

RESERVING

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INTRODUCTION

The law of reservations is, perennially and by acclamation, the most complex and controversial component of treaty law.¹ Roughly similar issues have been with us for over fifty years, notwithstanding the vigorous pursuit of their resolution. In 1950, the General Assembly considered the subject sufficiently important to petition the International Court of Justice for advice,² resulting in one of the Court's first advisory opinion.³ The General Assembly simultaneously tasked the International Law Commission with addressing reservations,⁴ resulting most immediately in a mere report⁵ – but also in a General Assembly resolution characterized by one commentator as “one of the most fundamental documents in the history of the law of treaties.”⁶ Fifteen years later, after much reflection and debate within and without the Commission, reservations were addressed in an important section of the Vienna Convention on the Law of Treaties.⁷

Although the Vienna Convention's provisions on reservations hardly pretended to restate customary rules, they now provide a comprehensive scheme for reservations – their formulation, their acceptance or their rejection, and their legal effects – that governs, by default, in a wide range of treaties. If a treaty is otherwise silent, the Convention bars reservations that are incompatible with the treaty's “object and purpose.” If other states

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¹ See, e.g., J.M. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 97, 101 (1975) (“The question of reservations has been one of the most controversial subjects of contemporary international law.”). After quoting Hersch Lauterpacht's submission in 1953 that “[t]he subject of reservations to multilateral treaties is one of unusual – in fact baffling – complexity,” and D.P. O'Connell's 1970 statement that reservations are “a matter of considerably obscurity in the realm of juristic speculation,” Anthony Aust – one of today's leading authorities on treaty law – indicates that such views “are even truer today.” Anthony Aust, *Modern Treaty Law and Practice* 110 (2000).

² G.A. Res. 478, U.N. GAOR, ¶ 1, 5th Sess. (Nov. 16, 1950).

³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28) [hereinafter *Genocide Convention*].

⁴ G.A. Res. 478, supra note __, ¶ 2. The ILC had in fact already been considering the matter. See SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES*, 1945-1986, at 424-25 (1989).

⁵ Report of the International Law Commission to the General Assembly, [1951] 2 Y.B. Int'l L. Comm'n 123, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

⁶ ROSENNE, supra note __, at 430; see G.A. Res. 598 (VI), U.N. GAOR, 6th Sess. (Jan. 12, 1952).

⁷ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, arts. 19-23, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*]; see Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session and Eighteenth Session, U.N. GAOR 21st Sess., Supp. No. 9, ¶ 35, U.N. Doc. A/6309/Rev.1 (1966) [hereinafter 1966 Report].

do not object within one year, the reservation modifies the treaty for the reserving state and for all others in their relation to the reserving state. If another state *does* object, does so only for itself, and it is presumed to be objecting only to the reservation, and not to the reserving state's ratification as a whole (though it could explicitly opt to prevent the treaty from coming into effect as between the two states); in that case, only the clause to which the reservation relates is deemed inapplicable as between the objecting state and the reserving state.

This leaves a large number of matters unresolved, and still other conflicts buried beneath the surface. Suppose that Canada ratifies a multilateral treaty barring the harvesting of seals, but attaches a reservation indicating that the treaty does not apply to its native peoples. If that reservation is incompatible with the treaty's object and purpose, is it automatically void, or void only upon the objection of another state? (On that front: How can the reservation's incompatibility be evaluated other than by objection on a state-by-state basis? If state objections are in fact pivotal, and Belgium objects two years after being informed of Canada's reservation, has it tacitly accepted that reservation by failing to object on a timely basis – even if Canada's reservation is incompatible with the object and purpose?) If the treaty regime establishes a treaty monitoring body, is Canada's reservation subject to that body's approval? And if that treaty body has the authority to pronounce Canada's reservation incompatible, may it insist that Canada withdraw the reservation, regard Canada as a non-party, or treat Canada as though it ratified without tendering the reservation?

These issues have been debated by academics, states, and international organizations since the advent of the Vienna Convention, with little evidence to date of any real progress.⁸ Several recent initiatives have the potential for upsetting the status quo. Returning to the fray, the International Law Commission appointed a Special Rapporteur to address the subject of treaty reservations; over the past decade, the Commission has received nine reports of extraordinary length and detail, in turn generating its own voluminous reports, while adopting draft articles incrementally.⁹ The UN Human Rights Committee, which in 1994 took a strong and controversial stance

⁸ For helpful recitations of these questions, see International Law Comm'n, First Report on the Law and Practice Relating to Reservations to Treaties: Preliminary Report by Alain Pellet, Special Rapporteur, 47th Sess, at ¶¶ 124, 148-49 [hereinafter Special Rapporteur, First Report] (describing ambiguities and gaps in the Vienna Convention); Thomas Giegerich, *Addendum 1998*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 965, 969 (2000).

⁹ As of this writing, the latest submissions by the Special Rapporteur are his Eighth Report and its supplements, one of which is dubbed the Ninth Report. See International Law Comm'n, Eighth Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, A/CN.4/535 (2003) [hereinafter Special Rapporteur, Eighth Report]; International Law Comm'n, Eighth Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, A/CN.4/535/Add. 1 (2003) [hereinafter Special Rapporteur, Eighth Report Add. 1]; International Law Comm'n, Ninth Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, A/CN.4/544 (2004) [hereinafter Special Rapporteur, Ninth Report]. The latest reaction by the International Law Commission to his efforts is the Report of the International Law Commission, 56th Sess., U.N. GAOR Doc. A/59/10 (2004) [hereinafter ILC, 56th Session Report]. Finally, the Special Rapporteur's work is also appraised in the Sixth Committee of the General Assembly. For the latest reaction, see Report of the International Law Commission on the Work of its Fifty-Fifth Session: Topical Summary of the Discussion held in the Sixth Committee of the General Assembly during its 58th Session, A/CN.4/537 (2004) [hereinafter Sixth Committee, Topical Summary on 55th Report].

regarding the incompatibility of certain reservations with human rights treaties (and, significantly, their severability),¹⁰ has set up a working group to address the subject before the Commission.¹¹ Still elsewhere within the United Nations, a sub-commission of the Commission on Human Rights,¹² having begun a self-described “battle” with the International Law Commission over whether human rights treaties require a separate reservations regime,¹³ recently agreed to stand down – at least until the Commission Special Rapporteur’s next report.¹⁴ Regional organizations, like the Council of Europe,¹⁵

¹⁰ Human Rights Committee, General Comment No. 24, UN Doc. CCPR/C/21/Rev.1/Add. 6 (1994) (available at <http://www.unhchr.ch/tbs/doc.nsf>) [hereinafter General Comment No. 24]; accord *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, Annex, UN Doc. CCPR/C/67/D/845/1999, ¶¶ 6.6-6.7, reprinted in 2 Annual Report of the Human Rights Committee for 2000, A/55/40, Annex XI.1 (deciding that reservation deemed inconsistent the Covenant on Civil and Political Rights and its Protocols would not preclude the admissibility of an individual complaint). *But see* *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, *supra* (dissenting opinion); *Evans v. Trinidad and Tobago*, Communication No. 908/2000, Annex, UN Doc. CCPR/C/77/D/908/2000 (dissenting opinion). France, the United Kingdom, and the United States abreacted to the severability position. Observations by France on General Comment 24, 4 INT’L HUM. RTS. REP. 6 (1997) [hereinafter France Observations]; Observations by the United Kingdom on General Comment 24, 3 INT’L HUM. RTS. REP. 261 (1996) [hereinafter UK Observations]; Observations by the United States on General Comment 24, 3 INT’L HUM. RTS. REP. 265 (1996) [hereinafter U.S. Observations]. Nonetheless, the Human Rights Committee’s position on the role to be played by treaty bodies has been supported by other such groups. UN Office of the High Commissioner for Human Rights, Report of the Ninth Meeting of Persons Chairing the Human Rights Treaty Bodies, A/53/125 (Annex), ¶ 18 (May 14, 1998) (reporting chairpersons’ “firm support for the approach reflected in General Comment No. 24”).

¹¹ UN Press Release, Human Rights Committee Decides to Set Up Working Groups on Reservations and on Streamlining Reporting Procedures Among Treaty Bodies, Oct. 31, 2002, available at <http://www.unhchr.ch>.

¹² The nomenclature is potentially confusing. The Human Rights *Commission*, a U.N. agency under the Economic and Social Council (ECOSOC), is distinct from the Human Rights *Committee* – a treaty-based body responsible for the ICCPR, and the author of the aforementioned General Comment No. 24.

¹³ UN Press Release, Subcommission Continues Debate on Rights of Children, Freedom of Religion and International Terrorism, HR/SC/98/29, Aug. 24, 1998 (reporting that Françoise Jane Hampson, later designated as Subcommission Special Rapporteur with regard to reservations, represented that “a ‘battle of reservations to human-rights treaties’ was under way in United Nations agencies”).

¹⁴ UN ECOSOC, Comm’n on Human Rights, Sub-Comm’n on the Promotion and Protection of Human Rights, Specific Human Rights Issues: Reservations to Human Rights Treaties, Final Working paper submitted by Ms. Françoise Hampson 4, E/CN.4/Sub.2/2004/42, at 19 (July 19, 2004) [hereinafter Final Hampson Working Paper]; for earlier input from the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as it was then known, see UN ECOSOC, Comm’n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Reservations to Human Rights Treaties: Working paper submitted by Ms. Françoise Hampson pursuant to Sub-Commission decision 1998/113, E/CN.4/Sub.2/1999/28 and Corr.1 (June 28, 1999). Perhaps surprisingly, members of the Human Rights Commission, of which the Sub-Commission is a subsidiary body, had been among those applying pressure for the Sub-Commission to yield. UN Press Release, Comm’n on Human Rights, 57th Sess., Apr. 25, 2001 Commission on Human Rights Adopts Ten Resolutions, Measures on the Death Penalty, Impunity, and Other Issues Concerning the Promotion and Protection of Human Rights (reporting that the Commission on Human Rights “decided to request the Subcommission to reconsider its request to appoint Françoise Hampson as a Special Rapporteur to carry out a comprehensive study on this issue in the light of the work under way by the International Law Commission”); UN ECOSOC, Comm’n on Human Rights, Promotion and Protection of Human Rights, E/CN.4/2001/L.103 (Apr. 20, 2001) (reporting draft decision submitted by India asking Sub-Commission to reconsider its undertaking, in light of ILC work); UN ECOSOC, Comm’n on Human Rights, Promotion and Protection of Human Rights,

have shown ongoing interest in developing and refining new reservations practices, and appear equally discontent with standing pat on the Vienna Convention.

Despite substantial differences on the details, there is agreement within these initiatives, and among scholars, about the character of the law of reservations. Reservations regimes may be depicted as posing a choice between treaty universality and treaty integrity,¹⁶ or between privileging the rights of reserving and non-reserving states,¹⁷ but both dichotomies actually share a common ground: reservations are understood to involve sharp (if not zero-sum) tradeoffs between honoring the consent of states agreeing to the unreserved treaty and respecting the conditioned consent of reserving states,¹⁸ and the law is said to decidedly favor the latter.¹⁹ The pervasive

E/CN.4/2002/L.100/Rev. 1 (Apr. 24, 2002) (reporting draft decision by Japan requesting the Sub-Commission to take heed of ILC work).

¹⁵ See Council of Europe, Committee of Ministers, Recommendation No. R(99) 13 of the Committee of Ministers to Member States on Responses to Inadmissible Reservations to International Treaties (May 18, 1999); Committee of Legal Advisers on Public International Law, Practical Issues Regarding Reservations to International Treaties, CM (2000) 50, App. 4, April 26, 2000 (Abridged report of the 19th meeting (Berlin, 13-14 March 2000)), <https://wcm.coe.int/ViewDoc.jsp?id=348409&Lang=en>.

¹⁶ See Lawrence J. LeBlanc, *Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice*, 4 INT'L J. CHILDREN'S RTS. 357, 359 (1996) (noting common agreement that "two 'contending forces,' or 'values,' have shaped the development of the law: integrity and universality") (quoting Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, IOWA L. REV. 295, 297 (1985)); e.g., Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT' L. 245 [hereinafter Redgwell, *Universality*].

¹⁷ I use the term "non-reserving" rather than "objecting" since, as will be discussed, states often take no overt position regarding the reservations proposed by others. See Reports of the International Law Commission on the Second Part of its Seventeenth Session, U.N. GAOR, 21st Sess., Supp. No. 9, at 38, A/6309/Rev. 1 [hereinafter ILC, Seventeenth Session Reports]. To be clear, a state may be deemed "non-reserving" with respect to another state's proposed reservations, but enter different reservations on its own behalf.

¹⁸ This tradeoff is obvious as it relates to the dichotomized interests of reserving and non-reserving states, but is equally fundamental to the other depiction. Treaty universality aims at enabling widespread state consent. The notion of treaty integrity, on the other hand, was originally understood to mean preserving the object and purpose of the treaty as negotiated, and not permitting reservations to subvert the consensual interest of others. See Anderson, *Reservations to Multilateral Conventions: A Re-Examination*, 13 INT'L & COMP. L.Q. 450, 474-75 (1964); e.g., 1966 Report, *supra* note __, at 36 (describing the "[t]he principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties"). More recently, though, treaty integrity is also invoked as part of a claim that treaties advance – and reservations betray – some inherently desirable obligations, particularly in the case of human rights treaties.

As Ryan Goodman notes, those taking the position that reservations may be severable sometimes concede that their position is inconsistent with state consent. See Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 533 & n.11 (2002) (citing examples). That is not universally the case, though, and a number take the view that any sacrifice in the reserving state's consent is more than offset by the respect shown for the consent of other state parties, which is arguably undermined by permitting states to become parties while subscribing only completely to the treaty. Goodman's own contribution, in any event, is to frame the case for severability solely in terms of promoting the reserving state's consent.

¹⁹ See, e.g., LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES 66 (1994) (describing advantages accruing to reserving states); D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 328 (1994) (criticizing the Vienna Convention's reservation regime as "giv[ing] an unacceptable advantage to the reserving state"); Final Hampson Report, *supra* note __, at ¶ 26

ambiguities in the law play a supporting role. Whatever their cause, it is thought, such ambiguities impair the progressive development of a reservations regime, and tend to disadvantage non-reserving states; the solution, expressly embraced by some participants in the International Law Commission project, is to resolve those ambiguities.

If we maintain this focus on state consent – bracketing the objection that deviations from certain treaties are objectionable *per se*²⁰ – existing criticisms, and the ambitions of those revising the law of reservations, are flawed, because they understate how reservations contribute to the interests of a non-reserving state.²¹ In fact, the positive law of treaty reservations – understood as reflecting, rather than surmounting, the ambiguities that frustrate critics – plausibly serves the interests of non-reserving states, and arguably does so even to a greater degree than for inveterate reserving states. Describing these patterns is not intended to redeem them, but instead may serve as a first step toward addressing them appropriately.

Part I of the paper briefly reviews the relevant controversies concerning the Vienna Convention's provisions on reservations. Part II then identifies how facilitating reservations may promote the interests of non-reserving states, and Part III describes the extent to which attempts at reform are consistent or inconsistent with those interests. In contrast to many accounts, my purpose is not to resolve the reservation regime's ambiguities, or to hazard the best solution in light of the Convention's objectives or some extrinsic value. The point, instead, is to describe the law that exists – to the extent that it exists – with particular care to the supposed victim, a state that disfavors another state's reservations. As Part I makes clear, gaps in the Vienna Convention indeed pose plausible problems for state parties, but they have been slow to adopt any solution either within the Convention framework or by overriding it. The limited ambition of this paper is to proffer several reasons why this might be, on the premise that an accurate assessment of the status quo should precede attempts to fix it.

(“The Vienna Convention regime favours the reserving state.”); Jan Klabbers, *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, 69 NORDIC J. INT'L L. 179, 179 (2000) (“One of the main sources of discontent has always been that whether a state would accept another state's reservation or not, the reserving state would get what it desired, unless the objecting state made known that its objections were so fundamental as to prevent the entry into force of the treaty between the reserving and the objecting party.”).

²⁰ This is a potentially significant complaint against the existing reservations regime, but it is not entirely independent of the concerns described in this paper. Even those who resist relativism often concede that human rights commitments must themselves be contextualized, including by their “specific institutional embodiment” at the local level, Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUMAN RIGHTS Q. 461, 508 (1997), and there is no reason to think these embodiments should not be reflected at the international level. The claim that normative force of claims is compromised, however, if the terms of the commitments in multilateral treaties is affected by the rules governing reservations – a hypothesis I tender below.

²¹ To be clear, some recent scholarship has suggested a kindred reexamination of state interests. Ryan Goodman, for example, has tried to explain how the interests of *reserving* states might be reconciled to recent apparent inroads into their prerogatives. See Goodman, *supra* note ___. And Francesco Parisi and co-authors, in work discussed further below, have sought to explain how non-reserving states may be under-compensated in some regard. See Vincy Fon & Francesco Parisi, *The Hidden Bias of the Vienna Convention on the Law of Treaties*, George Mason Univ. Law and Economics Working Papers 03-20; Francesco Parisi & Catherine Sevchenko, *Treaty Reservations and the Economics of Article 21 of the Vienna Convention*, BERKELEY J. INT'L L. 1 (2002).

Several caveats regarding this paper's incompleteness are in order. First, I generally assume that states are rational, unitary actors. Second, because I attempt a general assessment of reservations, the paper is not perfectly adapted to any particular type of multilateral conventions (though at several junctures important distinguishing features, such as those concerning human rights conventions, are noted). Third, I do not purport to address all the controversies surrounding reservations – ignoring, for example, the difficult task of distinguishing between reservations and interpretive declarations, which has attracted considerable attention). Fourth, in suggesting that the existing reservations regime has hidden virtues, I do not mean to suggest that it is optimal or in equilibrium, either independently or as part of a broader system of commitment and escape mechanisms. The argument, instead, is that reservations reforms should pause (yet longer) before undermining potentially desirable elements of the status quo.

I. THE LAW OF RESERVATIONS

A. *The Backdrop to the Vienna Convention*

While drafting the Vienna Convention, the International Law Commission had the luxury of considering several different types of reservations schemes.²² The traditional approach required that all other treaty parties agree to a state's proposed reservations. Requiring unanimity plainly discouraged reservations, but largely as an incidental effect of its broader orientation – toward state consent, expressed collectively. Though other approaches could be found, many possessed the same fundamental orientation. A more yielding variant, sometimes called the “collegiate” approach, required approval of the proposed reservation by a qualified majority; a weaker version, still, enabled the *rejection* of a reservation based on a qualified majority.²³ A harsher variant, on the other hand, simply banned any reservations at all.²⁴ Whether reservations had room to flourish depended, accordingly, on which voting rule was in effect, but in each case the state parties presented a single face toward them.

Another approach was meaningfully different in character. Under the Pan American doctrine,²⁵ a state proposing reservations submitted them to the treaty depository for circulation to the other signatories, which then had the opportunity to

²² For general discussions, see INGRID DETTER, *ESSAYS ON THE LAW OF TREATIES* (1967); FRANK HORN, *RESERVATIONS AND INTERPRETIVE DECLARATIONS TO MULTILATERAL TREATIES* (1988); ROSENNE, *supra* note __, at 356-57, 424-36; IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* ch. 3 (2nd ed. 1984); Rudolf L. Bindschedler, *Treaties, Reservations* (1984), in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 965 (2000); Giegerich, *supra* note __, at 968.

²³ Sinclair, *supra* note __, at 60-61; see, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, 1966, art. 20(2), 660 U.N.T.S. 195 (requiring rejection of a reservation when two-thirds object).

²⁴ An important example that emerged well subsequent to the Vienna Convention's drafting, but just after it entered into force, was the U.N. Convention on the Law of the Sea of 1982, article 309 of which banned any reservations.

²⁵ So dubbed after the then-Pan American Union, now the Organization of American States. See Convention on Treaties, signed in Habana on Feb. 20, 1928, OAS Law and Treaty Series No. 3. Pan American Union, Washington, D.C., 1950; see Rules Adopted by the Governing Body of the Pan American Union on the Procedure to be followed in the Deposit of Ratifications, Resolution XXIX of 4 May 1932, reprinted in 2 *Yearbook of the International Law Comm'n* 250 (1956).

object. The proposed reservations would be effective as against those states that had accepted them, but if a state objected, no treaty relations would be forged between it and the reserving state. The reserving state might always decide, in light of this response, to discard the reservation entirely. Absent that, this disaggregated the treaty into a three sets of bilateral relationships – one type for treaty relations between the reserving state and accepting states (the treaty’s original terms, as altered by the reservation), a second for treaty relations between the accepting states and other, non-reserving states (the treaty’s original terms), and a third for non-treaty relations between the reserving state and objecting states. The result, significantly, was that states were no longer unified in their appraisal or their final position.

A third approach, sometimes described as the “flexible” approach, was developed in the International Court of Justice’s *Genocide Convention* advisory opinion. The inquiry was occasioned by a relatively pedestrian problem – namely, whether U.N. lawyers tasked with reckoning when the Genocide Convention came into force should count states that had ratified with reservations eliciting objections.²⁶ But the Court’s answer was more ambitious. It denied that a requirement of absolute treaty integrity (or the unanimity principle serving the same end) “ha[d] been transformed into a rule of international law.”²⁷ To the contrary, the Court cited the prevalence of reservation, the allowance of tacit assent to them, and practices permitting reserving states to be regarded as treaty parties by some but not all states,²⁸ noting too that objections “appear to be too rare in international practice to have given rise to such a rule.”²⁹

In the absence of any background norm, the Court considered that the question turned on the treaty in question,³⁰ and the Court found it plausible that the drafters of the Genocide Convention had intended to permit reservations – perhaps not mentioning the possibility so as not unduly to encourage them.³¹ Not only was universal participation of the highest priority, thus implying the need to forgive the minor deviations facilitated by reservations, but the nature of the treaty meant that reservations imposed few costs on non-reserving states: in such a treaty, “the contracting states do not have interests of their own,” but instead have the common interest of promoting “the accomplishment of those high purposes which are the *raison d’être* of the convention.”³²

On the Court’s view, the importance of collective assent, and perhaps even individual state assent, took a back seat to whether the proposed reservations were consistent with the treaty’s object and purpose, a principle that was supposed to guide

²⁶ Rosenne, *supra* note __, at 424-25.

²⁷ Genocide Convention, 1951 I.C.J. at 24.

²⁸ Genocide Convention, 1951 I.C.J. at 21-22. In this vein, the Court later cited the practice of state members of the Organization of American States. *Id.* at 25.

²⁹ Genocide Convention, 1951 I.C.J. at 25. For the rival views of states on the question of whether, and when, the unanimity rule was a matter of customary international law, see Sinclair, *supra* note __, at 54-57.

³⁰ Genocide Convention, 1951 I.C.J. at 22 (“The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect”)

³¹ *Id.* at 22-23.

³² *Id.* at 23-24.

both those states making reservations and those considering whether to object.³³ Reservations that were compatible with the object and purpose would not, in theory, prevent a reserving state from becoming a party to the treaty, while those that were incompatible would presumably provoke objection by non-reserving states. The Court acknowledged that states might have differing opinions about compatibility. But in that event, those states regarding a reservation as incompatible with a treaty's object and purpose would regard the reserving state as not a party to the treaty, while those not objecting would implicitly have accepted the reserving state as a party, apparently accommodating its reservation in the bargain.³⁴

Four judges, dissenting in a common opinion,³⁵ depicted unanimous consent to reservations as a rule of law, but *not* an insurmountable one; the virtue of such a clear rule, instead, was to facilitate the negotiation by governments of alternative rules suitable to the convention in question.³⁶ The majority's approach, in contrast, was faulted not

³³ The Court spelled this out carefully:

The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.

Any other view would lead either to the acceptance of reservations which frustrate the purposes which the General Assembly and the contracting parties had in mind, or to recognition that the parties to the Convention have the power of excluding from it the author of a reservation, even a minor one, which may be quite compatible with those purposes.

Id. at 24.

³⁴ Id. at 26 ("[I]t necessarily follows that each State objecting to it will or will not, on the basis of its individual appraisal within the limits of the criterion of the object and purpose stated above, consider the reserving State to be a party to the Convention. In the ordinary course of events, such a decision will only affect the relationship between the State making the reservation and the objecting State"). Two potential exceptions were noted: first, when states dissatisfied with other parties' acceptance of a state's reservation sought a more general "jurisdictional" resolution of the matter on the common plane; second, when a state objected, but *without* claiming that a reservation was incompatible, and "an understanding [developed] between that State and the reserving State [to] the effect that the Convention will enter into force between them, except for the clauses affected by the reservation." Id. at 27.

³⁵ Id. at 31 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo). A separate dissent, submitted by Judge Alvarez, argued that the better result would be to hold plainly that reservations were simply inadmissible (particularly so for multilateral conventions like the Genocide Convention), and that if they must be accepted – due, for example, to an express provision in the convention – they would have more drastically change the nature of the convention. Id. at 49, 54-55.

³⁶ Id. at 37 ("While the principle of law governing reservations is clear, it permits negotiating governments the greatest flexibility in making express provisions in treaties. Against this background of principle, the law does not dictate what practice they must adopt, but leaves them free to do what suits them best in the light of the nature of each convention and the circumstances in which it is being negotiated."); see id. at 37-42 (citing examples, including that of the Genocide Convention).

only as lacking any basis in law,³⁷ but also for its ambiguity and difficulty of administration: a treaty's "object and purpose" would rarely be evident, and the individual appraisals by states would certainly vary, ordinarily without any means of resolving them – particularly as to any dispute resolution provisions that might, as in the Genocide Convention, themselves be the subject of reservations.³⁸ This forceful dissent laid out, in effect, the groundwork for criticisms of the Vienna Convention regime.

B. *The Vienna Convention and its Ambiguities*

The *Genocide Convention* opinion stressed that it only concerned that one treaty;³⁹ perhaps for that reason, the International Law Commission did not view its own project as mooted, and indeed was initially inclined to revert to the unanimity approach.⁴⁰ The transformation in its views toward a more flexible approach may in part be attributed to internal matters.⁴¹ But the Commission was also reacting to the mounting evidence in the practice of states – which suggested that unanimity would be impractical due, for example, to the increasing number of states participating in treaty-making, and the expanded competences of treaty depositories⁴² – and, more directly, to state involvement in the drafting process.⁴³

The Commission's attention to state practice, and the reciprocal attention of states to the Commission's undertaking, seems to have been well advised. Unlike the Court's opinion, which was officially confined to the Genocide Convention (and, even in that

³⁷ Id. at 42-43.

³⁸ Id. at 43-46.

³⁹ Id. at 20.

⁴⁰ 2 YB. INT'L L. COMM'N 128, ¶ 24 (1951) (concluding that "the criterion of the compatibility of a reservation with the objects and purposes of a multilateral convention . . . is not suitable for application to multilateral conventions in general").

⁴¹ See, e.g., Sinclair, *supra* note __, at 59 (attributing "fundamental change in the Commission's approach to reservations" to the appointment of a new special rapporteur in 1961).

⁴² Compare 2 YB. INT'L L. COMM'N 130-31 (1951), with 1966 Report, *supra* note __, at 321-22; see Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 289 (1991) (reporting that "[t]here were 110 delegations at the two sessions of the conference convened to negotiate the Vienna Convention, but not one favored the unanimity rule governing the admission of reservations.").

⁴³ To be sure, states had also participated in the Genocide Convention proceedings, see Genocide Convention, 1951 I.C.J. at __, but their participation in the ILC is somewhat more direct. Members of the International Law Commission are nominated by member states, but elected by the General Assembly, and serve in a representative capacity. Statute of the International Law Commission, arts. 2-11, available at <http://www.un.org/law/ilc/texts/statufra.htm>. Compare Statute of the International Court of Justice, art. 17 (stressing impartiality of judges) with id. art. 31 (permitting parties to a dispute to ensure the presence of a judge of its nationality, subject, *inter alia*, to the impartiality requirement). In principle, "[g]overnments have an important role at every stage" of the Commission's work; actual involvement varies, but participation during the drafting of the Vienna Convention was relatively high. UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 21-22, U.N. Sales No. E.95.V.6 (5th ed. 1996).

To be clear, I do not mean to suggest that the Vienna Convention rules on reservations, when drafted, were the unmediated result of state preferences. The Commission's preferences, and other factors, undoubtedly played a significant role. See, e.g., Rosenne, *supra* note __, at 427 (surmising that the General Assembly was surprised by the results of its initial inquiry).

regard, remained advisory in character),⁴⁴ the Vienna Convention was to be both binding and applicable to a wide range of multilateral conventions.⁴⁵ To be sure, the Convention allowed states to elect whatever approach to reservations they might prefer, much as the Court had in *Genocide Convention*. At the same time, its drafters consciously resisted limiting the Convention to the kinds of treaties addressed by the *Genocide Convention* opinion, instead addressing all manner of multilateral conventions.⁴⁶ And even though the Convention formally bound only parties to it, and with effect only as to subsequent treaties,⁴⁷ some suggest that its reservations regime has become binding customary international law.⁴⁸

The basic structure of the Convention is similar to the scheme described in *Genocide Convention*. Assuming a treaty is silent, the Convention allows reservations to be proffered unless they are incompatible with the treaty's object and purpose.⁴⁹ If non-reserving states fail to object to a proposed reservation within twelve months, the reservation is deemed to have been accepted,⁵⁰ and is effective both for the reserving state and for non-objecting states in their relation to the reserving state.⁵¹ If a state *does* object, it is presumed nonetheless to be accepting the reserving state as a treaty party,⁵² in

⁴⁴ The gap between advisory opinions and those rendered in contentious cases is not terrifically wide, and the limited authority of advisory opinions may speak more to the limited authority of the Court's pronouncements in general. Cf. MOHAMED SHAHABUDDIN, PRECEDENT IN THE WORLD COURT 171 (1996) (suggesting that "although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings."). But it is notable, in any event, that the General Assembly found it necessary to endorse the Court's opinion to guide the Secretary General's practice as depository, and to recommend its guidance to states. G.A. Res. 598(VI), U.N. G.A.O.R., U.N. GAOR, 6th Sess., 360th plen. mtg. at 84, U.N. Doc. A/L.37 (Jan. 12, 1952); see also

⁴⁵ For a review of the reservations to the Convention itself, see Sinclair, *supra* note __, at 63-68; for a current list of such reservations, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>.

⁴⁶ A separate convention was eventually promulgated for treaties involving international organizations. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. GAOR, U.N. Doc. A/CONF.129/15, reprinted in 25 I.L.M. 543 (1986). Addressing that convention is beyond the scope of this paper.

⁴⁷ Vienna Convention, *supra* note __, art. 4.

⁴⁸ The most persuasive view is that the Vienna Convention did not state customary international law, but may have since become accepted as such. Compare SINCLAIR, *supra* note __, at 13-14 (describing reservations provisions as "represent[ing], at least in some measure, progressive development rather than codification), with Report of the International Law Commission on the Work of its Forty- Ninth Session, U.N. GAOR, 52d Sess., Supp. No. 10, para. 58(a), U.N. Doc. A/52/10 (1997) [hereinafter 1997 ILC Report] (suggesting that Convention articles are now accepted as customary international law). Others, though, appear to take a stronger view. See, e.g., General Comment No. 24, *supra* note __, ¶ 6 & n.2; William A. Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, 1994 CAN. Y.B. INT'L L. 39, 46 (describing Convention, including as to reservations, as "a codification treaty usually considered to set out the customary rules in this field").

⁴⁹ Reservations are also prohibited if the treaty says so, or if it implies as much by "provid[ing] that only specified reservations, which do not include the reservation in question, may be made." Vienna Convention, *supra* note __, arts. 19(a), (b). For examples of each, see Schabas, *supra* note __, at 46.

⁵⁰ Vienna Convention, *supra* note __, art. 20(5).

⁵¹ Vienna Convention, *supra* note __, art. 21(1)(a) & (b).

⁵² Vienna Convention, *supra* note __, art. 20(4)(b).

that case, the provisions to which the reservation related are deemed inapplicable as to relations between the two states.⁵³

This sketch, however, passes over some genuine ambiguities, and raises a question of interpretive method. According to the Convention itself, there are formal rules for reading a treaty,⁵⁴ but these methods are often less than decisive; as one commentator remarked, treaty interpretation typically depends less on interpretive rules than on “ascertaining the logic inherent in the treaty, and *pretending* that this is what the parties desired.”⁵⁵ This presumes that a logic can readily be perceived, and that the parties are of one mind, two propositions that are very much at issue in the instant case. It is useful, accordingly, to identify the potential areas of uncertainty – in particular, those affecting the parties whose desires are *not*, in theory, promoted by the reservations scheme. As suggested previously, non-reserving states are often thought to have been most poorly accommodated by the flexible reservations approach. Indeed, the sum of the uncertainties afflicting them suggests, at least superficially, that the law of reservations is badly in need of fixing.

1. *The initial standing of reservations.* As noted above, Article 19(c) of the Vienna Convention provides that states “may . . . formulate a reservation unless . . . the reservation is incompatible with a treaty’s object and purpose.”⁵⁶ While straightforward on its face, this provision fails to resolve important questions about when, and the conditions under which, this incompatibility bar kicks in. Some of the implications for state behavior are spelled out later, but it is worth first explaining the uncertainty afflicting the question of whether states – especially non-reserving states – have any role to play at all.

If incompatibility is supposed to constrain a state even as it is formulating a reservation, one natural reading is that incompatible reservations are void *ab initio* – or, perhaps, are properly not regarded as reservations at all.⁵⁷ But this reading, sometimes termed the “permissibility” approach to reservations,⁵⁸ is not inevitable, once Article 19(c) is read in context. For one, a treaty’s object and purpose is not self-evident, and the

⁵³ Vienna Convention, *supra* note __, art. 21(3).

⁵⁴ The Convention advises focusing on the meaning of the language employed, construed in light of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” Vienna Convention, *supra* note __, art. 31 (providing that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). Where the result is “ambiguous or obscure,” or “manifestly absurd or unreasonable,” resort may be had to supplementary means of interpretation such as “the preparatory work of the treaty and the circumstances of its conclusion.” Vienna Convention, *supra* note __, art. 32.

⁵⁵ O’Connell, *supra* note __, at 253; see Aust, *supra* note __, at 185.

⁵⁶ See *supra* notes __ and accompanying text.

⁵⁷ See, e.g., D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT’L L. 67 (1976-77). Some additional reasons are elaborated in the next section.

⁵⁸ The term, together with the rival “opposability” label, may have originated in Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT’L L.J. 71, 97 (1982). For general discussion of the debate, see Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 EUR. J. INT’L L. 437, 452-54 (2002); Redgwell, *Universality*, *supra* note __, at 263-69.

rule can hardly be regarded as self-enforcing.⁵⁹ The Vienna Convention sheds no light on the proper reckoning,⁶⁰ and treaties typically do not specify what their objects and purposes.⁶¹ Without any means of determining whether a reservation is incompatible, it is harder to credit the suggestion that incompatible reservations are automatically void – unless one supposes that each reserving state is trusted to be the judge of its own cause.

Instead, those opposing the permissibility approach – sometimes called the “opposability” school – argue that the Vienna Convention contemplates vesting the other, non-reserving states with the final authority on the question of compatibility.⁶² On this view, the other state parties are to consider whether a proposed reservation is incompatible with the treaty’s object and purpose; they may object on any ground, to be sure, but their most serious charge is to assess whether a reservation is incompatible. If they accept the reservation, or fail to object within the allotted time, this may reflect their considered judgment that the reservation does not violate the treaty’s object and purpose, but it is in any event determinative of the question.

Neither of these perspectives is obviously correct.⁶³ While the permissibility approach fails to account for the Convention’s assignment of a role for non-reserving states and the possibility of tacit consent, the opposability approach fails to take seriously the limits imposed by Article 19(c) on the formulation of reservations – or, for that matter, to give force to the notion of incompatibility at all, given that (on the opposability view) all bases for objection have equal standing.⁶⁴ Moreover, incompatible reservations

⁵⁹ See, e.g., Isabel Buffard & Karl Zemanek, *The ‘Object and Purpose’ of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311 (1998); Jan Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINN. Y.B. INT’L L. 138 (1997). The problems with using a treaty’s object and purpose as a threshold test for reservations was evident from the beginning. See Genocide Convention, *supra* note __, at __ (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo) (“[W]e have difficulty in seeing how the new rule can work. When a new rule is proposed for the solution of disputes, it should be easy to apply and calculated to produce final and consistent results. We do not think that the rule under examination satisfies either of these requirements. It hinges on the expression ‘if the reservation is compatible with the object and purpose of the Convention’. What is the ‘object and purpose’ of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.”).

⁶⁰ As Schabas observes, the interpretive approach commended by the Vienna Convention, see *supra* note __, indicates that a treaty’s object and purpose is to be determined in light of its object and purpose. See Schabas, *supra* note __, at 48.

⁶¹ Schabas, *supra* note __, at 47.

⁶² See, e.g., Ruda, *supra* note __; see also Bindschedler, *supra* note __, at 965 (“If a reservation were to be incompatible with the object and purpose of a treaty, but all the other contracting parties were to accept it notwithstanding, the reservation probably would attain validity; in such circumstances another treaty with different aims would come into being”).

⁶³ Nor is it obvious which view more commentary favors. Compare Lijnzaad, *supra* note __, at 41 (“The majority of writers conclude that, though compatibility is an objective criterion, it will ultimately be the States parties who will decide upon the acceptability of a given reservation.”), and *id.* at 41-43, with Goodman, *supra* note __, at 534 n.21 (representing that “[t]he majority view among legal scholars is that, under the modern system, individual states cannot ‘accept’ state R’s incompatible reservation, unless all state parties consent to such a fundamental change.”); cf. First Report of the Special Rapporteur, *supra* note __, at ¶¶ 96-115 (describing division of opinion between permissibility and opposability schools, and taking position that the Commission could not resolve the debate at that juncture).

⁶⁴ When the *Genocide Convention* advisory opinion rejected unanimity, it suggested that compatibility with the object and purpose of a treaty “must furnish the criterion for the attitude of the State

fit awkwardly within the scheme described by Articles 20 and 21; just like reservations expressly or implicitly precluded by the treaty's terms, with which they are grouped,⁶⁵ incompatible reservations may in principle be judged as such without any intervention by a non-reserving state, and do not seem appropriately made part of a treaty through sheer inaction.

Nor, finally, do the permissibility and opposability approaches exhaust the range of possible constructions. For example, while the Vienna Convention creates a default presumption that reservations will modify treaty relations between the reserving state and non-reserving states,⁶⁶ an incompatible reservation might plausibly – irrespective of objection – void that default, without necessarily preventing the reserving state from becoming a party to the treaty. But identifying the most plausible interpretation or best rule is beyond the scope of this paper; what matters, for immediate purposes, is that the Convention's text admits of different understandings.

Practice has not resolved these fundamental questions. While support for the permissibility approach may be predominantly conceptual, states do sometimes address allegedly incompatible treaty reservations as though they were never good – or reveal, through their commentary or conduct, that they regard objecting to such reservations as strictly unnecessary, and that they place little real stock in the idea of tacit consent.⁶⁷ Treaty monitoring bodies, too, have increasingly asserted the right to re-evaluate the compatibility of treaty reservations.⁶⁸ Neither pattern seems consistent with the view that places responsibility in the hands of non-reserving states, and assumes that incompatibility becomes a non-issue – or, put differently, that the states have collectively, through their inaction, established a new understanding of the treaty's minima – if non-reserving states have initially failed to object.

On the other hand, there remains little or no common understanding as to the object and purposes of treaties, either as a general matter or with regard to particular

in making the reservation on accession *as well as for* the appraisal by the State in objecting to the reservation” – implying that the only basis for an objection was compatibility. Genocide Convention, *supra* note __, at __. The Commission adopted this approach in its 1962 proposals, but after several states protested that objections were often made on other grounds, see 1966 Report, *supra* note __, at 107 (comments by Australia); *id.* at 115 (comments by Denmark); *id.* at 174 (comments by United States), it dropped that limitation. Most commentators, accordingly, consider that objections may be made not just on incompatibility grounds, but on virtually any other basis, and with precisely the same effect. See, e.g., Aust, *supra* note __, at 127 (“No reasons for an objection have to be given, though they often are. Even if the basis for the objection is pure policy, it will have the same effect as an objection on legal grounds.”); Sinclair, *supra* note __, at 61; Redgwell, *supra* note __, at 251, 255 & n.52. *But cf.* Schabas, *supra* note __, at 63-64 (“Although Article 20 of the Vienna Convention does not specifically link the issue of objections with the grounds of illegality enumerated in Article 19, such a relationship is generally assumed. In other words, a state could not arbitrarily object to a reservation formulated by a ratifying state, but must base its objection on the breach of the ‘object and purpose’ test or of some other rule.”).

⁶⁵ See Vienna Convention, art. 19(a), (b), & (c).

⁶⁶ For further discussion, see *infra* text accompanying notes __.

⁶⁷ For example, views were recently voiced within the General Assembly's Sixth Committee to the effect that objecting on incompatibility grounds was not necessary, but might be helpful in alerting other parties to a treaty. See Sixth Committee, Topical Summary on the 55th Report, *supra* note __, ¶¶ 178, 188.

⁶⁸ See *infra* text accompanying notes __.

treaties, though that is central to any permissibility-oriented approach.⁶⁹ Even the low hanging fruit seem out of reach. Perhaps reservations contrary to peremptory norms are per se incompatible with a treaty's object and purpose,⁷⁰ but one may distinguish between reservations to the underlying peremptory norm (which would, concededly, be impermissible) and reservations as to treaty-based means of *enforcing* that norm;⁷¹ in any event, there is little agreement concerning which norms are peremptory in character.⁷² The same problem afflicts assertions that reservations inconsistent with customary international law are also per se incompatible.⁷³ Attempts to develop burden-shifting devices – such as the Human Rights Committee's view that reservations to non-derogable provisions of a treaty are *not* per se incompatible, but merely establish a "heavy onus" on states making the reservation⁷⁴ – have been no more successful. Reserving states may not, accordingly, be capable of evaluating the compatibility of a potential reservation without the assistance of the other parties⁷⁵ or, perhaps better, a disinterested and public spirited treaty body.⁷⁶ The similarities between the two interpretations will make it

⁶⁹ Attempts to articulate or apply the compatibility test almost invariably backfire. For example, the Human Rights Committee described in the object and purpose of the ICCPR in the following capacious terms:

In an instrument which articulates very many civil and political rights, each of the many articles, and their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

General Comment No. 24, *supra* note __, ¶ 7.

⁷⁰ See General Comment No. 24, *supra* note __, § 8.

⁷¹ See, e.g., U.S. Observations, *supra* note __.

⁷² See Schabas, *supra* note __, at 49-53. The Vienna Convention, again, provides no guidance, defining peremptory norms merely as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted" (which is to say, those that are peremptory). Vienna Convention, *supra* note __, art. 53.

⁷³ See General Comment No. 24, *supra* note __, § 8. The principal difference being the amount of opposition to that view and the Committee's own inconsistency in observing it. See Schabas, *supra* note __, at 54.

⁷⁴ General Comment No. 24, *supra* note __, § 10.

⁷⁵ The ILC commentary, at least, suggests as much in indicating that admissibility "is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States." See 1966 Report, *supra* note __, at 39 (commenting on then-Article 16).

⁷⁶ In the view of the Human Rights Committee, neither the reserving state nor the non-reserving states have a sufficient degree of impartiality and commitment to the public interest. See *id.*, *supra* note __, at § 18 ("Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.").

To supporters of an incompatibility approach, the reliance on other states or on international bodies is only a secondary characteristic. See, e.g., AUST, *supra* note __, at 118 ("The compatibility test should be applied objectively, even if in most cases it has to be applied by states rather than by a court – a situation which is quite normal in international law. And if a reservation has been objected to by even one contracting state for failing the test, the reserving state has an obligation to consider the objection in good faith. If the two states (there may of course be more) cannot agree, the question then becomes a matter of concern to the other contracting states, whether or not they have objected."); see also Horn, *supra* note __,

difficult to resolve which is more prevalent,⁷⁷ thus undermining any interpretive clues that might be derived from practice,⁷⁸ and equally impairing any attempt to divine a customary international law reaching beyond the Convention.⁷⁹

2. *The form and timing of objections.* Once a state has tendered a reservation, Article 20 of the Vienna Convention indicates that non-reserving states may accept the reservation or object to it – no other options are specified. An objection is presumed not to preclude the treaty’s entry into force “unless a contrary intention is definitely expressed by the objecting State,” in which case the objection decisively bars treaty relations – again, no third course is immediately apparent.⁸⁰ Objections may be made on any basis whatsoever. But they must, it would appear, be tendered within twelve months, or a non-reserving state will be deemed to have accepted the reservation.⁸¹

For reasons already suggested, the problem of incompatible reservations makes this less clear than it may initially appear.⁸² If incompatible reservations are void *ab initio*, it may be reasoned, it should be unnecessary to object – some even argue that it would be *inappropriate* to do so.⁸³ Second, it is mistaken also inappropriate, on this view, to regard states that fail to object to incompatible reservations as having tacitly accepted them, even if twelve months have passed. Third, it would be inappropriate to assume that an accepted (tacitly or otherwise) reservation has the same effect on treaty relations between the reserving and accepting state, as if there were nothing distinctive about reservations that are inconsistent with the object and purpose of a treaty – if, for example, a state party to the Genocide Convention were to include a reservation permitting it to commit genocide whenever it should appear especially necessary, it is inconceivable that such a term would modify the treaty’s terms *inter se*. Fourth, and finally, it would appear inconsistent on this permissibility view if objecting states were

at 121 (“[A]n incompatible reservation under article 19(1)(c) should be regarded as incapable of acceptance and as *eo ipso* invalid and without any legal effects. The trouble is that the possibilities to determine the incompatibility of a reservation in an authoritative and generally binding way are limited. As far as no objective procedure is available every party will make this evaluation individually.”).

⁷⁷ In theory, a state’s failure to exercise self-restraint in submitting reservations might be independently assessed as a violation of international law, thus supporting the *ab initio* interpretation, but I am aware of no such instances.

⁷⁸ See *supra* text accompanying notes ____.

⁷⁹ Cf. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (describing customary international law as evidenced by “a general practice accepted as law”).

⁸⁰ Vienna Convention, *supra* note ___, art. 20(4)(b) (stating that “an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State”).

⁸¹ Vienna Convention, *supra* note ___, art. 20(5) (“For purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is deemed to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”).

⁸² See generally Special Rapporteur, Eighth Report Add. 1, *supra* note ___, ¶ 73 (concluding that “Article 20, paragraph 5 gives ambiguous indications as to the period in which an objection may be formulated”).

⁸³ See, e.g., Bowett, *supra* note ___. But see *supra* text accompanying note ____ (describing view expressed in the Sixth Committee).

required to preclude explicitly entry into force of incompatible reservations.⁸⁴ Of course, if incompatible reservations fall entirely within the general legal scheme,⁸⁵ as the opposability school suggests, none of these concerns are well taken: states may accept even an incompatible reservation, even tacitly, and thereby modify the treaty's application between the reserving and the accepting states.⁸⁶

The uncertainty surrounding these questions pervades the actual practices of non-reserving states. States do not, in fact, always make clear whether they intend to object, accept, or take some intermediate position: for example, responses to reservations are sometimes more in the nature of queries, sometime due to difficulties in construing the intended scope of the reservation in question.⁸⁷ Even where the intention to object is manifest, the objection may be unclear as to whether the objecting state intends to prevent the reserving state from becoming a party to the treaty in relation to it. Uncertain responses of this character may be attributable to insufficient stringency as concerns the form of reservations, the form of objections, or both.⁸⁸

Moreover, states frequently make objections more than twelve months after receiving notice of a reservation, when in principal objecting is purposeless.⁸⁹ To be sure, dilatory objections may be attributable to the kinds of technical questions that afflict any deadline. An objecting state may regard a query of the kind just mentioned as tolling its period for objection. Even without any such place-holder, late objections may reasonably be blamed on reservations that are initially vague or misleading in character, or which proved impossible to assess at the time of their making.⁹⁰ Faced with the alternative of lodging a provisional objection – itself a measure arguably in tension with the requirement that objections be perfected within one year⁹¹ – late objections may be the lesser of two evils. Finally, late objections may simply be due to reasonable disagreements about when notification actually transpired.⁹²

Even were all of these creditable explanations, they do not seem sufficient to explain the problem's pervasiveness. Late reservations are endemic to human rights

⁸⁴ Lijnzaad, *supra* note __, at 45 (citing authorities espousing this view).

⁸⁵ See Aust, *supra* note __, at 117 (noting argument); see also *supra* note __; ILC 1966 Report, *supra* note __, at 39 (indicating that then-Article 16(c) must “be read in close conjunction with the provisions . . . regarding acceptance of and objection to reservations”).

⁸⁶ Vienna Convention, *supra* note __, art. 21(1).

⁸⁷ See, e.g., Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶¶ 86-92 (describing examples of “quasi-objections”); Lijnzaad, *supra* note __, at 225 (describing advent of the “pseudo-objection” under the ICCPR).

⁸⁸ See *infra* text accompanying notes __.

⁸⁹ See Horn, *supra* note __, at 205-09.

⁹⁰ For example, as in reservations promising to gradually accomplish a particular objective.

⁹¹ Redgwell, Reservations, *supra* note __, at 397-401.

⁹² The twelve-month period commences when the non-reserving state is “notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.” Vienna Convention, *supra* note __, art. 20(5). Notification may be provided either by the reserving state itself, or by the treaty depositary. See Vienna Convention, *supra* note __, art. 78(b), 78(c). For general discussions of timing niceties, see Horn, *supra* note __, at 205-09; Lijnzaad, *supra* note __, at 147-48; LeBlanc, *supra* note __, at 378-79.

treaties, in particular, at least in proportion to the number of timely objections.⁹³ Even conspicuous, unambiguous reservations may attract them. For example, while a number of states objected to the U.S. reservations to the ICCPR, not one of them appears to have been made on a timely basis.⁹⁴

While this might suggest that the twelve-month limit has not yet become customary international law,⁹⁵ the implications for the Vienna Convention regime are not clear. At a minimum, though, state practice casts a further cloud over the notion that tacit acceptance is accepted for all forms of reservations and objections, opening the door to less absolute understandings. To some, for example, Article 20(5)'s time limit is ambiguous as to whether it "expresses a criterion for the validity of an objection or it establishes no more than a presumption of acceptance," and there may be good reasons for preferring to regard it only as a presumption.⁹⁶ The case seems even stronger for distinguishing between exempting objections on incompatibility grounds from any strict deadline, or subjecting dilatory incompatibility objections to some lesser sanction.⁹⁷ Whatever the merits of these suggestions, the overlapping excuses for late objections make it unclear what rule states are forging – or routinely violating – and suggest that the scope of the tacit acceptance rule will remain murky.

3. *The effect of objections.* Under Article 21, if a non-reserving state accepts a reservation, it modifies for the reserving and non-reserving states, with respect to one another, "the provisions of the treaty to which the reservation relates to the extent of the reservation."⁹⁸ On the other hand, if a non-reserving state objects, without specifically denying the reserving party's status as a party, "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."⁹⁹

The uncertainty surrounding Article 21 stems in part from mundane problems of application: for example, the difficulty of resolving whether an objecting state has stated with sufficient clarity that it wishes to preclude treaty relations, or the ambiguity concerning which provisions are those "to which the reservations relates" or what "the extent of the reservation" measures. But the principal puzzlement actually stems from trying to distinguish the various paths open to non-reserving states – due, in particular, to

⁹³ Lijnzaad, *supra* note __, at 147-48 (addressing Convention on Racial Discrimination); *id.* at 222-24 (ICCPR); *id.* at 382 (Convention Against Torture); LeBlanc, *supra* note __, at 378-79.

⁹⁴ See Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L.Q. 390, 394-95 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 PA. L. REV. 399, 434-35 (2000).

⁹⁵ This appears to be the United Kingdom's position. 68 Brit. Y.B. Int'l L. 489 (1997).

⁹⁶ Horn, *supra* note __, at 208-09. Horn's argument cites state practice, but also adverts to the drafting history, functional considerations, the language of other conventions, and the fact that Article 20(5) states only that "a reservation is considered to have been accepted" when no objection has been made within a year – language that, without more, seems perfectly sufficient to refer to a deemed, but conclusive, acceptance.

⁹⁷ This solution requires a rather nuanced view of the relationship among Articles 19 through 21, but it is not out of the question. One might say, for example, that Article 21 requires that a reservation be "established" in accordance with Articles 19 and 20, and that incompatible reservations by definition are not. Cf. Aust, *supra* note __, at 117-18.

⁹⁸ Vienna Convention, *supra* note __, art. 21(1)(a), (b).

⁹⁹ Vienna Convention, *supra* note __, art. 21(3).

the evident similarity in result between accepting a reservation and objecting to it. As Elena Baylis observed,

[T]here 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.¹⁰⁰

The principal consequence of this system, the criticism runs, is that states have little incentive to refrain from formulating reservations in the first place. As explored below, the fact that reservations are reciprocal in character seems insufficient by itself to deter reservations – the potential advantages to reserving states bear no necessary relation to its disadvantage in extending the same privileges to others.¹⁰¹ This would matter less, of course, if the Convention identified clear alternatives to acceptance which, if invoked, would discourage the formulation of reservations. But objections appear to add little to the non-reserving state's arsenal, and reserving states may fairly discount their likelihood. Even if it were possible to distinguish between tailoring a provision to accommodate a reservation and knocking out the entire provision, the latter course may not be well tailored to a non-reserving state's interests: while it may ordinarily provide little incentive to object, even with regard to reservations that are inconsistent with the treaty's object and purpose,¹⁰² it also poses the possibility that a minor reservation to an important clause has the effect, after (and only after) objection, of interfering with the object and purpose of the treaty.¹⁰³ While states do have the option of expressly objecting to the treaty entering into force between the reserving and the objecting state, such objections are relatively rare, at least in part because they appear decisively to renounce what the non-reserving state really wants.¹⁰⁴

¹⁰⁰ Elena Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 294 (1999); see also Lijnzaad, *supra* note __, at 48; Ruda, *supra* note __, at 200; Sinclair, *The Vienna Convention on the Law of Treaties*, at 77.

¹⁰¹ See *infra* text accompanying notes __.

¹⁰² For example, where the reservation in question addresses the entirety of the provision.

¹⁰³ Here too, the reserving state has recourse: unless the treaty states otherwise, a reservation may be withdrawn at any time, without the consent of any accepting (and, presumably, objecting) state. Vienna Convention, *supra* note __, art. 21(1).

¹⁰⁴ See Final Hampson Report, *supra* note __, at ¶ 26 (explaining that “[t]he only tool in the hands of the objecting State is its ability to deny the entry into force of the treaty between itself and the reserving State. That result is the opposite of what it seeks; ratification without the offending reservation.”).

Given that reservations and objections may be withdrawn, however, see Vienna Convention, *supra* note __, art. 22, the apparent definiteness and finality of this form of objection may be called into question. It is not clear on the face of the Convention, for example, whether a state's withdrawal of an objected-to reservation should automatically revive its party status relative to an objecting state which had objected to that relationship solely on the basis of the now-withdrawn reservation – or whether the Convention instead affords each objecting state the opportunity to elect for itself whether to lift the effect of its sanction, even in that instance.

Two responses are of particular interest, not the least because they have raised more ambiguities than they have resolved. Some non-reserving states have decided to ignore the limited choices afforded by the Vienna Convention – particularly the choice between preventing the reservation’s application and preventing the treaty from entering into force as between the states – and to claim some different effects for their objections. The intellectual foundation, unsurprisingly, is the claim that objections premised on a reservation’s impermissibility are governed by Article 19, which suggests that states may not formulate reservations contrary to a treaty’s object and purpose, rather than Article 21.¹⁰⁵ Whatever their premise, some objections claim what has been described as an “intermediate effect” (in which the objecting state claims to disapply not only the reserved-to treaty clauses, but also other provisions not expressly referred to by the reservation) and “super maximum effect” (in which the objecting state claims to have a binding relationship with the reserving state under the entire treaty, including any provisions to which the reservation pertains).¹⁰⁶

A second response to the uncertain effect of objections – and, not incidentally, to the burden that rules like tacit acceptance seem to place on non-reserving states – has been the advent of intervention by treaty-monitoring bodies.¹⁰⁷ Whether such bodies have a role in reviewing reservations, or taking action concerning them, would seem in the first instance to turn on whether the underlying treaty – or at least the agreement in effect of the state parties – provides the body with such a role. The absence of any such authority was indeed pivotal in the decision by some bodies that they lacked the capacity to evaluate reservations.¹⁰⁸ But other bodies, like the European Commission on Human Rights¹⁰⁹ and the European Court of Human Rights,¹¹⁰ have concluded the opposite, with little more by way of explicit authority.¹¹¹

The pivotal factor has likely been those bodies’ differing perceptions of the need to correct the Vienna Convention regime. To the Human Rights Committee, the burden “necessarily [fell] to [it] to determine whether a specific reservation is compatible with the object and purpose of the Covenant [on Civil and Political Rights] . . . in part because . . . it is an inappropriate task for States parties in relation to human rights treaties, and

¹⁰⁵ See, e.g., Sixth Committee, Topical Summary on 55th Report, *supra* note __, ¶ 178.

¹⁰⁶ See, e.g., ILC, 56th Report, *supra* note __, at 276; Special Rapporteur, Ninth Report, *supra* note __, ¶¶ 95-96 (citing examples). For further discussion, see *infra* text accompanying notes __.

¹⁰⁷ For a good general discussion, see Korkelia, *supra* note __.

¹⁰⁸ See Legal Effects of Statements of Interpretation and Other Declarations Made at the Time of Ratification or Accession, ST/LEG/SER.C/14, UN Juridical Y.B. 219-21 (1976) (reporting view by the Office of Legal Affairs regarding the Committee on the Elimination of Racial Discrimination); The Legal Opinion of the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat Upon an Inquiry by the Committee Concerning the Implementation of Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women, in Report of the Committee on the Elimination of Discrimination Against Women, Official Records of the General Assembly, 39th Sess., Supp. No. 45, UN Doc. A/39/45, 55, at 56.

¹⁰⁹ *Temeltasch v. Switzerland*, 1982 DR 31, 120, at 144-45.

¹¹⁰ *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. H.R. Rep. 466 (1988) [hereinafter *Bellilos Case*].

¹¹¹ Nor is the phenomenon confined to human rights instruments – see, for example, the International Whaling Commission. Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Case of Cuba and Iceland*, 14 COLO. J. INT’L L. & POL’Y 53, 73-77 (2003).

in part because it is a task that the Committee cannot avoid in the performance of its functions.”¹¹² The general flaw in the Vienna Convention’s application to human rights treaties, according to the Committee, is that such treaties are non-reciprocal. Rather than constituting “a web of inter-State exchanges of mutual obligations,” they are endowments of individuals with rights in which reciprocity is generally irrelevant;¹¹³ given the lack of immediate state self-interest, a state may remain silent even when a reservation is incompatible with a treaty’s object and purpose.¹¹⁴ Because the issue of whether reservations were effective had to be more conclusively determined in order to fulfill the Committee’s function – and, the dissenters in the Genocide Convention case and others had argued, the state-based system offered little in the way of finality,¹¹⁵ and because the Committee would be a more objective source of legal principles – its intervention was wholly appropriate.¹¹⁶

The role of treaty-monitoring bodies is one of the more controversial aspects of reservations law,¹¹⁷ and I do not intend to address it completely. But it is useful to highlight three respects in which the function of those bodies arguably accentuates, rather than resolves, the Vienna Convention’s ambiguities. First, the Committee’s reasoning purports to accept some, but not all, aspects of the Vienna Convention for application to

¹¹² General Comment No. 24, *supra* note __, ¶ 18. The functions to which the Committee alluded involved its role in assessing state compliance and in reviewing individual communications under the First Optional Protocol.

¹¹³ *Id.* at ¶ 17.

¹¹⁴ *Ibid.*

¹¹⁵ See, e.g., Genocide Convention, *supra* note __, at __ (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo):

It is said that on the basis of the criterion of compatibility each party should make its own individual appraisal of a reservation and reach its own conclusion. Thus, a reserving State may or may not be a party to the Convention according to the different view-points of States which have already become parties. Under such a system, it is obvious that there will be no finality or certainty as to the status of the reserving State as a party as long as the admissibility of any reservation that has been objected to is left to subjective determination by individual States. It will only be objectively determined when the question of the compatibility of the reservation is referred to judicial decision; but this procedure, for various reasons, may never be resorted to by the parties. If and when the question is judicially determined, the result will be, according as the reservation is judicially found to be compatible or incompatible, either that the objecting State or States must, for the first time, recognize the reserving State as being also a party to the Convention, or that the reserving State ceases to be a party in relation to those other parties which have accepted the reservation. Such a state of things can only cause the utmost confusion among the interested States.

See also Daniel L. Hylton, Note, *Default Breakdown: The Vienna Convention On The Law Of Treaties’: Inadequate Framework On Reservations*, 27 VAND. J. TRANSNAT’L L. 419, 448-50 (1994) (arguing for development of authoritative decision makers regarding reservations).

¹¹⁶ General Comment No. 24, *supra* note __, ¶ 18.

¹¹⁷ Korkelia, *supra* note __, at 437-38.

human rights treaties,¹¹⁸ creating room for doubt as to what other features will be found wanting – and more room for variation among particular treaties, depending on the roles other treaty bodies may elect. Second, while the Committee stressed that state objections would continue to have some utility,¹¹⁹ its rule runs the risk that non-reserving states would come to depend upon intervention by treaty bodies, further undermining those states' incentives to object.

The third and final source of ambiguity has to do with the appropriate remedy for incompatible reservations. The Human Rights Committee briefly noted, almost in passing, that “[t]he *normal* consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party”; “[r]ather, 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.” The Committee’s position is controversial,¹²⁰ though it is not alone in its view.¹²¹ Putting to one side the question of whether this is consistent with the Vienna Convention, customary international law, or public policy,¹²² the lack of specificity as to when a reservation will be deemed severable – when, that is, a state that cares deeply about a reservation ought hesitate before ratifying – is striking. Given that states have not generally asserted such authority on their own behalf, the Human Rights Committee’s view also sharpens the divide between the risks a state takes when subject to the review of its peers, as opposed to when it faces the prospect of intervention by a third party.

C. The Puzzle of Ambiguity

The ambiguities of the Vienna Convention’s reservations regime raise questions of considerable practical relevance to the several reform efforts presently being undertaken, especially for non-reserving states. If there is any answer for what was once described as “the almost universal failure of states to object to reservations, whether implicitly permitted or not” – which one commentator described as “the basic reason for the juristic bewilderment that has confounded this subject”¹²³ – it is that the Vienna Convention rules provide them with inadequate incentives to do so. By this reckoning, states tend to forgive reservations that they would not, and should not, were the rules

¹¹⁸ General Comment No. 24, *supra* note __, ¶ 17 (reporting that “it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions,” but that “its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties”).

¹¹⁹ General Comment No. 24, *supra* note __, ¶ 17 (stating that “an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant”).

¹²⁰ For a representative criticism, see Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 EUR. J. INT’L L. 413 (2000); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT’L L. 277, 325 (1995).

¹²¹ See *Belilos Case*, 132 Eur. Ct. H.R. (ser. A) (1987); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995).

¹²² General Comment No. 24, *supra* note __, ¶ 18.

¹²³ O’Connell, *supra* note __, at 235; accord LeBlanc, *supra* note __, at 373-73 (discussing example of the Convention on the Rights of the Child).

better designed. The problem is most acute with respect to human rights treaties, but appears to be common to many other kinds of treaties as well.¹²⁴

This answer is at least incomplete. One difficulty concerns identity. States are not, of course, consistent in their reservations roles – all reserving states are on other occasions non-reserving states, and likely vice-versa – and would not, it may be supposed, decisively favor one role over the other.¹²⁵ Perhaps states-as-reservers extract a kind of rent from states performing their other roles, perhaps even colluding in that guise against their other interests, but it seems less plausible than if state identities were more rigid.

Second, non-reserving states do not exploit some of the opportunities presented them by the Convention – for example, to object to party status for reserving states.¹²⁶ Moreover, if the Convention provides an inadequate structure, states may negotiate around it, and provide for separate reservations regimes. Even if states are too busy to bother assessing the numerous reservations that may be formulated for a given multilateral convention under the Vienna Convention,¹²⁷ they might at least attempt to head off the issue by negotiating a better reservations regime tailored to that treaty – such as by identifying provisions as to which reservations are permissible (or impermissible), or by banning reservations altogether¹²⁸ – and yet they seem to do so infrequently.¹²⁹

Third, it remains puzzling how this has all come to pass, and why it has stayed that way. States were alerted to the basic contours of the flexible system by the Genocide Convention opinion, and yet adopted something very much like it in the Vienna Convention; in the years since, they have not openly rebelled against the Convention's basic terms, and indeed maintained the course in the separate convention governing treaties with international organizations.¹³⁰ The apparently deliberate embrace of these apparently inadequate terms, and with such potential impact, is at least counter-intuitive. As one commentator noted, "One would expect the law regarding the States bound by a treaty and the provisions of the treaty to be of such a fundamental character that the law

¹²⁴ See, e.g., Harry M. Fletcher, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. Comm. 187 (1998).

¹²⁵ See supra notes __ and accompanying text; see also infra notes __ and accompanying text.

¹²⁶ Why do so few states object to party status? See Aust, supra note __, at 115 (citing examples).

¹²⁷ See Aust, supra note __, at 115; see also Hylton, supra note __, at 439 (arguing that the lack of administrative resources in many states to track and respond to reservations on a timely basis, and the cumbersome administrative process even in states that process such resources, means that "the reserving state almost is guaranteed party status").

¹²⁸ See Aust, supra note __, at 124 ("The problems of reservations may be lessened, or even avoided, if provision is made in each new treaty, but this is not new.").

¹²⁹ Int'l Law Commission, *Second Report on Reservations to Treaties* by Alain Pellet, Special Rapporteur, ¶¶ 123-24, 48th Sess., A/CN.4/477/Add. 1 (1996) [hereinafter *Second Report of the Special Rapporteur*] (citing rarity of provisions banning reservations); e.g., Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 B.Y.B.I.L. 281, 317-19 (1976-77) (describing inconclusive negotiation of reservations clause to ICCPR).

¹³⁰ See supra text accompanying notes __.

regarding reservations would be clear and stable. This has not, however, been the case.”¹³¹

These questions are presently of only secondary interest, at most, to those engaged in reexamining the Vienna Convention’s reservations regime. For some of them, the Convention is a system in need of an overhaul – at least with regard to human rights treaties.¹³² The International Law Commission has thus far rejected that suggestion, at least insofar as it suggests that a different regime ought to govern human rights treaties.¹³³ In its preliminary view, the basic reservations regime set out in the Vienna Convention is essentially sound, and there is not in any case any evident alternative to it.¹³⁴ Nonetheless, its uncertainties presently interfere with its effective operation, and constitute one of the greatest risks for its failure;¹³⁵ supplemental guidelines are necessary, on this view, to resolve ambiguities and restore order.¹³⁶

If, on the other hand, we take the positive analysis of reservations law (and its vagaries) seriously, rather than simply regarding it as a mess to be reformed, a different picture emerges – one in which non-reserving states fare better. The first step in that analysis is more clearly identifying what they might want.

II. THE INTERESTS OF NON-RESERVING STATES

One deficiency in existing analyses of the Vienna Convention reservations regime lies in the incomplete understanding of how non-reserving states may regard reservations. For some, like Ryan Goodman, the “interest [of non-reserving states] consists in preserving the bargained-for elements of a multilateral agreement, which incompatible reservations or similar arrangements would defeat.”¹³⁷ On this view, non-reserving states want to oppose reservations; if they don’t, the problem probably lies with the underlying rules. Others suggest that the primary interest of non-reserving states may lie – in human rights treaties, at least – in preserving their own opportunity to reserve, such that they have little interest in opposing any other state’s reservations (and, indeed, may even be

¹³¹ Richard W. Edwards, Jr., *Reservations to Treaties*, 10 Mich. J. Int’l L. 363, 362 (1989).

¹³² This was plainly the perspective of the Human Rights Committee in its General Comment 24, and the tenor of recent efforts by the Sub-Commission on the Promotion and Protection of Human Rights to review the law of reservations, though it appears to have recently elected to suspend its pursuit of that argument until the International Law Commission more definitively takes a position concerning the relation between its efforts and human rights treaties. Final Hampson Report, *supra* note __, at 19. A great deal of secondary literature takes the position that the Vienna Convention regime is unsuitable in whole or in significant part to human rights treaties. See, e.g., Giegerich, *supra* note __, at 977-78.

¹³³ 1997 ILC Report, *supra* note __, at 126 (setting out Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties).

¹³⁴ 1997 ILC Report, *supra* note __, at ¶¶ 58, 94.

¹³⁵ First Report of the Special Rapporteur, *supra* note __, at ¶¶ 92, 92, 95.

¹³⁶ See, e.g., Report of the International Law Comm’n, 59th Sess., Supp. No. 10, at ¶ 288, A/59/10 (2004) [hereinafter 2004 ILC Report] (reporting view that “the provisions of the Vienna Conventions concerning objections were vague and needed to be clarified”); 1997 ILC Report, *supra* note __, at ¶¶ 100-123 (setting out wide-ranging discussion of ambiguities and gaps in the Vienna Convention).

¹³⁷ Goodman, *supra* note __, at 533.

inclined to cooperate in promoting a shared interest in facilitating them).¹³⁸ On this view, non-reserving states decisively favor their complimentary role as reserving states; the problem may be placed at their doorsteps, or again blamed on the rules for giving them inadequate incentives.¹³⁹ But helplessness and collusion do not exhaust the alternatives.

A. *The Interests in Reservations*

1. *The interest in breadth.* Perhaps the most accepted benefit to permitting reservations, beginning at least with the *Genocide Convention* opinion, is that doing so encourages additional states to become parties.¹⁴⁰ That objective is clearest for human rights treaties that aim for universal subscription. Even critics of the present reservations system acknowledge their contribution to developing broader participation,¹⁴¹ and officials in human rights regimes have actually encouraged those states that are on the fence to explore the possibility of employing reservations.¹⁴²

The marginal returns on breadth diminish over time, and the prospective benefits may seem *de minimis* for the human rights treaties that already approach near-universal

¹³⁸ Rosalyn Higgins, then a member of the Human Right Committee (and now Judge of the International Court of Justice), explained:

In a normal treaty State A will lose some direct benefit under the treaty terms if State B, by reservation, announces it will not be performing a certain obligation. But in a human rights treaty it matters not very greatly to State A if State B decides not to guarantee to *its own citizens* certain rights envisaged under the treaty. An examination of the practice of objections leads one to believe that states are not rigorous about entering objections where, on the basis of the legal test – compatibility with the object and purpose of the treaty – they might reasonably be expected to do so. *Indeed, one might even say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged.*

Rosalyn Higgins, *The United Nations: Still a Force for Peace* [sic: properly, *Human Rights: Some Questions of Integrity*], 52 MOD. L. REV. 1, 11-12 (1989) (emphasis added).

¹³⁹ See supra text accompanying notes ____.

¹⁴⁰ See supra text accompanying notes ____.

¹⁴¹ See Preliminary Opinion of the Committee for the Elimination of Racial Discrimination on the Issue of Reservations to Treaties on Human Rights, CERD/C/62/Misc.20/Rev.3 (March 13, 2003) (asserting that “[r]eservations to multilateral treaties are a fact of life; they are “le mal necessaire” with the view to have as many States parties as possible, to bring treaties of this kind close to universality”); id. (asserting that “[i]t is obvious that many of the States parties would not have ratified the International Convention for the Elimination of all forms of Racial Discrimination if the possibility of making the respective reservations was denied to them during the period 1970-1990, when they became parties”); LeBlanc, supra note ___, at 371 (criticizing use of reservations in the Convention on the Rights of the Child, but acknowledging that the “it would appear that the relatively liberal reservations regime presently in existence made it possible for more states to ratify the Convention . . . than would have been the case had reservations not been permitted, or had the traditional unanimity rule still applied”); Schabas, supra note ___, at 41.

¹⁴² See Schabas, supra note ___, at 41.

participation.¹⁴³ Even if we put these and other existing treaties to one side,¹⁴⁴ the era of human rights-related treaties may not yet have passed, as the Torture Convention,¹⁴⁵ the Landmines Convention,¹⁴⁶ and the International Criminal Court¹⁴⁷ arguably illustrate. It is plausible, moreover, that parties to other kinds of multilateral conventions have a comparable interest in increasing state participation.¹⁴⁸ Such was the view taken by the International Law Commission in generalizing the reasoning of Genocide Convention as a default rule for all bilateral and multilateral treaties, although it acknowledged that it would be difficult to establish whether reservations were strictly necessary in order to secure the participation of reserving states.¹⁴⁹

The Commission did not articulate why increased participation should be presumed beneficial, save in the most general terms,¹⁵⁰ but numerous reasons may be hypothesized. Where a treaty scheme exhibits network effects, or where another state's participation has any kind of positive externalities, expanded participation will benefit other state members.¹⁵¹ Increased participation may also equalize the costs imposed by membership – for example, limiting the competitive economic disadvantage suffered by state parties to the Kyoto Protocol.¹⁵² Broadening participation in a convention may

¹⁴³ The ICCPR, for example, has 144 signatories, while the Convention on the Rights of the Child has 191 signatories. But universality clearly remains a significant goal for the human rights project as a whole. See Alston, *supra* note __, ¶¶ 14-36.

¹⁴⁴ Whether such treaties fall within the purview of any reservations reforms depends, in the first instance, on whether such reforms are regarded as new rules, and whether they purport to have retroactive effect. It may be expected, however, that states that have already become parties with reservations would be loathe to accept changes that diminished their rights, and prospective members would complain about inequitable treatment were their reservations judged by a more demanding standard.

¹⁴⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

¹⁴⁶ Convention on Prohibition of Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

¹⁴⁷ Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998).

¹⁴⁸ Indeed, a number of commentators cite the objective of universality without differentiating among treaty types. See Piper, *supra* note __; Redgwell, *supra* note __.

¹⁴⁹ 1966 Report, *supra* note __, at 37-38. As the Commission recognized, the increased number of members generally involved in multilateral conventions – presumably, irrespective of the reservations regime – was another reason why the unanimity requirement was untenable. *Id.* at 36-38.

¹⁵⁰ 1966 Report, *supra* note __, at 38 (asserting that “in the present era of change of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community”).

¹⁵¹ It is possible that kindred network effects would actually lead to concerted resistance to a multilateral solution – in favor, for example, of a regional or hegemonic approach. Cf. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 87 (2002). But it seems fair to assume the value of increased participation for those multilateral efforts that have already achieved a critical mass.

¹⁵² Until recently, this concern was dominated by the need to enlist states with sufficient emissions so as to bring the Protocol into effect, and it is complicated by the opportunity for parties to trade emissions. But even EU officials have expressed concern that European industry may suffer if other industrialized states do not become parties. *Leadership Costs: What If The EU Leads On Climate Change, And No One Follows?*, FIN. TIMES, March 1, 2004, at 16.

influence its chances for becoming regarded as customary international law,¹⁵³ thereby advancing substantially the cause of universality (and, potentially, overcoming the reservations themselves).¹⁵⁴ And states that have committed themselves to a particular treaty scheme are likely to perceive benefits to others behaving likewise – due, perhaps, to the reaffirmation of their own perceptions and beliefs, or to the independent perception of ratification’s appropriateness – irrespective of any demonstrable utility.

The Rome Treaty provides a recent example of the potential utility of reservations. Article 120 of the Treaty bars reservations altogether, thereby departing from the Vienna Convention default. That stance, however, may have contributed to the U.S. decision to stay out of the treaty,¹⁵⁵ thereby depriving the regime of what is arguably an indispensable supporter.¹⁵⁶ As it develops, moreover, state parties have found alternative methods for achieving similar ends, such as through “declarations” that in fact seek to materially alter treaty obligations.¹⁵⁷

The interest in breadth should not, ordinarily, be decisive; were it so, no compatibility limits to reservations would have been adopted, nor any mechanism for objecting. Not all treaty parties are equals, and a state’s inclination to lodge reservations may be inversely correlated with its desirability. Reserving states are also prone to exaggerate the salience of reservations to their decisions to participate.¹⁵⁸ Finally,

¹⁵³ See Piper, *supra* note __, at 296 n.20 (citing Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 434-35 (1983)). If states adhere to a norm only to the extent that they subscribe to the treaty, however, it is unlikely that it would be regarded as significant evidence of customary international law, and is “exceptionally rare” that the treaty would itself be considered the basis for customary international law. COMM. ON FORMATION OF CUSTOMARY (GEN.) INT’L LAW, INT’L LAW ASS’N, FINAL REPORT: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW §§ 24-27 (2000) [hereinafter ILA FINAL REPORT], <http://www.ila-hq.org/pdf/CustomaryLaw.pdf>.

¹⁵⁴ Cf. ILA FINAL REPORT, *supra* note __, § 22 (providing that “[t]he fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law.”).

¹⁵⁵ William A. Schabas, *United States Hostility to the International Criminal Court: It’s All About the Security Council*, 15 Eur. J. Int’l L. 701, 711 (2004) (“For example, Ambassador Scheffer has noted that the prohibition of reservations in Article 120 of the Statute is excessive. Even had the United States administration tried to submit the Statute, Article 120 would have frustrated the Senate with its penchant for reservations, understandings, declarations and provisos, and made ratification improbable.”).

¹⁵⁶ See Jack L. Goldsmith, *The Self-Defeating Criminal Court*, 70 U. Chi. L. Rev. 89, 89 (2003) (arguing that describing hopes for ICC as unrealistic primarily because “the ICC as currently organized is, and will remain, unacceptable to the United States. This is important because the ICC depends on U.S. political, military, and economic support for its success. An ICC without U.S. support – and indeed, with probable U.S. opposition – will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human rights-protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.”).

¹⁵⁷ See Schabas, *supra* note __, at 711.

¹⁵⁸ One recent example concerns the Framework Convention on Tobacco Control. The United States for some time insisted that amending the Convention’s outright ban on reservations was indispensable to its membership. See Marc Kaufman, *U.S. Seeks to Alter Anti-Tobacco Treaty*, Wash. Post, April 30, 2003, at A1; Gregory F. Jacob, *Without Reservation*, 5 Chi. J. Int’l L. 287 (2004). But when other states held firm it capitulated. Reuters, *U.S. Lights Up Eyes by Backing Smoking Limits*, Chicago Tribune, May 19, 2003, at 5; see *United States Signs Tobacco Control Treaty*, FDCH Regulatory Intelligence Data, May 11, 2004 (noting that HHS Secretary had signed on behalf of the United States); see

breadth is an incomplete answer to the purported imbalance suffered by non-reserving states: both reserving and non-reserving states presumptively benefit from increasing participation, yet only reserving states benefit from the ability to formulate reservations. A fuller answer, then, requires looking beyond the traditional bases for flexibility.

2. *The interest in depth.* While the interest in breadth is consistent with a static view of the underlying treaties, more dynamic considerations are easily discerned. A prominent objection to reservations is that facilitating participation in this way reduces treaty integrity, since the core values of the treaty are degraded by varying obligations among state parties.¹⁵⁹ The loss of uniformity might be regarded as objectionable in itself, on equitable grounds, but the integrity argument usually assumes the virtue of promoting the underlying treaty objectives.¹⁶⁰

The obvious rejoinder is that this takes treaty contents as a given. A treaty's negotiated terms may well be influenced by the opportunities for self-exemption. If the liberty of making reservations were significantly restricted, states may not only consider subscribing in lesser numbers, but might also take steps to ensure that the treaty's terms are less demanding, so as to obviate the need to resort to reservations in the first place.¹⁶¹ Integrity, on this view, is something less than an independent variable.

It is perfectly reasonable, moreover, for states to tolerate reservations as the price for deeper treaty obligations, though there is clearly a tension between the two prospects. Just as with decisions to participate, states may exaggerate the salience of reservations to their willingness to accept additional terms. Moreover, states once willing to accept an additional, binding treaty obligation *without* reservation may, if given the opportunity, choose to ratify with reservations.¹⁶² On the other hand, while a state may be disinclined

generally Sean D. Murphy, Adoption of the Framework Convention on Tobacco Control, 97 Am. J. Int'l L. 689 (2003). That Convention, however, has yet to be approved by the Senate.

¹⁵⁹ See *supra* text accompanying notes ____.

¹⁶⁰ This is clearest with respect to human rights. See, e.g., General Comment No. 24, *supra* note ___, at ¶ 4 ("Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being"); *id.* at ¶ 17 (contending that the Vienna Convention provisions concerning state objections "are inappropriate to address the problem of reservations to human rights treaties," since such a treaty "not a web of inter-State exchanges of mutual obligations," but instead "concern the endowment of individuals with rights").

¹⁶¹ The ability to affect the stringency of treaty terms will depend, of course, on the nature of the voting rules employed during the negotiating process: were the treaty terms finalized by unanimous vote or by consensus, the power of would-be reserving states would be considerable, but their authority under a majority voting rule may be considerably less impressive.

¹⁶² The states most likely to fit this profile may be divided-power democracies, such as the United States, in which the institutions charged with negotiation and signature are not identical with those involved in ratification. The same may hold true for the type of state most likely to insist upon, but then abandon, the right to reserve as a *quid pro quo* for additional terms. This dynamic was apparently particularly evident in the Tobacco Convention. See Jacob, *supra* note ___, at 298 ("[A] surprisingly large number of delegates argued in favor of the provision on the grounds that if reservations were allowed, their own government would be likely to take some. I felt as though I had stepped into the Geneva edition of the Twilight Zone, as I watched the representatives of governments that apparently would have liked to take

to commit itself to additional, binding treaty obligations during negotiations, it is likely to feel less keenly when those obligations are accompanied by a reservation escape hatch – and may feel still less keenly, due to internal or external changes, when the time comes for ratification.

Balancing the risk that some states will “unnecessarily” avail themselves of reservations, when given the option, against the prospect that some states will fail to avail themselves of potential reservations, even those that had to be available in order to persuade those states to accede to additional terms, will depend on the circumstances.¹⁶³ Nonetheless, it would be reasonable for non-reserving states to take the risk of reservations. Negotiated-for additional terms seem likely to be relatively sticky, and have virtue for all states that would not reserve, but yet might not adhere to terms absent their inclusion in a multilateral treaty; in contrast, an omitted additional term is unlikely to be pursued through post-treaty negotiations or adopted on a purely autonomous basis. Precluding or severely limiting reservations, moreover, increases materially the incentive for states to participate in multilateral negotiating, rather than relying on the opportunity to deviate later. While including more states in preliminary negotiations may be entirely productive, it risks thwarting consensus not only on the provisions to which the new participants might later reserve, but also on any topic of discussion. The interest in depth is at least a plausible basis for non-reserving states to favor rules facilitating reservations.

3. *The interest in reciprocity.* Article 21(b) of the Vienna Convention provides that a reservation properly established with respect to another state not only modifies treaty obligations for the reserving state, but also “modifies those provisions to the same extent for that other party in its relations with the reserving State.”¹⁶⁴ This symmetry may serve two functions. First, reciprocity deters reservations, if and to the extent a reserving state’s interest in its reservation is outweighed by the harm to it from extending the reservation to other states. Second, if reservations are nonetheless formulated, reciprocity may mean that they benefit the non-reserving states: if and to the extent the cost of a reservation is outweighed by the benefits of enjoying its reciprocal extension, a non-reserving state may actually welcome the other state’s reservation.

There is reason to think that neither of these conditions is satisfied with any frequency. In a recent article, Francesco Parisi and Catherine Sevckenko consider reciprocity as a possible solution to what they perceive as a contradiction: while the law of reservations favors the reserving states, reservations do not seem to be as common as might be suggested from this “natural advantage.”¹⁶⁵ After modeling reservations as a prisoner’s dilemma, in which states will reserve excessively and sub-optimally, at the

reservations to the Convention deliberately acting to deprive their governments of the opportunity to do so”).

¹⁶³ The assessment would presumably depend, for example, upon the identity and significance of any states that were on the cusp.

¹⁶⁴ Vienna Convention, supra note __, art. 21(b).

¹⁶⁵ Parisi & Sevckenko, supra note __, at 1, 25. Understandably, they do not explain how many reservations would be predicted based on their “natural advantage” (and, thus, how surprisingly, “relatively low” reservations are at present), nor provide in the end any clear explanation as to whether the solution they identify – package deals that simply preclude reservations altogether – accounts for the discrepancy. Id. at 17-20.

cost of treaty integrity, they consider reciprocity as a possible solution.¹⁶⁶ As they explain, Article 21(1) provides a solution only when states are in symmetrical positions and uncertain about the future.¹⁶⁷ They describe the reciprocity solution as particularly wanting with regard to human rights treaties, since (among other things) states have divergent interests, and one state's reservation (in their example, exempting female genital mutilation, notwithstanding the Convention on the Elimination of All Forms of Discrimination Against Women) will not necessarily benefit another.¹⁶⁸ The result, seemingly, is that the states agreeing to the Vienna Convention simply got it wrong, and the solution lies either in barring reservations or in persuading states to take a keener interest in other states' compliance.¹⁶⁹

For reasons previously suggested, it is not self-evident why the treaty as actually negotiated in the shadow of the Vienna Convention – rather than, say, the treaty's terms as they would have negotiated absent the latitude afforded by reservations – should be considered as the baseline. In any event, the inefficiency of reservations is not necessarily inconsistent with the second function of reciprocity: the idea that non-reserving states may benefit from reservations, even if their benefit is unlikely to approach the benefit of the reservation to the reserving state.¹⁷⁰ The potential gulf between those interests, to be sure, gives pause, and is evident from the outset. The reserving state reveals the acuity of its interest by taking the initiative, while the non-reserving state will generally have failed to take a reservation as to the same subject-matter, providing a leading indicator of asymmetrical interests.¹⁷¹

More important, Parisi and Sevenko miss something crucial about the way the Vienna Convention operates, in part because they try to generalize from two-player game matrices to what they admit is “the more complex case of multilateral treaties.”¹⁷² Put simply, reciprocity benefits the non-reserving state against the reserving state, but not as against the world. As the Commission recognized even in 1966,

[T]he equality between a reserving and non-reserving State, which is the aim of [the objections principles], may in practice be incomplete. For a non-reserving state, by reason of its obligations toward other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation.¹⁷³

¹⁶⁶ Id. at 9-13.

¹⁶⁷ Id. at 15-16.

¹⁶⁸ Id. at 20-24; see also Second Report of the Special Rapporteur, *supra* note __, at ¶ 152 et seq.

¹⁶⁹ See Parisi & Sevcenko, *supra* note __, at 24 (discussing human rights).

¹⁷⁰ Their argument is, however, strongly suggestive on that score, particularly if one attaches significant value to the fragmentation of a treaty that may result from a great number of undeterred reservations.

¹⁷¹ Indeed, were it otherwise, the exemptions proposed by such reservations would be legitimate candidates for mutually agreed revisions to the treaty, at least were state interests stable between the negotiations and ratification stages.

¹⁷² Parisi & Sevcenko, *supra* note __, at 15. They specifically assert, however, that the results from a two-player scenario “hold” for multilateral treaties. Id.

¹⁷³ 1966 Report, *supra* note __, at 38.

Non-reserving states, accordingly, remaining vulnerable to the invocation by other parties of their obligations under the relevant treaty provision, and only obtain immunity from protest by the reserving state – perhaps an absolute immunity, if a potential transgression affects only the interests of the reserving state, but perhaps not. The reserving state, on the other hand, benefits from the reservation at least in relation to all non-objecting states.¹⁷⁴ To be sure, not all of the other states would have a legal or political interest in protesting a non-reserving state's attempt to exploit the terms of a reservation, but this suggests that the relative benefits from reciprocity to non-reserving states may decline as a function of the number of parties to a given treaty.

These significant qualifications to the interest in reciprocity, however, do not entirely abnegate it. It may be argued, moreover, that they artificially confine the notion of reciprocity. Non-reserving states may benefit indirectly from a reservation, for example, insofar as it sets legal or political precedent for the permissibility of some *other* reservation with respect to that treaty,¹⁷⁵ or establishes the conditions under which a reservation may be tolerated or overlooked – for example, because it is just one of many reservations to the treaty.¹⁷⁶ Finally, the fact that the interest in reciprocity is not comparable to the interest in reservations, and would not optimally deter them, does not suggest that it cannot, in combination with other interests, be significant.

4. *The interest in information.* The least recognized virtue of reservations for non-reserving states is informational. The quest for information accounts for a substantial proportion of international norms and institutional practices,¹⁷⁷ and producing information about other states is likewise one of the central values of negotiating, concluding, and administering international agreements. As Ken Abbott observed, where states have incentives both to cooperate and to act independently,

[I]nformation regarding the structure of the interaction, the incentives perceived by other states, and the compliance of others with their obligations will be crucial to international cooperation. Information on compliance is particularly important, both for itself and for the light it can shed on other issues. States will be reluctant to enter into agreements without clearly defined mechanisms for the ongoing production of reasonably timely and reliable information on these matters. Such mechanisms (contained either within the agreements

¹⁷⁴ As noted previously, it also obtains substantially similar benefits even with respect to objecting states. See *supra* text accompanying notes ____.

¹⁷⁵ I have not yet discovered, however, any examples in which a state has expressly adverted to another state's reservation in an attempt to defend its own.

¹⁷⁶ While seemingly undesirable, this is meaningfully distinct from the suggestion that states actively collude in failing to object to reservations – though there may also be truth to that. See *supra* text accompanying notes ____.

¹⁷⁷ See, e.g., Xinyuan Dai, *Information Systems in Treaty Regimes*, World Politics, July 2002, at 405, 405 (asserting that “information provision by international institutions lies at the foundation of neoliberal institutionalism”); Randall H. Cook, *Dynamic Content: The Strategic Contingency of International Law*, 14 *Duke J. Comp. & Int'l L.* 89, 104 (2004) (“Information-enhancing rules and organizations . . . provide the principal substantive content of international law”).

themselves or parallel to them) may determine the success of an agreement in practice.¹⁷⁸

A number of agreements, indeed, are primarily oriented toward the production of information, either because of institutional limits on promoting compliance with more demanding obligations or because of the information's intrinsic value. Human rights treaties probably illustrate both explanations. While no such treaty provides much by way of traditional sanctions for violations of human rights, some do establish elaborate mechanisms for reporting and, to a lesser degree, fact-finding about the policies of state parties.¹⁷⁹ That information, in turn, helps to influence the behavior of parties and non-parties alike, as they consider how to incorporate the information in their unilateral, bilateral, and multilateral relations with the state concerned.

The difficulty, however, is that good information is difficult and expensive to obtain. With human rights treaties, for example, the frequency with which states violate their reporting obligations, and the quality of their reporting, is appalling.¹⁸⁰ Reforms are routinely proposed, but the basic difficulties – the inadequate incentive for states to disclose potentially embarrassing information about themselves,¹⁸¹ and the disincentive for states to turn one another in, and risk retaliation in kind¹⁸² – remain.¹⁸³ As a result,

¹⁷⁸ Kenneth W. Abbott, "Trust But Verify": The Production of Information in Arms Control Treaties and Other International Agreements, 26 *Cornell Int'l L.J.* 1, 4 (1993). For other discussions of the significance of information in international agreements, see James D. Fearon, *Rationalist Explanations for War*, 49 *Int'l Org.* 379 (1995); Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 *Int'l Org.* 729, 740-42 (1998); see also Helen V. Milner, *Interests, Institutions, and Information* 202-23 (1997) (contrasting prominence of information in economic analysis and international relations theory with relative neglect in understanding the domestic politics of international affairs).

¹⁷⁹ See, e.g., *International Covenant on Civil and Political Rights*, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; *Torture Convention*, supra note __, art. 2, § 1, S. Treaty Doc. No. 100-20, at 20, 1465 U.N.T.S. at 114.

¹⁸⁰ See, e.g., Anne F. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* 7-25 (2001), <http://www.bayefsky.com/report/finalreport.pdf>; Philip Alston, *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. ESCOR, 53d Sess., Agenda Item 15, ¶¶ 37-59, U.N. Doc. E/CN.4/1997/74 (1996); Anne F. Bayefsky, *How to Complain to the UN Human Rights Treaty System* 155 (2002); Anne F. Bayefsky, *Making the Human Rights Treaties Work*, in *Human Rights: An Agenda for the Next Century* 229, 234, 286 (Louis Henkin & J.L. Hargrove eds., 1993); Dai, supra note __, at 427.

¹⁸¹ HENKIN, *THE AGE OF RIGHTS*, supra note __, at 22 (noting that "many [state reports to the Human Rights Committee] are skimpy and almost all of them are self-serving and concealing rather than revealing inadequacies in compliance"); Anne F. Bayefsky, *Making the Human Rights Treaties Work*, supra note __, at 242 (describing complete inadequacy of some state reports, so much so as to call credibility into question); J. Shand Watson, *Theory and Reality in the Protection of Human Rights* 155-56 (1999) (describing inadequacy of entrusting reporting to potential norm violators, including because states will tend to base reports on "internal law which they may not be implementing").

¹⁸² Watson, supra note __, at 156 (noting that the check on self-reporting is other governments, which "[i]n order to avoid having to endure the same treatment at some later time . . . have a strong self-interest in defeating the full potential of the system.").

¹⁸³ To be sure, genuinely non-state actors may have fewer disincentives, but suffer from more restricted access to information. Hathaway, supra note __, at 2009 (noting that even domestic and international organizations that are "genuinely committed to the ends of [human rights] treaties . . . have restricted access to information regarding the real impact of the treaties in individual countries").

one of the most feasible functions of the human rights treaty system is badly compromised.¹⁸⁴

Information is also painfully difficult to generate in other, non-normative treaties, perhaps because more is at stake. Negotiating parties need information about one another's present preferences, and about expectations for the future, but each is hard to come by.¹⁸⁵ It is theoretically easier to obtain information about compliance, but treaty organizations themselves rarely suffice;¹⁸⁶ for the states' parts, uncertainty and incentives to mislead persist,¹⁸⁷ particularly where the interests of noncompliance victims and their states are noncongruent,¹⁸⁸ and it is often critical to develop treaty mechanisms that will generate additional information.¹⁸⁹ The presence of more substantial sanctions in some treaties, while perhaps diminishing the significance of information-production as an end in itself, also substantially increases the incentives to dissemble.

As against the alternatives, reservations to treaties produce information in an admirably effective fashion. In formulating a reservation, a state indicates at least one regard in which it cannot meet, or hopes not to meet, the treaty's original terms. The information may be incomplete, of course, as to why it has that preference, or how keenly that preference is felt – the state's interest may simply be *ceteris paribus*, or it may be a necessary condition for it to participate in the treaty. Still, such information might otherwise have been unavailable to non-reserving states, or too costly for them to obtain. Similar information may be gleaned during the treaty negotiations themselves, but it may be changed or enhanced along the path to ratification, including by the participation of domestic actors like legislatures that are less visible on the international plane. (Some states, moreover, may become parties without having participated in the negotiating process, thereby frustrating the opportunity for others to learn about its preferences.) Learning instead through the would-be reserving state's breach may be more concrete, but less easily remediable, and would in any event extend still fewer reciprocal benefits to the non-reserving state.¹⁹⁰

¹⁸⁴ See, e.g., Hathaway, *supra* note __, at 203 (“The main method of enforcement and monitoring under the major universal treaties is a largely voluntary system of self-reporting. The bodies cannot assess any real penalties when countries fail to comply with reporting requirements, and these bodies possess insufficient resources to give complete and critical consideration to the reports that are made.”).

¹⁸⁵ Abbott, *supra* note __, at 14 (explaining that, given the incentives of other states to conceal negative or conflicting information, “[s]tates will often have to make do with incomplete knowledge of preferences, relying on reputation, recent experience and their own understanding of the situation as proxies”); *id.* at 15 (commenting that, with regard to expectations about the future, “such information is at least as problematic on an ongoing basis as it was initially”).

¹⁸⁶ Dai, *supra* note __, at 405.

¹⁸⁷ Dai, *supra* note __, at 409.

¹⁸⁸ See Dai, *supra* note __, at 413; e.g., *id.* at 426 (discussing example of human rights regimes); *id.* at 431 (discussing example of environment regime).

¹⁸⁹ Abbott, *supra* note __, at 15-16.

¹⁹⁰ Under the Vienna Convention, at least, two wrongs do not make a right. Under Article 60, only states specially affected by a material breach, or among those whose position was radically changed by a material breach, may individually elect to suspend the treaty in whole or in part, and such rights do not obtain with regard to treaties of a humanitarian character. Vienna Convention, *supra* note __, art. 60(2), (5).

For reserving states, too, producing such information via reservations is considerably less costly than the alternatives. Reservations signal that the reserving state may not comport itself according to certain negotiated terms, but also reaffirms its commitment to those terms to which it has *not* taken a reservation. Reservations also allow a reserving state an opportunity to avoid any generalized inferences about its trustworthiness that might follow in the event of a reservation-less breach. If reputations matter,

Finally, non-reserving and reserving states may mutually benefit from an improved ability to negotiate follow-on instruments. As others have observed, information is critical in allowing treaty parties “to evaluate past progress in order to redesign the regime to perform better in the future.”¹⁹¹ Reservations provide acute information concerning lacunae in existing agreements, thus identifying topics for future negotiation. Those lacunae exist, of course, precisely because agreement on those terms – with those reserving states – is difficult; on the other hand, if the criticisms of reservations are well taken, and reservations are entered needlessly and opportunistically, the fact that reservations were taken does not necessarily signal an intractable problem. It does, however, vest the non-reserving states with a decision concerning how to react properly.

B. The Interests in Reserving

One of the costs that reservations impose on non-reserving states is uncertainty. As Richard Bilder observed, reservations are a potentially potent technique for reducing the reserving state’s risks by giving it greater latitude to deviate from a treaty’s terms in the future. This risk reduction, however, also risks uncertainty as to the treaty relations between the reserving state and states which have not formally accepted the reservation.¹⁹²

It is by no means clear, however, that non-reserving states truly desire certainty; what they probably dislike, rather, is uncertainty where the outcome is controlled by another state.¹⁹³ Put differently, non-reserving states *also have an interest in reserving – in the more general sense of reserving judgment regarding another state’s reservations.*

The principal vehicle for them to do so involves objecting. Most critiques of the Vienna Convention suppose that it creates too few opportunities for non-reserving states to manifest their preference for changing the reserving state’s policy. But states may have only a weak preference for changing such policies, and may in any event fairly distinguish the desire to change the other state’s policy through bilateral confrontation. Human rights treaties illustrate both tendencies. Such treaties are sometimes criticized for rewarding “positions rather than effects,” and serving “to relieve pressure for real

¹⁹¹ Ronald B. Mitchell, Sources of Transparency: Information Systems in International Regimes, 42 Int’l Studies Q. 109, 109 (1998); id. at 113.

¹⁹² RICHARD B. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT 71-73 (1981).

¹⁹³ States surely desire to reduce the uncertainty imposed by international agreements. See, e.g., Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 518-23 (1991).

change in performance in countries that ratify the treaty.”¹⁹⁴ A partial explanation may be that other states are indifferent, or ignorant of how treaty obligations bear no necessary relation to the other state’s genuine conditions.¹⁹⁵ But it may also be that confronting a state regarding its noncompliance is costlier and less rewarding than other forms of pressure. On this view, non-reserving states might prefer that another state not formulate reservations, but if it *does* reserve, they may prefer not to incite a disagreement about the state’s betrayal of the treaty by objecting.

On a (still) more jaundiced view, states may actually prefer that other states formulate reservations, and not simply because of reciprocity. Particularly where a reservation anticipates circumstances in which the reserving state would likely depart from the treaty’s terms – even were its reservation disallowed – non-reserving states may gladly forego the opportunity to complain about its breach, and so prefer that the reservation be formulated and effectuated, at least relative to them. Complaining that another state’s reservations have betrayed an international treaty may have little allure for states: the criticized state may retaliate, whether politically or within the treaty scheme itself (for example, by complaining of the non-reserving state’s own reservations or breaches),¹⁹⁶ may attempt to denounce the treaty and slip any obligations whatsoever,¹⁹⁷

¹⁹⁴ Hathaway, *supra* note __, at 2007; Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT’L L. 185, 187 n.4 (2003) (noting that “ratification can lead international actors to reduce political pressure for real improvements in human rights practices”).

¹⁹⁵ See, e.g., J. SHAND WATSON, *THEORY AND REALITY IN THE PROTECTION OF HUMAN RIGHTS* 65 (1999) (“[I]n the typical pure human rights case, there is inevitably insufficient interest on the part of other states for them to sanction effectively when confronted with a violation”); Hathaway, *supra* note __, at 2007 (noting that “there is little incentive for individual states to take on the burden of engaging” in [any costly] enforcement activity” with regard to human rights); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 253 (1989) (“[I]n general, States – even if they have adhered to international agreements – do not have a strong interest in human rights generally, and are not yet politically acclimated and habituated to responding to violations of rights of persons abroad other than their own nationals.”); *id.* at 253 (“[T]he principal element of horizontal deterrence is missing” in the area of human rights: “[T]he threat that ‘if you violate the human rights of your inhabitants, we will violate the human rights of our inhabitants’ hardly serves as a deterrent.”).

¹⁹⁶ One curious result contraindicating this theory is provided by Horn, who indicates that objecting states (other than the most consistent objectors) have, in the case of objections to the size-of-mission provisions of the Diplomatic Relations Convention, “all followed an identical pattern of objecting to all reservations that have been communicated before their own ratification, but not objecting to reservations that were notified after this date. It seems that once a state has undertaken all necessary steps to give its final consent to participation in the treaty it often loses [sic] interest in subsequently notified reservations.” Horn, *supra* note __, at 191.

¹⁹⁷ See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 Colum. L. Rev. 1832, 1881 (2002) (describing denunciation of ICCPR Optional Protocol by Trinidad & Tobago, followed by immediate re-ratification with reservation precluding jurisdiction over petitions from capital defendants, and, when that reservation was declared incompatible, followed by denunciation of the Optional Protocol again). As in the Trinidad & Tobago episode, similar tactics have been used to insert reservations where there were none before. See also Committee of Legal Advisers on Public International Law, *Practical Issues Regarding Reservations to International Treaties*, *supra* note __ (noting that “[r]ecently, there have been instances where States have denounced a treaty to which they had not made reservations with a view to re-accessing to the treaty with reservations,” and that “[t]he VCLT has no specific rules covering this situation,” which is “controversial”); *id.* (cautioning that “a number of States have started to explore ways

and will in any event tend to regard the objection with disfavor.¹⁹⁸ That states dislike confrontation seems a fair inference from the infrequency of inter-state complaints relative to colorable violations of treaty obligations.¹⁹⁹ Non-reserving states may also prize another state's reservations as a tool for disarming domestic constituencies, which sometimes pressure their sovereign to enforce another state's treaty responsibilities irrespective of the political costs, converting the sovereign's right to complain into an unwanted political obligation.²⁰⁰

Precisely the opposite may be the case – states may enjoy accruing potential grievances against other states, and may find objecting an attractive and low-cost means of enhancing their reputation for legal rectitude – and the preference is probably highly contingent. Sometimes non-reserving states appreciate the opportunity to object to reservations, and sometimes they do not; sometimes, it is conceivable, non-reserving states may even prefer that a reservation be effectuated. The point is that several situations may plausibly serve a state's purposes, and any given state's preferences may shift over time. A non-reserving state's interest in objecting will likely depend on the status of its relations with the reserving state – with objecting perhaps being most likely when the relationship is beyond salvaging, or so strong as to withstand minor disagreements. Another likely variable is the reaction of third states. A more reticent

around th[e] prohibition [on late reservations], by denouncing a treaty and re-ratifying the same treaty while formulating reservations”).

¹⁹⁸ See, e.g., Parisi and Sevcenko, *supra* note __, at 21 (“By their very nature, human rights treaties touch on sensitive cultural issues, meaning that states may hesitate to object to a reservation for fear of causing unnecessary tension in existing bilateral relationships. The focus is on a state's individual actions and the extent to which it meets international standards, or fails to do so, so that other states generally do not have a vested interest in policing how closely a reserving state is respecting the letter of the convention”).

¹⁹⁹ The case is particularly strong in the human rights context. For example, relatively few states subscribe to Article 41 of the ICCPR, which permits other states to complain to the Human Rights Committee that the declaring state is not fulfilling its treaty obligations. ICCPR, *supra* note __, art. 41. Even among those states, which have voluntarily and reciprocally agreed to expose themselves to inter-state complaints – seemingly illustrating a relative tolerance for entertaining criticism – not a single complaint has been lodged, notwithstanding the presentation of numerous individual complaints.

One reason, certainly, has to do with the possibility of retaliation. Under the ICCPR, the only states that may submit such complaints are those that have subjected themselves to the competence of the Human Rights Committee. In practice, this “means . . . that only those states that might be subject to subsequent complaints, perhaps in retaliation, may initiate the process. This . . . has the effect of ensuring the negative effect of reciprocity, reciprocal inaction, is maintained. . . . [O]ne would expect the power not to be used, and this is exactly what has happened.” Watson, *supra* note __, at 159. Similar problems afflict the Torture Convention (Article 21(1)) and the Racial Discrimination Convention. *Id.*

Part of the explanation, however, could be that “states already have ample opportunity in other forums to complain about each other,” and would prefer not to “eagerly or gratuitously invite criticism” through an additional mechanism. James Flood, *The Effectiveness of UN Human Rights Institutions* 37 (1998). If true, this suggests that any benefit to the non-reserving state in terms of reduced pressure to complain should be discounted to the extent that other opportunities for complaint – with comparable opportunities for pressure – exist.

²⁰⁰ U.S. policy toward Cuba arguably illustrates the point, at least if one discounts the possibility that assailing Cuba serves independent U.S. foreign policy preferences, rather than merely accommodating domestic pressure groups. Cf. Cuba Rights Censure Sparks Uproar, BBC News America, Apr. 16, 2004 (describing U.S.-sponsored resolution of censure adopted by the Human Rights Commission, attendant fallout, and criticism of U.S. indulgence of other states with human rights compliance issues).

non-reserving state may, for example, prefer to wait until other states have exhausted their opportunities to object (or complain, as the case may be); doing so may benefit that state by lessening the pressure it feels to do likewise, permit it to follow suit with a diminished risk of being the focus of the reserving state's ire, and inform its decision by providing feedback on how seriously other states perceive the risks posed by the reservation.²⁰¹

The non-reserving state may also face evolving domestic dynamics. The U.S. executive branch has traditionally been less receptive to human rights concerns and more disinclined to exert pressure on "reluctant friendly foreign governments" – "resist[ing] in particular 'intrusive' scrutiny, criticism, and especially economic or military sanctions against governments for human rights violations" – while Congress has generally been more receptive to populist human rights pressures.²⁰² The same dynamic is apparent in other international contexts, such as trade, where Congress has attempted to constrain the authority of the U.S. Trade Representative to underenforce violations of international agreements. The distinction is imperfect, but illustrates the potential value of flexibility on the international plane.²⁰³

III. REVISING THE VIENNA CONVENTION

Assuming that reservations may indeed have benefits for non-reserving states, it is unclear how to assess them – or, for that matter, how the more contingent benefits of what I call "reserving" stack up – against the obvious costs exacted by reservations. An equally relevant question, perhaps, is how the Vienna Convention indulges those interests. Its drafters seem to have made fundamental choices without regard for their distributional consequences.²⁰⁴ Perhaps, then, its ambiguities were unanticipated, or at

²⁰¹ Cf. Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 Ga. J. Int'l & Comp. L. 99, 123 (1995-1996) (suggesting that "when a reservation has evoked objections from some states, other states which find the reservation objectionable may see no point in adding to the list of objecting states, since additional objections would make no legal difference."). For reasons previously mentioned, additional objections *do* make a legal difference, but perhaps not a sufficient one.

²⁰² Louis Henkin, *The Age of Rights* 67-70, 73 (1990).

²⁰³ *Id.* at 70 ("Congress, while sensing the need to induce a reluctant executive to attend to human rights, was also content to provide an avenue of escape from these restrictions in some cases if the President were prepared to assume the onus for taking it. For its part, the executive branch, or some elements in it, were often content to criticize or implement sanctions against human rights violators if they could attribute responsibility to Congress and could maintain executive helplessness to disregard the restrictions."); *id.* at 73 ("Some thought Congress was content with the ambiguities: a law on the books expressing a policy Congress favored, but that would not unduly hamper a President, who would then bear the onus of subverting the law while relieving Congress of the charge that insistence on its laws had helped spread Communism").

²⁰⁴ During the negotiations over the Vienna Convention, in expanding the range of potential objections beyond those pertaining solely to incompatibility, the Commission noted that objections *not* premised on incompatibility were usually not made with the intent of thwarting treaty relations. Interstate negotiations at the Vienna Conference later reversed the presumption that objections would prevent the entry into force of the treaty between the reserving and objecting parties in favor of a rule putting the burden on the objecting state to make that intention explicit. After debate, an expert consultant opined: "[T]he problem was merely that of formulating a rule one way or the other. The essential aim was to have a state rule as a guide to the conduct of States, and from the point of view of substance it was

most resulted avoiding difficult questions in order to improve the possibility of adoption. Much as with Article 2 of the UCC, academic drafting (here, within the International Law Commission) may have drifted from a more conservative attachment to unanimity by adopting vague standards like object and purpose in order to secure agreement.²⁰⁵ It simply happened that this vagueness had pathologies, and is now being reconsidered.

While this account is not implausible, the persistence of these ambiguities is puzzling: why haven't states dissatisfied with the Vienna Convention, and preferring brighter lines, contracted around it to a greater degree, just as private parties have contracted around Article 2?²⁰⁶ The answer may be that dissatisfaction with the Convention is not so acute, or that negotiating around defaults is more difficult in large-scale multilateral conventions. But non-reserving states may also benefit from the reservation regime's ambiguities to an unexpected degree, and state practices under the Convention – even short of departures from the default rules – may suggest something closer to an equilibrium solution than has been supposed. If so, even the relatively modest reforms being proposed by the International Law Commission may undertheorized.²⁰⁷ It is useful, then, to reexamine the some of the Vienna Convention's ambiguities in light of a fuller theory of the interests of non-reserving states.

A. *The Initial Standing of Reservations*

To date, the International Law Commission has not stepped into the quagmire of the permissibility/opposability debate, and perhaps with good reason. As previously noted, the opposability strain of the Vienna Convention generally entrusts individual states to determine for themselves which reservations are consistent with the object and purpose of a treaty. Indeed, it may even be said to entrust reserving states with substantial responsibility for determining what is most acceptable to the *other* parties, given their lack of incentive in many instances to object. This is not an empty gesture – reserving states likely care to some degree how their reservations are regarded, and whether they generate ill-will, even if other states are inhibited in their ability to object to them – but nor does it seem wholly sufficient.

One virtue of this scheme from the standpoint of non-reserving states is that it provides information about the reserving state and its preferences. To be sure, much of this information was revealed with the *formulation* of the reservations – if not in the preceding multilateral negotiations – and does not necessarily require that those reservations be tolerated. But in a world in which reservations were vigorously and immediately scrutinized, and risked preventing the reserving state from becoming a party, significant disclosures would presumably become rarer. States would tend to keep mum about any expectations that they supposed others could decisively oppose, and instead

doubtful if there was any great consideration in favour of stating the rule in one way rather than the other providing it was perfectly clear.” Official Records, 2nd Sess., 10th Plenary Meeting, quoted in Sinclair, *supra* note __, at 62-63.

²⁰⁵ Cf. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).

²⁰⁶ Cf. Robert E. Scott, *The Rise and Fall of Article 2*, 62 La. L. Rev. 1009 (2002).

²⁰⁷ For one summary of the approach, see Special Rapporteur, Ninth Report, *supra* note __, ¶¶ 13, 17 n.34 (citing consensus within Commission).

simply engage in that conduct if and when necessary. If, on the other hand, the consequences of an unacceptable reservation are less certain, and in any event delayed, states have less cause to be circumspect, and more information will be produced. This information may be useful in identifying the reserving state's likelihood of breaching the treaty's original terms, and for mustering formal and informal mechanisms for redressing compliance gaps. Non-state actors, too, may use the reservations as a focal point for advocacy.

This scheme makes sense in familiar law and economics terms. When states decide on the content of a default rule such as the Vienna Convention, they need to elect between providing what most parties would desire, were they to fully articulate it, and a "penalty" default that aims instead at something else – as most relevant here, at forcing parties to reveal information in the process of contracting around the default.²⁰⁸ Such information may concern the parties' intent, clarify what the law is (and so reduce gaps in expertise), or divulge otherwise expensive information about the party's type (for example, the risk that it will violate the rule).²⁰⁹ States may be reluctant, however, to provide such information, perhaps because it exposes them to exploitation by a more powerful party²¹⁰ or forces them to put a pooling-generated subsidy at risk.²¹¹

Against this backdrop, the reservations scheme may be understood as a non-majoritarian means of achieving a partly "separated" outcome – in which states at least partially distinguish themselves from pools in which their traits would be disguised.²¹² The initial incentive is established by the broader and more stringent treaty terms that the existence of reservations in part facilitates – sometimes made still easier by the adoption of majority or qualified-majority voting.²¹³ Notwithstanding this incentive, states may

²⁰⁸ Information-forcing is not the only reason for choosing "minoritarian" defaults. See Ian Ayres & Robert Gertner, *Majoritarian v. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591, 11593-1606 (1999) (describing other rationales, such as "different private costs of contracting around," "different private costs of failing to contract around," "different public costs of filling gaps," and "ignorance of the law"). Some of these may be salient to the reservations context. See *infra* text accompanying notes ____.

²⁰⁹ For a suggestive discussion in the contracts context, see Ayres & Gertner, *supra* note ___, at 1591, 1606.

²¹⁰ Cf. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992) (considering fate of a private party facing another party with market power, and the opportunity to use revealed information to take more of the gains of trade).

²¹¹ Cf. Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999) (explaining how an informed party may resist contracting around a default rule, and providing information, when doing so would risk the elimination of subsidies achieved by lurking within an undifferentiated pool).

²¹² See Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 51 AM. L. & ECON. REV. 433, 456-57 (2003) ("In a pooling outcome, individuals with different characteristics choose the same behavior. In a separating outcome, individuals choose different behaviors, each according to her unique characteristics."); see generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* chs. 3, 4 (1994).

²¹³ The connection was explicitly drawn by the International Court of Justice in *Genocide Convention*. *Genocide Convention*, *supra* note ___, 1951 I.C.J. at 22 ("The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations. This observation is confirmed by the great number of reservations which have been made of recent years to multilateral conventions.").

resist providing information indicating that they are “bad” types with whom treaty arrangements are more costly.²¹⁴

The Vienna Convention breaks down this resistance in several ways. One way is by offsetting: reserving states increase, solely by virtue of their reservations, their desirability as treaty parties, insofar as reciprocity diminishes their ability to complain about corresponding breaches by non-reserving states – and presumably diminishes as well their inclination to object, and the political force of any objections, to kindred reservations by other states.²¹⁵ The second is by reducing the evident costs of self-exposure. Unlike a party to a private contract, which may face renegotiation on key terms or a shift in price were it to reveal that it is of a suspect type, reserving states are unlikely to face severe reprisals under the Vienna Convention. Reservations postdate the negotiation of the treaty’s basic terms. Moreover, as previously explained, reserving states are entrusted with the initial responsibility for determining whether their reservations are permissible, non-reserving states are rarely inclined toward the disproportionate and fragmenting solution of deeming the reserving state a non-party *inter se*, and the penalty associated with objections is not itself overly severe, given that it largely gives the reserving state what it wanted in the first place.

The information thus produced may be valuable for non-reserving states. In addition, non-reserving states will benefit indirectly from the separation function, since it indirectly identifies them as *less* costly states – to the extent, at least, that they refrain from themselves reserving to the relevant terms, and do not over-indulge in reservations to other provisions. They may, should they so choose, further separate themselves by objecting to reservations, thereby indicating the seriousness with which they regard the treaty’s terms.²¹⁶ States like the United Kingdom, the Netherlands, Germany, Australia, and Denmark seem regularly to distinguish themselves as protectors of treaty integrity, and likely benefit from the contrast with those states that are inveterate reservers – particularly those whose reservations are more frequently protested.²¹⁷

There are theoretical and practical objections to this account. First, if the claimed virtues for non-reserving and reserving states are substantial, the information-forcing function of reservations risks internal incoherency: For example, claiming that non-reserving states benefit substantially from the information, and the ability to distinguish themselves, seems in tension with the idea that the reservations scheme encourages

²¹⁴ See Adler, *supra* note __, at 1560 (including among such high cost types “[a] party who suffers unusually from breach,” “[o]ne who is unusually likely to breach where there is a chance she will leave a damages claim unpaid,” or “one who is unusually likely to leave a damages claim unpaid”; in general, “[t]he greater the expected deficiency in compensation from breach, the more costly that party is as a contractual partner”); *id.* (“Thus, just as a party can be a high-cost type if she is unusual in the probability that she will suffer damages or in the extent of those damages, a party can be a high-cost type if she is unusual in the probability that she will impose uncompensated damages or in the extent of those damages.”).

²¹⁵ This is analogous to a party revealing that its likelihood of *suffering* from a breach, and its costs in that event, are low. See *id.*

²¹⁶ This may be enhanced or tempered at subsequent stages in the reservations dialogue. See *infra* text accompanying notes __.

²¹⁷ See Horn, *supra* note __, at 197-200 (compiling information regarding states with most active reservations practices).

disclosure by reserving states. Such tension may be tolerable, however, so long as objections do not become so widespread and effective that reserving states must take them into account in their *ex ante* calculus.²¹⁸

Second, to the extent that this account suggests that the reservations scheme fulfills the common interest of reserving and non-reserving states, it sounds more like a majoritarian rule, with correspondingly less to show by way of penalty default benefits. But this contradiction is more apparent than real. Among other things, the majoritarianism here is general and nontailored in character, not specific to any particular type of treaty, and thus may be both strict enough and yielding enough to reveal information.²¹⁹ The question may become more acute, however, in the event that more tailored approaches are adopted, such as any regime specially tailored to human rights treaties.

Third, this account may overstate the information uniquely produced by the existing reservations regime. The Vienna Convention default rules are certainly not the only means of disgorging information. Draft treaties that provisionally prohibit reservations will produce disagreements exposing a would-be reserving state's preferences, much as might any substantive treaty negotiations. (Such "no reservation" provisions are occasionally employed, particularly to protect package deals like the Law of the Sea Convention, but they are far from common even outside the human rights field.²²⁰) Treaties may also be negotiated so as to permit reservations only to certain clauses, as with the Council of Europe's recent Cybercrime Convention.²²¹ In those circumstances, the negotiations about permissible reservations communicate information – not only "highlight[ing] the areas of disagreement . . . and emphasiz[ing] (by their absence) areas of consensus,"²²² but also about the states seeking the relevant reservations clauses²²³ – as well as less meaningful probative information about those ultimately implementing reservations of those types.

²¹⁸ The tension may also be ameliorated by temporal considerations. For example, once a state becomes a party to a treaty, it may be easier for it to withdraw reservations without attracting undesired scrutiny from domestic institutions and interest groups. Where a more public decision must be made, any objections made by international peers may be helpful in galvanizing support for the withdrawal. Withdrawal may also be subject to more yielding constitutional processes, as in the United States. Cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality op.) (describing abrogation of a treaty, in the absence of constitutional provision regarding termination, as presenting a political question).

²¹⁹ Ayres & Gertner, *supra* note __, at 1607.

²²⁰ See, e.g., Jacob, *supra* note __, at 290 (claiming that before negotiating on the Tobacco Convention, "[m]any of the delegates had never heard of a 'no reservations' clause").

²²¹ Convention on Cybercrime, Nov. 23, 2001, Europ. T.S. No. 185, available at <http://conventions.coe.int/Treaty/en/cadreprincipal.htm>.

²²² Amalie M. Weber, *The Council of Europe's Convention on Cybercrime*, 18 BERKELEY TECH. L.J. 425, 440 (2003).

²²³ In some instances, it is unmistakable, as in the right under Article 41(1) for a federal states to "reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities," but requiring that it cooperate with significant obligations, and providing that "a federal State may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II" and that the federal state "[o]verall . . . shall provide for a

Given that these negotiations transpired against the backdrop of the Vienna Convention, the question remains whether adopting some other default – such as a presumption that multilateral conventions do not permit reservations – would yield more information. It seems more plausible that it would not. In the face of such a presumption, states would propose permitting reservations only where they had support sufficient to adopt a reservations provision – which would tend to eliminate instances in which reservations have enough support to avoid overturning the Vienna Convention’s present presumption in their favor, but not enough to overcome the hypothetical bar on them – and there would provide a safety in numbers that diminishes the information yielded, save where the would-be reserving state is sufficiently influential as to attempt to overcome that preference (as with the United States in the instance of the Tobacco Convention).²²⁴ As against more moderate alternatives, perhaps the most that can be said is that the Vienna Convention strikes a more reasonable balance than it may first appear, once the interest in information is factored in, and that attempts to make reservations more difficult have a cognizable cost.

Fourth, and finally, reservations may communicate little information no matter what scheme is at issue.²²⁵ Obscure reservations should, to some degree, be self-detering: Reserving states will be disadvantaged if it is hard for them to establish that their subsequent conduct falls within their reservation, both in terms of compliance with the treaty and in terms of their reputations for compliance, which may be clouded as a consequence. But that may not be sufficient. The drafters of the European Convention on Human Rights, for example, found it necessary to preclude what they termed “general” reservations,²²⁶ understood as reservations that fail to refer to a specific provision of the Convention or are “couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope.”²²⁷

The principle that reservations should meet some general standard of clarity seems defensible. At the same time, the European Convention’s background conditions and reservations regime – for example, its preclusion of reservations made to enable

broad and effective law enforcement capability with respect to those measures.” Convention on Cybercrime, *supra* note __, art. 41.

²²⁴ See *supra* text accompanying note __.

²²⁵ See *supra* text accompanying notes __.

²²⁶ Article 57 of the Convention provides:

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

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 57, Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. 5, amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118.

²²⁷ *Temeltasch v. Switzerland*, App. No. 9116/80 (1982); *Bellilos Case*, *supra* note __, at 26, ¶ 55; *Chorherr v. Austria*, Case No. 22/1992/367/441, ¶ 18 (1993).

future changes in domestic law,²²⁸ and its prohibition on any reciprocal effect of reservations for non-reserving states²²⁹ – differs in important regards from the average treaty employing the Vienna Convention scheme, limiting its direct relevance. It may be inappropriate, for example, to follow that understanding of “general” reservations to proscribe reservations that affect more than one treaty provision, are comprehensive in their effect, or flexible in their adaptation to circumstances.²³⁰ If nothing else, the adaptability of a reservation’s terms facilitates its transplant to non-reserving states, thereby increasing marginally its reciprocity and deterring its formulation in the first place.

B. The Form and Timing of Objections

As discussed in Part I, one factor encouraging late objections – in addition to relatively technical questions concerning when notice has been received – is the unresolved tension between the permissibility and opposability schools. If reservations that are incompatible with the treaty’s object and purpose are void *ab initio*, then non-reserving states may – or so it is argued – choose to object at any point they wish. Though extreme versions of the permissibility approach would deny that objections to incompatible reservations are necessary or even permissible,²³¹ it is more common to suggest that the year-long default rule indicated by the Vienna Convention is somehow relaxed.²³²

The International Law Commission has to this point taken a critical view toward late objections, perhaps on the premise that they carelessly actions that could properly have been taken within the prescribed period.²³³ That view, however, seems seriously in error. Late objections may be justified based on the permissibility thesis, which has not definitively been repudiated, and indeed their practice arguably reinforces the validity of that perspective. Moreover, late objections afford the non-reserving state an opportunity to recover, by “reserving,” some of the risk management allocated to the reserving state. If non-reserving states are able to formulate late objections, at least in the case of arguably incompatible reservations, they may reserve judgment as to whether that path is advisable – and diminish the certainty and flexibility that the reservation affords its author. One might be wary, in any event, of further diminishing the defenses available to opponents of reservations.

²²⁸ European Convention, *supra* note __, art. 57(1) (adverting to “any law then in force in its territory”); see Iain Cameron & Frank Horn, *Reservations to the European Convention on Human Rights: The Bellilos Case*, 7 GERM. Y.B. INT’L L. 33, 103-105 (1990).

²²⁹ See Susan Marks, *Reservations Unhinged: The Belilos Case before the European Court of Human Rights*, 39 INT’L COMP. L.Q. 300, 320-21 (1990).

²³⁰ See Cameron & Horn, *supra* note __, at 100-05 (describing potential and actual applications of generality rule).

²³¹ See *supra* text accompanying notes __.

²³² See, e.g., Final Hampson Report, *supra* note __, at ¶ 19; see *supra* text accompanying note __.

²³³ However, it has not yet drafted any guideline on this question. Cf. Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶ 76 (indicating that “it would be better not to mention the moment when an objection can be formulated” in defining objections, but that it should instead be examined and addressed separately).

The ability to tender late objections is actually simulated, or even reinforced, by other aspects of the Commission's project. For one, states would be permitted to employ late reservations, which in theory allows non-reserving states to achieve for themselves reciprocal or other benefits from reservations even after the time for their submission – at least so long as the reservations are unanimously approved.²³⁴ The Commission would also approve of the depositary's power to evaluate reservations and, where a reservation is “manifestly [impermissible],” to draw that to the attention to the reserving state, signatory states, and the competent organ of the international organization.²³⁵ This suggests a distinctive character to incompatibility inquiries that would be inconsistent with a pure opposability approach, even as it would diminish the ability of non-reserving states to plead lack of notice. Indeed, a strict approach to late objections is simply inconsistent with the review function assumed in dispute settlement and other treaty-based functions, which appear to keep the issue of incompatibility very much alive.²³⁶

The potentially disruptive effect of continuing to permit tardy objections, finally, should not be regarded as prohibitive, given the increasingly dialogic form of interactions concerning reservations and objections. As noted previously, it is not uncommon for non-reserving states to react to reservations with queries or other indeterminate statements, sometimes touching off further exchanges with the reserving state and sometimes involving a treaty body as well.²³⁷ In the context of such discussions, a tardy objection does not have the effect of finally establishing treaty relations between the reserving and objecting states; the outcome, instead, may be withdrawal or modification of the reservation, withdrawal of the objection, or both. The information exchanged in such discussions may be useful in further clarifying the parties' intentions and expectations, and further improve the information functions described earlier.²³⁸ The reservations dialogue may even be routinized to some degree, as suggested by the Council of Europe's model responses to inadmissible reservations.²³⁹

It may be excessive, on the other hand, to insist that objections correspond to some predetermined ideal. One potential source of disagreement between the International Law Commission and its Special Rapporteur has concerned the definition of objections. To the Special Rapporteur, “reasons of legal security” make it “essential to determine whether a response to a reservation is an objection or a mere comment,” much as the interest in certainty required a more precise definition of reservations;²⁴⁰ during

²³⁴ 2004 Report, *supra* note __, at 260, 269-74 (setting out draft guidelines 2.3.3 & 2.3.5 and accompanying commentary).

²³⁵ *Id.* at __ (setting out draft guidelines 2.1.8 and accompanying commentary). There were, however, dissents to this position in the Sixth Committee. Sixth Committee, Topical Summary on 55th Report, *supra* note __, ¶ 175.

²³⁶ Cf. Final Hampson Report, *supra* note __, ¶ 33.

²³⁷ Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶¶ 70, 87.

²³⁸ Objecting, after all, may yield more information in the short run; Note that objecting can yield more information; if states withdraw, or if they protest, or maintain, it reveals how likely they were to breach, or how significant to them the reservation was.

²³⁹ See, e.g., Committee of Ministers, Council of Europe, Recommendation No. R(99) on Responses to Inadmissible Reservations to International Treaties (detailing model responses to non-specific reservations).

²⁴⁰ Special Rapporteur, Ninth Report, *supra* note __, ¶ 3; Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶ 92.

plenary discussions in the Commission, on the other hand, some speakers indicated that the parallel should be resisted, at least insofar as it would prejudge the validity of objections or the limitation of their effects.²⁴¹ Putting to one side the debate about regulating objections' effects, there are reasons to be leery of the Special Rapporteur's inference that:

States often use vague terms whose ambiguity conceals their true intentions, which would seem to indicate that the definition of objections should be treated in the same way as the definition of the reservations themselves and that an objection may be regarded as such even if it is not expressly presented as an objection by the author of a unilateral statement reacting to a reservation . . .²⁴²

The mere fact that both reservations and objections may be vague does not suggest that the solution should be the same. For reasons previously discussed, one of the central problems with reservations is that they unduly shift the costs of uncertainty to non-reserving state; uncertainty about the intent behind a *response* to a reservation may help level the playing field, much as does the lingering possibility that a reservation could be deemed incompatible. Particularly if the intended effect of an objection is to be decided at the same time, the Rapporteur's approach may artificially classify a state's response as an objection – or, far more damningly, as something *less* than objection, with potential implications for any true objection's timeliness – without any comparable need for clarification.

One tactical alternative available to non-reserving states that deserves protection, notwithstanding its tension with the stricter reading of the Vienna Convention urged by the Commission, is the communication of general objections: that is, objections presented by states that indicate a general view of reservations. Some may be of the most general nature imaginable – for example, Greece's objection that it would not accept any reservations to the Genocide Convention that had been or would in the future be proposed²⁴³ – or they may be tailored, either indicating a particular type of reservation that is unacceptable or listing states that have entered disfavored reservations.²⁴⁴ On the one hand, it seems unduly formalistic to discourage such objections, particularly if they help redress any imbalance favoring reserving states, or communicate more effectively the non-reserving state's position. On the other hand, the relative infrequency of general objections, notwithstanding their tolerance under most treaty schemes, suggests the value to non-reserving states of tailoring, and delaying, their reactions.

²⁴¹ Id. ¶ 7; see also Sixth Committee, Topical Summary on 55th Report, *supra* note __, ¶ 187 (“It was also suggested that the definition of objections to reservations, if there was any need for one, should include all the negative reactions to reservations, either with regard to the content or the fact that they were late.”).

²⁴² Id. ¶ 3.

²⁴³ For the text, see Horn, *supra* note __, at 184.

²⁴⁴ See Horn, *supra* note __, at 196-97 (citing examples).

C. *The Effect of Objections*

An additional reaction to the apparently limited choices available to objecting states, and another potential byproduct of the permissibility school, has been the assertion by some states – especially, it would appear, the Nordic states²⁴⁵ – that it is open to them to describe their own effects for objections. Such objections, including those with “intermediate” effect that would disapply provisions of the treaty not referenced by the reserving state, and those with the “super maximum” effect of disregarding the reservation and asserting that the entire treaty is in effect,²⁴⁶ have thus far produced an equivocal reaction within the International Law Commission. Objections with intermediate effect are regarded as somewhat dubious, but their continuation seems to be accepted.²⁴⁷ Objections with “super maximum effect,” on the other hand, are generally regarded as inappropriate.²⁴⁸ The rationale, as the Special Rapporteur stated it, was that whether or not objections with intermediate effect were valid, they “prima facie . . . fell within the consensual framework on which the Vienna regime was based, unlike reservations with super maximum effect, which diverged from it.”²⁴⁹ This reflects a puzzling distinction. In either case, it would appear, the objections take a form exceeding the options delineated by Article 21. In either case, moreover, the objections – if given their intended effect – propose a bargain to which the reserving state has not agreed.²⁵⁰

The key, perhaps, lies in realizing that neither form of objection conclusively gives the objecting state what it desires. Objections with innovative effects may prove a valuable counterweight to the reserving state’s power of initiation; liberating a non-reserving state to choose between silence, querying a reservation, “simple” objection, objection to party status, objection and reformulation of the treaty relation with intermediate effect, and objection with super maximum effect helps equalize the asymmetries otherwise favoring the reserving state. Innovative objections do so, moreover, in the context of a reservations dialogue, in which they are more like place-

²⁴⁵ See Jan Klabbers, *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, 69 *Nordic J. Int’l L.* 179 (2000); Lars Magnuson, *Elements of Nordic Practice 1997: The Nordic Countries in Coordination*, 67 *Nordic J. Int’l L.* 345, 350 (1998). For example, Sweden’s objection to Qatar’s reservation in its accession to the Optional Protocol to the Convention on the rights of the Child stated: “This objection shall not preclude the entry into force of the Convention between Qatar and Sweden. The Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.” See Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶ 96 (internal citations omitted). But the phenomenon is not limited to those countries. Final Hampson Report, *supra* note __, at ¶¶ 16-17 (citing examples); Special Rapporteur, Ninth Report, *supra* note __, ¶ 19 n.38 (citing examples).

²⁴⁶ See *supra* text accompanying notes __.

²⁴⁷ See, e.g., Special Rapporteur, Eighth Report Add. 1, ¶ 95 (describing intermediate effect as an “established practice” among states). But see, e.g., ILC, 56th Report, *supra* note __, ¶ 285 (relating view that objections with intermediate effect resembled reprisals).

²⁴⁸ Special Rapporteur, Eighth Report Add. 1, *supra* note __, ¶ 97; Special Rapporteur, Ninth Report, *supra* note __, ¶ 20; Sixth Committee, Topical Summary on 55th Report, *supra* note __, ¶ 192; ILC, 56th Report, *supra* note __, ¶ 289.

²⁴⁹ ILC, 56th Report, *supra* note __, ¶ 293(d).

²⁵⁰ If anything, the objection with super maximum effect is less transgressive, at least in cases of incompatibility, since in those instances the treaty’s terms are restored to exactly their condition but for the reserving state’s violation of Article 19.

holders, or even preliminary objections, that have the effect of extending the time horizon for mutual evaluation by the reserving and objecting states.

Viewed this way, innovative objections of this kind resemble the assertion of some treaty monitoring bodies of the authority to evaluate whether reservations violate the object and purpose of a treaty. While those bodies may represent that authority as an alternative to state objections, that tends to exaggerate its potential scope, since the effect is in no instance to change the terms of the reserving state's treaty relationships.²⁵¹ The effect of intervention, instead, is to prevent the reserving state from having benefit of its reservation for certain purposes – for example, in considering state reports, or in evaluating complaints.²⁵²

To be sure, many have misgivings about the role of treaty bodies too, and it is wrong to ignore – as the Commission has to date²⁵³ – the potentially counterproductive effect that their intervention, and the severability remedy some have asserted, may have on the incentives of reserving states²⁵⁴ and non-reserving states²⁵⁵ alike. But it does seem correct to resist, as the Commission also has to date, any attempt to substitute its intuitions about the legitimacy of innovative objections or treaty body interventions for the practices that other institutions are yet developing.²⁵⁶

²⁵¹ Compare, e.g., Observations by the United States on General Comment 24, *supra* note ____ (disputing that Human Rights Committee could “impose on States Parties an obligation to give effect to the Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant”), with P.R. Ghandhi, *The Human Rights Committee and the Right of Individual Communication* 371 (1998) (suggesting, in responding to U.S. views, that “[t]here appear to be some misunderstandings here: clearly the Committee is not seeking to arrogate a legally binding quality to its views”).

²⁵² That is not to say that the effects will be precisely equivalent. States may, for example, be more tolerant of intervention by non-state actors. See HENKIN, *THE AGE OF RIGHTS*, *supra* note ___, at 22 (noting that the Human Rights Committee “is composed of independent experts but, as in other bodies of international experts, some are not independent in fact but are subject to substantial control by their governments”); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 208-14 (1995) (“States have not become much more willing to scrutinize or be scrutinized by other States; they have become less unwilling to respond to intercession by a respected multilateral body in limited circumstances.”).

²⁵³ See Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, *supra* note ___, ¶ 6 (stressing that “this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties”).

²⁵⁴ Under the position proffered by the Human Rights Committee and others, reservations contribute to a one-way ratchet of a kind common to treaty law: a state may, it would appear, take the risk of entering reservations, but after ratification might find them severed, leaving it as an (unreserved) treaty party, in some treaty contexts without any right of denunciation. This may, in fact, be the reserving states’ preferred solution, as Ryan Goodman has recently contended, *at the time when the reservations would be found objectionable* – but it may also cause states to adopt a different posture when making the *ex ante* decision whether to ratify, or when negotiating future treaties. Which effect is more important requires a complex balancing of risks, including difficult estimations concerning whether the era of crafting great multilateral human rights instruments has passed, leaving only the business of corralling and keeping signatories.

²⁵⁵ The possibility of Committee intervention, as noted earlier, may be to diminish state scrutiny of reservations still further. See *supra* text accompanying note ____.

²⁵⁶ ILC, 56th Report, *supra* note ___, ¶ 278 (praising proposed definition of objections “as not prejudge[ing] the effects an objection may have and left open the question whether objections which

IV. CONCLUSION

[To be supplied.]

purport to have effects other than those provided for by the Vienna Conventions are or are not permissible,” and as properly failing to “indicate which category of States or international organizations could formulate objections or on which date the objections must or could be formulated,” since “those were sensitive issues on which it would be better to draft separate guidelines.”); Special Rapporteur, Ninth Report, *supra* note __, ¶ 7.