* note 4, art. 51.

193. Ironically, although the U.S. Senate was infuriated by the Comment, the Committee's tactics bore a distinct resemblance to the U.S. approach to the ratification process. Like the United States' references to domestic constitutional law in its ratification, the Committee made some gestures at the law of treaties by referring to the Vienna Convention and the *Genocide Convention* case, but in the end its claim to the authority to adjudicate reservations is that it is "particularly well placed to perform [the] task." General Comment 24, *supra* note 48, ¶ 18. The Committee is inarguably well placed, as well as particularly knowledgeable and competent due to its constant administration of the treaty and review of states parties' practices. Had the Committee been granted authority over reservations in the Covenant itself, it seems far less likely that the United States and other states parties would have felt free to offer reservations that collectively nullify any effect the Covenant might have.

194. See U.N. CHARTER art. 96, ¶ 1.

their activities.”¹⁹⁵ Therefore, the Committee could have requested an opinion with the authorization of the General Assembly.¹⁹⁶

The ICJ is authorized by its statute to offer advisory opinions “on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations.”¹⁹⁷ The question of the fate of incompatible reservations to human rights treaties is not localized to the language of any particular treaty, but is a legal question affecting human rights treaties generally. As such, it would be a particularly appropriate subject for an ICJ advisory opinion of general applicability. In deciding its advisory opinion, the ICJ would draw from international conventions and custom, “the general principles of law recognized by civilized nations,” and national judicial decisions and legal scholarship.¹⁹⁸

Of course, the real question is whether those affected by an advisory opinion would abide by the result. As an organ of the United Nations, the Committee would have difficulty denying the validity of the decision of “the principal judicial organ of the United Nations”¹⁹⁹ on an inherently legal question of treaty interpretation. While states that are members of the United Nations are bound by the UN charter to “comply with the decision of the International Court of Justice in any case to which it is a party,”²⁰⁰ the states would not be parties to a request for an advisory opinion, strictly speaking. Putting such legal niceties aside, states have certainly been known to dispute ICJ authority and decisions. Also, the parties would likely face a long delay in waiting for a decision from the court.

Another possibility was suggested by the Organization of American States (hereinafter “OAS”), in its written statement to the I.C.J. in the Genocide Convention case.²⁰¹ The OAS is a regional body which at that time had already served as depositary for many multilateral treaties. The OAS has developed a practice of requiring states that are ratifying with reservations to circulate the reservations to the states parties before ratifying in order to allow the parties to declare in advance whether they would accept the reservation. This procedure permits a reserving state to know whether the states parties to the treaty would object to its reservations and ratification when deciding whether to submit its reservations.²⁰² While this practice is dependent on the contract-based assumptions that are inappropriate in human rights treaties, it could be modified to fit the context of the Covenant. A preliminary evaluation of reservations by the Committee would allow a state to make an informed decision about whether to

195. *Id.*, art. 96, ¶ 2.

196. The states parties, of course, could request an advisory opinion only through their instigation of a General Assembly request.

197. Statute of the International Court of Justice, *supra* note 97, art. 65.

198. *Id.* art. 38.

199. U.N. CHARTER art. 92, ¶ 1.

200. *Id.* art. 94, ¶ 1.

201. Written Statement of the Organization of American States, 1951 I.C.J. Pleadings (Genocide Convention Case) 15 (December 14, 1950).

202. *Id.* at 18.

ratify, knowing that the Committee would not accept certain reservations. This would eliminate the problematic practice of binding a state to provisions it had not accepted, while providing a more flexible system than any of the alternatives considered thus far. Some power would be shifted back to the states parties from the Committee. Unfortunately, this system would still have the pitfall the Committee was so anxious to avoid. Some states would doubtless decide not to ratify the Covenant as a result of the Committee's preliminary rejection of their reservations.

Another alternative strikes more of a middle ground. The Committee could ask states to amend their incompatible reservations rather than simply severing them.²⁰³ This process would not necessarily resolve the problem the Committee originally faced. Without any enforcement mechanisms at the Committee's disposal, states parties could easily avoid complying with requests for amendments. However, since dialogue, persuasion and international embarrassment are the only tools the Committee ultimately has at its disposal anyway, this solution would better comport with the Committee's actual power and with the parameters of the Committee's authority under the express terms of the Covenant.

b. The U.S. Response and Other Alternatives

There are a number of options the United States and other states parties troubled by General Comment 24 may consider as a means to protest the imposition of the Comment's reservations policies. The U.S. Senate has already attempted one such response. In the Foreign Relations Authorization Act for fiscal years 1996 and 1997, Congress attempted to cut off funding for United States obligations under the Covenant beginning in 1998, unless the Committee revoked the Comment and "expressly recognized the validity as a matter of international law" of the various U.S. reservations, declarations and understandings.²⁰⁴ The bill declared: "The purpose and effect of General Comment No. 24 is to seek to nullify as a matter of international law the reservations, understandings, declarations and proviso contained in the Senate resolution of ratification, therefore purporting to impose legal obligations on the United States never accepted by the United States."²⁰⁵ Although Congress passed the bill, President

203. In his recent report to the International Law Commission on the issue of reservations, the ILC's Special Rapporteur proposed that the Committee should issue nonbinding findings on the subject of a state party's reservation. The state party would then be free to respond "after having examined the finding in good faith," by maintaining, withdrawing, or replacing its reservation, or by renouncing its accession to the treaty. *Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May - 18 July 1997*, U.N. GAOR, 52nd Sess., Supp. No. 10, at 107, ¶¶ 85-86, U.N. Doc. A/52/10 (1997). [hereinafter ILC Report]. This proposal would be somewhat less authoritative than a direct request for amendment by the Committee, but the practical result would be essentially the same. It is, however, unclear why the Special Rapporteur mentioned renunciation as a possibility in the context of discussing the Committee, since it is clear from the Vienna Convention and the other literature on reservations that a state cannot simply renounce its involvement in a human rights treaty. See *infra* text accompanying notes 208-12.

204. Foreign Relations Authorization Act, Fiscal years 1996 and 1997, 1996 Cong. U.S. HR 1561, 104th Cong., 2d Sess., § 1504.

205. *Id.*

Clinton vetoed it, and the House did not muster enough votes to override the veto.²⁰⁶

Several other obvious courses of action that the United States or other parties might consider are *not* possible under the Covenant or international custom. The states parties cannot utilize a pre-existing system of dispute resolution. There is no provision in the Covenant for adjudication of disputes between states parties and the Committee. The Committee and whatever *ad hoc* commissions it may create are the only adjudicative bodies referred to in the Covenant. Their function is to adjudicate disputes solely regarding complaints from other states or from individuals that a state party is not fulfilling its obligations under the treaty.²⁰⁷ It is improbable that the United States would want to bring this controversy before an international tribunal, even if the Committee would agree to such a solution, because the Covenant's weak enforcement measures make non-adjudication a very attractive option for the United States. The United States faces no sanctions for any act it might commit in the course of this dispute. In contrast, formal adjudication would present the possibility of a ruling against the U.S. position. Without adjudication, the United States can maintain a position of defiance so long as the cost to its reputation is not too great.

The United States could not unilaterally withdraw from the Covenant under international law and custom.²⁰⁸ The Covenant itself makes no provision for withdrawal from the treaty as a whole, although it does allow withdrawal of the optional declarations recognizing the Committee's competence to hear complaints from states and individuals.²⁰⁹ The Vienna Convention allows unilateral withdrawal from a treaty only if the treaty expressly permits withdrawal, if the nature of the treaty implies a right of withdrawal, or if it can be demonstrated that the parties intended to allow withdrawal.²¹⁰ None of these circumstances are present here. According to customary international law, the United States could still withdraw from the treaty with the consent of all the parties, but this is

206. The bill that was eventually passed, HR 1868, did not address the Comment. See Foreign Operations, Export Financing, And Related Programs Appropriations Act of 1996, Pub. L. No. 104-107, 110 Stat. 704, (1996).

207. See Civil and Political Covenant, *supra* note 4, arts. 41, 42.

208. In what it is likely not a coincidence, the Committee recently addressed this issue in a general comment, finding that a state party cannot withdraw from the Covenant. See *General Comment* 26, U.N. GAOR Hum. Rts. Comm., 53rd Sess., Supp. No. 40, ¶ 5, U.N. Doc. A/53/40 (1998). The Committee used similar reasoning to that developed here, also expressing the view that since "[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party," "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them," regardless of any act taken by the state party or of a change or end to the government of the state. *Id.* ¶ 4.

209. See Civil and Political Covenant, *supra* note 4, art. 41(2); First Protocol, *supra* note 24, art. 12.

210. See Vienna Convention, *supra* note 59, arts. 42, 56. It has been suggested that commercial or trading treaties might be of a nature which would suggest a unilateral right to withdraw. The phrase appears to refer to treaties that are either expressly or implicitly temporary in nature. See SINCLAIR, *supra* note 121, at 186-88. Oppenheim expressly sets "treaties which are apparently intended . . . for a permanent purpose" outside of the class from which a state could unilaterally withdraw. 1 OPPENHEIM'S INTERNATIONAL LAW § 647, at 1298 (Sir Robert Jennings & Sir Arthur Watts, 9th ed. 1992).

probably not a viable option.²¹¹ It seems unlikely that all the parties to the Convention would be willing to release the United States from its obligations. Furthermore, an attempt to secure such an agreement would be a diplomatic endeavor on a scale the United States is probably unwilling to pursue, and the U.S. would face a substantial risk of international embarrassment by attempting to withdraw from a human rights treaty, whatever the relevant circumstances.²¹²

Nonetheless, some avenues are available to protest the Comment. The United States could propose an amendment to the treaty establishing a new reservations regime. The Covenant expressly provides that any state party may submit a proposed amendment to the UN Secretary General, which will be put to a vote if it receives the support of one-third of the states parties.²¹³ The amendment would then be accepted if it were to be approved by two-thirds of the states parties, but it would be binding only upon those states parties that approved it.²¹⁴ Of course, the reason the Covenant did not originally contain a statement on reservations was that no consensus could be reached.²¹⁵ Like securing agreement from the other states parties to denounce its ratification, proposing an amendment would require the United States to undertake a substantial diplomatic project with a high risk of failure. However, this option would permit the United States to claim the moral high ground by following an established procedure to address an issue that the Committee had confronted by simply claiming unprecedented authority.

The United States could also denounce its recognition of the Committee's competence to hear complaints about its performance of the Covenant obligations from other states parties. The Covenant allows states parties to withdraw their recognition of the Committee's competence to hear complaints from other states immediately upon denunciation.²¹⁶ Such a denunciation would leave the Committee powerless to take any action beyond requiring reports from the

211. For a discussion of international custom regarding withdrawal, see OPPENHEIM's *INTERNATIONAL LAW*, *supra* note 210, § 646, at 1297. Manfred Nowak also takes the view that the Covenant cannot be denounced except with the express agreement of every state party. See NOWAK, *supra* note 110, at xxvii.

212. Nations have been successful in unilaterally denouncing treaties based on fundamental changes in circumstances. While these changes have generally been factual changes in a nation's external circumstances and not legal changes in their obligations under the treaty, the language used by the U.S. to characterize the Comment recalls that used by the ICJ in its *Fisheries Jurisdiction* case. The U.S. described the Comment as "impos[ing] legal obligations on the United States never accepted by the United States." Foreign Relations Authorization Act, *supra* note 204, § 1504. In the *Fisheries Jurisdiction* case the ICJ declared: "The change [in circumstances] must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken." ICJ Rep (1973) at 21, quoted in OPPENHEIM's *INTERNATIONAL LAW*, *supra* note 210, § 651, at 1308. However, this interpretation would also undermine the decisions in the European Court cases that held nations responsible under treaty provisions which they had invalidly reserved. See *Belilos* case, *supra* note 51; *Loizidou* case, *supra* note 51.

213. See Civil and Political Covenant, *supra* note 4, art. 51.

214. See *id.*

215. See LUNZAAD, *supra* note 102, at 186.

216. A denunciation would not, however, prejudice the consideration of complaints that have already been submitted before the date of the withdrawal. See Civil and Political Covenant, *supra* note 4, art. 41(2).

United States on the steps it has taken to fulfill the treaty. The Committee has no sanctions or other enforcement mechanisms to respond to a failure to provide such reports or to reports that indicate failure to take any steps toward fulfillment of treaty obligations. Denunciation of the Committee's competence to hear complaints would only be a symbolic gesture, since the lack of Covenant enforcement mechanisms renders the Committee's adjudication of complaints nonbinding. Denunciation would indicate the United States' intent to distance itself from the Covenant and from the Committee while not requiring the diplomatic campaign of an amendment or denunciation of the Covenant.

If the United States were to intentionally fail to fulfill its treaty duties in protest of the Comment, as Congress threatened in the proposed Foreign Relations Authorization Act, this would constitute a breach of the Covenant. However, the Committee would have no power to respond to this breach, nor could the United States be expelled from the Covenant under the Vienna Convention.²¹⁷ Therefore, the only pressure upon the United States would stem from international embarrassment. Of course, part of the United States' motivation for ratifying the Covenant was the fact that its failure to do so had become an embarrassment for it within the human rights community and was impairing its ability to impugn other nations for their human rights failures.²¹⁸

To date, the Committee has apparently not exercised its newly claimed power to sever reservations. Rather, it has continued to limit itself to recommendations that states parties withdraw their reservations.²¹⁹ Nor has the Committee issued any new general comments on the subject.²²⁰ Therefore, no practice has been developed that would illustrate the impact this policy will have on states parties and on the Covenant as a whole.

The Committee and the United States appear to be at a standoff over the issue of the U.S. reservations, at least for the moment. The Committee reviewed the reservations and the U.S. response to the Comment in 1995, when it received the first U.S. report.²²¹ The Committee specifically objected to "the extent of the State party's reservations, declarations and understandings . . . [T]aken together, they intended to ensure that the United States has accepted only what is already the law of the United States."²²² The Committee also expressed "particular concern" at the U.S. reservations to the Covenant provisions forbidding

217. While the Vienna Convention does allow the other parties to a multilateral treaty to effectively expel a party that has breached the treaty, it does not allow expulsion in the case of a human rights treaty. See Vienna Convention, *supra* note 59, art. 60(5).

218. See S. EXEC. REP. Nos. 102-23, *supra* note 48, at 649.

219. See, e.g. Comments on United States of America, U.N. GAOR Hum. Rts. Comm., 50th Sess., Supp. No. 40, ¶ 292, U.N. Doc. A/50/40 (1996); Comments on Sweden, U.N. GAOR Hum. Rts. Comm., 51st Sess., Supp. No. 40, ¶¶ 82, 93, U.N. Doc. A/51/40 (1997).

220. General Comment 26, however, did address the suggestive issue of whether states parties could withdraw from the Covenant. The Committee found, unsurprisingly, that they could not. See *General Comment 26*, *supra* note 208, ¶ 5. General Comment 25, the only other general comment issued since General Comment 24, addressed the totally unrelated issue of the proper understanding of article 25 of the Covenant. See *General Comment 25*, U.N. GAOR Hum. Rts. Comm., 53rd Sess., Supp. No. 40, U.N. Doc. A/53/40 (1998).

221. See Comments on United States of America, *supra* note 219.

222. *Id.* ¶ 279.

imposition of the death penalty upon minors and forbidding torture or medical and scientific experimentation without consent.²²³ Despite the Committee's claim of authority to sever reservations and its firmly articulated disapproval of the U.S. reservations, the Committee did not move to sever any U.S. reservations. Rather, it "recommend[ed] that the State party review its reservations, declarations and understandings with a view to withdrawing them."²²⁴ For now, both the United States and the Committee have registered their official disapproval of the other's position, but neither has taken any further action, either through established Covenant procedures or in violation of them. In fact, the Committee has done no more to counter the U.S. reservations than it could have done before General Comment 24.

IV.

EVALUATION AND MITIGATION

A. *The International Law Commission's Review*

In 1993, the International Law Commission (hereinafter "ILC"), resolved to discuss the question of reservations at its next session and appointed a Special Rapporteur to investigate the issue.²²⁵ In 1997, the ILC considered the Special Rapporteur's second report.²²⁶ In the intervening years, this very issue had been raised by General Comment 24. Accordingly, the Special Rapporteur's report and the ILC's discussion took special note of the questions of the applicability of the Vienna Convention reservations regime to human rights treaties, and of the authority of organizations administering human rights treaties to alter that regime.²²⁷

The Special Rapporteur concluded that no exception for human rights or other normative treaties should be made to the Vienna Convention provisions on reservations, although he pointed out that parties were of course free to create their own reservations rules through express treaty provisions.²²⁸ The Special

223. *Id.* The Committee stated that these reservations were incompatible with the object and purpose of the Covenant. *Id.*

224. *Id.* ¶ 292. Indeed, there is no indication that the Committee has acted to sever any state's reservation to date. Its published materials contain no record of any such act, and its comments on state parties' reports continue to include reviews of and recommendations regarding reservations with no suggestion that severance looms. *See, e.g., id.*; Comments on Sweden, *supra* note 219, ¶¶ 82, 93.

225. *See* ILC Report, *supra* note 203, at 94, ¶¶ 44-45.

226. *See id.* at 95, ¶ 50.

227. *See id.* at 103-07, 116-23, ¶¶ 75-87, 124-46.

228. *See id.* at 103-05, ¶¶ 73-77. The Special Rapporteur noted that "the point of departure" for the Vienna Convention and the ICJ *Genocide Convention* opinion, was directly concerned with a human rights treaty. *Id.* at 104, ¶ 76. Therefore, the Vienna Convention was not only intended to be applied to human rights treaties, but the drafters certainly had the possible case of human rights treaties in mind. Furthermore, most human rights treaties since the Vienna Convention have expressly referred to it or to the object and purpose test as the governing law. *See id.* Of course, this does not address the fact that, whatever may have been the role of the *Genocide Convention* case in bringing the question of reservations to the fore, the drafters formulated the provisions with the aim of applying them to multilateral treaties generally, not to human rights treaties. Finally, the Special Rapporteur noted that it was "the lacunae and the ambiguities of the *general regime*" of the Vienna Convention that opponents were objecting to, and not problems of applying an otherwise accepted

Rapporteur also asserted that human rights bodies "could and should assess whether reservations were permissible when that was necessary for the exercise of their functions," but that they could not do more than was necessary "to discharge their main responsibility."²²⁹ In this context, the Special Rapporteur distinguished regional bodies and treaties, such as the European Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms, from global bodies and treaties, such as the Human Rights Committee and the International Covenant on Civil and Political Rights. One significant distinction is that regional ties and agreement on substantive law tend to be stronger than global relationships and agreement. Therefore, some regional treaties have granted their monitoring bodies jurisdictional power to make binding decisions, while global treaties tend to grant their monitoring bodies more limited authority.²³⁰ However, this analysis does not directly confront the Committee's formulation of the problem. The Committee claims that it needs authority to make binding decisions about reservations precisely in order to fulfill its "main responsibility." In contrast, the Special Rapporteur did not acknowledge the possibility that a monitoring organization may need more authority than is granted by a treaty in order to carry out its treaty role effectively.

The Special Rapporteur then turned to the problems of consent and state sovereignty that arise from the Comment. He sharply opposed the Committee's contention that a reservation could be severed from the state's consent to be bound by the treaty, finding that "[t]he reservations made . . . were 'consubstantial' with the State's consent to be bound by the treaty . . . [such that] the State *alone* could know the exact role of its reservation to its consent."²³¹ The Special Rapporteur directly attacked the Committee for its "excessive pretensions . . . in seeking to act as the *sole* judge of the permissibility of reservations,"²³² and for its claim of authority to make binding decisions although it was "not given decision-making powers by the States parties."²³³ He concluded that "decisions of that type made by bodies . . . like the Committee . . . would be contrary to

and comprehensive regime to human rights treaties. *Id.* at 104, ¶ 75. Therefore, the appropriate solution would be to resolve those ambiguities, not to exempt human rights treaties from the regime. However, it seems that some of these ambiguities become more pronounced and significant in the context of human rights, such as the discontinuities that result when a state objects to a reservation but not on the basis of the object and purpose of the treaty.

229. *Id.* at 106, ¶ 82. The Special Rapporteur compared the situation of human rights monitoring bodies in assessing reservations to other tribunals that must determine the validity of a reservation as a preliminary matter in order to resolve a dispute between states under the terms of a treaty. Both bodies would be justified in evaluating reservations in the course of fulfilling their primary mandate; neither would be justified in adjudicating reservations independently. *Id.* Of course, the role of monitoring bodies is much broader than the role of such a tribunal, and it is the difficulty of defining the extent of that role that is central to the question of their authority over reservations.

230. *See id.* at 107, ¶ 84 "If the [treaty monitoring] bodies were jurisdictional (such as the European Court of Human Rights), they had the power to make decisions binding on the parties concerned. If they were consultative in character, their opinion would not be binding, but the States parties should consider the opinion in good faith." *Id.* at 106, ¶ 82.

231. *Id.* at 106, ¶ 83.

232. *Id.* at 107, ¶ 87. The Special Rapporteur's view was that even if the Committee was to have authority to adjudicate reservations, the states parties had that right as well.

233. *Id.* at 107, ¶ 85.

general international law.²³⁴ The Special Rapporteur argued that bodies such as the Committee should only provide a state party with their advisory analysis on the state's reservations. The state ought then to "examine the finding in good faith" and react as it felt appropriate.²³⁵

The ensuing discussion in the ILC report covers virtually every imaginable point of view on the subject.²³⁶ A number of concerns are raised regarding ambiguities and discontinuities present in the Vienna Convention, such as the failure to acknowledge the importance of the political context for "assessing the relationship between the reservation itself and the instrument,"²³⁷ the significance of "the *impact* of reservations on treaties and . . . their possible role as a source of customary rules,"²³⁸ and the fact that there were not merely discontinuities in the Vienna rules "but also . . . obvious illogicitics."²³⁹

The discussion reveals the tension between the belief that a system of treaty administration can apply only such authority as the parties have agreed to if the treaty requirements are to maintain legitimacy in the eyes of the parties, and the countervailing awareness that the Covenant's monitoring system was not fulfilling its mandate and that the parties were knowingly abusing the weaknesses of that system.²⁴⁰ Some members of the ILC pointed out that whatever the theoret-

234. *Id.*

235. *Id.* at 107, ¶ 86. The Special Rapporteur suggested that the state would have four possibilities: maintaining, withdrawing or replacing its reservation, or withdrawing from the treaty. See *supra* discussion at note 203.

236. An example of just how broadly the discussion ranged was the comment that the Vienna Convention rules on reservations "were the result of a package deal made at the time of negotiation of the Convention, between the Soviet position, which had favored a virtually unlimited right of States to make reservations, and the more strict Western position." *Id.* at 109, ¶ 96. The implication, presumably, was that the Vienna rules should not be regarded *per se* as an authentic expression of the status quo or as the best rule that neutral legal minds could devise. Some members of the ILC who had been a part of the process of creating those rules took sharp opposition to this claim. *Id.*

237. *Id.* at 110, ¶ 101. The implication was that some discontinuity is inevitable in any proposed bright line rule as political context will vary enormously case by case.

238. *Id.* at 110, ¶ 104.

239. *Id.* at 112, ¶ 107. The speaker referred specifically to the counterproductive provisions regarding "the effects of acceptances of an objection to reservations which might lead to the same result." *Id.* See *supra* text accompanying notes 92-96.

240. Some members of the ILC took the position that "the arguments advanced by universal bodies to back up their competence . . . were political rather than juridical," and argued that this political quality indicated the weakness of the monitoring bodies' position. Others in the ILC felt that the problems human rights bodies were experiencing with states' compliance under the current regime established some legitimacy for their claims of competence to assess reservations. This faction argued that "[s]ince the regime to check the permissibility of reservations between States did not function satisfactorily, it was incumbent on those [monitoring] bodies to ensure proper implementation of the treaty of which they were the guardians." *Id.* at 120, ¶¶ 135, 136.

An interesting distinction was drawn between the question of what sort of reservations regime was appropriate, which was defined as normative, and the question of what powers a monitoring body should have, which was defined as institutional. This distinction was an attempt to justify the position that "[s]tates were free to act as they saw fit in regard to the findings of the monitoring bodies, but there was no doubt about the right of regional or international bodies to develop their practice or to create precedents." However, others felt this distinction broke down at the point that the monitoring body purported to sever the reservation. According to this view, the act of severance destroyed the balance between the normative and institutional aspects, and the monitoring body might well be acting *ultra vires*. *Id.* at 121, ¶¶ 138, 139. The Commission went on to discuss the problems of determining the state's purpose in formulating its reservation and the practical and

ical flaws of the Comment, it was a result of the states parties' practice of "frequently and knowingly formulat[ing] reservations contrary to the object and purpose of such treaties in the knowledge that the other States would not challenge them."²⁴¹ Nevertheless, there was great concern over the fact that simple seizure of authority over reservations by monitoring bodies would not only be legally inappropriate, but "could even discourage States from becoming parties to human rights treaties."²⁴² Furthermore, "the fact that [monitoring bodies] could carry out such monitoring several years after the formulation of the reservation would jeopardize the stability of treaty relations."²⁴³

While the Special Rapporteur will be developing detailed reports on various questions of reservations, including the issues raised by the Comment, the ILC has already offered some preliminary conclusions. The Commission has upheld the Vienna Convention's precepts as appropriate for all treaties, noting specifically their appropriateness for "treaties in the area of human rights."²⁴⁴ However, the ILC also stated 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."²⁴⁵ This, of course, was the justification proffered by the Committee for its need to evaluate reservations. However, the Committee claimed the authority not just to evaluate reservations and "comment," but also to sever inappropriate reservations. This extension of authority was opposed by the ILC, which concluded that:

the legal force of the findings made by monitoring bodies in the 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; . . . in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action.²⁴⁶

The Committee had also asserted that it would be the sole adjudicator of reservations. The ILC criticized this approach as well: "this competence of the monitoring bodies [to evaluate reservations] does not exclude or otherwise affect the traditional modalities of control by the contracting parties."²⁴⁷ The ILC's preliminary conclusions indicate that it would prefer to shift responsibility, and therefore, authority, back to the states parties.

theoretical problems with having a severance policy for incompatible reservations. *See id.* at 121-22, ¶¶ 141-42. There was also discussion of the extent to which the experience of regional bodies was applicable in the context of a global treaty and of the possibility that binding acts or at least nonbinding recommendations by global monitoring bodies could be justified by a theory of implicit powers in the context of their express functions or by a simple demand for effectiveness. *See id.* at 122-24, ¶¶ 143-47.

241. *Id.* at 118, ¶ 130.

242. *Id.* at 119, ¶ 135.

243. *Id.* at 119, ¶ 134.

244. *Id.* at 126.

245. *Id.* at 126. Some members voiced disagreement with this preliminary conclusion. *See id.* at 124, ¶ 150.

246. *Id.* at 127.

247. *Id.* at 126.

The ILC has initially approved of some of the Committee's conclusions in General Comment 24. The ILC offered its support for the Committee's claim to possess power to evaluate reservations as necessary in its function as a monitoring body for the Covenant, and urged states parties to "cooperate" with monitoring bodies in their evaluation of reservations.²⁴⁸ However, the ILC's preliminary conclusions sharply oppose the Committee's claim to have authority to bind the states parties to its severance of their reservations. Of course, the ILC's preliminary conclusions are, by definition, not their final word on the subject. When the Special Rapporteur presents his more detailed reports, the ILC will return to the question of reservations, and of the Comment.

B. Mitigating Problems of Consent in Human Rights Regimes

Insofar as the Covenant is viewed in a contractual context, General Comment 24 raises serious issues of proper notice and consent by the states parties. Ratification with reservations could only be regarded as implied consent to sever the reservations if states parties were aware before ratifying that severance was a possibility.²⁴⁹ Otherwise, the state is necessarily being bound to the provisions it initially reserved without its consent. The Covenant does not provide such notice, nor did the Committee provide any notice before instigating this policy. Rather, it claimed authority to adjudicate all reservations retroactively, although it has not in fact done so.

While it could be argued that the *Belilos* case provided notice prior to the Comment that severance of reservations was a possibility, this case was not well known, certainly not to domestic bodies such as the United States Senate. Furthermore, the *Belilos* case was not an interpretation of the Covenant, but of another human rights treaty. Additionally, the severance practice it employed had not become the standard practice such that a state party would expect the severance technique to be employed as a matter of course, or even to the degree that it had been accepted as one of several possibly appropriate alternatives. Rather, it represented a novel innovation. Finally, in both the *Belilos* and *Loizidou* cases, the parties were well aware that the European Court had jurisdiction to make binding determinations about any controversies surrounding the treaty, including their reservations, and they submitted to that jurisdiction when they ratified the treaty. In this case, the parties had no notice that the Committee claimed the power to adjudicate their reservations. Nor could they have supposed it could do so in any binding fashion, given the limits on the Committee's power to make any binding determinations even in those areas over which the treaty expressly grants it authority.

While the United States can garner little sympathy given its egregious list of reservations and declarations, it was correct to emphasize its lack of consent to the Covenant without the reservations as the problematic element of the Com-

248. *Id.* at 126-27.

249. Even in the *Loizidou* case, the Court had previously severed an incompatible reservation and the European Commission on Human Rights had argued that this was an appropriate practice. See *Loizidou* case, *supra* note 51, ¶ 95.

ment. It is a maxim of international law that a nation cannot be held to an agreement without its consent. In discussing the problem of reservations and consent, McNair recommended that reservations should always be addressed within the treaty itself, so that the parties "can comply in advance with the principle of unanimous consent, which is the basis of treaty obligations."²⁵⁰ Here, the lack of notice might be somewhat mitigated if a state party's reservations were determined to be so flagrant as to constitute bad faith in ratifying the Covenant. More generally, it would also be mitigated if the argument were accepted that the Vienna Convention authorizes the Committee to act because the Covenant served as the Committee's constituent instrument. Nevertheless, it cannot be denied that the United States and the other states parties could not have reasonably anticipated in light of prevailing international custom that the Committee would evaluate their reservations or that they would be treated with the severance policy.

Yet, there is another distinction between human rights treaties and other treaties that could justify binding states parties to Covenant obligations without their express consent to every provision. It is the nature of human rights treaties to create customary norms of international law that eventually bind all states, not just the states that ratified the initial treaty. The imposition of a human rights standard on a state does not ultimately depend upon that state's consent, but upon the acceptance of that standard in the international community. In this context, binding a state to a reserved human rights norm does not pose the same affront to national sovereignty as would be presented by binding the state to an economic or political provision.

The accepted international law treatises confirm this view of the purpose of human rights treaties. McNair observes:

Strictly speaking, a treaty of this [constitutive, public law] kind . . . binds at first the parties thereto and no other States. But it is undeniable that after a period of time, to which no fixed duration can be attributed, the mere lapse of time and the acquiescence of other States in the arrangement thus made have the effect of reinforcing the essential juridical element of the treaty and converting what may at first have been a partly *de facto* situation into a *de jure* one.²⁵¹

Oppenheim also notes that:

relatively extensive participation in a treaty, coupled with a subject matter of general significance and stipulations which accord with the general sense of the international community, do establish for some treaties an influence far beyond the limits of formal participation in them. These factors . . . assist the acceptance of the treaty's provisions as customary international law in addition to their contractual value for the parties.²⁵²

Even the U.S. Senate implicitly recognized this characteristic of human rights treaties when it acknowledged that its purpose in ratifying the treaty was to gain credibility in pursuing enforcement of certain human rights norms which it be-

250. McNAIR, *supra* note 67, at 169.

251. *Id.* at 259.

252. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 210, § 583, at 1204.

lieved to be appropriate apart from their codification in the treaty itself.²⁵³ Oppenheim concludes from this special character of human rights treaties that "the effect of entering a reservation to such a provision, or denouncing a treaty containing such provisions, or becoming a party to such treaty, is different from the effect in relation to a treaty merely constituting a consensual agreement *inter parties*."²⁵⁴ However, he does not speculate about the particular nature of such effects.

Even a slightly less grandiose vision of the purpose of the Covenant leads to the conclusion that the Comment does not have the same detrimental impact on states parties' sovereignty that it might in the context of another sort of treaty. The Covenant could be viewed primarily as an attempt to create a regime for countries with no internal processes for adjudicating human rights abuses. Under this analysis, the purpose of ratification by countries with domestic adjudication systems in place is primarily to bolster the norms being propagated by the treaty. The lack of enforcement mechanisms makes more sense in this context. The states with well-developed human rights practices will not need the mechanisms, whereas the states with no such internal mechanisms will be educated simply by the process of evaluation.

Finally, the absence of enforcement mechanisms in and of itself is a substantial mitigator of the notice and consent concerns. The Covenant's lack of enforcement provisions means that a state's loss of its reservations does not create any practical consequences for it. The Comment's infringement upon the sovereignty of states parties is therefore largely theoretical.

C. Conclusion

In the period before the Committee enacted General Comment 24, reservations had become a means for a ratifying state to insulate itself from any obligations under the Covenant. The Committee was unable to limit the use of reservations as a means to temporarily clarify a state's legal obligations while it moved into compliance with the Covenant. The states parties were not acting to identify and object to reservations that violated the object and purpose of the treaty. The Committee found itself perpetually frustrated in its attempts to actively administer the treaty and evaluate states parties' compliance. General Comment 24 is in keeping with the international movement toward successful ratification of treaties despite reservations to which some parties object. However, the general progression in international law has also been toward successful implementation of reservations.

253. See S. EXEC. REP. NOS. 102-23, *supra* note 48, at 649. In his article on the *Belilos* case, Henry Bourguignon justifies the European Court's decision to wield authority over reservations in a slightly different way. Rather than viewing the European human rights conventions as creating customary law, he believes the European Court's jurisprudence has developed a practice of "treat[ing] the Convention as a quasi-constitutional bond." Bourguignon, *supra* note 138, at 371. Such a claim would not, of course, apply to the Covenant.

254. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 210, § 583, at 1205 n.6.

While there are fundamental questions about the Committee's authority to adjudicate the reservations, a broad reading of the Vienna Convention would provide a legal basis for such authority, taking into account the states parties' acquiescence in the Committee's earlier expansion of its functions. The Committee's argument that it alone stands in a position to act as an adjudicative body and that it is competent to do so is a strong one. The Covenant itself, however, sharply limits the Committee's power and does not indicate that it might have authority over reservations. It would have been more appropriate for the Committee to propose an amendment to the Covenant granting it this authority, although this process might well have proved unsuccessful. It is unlikely that the Committee can successfully adjudicate reservations when it does not have the authority to make binding judgments about a state's compliance with the provisions of the Covenant. There is also the possibility that the Comment will discourage states from ratifying the Covenant.

While there is some precedent for severing incompatible reservations, this practice can hardly be characterized as international custom. The issues of notice and consent that the United States raised are mitigated by the purpose of human rights treaties to create customary norms that bind all states, not just those which are parties. They are also mitigated by the very fact that diminishes the effect of the Comment: there are no serious consequences that result from failure to comply with a provision of the Covenant. On the contrary, the Committee has power to do no more than publicize such a failure.

Of course, in the end what will determine the success of the Comment will be whether most states accept this new authority. The ICJ's introduction of the object and purpose test in the Genocide Convention case was utterly novel, based only on the ICJ's practical concerns about administering a human rights treaty. The dissenting members of the Court vigorously opposed the new rule, for which there was "no trace of any authority,"²⁵⁵ protesting that "the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties."²⁵⁶ Yet the object and purpose test proved so useful that it has become the international standard for analysis of reservations. The Comment may yet do the same.

255. Genocide Convention case, *supra* note 60, at 42 (Guerrero, McNair, Read & Mo, dissenting).

256. *Id.* at 32.