RESTORING EQUILIBRIUM: MAXIMIZING STATE CONSENT THROUGH A MODIFIED SEVERABILITY REGIME

*By Lauren A. Marsh**

I. INTRODUCTION

The intersection of state consent, severability, and treaty reservations is a volatile one. Evoking strong emotions that strike at the heart of statehood, the concept of severing inadmissible treaty reservations has been contentiously debated within the international law community. With the International Law Commission's publication of its *Guide to Practice on Reservations to Treaties*[1] in 2011, the severability debate reignited. With the severability rule gaining traction mostly in European countries but still staunchly opposed by states like the United States, the time is ripe to evaluate the effects of international law adopting a severability regime.

A reservation is defined in Article 2 of the Vienna Convention on the Law of Treaties (Vienna Convention):

> "[R]eservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.[2]

Malcolm N. Shaw explains reservations in a more understandable way:

> Where a state is satisfied with most of the terms of a treaty, but is unhappy about particular provisions, it may, in certain circumstances, wish to refuse to accept or be bound by such provisions, while consenting to the rest of the agreement. By the device of excluding certain provisions, states may agree to be bound by a treaty which otherwise they might reject entirely.[3]

The legal authority for lodging reservations to international treaties stems from the principle of "sovereignty of states."[4] Under this principle, states may refuse to

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1. Rep. of the Int'l Law Comm'n, Guide to Practice on Reservations to Treaties, ¶75, U.N. Doc. A/66/10 (2011), *available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf [hereinafter ILC Guide].

2. Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

3. NURULLAH YAMALI, HOW ADEQUATE IS THE LAW GOVERNING RESERVATIONS TO HUMAN RIGHTS TREATIES? 3 (2004), *available at* http://www.justice.gov.tr/e-journal/pdf/LW7090.pdf (quoting MALCOLM N. SHAW, INTERNATIONAL LAW 914 (6th ed. 2008)).

4. *Id*. at 4.

consent to certain provisions of an international treaty, effectively rendering these provisions null with respect to the state.[5]

The current Vienna Convention framework on the law of treaty reservations blatantly favors the sovereignty of reserving states above all else—including the sovereignty of other state parties, universality, or integrity.[6] The result is a drastically distorted and unfair regime in which states must navigate highly unpredictable scenarios, where its likely that a state who lodges a reservation trumps all other nations to modify its treaty relations. Due to the imbalance, nonreserving states have resigned themselves to second place, subjugating themselves to the whims of another state's sovereignty.

In the second half of the twenty-first century, changes in treaty law raised the tension between two frequently contradictory goals: the universality of treaty membership and the integrity of treaty content.[7] The flexibility of the reservations regime evolved to increase the universality of treaty membership, allowing for a greater consensus on the legal rights and obligations of states.[8] However, despite the need for state consent in the international treaty reservations regime, there is also a need for cooperation between states to keep the integrity of treaties intact.[9] Treaty reservations, therefore, become a case study in the ever-oscillating importance of interests between protecting consent, sovereignty, and universality and protecting international state cooperation and treaty integrity.[10]

This comment begins with a brief review of the foundational concept of state consent in international law. It then provides a history of the law of reservations, following the thread of state consent through different iterations of treaty reservations law and ending with the Vienna Convention. This comment contends that the current state of affairs is not only unfair to non-reserving states, but also harmful to the institution of treaty regimes as a whole. Specifically, this comment argues that the adoption of a broad presumption of severability will maximize not only the state consent of all treaty parties, but will stabilize the flux between the values of universality and integrity in multilateral treaties. Finally, this comment concludes that the adoption of a broad presumption of severability is more advantageous than not, and its establishment is well within the purview of international law doctrine.

II. FOUNDATIONAL BASES FOR STATE CONSENT

Simply put, modern international law is built on a foundation of state

5. SHAW, *supra* note 3; YAMALI, *supra* note 3, at 4.

6. Vienna Convention, *supra* note 2, arts. 19–23.

7. YAMALI, *supra* note 3, at 3; Roslyn Moloney, *Incompatible Reservations to Human Rights Treaties: Severability and the Problem of State Consent*, 5 MELB. J. INT'L L. 155, 155 (2004).

8. YAMALI, *supra* note 3, at 3.

9. SHAW, *supra* note 3, at 914–15.

10. Jean Koh Peters, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71, 71 (1982).

consent.[11] However, with the advent of rapid globalization, the once sacrosanct commitment to state consent has increasingly become a proverbial double-edged sword.[12] On one hand, the commitment to state consent protects notions of sovereignty and respects the interests of states.[13] On the other hand, the requirement of state consent can frustrate attempts to solve global problems by creating a barrier to global cooperation between many vastly divergent nations with vastly divergent concerns.[14]

The reasons that state consent has become so central to the international law regime are easy to comprehend.[15] The state remains the most important political entity within the fragmented international law system.[16] States act on behalf of their nationals, enter into international agreements, and claim exclusive jurisdiction over acts within their territory. States zealously guard their sovereignty.[17] States decide which international obligations they will comply with and which they will breach.[18] More than any other entity in play in the international legal regime, states control the content and the implementation of international law.[19]

While it is easy to conceive of problems with the constant need for state consent, there is also a strong foundational basis for it. The three main arguments for a consent-based international law regime are that consent: (1) encourages compliance with international law; (2) increases the legitimacy of the international law system; and (3) protects against harmful changes to international law.[20] The compliance argument revolves around the lack of enforcement mechanisms in international law. Forcing states to abide by rules without their consent increases the chance that international law rules will be ignored.[21] The legitimacy concerns center on the desirability and practicality of a non-consensual rule.[22] Normatively, a rule that is deemed legitimate due to state consent is more likely to be considered

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11. ANDREW GUZMAN, THE CONSENT PROBLEM IN INTERNATIONAL LAW 5 (2011), *available at* http://andrewguzman.net/wp-content/uploads/2012/07/The-Consent-Problem-in-International-Law.pdf; *see also* ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 4 (2005) ("[International law] is based on the consent (express or implied) of states."); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 72 (2008) ("For centuries, the international legal system has been premised on the bedrock understanding that states must consent to the creation of international law."); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 142 (2005) ("Notwithstanding such criticism of Article 38 and state consent, most international lawyers still rely on them as international law's operating framework.").

12. GUZMAN, *supra* note 11, at 5.

13. *Id*.

14. *Id*.

15. *Id*.

16. *Id*.

17. *Id*.

18. GUZMAN, *supra* note 11, at 5.

19. *Id*. at 5.

20. *Id*. at 4–5.

21. *Id*. at 4.

22. *Id*. at 14–15.

desirable and derived from well-founded rule-making.[23] The protectionist claim of state consent is concerned with the confidence of states in non-consensual rules—if states have not agreed to the rules, they cannot be sure that the rules take into account their best interests.[24]

Treaties are the predominant means for expressing state consent in the international law regime.[25] To become a party to a treaty, a state must express, through a concrete act, its willingness to undertake the legal rights and obligations contained in the treaty—it must "consent to be bound" by the treaty.[26] A state can express its consent to be bound by a treaty in several ways, as specifically set out in the final clauses of the relevant treaty.[27] The most common ways are definitive signature,[28] ratification,[29] acceptance,[30] approval,[31] and accession.[32]

III. HISTORY OF THE LAW OF RESERVATIONS AS A REFLECTION OF WORLD ORDER

The law of reservations as it exists today is highly conventional.[33] The basic framework consists of the Vienna Convention rules as modified by state practice, with a secondary role for customary international law norms that govern states not directly constrained by the Vienna Convention.[34] Despite the ancillary role that the customary law of reservations plays in today's reservations regime, important features of today's regime were developed through the evolution of customary reservations law throughout the years.[35]

The evolution of the legal doctrine of reservations can be seen as a case study

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23. *Id*. at 4.

24. GUZMAN, *supra* note 11, at 5.

25. *See Sources of International Law*, ICELANDIC HUMAN RIGHTS CENTRE, http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/sources-of-international-law (last visited Mar. 24, 2015) ("'[T]reaty law' constitutes a dominant part of modern international law.").

26. Vienna Convention, *supra* note 2, arts. 2, 11–18; United Nations, Press Information Kit, 2011 Treaty Event—Towards Universal Participation and Implementation, Sept. 20–22 & 26–27, *Understanding International Law*, https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf [hereinafter Towards Universal Participation].

27. Vienna Convention, *supra* note 2, art. 11; Towards Universal Participation, *supra* note 26.

28. Vienna Convention, *supra* note 2, art. 12.

29. *Id*. art. 14, para. 1.

30. *Id*. art. 14, para. 2.

31. *Id*.

32. *Id*. art. 15.

33. Edward T. Swaine, *Treaty Reservations*, *in* THE OXFORD GUIDE TO TREATIES 277, 281 (Duncan B. Hollis ed., 2012).

34. *Id*. at 281. For example, the United States has signed the Vienna Convention but is not a party to the Convention. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L. J. 307, 307–308 (2007). Many commentators have claimed that the Vienna Convention reflects customary international law, a claim that the United States has not denied. *Id*.

35. Swaine, *supra* note 33, at 281.

of the oscillation of the societal worldview between the opposite poles of universality and integrity—one extreme favoring a world composed of autonomous states and the other preferring an integrated world order.[36] The entire treaty process, including the reservations regime, is used by states to advocate how the world order should be structured—a forum of sovereign states or an integrated global community.[37]

A. The Unanimity Rule

The traditional rule of customary international law governing the validity of reservations was that a reservation to a multilateral treaty may only be accepted if all parties to the treaty agree.[38] This "unanimity rule" directly emanated from the consensual nature of treaty making[39] and reflected a purely subjective view of reservation law, one where the legal doctrines of absolute state sovereignty and contract theory dominated.[40] The practical effect of the unanimity rule was that it afforded each treaty partner a veto, ensuring that no state would be bound by a treaty reservation it did not endorse.[41]

In a way, the unanimity rule reflects a "golden period" in the law of reservations; the rule was clear, simple to apply, and universally accepted.[42] It was also heavily influenced by the positivist international legal worldview espoused in the early to mid-twentieth century.[43] The absolute sovereignty of states prevailed, at least in theory, and the developed Western states dominated rule making at the international level.[44]

B. The Pan-American Approach

The Pan-American approach shifted away from the unanimity rule by allowing a reserving state to become a party to the treaty despite objections to its

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36. Peters, *supra* note 10, at 71.

37. Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT. Y.B. INT'L L. 245 (1993).

38. Swaine, *supra* note 33, at 281.

39. *Id*.

40. Peters, *supra* note 10, at 75.

41. JAN KLABBERS, INTERNATIONAL LAW 48 (2013).

42. Pierrick Devidal, Reservations, Human Rights Treaties in the 21st Century: from Universality to Integrity 10 (Jun. 1, 2003) (unpublished LLM Thesis, on file with University of Georgia Law School Library), *available at* http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1013&context=stu_llm.

43. *Id*.

44. Jennifer Riddle, *Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process*, 34 GEO. WASH. INT'L L. REV. 605, 607 (2002); *see also* Duncan B. Hollis, *Private Actors in Public International Law*, 25 B.C. INT'L & COMP. L. REV. 235, 249 (2002) ("[I]t is fallacy to say that there ever was . . . a system of sovereign states, each having absolute domestic jurisdiction over its territory to the exclusion of all other states.").

reservation as long as one other contracting state accepted the reservation.[45] The treaty would only be effectuated between the reserving state and the states that accepted the reservation. This approach was promulgated in the 1930s by the Pan-American Union and expressed a variation on the subjective view of reservation law seen in the unanimity rule.[46] The Pan-American approach was based solely on the independent, sovereign acceptance of the reservation by each party to the treaty.[47] This reservations regime rendered objections to reservations null in the context of non-objecting states, and "[u]nder the piecemeal validity doctrine of the Pan-American system, only unanimous opposition could make a reservation completely invalid."[48]

The practical effect of the Pan-American reservations system was that it turned the concept of a multilateral treaty into a general framework like a large umbrella, which linked various and diverse bilateral agreements related to the same subject.[49] This juncture in the history of reservations is where there is the first inclination of a shift from the absolute sovereignty pole towards the idea of an integrated global community.[50] The Pan-American system seems to have its foot on both sides of the line. It protected a state's sovereignty by preventing any reservation from having an effect on an objecting state, but it also provided for flexibility in allowing for maximum state participation.[51]

C. The Genocide Case

The reservations regime saw another shift after the end of World War II.[52] The rise of human rights treaties after the war suggested that the subjective view of reservations, favoring unanimity, might result in states choosing not to join treaties, frustrating the global nature and aspirations of human rights treaties.[53]

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45. *See* Devidal, *supra* note 42, at 11 (showing that only a unanimous opposition could make a reservation invalid).

46. *See* Peters, *supra* note 10, at 80 ("In 1932, the Governing Board of the Pan-American Union, the precursor of the Organization of American States (OAS), provisionally accepted a new system of rules on the juridical effects of reservations, known as the Pan-American system.").

47. *See* Devidal, *supra* note 42, at 11 ("Thus the validity of a reservation was variable and could only be analyzed on a reciprocal basis.").

48. Peters, *supra* note 10, at 81.

49. *See* Devidal, *supra* note 42, at 11 (showing that, under this system, the multilateral treaty was only a sort of framework).

50. *See* Peters, *supra* note 10, at 83–84 ("The element of uniformity which seemed to be implied by the principle of unanimous consent nevertheless transformed the traditional visions of the world by introducing an element of collective commitment which would keep the multilateral treaty a stable, unified structure.").

51. *See* Devidal, *supra* note 42, at 11–12 (showing that because of this dual nature, the system was the first step towards the recognition of the need for universal acceptance of non-restricted multilateral treaties).

52. *See id*. at 13 (showing that the adverse effects of the use of reservations became apparent in the 1950's); Peters, *supra* note 10, at 84 ("In 1950, a United Nations General Assembly resolution requested the International Court of Justice to answer three questions regarding the validity and legal effects of reservations to the Convention on the Preservation and Punishment of the Crime of Genocide.").

53. *See* Devidal, *supra* note 42, at 14 (showing the effect of the human rights concerns).

The conflict between the unanimity rule and the Pan-American approach came to a head during the Sixth Committee of the United Nations General Assembly (General Assembly) in 1950.[54] Facing the imminent entry into force of the 1948 Convention on the Prevention and Punishment of the Crime Genocide (Genocide Convention), the General Assembly was tasked with determining the legal consequences of multiple reservations to the Genocide Convention and the objections of various states to such reservations.[55] The Genocide Convention itself contained no provision regarding reservations.[56] The "profound divergence" of views expressed during discussions of the Sixth Committee on how to deal with the reservations and objections led the General Assembly to request an advisory opinion from the International Court of Justice (ICJ).[57]

In May 1951, the ICJ handed down its opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[58] By a majority vote of seven justices to five, the court abandoned the unanimity rule and introduced a novel "object and purpose" test—unless the parties themselves agreed otherwise, reservations to treaties should be deemed permissible as long as they were consistent with the object and purpose of the treaty.[59] This in effect ended the exclusively contractual nature of multilateral treaty-making and injected more integration in a world dominated by sovereignty by introducing an objective element to the law of reservations.[60]

The court based its opinion on the content of the Genocide Convention, which was intended to create universal participation in the formation of minimal international standards for individual human rights.[61] On one side, the court decided that the unanimity rule was absurd in this situation due to the fact that the norm-creating purpose of the convention could only be achieved with wide participation.[62] On the other hand, the court realized that resorting to the Pan-American approach was too flexible and could result in the destruction of the purpose of the convention for the sake of obtaining as many parties as possible.[63] The new "object and purpose" test balanced sovereignty concerns by safeguarding the freedom of states to enter reservations within the threshold of the object and purpose of the convention, keeping its integrity intact.[64]

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54. *See id*. at 13 (describing the Sixth Committee of the United Nations General Assembly).

55. *See id*. (showing the issues facing the Sixth Committee of the United Nations General Assembly).

56. *Id*.

57. Redgwell, *supra* note 37, at 248.

58. Reservations to Convention on Prevention and Punishment of Crime of Genocide (*The Genocide Case*), Advisory Opinion, 1951 I.C.J. 15 (May 28).

59. *Id*.

60. *See* Devidal, *supra* note 42, at 13 (showing the effect of the ICJ's opinion on the legal effects of reservations to the Genocide Convention).

61. *Genocide Case*, 1951 I.C.J. 15; Devidal, *supra* note 42, at 14.

62. *Genocide Case*, 1951 I.C.J. 15; Devidal, *supra* note 42, at 14.

63. *Genocide Case*, 1951 I.C.J. 15; Devidal, *supra* note 42, at 14.

64. Devidal, *supra* note 42, at 14.

As a practical result, a state could now invalidate the reservation of another party by reference to this ambiguous external objective standard of object and purpose.[65] Despite the ICJ explicitly stating that "[i]t is well established that in its treaty relations a State cannot be bound without its consent,"[66] this new standard seemingly marked an incredible intrusion on the reserving states' sovereignty.[67] The minority blasted the majority's decision, claiming it was an attack on the concept of state sovereignty and on the sacred rule of state consent.[68] Despite the criticisms and imperfections that arose from the ICJ's decision, it remains a "catalytic event initiating the subsequent development in the law of reservations."[69]

IV. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention provides the codification of existing rules of international customary law governing the creation, effects, and interpretation of international agreements.[70] As of 2013, 113 states are party to the Vienna Convention, although its legal force betrays that number.[71] Most states in the world, even if they are not parties to the Vienna Convention, admit that it is the authoritative guide to treaty practice.[72]

The rules for reservations effectuated by the Vienna Convention attempt to offer enough flexibility to protect the sovereignty of states while maintaining several presumptions in favor of the treaty.[73] Articles 19 through 23 of the Vienna Convention deal with the rules on reservations and have become the most elaborate doctrine of reservations in international law.[74] Article 19 deals with the formulation

65. *See id*. at 15 (describing this restriction on invalidation as an intrusion on the states' sovereignty).

66. *Genocide Case*, 1951 I.C.J. 15.

67. Devidal, *supra* note 42, at 15 ("This newly established objective standard constituted a rather remarkable intrusion on the states' sovereignty.").

68. *Genocide Case*, 1951 I.C.J. 15 (M. Alvarez dissent) (describing this intrusion as a departure from the traditional practice).

69. Devidal, *supra* note 42, at 17 (citing Redgwell, *supra* note 37).

70. Vienna Convention, *supra* note 2.

71. *Id*.

72. The United States Department of State has acknowledged that the Vienna Convention is "already recognized as the authoritative guide to current treaty law and practice." STATE DEPARTMENT SUBMISSION OF THE VIENNA CONVENTION TO THE UNITED STATES SENATE, S. Exec. Doc., 92nd Cong. 1st Sess., 1 (1971); *see also* Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308–309 (2d Cir. 2000) ("The United States recognizes the Vienna Convention as a codification of customary international law.").

73. Prior to the Vienna Convention, if a state objected to a reservation without further specifications, the whole treaty would not have entered into force between the objecting state and the reserving state. Massimo Coccia, *Reservations to Multilateral Treaties on Human Rights*, 15 CAL. W. INT'L L.J. 1, 36 (1985); *see also* Devidal, *supra* note 42, at 24 (discussing the new presumption which favors the maintenance of treaty relations).

74. *See* Peters, *supra* note 10, at 80 (showing the rules for reservations, which are virtually identical to the rules that govern the treaty relations between states and international organizations or between international organizations); *see also* Vienna Convention, *supra* note 2 (containing the three rules concerning the juridical effects of reservations).

of reservations.[75] Article 20 deals with the acceptance of and objections to reservations.[76] Article 21 deals with the legal effects of reservations and the legal effects of objections to reservations.[77] Article 22 enumerates the rules for the

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75. Vienna Convention, *supra* note 2, art. 19. Article 19 states:

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

(a) the reservation is prohibited by the treaty;

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

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Id.

76. *Id*. art. 20. Article 20 states:

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

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

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

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

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) 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;

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

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

Id.

77. *Id*. art. 21. Article 21 states:

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

withdrawal of both reservations and objections.[78] Article 23 states the procedural rules concerning reservations.[79] The following analysis will focus on Articles 19, 20, and 21, which represent the codification of the rule espoused by the ICJ in the *Genocide Case*.

A. Article 19

Article 19 establishes when a state may formulate a reservation when signing, ratifying, accepting, approving, or acceding to a treaty.[80] The object and purpose test espoused by the ICJ is codified in Article 19, but only as a default rule.[81] This safety net only enters into force when the treaty itself is silent as to a reservations regime.[82]

Under the Vienna Convention, there is a presumption in favor of allowing reservations to be made.[83] This presumption can be defeated by an explicit provision within a treaty prohibiting the submission of a particular reservation or an implicit prohibition created from the absence of the reservation in question within a specific authorization clause that enumerates specific permissible reservations.[84] In essence, under Article 19, a state may enter a reservation if the

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Id.

78. Vienna Convention, *supra* note 2, art. 22. Article 22 states:

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;

(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Id.

79. *Id*. art. 23. Article 23 states:

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

Id.

80. *Id*. art. 19.

81. *See* Devidal, *supra* note 42, at 21 (describing the test in Article 19 as a safety net).

82. *See id*. (describing when the safety net comes into play).

83. *See id*. at 21–22 (showing that the vocabulary used by the drafters is what suggests a general positive presumption for reservations).

84. *See id*. at 22 ("Thus, the default rule of article 19(c) has a broad scope of application

treaty does not explicitly prohibit doing so, does not contain a list of available reservations that excludes the reservation desired, and the reservation is not contrary to the object and purpose of the treaty.[85]

B. Article 20

Article 20(4) comprises the basic rules concerning reservations, namely the consequences of reservations as well as the consequences of objections to reservations.[86] This provision basically lays out the pattern of future treaty relations.[87] Article 20 outlines four different responses to the proffer of a reservation: (1) explicit acceptance of the reservation; (2) tacit acceptance through silence; (3) objection to a reservation without wanting to jeopardize treaty relations with the reserving state; and (4) objection to a reservation with an expressed desire to have no treaty relations with the reserving state.[88]

The modes of acceptance function on a purely bilateral basis, triggering reciprocal treaty relations between the reserving state and the accepting state.[89] The Vienna Convention lays out a flexible system concerning reservations. The flexibility lies in the fact that acceptance of the reservation by all state parties is not required because the treaty enters into force between the reserving state and each state that accepts the reservation.[90] Echoing the effect of the Pan-American approach, the multilateral treaty theoretically breaks into many bilateral treaties, where states are bound by the original treaty as modified to the extent they have objected to or accepted the reservations.[91] This mechanism complements the flexibility of the Vienna Convention system and encourages the formulation of reservations.[92]

An objection in and of itself will not preclude the entry into force of the treaty between the reserving state and an objecting state.[93] The objecting state carries the burden of definitively expressing its opposition to entry into force of the treaty between the reserving state and the objecting state.[94] In this way, objections are attached very little effect, unless the objecting state has explicitly stated otherwise.[95]

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and covers every other treaty.").

85. *See id*. (describing when a state can enter a reservation).

86. Vienna Convention, *supra* note 2, art. 20; Devidal, *supra* note 42, at 23.

87. LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 42 (1995).

88. KLABBERS, *supra* note 41, at 50.

89. *See* Devidal, *supra* note 42, at 23–24 (showing that Article 20 contains the basic rules for reservation).

90. *Id*.

91. LIJNZAAD, *supra* note 87, at 43.

92. Devidal, *supra* note 42, at 24.

93. *Id*.

94. *Id*.

95. *Id*.

C. Article 21

The provisions of Article 21 place limits on the effect of any reservation.[96] Reservations modify the treaty relationship between the reserving state and accepting state in a reciprocal manner.[97] The provision of the treaty that was reserved is modified for that reserving state to the extent of that specific reservation and to the same extent for the other party.[98] The extent of the reservation's modification of the treaty is limited to a bilateral context because the reservation "does not modify the provisions of the treaty for other State parties to the treaty inter se."[99]

Article 21(3) has rendered any meaningful difference between acceptance and objection "rather obscure."[100] An objected-to reservation essentially has the same effect as an accepted reservation—the reserved-to provision is not applied, to the extent of the reservation, between the two parties.[101]

V. AN UNFAIR RESERVATIONS REGIME?

It has been widely noted that the Vienna Convention's reservations regime is heavily tilted in favor of the reserving state.[102] There are very few situations in which the end result is the reserving state not getting what it wants, so much so that there have been claims made that the reservations framework in place can actually ruin entire treaty regimes.[103] In most cases, the treaty will enter into force with the benefit of the reservation, in accordance with the Vienna Convention's presumption of favoring entry into force.[104]

A. Practical Effects of the Vienna Convention's Reservations Provisions

The practical effect of the Vienna Convention's reservations provisions is that the reserving state is almost always able to enter into the treaty, even with states that raise objections, complete with the benefit of the reservation.[105]

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96. Vienna Convention, *supra* note 2, art. 21.

97. Devidal, *supra* note 42, at 25.

98. *Id*.

99. Vienna Convention, *supra* note 2, art. 21.2.

100. Coccia, *supra* note 73, at 36.

101. Devidal, *supra* note 42, at 26.

102. KLABBERS, *supra* note 41, at 50; *see also* D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 328 (1994) ("[T]hese provisions . . . give an unacceptable advantage to a 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) [hereinafter Klabbers, *Accepting the Unacceptable?*] ("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 . . . ."); Francesco Parisi & Catherine Ševčenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1, 1 (2003) ("[T]he law of reservations, enshrined in Articles 19–21 of the Vienna Convention on the Law of Treaties, favors the reserving state . . . .").

103. *See, e.g.*, KLABBERS, *supra* note 41, at 50; LIJNZAAD, *supra* note 87, at 43.

104. LIJNZAAD, *supra* note 87, at 53.

105. KLABBERS, *supra* note 41, at 50; s*ee also* D.W. Greig, *Reciprocity, Proportionality,*

The first response to a proffer of a reservation outlined in Article 20 is express acceptance.[106] In this case, both states have agreed to modify their treaty relations with each other to the extent of the reservation.[107] This is the cleanest form of reservation acceptance, although it is incredibly rare.[108]

The second form of acceptance contemplated by Article 20 is more likely—silence or tacit acceptance.[109] A state may remain silent on a reservation for a number of reasons.[110] Perhaps it has not been able to fully investigate the proposed reservation because small treaty offices must prioritize resources; perhaps it agrees but does not see any reason to explicitly say so; or perhaps, especially in the case of multilateral human rights treaties, the principle of non-reciprocity absolves other states of needing to deal with the reservation at all.[111] Despite a state not taking a positive stance on a reservation, if it does not object to a reservation within twelve months of being notified of the reservation or before it consents to the treaty, the Vienna Convention imputes acceptance of the reservation.[112]

The third scenario contemplated by Article 20 is even more difficult; a state may object to a reservation, but fearing reputational harm or damage to treaty relations with the reserving state, the state may enter into the treaty relationship with the reservation anyway.[113] Unless the objecting state definitively expresses intent not to be bound, the treaty will enter into force with the reservation despite the objection.[114] Simply put, the reserving state gets what it wants despite objections from other states.[115]

In fact, the reserving state gets what it wants regardless of another state's express acceptance, silence, or objection.[116] The only time the reserving state does not get what it wants is under the fourth response to the proffer of a reservation

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and the Law of Treaties, 34 VA. J. INT'L L. 295, 328 (1994) ("[The Vienna Convention's provisions] give an unacceptable advantage to a reserving state."); Klabbers, *Accepting the Unacceptable?*, *supra* note 102, at 179 ("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 . . . ."); Parisi & Ševčenko, *supra* note 102, at 1 ("[T]he law of reservations, enshrined in Articles 19–21 of the Vienna Convention on the Law of Treaties, favors the reserving state . . . .").

106. Vienna Convention, *supra* note 2, art. 20.

107. *See* Devidal, *supra* note 42, at 23–24 (indicating acceptance establishes treaty relations on a reciprocal basis).

108. KLABBERS, *supra* note 41, at 50.

109. *Id.*

110. *Id*.

111. *Id*.

112. *Id*.

113. *Id*.

114. KLABBERS, *supra* note 41, at 50.

115. *Id*.

116. *Id.* For a much more nuanced discussion of the differences between an acceptance and an objection, see LIJNZAAD, *supra* note 87, at 53, and see generally Alain Pellet & Daniel Müller, *Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 37 (Enzo Cannizzaro ed., 2011).

contemplated in Article 20.[117] If a treaty partner expresses that it does not accept a proposed reservation and as a result does not wish to have any treaty relations with the reserving state, the reservation has no effect, and for once, the objecting state gets what it wants.[118] In this situation, the treaty effectively does not enter into force between the two states at all.[119]

This tactic is really only a viable option when the treaty itself is conducive to being broken down into an amalgamation of bilateral treaties, for example, a multilateral treaty regarding extradition.[120] This option is much less feasible when a treaty aims to create a unified global regime, like in the areas of human rights or the environment.[121] Because these types of unified regimes are essentially at the mercy of reserving states, these types of treaties lose some of their power when broken down into groups of bilateral treaties, [122] and the goal of global unification is utterly defeated.

B. Stripping Objections of Any Legal Value

The Vienna Convention strips objections of any legal value through the framework of Article 20. Article 20 makes a distinction between the act of accepting or objecting to a reservation and the matter of entry into force, or the lack thereof.[123] Under the Vienna Convention, states are required to react to a reservation on at least two fronts.[124] One is to express approval or disapproval by either accepting or objecting to the reservation, the other is to indicate whether the treaty will enter into force between the two states.[125] The result is that accepted reservations and reservations that are objected to can create identical reciprocal modifications between the reserving state and the objecting state.[126] It has been argued that objections surely convey disapproval and can serve to prevent a particular interpretation from gaining popular traction and, in turn, influence the evolution of customary international law.[127] While all of these signaling functions of objections are certainly an integral part of the reservations regime,[128] this

117. KLABBERS, *supra* note 41, at 50.

118. *See* Vienna Convention, *supra* note 2, art. 20 (precluding entry into force only when such intention is definitively expressed).

119. KLABBERS, *supra* note 41, at 50.

120. *Id*.

121. *Id*.

122. *Id*.

123. LIJNZAAD, *supra* note 87, at 53.

124. It can be argued that the Vienna Convention requires states to react to a reservation on a third front: whether the reservation is admissible per the object and purpose test and the text of the convention. *Cf*. *id*. (describing the compatibility analysis that precedes acceptance and objection).

125. Vienna Convention, *supra* note 2; LIJNZAAD, *supra* note 87, at 53–54.

126. LIJNZAAD, *supra* note 87, at 54.

127. *Id*.

128. *See id*. at 54–55 (finding that diversity in possible reactions to reservations may be the result of imprecise drafting, but it must be assumed that the comprehensive system of reactions for a proposed reservation will lead to clarity).

explanation of the existence of objections is lacking. If objections are merely a signaling function, then the Vienna Convention has completely disregarded the principle of state consent in the reservations arena, forcing states who are silent or who object to reservations to bow to the will of reserving states if they do not want to disavow treaty relations completely.

C. Attempts to Restore Equilibrium

State discontent with the unfairness of the Vienna Convention's reservations regime has slowly come to the attention of the international law community through multiple attempts to shift the balance of power back towards silent and objecting states.[129] It was only a matter of time before states began to conceive of different ways to handle reservations.

1. The *Belilos* Case

In the 1980s, the European Court of Human Rights heard a line of cases in which the court suggested that, because it was vested with the authority to make binding determinations on the scope of the rules of the European Convention, it was similarly vested with the authority to make decisions about the permissibility of reservations.[130] The most famous iteration of this show of authority came in *Belilos v. Switzerland*,[131] when the court held that the power to decide on reservations was inherent in its judicial function.[132] The court held that an interpretive declaration made by Switzerland in its instrument of ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms was legally equivalent to a reservation.[133] The court went on to hold that this reservation was invalid under the rules governing reservations of the European Convention.[134]

Reservations had frequently been challenged in the past by individual states, but the *Belilos* case was the first time that an international tribunal found a reservation to be invalid.[135] The court made the decision about the validity of the Swiss reservation despite there being no objections from state parties of the European Convention.[136] The court went further and severed the invalid reservation, resulting in Switzerland being bound to the treaty without the benefit of its reservation.[137]

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129. KLABBERS, *supra* note 41, at 50–51.

130. *Id*. at 51.

131. Belilos v. Switzerland, App. No. 10328/83, 132 Eur. Ct. H.R. (ser. A) at 132 (1988), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57434#{"itemid":["001-57434"]}.

132. *Id*.

133. *Id*.

134. *Id*.

135. Richard W. Edwards, Jr., *Reservations to Treaties: The Belilos Case and the Work of the International Law Commission*, 31 U. TOL. L. REV. 195, 195 (2000).

136. *Id*. at 197.

137. *Id*.

2. Nordic Approach

Another attempt to bring the power balance back to equilibrium was forged by the Nordic states through a strict severability regime, which started to add the statement that the reserving state "shall not benefit" from its reservation.[138] Sweden was one of the first to use the tactic, specifying that, in the context of questionable reservations, the treaties concerned would "become operative . . . without the reserving State benefitting from the reservation."[139] A Swedish representative shed light on the rationale behind this strategy before the General Assembly's Sixth Committee in 1997, stating that the Nordic countries had "doubts about the commitment of states making wide-ranging, non-specific reservations or reservations deemed to be in conflict with the treaty's object and purpose."[140] The Swedish representative argued that the Nordic states did not believe that these reservations could modify the treaty concerned.[141]

Other Nordic states followed in Sweden's footsteps, including Denmark, when it objected to Guatemala's reservation to the Vienna Convention in 1998, and the Finish government, which has made multiple similar objections.[142] In 1999, the Council of Europe's Committee of Ministers recommended that other states consider using similar tactics, even referencing the possibility of claiming that the reserving state shall not benefit from its unacceptable reservations in its lists of model responses to reservations.[143]

The Nordic approach marked a new era in the evolution of objections, elevating them to more than signaling devices.[144] These objections do not seek to merely convey displeasure or vaguely influence customary international law, rather, these objections aim to preclude the reserving state from getting what it wants.[145]

3. The International Law Commission

A third attempt to rectify the power imbalance has been to bring the issue to the U.N. International Law Commission (ILC), the body responsible for drafting and maintaining the Vienna Convention.[146] The ILC appointed Alain Pellet as special rapporteur on reservations to multilateral treaties, and he has produced and published a series of reports regarding reservations since 1995.[147]

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138. KLABBERS, *supra* note 41, at 51.

139. Klabbers, *Accepting the Unacceptable?*, *supra* note 102, at 184–85 (emphasis removed).

140. *Id*. at 185.

141. *Id*.

142. *Id*. at 185–86.

143. *Id*. at 186.

144. LIJNZAAD, *supra* note 87, at 54.

145. Klabbers, *Accepting the Unacceptable?*, *supra* note 102, at 187.

146. KLABBERS, *supra* note 41, at 51.

147. *Id*. For a concise summary of Special Rapporteur Pellet's reports, see Bruno Simma & Gleider I. Hernández, *Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where do we Stand?*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, Pellet & Müller, *supra* note 116, at 60.

In Chapter II of his Second Report, released in 1996, Special Rapporteur Pellet affirmed that state consent was still the governing principle in a treaty regime.[148] It was not until his Fifteenth Report, released in 2010, that Special Rapporteur Pellet took up the issue of the effect of objections made to reservations.[149] Pellet views reservations as being consubstantial with a state's consent to be bound; logically extended, objections constitute the objecting state's refusal to consent to the reservation.[150] As a result of Special Rapporteur Pellet's reports, a *Guide to Practice on Reservations to Treaties* was adopted by the ILC in 2011 ("ILC *Guide*").[151]

i. The Beginning of a Modified Severability Regime

In June 2010, Special Rapporteur Pellet submitted his First Addendum to his Fifteenth Report, which confirmed the idea that a presumption of severability was to apply in the case of impermissible reservations to human rights treaties.[152] This assertion is codified in ILC *Guide* § 4.5.3, which creates a presumption that impermissible reservations are severable unless the reserving state expresses that the reservation was indispensable to the state's consent to be bound by the treaty.[153] The bottom line is that unless an author of an invalid reservation has expressed a contrary intention, it is considered a contracting state without the benefit of the reservation deemed to be invalid.[154] While the severability presumption espoused in the ILC *Guide* is limited only to invalid reservations, this is the first institutionalized embrace of severability seen since *Belilos*.[155]

ii. State Reaction

While some states like Finland and Portugal have expressed support for ILC *Guide* § 4.5.3,[156] predictably, states like the United States have had a negative reaction.[157] David P. Stewart has called the severability rule "the most troubling recent development in recent 'treaty reservation practice.'"[158] Stewart claims that

148. Simma & Hernández, *supra* note 147, at 69.

149. *Id*. at 75.

150. *Id*.

151. ILC Guide, *supra* note 1.

152. Simma & Hernández, *supra* note 147, at 77.

153. ILC Guide, *supra* note 1, at ¶ 75, § 4.5.3.

154. *Id*.

155. *Id*.

156. Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2011, Reservations to Treaties: Comments and Observations Received from Governments, U.N. Doc. A/CN.4/639 (Feb. 15, 2011).

157. *See id*. (expressing that the United States only had criticisms regarding § 4.5.3 and did not expressly support it, even though Portugal and Finland did).

158. David Stewart, *The Oxford Guide to Treaties Symposium: Treaty Reservations and 'Objections-to-Reservations,'* OPINIO JURIS (Nov. 8, 2012, 9:30 AM), http://opiniojuris.org/2012/11/08/the-oxford-guide-to-treaties-symposium-treaty-reservations-and-objections-to-reservations/. David Stewart is a Visiting Professor of Law at Georgetown University Law Center and a former State Department lawyer. *Id*.

the severability rule may actually be a disincentive to broad treaty adherence.[159]

Harold Koh, former Legal Adviser to the U.S. Department of State, has similarly noted his concern regarding the severability rule.[160] Koh states that § 4.5.3 "makes little sense" and "smacks of unfairness."[161] Koh reiterates the oft-cited United States position that it is hard to square the severability rule with the "bedrock principle of treaty law that States are bound only to those obligations they affirmatively consent to undertake."[162]

Koh's assertions do not accurately reflect the reality of state practice and the realities of the Vienna Convention reservations regime. If the bedrock principle of treaty law is affirmative consent, an objection to a reservation should automatically make the treaty not enter into force between two states, as an objection is a state's refusal to affirmatively consent.[163] Similarly, staying silent is not affirmative consent. According to the principle laid out by Koh, the only way a reservation may modify treaty relations between two states is with express acceptance, which rarely ever happens.[164] In other words, as Koh advocates, there should be respect of the same principle of state consent; however, an across-the-board severability regime will maximize state consent more than the current Vienna Convention regime.

VII. HOW SEVERABILITY CAN FIX THE RESERVATIONS REGIME

The ILC position—adhering to a presumption of severability unless the reserving state expresses an intention not to be bound without the benefit of the reservation—toes a line in the middle of the two extremes,[165] and should be expanded to a general rule of treaty law. The ILC presumption of severability balances the state sovereignty and consent interests of both the objecting state and the reserving state, as well as the interests of both universality and integrity.[166]

The severability rule is respectful of the state sovereignty of *both* the objecting and the reserving state. Severability also balances the principle of universality with the principle of integrity. When a reservation is severed, the reserving state is still a full party to the treaty, and, presumably, the reservation was severed to protect the integrity of the treaty. Simultaneously, severability maximizes state consent, universality, and integrity, something the Vienna Convention struggles to accomplish.

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159. *Id*.

160. *See* Harold Hongju Koh, *The Oxford Guide to Treaties Symposium: What Happens if a Treaty Reservation is Invalid?*, OPINIO JURIS (Nov. 8, 2012, 11:30 AM), http://opiniojuris.org/2012/11/08/the-oxford-guide-to-treaties-symposium-what-happens-if-a-treaty-reservation-is-invalid/.

161. *Id*.

162. *Id*. (emphasis omitted).

163. Simma & Hernández, *supra* note 147, at 75.

164. Koh, *supra* note 160.

165. *See* Swaine, *supra* note 33, at 297 ("A presumption of severability is certainly more moderate than an absolute severability rule . . . .").

166. *See* Simma & Hernández, *supra* note 147, at 84 ("A presumption of severability serves to accommodate the values of universality and integrity . . . .").

One of the biggest questions in the severability debate is why should we adopt a severability regime? Critics of the Nordic approach wonder why it should be up to the Nordic states, or more broadly, objecting states, to re-write the Vienna Convention's reservations regime.[167] The truth is that the emergence of the Nordic approach and other attempts to shift the power balance between reserving states and objecting states to equilibrium is tangible proof that the existing reservations regime is broken. Today, states are fighting the Vienna Convention in any way they can in order to retain more of their most precious commodity—their sovereignty.

The story of reservations and their complicated relationship with state consent has come a long way from the early days of the unanimity rule, where the concern was for the state consent of all parties but the reserving state, to the current Vienna Convention, where a battle of wills in a state consent context almost always favors the reserving state.

A. Protecting the Sovereignty of Objecting States

As the reservations regime stands now, an objecting state essentially has no recourse when another state makes a reservation that the objecting state does not want to be bound by.[168] Objections do not do much, and neither does silence.[169] Unless the state wants to risk reputational harm by denouncing treaty relations altogether with the reserving state, it is locked into the treaty relationship.[170] But the objecting state has just as much right to invoke sovereignty considerations as the reserving state. "Why should the objecting State be locked in a treaty relationship with another State whose position it objects to?"[171]

Keeping in mind the underlying foundation and importance of a state's consent in treaty-making, under a modified severability regime as espoused by the ILC *Guide*, the sovereignty and consent of objecting states is safeguarded as a function of the integrity of the treaty.[172] The treaty as negotiated becomes the purpose of the treaty and the nexus of state consent.[173] That core is something that cannot be freely or unilaterally modified by a reserving state.[174] If a reserving state purports to exclude or modify the treaty to such an extent that it cannot be said that the other parties have consented, then the other parties may sever the reservation as

167. *See* Klabbers, *Accepting the Unacceptable?*, *supra* note 102, at 188 (addressing the argument that in making a reservation, the reserving state may be presumed to agree to submit its reservation to the scrutiny of other states).

168. *See id*. at 189.

169. *See id*. at 188–190.

170. *See id*.

171. *Id*. at 190.

172. *See generally* Simma & Hernández, *supra* note 147, at 82 (discussing how consent of parties goes to the core of treaties).

173. *See id*. at 84 ("The essential purpose of a treaty concluded between states . . . may be considered as a common core of the states parties' consent, a core which other states may not freely modify or change.").

174. *Id*.

both a function of state consent and treaty integrity.[175]

The ILC *Guide* provides an out for the reserving party—it can prevent severance by manifesting intent that its consent to be bound to the treaty is conditional on the acceptance of the reservation.[176] However, this distinction is inherently problematic. As an end run around the rule, states may suddenly claim that all reservations are essential.[177]

More appropriately, the dividing line should be between reservations that modify and reservations that exclude. The distinction between modification and exclusion is a much more objective standard. An objective standard makes it much easier for third party monitors or adjudicators to accurately judge the severability of a reservation because they will no longer have to guess a state's intent.[178] A definitive expression that a certain reservation is essential to a state's consent will smooth the way to a just result from a tribunal.[179]

An analysis of a hypothetical under both the Vienna Convention and this proposed modified severability regime will be illustrative. In a human rights treaty, states A, B, and C have agreed to not use weapons of mass destruction under any circumstances, the ICJ has jurisdiction over disputes, and each state will extradite those who are suspected of using weapons of mass destruction. All three states have freely given consent to those purposes. State C lodges a reservation stating that it only consents to the ICJ's jurisdiction when its domestic law allows, state B lodges a reservation stating that it withholds the right to use weapons of mass destruction "when it deems necessary," and state A objects to both reservations.

Under the Vienna Convention, states C and B will most likely get what they want. Under Article 20 of the Vienna Convention,[180] for state A's objection to have any practical bearing on the entry into force and legal duties and obligation between state A and states B and C, state A would have to definitively express a "contrary intention" to the treaty entering into force.[181] Without that contrary intention being definitively stated, state A's objections will not preclude the entry into force of the treaty between state A and states B and C. State A has not expressly stated that the treaty will not enter into force between it and the other two states out of fear of reputational harm. Objections have been stripped of legal significance under Article 20 of the Vienna Convention,[182] leaving state A bound to treaty relations it has not consented to. In this scenario, the integrity of what the three states originally agreed to has been degraded so much that it is no longer the

175. ILC Guide, *supra* note 1, § 4.5.3.

176. *See id*. (setting out the expression of intention to preclude the entry into force of the treaty).

177. *See* Simma & Hernández, *supra* note 147, at 84 (discussing the results of the presumption of severability).

178. *See id*. at 83 (describing the consequences of unclear reservations).

179. *Id*. (arguing that reservations of juridical review cannot be valid in a human rights context that requires monitoring for a treaty to be effective).

180. Vienna Convention, *supra* note 2, art. 20.

181. *Id*.

182. LIJNZAAD, *supra* note 87, at 53.

nexus of consent that state A agreed to.

Under a modified severability regime, state A has some recourse to get the deal it consented to. State B's reservation clearly alters the nexus of consent to a point that it cannot be said that state A consented. State B has exempted itself out of a consensual obligation. In that case, state A would be able to sever state B's reservation, and hold state B accountable as a full party to the treaty without the benefit of state B's reservation.

An example of a modifying reservation is exemplified in state C's reservation. State C is not trying to exclude itself from substantive consensual duties and obligations. Rather, it is merely modifying the procedural obligations it took on to be in line with its domestic law. Despite the relationship between states A and C not being exactly what was consented to, state A would not be able to sever this reservation, balancing the interests and sovereignty of states A and C.

B. Protecting the Sovereignty of Reserving States

Rhetoric and scholarship surrounding the discussion of severability, treaty reservations, and state consent tend to focus mainly on the sovereignty and consent of the reserving state only.[183] A gut reaction screams that severing a state's reservation to a treaty tramples its state sovereignty, and that is as far as the analysis goes. However, a modified severability regime can balance the sovereignty of reserving and objecting states, respecting both.

The modified severability regime announced in the ILC *Guide* respects the sovereignty of reserving states while also balancing the principle of universality. The predictability and transparency of a severability regime safeguards a reserving state's sovereignty. The rules of the modified severability regime provide reserving states with both advance notice and an escape hatch from severability, even allowing the state to withdraw from the treaty at any time it wishes. The Vienna Convention as it stands is so muddy that a state may lodge a reservation and have no idea if it is admissible, permissible, or opposable.

Under the proposed objectiveness of the modified severability regime, a reserving state would know what is severable; whether that line is between essential and non-essential, modifying and exclusionary, or somewhere else; and what documentation needs to accompany the proffer to save the reservation from potential severance. The clarification will allow states to formulate reservations that will not be severed against the state's wishes. Alternatively, there is a constant out, allowing for a state to withdraw from a treaty at any time. If a state's reservation is severed and it no longer wishes to be a party to the treaty without the benefit of the reservation, it may withdraw.[184]

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183. *See* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002) (discussing invalid reservations to multilateral treaties and the options for legal remedies that follow).

184. For an in-depth analysis of why severability is not antithetical to a reserving party's sovereignty, see *id*.

While withdrawal of a state whose reservation has been severed is always an option, the instability that would accompany the sudden withdrawals of states from treaties could potentially be catastrophic. As an incentive for states to properly lodge their reservations and to properly categorize their reservations as modifying or exclusionary, states should be held as a party to the treaty without the benefit of the reservations until the withdrawal process is complete.

VIII. ADVANTAGES AND CHALLENGES OF A SEVERABILITY REGIME

A. Advantages of a Severability Regime

There are advantages to a broad presumption of severability in the international reservations regime that accentuate the importance of state consent, rather than undercut it. The three main advantages to a severability regime are: 1) transparency; 2) clarification of state intent; and 3) reunification of multilateral treaties.[185]

A presumption of severability creates transparency and predictability in the fact that a state would know ex ante that its reservation runs the risk of being severed and what the consequences of that severance would be.[186] The ambiguity inherent in the Vienna Convention bestows a certain amount of "flexibility necessary to enable states party to a convention to adjust gradually and progressively to rules which may not be precise in their application nor interpreted consistently over time."[187] This ambiguity cuts both ways. It has allowed the Vienna Convention to stand the test of time and continue to be the preeminent document governing international treaty relations,[188] but the ambiguity has also led to the muddy reservations mess we currently find ourselves in. It is time to resolve the ambiguity and crystallize a treaty reservations system that respects the state sovereignty of all states, not just of states that lodge treaty reservations. The global legal community cannot function efficiently when states are allowed to unilaterally modify international treaty relations. It is time to restore equilibrium.

The picture of severability painted in the ILC *Guide* forces a reserving state to memorialize its intent to consider its reservation essential at the time the reservation is made.[189] This will make it much easier for third party monitors or adjudicators to evaluate the reservation, as they will no longer have to guess at a state's intent. The intent that a certain reservation is essential to a state's consent to be bound will be definitively expressed, smoothing the way to a just result from a tribunal.[190]

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185. Simma & Hernández, *supra* note 147, at 81–84.

186. *Id*.

187. Redgwell, *supra* note 37, at 279; *see also* Simma & Hernández, *supra* note 147, at 81–82; Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307, 345 (2006).

188. *See* Bradley, *supra* note 34, at 307–308 (discussing how the Vienna Convention reflects customary international law that binds nations who have not joined it).

189. *See* Simma & Hernández, *supra* note 147, at 82–83 (describing the advantages of memorializing severability).

190. *See id*. at 83 (discussing the impact of reservations incompatible with the object or

A severability regime will also enhance the universality and integrity of multilateral treaties by uniting them under an objective, but consensual, multilateral framework, rather than branching off into a bundle of bilateral agreements.[191] The potential payoffs from defragmentation are enormous. Reunification could potentially lead to much greater global cooperation to tackle large-scale global issues.[192] Similarly, severability can lead to a much more open and efficient global discourse.[193] Global issues like the environment and poverty cannot be addressed bilaterally, as evidenced by the adage, "Global problems need global solutions." The severability regime will reunify fragmented multilateral treaties, allowing them to work efficiently and properly to address global problems.[194] As it stands now, states are discouraged from opposing other states' reservations. With the introduction of a severability regime, those not in favor of certain reservations have an incentive to make their voices heard, adding to an open and frank discussion about solving these global problems.

B. Challenges to a Severability Regime

A presumption of severability will not be perfect; it introduces its own set of issues. Even with a requirement to definitively express whether a reservation is essential to a state's consent to be bound, it will sometimes be difficult to discern a state's intent in making a reservation. The move to a severability regime could introduce the practice of "overclaiming"—wherein a state claims that every single one of its reservations is essential to its consent to be bound—hampering the ability of other states to meaningfully object.[195] To avoid this potential problem, the dividing line should be drawn between modifying and exclusionary reservations.[196]

However, these potential costs are heavily outweighed by the amount of transparency that severability interjects into the reservations regime. Not only will predictability be a new addition to the regime, but the transparency will be able to take into account a state's true consent, rather than guessing the consensual implications of a state's silence or whether it really meant its objection.[197]

IX. DOCTRINAL JUSTIFICATIONS FOR A SEVERABILITY REGIME

Despite the spirited arguments against introducing an expansive severable

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purpose of a human rights treaty).

191. *Id*. at 84.

192. *See id*. (discussing global advantages of the presumption of severability).

193. *Id*.

194. *See* Simma & Hernández, *supra* note 147, at 84 (discussing global advantages of the presumption of severability).

195. *Id*.

196. This does not imply that a line between exclusion and modification is perfect either, but delving deeper into the issue is beyond the scope of this comment. However, it is a preferable alternative to the essential vs. non-essential distinction made in the ILC *Guide*. *See infra* Section VII, Part A.

197. Simma & Hernández, *supra* note 147, at 84–85.

reservations regime, there are many international law bases for how the regime could be implemented in accordance with international law.

A. Following the Advice of the ILC

First, the severability rule has been legitimized by its codification, however narrow, in the ILC *Guide*.[198] The ILC was established by the General Assembly in 1947 to "initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification."[199] That is exactly what the ILC did here—the special rapporteur studied the state of reservations for *many* years and made a recommendation for the progressive development of international law.[200] Severability is no longer a concoction of the Portuguese[201] or Nordic[202] imagination; it has been accepted, at least in some circumstances, by the venerable body of the ILC.[203]

B. State Practice

While it is still far too soon to see if the severability rule in the ILC *Guide* is practiced by states enough to be considered a norm of customary international law, there is evidence that the concept is gaining traction independently of the ILC *Guide*, especially in Europe.[204] Only time will tell if subsequent practice will become common enough to create customary international law.

Nordic states especially have been formulating objections that purport to bind the reserving state without the benefit of the reservation.[205] For example, Sweden's objection to a reservation to the Convention on the Rights of Persons with Disabilities by El Salvador stated:

> The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Republic of El Salvador to the Convention on the Rights of Persons with Disabilities and considers the reservation null and void. This objection shall not preclude the entry into force of the Convention between El Salvador and Sweden. The Convention enters into force in its entirety between El Salvador and Sweden, without El Salvador benefiting from its reservation.[206]

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198. ILC Guide, *supra* note 1.

199. G.A. Res. 174 (II), at 105, U.N. Doc. A/RES (Nov. 17, 1947).

200. *See* ILC Guide, *supra* note 1, at 12–13 (explaining how the ILC *Guide* was compiled).

201. One of the earliest objections with the effect of binding the reserving state to the treaty without the benefit of the reservation was made by Portugal in response to a reservation made to the Convention on the Elimination of All Forms of Discrimination against Women by the Maldives. *See* Special Rapporteur, *Addendum to the Fifteenth Report on Reservations to Treaties*, n. 700, U.N. Doc. A/CN.4/624/Add.1 (May 26, 2010) [hereinafter Fifteenth Report].

202. Klabbers, *Accepting the Unacceptable?*, *supra* note 102.

203. ILC Guide, *supra* note 1.

204. *See* Fifteenth Report, *supra* note 201 (outlining the effect of objections made to valid reservations).

205. *See id*. (discussing objections from many states, including the Nordic states).

206. *Id*. ¶ 437 (quoting *Multilateral Treaties Deposited with the Secretary-General*, chap. IV, 15, available from http://treaties.un.org (Status of Treaties)).

Austria, the Czech Republic, and the Netherlands also entered similar objections to the reservations made by El Salvador and Thailand to the Convention on the Rights of Persons with Disabilities.[207]

More recently, in early 2010, several European states objected to a reservation formulated by the United States, which expressed its consent to be bound by Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects.[208] At least five of these objections contained wording similar to the Swedish objection above, intended to bind the United States without the benefit of its reservation.[209]

Likewise, Austria, the Czech Republic, Estonia, Latvia, Norway, Romania, Slovakia, and Spain included similar objections to Qatar's reservation to the Convention on the Elimination of All Forms of Discrimination against Women.[210] This largely European practice is certainly influenced by the 1999 Council of Europe's Committee of Ministers' inclusion of these types of model objections for the use of member states.[211]

C. The Vienna Convention on the Law of Treaties

Admittedly, it is a harder argument to make out that the adoption of a severability regime is warranted under the Vienna Convention. The current conflict and debate over the severability issue makes it painfully clear that the ambiguity, or flexibility, of the Vienna Convention has left gaps in the reservations regime that need to be resolved.

While there are many ways to fill in those gaps, only subsequent interpretation or state practice evolving into customary international law will be able to adequately fill the holes under the Vienna Convention. An amendment or a

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207. *Id*. ¶ 438.

208. *Id*. ¶ 439. Sweden specified that "[t]his objection shall not preclude the entry into force of the Convention between the United States of America and Sweden. The Convention enters into force in its entirety between the United States of America and Sweden, without the United States of America benefitting from its reservation." *Multilateral Treaties Deposited with the Secretary-General*, chap. XXVI, 2, available from http://treaties.un.org (Status of Treaties).

209. Fifteenth Report, *supra* note 201, ¶ 439.

210. *Id*. ¶ 429. The Czech Republic stated:

> The Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefitting from its reservation.

Multilateral Treaties Deposited with the Secretary-General, chap. IV, 8, available from http://treaties.un.org (Status of Treaties). Spain specified "[t]he government of the Kingdom of Spain believes that the aforementioned declarations . . . have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention." *Id*.

211. Fifteenth Report, *supra* note 201, ¶ 439; *see also* Klabbers, *Accepting the Unacceptable?*, *supra* note 102, at 186 (discussing the Council of Europe's Committee of Ministers' recommendation).

subsequent agreement is plausible, although unlikely, given the already violent pushback from states like the United States.[212] Only time will tell if any of these solutions will bring an expansive severability regime to the world of treaty reservations.

X. CONCLUSION

A broad presumption of severability goes a long way to rectify the broken Vienna Convention reservations regime. A modified severability regime becomes the great equalizer of sovereignty and the great stabilizer of universality and integrity. At the same time, a severability regime is not a panacea; it brings with it its own set of challenges. What is apparent is that a severability regime makes the law of reservations less muddy and restores the equilibrium between the sovereignty of both reserving and non-reserving states.

212. *See* Koh, *supra* note 160 (criticizing the severability rule as stated in the ILC *Guide*); Stewart, *supra* note 158 (claiming that the severability rule may actually be a disincentive to broad treaty adherence).