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CONTESTING RESERVATIONS: THE ROLE OF TREATY MONITORING BODIES IN SAFEGUARDING HUMAN RIGHTS

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Reservations to international treaties have long been used to protect state sovereignty, yet in the sphere of human rights they generate complex legal and normative dilemmas that test the universality and integrity of core rights and freedoms. The relevance of this study stems from this very tension, as it seeks to analyze how treaty monitoring bodies and regional courts interpret and assess reservations, and what implications this has for the effectiveness of international human rights protection. The methodology combines general scientific, dogmatic, statistical, and legal interpretation methods in analyzing the evolution of treaty bodies' approaches to reservations in human rights law. This study is of particular importance for Kazakhstan, whose unusual treaty practice, marked by the absence of reservations, creates both opportunities to demonstrate visible adherence to international obligations and vulnerabilities to rigorous external oversight. The novelty of the article lies in its examination of this "strategic silence" and its implications for Kazakhstan's engagement with international oversight mechanisms. Ultimately, the study concludes that reservations simultaneously function as a safeguard of sovereignty and as a barrier to the universality of human rights, and severability of incompatible reservations by treaty monitoring bodies.

Key words: reservations, human rights treaties, Vienna Convention on the Law of Treaties, treaty monitoring bodies, European Court of Human Rights, Inter-American Court of Human Rights, international law.

Introduction

Reservations to international treaties, defined as "a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it seeks to exclude or modify the legal effect of certain treaty provisions in their application to that State" [1], represent one of the most complex and controversial elements of the Vienna regime. This regime is primarily governed by the Vienna Convention on the Law of Treaties (1969) (VCLT), the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), and the Vienna Convention on Succession of States in Respect of Treaties (1978).

Although the concept of reservations may seem straightforward, in practice it is fraught with complexities. As observed, "the matter of a definition [of reservations], while relatively simple in the abstract, can be difficult in practice" [2]. Paul Reuter, Special Rapporteur of the International Law Commission (ILC), described reservations as "a thorny and controversial issue," noting that even the provisions of the VCLT have not resolved all associated difficulties [3]. The ILC Special Rapporteur on Reservations to Treaties, Alain Pellet, characterized reservations as an "absolute evil" because they undermine the integrity of a treaty, yet acknowledged that they can also promote broader adherence and thus universality. He emphasized, however, that the freedom of states to formulate reservations is not unlimited, as it "clashes with the other prerequisite that forms the very essence of the treaty" [4, p. 522-523].

In accordance with Articles 19 and 20 of the VCLT, a reservation shall be binding on other parties only if two conditions are met: (1) the reservation must be legally permissible; and (2) the reservation must be accepted by the other states parties.

As outlined in Article 19, a state may introduce a reservation unless one of the following applies:

The treaty explicitly prohibits reservations;

The treaty permits only specific reservations, and the proposed one is not among them;

In cases not covered by (a) or (b), the reservation is deemed incompatible with the treaty's object and purpose.

If a reservation is permissible, the second condition is its acceptance by other states. A reservation that is expressly permitted by the treaty does not require subsequent acceptance by other states parties, unless the treaty provides otherwise (Article 20, paragraph 1). If a state makes a reservation to a treaty that constitutes the founding instrument of an international organization, such a reservation must be accepted by the competent organ of that organization (Article 20, paragraph 3).

Article 21 outlines the legal effect of valid reservations: they modify the treaty only between the reserving and accepting states and do not affect other parties *inter se*. If a state objects to a reservation but does not prevent entry into force, the reserved provision does not apply between the two states. Article 22 allows states to withdraw reservations and objections at any time, with notification requirements. Article 23 emphasizes that all reservations, acceptances, objections, and withdrawals must be made in writing and communicated accordingly, with formal confirmation needed if made at signature. Collectively, these provisions seek to balance state sovereignty with the integrity of treaty obligations, yet remain a source of legal and political complexity in practice.

The main challenge is raised with human rights treaties, where the traditional Vienna regime, designed for reciprocal inter-state obligations, faces serious limitations. These treaties aim to protect individuals, not allocate benefits among states, making reservations particularly problematic when they undermine core rights or breach treaty object and purpose. As such, treaty bodies have often asserted the authority to assess and even "sever" impermissible reservations, further complicating the balance between state consent and universal human rights protection.

"The object and purpose" test foreseen in Article 19(c) became the main test for assessing reservations to human rights. The key challenge lies in the ambiguity of the phrase and the absence of clear mechanisms for determining compatibility or resolving disputes. As L. Lijnzaad observes, the difficulty becomes evident when comparing the Convention on the Prevention and Punishment of the Crime of Genocide, whose single aim is to prohibit genocide, with more complex treaties that pursue multiple, interrelated objectives [5, p. 40]. J. Klabbers similarly argues that some international agreements have several objects and purposes, and in the human rights context, identifying them can be particularly challenging. For example, while one might broadly define the ECHR's object and purpose as the protection of human rights, such a general statement provides little guidance when evaluating the validity of a specific reservation, such as one affecting the right to freedom of assembly [6, p. 49]. Judge Bruno Simma likewise criticizes the Vienna regime for "fail[ing] to provide a means to measure a reservation against the object and purpose of the relevant treaty, and [leaving] open the consequences to be attached to a reservation considered impermissible under this test" [7, p. 6].

Although this provision echoes the ICJ's 1951 *Advisory Opinion on Reservations to the Genocide Convention* which examined whether a state making a reservation could remain a party to the Convention, particularly in cases where some parties objected while others accepted, their approaches diverge significantly. The ICJ held that a reservation could be accepted, even if objected to by some states, provided it does not defeat the treaty's object and purpose: "A State which has made and maintains a reservation... can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention" [8, 26].

In that opinion, the ICJ applied the "object and purpose" test both to the reservation itself and to the legal consequences of objections. By contrast, Article 19(c) of the VCLT applies the test solely at the moment of the reservation's formulation, without clarifying the legal effect of objections or identifying the authority competent to adjudicate compatibility.

Another layer of complexity arises from the decentralized nature of the Vienna regime: "Each State which is a party to the Convention is entitled to appraise the validity of the reservation, and it exercises this right individually and from its own standpoint" [8, p. 26]. This leads to fragmentation: if state A accepts a reservation while state B objects, the treaty's application becomes inconsistent. As the ILC acknowledged, the absence of an objective mechanism to resolve such disagreements results in legal uncertainty: "so long as the application of the criterion of compatibility remains a matter of subjective discretion... the status of a reserving state in relation to the convention must remain uncertain" [9, p. 128].

This legal uncertainty is further exacerbated by the practice of treaty monitoring bodies in the field of human rights law. These bodies have taken an assertive role in reviewing the admissibility of reservations and promoting the severability of those they find incompatible with the object and purpose of the treaty. Such interventions challenge the decentralized logic of the Vienna regime and raise new questions about the competency and legitimacy of judicial and quasi-judicial treaty bodies to unilaterally determine the validity of reservations. Moreover, a key legal dilemma arises when reservations to human rights treaties are found to be invalid: how does this affect the status of the reserving state as a party to the treaty?

The present article aims to critically analyze this evolving practice, comparing the traditional Vienna regime with the emerging approach in human rights treaty bodies, and assessing its implications for the coherence, legitimacy, and effectiveness of international treaty law. This analysis acquires particular significance for Kazakhstan, which has thus far refrained from making use of the institution of reservations, although it may reconsider this practice in the future.

European Convention on Human Rights's Approach to Reservations

The European Convention on Human Rights (1950) (ECHR) is distinctive among international human rights treaties in explicitly regulating reservations through Article 57, which imposes both substantive and procedural constraints on state parties. Specifically, a reservation must: (1) be made at the time of signature or ratification; (2) relate to specific domestic laws in force at that time; (3) not be of a general character; and (4) include a brief statement of the relevant law. This provision reflects the Convention's strict approach to reservations, designed to uphold the integrity and effectiveness of the rights it protects while allowing limited domestic flexibility.

Despite this detailed framework, both the European Court of Human Rights (ECtHR) and the former European Commission of Human Rights have interpreted reservations restrictively. They consistently held that compliance with Article 57 is a substantive matter, not merely procedural, and subject to judicial review.

In *Temeltasch v. Switzerland*, the Commission assessed whether Switzerland's so-called "interpretative declaration" related to Article 25 on the right of individual petition should, in substance, be considered a reservation. The Commission held that despite its label, the declaration limited Switzerland's obligations and was therefore a reservation under Article 2(1)(d) VCLT, which defines a reservation as a unilateral statement seeking to exclude or modify the legal effect of a treaty provision. It emphasized that "the decisive criterion is its substantive content and not its formal designation" [10, para 68]. This case emphasized that timing alone is insufficient, the content of the statement must also comply with Article 57.

This approach that substance prevails over form was later reinforced by the ECtHR in *Belilos v. Switzerland*. In that case, the Court invalidated Switzerland's reservation to Article 6(1) on the right to a fair trial, holding that the declaration, though labeled interpretative, effectively modified the state's obligations and thus qualified as a reservation under Article 2(1)(d) VCLT. The Court stated: "one must look behind the title given to [a declaration] and seek to determine the substantive content" [11, para 49].

The *Belilos* case also clarified the standards set out in Article 57 ECHR. The Court found the Swiss reservation impermissible because it was "couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope" [12, para 55]. As the Court concluded, general or imprecise reservations violate the requirements of Article 57 and undermine legal certainty.

The ECtHR has also firmly rejected attempts to use territorial exclusions as valid reservations under the ECHR. In *Loizidou v. Turkey*, the Court examined Turkey's declarations under Articles 25 and 46, which sought to exclude its jurisdiction over acts committed in Northern Cyprus. The ECtHR ruled that these territorial limitations were invalid. It emphasized that such declarations cannot be used to restrict

the Court's jurisdiction and reaffirmed that the authority to interpret the legal effect of declarations lies solely with the Court, not the respondent state [13, para 95]. The ECtHR concluded that Turkey's acceptance of the Convention's jurisdiction remained fully effective and could not be qualified by unilateral territorial exclusions.

This logic was extended in *Ilascu, Lesco, Ivantoc and Petrov-Popa v. Moldova and Russia*, where Moldova's declaration disclaiming responsibility for the Transdniestria was found not to constitute a valid reservation [14, para 324, p.75]. The Court observed that it did not refer to any specific provision of the Convention nor cite any domestic legal basis, thereby failing to meet the requirements under Article 57. Similarly, Azerbaijan's declaration stating it could not ensure application of the Convention in Armenian-occupied territories is of dubious validity, lacking specificity and legal grounding [15, p. 463].

In contrast, the ECtHR has upheld reservations that meet Article 57's criteria of specificity and clarity in many cases. For example, in *Chorherr v. Austria*, a reservation to Article 5 was accepted because it referenced a limited number of legal provisions forming a "well-defined and coherent body of substantive and procedural administrative provisions" [16, para 18, p. 7]. Similarly, in *Helle v. Finland*, a reservation relieving certain courts from the obligation to hold oral hearings was found to be sufficiently precise [17, para 42]. The Court also upheld reservations in *Steck-Risch and Others v. Liechtenstein*, concerning the right to a hearing and public pronouncement of judgments [18], and in *Jėčius v. Lithuania*, where a prosecutor's authority to order detention on remand was clearly based on domestic law [19]. These cases illustrate that specificity and legal clarity are essential for a reservation's validity under Article 57.

It is also of vital importance to understand how the ECtHR developed and asserted its jurisdiction to review the validity of reservations and interpret the legal scope of declarations. While the Court's general mandate is to interpret and apply the ECHR and its Protocols in cases brought by individuals, groups, or states, it has consistently affirmed its authority to independently assess the permissibility of reservations, regardless of how states themselves characterize or justify them.

Allain Pellet, ILC Special Rapporteur, stressed that the "difficulties which surfaced with regard to establishing the compatibility of a reservation with the 'object and purpose' test of the Vienna regime" were significantly mitigated by "the setting up of monitoring mechanisms endowed with the competence to determine objectively the permissibility of reservations" [20, p. 538]. According to Pellet, this development "finally gave the 'object and purpose' criterion the place it deserved: an objective limitation on the freedom of states to formulate reservations to a treaty." [p. 538]. In a similar vein, ICJ Judge Bruno Simma, in his article co-authored with Gleider I. Hernández, emphasized that "the monitoring of human rights obligations is a central element in the protection of the overarching object and purpose of human rights treaty instruments" [21, p. 31].

In *Belilos v. Switzerland*, the Court made clear that an invalid reservation does not relieve a state of its obligations under the ECHR, stating: "It is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration" [22, para. 60]. Furthermore, the Court rejected Switzerland's argument that its declaration had been tacitly accepted under Article 20 of the VCLT on the basis that neither the Secretary General (as depositary) nor other state parties had objected. The Court firmly held that "the silence of the depositary and the Contracting States does not relieve the Convention institutions of the power to make their own assessment" [23, para. 47], reinforcing the ECtHR's autonomous role in safeguarding the Convention's integrity.

In *Loizidou v. Turkey*, the Court strongly reaffirmed its role as the final authority of the Convention's legal framework. It rejected Turkey's attempt to limit the Court's jurisdiction through territorial exclusions attached to its declarations under Articles 25 and 46. The Court found such limitations incompatible with the ECHR, noting that allowing them would "undermine the effectiveness of the Convention system" [24, para 70, p. 21]. It firmly asserted that the determination of the legal effect of a declaration under the Convention lies "within the competence of the Court and not of the respondent Government" [24, para 60, p.18), and that "it is for the Court to determine the scope *ratione loci* of the declaration made under Article 25" [24, para 89].

Importantly, the ECtHR declined to apply Articles 20–21 of the VCLT on objections to reservations, opting instead for an autonomous interpretative approach rooted in the Convention's object and purpose. As the Court stressed, "the object and purpose of the Convention require that the rights and freedoms

it guarantees should be practical and effective" [24, para 72]. On this basis, the Court concluded that reservations or limitations incompatible with the Convention's purpose could not be permitted to dilute its protections.

These rulings underscore the ECtHR's broader interpretative stance that the Convention is a "living instrument" to be interpreted in light of evolving standards and present-day conditions. By asserting that it, not states, has the authority to assess the severability and consequences of invalid reservations, the Court reinforced its supervisory role and ensured that states remain bound by the Convention even in the absence of valid reservations [24, para 95].

Therefore, the ECtHR has developed a distinctive and robust framework for evaluating the validity of reservations under Article 57 of the ECHR. Through a combination of strict formal requirements and purposive interpretation, the Court ensures that reservations do not undermine the Convention's fundamental guarantees. By consistently prioritizing substance over form, demanding specificity and legal clarity, and asserting its own jurisdiction to review reservations, the Court safeguards the Convention's integrity. This judicial approach marks a departure from traditional treaty law doctrines under the VCLT, reinforcing the unique status of the ECHR as a living instrument with a strong supervisory mechanism.

Reservations in the Inter-American System

In contrast to Article 57 of the ECHR, which imposes a more formalistic approach by requiring that reservations be specific, non-general, and tied to domestic law, the Inter-American human rights system adopts a more substantive framework. Article 75 of the American Convention on Human Rights (1969) (ACHR) states that "this Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969," [25] thereby grounding the admissibility and interpretation of reservations in the object and purpose test under international treaty law.

While the Inter-American model is more flexible in terms of permitting a broader range of reservations without rigid formalities, this flexibility comes at a cost: in the absence of clear procedural limits, vague or broadly worded reservations might still be accepted if their substantive impact is ambiguous or difficult to assess. For example, although Article 4(5) of the ACHR prohibits the execution of individuals who were under the age of eighteen at the time of the offense, Barbados entered a reservation allowing for the execution of individuals aged 16 and above, as well as those over 70, under its domestic law [26, p. 129]. Similarly, Mexico's reservation pertained to political rights, stipulating that members of the clergy are not permitted to vote, either actively or passively, or to associate for political purposes [26, p.129]. These examples highlight how, despite the Convention's reliance on the object and purpose test, the substantive review of reservations may still allow for considerable discretion by states.

This tension is reflected in two key Advisory opinions by the Inter-American Court of Human Rights (IACtHR): 1982 Effect of Reservations on the Entry into Force of the ACHR and 1983 Restrictions to the Death Penalty. Together, these opinions articulate the Court's nuanced yet principled approach to reservations. In 1982 Advisory opinion, the Court underscored that human rights treaties differ from traditional multilateral treaties. Their function is not to balance mutual state obligations but to protect individual rights regardless of nationality. As the Court noted, "their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States" [27, para. 29].

This foundational understanding led the Court to apply Article 20(1) VCLT, concluding that a reservation does not require acceptance by other states for the Convention to enter into force [27, paras. 26–27, 35–37]. Instead, the decisive question is whether the reservation is compatible with the Convention's object and purpose. This interpretation promotes broader ratification of the ACHR while simultaneously safeguarding its normative integrity through Article 19(c) VCLT.

In 1983 Advisory opinion, the IACtHR applied this principle to a reservation by Guatemala to Article 4(4) ACHR, which prohibits the imposition of the death penalty for political offenses. The Court reaffirmed that any reservation seeking to suspend non-derogable rights would be incompatible with the Convention's object and purpose and thus impermissible [27, para. 61]. However, if the reservation merely restricted a specific aspect of a non-derogable right, without eliminating its core protection, it

might still be valid in principle. In this case, the Court reasoned that Guatemala's reservation did not wholly deny the right to life and therefore was not per se invalid.

Nevertheless, the IACtHR emphasized that a reservation only excludes what is explicitly stated within its text and should not be interpreted broadly. As the Court explained, "a State reserves no more than what is contained in the text of the reservation itself" [28, para 69]. Consequently, Guatemala's reservation applied only to the application of the death penalty to political offenses; all other guarantees under Article 4 remained fully binding. Moreover, the Court observed that Guatemala had not clearly or unequivocally rejected the article it reserved, reinforcing the need to interpret the reservation narrowly and cautiously [28, para 74].

Hence, the Inter-American system adopts a flexible and principled approach to reservations. While Article 75 ACHR allows reservations in line with the VCLT's object and purpose test, the lack of formal requirements can permit vague or broad reservations. The Inter-American Court has clarified that such reservations are valid only if they do not undermine core rights, especially non-derogable ones. Through its advisory opinions, the Court emphasized narrow interpretation and reinforced that human rights treaties aim to protect individuals, not facilitate reciprocal state obligations.

UN Treaty Bodies and the Evolving Practice on Reservations

Human Rights Committee

The United Nations treaty monitoring bodies, particularly the Human Rights Committee (HRC), have played a pivotal role in redefining the legal understanding of reservations to human rights treaties. Departing from the traditional, state-centric model grounded in reciprocity and political consent, the HRC has developed a human rights–oriented approach that emphasizes the object and purpose of the treaty and the primacy of individual rights.

A pivotal early step in this shift occurred in *T.K. v. France*, where France declared that Article 27 of the International Covenant on Civil and Political Rights (1966) (ICCPR) was "not applicable" to its territory [29]. Though framed as a "declaration," the Committee held that "it is not the formal designation but the effect the statement purports to have that determines its nature," concluding it should be treated as a binding reservation that barred it from examining the communication. This reasoning, grounded in Article 2(1)(d) of the VCLT, laid the foundation for future jurisprudence.

This logic was reaffirmed in *M.K. v. France*, where a Breton speaker challenged the lack of linguistic protections. Again, the Committee found that France's so-called declaration had the legal effect of a reservation and must be treated as such if it modifies the state's obligations [30, para 8.6]. These cases established the Committee's authority to independently characterize state declarations and assess their legal implications, marking a shift toward a more assertive interpretive role.

This evolving practice was formally consolidated in General Comment No. 24, which was expressly objected to by only three States (the United States, the United Kingdom, and France), implying that the remaining States parties tacitly accepted it.

In this landmark document, the Committee articulated a bold departure from VCLT orthodoxy by affirming its own authority to:

Determine whether a reservation is compatible with the object and purpose of the ICCPR;

Declare invalid any reservation that violates this test;

Sever such reservations, meaning the reserving state remains bound by the treaty without the benefit of the reservation.

This framework was applied in *Rawle Kennedy v. Trinidad and Tobago*, where the Committee reviewed a reservation excluding its jurisdiction over death penalty cases. The Committee reaffirmed its stance from General Comment No. 24, stating: "It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant" [31, para 18]. It further emphasized its authority to consider admissibility even where a reservation is at issue: "The Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation" [31, para 6.4].

However, Zdzislaw Galicki the ILC Special Rapporteur criticized the HRC for acting as a "sole judge of the permissibility of reservations." [32, para 44]. He stressed that "such a control on the permissibility of

Reservations … was not the monopoly of the monitoring bodies. States, through objections, could exercise another kind of control and such "duality" of controls would make for still more effective operation of the treaty; moreover, objections by States were often not only a means of exerting significant "pressure" but also a useful guide for the assessment of the permissibility of a reservation by the Committee itself" [32, para 44].

Despite this strong normative position, the Committee's practice has at times revealed inconsistency and caution. In *Francis Hopu and Tepoaiti Bessert v. France*, involving expropriation of indigenous land, the Committee declined to rule on the validity of France's reservation to Article 17. It merely stated: "The Committee does not find it necessary to pronounce itself on the validity of this reservation" [33, para 4.3]. Martin Scheinin have suggested that this hesitation may reflect political pragmatism, especially in cases involving influential states or sensitive issues [34].

The same pattern emerged in *Manuel Wackenheim v. France*, which challenged a ban on "dwarf tossing" under Article 26 [35]. Although France maintained a reservation to this provision, the Committee did not address its permissibility. Instead, it justified the ban on the basis of public order and human dignity, and the issue of the reservation was left unexamined, perhaps deliberately, since France itself did not invoke it.

These cases reveal an ongoing tension between legal principle and political realism. On one hand, *T.K., M.K.,* and *Rawle Kennedy* illustrate the Committee's ambition to uphold the object and purpose standard and enforce the integrity of human rights norms. On the other hand, *Hopu* and *Wackenheim* demonstrate a more cautious, even deferential posture in the face of geopolitical sensitivities or state silence. This selective application of General Comment No. 24 points to the limits of legal authority in the absence of enforcement mechanisms and underscores the challenges treaty bodies face when navigating the intersection of law and diplomacy.

CEDAW

Although the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) permits reservations under Article 28(2), provided they are compatible with the object and purpose of the Convention, the CEDAW Committee has consistently raised concerns about the scope and nature of such reservations. By entering a reservation, a state signals its "unwillingness to comply with an accepted human rights norm. It also ensures that women's inequality with men will be entrenched at the national level… This not only affects women's ability to exercise and enjoy their rights, but also guarantees that they will remain inferior to men and have less access to the full range of civil, political, economic, social and cultural rights enjoyed by men [36, para 15].

Several examples illustrate the persistence of such reservations. Bangladesh, for instance, has declared that it does not consider Articles 2 and 16(1)(c) binding "as they conflict with Sharia law based on the Holy Quran and Sunna" [36]. Similarly, Brunei Darussalam entered broad reservations to provisions that may conflict with its Constitution or Islamic principles [36]. Iraq reserved Article 29(1) relating to international arbitration and, notably, added a political clause stating that its accession "in no way implies recognition of or entry into any relations with Israel" [36].

In its General Recommendation No. 4, the Committee expressed concern over the significant number of reservations that appeared to be incompatible with the Convention's core principles. This concern was further addressed in General Recommendation No. 20, adopted at the Committee's 11th session in 1992, where it recalled the decision of the fourth meeting of States parties regarding reservations under Article 28(2), as noted in Recommendation No. 4.

The Committee has emphasized that overly broad or vague reservations undermine the effective implementation of the Convention and other human rights treaties. It has therefore urged States parties to reconsider such reservations as part of broader efforts to strengthen compliance with international human rights obligations. As noted in General Recommendation No. 21, such reservations make it "difficult for the Committee to evaluate and understand the status of women" [37, para 46]. This challenge is compounded in countries where constitutional frameworks themselves limit the scope of non-discrimination protections. For example, the constitutions of Botswana, Zambia, and Zimbabwe explicitly exclude customary personal laws from the application of non-discrimination provisions, thereby

allowing discrimination against women in matters of personal status law, such as marriage, divorce, and inheritance [38].

Moreover, in General Recommendation No. 21, the Committee on the Elimination of Discrimination against Women expressed its concern over the large number of reservations made by States parties to Article 16 of the Convention, especially when accompanied by reservations to Article 2 [37, para. 41]. These reservations are frequently justified on cultural, religious, economic, or political grounds, often reflecting a patriarchal conception of the family that places men in a dominant position over women.

In response, the Committee calls on States to gradually move toward the full realization of gender equality within the family. It urges States parties to resolutely discourage notions of women's inequality in the home and to work toward the withdrawal of reservations, particularly to Articles 9, 15, and 16 of the Convention [37, para. 43]. Nonetheless, certain states continue to uphold reservations that undermine these objectives. For example, Egypt maintains a reservation to Article 16, citing Islamic Sharia provisions that allegedly provide women with rights "equivalent to those of their spouses" to maintain a "just balance"[36]. Similarly, Iraq has entered multiple reservations, including to Articles 2(f), 2(g), and 16, also relying on Sharia law as justification [36]. Additionally, Kuwait has declared that it does not consider itself bound by Article 16(f) to the extent that it conflicts with Islamic Sharia, noting that Islam is the official religion of the State.

It is worth to be mentioned, that in contrast to the HRC, CEDAW places the primary responsibility for assessing the permissibility of reservations on states. As the Committee has stated, "control of the permissibility of reservations is the primary responsibility of the States parties" [37, para 24].

While the CEDAW Committee has taken a clear and principled stance against reservations that undermine the Convention's core objectives, particularly those to Articles 2 and 16, it remains institutionally constrained by the Convention's framework, which places the primary responsibility for assessing the permissibility of reservations on States parties themselves. The Committee's General Recommendations repeatedly highlight the damaging impact of broad or vague reservations, especially those grounded in cultural or religious justifications, as they entrench gender inequality and obstruct the realization of women's rights. Despite urging States to withdraw such reservations and progressively advance toward substantive equality, many states continue to maintain them, often invoking Sharia law or constitutional principles. This persistent pattern reflects the broader challenge of reconciling international human rights obligations with domestic legal and socio-cultural frameworks, and underscores the need for stronger mechanisms to hold states accountable to the Convention's object and purpose.

ICERD

Article 20 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD) was initially recognized as a progressive innovation for embedding the "object and purpose" test within a binding human rights treaty. It introduced a dual threshold: first, that reservations must not be incompatible with the object and purpose of the Convention; and second, that they must not inhibit the operation of its supervisory mechanisms. However, in practice, both the conceptual clarity and legal effectiveness of Article 20 have been the subject of sustained criticism.

As Lijnzaad notes, the dual criteria introduce interpretive ambiguities that risk undermining legal coherence [38]. By treating incompatibility with the Convention's object and purpose and obstruction of supervisory mechanisms as distinct grounds for impermissibility, the provision fragments its normative foundation. This separation contrasts sharply with the more integrated and normatively robust approach of the HRC in its General Comment No. 24, which treats compatibility with a treaty's object and purpose as an inherently legal determination – one that must be made objectively and not left to political discretion.

Equally problematic is the procedural mechanism under Article 20(2), which requires that two-thirds of state parties object to a reservation in order for it to be deemed invalid. While designed to promote consensus and collegiality among States, this rule has proven unworkable in practice. With over 180 states parties, reaching the two-thirds threshold is virtually unattainable, rendering the provision more symbolic than substantive. Lijnzaad critiques this as a form of pseudo-objectivity: rather than engaging in legal analysis of a reservation's substance, the mechanism relies on the absence of sufficient political objection to presume compatibility [38, p. 175].

This structural design exposes a broader normative tension between legal accountability and political expediency in the human rights treaty system. The ICERD model delegates the gatekeeping function over reservations to states themselves, sidestepping the independent legal scrutiny that treaty bodies like the HRC have asserted. As Simma and others have observed, this reliance on political processes rather than juridical assessment weakens the integrity of the object and purpose test, leaving room for reservations that may significantly dilute core treaty obligations [39, p. 537].

Moreover, the ICERD approach stands at odds with evolving treaty body practice, which increasingly recognizes that legal coherence and normative consistency require independent monitoring bodies to evaluate the permissibility of reservations. The Committee on the Elimination of Racial Discrimination (CERD), unlike the HRC, has not consistently asserted this function, further compounding the weaknesses of Article 20.

Therefore, ICERD's reservations regime, though ambitious in its framing, falls short in its implementation. Its reliance on vague thresholds, political objection mechanisms, and a bifurcated legal test undermines its capacity to safeguard the universality and effectiveness of the Convention. Without reform or stronger interpretive engagement by CERD, Article 20 risks becoming an empty safeguard, unable to prevent reservations that erode the foundational guarantees of racial equality and non-discrimination.

Conclusion

The evolving practice surrounding reservations to human rights treaties reveals a fundamental tension between state sovereignty and the universal protection of individual rights. While the VCLT established a consent-based, decentralized framework rooted in inter-state reciprocity, human rights treaties demand a reorientation toward an object-and-purpose-driven approach. Treaty monitoring bodies such as the HRC and the ECtHR have reinterpreted traditional doctrines to prioritize substantive human rights guarantees over formalistic state prerogatives, often asserting the authority to assess and even sever incompatible reservations. This shift has led to a more robust defense of treaty integrity but also raises questions about the legitimacy and consistency of these interpretive powers.

The analysis of practice from the ECtHR, IACtHR, HRC, and CEDAW Committee demonstrates that legal reasoning increasingly favors the substantive effects of reservations over their formal designation. Courts and committees have emphasized clarity, specificity, and compatibility with treaty goals, rejecting vague or general reservations as impermissible. However, the practical application of these principles remains uneven. While some cases, such as *Belilos* or *Rawle Kennedy*, demonstrate assertive scrutiny, others, including *Wackenheim* or *Francis Hopu*, illustrate political caution or selective engagement. This inconsistency highlights the fragile balance between normative ambition and diplomatic pragmatism within the human rights treaty system.

Although Kazakhstan is a party to numerous core universal human rights treaties, including the ICCPR and its two Optional Protocols, the CEDAW and its Optional Protocol, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the CAT along with its Optional Protocol (OP-CAT), it has not entered any reservations to these instruments.

This absence of reservations could, at first glance, signal a strong normative commitment to the full implementation of international human rights standards. It suggests a willingness to accept obligations in their entirety and to undergo external scrutiny without limitation. In practice, however, this silence raises interpretative ambiguities. Without formal reservations to delimit treaty commitments, Kazakhstan retains wide discretion to interpret and apply treaty provisions in a manner that may not always align with their intended object and purpose.

This ambiguity creates a paradox: while the absence of reservations may generate positive optics and enhance Kazakhstan's international reputation, it also leaves the country vulnerable to more rigorous engagement by treaty monitoring bodies. Committees such as the HRC or CEDAW Committee may interpret Kazakhstan's obligations expansively, with no legal limitations constraining their review. This opens the door to broader and more critical assessments during periodic reviews or individual communications, particularly on issues where national law may deviate behind international standards, such as gender equality, freedom of expression, or minority rights.

Moreover, as treaty bodies increasingly assert their interpretive authority, exemplified by the HRC in General Comment No. 24, which insists on objective compatibility and the severability of invalid reservations, the strategic benefits of Kazakhstan's silence may diminish. The absence of formal reservations removes procedural obstacles for monitoring bodies to engage with controversial or politically sensitive areas of domestic law. In this evolving legal landscape, Kazakhstan may find itself under pressure to clarify its interpretive positions, either through detailed state reports, practice-based clarification, or through the adoption of interpretative declarations that articulate how treaty provisions are understood and applied domestically.

Ultimately, Kazakhstan's reservation-free treaty practice reflects a delicate balance between diplomacy and legal risk. While it avoids the criticism typically associated with limiting treaty obligations, it also heightens expectations for full compliance and may invite more assertive oversight by international mechanisms. This is particularly relevant in light of recent Human Rights Council recommendations that Kazakhstan ratify the International Labor Organization Violence and Harassment Convention and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence [40]. It would require Kazakhstan to consider potential legal and policy instruments that enhance the protection of rights, strengthen implementation mechanisms, and ensure alignment between legislation and evolving international human rights standards.

Looking ahead, the debate over the permissibility and effect of reservations to human rights treaties will likely intensify as monitoring bodies continue to assert interpretive authority in response to evolving global challenges. States must navigate a complex legal landscape where silence can be as consequential as explicit limitation. For Kazakhstan and other similarly situated states, sustained engagement with treaty bodies, transparent interpretive positions, and progressive legal harmonization may prove more effective than reliance on strategic ambiguity. Ultimately, the legitimacy and effectiveness of the human rights treaty system will depend on achieving a principled equilibrium between respect for sovereignty and the indivisibility of rights.

А. Смагулова, Teaching Professor, Руководитель образовательной программы «Международное право» (г. Астана, Республика Казахстан): **Оспаривание оговорок: роль договорных органов в обеспечении защиты прав человека.**

Оговорки к международным договорам на протяжении длительного времени применяются для защиты государственного суверенитета, однако в сфере прав человека они порождают сложные правовые и нормативные дилеммы, ставящие под сомнение универсальность и целостность основных прав и свобод. Актуальность исследования обусловлена именно этим противоречием, поскольку его цель состоит в анализе того, как договорные органы и региональные суды интерпретируют и оценивают оговорки, а также в выявлении последствий этого процесса для эффективности международной защиты прав человека. Методология исследования сочетает общенаучные, догматические, статистические методы, а также методы юридического толкования при изучении эволюции подходов договорных органов к оговоркам в области прав человека. Особое значение работа имеет для Казахстана, чья необычная договорная практика – отсутствие оговорок – одновременно создает возможности для демонстрации приверженности международным обязательствам и обуславливает уязвимость перед строгим внешним контролем. Новизна статьи заключается в рассмотрении феномена «стратегического молчания» и его последствий для взаимодействия Казахстана с договорными органами. В результате исследование приходит к выводу, что оговорки одновременно выступают как гарантия государственного суверенитета и как барьер на пути к универсальности прав человека, а также способствуют формированию новой практики договорных органов по отделению неправомерных оговорок.

Ключевые слова: оговорки, международные договора в области прав человека, Венская конвенция о праве международных договоров, договорные органы, Европейский суд по правам человека, Межамериканский суд по правам человека, международное право.

А. Смағұлова, Teaching Professor, «Халықаралық құқық» бағдарламасының жетекшісі (Астана қ., Қазақстан Республикасы): **Дау туғызатын ескертпелер: адам құқықтарын қорғауды қамтамасыз етудегі шарттық органдардың рөлі.**

Мемлекеттің егемендігін қорғау мақсатында халықаралық шарттарға ескертпелер бұрыннан қолданылған, бірақ адам құқықтары саласында олар негізгі құқықтар мен бостандықтардың әмбебаптығы мен тұтастығына күмән тудыратын күрделі құқықтық және нормативтік дилеммаларды тудырады. Зерттеудің өзектілігі осы қарама-қайшылыққа байланысты, өйткені оның мақсаты шарттық органдар мен аймақтық соттардың ескертулерді қалай түсіндіретінін және бағалайтынын талдау, сондай-ақ халықаралық адам құқықтарын қорғау тиімділігі үшін осы процестің салдарын анықтау болып табылады. Зерттеу әдістемесі жалпы ғылыми, догматикалық, статистикалық әдістерді, сондай-ақ шарттық органдардың адам құқықтары саласындағы ескертулерге көзқарастарының эволюциясын зерделеуде құқықтық түсіндіру әдістерін біріктіреді. Бұл жұмыс Қазақстан үшін ерекше маңызға ие, оның әдеттен тыс шарттық тәжірибесі – ескертпелердің жоқтығы – халықаралық міндеттемелерге адалдығын көрсетуге мүмкіндіктерін жасай отырып, қатаң сыртқы бақылауға осалдығын анықтайды. Мақаланың бірегейлігі «стратегиялық үнсіздік» феноменін және оның Қазақстанның шарттық органдармен өзара іс-қимылы үшін салдарын қарастыруда. Нәтижесінде, зерттеу ескертпелер бір мезгілде мемлекет егемендігінің кепілі және адам құқықтарының әмбебаптығына тосқауыл ретінде әрекет етеді, сондай-ақ шарттық органдардың заңсыз ескертпелерді жоюдағы жаңа тәжірибесін қалыптастыруға ықпал етеді деген қорытындыға келеді.

Түйін сөздер: ескертпелер, адам құқықтары жөніндегі халықаралық шарттар, Шарттар құқығы туралы Вена конвенциясы, шарттық органдар, Адам құқықтары жөніндегі Еуропалық сот, Адам құқықтары жөніндегі Американ аралық сот, халықаралық құқық.

References:

1. United Nations. (1969). Vienna Convention on the Law of Treaties. URL: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (09.08.2025).

2. International Law Commission. (1998). Third report on reservations to treaties, U.N. Doc. A/CN.4/491 and Add.1–6, in Yearbook of the International Law Commission, 1998, Vol. II, Part 1. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1998_v2_p1.pdf#page=227 (09.08.2025).

3. International Law Commission. (1981). Tenth report on the question of treaties concluded between States and international organizations or between two or more international organizations, U.N. Doc. A/CN.4/341 and Add.1, in Yearbook of the International Law Commission, 1981, Vol. II, Part One. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2002_v2_p1.pdf#page=10 (09.08.2025).

4. International Court of Justice. (1951, May 28). Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion. URL: https://www.icj-cij.org/sites/default/files/case-related/12/012-19510528-ADV-01-00-EN.pdf (22.08.2025).

5. Lijnzaad, E. Reservations to Un-Human Rights Treaties: Ratify or Ruin? Martinus Nijhoff Publishers, 1995.

6. Klabbers, J. International law. Cambridge University Press. 2013.

7. Simma, B., & Hernández, G.I. Legal consequences of an impermissible reservation to a human rights treaty: Where do we stand? In E. Cannizzaro (Ed.), The law of treaties beyond the Vienna Convention Oxford University Press. 2011. pp. 60–85. URL: https://durham-repository.worktribe.com/output/1658454 (22.08.2025).

8. International Court of Justice. (1951, May 28). Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion URL: https://www.icj-cij.org/sites/default/files/case-related/12/012-19510528-ADV-01-00-EN.pdf (22.08.2025).

9. United Nations. (1966). Yearbook of the International Law Commission 1966, Volume II: Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly (A/CN.4/SER.A/1966/Add.1). United Nations. URL: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf (09.08.2025).

10. European Commission of Human Rights. (1982, 5 May). Temeltasch v. Switzerland, Application No. 9116/80. https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-95708 (22.08.2025).

11. European Court of Human Rights. (1988, April 29). Belilos v. Switzerland, Application No. 10328/83. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57434%22]} (22.08.2025).

12. European Court of Human Rights. (1988, April 29). Belilos v. Switzerland, Application No. 10328/83. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57434%22]} (09.08.2025).

13. European Court of Human Rights. (1995, March 23). Loizidou v. Turkey (Preliminary Objections), Application No. 15318/89. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57920%22]} (09.08.2025).

14. European Court of Human Rights. (2004, 8 July). Case of Ilascu and Others v. Moldova and Russia, Application No. 48787/99. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61886%22]} (09.08.2025).

15. Leach, P. Taking a case to the European Court of Human Rights (3rd ed.). Oxford University Press. 2011.

16. European Court of Human Rights. (1993, 25 August). Chorherr v. Austria, Application No. 13308/87. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-45543%22]} (09.08.2025).

17. European Court of Human Rights. (1997, December 19). Helle v. Finland, Application No. 157/1996/776/977.URL:https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58126%22]}(15.08.2025)

18. European Court of Human Rights. (2010, May 11). Steck-Risch and Others v. Liechtenstein, Application No. 29061/08. URL: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2229061/08%22],%22itemid%22:[%22001-99220%22]} (09.08.2025).

19. European Court of Human Rights. (2001, July 31). Jėčius v. Lithuania, Application No. 34578/97. URL: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58781%22]} (09.08.2025).

20. Pellet, A., & Müller, D. Reservations to Human Rights Treaties: Not an Absolute Evil. In U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer, & C. Vedder (Eds.), From bilateralism to community interest: Essays in Honour of Judge Bruno Simma. Oxford University Press. 2011. Pp. 521–546. URL: https://doi.org/10.1093/acprof:oso/9780199588817.003.0034 (09.08.2025).

21. Simma, B., & Hernández, G.I. Legal consequences of an impermissible reservation to a human rights treaty: Where do we stand? In E. Cannizzaro (Ed.), The law of Treaties Beyond the Vienna Convention. Oxford University Press. 2011. P. 60–85. URL: https://durham-repository.worktribe.com/output/1658454 (20.08.2025).

22. European Court of Human Rights. (1988, April 29). Belilos v. Switzerland, Application No. 10328/83. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57434%22]} (20.08.2025)

23. European Court of Human Rights. (1995, March 23). Loizidou v. Turkey (Preliminary Objections), Application No. 15318/89. URL: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57920%22]} (12.08.2025).

24. American Convention on Human Rights ("Pact of San José, Costa Rica"). (1969, November 22). Organization of American States. URL: https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf (12.08.2025).

25. Pasqualucci, J.M. . The Practice and Procedure of the Inter-American Court of Human Rights. Great Britain: Cambridge University Press. 2013.

26. Inter-American Court of Human Rights. (1982). The effect of reservations on the entry into force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2. URL: https://hrlibrary.umn.edu/iachr/b_11_4b.htm (25.08.2025).

27. Intyr-American Court of Human Rights. (1983). Restrictions to the death penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3. URL: https://hrlibrary.umn.edu/iachr/b_11_4c.htm(25.08.2025).

28. Human Rights Committee. (1987, 12 January). T.K. v. France, Communication No. 222/1987, U.N. Doc. CCPR/C/37/D/220/1987. URL: https://juris.ohchr.org/casedetails/463/en-US (25.08.2025).

29. Human Rights Committee. (1989, November 8). M.K. v. France, Communication No. 222/1987, U.N. Doc. CCPR/C/37/D/222/1987. URL: https://ccprcentre.org/files/decisions/222_1987_M_K__v__France.pdf (25.08.2025).

30. Human Rights Committee. (1999, December 31). Rawle Kennedy v. Trinidad and Tobago, Communication No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999. URL: https://juris.ohchr.org/casedetails/849/en-US (25.08.2025).

31. International Law Commission. (1997, July 9). Draft report of the International Law Commission on the work of its forty-ninth session: Chapter V, Reservations to treaties (A/CN.4/L.544). United Nations. URL: https://digitallibrary.un.org/record/240366/files/A_CN.4_L.544-EN.pdf (15.08.2025).

32. Human Rights Committee. (1997). Francis Hopu and Tepoaitu Bessert v. France, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. URL: https://juris.ohchr.org/casedetails/878/en-US (10.08.2025).

33. Ziemele, I. (Ed.). Reservations to human rights treaties and the Vienna Convention regime: Conflict, harmony or reconciliation? Springer Science+Business Media. 2013.

34. Human Rights Committee. (2002, July 26). Manuel Wackenheim v. France, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999. URL: https://juris.ohchr.org/casedetails/1010/en-US (12.08.2025).

35. United Nations Treaty Collection. (n.d.). Convention on the Elimination of All Forms of Discrimination against Women. URL: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en (30.08.2025).

36. Committee on the Elimination of Discrimination against Women. (1994). General Recommendation No. 21: Equality in marriage and family relations, para 46. URL: https://www.refworld.org/es/leg/coment/cedaw/1994/es/61456

37. Constitution of Botswana, 30 September 1966, Article 15 (4) https://botswanalaws.com/consolidated-statutes/constitution-of-botswana; Constitution of Zambia, 1991 (Act No.1 of 1991), Article 23 (4c). URL:https://zambialii.org/akn/zm/act/1991/1/eng@2016-01-05#att_1__part_III__art_23; Constitution of Zimbabwe, 1979 as amended (Zimbabwe Constitution Order SI 1979/1600 of the United Kingdom), art. 23 (3). URL: https://www.legislation.gov.uk/uksi/1979/1600/pdfs/uksi_19791600_en.pdf (10.08.2025).

38. Lijnzaad, L. Reservations to UN Human Rights Treaties: Ratify and Ruin?. Netherlands: Brill. 2022.

39. Simma, B. From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma. Italy: Oxford University Press. 2011.

40. United Nations Office of the High Commissioner for Human Rights. (2024, November 6). Compilation of information prepared by the Office of the United Nations High Commissioner for Human Rights: Kazakhstan (A/HRC/WG.6/48/KAZ/2). Human Rights Council Working Group on the Universal Periodic Review, 48th session. URL: https://docs.un.org/en/A/HRC/WG.6/48/KAZ/2 (10.08.2025).

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